

# Human Rights and Terrorism

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### ABSTRACT

In this article, Paul Hoffman, the Chair of the International Executive Committee of Amnesty International, presents Amnesty's view that the way in which the "war on terrorism" has been waged threatens to undermine the international human rights framework so painstakingly built since World War II. Written before the Abu Ghraib revelations became public, the paper argues that abandoning human rights in times of crisis is shortsighted and self-defeating. A "war on terrorism" waged without respect for the rule of law undermines the very values that it presumes to protect. We must restore the balance between liberty and security by reasserting the human rights framework, which provides for legitimate and effective efforts to respond to terrorist attacks.

### I. INTRODUCTION

Did the events of September 11, 2001, change the world forever? Is the possibility that a terrorist cell will detonate weapons of mass destruction in a large city so imminent a threat that the entire structure of international law and society must bend to the imperative of doing whatever is necessary to

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meet this threat regardless of the human rights consequences? Can we afford universal human rights norms in a time of perpetual crisis and exceptional danger? Will there be a “war on terrorism” exception to the international human rights framework?<sup>1</sup>

These questions will define the landscape of human rights practices for a long time. Terrorist threats have existed throughout modern history, and the importance of deterring and preventing terrorist acts is of central importance.<sup>2</sup> The impulse to abandon human rights norms in times of fear and crisis is shortsighted and self-defeating. As the revelations of shocking abuses at Abu Ghraib prison have demonstrated, the world will not easily accept inhumane treatment in any context, and such treatment will tarnish and undermine even legitimate security operations.

As Chou-En-Lai is reported to have said about the impact of the French Revolution, perhaps it is “too soon to tell” whether the events of September 11 were world changing in this way. The full scope and nature of the “terrorist” threat is uncertain, though the recent events of March 11 in Spain suggest that the threat is real, substantial, and ongoing.

The United States–led “war on terrorism” is premised on the notion that the events of September 11 should be seen as a wake-up call that the world has changed. The international community needs new tools and strategies, perhaps a new normative structure, to deal with these dire threats to the world’s security.<sup>3</sup> In the absence of international agreement about the new tools, strategies, and norms, the “war on terrorism” is being waged on its own imperatives regardless of existing norms.

The way this “war” is being waged is itself a threat to human security. By challenging the framework of international human rights and humanitarian law, so painstakingly developed over the last several decades, the “war on terrorism” undermines our security more than any terrorist bombing. The

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1. In this article the author uses the term “human rights framework” as a shorthand to refer to the existing body of international human rights law starting with the Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, Pt. 1), at 71, U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT’L L. SUPP. 127 (1949), *available at* [www.un.org/Overview/rights.html](http://www.un.org/Overview/rights.html). This framework overlaps with the body of international humanitarian law to a large degree in this context.
  2. By “terrorist” acts in this context I mean acts of violence directed at civilians for political or religious objectives. *See generally* text at Section II.
  3. It appears that the terms “war on terror” and “war against terror” were coined shortly after the September 11, 2001, attacks. The first example came from President Bush’s statement to the United States on the evening of September 11, when he stated, “America and our friends and allies join with all those who want peace and security in the world, and we stand together to win the war against terrorism.” *See* Press Release, The White House, Statement by the President in His Address to the Nation (11 Sept. 2001), *available at* [www.whitehouse.gov/news/releases/2001/09/20010911-16.html](http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html).

horror of the September 11 attacks understandably overshadows the human rights consequences of the “war on terrorism” in the public’s consciousness. It is time to restore the balance between liberty and security provided by existing international human rights and humanitarian standards.

The human rights vision of the Universal Declaration of Human Rights, and the body of human rights norms it spawned, is even more relevant and important today than it was on 10 September 2001. The fulfillment of universal human rights is essential to building a world in which terrorism will not undermine our freedom and security. The human rights framework does not inhibit legitimate and effective efforts to respond to terrorist attacks. The limits that international human rights law places on certain forms of executive power (e.g., the prohibition against torture) embody profound agreements about the values the international community in all of its diversity accepts as fundamental.<sup>4</sup>

History shows that when societies trade human rights for security, most often they get neither. Instead, minorities and other marginalized groups pay the price through violation of their human rights. Sometimes this trade-off comes in the form of mass murder or genocide, other times in the form of arbitrary arrest and imprisonment, or the suppression of speech or religion. Indeed, millions of lives have been destroyed in the last sixty years when human rights norms have not been observed.<sup>5</sup> Undermining the strength of

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4. One of the more shocking responses to the events of September 11 has been the call for the codification of some torture techniques by some. Alan Dershowitz, *Is There a Tortuous Road to Justice*, L.A. TIMES, 8 Nov. 2001, at 19. Perhaps more shocking is the advice given by the Office of Legal Counsel in the Justice Department that the President could order the torture of detainees in his role as Commander in Chief without legal restraint. See generally Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (6 Mar. 2003), available at [www.isthatlegal.org/mil\\_torture.pdf](http://www.isthatlegal.org/mil_torture.pdf).

5. Long before the “war on terrorism” and the Cold War, the fight against Communism provided the justification for mass human rights violations in many countries. One only has to recall the many politically motivated atrocities over a twenty year period committed by security and police authorities under the Marcos government in the Philippines, which included torture, illegal detention, and extrajudicial killings. See Jefferson Plantilla, *Elusive Promise: Transitional Justice in the Philippines*, in HUMAN RIGHTS DIALOGUE, Series 1, No. 8 (Carnegie Council on Ethics and International Affairs, 1997), available at [www.cceia.org/viewMedia.php/prmlID/553](http://www.cceia.org/viewMedia.php/prmlID/553).

During Argentina’s “Dirty War,” the Argentine military “disappeared” at least 10,000 Argentines in the so-called “war” against “subversion” and “terrorists” between 1976 and 1983; human rights groups in Argentina put the number at closer to 30,000. See HUMAN RIGHTS WATCH, WORLD REPORT 2001: ARGENTINA: HUMAN RIGHTS DEVELOPMENTS (2001), available at [www.hrw.org/wr2k1/americas/argentina.html](http://www.hrw.org/wr2k1/americas/argentina.html).

In 1965 and 1966, General Suharto rose to power in Indonesia organizing the massacre of some half a million to a million alleged Communists. In addition to those killed, hundreds of thousands more were tortured and imprisoned. The families of those accused were also victimized through a program of institutional ostracism that denied them the opportunity to engage in normal economic and social life. See, e.g., ASIAN

international human rights law and institutions will only facilitate such human rights violations in the future and confound efforts to bring violators to justice.<sup>6</sup>

Also, a state's failure to adhere to fundamental human rights norms makes it more likely that terrorist organizations will find it easier to recruit adherents among the discontented and disenfranchised and among the family and friends of those whose human rights have been violated. Human rights violations in the name of fighting terrorism undermine efforts to respond to the threats of terrorism, making us less rather than more secure in both the short and long run.

Failure to respect universal human rights norms not only undermines our shared values, it undermines the international cooperation and public support so crucial to developing effective antiterrorism efforts. No nation, no matter how powerful, can solve the problem of terrorism on its own. All governments need the voluntary cooperation of every segment of its society to be effective in preventing acts of terrorism. Without adherence to

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HUMAN RIGHTS COMMISSION, INDONESIA: A STATEMENT BY THE ASIAN HUMAN RIGHTS COMMISSION: TIME FOR A NEW INDONESIAN HISTORY (2003), available at [www.ahrchk.net/hrsolid/mainfile.php/2003vol13no04-05/2297](http://www.ahrchk.net/hrsolid/mainfile.php/2003vol13no04-05/2297).

6. For example:

Since the September 11 attacks, China has sought to blur the distinctions between terrorism and calls for independence by the ethnic Uighur community in the Xinjiang-Uighur Autonomous Region (XUAR) in order to enlist international cooperation for its own campaign, begun years earlier, to eliminate "separatism." . . . The police have claimed success in cracking down on terrorists, arresting over 100 of the more than 1,000 Chinese Muslim Uighurs identified by authorities as having fought with the Taliban.

HUMAN RIGHTS WATCH, IN THE NAME OF COUNTER-TERRORISM: HUMAN RIGHTS ABUSES WORLDWIDE: A HUMAN RIGHTS WATCH BRIEFING PAPER FOR THE 59TH SESSION OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS 10-11 (2003), available at [www.hrw.org/un/chr59/counter-terrorism-bck.pdf](http://www.hrw.org/un/chr59/counter-terrorism-bck.pdf).

The same trends are happening in Egypt:

Since September 11, 2001, [the government] has arrested hundreds of suspected government opponents, many for alleged membership in the Muslim Brotherhood, a banned but non-violent group, and possession of "suspicious" literature. Many of those arrested, including professors, medical doctors, and other professionals, have been referred to military courts or to emergency and regular state security courts whose procedures do not meet international fair trial standards.

*Id.* at 12.

After September 11, Russia went to great lengths to link the war in Chechnya to the global campaign against terrorism. On September 12, 2001, Russian President Vladimir Putin declared that America and Russia had a "common foe" because "Bin Laden's people are connected with the events currently taking place in our Chechnya," and on September 24 said that the events in Chechnya "could not be considered outside the context of counter-terrorism," glossing over the political aspects of the conflict. . . . While Russia has described its actions in Chechnya as a tightly focused counter-terrorism operation, it has produced vast civilian casualties. . . . This cycle of abuse, well established before September 11, continues to this day. Hundreds of people have "disappeared" since that date after being taken into Russian custody. Increasingly, Russian forces conduct targeted night operations, in which masked troops raid particular homes, execute targeted individuals, or take them away, never to be seen again.

*Id.* at 18-19.

international human rights standards, such cooperation will be more difficult, if not impossible, to obtain at the international, national, and local levels.

This article examines the threat to the human rights framework posed by the “war on terrorism.”<sup>7</sup> The focus is primarily on actions taken or initiated by the United States because of its leadership role in the “war on terrorism,” and also because its actions have been used to justify a variety of antiterrorism measures around the world that also pose a threat to the human rights framework.<sup>8</sup> Section II considers briefly the definitional problems that plague discussion and action on these issues. In Section III, the human rights consequences of the way in which the “war on terrorism” is being waged are surveyed. In Section IV, the relevance of the human rights framework, and the peril of ignoring it, are discussed.

## II. THE PROBLEM OF DEFINITION

One need only review the reports of the UN Special Rapporteur on terrorism and human rights to know that efforts to define terrorism are fraught with political consequence and disagreement.<sup>9</sup> The controversy is often captured in the phrase “one person’s terrorist is another person’s freedom fighter.”<sup>10</sup>

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7. There is vast literature on these issues; hence, this article is not comprehensive in any respect. For more comprehensive discussion of these issues, see, e.g., *Terrorism and Human Rights: Preliminary Report Prepared by Ms. Kalliopi K. Koufa, Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1999/27 (1999), available at [www.un.org/documents/ecosoc/cn4/sub2/e-cn4sub2\\_99\\_27.pdf](http://www.un.org/documents/ecosoc/cn4/sub2/e-cn4sub2_99_27.pdf). See also *Terrorism and Human Rights: Progress Report Prepared by Ms. Kalliopi K. Koufa, Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/2001/31 (2001), available at [www.un.org/documents/ecosoc/cn4/sub2/e-cn4sub2\\_01\\_31.pdf](http://www.un.org/documents/ecosoc/cn4/sub2/e-cn4sub2_01_31.pdf). See also Conference, International Peace Academy, Human Rights, the United Nations and the Struggle Against Terrorism (7 Nov. 2003), available at [www.ipacademy.org/Events/Nov\\_7\\_2003.htm](http://www.ipacademy.org/Events/Nov_7_2003.htm).
  8. See Lawyers Committee for Human Rights (now Human Rights First), available at [www.lchr.org](http://www.lchr.org), for examples of this phenomenon. Many similar examples may be found on the websites of Amnesty International, available at [www.amnesty.org](http://www.amnesty.org), Human Rights Watch, available at [www.hrw.org](http://www.hrw.org), and other human rights organizations. See, e.g., Article 19, available at [www.article19.org](http://www.article19.org).
  9. *Terrorism and Human Rights, Preliminary Report*, *supra* note 7, at 8–21.
  10. Christine Chinlund, *Who Should Wear the “Terrorist” Label?*, BOSTON GLOBE, 8 Sept. 2003, at A15, available at [www.boston.com/news/globe/editorial\\_opinion/editorials/articles/2003/09/08/who\\_should\\_wear\\_the\\_terrorist\\_label/](http://www.boston.com/news/globe/editorial_opinion/editorials/articles/2003/09/08/who_should_wear_the_terrorist_label/). Long before the “war on terrorism,” the tension over the definition of terrorism manifested itself in the United States reluctance to sign onto the Additional Protocols to the Geneva Conventions, which the Reagan Administration perceived as blurring the lines between “terrorism” and wars of national liberation. See Abraham Sofaer, *The Rationale for the United States Decision Not to Ratify*, 82 AM. J. INT’L L. 784, 785 (1988).

The Special Rapporteur notes that it is difficult to distinguish between internal armed conflict and terrorism. Should state-sponsored terrorism be included in this discussion? How about substate terrorism? Is there a difference between the terrorism of the past and the new threat of nonstate-actor superterrorism with the potential for catastrophic use of weapons of mass destruction?

There is no doubt the international community will continue to struggle to find common ground in the battle over the definition, perhaps reaching accord on a piecemeal basis over time. There is already some agreement about prohibiting certain acts the international community condemns as terrorist acts.<sup>11</sup> Hopefully, the international community will agree that targeting civilians for death and destruction qualifies as "terrorism" and should subject the perpetrators to the jurisdiction of the International Criminal Court as well as universal jurisdiction.<sup>12</sup>

This author will not try to come up with a comprehensive definition of "terrorism." In defending the human rights framework, the author assumes that there is a core meaning of "terrorism," at least with respect to attacks on civilians about which there is increasingly very little normative disagreement. This principle lies at the heart of the entire structure of international human rights and humanitarian law and applies regardless of the motives or political objectives of the authors of such acts.

The September 11 attacks on the World Trade Center and the March 11 bombing of commuter trains in Madrid are paradigmatic examples of what this author has in mind as being at the core of any existing or possible definition of terrorism. These attacks constitute crimes against humanity in that they are, especially taken with other attacks by the same actors, part of a widespread or systematic attack on civilian populations. This view was expressed by the UN High Commissioner for Human Rights Mary Robinson in the immediate aftermath of the September 11 attacks.<sup>13</sup>

This approach leaves many questions unanswered, but the targeting of civilians in this way is at the heart of current concerns about "terrorism" and the current massive efforts to deter and destroy terrorist capabilities. The use of weapons of mass destruction in such an attack would, of course, cause such catastrophic and indiscriminate death and suffering that prevention of such attacks would naturally be at the forefront of any antiterrorism strategy.

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11. For a brief description of the international legal regime regarding terrorism, see Patrick Robinson, *The Missing Crimes*, in *THE ROME STATUTE FOR AN INTERNATIONAL CRIMINAL COURT* 510–21 (Antonio Cassese et al. eds., 2002).

12. *Id.* at 517–21. See also *Spanish Judge Charges 5 More for Ties to Qaeda*, N.Y. TIMES, 21 Apr. 2004, at A12.

13. This characterization of the September 11 attacks is also the view taken by human rights NGOs such as Amnesty International and Human Rights Watch.

There is, of course, another aspect of the problem of definition that should be mentioned here. In many of the antiterrorism measures taken since September 11, 2001, governments have used vague and overbroad definitions of terrorism. Such definitions run the risk of sweeping peaceful, expressive activity into the definition of terrorism and can be the basis for repressive regimes attacking political opponents or other pretextual uses of antiterrorism campaigns.<sup>14</sup> Such antiterrorist laws violate the principle of legality and provide a basis for governments to label political opponents or human rights defenders as “terrorists.” In addition, it can subject them to exceptional security measures that would not be tolerated in other contexts.

Adherence to basic human rights standards requires that antiterrorism laws avoid a sweep so broad that political activity protected by international human rights law is inhibited or penalized. Labeling as “terrorists” those who wish to engage in political dialogue, even dialogue sharply critical of existing governmental policies or the way that societies are structured, will become a self-fulfilling prophecy.

### III. HUMAN RIGHTS AS A CASUALTY OF THE “WAR ON TERRORISM”

Since the September 11 attacks, the United States, with the support of many governments, has waged a “war on terrorism.”<sup>15</sup> This “war” puts the human rights gains of the last several decades and the international human rights framework at risk. Some methods used in detaining and interrogating suspects violate international human rights and humanitarian norms in the name of security. Throughout the world, governments have used the post-September 11 antiterrorism campaign to crack down on dissidents and to suppress human rights. These actions are documented by Amnesty International and many other human rights groups.<sup>16</sup>

Of course, not all of the antiterrorism efforts of the last thirty months deserve such criticism. There are many examples of cooperative law enforcement efforts to prevent terrorist acts and to bring suspected perpetra-

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14. See, e.g., AMNESTY INTERNATIONAL, RIGHTS AT RISK: AMNESTY INTERNATIONAL'S CONCERNS REGARDING SECURITY LEGISLATION AND LAW ENFORCEMENT MEASURES (2002), ACT 30/001/2002, available at [www.amnestyusa.org/waronterror/rightsatrisk.pdf](http://www.amnestyusa.org/waronterror/rightsatrisk.pdf).

15. This section focuses primarily on actions taken by the United States; however, the ramifications of the “war on terrorism” reverberate throughout the world and there are many governments which have taken antiterrorism measures, sometimes repelling US measures, which undermine international human rights norms.

16. Numerous reports and updates may be found on the websites of Amnesty International, available at [www.amnesty.org](http://www.amnesty.org), Human Rights Watch, available at [www.hrw.org](http://www.hrw.org), as well as many other NGOs.



tors to justice taken within a human rights paradigm. The allocation of additional resources and attention to these efforts in light of massive attacks on civilians is understandable. Governments have a wide degree of discretion in identifying threats to national or international security, and such discretion is recognized in existing human rights and humanitarian law.<sup>17</sup>

The analysis that follows is a review of the human rights consequences of the “war on terrorism” as it has been waged in the last thirty months that is presented in order to illustrate the ongoing threat to the human rights framework.<sup>18</sup>

### A. The “War” Paradigm

At the heart of the challenge to the human rights framework is the question of whether the “war on terrorism” is a “war,” and if so, what sort of a war it is. To date, one of the characteristics of the “war on terrorism” is a refusal to accept that any body of law applies to the way this “war” is waged. Central to the human rights framework is the idea that there are no “human rights free zones” in the world, and that human beings possess fundamental human rights by virtue of their humanity alone. In addition, contrary to the picture painted by many in Washington DC, there is no gap between human rights law and humanitarian law in which a “war on terrorism” may be waged, free from the constraints of international law. The essence of the rule of law requires that executive action be constrained by law.

The refusal to accept that the rule of law governs the conduct of the “war on terrorism” has created tremendous uncertainty and has also led to the erosion of individual rights.<sup>19</sup> For example, in April 2003 the United

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17. This article does not address the legality of the military actions in Afghanistan or Iraq. An analysis of those actions is beyond the scope of this article and raises a host of additional issues and challenges. It should be noted, however, that the new US doctrine of preemptive attack also challenges basic assumptions about the way the international community is structured and exacerbates the dangers the “war on terrorism” poses for international human rights protection.

18. There is a large and growing literature about the human rights consequences of the “war on terrorism.” See, e.g., AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE THREAT OF A BAD EXAMPLE: UNDERMINING INTERNATIONAL STANDARDS AS “WAR ON TERROR” DETENTIONS CONTINUE (2003), AMR/51/114/2003, available at [web.amnesty.org/library/Index/ENGAMR511142003](http://web.amnesty.org/library/Index/ENGAMR511142003); see also AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: RESTORING THE RULE OF LAW: THE RIGHT OF GUANTANAMO DETAINEES TO JUDICIAL REVIEW OF THE LAWFULNESS OF THEIR DETENTION (2004), AMR 51/0931/2004, available at [web.amnesty.org/library/Index/ENGAMR510932004?open&of=ENG-USA](http://web.amnesty.org/library/Index/ENGAMR510932004?open&of=ENG-USA).

19. See generally Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT’L & COMP. L. REV. 303 (2002). See generally RESTORING THE RULE OF LAW, *supra* note 18.



States took the position, in response to questions posed by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions about the November 2002 killing of six men in Yemen by a missile shot from an unmanned drone, that this attack was against enemy combatants in a military operation and, thus, was beyond the competence of the Special Rapporteur and the UN Human Rights Commission.<sup>20</sup>

The US carried out this operation in cooperation with the Yemeni government. Thus, it is not an example of an act of last resort because a government is alleged to be hiding or assisting suspected terrorists. Capturing persons suspected of planning or having engaged in criminal actions, whether considered “terrorism” or not, is the quintessential law enforcement activity; an activity that is ordinarily subject to the restrictions of international human rights law. Those ordinary restrictions require the governments of United States and Yemen to capture these men and try them under applicable criminal laws. By defining the “war on terrorism” as a “war,” the United States and cooperating governments conveniently eliminate all of the protections of human rights law, even in circumstances in which international humanitarian law does apply. It is not clear why this precedent would not be applicable to any government seeking to target dissidents, national liberation movements, or anyone opposed to a regime as being a “terrorist” and an appropriate military threat in this global “war.”

The substantive, temporal, and geographic scope of the “war on terrorism” are unbounded and unknown. The “war on terrorism” exists in a parallel legal universe in which compliance with legal norms is a matter of executive grace or is taken out of diplomatic or public relations necessity.<sup>21</sup> The concept of “terrorism” put forward is any act perceived as a threat by those waging the war against it. The battlefield is the entire planet, regardless of borders and sovereignty. The “war on terrorism” might continue in perpetuity, and it is unclear who is authorized to declare it over. Human rights protections simply do not exist when they conflict with the imperatives of the “war on terrorism.”

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20. *Civil and Political Rights, Including the Questions of: Disappearances and Summary Executions*, U.N. Doc. E/CN.4/2003/G/80 (2003), available at [www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/9b67b6687466cfcac1256d2600514c7f/\\$FILE/G0313804.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/9b67b6687466cfcac1256d2600514c7f/$FILE/G0313804.pdf).

21. In February 2002, President Bush declared that the detainees held at Guantanamo Bay, Cuba, would be treated “humanely and, to the extent appropriate and consistent with military necessity, consistent with the principles” of the Geneva Convention. See John Yoo, *With “All Necessary and Appropriate Force,”* L.A. TIMES, 11 June 2004, at B13, available at [www.aei.org/news/filter.,newsID.20688/news\\_detail.asp](http://www.aei.org/news/filter.,newsID.20688/news_detail.asp).

## B. The Guantanamo Detainees

The continuing detention of more than 600 alleged “terrorists” at a military base in Guantanamo is becoming the most visible symbol of the threat to the human rights framework posed by the “war on terrorism.”<sup>22</sup> The Guantanamo detainees essentially have been transported to a “human rights free zone” or “legal black hole,”<sup>23</sup> where only visits by the International Committee of the Red Cross (ICRC) stands between them and the arbitrary, unreviewable exercise of executive power.<sup>24</sup>

The detainees are beyond the reach of any body of law and receive the treatment that their captors deem reasonable in the circumstances. The US says the detainees are to be treated consistent with the laws of war. Yet, they are denied hearings required by Article 5 of the Third Geneva Convention before a “competent tribunal” to determine whether they are prisoners of war,<sup>25</sup> as the ICRC presumptively believes them to be. In the eyes of their captors, they are conclusively determined to be “enemy combatants” or “enemy aliens,” who may be tried before military commissions and detained indefinitely whether they are convicted by those commissions or not.

The Military Order of November 13, 2001—Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terror, authorizes the detention and trial of “terrorists” and uses a broad definition of “individuals subject to this order.”<sup>26</sup> Thus, US authorities may take any person in the

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22. There are also detentions in other locations including Bagram Air Base in Afghanistan and in other secret detention facilities. See HUMAN RIGHTS FIRST, ENDING SECRET DETENTIONS (2004), available at [www.humanrightsfirst.org/us\\_law/PDF/EndingSecretDetentions\\_web.pdf](http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf).
  23. The Queen on the Application of Abbasi and Another v. Sec’y of State for Foreign and Commonwealth Affairs, EWCA Civ 1598, ¶ 64 (U.K.) Sup. Ct. Judicature, (C.A.) (6 Nov. 2002), available at [www.courtservice.gov.uk/judgmentsfiles/j1354/abassi\\_judgment.htm](http://www.courtservice.gov.uk/judgmentsfiles/j1354/abassi_judgment.htm).
  24. For a more comprehensive discussion of the rights possessed by the detainees in Guantanamo and Afghanistan, see AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: MEMORANDUM TO THE US GOVERNMENT ON THE RIGHTS OF PEOPLE IN US CUSTODY IN AFGHANISTAN AND GUANTANAMO BAY (2002), AMR 51/053/2002, available at [web.amnesty.org/library/Index/ENGAMR510532002](http://web.amnesty.org/library/Index/ENGAMR510532002). See also RESTORING THE RULE OF LAW, *supra* note 18. For a recent examination of the legal issues surrounding the detention in Guantanamo, see Dianne Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT’L L. 263 (2004).
  25. Geneva Convention (III) Relative to the Treatment of Prisoners of War (Geneva III), adopted 12 Aug. 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135, art. 5 (entered into force 21 Oct. 1950) (entered into force for U.S. 2 Feb. 1956). The convention also requires humane treatment, limits interrogation, and requires repatriation at the end of hostilities.
  26. Sec. 2. Definition and Policy states:
    - (a) The term “individual subject to this order” shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

world they believe fits this broad definition and transport them to the “human rights free zone” in Guantanamo. There the US is not subject to judicial oversight by domestic<sup>27</sup> or international authorities, and the detainees can be treated in any manner until they are tried, released, or held in these conditions indefinitely.

The Military Order applies only to noncitizens, leading to a stark double standard between the treatment of US citizens accused of being involved in terrorist activity and noncitizens, who are not entitled to the panoply of rights accused US “terrorists” will receive.<sup>28</sup> There is no reason to believe that US citizens may not also engage in terrorist activity. Indeed, before September 11, the worst terrorist act on US soil was committed in Oklahoma City by US citizen Timothy McVeigh. The idea that noncitizens are not entitled to international fair trial standards because they are unworthy “terrorists” is at odds with international antidiscrimination and fair trial norms as well as the presumption of innocence.

Trials before the military commissions, established pursuant to the November 2001 order, will not comply with essential international fair trial safeguards or guarantees of an independent judiciary. Indeed, the proceedings appear to be no different from military tribunals the international community has criticized in many other settings as a violation of international human rights standards.<sup>29</sup>

The availability of the death penalty in these military commissions undermines the human rights goal of eventual abolition of the death

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(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more.

Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834 (13 Nov. 2001), available at [www.cnss.org/milorder.pdf](http://www.cnss.org/milorder.pdf).

27. On 28 April 2004, the United States Supreme Court heard oral arguments in two cases in which family members of Guantanamo detainees are asserting that US courts have habeas corpus jurisdiction to consider the legality of detainees’ detention under US law. The argument did not focus on whether there was an international obligation to provide some means for the detainees to obtain judicial oversight of their detentions. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).
28. This double standard is reflected in the treatment of John Walker Lindh, who was captured while fighting for the Taliban in Afghanistan and was charged in an ordinary federal court and received all of the rights ordinary criminal defendants would receive in US courts.
29. For a comparison of the rules governing military commissions and international standards, see HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH BRIEFING PAPER ON U.S. MILITARY COMMISSIONS (2003), available at [www.hrw.org/background/usa/military-commissions.pdf](http://www.hrw.org/background/usa/military-commissions.pdf).

penalty; especially in light of the important strides the international community has made toward abolition of the death penalty in the Rome Statute and elsewhere, for even the most egregious crimes. These commissions also inhibit international cooperation to combat terrorism given the strong views of many states that abolition of the death penalty is an important human rights issue.<sup>30</sup>

The conditions under which the detainees are held also raise serious human rights issues. Historically, incommunicado and secret detentions have often led to torture and other forms of ill treatment. Now, there is evidence that suggests that the conditions of detention on Guantanamo, secure from outside oversight, violate these international standards. Based on reports emerging from released detainees, detainees are subjected to repeated interrogations and to techniques designed to wear them down and seemingly humiliate them. These techniques reportedly include twenty-four hour illumination, sleep deprivation, and standing for long periods of time. Detainees have also been kept in cramped detention cages or small cells and denied adequate exercise in violation of basic humanitarian and human rights norms.<sup>31</sup> The fact that these detentions are outside any established legal framework has resulted in a negative impact on the mental state of the detainees;<sup>32</sup> establishing a detainee's status in a fair process and providing humane conditions to detainees are fundamental norms of both international human rights and humanitarian law.<sup>33</sup>

In the post-September 11 environment, the absolute prohibition against torture has been questioned, but there is no logical stopping point to any relaxation of the prohibition of torture. Would it be used only on those who

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30. See European Parliament Resolution on EU Judicial Co-operation with the United States in combating terrorism, B5-0813/2001 (11 Dec. 2001), available at [www.epp-ed.org/Activities/doc/b5-813en.doc](http://www.epp-ed.org/Activities/doc/b5-813en.doc) (encourages mutual assistance with US in combating terrorism while urging complete abolition of the death penalty).
  31. See Geneva III, art. 38, *supra* note 25; see also Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Geneva IV), adopted 12 Aug. 1948, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, art. 94 (entered into force 21 Oct. 1950) (entered into force for U.S. 2 Feb. 1956). See also *Standard Minimum Rules for the Treatment of Prisoners*, adopted 30 Aug. 1955, E.S.C. Res. 663C (XXIV), U.N. ESCOR, 24th Sess., Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), 21(1), amended by U.N. Doc. E/5988 (1977), available at [www1.umn.edu/humanrts/instreet/g1smr.htm](http://www1.umn.edu/humanrts/instreet/g1smr.htm) (requires at least one hour of suitable open air exercise a day.)
  32. The ICRC has expressed concern about the mental state of detainees especially as the length of their detentions grows. There have been reports of a substantial number of suicide attempts. *Red Cross Finds Deteriorating Mental Health at Guantanamo*, USA TODAY, 10 Oct. 2003, available at [www.usatoday.com/news/world/2003-10-10-icrc-detainees\\_x.htm](http://www.usatoday.com/news/world/2003-10-10-icrc-detainees_x.htm).
  33. International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 10, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976); Common Article Three of the Geneva Conventions. See Geneva III, *supra* note 25; Geneva IV, *supra* note 31.

might know of the existence of a terrorist sleeper cell determined to use a weapon of mass destruction? This logic would surely undermine the categorical prohibition of torture achieved, though not yet consistently implemented, after decades of human rights campaigning. There is also no evidence that a policy of allowing torture would actually make the world any safer from terrorist attack.

There is more to say about the conditions of confinement in Guantanamo Bay, especially after recent revelations about the widespread abuse of prisoners in Iraq and elsewhere. The central challenge it presents to the human rights framework is that the detainees are left without the protection of law or judicial or international oversight. Although the ICRC is allowed to visit the detainees, the United States does not agree that the detainees are prisoners of war or even entitled to the full protections of international humanitarian or human rights law.

The United States has labeled the detainees as “enemy combatants,”<sup>34</sup> but this label cannot avoid the requirement of a determination of every detainee’s status by a “competent tribunal.” Humanitarian law requires that such determinations be made by tribunals and under procedures that guarantee fair treatment, protect vulnerable detainees, and restrain the detaining power.<sup>35</sup> Instead, the detainees, like the six men killed in Yemen, are subject only to the discretion of an unrestrained executive authority.

Fundamental human rights norms require that detentions be subject to judicial oversight.<sup>36</sup> As the UN Working Group on Arbitrary Detention stated in December 2002, if prisoner of war status is not recognized by a competent tribunal,

[T]he situation of detainees would be governed by the relevant provisions of the [International Covenant on Civil and Political Rights] and in particular by articles 9 and 14 thereof, the first of which guarantees that the lawfulness of a

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34. The US Supreme Court is considering whether the president may label US citizens as “enemy combatants” and deprive them of Constitutional rights. See Hamdi, *supra* note 27; Padilla, *supra* note 27. These cases do not concern the fate of the non-citizen “enemy combatants” in Guantanamo.

35. See *generally* RESTORING THE RULE OF LAW, *supra* note 18.

36. As ICRC President, Jakob Kellenberger emphasized in a 17 March 2004 speech to the UN Commission on Human Rights:

For example, fundamental judicial guarantees are a cornerstone of protection in peacetime and in armed conflict. This is confirmed by the wording of Article 75 of Additional Protocol I of 1977, which is applicable in international armed conflicts, a provision clearly influenced by human rights law. Similarly, the application of human rights standards is needed in non-international armed conflicts in order to supplement humanitarian law provisions governing the treatment, conditions of detention and rights regarding a fair trial of persons deprived of liberty.

Jakob Kellenberger, 60th Annual Session of the UN Commission on Human Rights—Statement by the President of the ICRC (17 Mar. 2004), *available at* [www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5X6MY5?OpenDocument&style=custo\\_page](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5X6MY5?OpenDocument&style=custo_page).

detention shall be reviewed by a competent court, and the second of which guarantees the right to a fair trial.<sup>37</sup>

The United States has rejected the UN's position and every other form of international oversight of these detentions.

As a result, the identity of the detainees are secret, and there is no international or domestic oversight of the detentions. There is no way of knowing whether there is any basis for the continued detention of particular detainees, which includes children as young as thirteen. Over time, a number of detainees have been released, and so far the released detainees have not been charged with any criminal offense. Thus, raising substantial questions about the grounds for their detention in the first place and even more concern about the length of the detentions. Despite assurances by United States officials, there are examples of mistakes coming to light.

The case of Sayed Abassin, a taxi driver from Afghanistan, lends a human face to these human rights violations.<sup>38</sup> In April 2002, Abassin was arrested in Gardez. He had the misfortune of driving the wrong passengers from Kabul to Khost. Abassin was detained and subjected to sleep deprivation, shackling, and repeated interrogations at Bagram Air Base and a base in Kandahar. He had no access to a court, a lawyer, or to a "competent tribunal" guaranteed under the Third Geneva Convention. He was transferred to Guantanamo, where he was detained for nearly a year. For the last ten months he was not even interrogated. He was released without charge or trial in April 2003. The disruption to his life and to the lives of his family members was substantial and could have been avoided had international human rights or humanitarian standards been respected.

There is no way of knowing how many similar cases will emerge from the "human rights free zone" in Guantanamo. The whole point of judicial oversight is to ensure that there is a legitimate basis for the continued

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37. *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Working Group on Arbitrary Detention, Louis Joinet Chairperson-Rapporteur, Executive Summary*, U.N. ESCOR, Comm'n on Hum. Rts., 59th Sess., Agenda Item 11(a), U.N. Doc. E/CN.4/2003/8 (2002), available at [www.hri.ca/fortherecord2003/documentation/commission/e-cn4-2003-8.htm](http://www.hri.ca/fortherecord2003/documentation/commission/e-cn4-2003-8.htm). The United States rejected this position. *Civil and Political Rights, Including the Questions of: Torture and Detention: Response of the Government of the United States of America to the December 16, 2002 Report of the Working Group on Arbitrary Detention*, U.N. ESCOR, Comm'n on Hum. Rts., 59th Sess., Agenda Item 11(a), U.N. Doc. E/CN.4/2003/G/73 (2 Apr. 2003), available at [www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/35a53be3c4b5a245c1256d050036ff03/\\$FILE/G0312799.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/35a53be3c4b5a245c1256d050036ff03/$FILE/G0312799.pdf). The United States is a party to the ICCPR, yet no other party has seen fit to bring a state-to-state complaint challenging the US position on these detentions. The Inter-American Commission on Human Rights has taken a similar position on the Guantanamo detainees and the United States has rejected this position as well.

38. See THREAT OF A BAD EXAMPLE, *supra* note 18, at 23.

detention of individuals. Even if judges give substantial deference to detaining authorities given the context of these detentions, as seems likely, there must be some independent check on the arbitrary exercise of executive authority.

### C. The Problem of Discrimination

One of the features of the “war on terrorism” so far is that minority groups have paid most of the cost for antiterrorism efforts, presumably undertaken for the benefit of society as a whole. Such discrimination is not only unfair, it is corrosive to legitimate security efforts. In this section, the focus is again on US examples, but there are examples in many other contexts which could be cited.

In the aftermath of September 11, thousands of Arab nationals and Muslims have been rounded up and detained in the United States in a massive form of preventive detention. These detentions were undertaken in secret, and the government opposed bail for post-September 11 detainees as a matter of course. Detainees were kept in harsh conditions, often with those charged with criminal offenses. Contacts with family and lawyers were heavily circumscribed.<sup>39</sup> Government investigative reports confirm that widespread abuses of noncitizens were perpetrated during the course of these activities.<sup>40</sup>

In addition to detainees picked up in the immediate aftermath of September 11, the government continues to arrest and detain persons from these cultural backgrounds. Additionally, the government conducted a special registration program limited to nationals of only certain backgrounds and has engaged in other activities considered viably to be racial profiling, thus, exacerbating feelings of exclusion and anger.

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39. For a more comprehensive description of these events, see DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003). See also AMERICAN CIVIL LIBERTIES UNION, *AMERICA'S DISAPPEARED: SEEKING INTERNATIONAL JUSTICE FOR IMMIGRANTS DETAINED AFTER SEPTEMBER 11* (2004), available at [www.aclu.org/Files/OpenFile.cfm?id=14799](http://www.aclu.org/Files/OpenFile.cfm?id=14799). The ACLU has filed a complaint on behalf of the post-September 11 detainees with the UN Working Group on Arbitrary Detention. See also Marjorie Cohn, *Rounding up the Unusual Suspects: Human Rights in the Wake of 9/11: Human Rights, Casualty of the War on Terror*, 25 *SAN DIEGO JUSTICE J.* 317 (2003). See also Kareem Farhim, *The Moving Target: Profiles in Racism*, AMNESTY NOW, Winter 2003, available at [www.amnestyusa.org/amnestynow/racial\\_profiling.html](http://www.amnestyusa.org/amnestynow/racial_profiling.html).
40. U.S. DEPARTMENT OF JUSTICE: OFFICE OF THE INSPECTOR GENERAL, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS* (2003), available at [www.usdoj.gov/oig/special/0306/index.htm](http://www.usdoj.gov/oig/special/0306/index.htm). In contrast to Guantanamo at least immigrants detained within the United States were allowed to have counsel and were placed within a process where there was the possibility, however limited, of administrative and judicial oversight.



Almost all of the detainees have been held on minor immigration law violations, which ordinarily would not warrant detention or deportation. One commentator reports that only three of the estimated 5,000 noncitizens detained by these efforts have been charged with any offense remotely related to terrorism, indicating the ineffectiveness of such strategies.<sup>41</sup> Yet, these activities make life within the United States insecure for thousands of vulnerable noncitizens based on their national or religious background.

These transgressions on immigrant communities are just a part of the “collateral damage” of the “war on terrorism.” International norms clearly prohibit discrimination on the basis of ethnicity, nationality, or religion. There is a growing recognition of the harms caused by discrimination in the social fabric of our communities. By targeting immigrant communities, the government fosters the discrimination and exclusion that human rights law has struggled so hard to eradicate, making it all the more difficult to engender understanding and cooperation between communities in the fight against terrorism.

The United States is not alone in using new antiterrorism powers against minority groups or noncitizens. Antiterrorism legislation in the United Kingdom is also targeted at noncitizens, so British citizens will receive the full panoply of protections if suspected of terrorism, while noncitizens can be detained indefinitely without trial or charge.

Discrimination is also counterproductive in the fight against terrorism. The statistics showing that such dragnet arrests and detentions have produced virtually no terrorists indicate the extremely limited utility of using such tactics in the fight against terrorism. Instead, it has been demonstrated that such tactics create enmity between law enforcement authorities and the affected communities. The voluntary cooperation so essential to uncovering and to preventing terrorist actions is now less likely to occur. Why would Arab nationals or Muslims in the United States or targeted minority groups in any country voluntarily assist the same governmental authorities who take arbitrary action against their innocent relatives, friends, and co-religionists? In this sense, adherence to human rights standards is not only the right thing to do, but it is necessary to enlist the entire community in the effort to achieve greater security for everyone.

#### **D. Renditions Without Rights**

The case of Maher Arar raises another troublesome aspect of the way the “war on terrorism” is being waged. Arar was detained at JFK airport on

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41. See COLE, *supra* note 39, at 188.

26 September 2002 while in transit to Canada on a Canadian passport.<sup>42</sup> He was held in US custody for thirteen days, during which time he was interrogated about his links to Al-Qaeda. After this, he was transported to Syria through “expedited removal,” without a hearing and without his lawyer, family, or the Canadian consulate being notified. He was held without charge in Syria for a year, during which time he suffered torture as well as cruel, inhumane, and degrading treatment and punishment. His rendition to Syria violated US obligations under Article 3 of the Convention Against Torture, which prohibits sending an individual to a country in which there is reason to believe that he will be subjected to torture. There is evidence that this is not an isolated event and that secret renditions are taking place outside any judicial oversight, often in violation of the Convention Against Torture.

Another lesser known challenge to the rule of law has been the manner in which many of the detainees held in Guantanamo have been brought there.<sup>43</sup> Although it has been claimed that the Guantanamo detainees are “battlefield” captives, this is true only if the battlefield is anywhere a “terrorist” suspect is found. Though it appears that most Guantanamo detainees were captured in Afghanistan, an unknown number of detainees have been seized in other circumstances and places usually outside normal legal channels or judicial oversight.

An intricate web of extradition and mutual assistance treaties exists, which could be used to render persons accused of crime to the custody of the United States or other governments seeking them upon sufficient evidence. These agreements ordinarily provide for judicial supervision and some minimal guarantees of procedural and substantive fairness to persons accused of criminal acts.

In the “war against terrorism,” this web of international cooperation is seen as optional and the lawless rendition of suspects more convenient. Perhaps the most egregious example of this phenomenon was the transportation of six Algerian suspects from Bosnia at a time when their cases were under judicial review by the appropriate judicial body in Bosnia. Rather than await a legal ruling, the suspects were spirited out of Bosnia to Guantanamo, where they remain without charge or trial.

There may well be circumstances in which international cooperation and the rule of law in the rendition of suspects cannot be observed without threatening national security. An example of such a time being when a government hides terrorists who are planning an attack. However, casual

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42. Press Release, Amnesty International, USA: Deporting for Torture? (14 Nov. 2003), AMR 51/139/2003, available at [web.amnesty.org/library/index/engamr511392003](http://web.amnesty.org/library/index/engamr511392003).

43. See Joan Fitzpatrick, *Rendition and Transfer in the War Against Terror: Guantanamo and Beyond*, 25 LOY. L.A. INT'L & COMP. L.J. 457 (2003).

circumvention of these legal obligations and the failure to abide by human rights norms undermines respect for the rule of law in general.

#### IV. A HUMAN RIGHTS FRAMEWORK IS ESSENTIAL IN THE RESPONSE TO TERRORISM

For the most part, the international community has responded to the events of September 11 and their aftermath with an insistence that the response to terrorism must unfold within basic standards of human rights and international law. For example, the United Nations Security Council in Resolution 1456 (2003) insisted that any measure taken to combat terrorism must comply with international law obligations, “in particular international human rights law, refugee, and humanitarian law.”<sup>44</sup>

The question is whether these norms will actually govern the conduct of states and what the international community will do if they do not. The detainees in Guantanamo are in a “human rights free zone” with the active cooperation of many governments and the absence of an adequate response by the international community as a whole. It is not too late to repair this damage to the human rights framework.

##### A. A Right to Security

At the heart of antiterrorism efforts is a recognition that all human beings have a right to security and to life. All governments have a responsibility to respect, ensure, and fulfill these rights and, to that end, to employ effective strategies to prevent and to punish acts of mass murder and destruction. No human rights advocate would deny this responsibility. The human rights framework is built on this recognition, but the right to security must be fulfilled within the framework of human rights protection, not at the expense of human rights. Just as the state must prevent human rights violations from occurring within its territory, whether they are committed by nonstate actors or officials, it must protect those within its borders from “terrorism.”

Recognizing the existence and force of universal human rights norms does not mean that international society has entered into a collective suicide pact, placing individual rights invariably over pressing security

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44. S.C. Res. 1456, U.N. SCOR, 58th Sess., 4688th mtg., ¶ 6, U.N. Doc. S/RES/1456 (2003), available at [www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/S.RES.1456+\(2003\).En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/S.RES.1456+(2003).En?Opendocument). See also Report on Terrorism and Human Rights, Inter-Am. C.H.R., OEA/ser.L/V/II.116, doc. 5 rev. 1 corr. (2002), available at [www.cidh.org/Terrorism/Eng/toc.htm](http://www.cidh.org/Terrorism/Eng/toc.htm).

needs. To the extent a “war on terrorism” is meant to imply a marshaling of the resources to address this pressing threat, this “war” must respect the basic human rights everyone has a right to have fulfilled. The purpose of this article is not to voice a problem with the rhetorical use of the “war” metaphor but to argue against the rhetoric becoming policy and altering the international legal regime.

The right to security is not absolute in theory or in reality. No society can be protected completely from those who would use violence to achieve their desired ends. There will always need to be some balance between liberty and security. Indeed, the development and implementation of international human rights standards and humanitarian law have always been sensitive to the balance between liberty and security. These are not new questions. There have always been threats of violence, including violence leading to the deaths of thousands of civilians; and in the last sixty years the human rights framework has not been an obstacle to legitimate government action designed to respond to those actions and threats.

In fact, the human rights framework has been forged out of the experiences of the devastation societies suffered when human rights were exchanged too easily in a fight against terrorists, subversives, or whatever name is placed on the threat. Using these terms, governments have been able to justify political murder and torture. In today’s world there are more people who must endure the loss of loved ones or personal suffering because of the failure of states to adhere to human rights standards than there are victims of terrorist attacks.

The author does not mean to elevate one form of suffering over another or to denigrate any efforts to end terrorist attacks. The point is that there are real and well documented risks involved when the fabric of human rights protection is torn asunder or ignored. The cost of abandoning human rights standards in the fight against terrorism may not be immediately apparent, but it is as real as the suffering of the victims of a terrorist attack. One less obvious impact is that massive human rights catastrophes have been allowed to unfold without sufficient international attention or action, while the war on terrorism receives a disproportionate amount of attention and resources.<sup>45</sup>

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45. One example are the events unfolding in the Darfur region of the Sudan. Just as millions may have died in recent years, without much public notice, in the Democratic Republic of the Congo, thousands may be dying now in Darfur; yet the world is not mobilizing adequately to prevent this impending catastrophe.

## **B. A Human Rights Framework Does Not Impair the Fight Against Terrorism**

Implicit in the design of the “war on terrorism” is the notion that the international human rights framework necessarily complicates the fight against terrorism. However, there is nothing in the existing human rights framework that need impair international efforts to fight terrorism. Indeed, it is difficult to see how international cooperation in the fight against terrorism can be maintained without respect for the rule of law.

Nothing in international human rights law prevents governments from passing laws that impose criminal penalties on those who would conspire or act to commit mass murder and destruction. Indeed, many nations have already enacted such laws. Governments may not enact laws that infringe on freedom of expression, religion, or other freedoms or that are so vague they invite abuse. Antiterrorism laws can be fashioned within these basic requirements. Some post-September 11 legislation raised these concerns, but the scope for legislation that addresses terrorist acts remains broad.

Even if one assumes the detainees are not covered by international humanitarian law,<sup>46</sup> the international human rights framework still requires they be tried for a recognizable criminal offense and be granted the internationally recognized guarantees of a fair trial. The United States had no difficulty complying with these requirements in response to the first World Trade Center bombing,<sup>47</sup> showing it is possible for governments to create special procedures for handling classified or sensitive evidence in such trials in accordance with their legal systems. Many countries have experience trying alleged terrorists in ordinary courts under procedures that comply, or at least arguably comply, with international standards. There can be increased cooperation at every level of government within a human rights framework.

Many human rights standards, beginning with Article 29 of the Universal Declaration of Human Rights, explicitly recognize limitations based on the requirements of public order or security. There is a substantial body of international, regional, and domestic jurisprudence in balancing liberty and security in a wide variety of specific contexts. These standards should be respected and enforced, not ignored.

International human rights law also explicitly recognizes that there may be emergencies that justify suspension of some international human rights

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46. If deemed prisoners of war then there is a well-defined regime of humanitarian law under which the detainees must be treated.

47. See *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003) (affirming convictions of those responsible for the 1993 World Trade Center bombing).

protections during times of crisis.<sup>48</sup> For example, Article 4 of the ICCPR allows for measures derogating from obligations assumed under the Covenant in a time of “public emergency” that is “officially proclaimed” and “threatens the life of the nation.” Notification of this declaration must be given to other state parties through the Secretary-General. Derogating measures must only be to the extent “strictly required by the exigencies of the situation,” and cannot involve discrimination on the ground of race, color, sex, language, religion, or social origin and cannot conflict with other international law obligations. While the Bush administration has used the rhetoric of national security to justify the incognito detention of hundreds of Arab residents in the US for minor immigration violations since September 11, it has yet to notify the Secretary-General of declaration of an emergency under Article 4.

Moreover, there are some obligations (e.g., the right to life, the prohibition against torture, and other forms of cruel, inhumane, and degrading treatment or punishment) that are nonderogable. In addition to these explicit nonderogable rights, the Human Rights Committee has determined that the obligation to treat detainees with humanity, the prohibition of the arbitrary deprivation of liberty, and the presumption of innocence have become peremptory rules of international law. These new rules further restrict what may be done in a crisis situation.<sup>49</sup>

International human rights bodies, especially regional human rights bodies, have had substantial experience in adjudicating cases arising out of alleged terrorism attacks and terrorist groups.<sup>50</sup> The international human rights framework was developed with the possibility of crisis threatening the life of a nation in mind. There are no grounds to abandon the framework altogether because of the events of September 11 or because of the threat of similar attacks.

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48. See generally JOAN F. FITZPATRICK, *HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY* (1994).

49. *General Comment on Article 4*, General Comment No. 29, U.N. GAOR, Hum. Rts. Comm., 1950th mtg., ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add 11 (2001).

50. See, e.g., *Brogan and Others v. United Kingdom*, 24 Eur. Ct. H.R. (ser. B) at 145-B (1988), available at [www.worldlii.org/eu/cases/ECHR/1988/24.html](http://www.worldlii.org/eu/cases/ECHR/1988/24.html) (emphasizing the requirement of judicial oversight); see also *Habeas Corpus in Emergency Situations* (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87 of 30 January 1987, Inter-Am. C.H.R. (Ser. A) No. 8 (1987), available at [http://www.unige.ch/humanrts/iachr/b\\_11\\_4h.htm](http://www.unige.ch/humanrts/iachr/b_11_4h.htm). See also American Convention on Human Rights, signed 22 Nov. 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979) (entered into force 18 July 1978), reprinted in 9 I.L.M. 673 (1970).

### C. A Human Rights Framework Is Essential For Real Human Security

Without denying the legitimacy of responding to threats of terrorist attacks, a central problem with the “war on terrorism” is that it ignores other equally or more pressing challenges to human security. For hundreds of millions of people in the world today, the most important source of insecurity is not a terrorist threat but grinding, extreme poverty. More than a billion of the world’s six billion people live on less than one dollar a day.

The Universal Declaration of Human Rights and the entire human rights framework is based on the indivisibility of human rights. This includes not only civil and political rights but also economic, social, and cultural rights. The discrepancy between these human rights promises and the reality of life for more than one-sixth of the world’s people must be eliminated if terrorism is to be controlled.

Every human being is entitled to a standard of living that allows for their health and wellbeing, including food, shelter, and medical care. Yet more than three thousand African children die of malaria each day. Only a tiny percentage of the twenty-six million people infected with HIV/AIDS have access to the health care and medicine they need to survive. Many additional examples could be given.

Many governments have adopted the Millennium Development Goals to be achieved by 2015.<sup>51</sup> The goals include targets for child and infant mortality, the availability of primary education for all children, halving the number of people without access to clean water along with many others. According to the World Bank,<sup>52</sup> these goals will not be achieved, in part because the “war on terrorism” is shifting attention and resources away from long-term development issues.

How can we eradicate violent challenges to the existing world order if education is not universal? Without education and peaceful exchanges between peoples, the “war on terrorism” will only succeed in creating new generations of warriors.

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51. Millennium Development Goals: All 191 UN Member countries have pledged to meet the goals stated as UN Millennium Development Goals by the year 2015. These include

1. Eradicating extreme poverty and hunger;
2. Achieving universal primary education;
3. Promoting gender equality and empowering women;
4. Reducing child mortality;
5. Improving maternal health;
6. Combating HIV/AIDS, malaria, and other diseases;
7. Ensuring environmental sustainability;
8. Developing goals (MDG).

available at [www.un.org/millenniumgoals/](http://www.un.org/millenniumgoals/).

52. Paul Blustein, *Agencies Say Poverty Persists Despite Global Efforts*, WASH. POST, 23 Apr. 2004, at A24.



Why is terrorism given more attention than the scourge of violence against women? Millions of women are terrorized in their daily lives, yet no “war” on violence against women is being waged. Clearly, this problem is more widespread than terrorist violence and invariably makes women insecure as well as second-class citizens in every corner of the world.

If some of the resources and attention devoted to the “war on terrorism” were diverted to the eradication of world poverty or eliminating violence against women, would the world be more secure? There is no easy answer to this question, but the “war on terrorism” seems to sideline any serious discussions, along with any serious action on the other pressing causes of human insecurity.

True security depends on all of the world’s peoples having a stake in the international system and receiving the basic rights promised by the Universal Declaration of Human Rights, regardless of race, gender, religion, or any other status. The “war on terrorism” undermines that prospect by ignoring all other causes of human insecurity, while undermining human rights norms that offer a promise of human security for all human beings. The challenge of terrorism is real and cannot be ignored; however, it must not blind states of the other challenges just as pressing as the fight against terrorism.

## V. CONCLUSION

This article addresses one aspect of the ongoing debate about terrorism and human rights. Of course, there are many other issues, challenges, and achievements not mentioned here. While urging adherence to existing human rights and humanitarian standards in the fight against terrorism and raising the alarm about how the “war on terrorism” is being waged, one should not ignore the challenges posed by transnational networks of persons willing to engage in acts of mass destruction. Nor is it suggested that any adjustment of the existing normative structure is inappropriate. There are opportunities for cooperative, multilateral approaches to this challenge. For example, expanding the jurisdiction of the International Criminal Court to cover a broader range of attacks on civilians would be a positive development and one fully consistent with the rule of law.

Of utmost concern is the fundamental challenge to the rule of law and to the relevance of international human rights and humanitarian law standards posed by the “war of terrorism” as it has been waged to date. The “war on terrorism” need not be conducted this way. Existing standards can accommodate the appropriate balance between liberty and security, taking into account new realities without abandoning core human rights prin-

principles. Abandoning these principles in the face of terrorist threats is not only self-defeating in the fight against terrorism, but it also hands those who would engage in attacks such as those of September 11 and March 11 an undeserved victory.