
Speaking Law to Power: The War Against Terrorism and Human Rights

Joan Fitzpatrick*

Abstract

*The human rights regime adopts a legalist approach to limit the harm the powerful may inflict on the vulnerable. The attacks of September 11, 2001 and the ensuing 'war against terrorism' test the limits of the legalist approach. Human rights constrain state responses to terrorism more directly than they govern the conduct of terrorists. As a result, the international human rights regime is disadvantaged rhetorically and politically. While substantive human rights standards have not changed since September 11, six possible norm developments may occur: (1) alterations in norms governing the use of force may increase the perceived legitimacy of pre-emptive defensive action, for example with regard to targeted assassinations; (2) reconceptualization of counter-terrorism as a new species of international armed conflict may displace human rights law and international criminal law, and substitute new rules that are less detailed than those that apply to conventional armed conflicts; (3) derogation principles may be refined, especially in relation to the temporal element and the non-derogability of the prohibition on arbitrary detention and of fair trial rights; (4) an increase in the commission of extraterritorial human rights violations may spur the clarification of the scope of human rights treaties *ratione loci*; (5) the targeting of non-citizens, Muslims and Arabs may clarify non-discrimination norms; and (6) exclusion from refugee protection may expand. In institutional terms, the 'war against terrorism' has not yet had significant effects, but the following issues are notable: (1) integrating human rights into UN counter-terrorism initiatives; (2) the aggressive campaign by the United States Government against the International Criminal Court; (3) the tendency toward American exceptionalism; (4) leadership by Europe to preserve human rights principles in counter-terrorism; (5) increased polarization of UN human rights bodies around the Israeli-Palestinian crisis; (6) silencing of criticism of gross violators in exchange for counter-terrorist cooperation; and (7) marginalization of human rights treaty bodies as effective monitors of counter-terrorist policies.*

* Brotman Professor of Law, University of Washington.

1 Introduction

The human rights movement employs the language and the institutions of law to limit the harm that the powerful inflict on the vulnerable. The attacks of September 11 and the ensuing ‘war against terrorism’ test the limits of the legalist approach, leaving human rights advocates baffled and marginalized. Governments that style themselves as champions of the rule of law against the absolutism or nihilism of terrorists have, at least temporarily, constructed ‘rights-free zones’.¹ Bedrock principles have been displaced by legally meaningless terms, and energies are diverted to wrestling with legal phantoms.

Fundamentally, human rights standards have not changed since September 11.² But the political atmosphere has palpably altered. The human rights regime is menaced by potentially dramatic alterations in the rules on the use of force in international relations and in norms of humanitarian law. Human rights institutions have largely conducted business as usual in the aftermath of September 11, albeit with a sense of dread, defensiveness, and political polarization. For many years sceptical, stand-offish, and self-righteous, the United States now exercises its hegemony more corrosively than ever on the international human rights regime, with the increasingly bold campaign against the International Criminal Court (ICC) serving as the most vivid example of American exceptionalism. Not surprisingly, repressive governments have been emboldened to pursue their own business as usual, with less fear of critical scrutiny by United Nations (UN) Charter-based bodies. Little has been achieved to address the root causes of terrorism, although the pivotal importance of resolving the crisis in the Middle East has become incontrovertible. Despite all these negatives, human rights advocates express cautious optimism that the internal contradictions and excesses of the ‘war against terrorism’ will enable the human rights regime to recover its balance as time passes and the current control techniques prove unsustainable.

No paucity of law exists to punish and deter international terrorism. September 11 prompted a massive shift of law enforcement resources toward combating terrorism, sparked renewed interest in the dozen UN anti-terrorism treaties (also reviving debate on the problematic comprehensive convention on international terrorism),³ launched

¹ Harold Koh used this phrase to describe the US Naval base at Guantánamo Bay, when Haitian and Cuban asylum-seekers were held there and denied access to US courts to assert their rights under international refugee law and US law. Koh, ‘America’s Offshore Refugee Camps’, 29 *Richmond L. Rev.* (1994) 139, at 140–141.

² Departing United Nations High Commissioner for Human Rights Mary Robinson described her experience of the preceding year: ‘[W]hen she questioned other governments on repressive measures, they responded by pointing to the United States and saying, in her words, “For goodness sakes, standards have changed.”’ Preston, ‘Departing Rights Commissioner Faults U.S.’, *NY Times*, 12 Sept. 2002, at B22.

³ A Sixth Committee working group met from 15 to 26 October 2001 and an Ad Hoc Committee met from 28 January to 1 February 2002. ‘but, despite some signs of further progress, the outstanding divergent views of delegations could not be finally reconciled.’ ‘Terrorism and Human Rights’, Second progress report prepared by Ms Kalliopi K. Koufa, Special Rapporteur, UN Doc. E/CN.4/Sub.2/2002/35 para. 23 [hereinafter Koufa Report].

an 'anti-terrorist legislative wildfire' at the national level,⁴ and produced SC Res. 1373 of 28 September 2001 and a Counter-Terrorism Committee to review the adequacy of national anti-terrorist policies. These measures tread familiar ground, if at a faster pace and with a greater sense of urgency, and many arouse serious human rights concerns.

Acts of terrorism such as the attacks of September 11 are obviously antithetical to human rights values, not least the right to life and the inherent dignity of the human person not to be used as the instrument of another's ideology. But the international human rights regime has itself produced relatively little to confront the destructive force of groups such as Al Qaeda. Rhetorically and politically, this places human rights institutions at a disadvantage. As noted in a recent analysis:

The two qualities that human rights organizations distinctively bring to advocacy are knowledge of the law and a precise grasp of institutional procedures. ... [However, h]uman rights organizations cannot afford to stand on the edge of events, or be seen to be compulsively parsing law. ...⁵

The human rights framework is not inflexible in the face of extraordinary dangers, and a complex derogation jurisprudence has developed to balance rights against the imperative needs of security. However, with the exception of the definition of 'crimes against humanity'⁶ and concepts of universal jurisdiction, human rights law offers relatively few legal rules for the conduct of transnational criminal networks. Human rights norms constrain state responses to terrorism more clearly and directly than they govern the conduct of terrorists.⁷

The former UN High Commissioner for Human Rights offered human rights as a 'uniting framework' for grappling both with terrorist threats and also with control measures, but her vision has not yet resonated in capitals nor with publics.⁸ The unprecedented policies adopted by liberal democracies in the aftermath of September 11, with the offshore indefinite detention camp at Guantánamo serving as the most extreme example, pose a serious challenge to the human rights regime, illuminating substantive ambiguities and institutional deficiencies.

The September 11 attacks were both novel and familiar. Suicide hijacking, without

⁴ Zelman, 'Recent Developments in International Law: Anti-Terrorism Legislation — Part One: An Overview', 11 *J. Transnat'l. L. & Pol'y* (2001) 183, at 184.

⁵ International Council for Human Rights Policy, *Human Rights after September 11* (2002) 48.

⁶ It now seems to be commonly accepted that the attacks of September 11, even if not attributable to any state, fit the definition of crimes against humanity in Article 7 of the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, adopted 17 July 1998. The fact that terrorism generally was not included in the scope of the ICC's jurisdiction is of no significance.

⁷ Even prior to September 11, human rights organizations realized the importance, and the difficulty, of devising appropriate strategies to confront those terrorist entities that are armed political groups. See International Council for Human Rights Policy, *Ends & Means: Human Rights Approaches to Armed Groups* (2000). See also, Amnesty International, *Without Distinction: Attacks on Civilians by Palestinian Armed Groups*, AI Index: MDE/02/003/2002 (July 2002).

⁸ Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights, Report of the High Commissioner submitted pursuant to General Assembly Resolution 48/141, 'Human Rights: A Uniting Framework', UN Doc. E/CN.4/2002/18 (2002).

communicated demands, captured on surreal videotape; the breathtaking cold-bloodedness that leveraged box cutters into heavily fuelled projectiles filled with terrified passengers; the astounding devastation wreaked by the skyscrapers' collapse; the terrorists' success in taking over 3,000 lives in the space of hours on US soil — these were horrifyingly new. Even informed observers of international terrorism did not escape the profound emotional and psychological impact of September 11.

Yet, much about September 11 was familiar. Al Qaeda's enmity toward the United States was no surprise, nor was its eagerness and capacity to launch attacks on US governmental, military and civilian targets inside and outside the United States. Federal criminal prosecutions against Al Qaeda operatives were ongoing in New York on the day of the attacks.⁹ Indeed, suspects allegedly linked to Al Qaeda continue to be indicted in US courts.

Domestic law enforcement and mutual criminal assistance remain the primary tools for states to combat terrorism. For most of Europe, the counter-terrorism picture after September 11 differs not in kind but in degree from that which prevailed before the attacks. Increased use of administrative detention, without criminal charge or trial, has occurred in states that have traditionally used this tool against domestic subversives or suspected terrorists.¹⁰ Other states have broadened the definition of terrorist-related crimes and established or revised special security courts.¹¹

Military force has been used in the past by states such as the United States to confront terrorist threats,¹² and military strategies have dominated the Israeli policy response to the Palestinians.¹³ Military involvement in law enforcement regarding transnational crimes is not an innovation, and has been common with respect to the drug trade and migrant smuggling, as well as terrorism.

The military action launched in Afghanistan in October 2001, to eradicate or detain the remnants of Al Qaeda and the Taliban, involving US and allied troops, does mark a significant shift in counter-terrorist strategy. The Afghan intervention raises interesting and difficult issues regarding state complicity in transboundary harm caused by non-state entities operating within the state's territory, and the use of force in response to such harm. But what is truly unprecedented in the response to the September 11 attacks is its conceptualization as an open-ended 'war against terrorism'.

The notion that the September 11 attackers represented an entirely new type and degree of threat led to "'close-to-panic" reactions' by states,¹⁴ and a rush to jettison

⁹ The prosecutions concerned the 1998 bombings of US embassies in Kenya and Tanzania. *United States v. Usama Bin Laden, et al.*, Case no. S(7)98 Cr. 1023 (LBS), S.D.N.Y.

¹⁰ Such states include Singapore (using its existing Internal Security Act), UN Doc. E/CN.4/2002/157 (2002); and the United Kingdom (under the Anti-terrorism, Crime and Security Act 2001).

¹¹ Examples include India's Prevention of Terrorism Bill 2001 and China's December 2001 amendments to its criminal law.

¹² 'Military Responses to Terrorism', 81 *ASIL Proceedings* (1987) 287.

¹³ Israel's public criminal trial in a non-military court of Palestinian leader Marwan Barghouti on terrorism-related charges has been widely remarked upon as an anomaly in Israeli practice. See Morris, 'Trying the Intifada', *Financial Times*, 7 Sept. 2002, available in LEXIS, News Library. Majpap File.

¹⁴ Koufa Report, *supra* note 3, at para. 59.

familiar legal frameworks. Policy-makers operate as if ‘anomia threatens’.¹⁵ The ‘war against terrorism’ fits no accepted legal paradigm.¹⁶ Leaders of the anti-terrorism coalition resist providing a stable definition of the ‘enemy’.¹⁷ For purposes of this essay, I assume the target of the ‘war against terrorism’ to be all international terrorists of ‘global reach’, and the objective to be their eradication or incapacitation.

This essay separately addresses the substantive and institutional implications of the ‘war against terrorism’ on human rights. The crisis illustrates the centrality of the rule of law to the protection of human rights, and its fragility even in liberal democracies. Legal rules governing permissible state responses to terrorism must be located in the distressingly murky interstices among five distinct bodies of international law (human rights, refugee law, humanitarian law, norms concerning the use of force in international relations, and international criminal law).

US policy-makers, who dominate the agenda of the ‘war against terrorism’, manifest an absolute conviction of their own rectitude. Any legal or institutional constraints upon their discretion, whether domestic or international, appear dangerous to them. Error, either conceptual or operational, is impossible.¹⁸ American officials exploit the ambiguities of humanitarian law and the rules on the use of force, and refuse to recognize human rights law as being of any relevance, much less a set of ‘red and green lights to guide their action’.¹⁹

At the same time, the human rights community has reacted with its own strong sense of moral outrage. Human rights actors ranging from the High Commissioner, to the special rapporteurs of the UN Commission on Human Rights, to the treaty bodies, to non-governmental organizations (NGOs), have reiterated fundamental principles, stressed that their preservation is vital in a time of crisis, and asserted that their erosion would hand the terrorists a victory over tolerance, the rule of law, and basic human dignity. They rest their faith in the historical experience that authorities in

¹⁵ Mégret, ‘“War”? Legal Semantics and the Move to Violence’, 13 *EJIL* (2002) 361, at 399.

¹⁶ Koufa asserts that ‘The novel question of whether a State can be at war with a terrorist group or multinational criminal organization was never raised prior to 11 September 2001.’ Koufa Report, *supra* note 3, at para. 63. Art. 1(4) of Additional Protocol I of 1977, which recognizes as international armed conflicts wars of national liberation and against colonial domination, is regarded as controversial by some influential non-ratifying states, including the United States, which rejected the concept of international armed conflict between states and non-state entities.

¹⁷ In September 2002, the US Government provided this extremely broad definition:

The struggle against global terrorism is different from any other war in our history. It will be fought on many fronts against a particularly elusive enemy over an extended period of time. . . .

. . . Afghanistan has been liberated. . . . But it is not only this battlefield on which we will engage terrorists. Thousands of trained terrorists remain at large with cells in North America, South America, Europe, Africa, the Middle East, and across Asia.

The National Security Strategy of the United States of America, available at <http://www.whitehouse.gov/nsc/nss.pdf> (September 2002) 5.

¹⁸ For example, the President’s claim that a US citizen arrested in the United States is an ‘enemy combatant’ is argued to be a conclusive basis for indefinite incommunicado military detention.

¹⁹ *Supra* note 8, at para. 1.

democratic countries that strip civil liberties in times of crisis afterwards often experience shame and remorse.²⁰

Thus, a clash of moral absolutes displaces genuine dialogue between those prosecuting the ‘war against terrorism’ and those who position themselves as guardians of the human rights regime. No space has yet appeared for negotiation of defined norms possibly better adapted to a world in which transnational terrorist networks wield enormous destructive power and have the capacity to set the agenda in international affairs.

Nevertheless, it is possible to sketch in Section 2 several substantive areas in which norm clarification may occur, if counter-terrorism pursues its rhetorical and conceptual move from a crime-control to an armed-conflict paradigm. First, alterations in norms governing the use of force in international relations may indirectly affect human rights standards by increasing the perceived legitimacy of pre-emptive defensive action. Second, should there be general acceptance of the concept of international armed conflict between a state and transnational terrorist networks, humanitarian law would presumably displace human rights norms as the primary legal constraint on counter-terrorist tactics.

Third, derogation principles are likely to be refined by human rights treaty bodies, especially the threshold of severity for derogation, the temporal element of emergencies, the non-derogability of judicial guarantees against arbitrary detention and fair trial rights, the proportionality principle, consistency with humanitarian law norms, and the non-discrimination principle. Fourth, an increase in the commission of extraterritorial human rights violations may prompt clarification of the scope of human rights treaties *ratione loci* and, more fundamentally, the concept of universal rights.

Fifth, the targeting of non-citizens and Muslims in the ‘war against terrorism’ may accelerate the clarification of discrimination on the basis of nationality in human rights law, as well as raise a debate about racial profiling and guilt by association at the international level. Sixth, the exclusion clauses of the 1951 Refugee Convention may take a rights-restrictive turn.

Institutionally, the ‘war against terrorism’ has produced few measurable effects on the human rights regime, aside from an enormous diversion of energies from other compelling issues and needs. In Section 3 this essay identifies seven trends that either highlight existing deficiencies or suggest potential adverse consequences: (1) difficulties in integrating human rights concerns into UN counter-terrorism initiatives; (2) fissures over international criminal tribunals; (3) aggravation of US exceptionalism from human rights constraints; (4) European leadership to entrench human rights values; (5) increased polarization of UN political bodies concerned with human rights, especially around the Israeli–Palestinian struggle; (6) silencing of

²⁰ Thus, for example, the reparations paid to US citizens of Japanese descent as apology for their internment during the Second World War are frequently mentioned in the press and NGO documents. The belated reckoning with the consequences of the absolutist doctrine of ‘national security’ during the ‘dirty wars’ of the 1970s and 1980s in Latin America is a similar case in point.

criticism of gross violators in exchange for cooperation in counter-terrorist strategies; and (7) the apparent marginalization of human rights treaty bodies, at least in the initial phase.

2 Substantive Implications

A *Pre-emptive Self-defence*

The impact of the 'war against terrorism' on international rules relating to the use of force is addressed here only in relation to the potential incidental effects on international human rights. The doctrine of pre-emptive self-defence articulated by the US Executive dispenses with the Charter's structural and substantive limits on the use of force. Massive military force may be used against any state. No authorization of the Security Council is necessary, no 'armed attack' attributable to another state is required to precede the intervention, and no limits of proportionality are relevant, because the future terrorist activity prevented by the military action can always be hypothesized in apocalyptic terms.²¹

The implications for human rights fall into two categories. First, control measures against individuals suspected of terrorist involvement are shifting from a retrospective to a prospective approach (pre-emptive self-defence writ small). Second, intervening states will more frequently commit human rights violations against terrorist suspects and collaterally affected civilians on the territory of third states, with or without the latter's formal consent.

The primary objective of the anti-terrorist coalition is the prevention of further terrorist attacks through the disruption and dismantling of terrorist networks. The strategy includes increased reliance on military means to incapacitate terrorist suspects and persons believed to assist them. Techniques of prevention include military action in Afghanistan, seizure of terrorist suspects in third states without the formalities of extradition, and detention without charge or trial. The assassination policy of the Israeli Government can also be conceptualized as preventive self-defence.²² The United States has begun to undertake similar assassinations.²³ Possible future steps include an invasion of Iraq to prevent the transfer of weapons of mass destruction to terrorist groups.

The criminal law paradigm that previously characterized international cooperation

²¹ For an academic view that international law no longer constrains the use of force in international relations, see Glennon, 'The Fog of War: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter', 25 *Harv. J. L. & Pub. Pol.* (2002) 539, at 556–558.

²² Gross, 'Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect Its Citizens', 15 *Temple Int'l & Comp. L.J.* (2001) 195. Such a policy straddles the line between deaths in combat (subject to rules of humanitarian law) and the prohibition on extrajudicial execution in human rights law.

²³ Six persons, including a US citizen, were killed by a rocket attack launched from an unmanned Central Intelligence Agency drone in Yemen in November 2002. Risen and Santora, 'Man Believed Slain in Yemen Tied by U.S. to Buffalo Cell', *NY Times*, 10 Nov. 2002, available in LEXIS, News Library, NYT File.

against terrorism combines incapacitation, deterrence and retribution. The focus in a criminal prosecution is on individual responsibility for proven past criminal acts, even where prevention of additional and possibly greater harm is also sought. In the United States, ordinary criminal prosecutions continue to be brought against terrorist suspects. The Administration also contemplates implementing a shadow criminal justice system through the ‘military commissions’ authorized by President Bush’s 13 November 2001, Military Order.²⁴

Administrative detention is not an unusual or innovative anti-terrorist technique, although it has long been associated with serious deprivations of human rights. The move to ‘war’ rhetoric adds a new wrinkle to an old debate about the derogability of arbitrary detention and fair trial norms, a debate that had advanced markedly in the direction of strict human rights protection in recent years.²⁵

Derogation standards incorporate by reference norms of humanitarian law. Human rights bodies have drawn upon the fair trial guarantees of the Geneva Conventions (which apply in the most extreme of emergencies) to reach the conclusion that many aspects of fair trial are functionally non-derogable. Moreover, human rights bodies recognize that the right to challenge the lawfulness of detention before an independent judicial body must never be suspended.

The move to ‘war’-time internment may be motivated by a belief that preventive measures are effective in neutralizing potential terrorist threats, without the risk and cost entailed in individual prosecutions, and without the human rights constraints that apply to administrative detention during emergencies. Whether humanitarian law displaces human rights law in relation to those detained in the ‘war against terrorism’ is considered in the following section.

B A War without Rules?

Which war? The ‘war against terrorism’ eludes definition, largely because those prosecuting the campaign find ambiguity advantageous to avoid legal constraints and to shift policy objectives with minimal accountability. Scholars and commentators

²⁴ ‘Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism’, 66 *Fed. Reg.* (2001) 57833.

²⁵ See Human Rights Committee, General Comment No. 29: ‘States of Emergency’, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001); *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights), I–A Ct. H.R. (1987) Advisory Opinion OC-8/87; *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 of the American Convention on Human Rights), I–A Ct. H.R. (1987) Advisory Opinion OC-9/87; *Castillo Petruzzi v. Peru*, I–A Ct. H.R. (1999) Series C, No. 52; *Brannigan and McBride v. United Kingdom*, ECHR (1993) Series A, No. 258.

have been surprisingly tolerant of this approach, although critical voices are multiplying.²⁶

Neither 'war' nor 'terrorism' has a fixed meaning in contemporary international law. Post-September 11 events suggest the following possible identities for the 'war against terrorism':

- An undeclared international armed conflict by the United States and allied states against Afghanistan
- An undeclared international armed conflict by the United States and allied states against the former Taliban regime in Afghanistan
- An internal armed conflict in Afghanistan between the Taliban and its domestic rivals, internationalized by the intervention in October 2001 by the United States and allied states
- An undeclared international armed conflict by the United States and allied states against the non-state entity Al Qaeda
- An undeclared international armed conflict by the United States and allied states against a range of non-state entities and individuals alleged from time to time to be international terrorists
- A continuation of crime control activities against international terrorists, with a metaphorical use of 'war' rhetoric

In a turn toward conventionality, the United States threatens an international armed conflict against Iraq, which would bear a complicated relationship to the existing 'war against terrorism.'

Assuming the enemy is the full range of international terrorists, one must navigate the boundaries between humanitarian law and international criminal law to locate the legal rules for this campaign. This is not an international armed conflict cognizable under Common Article 2 of the Geneva Conventions of 1949, nor even under the expanded definition of Article 1(4) of Additional Protocol I of 1977. In essence, the United States has made a claim of 'instant custom', enabling it to exercise extraordinary powers related to international armed conflict, but without any defined protections for its non-state enemies. While other states have cooperated militarily and diplomatically in the 'war against terrorism', no evidence exists that these states accept the extraordinary legal claims by the US Government as new norms of customary law. My intention here is to identify how this semantic move may affect the capacity of the human rights regime to preserve essential aspects of the rule of law during the present crisis.

The Guantánamo captives and the 'enemy combatants' being held in Afghanistan

²⁶ See ICHRP, *supra* note 5, at 17:

Human rights organisations are particularly concerned about the legal ambiguity of a campaign that has been described as a war, is undertaken in self-defence, has the approval of the Security Council, but has no defined geographical scope or limit, has failed to define its enemy in a clear manner, and *has refused to position the conflict in terms of human rights law or humanitarian law.* (italics in original). See also, Sontag, 'Real Battles and Empty Metaphors', *NY Times*, 10 Sept. 2002, available in LEXIS, News Library, Majpap file.

and in the United States are indefinitely detained without charge or trial, and without access to counsel or family. Those held in the United States are US citizens. Terrorist suspects are being seized far from the battle zone in Afghanistan (for example, Bosnia, Zambia, Chicago, and other international airports) and transported to these detention sites.²⁷ The policy of the US Government is that the captives are not prisoners of war (POWs) whose internment is regulated by the Third Geneva Convention,²⁸ and they are denied the mandatory hearings before a ‘competent tribunal’.²⁹ Their standards of treatment are determined by discretionary executive policy, not by legal norms. None of them has been charged or tried for any violations of humanitarian law that would establish their status as unprivileged combatants. Neither are the captives treated as interned civilians whose treatment is governed by the Fourth Geneva Convention. None of them is an ‘enemy alien’ subject to internment under traditional rules of international law and the Fourth Geneva Convention.³⁰ The selection of internees is determined by a pure exercise of administrative discretion, without announced criteria or process, and without judicial oversight.

What is the relevance of the prohibition on arbitrary detention to these practices? The Working Group on Arbitrary Detention of the UN Commission on Human Rights ‘will not deal with situations of international armed conflict in so far as they are covered by the Geneva Conventions of 12 August 1949 and their Additional Protocols, particularly when the International Committee of the Red Cross (ICRC) has competence.’³¹ While this is a self-imposed limit on the Working Group’s mandate, it suggests the potential that a semantic move to ‘war’ may create gaps in human rights protection that are not adequately filled by established protections of humanitarian law.

The Guantánamo policy is being assessed with regard to regional human rights norms, interpreted in the light of humanitarian law standards, by the Inter-American Commission on Human Rights (IACHR).³² The less militarized administrative detention policy enacted in the United Kingdom is under review by domestic courts under the Human Rights Act, as violative of provisions of the European Convention on Human Rights, and may eventually be challenged before the European Court of Human Rights.³³

Humanitarian law recognizes the permissibility of incapacitating combatants and civilians who pose a significant danger to a detaining power during active hostilities.

²⁷ The most recently reported instance is the capture of Abd al-Rahim al-Nashiri at ‘an airport in a foreign country’ and his transport to ‘an American-run interrogation center elsewhere overseas’. Shenon, ‘A Major Suspect in Qaeda Attacks Is in U.S. Custody’, *NY Times*, 22 Nov. 2002, at A1.

²⁸ White House Fact Sheet: Status of Detainees at Guantanamo (7 Feb. 2002), at <http://www.whitehouse.gov/news/releases/2002/02/>.

²⁹ Third Geneva Convention, Art. 5.

³⁰ See *infra* note 56.

³¹ Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1993/24 Annex IV: Revised Methods of Work, para. 16 (1993). The ICRC has been granted access to the Guantánamo captives.

³² Inter-American Commission on Human Rights, Decision on Request for Precautionary Measures (Detainees at Guantanamo Bay, Cuba), 41 ILM 532 (2002).

³³ *A, X and Y and Others v. Secretary of State for the Home Department*, [2002] EWCA Civ 1502.

At least where combatants are granted POW status and privileges, judicial supervision is not integral to such internment. Under Article 43 of the Fourth Geneva Convention, interned civilians are entitled to periodic hearings regarding the continued necessity for their detention.

Derogation jurisprudence under human rights treaties stresses the indispensability of judicial supervision of the lawfulness of detention. Thus, the fate of the captives of the 'war against terrorism' hinges upon whether war-like semantics can substitute an internment regime for 'enemy combatants' (without the protections of the Geneva Conventions) for the prohibition on arbitrary detention in human rights law.

In broader terms, conceptualizing the campaign against global terrorism as an international armed conflict risks undermining the integrity of international humanitarian law. Even prior to September 11, the move to 'limited and ambiguous conflicts',³⁴ the reliance on high-tech weapons requiring substantial battlefield civilian support and minimizing combatant casualties, and asymmetries of power undermining reciprocity as a rationale for compliance, had created a risk that US commitment to humanitarian law might erode. President Bush's November 2001 Military Order and February 2002 decision on POW status raise serious doubts about the attachment of US political leaders to contemporary rules of warfare. Since human rights law and humanitarian law combine to set a floor for fundamental standards of humanity, even during the gravest of crises, this apparent indifference to humanitarian law on the part of a hegemonic power is of legitimate concern to the human rights regime.

C The Permanent Emergency

The 'war against terrorism' is the quintessential 'normless and exceptionless exception'.³⁵ No territory is contested; no peace talks are conceivable; progress is measured by the absence of attacks, and success in applying control measures (arrests, intercepted communications, interrogations, and asset seizures). The duration of 'hostilities' is measured by the persistence of fear that the enemy retains the capacity to strike.³⁶ Long periods without incident do not signify safety, because the enemy is known to operate 'sleeper cells'. The enemy may be of any nationality,

³⁴ Walker, 'The Demise of the Nation-State, the Dawn of New Paradigm Warfare, and a Future for the Profession of Arms', 51 *Air Force L. Rev.* (2001) 323, 339.

³⁵ Gross, 'Exception and Emergency Powers: The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy', 21 *Cardozo L. Rev.* (2000) 1825.

³⁶ The UK Government describes what must be that nation's permanent condition in its derogation order: There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organizations or groups which are so concerned or of having links with members of such organizations or groups, and who are a threat to the national security of the United Kingdom.

Human Rights Act 1998 (Designated Derogation) Order 2001, No. 3644, in force 13 November 2001, quoted in Amnesty International, *Memorandum to the UK Government on Part 4 of the Anti-terrorism, Crime and Security Act 2001*, AI Index: EUR 45/017/2002 (2002) 2–3.

occupation or residence, and is perceived as all the more dangerous for his seeming ordinariness. The war will end when the coalition decides, on the basis of unknown criteria.

Derogation norms apply in all emergencies threatening the life of the nation, regardless of the source of the threat, both in war and peacetime. However, the derogation jurisprudence of the UN and regional human rights bodies was primarily developed in the context of internal armed conflict and strife, as well as political repression, and has rarely addressed the peculiarities of international armed conflict, real or imagined.

The current crisis may require a searching re-examination of derogation standards by human rights treaty bodies. These bodies may reconsider their generally deferential approach to states' claims of the existence of an emergency. The temporal element of emergencies should be clarified. The circumstances under which terrorist suspects may be tried by military courts³⁷ or interned as 'enemy combatants' without judicial supervision must be addressed in greater detail. The treaty bodies must assess the element of proportionality ('strictly required by the exigencies of the situation') with respect to deprivations of liberty in the context of potential risks of plots involving weapons of mass destruction. Certain interrogation techniques and prolonged incommunicado detention of terrorist suspects for purposes of interrogation may contravene non-derogable rights. Finally, restriction of certain anti-terrorist derogation measures to non-citizens must be examined in light of non-discrimination norms.

D Territorial Scope of Human Rights Protection

Human rights are universal. But how effective is the international human rights regime in constraining extraterritorial state conduct? How relevant is it in prescribing the behaviour of non-state entities that do not exercise or aspire to territorial control?

The scope *ratione loci* of human rights treaties is not delineated with optimal clarity in the texts.³⁸ Extraterritorial conduct of a military or law enforcement nature against suspected terrorists, with or without the consent of the territorial state, may give rise

³⁷ Trial of civilians by military courts, a practice frequently associated with states of emergency and counter-terrorism, has come under increasingly critical scrutiny by human rights bodies. See 'Issue of the Administration of Justice through Military Tribunals', Report submitted by Mr Louis Joinet pursuant to Sub-Commission decision 2001/103, UN Doc. E/CN.4/Sub.2/2002/4 (2002).

³⁸ International Covenant on Civil and Political Rights (ICCPR), Arts. 2(1), 50; Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), Art. 2(1); International Convention on the Elimination of All Forms of Racial Discrimination (CERD), Arts. 3, 6; American Convention on Human Rights (ACHR), Arts. 1(1), 28; European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Arts. 1, 56(1); African Charter on Human and Peoples' Rights, Art. 1.

to claims that human rights treaties or customary norms have been violated.³⁹ Cooperation among Latin American dictatorships during the 'dirty wars' resulted in cross-boundary kidnapping, torture and disappearance of suspected leftists. The Human Rights Committee held in *López Burgos v. Uruguay*:⁴⁰

Article 2(1) of the Covenant places an obligation upon a State party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction', but it does not imply that the State Party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it. . . . [I]t would be unconscionable so to interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.

The Inter-American Commission on Human Rights has indicated in state reports and in individual communications that coming within a state's jurisdiction are 'individuals interdicted on the high seas, shot down in international airspace, injured in invasions by the respondent state, or attacked by agents of the respondent state in another country'.⁴¹

The Turkish invasion and occupation of Northern Cyprus similarly resulted in judgments by the European Court of Human Rights that the conduct of the Turkish military could be challenged as a violation of the European Convention.⁴²

Theodor Meron examined this question in the context of the US humanitarian intervention in Haiti.⁴³

In view of the purposes and objects of human rights treaties, there is no a priori reason to limit a state's obligation to respect human rights to its national territory. Where agents of the state, whether military or civilian, exercise power and authority (jurisdiction, or de facto jurisdiction) over persons outside national territory, the presumption should be that the state's obligation to respect the pertinent human rights continues. That presumption could be rebutted only when the nature and the content of a particular right or treaty language suggest otherwise.

Meron's point is an important one, and insufficient jurisprudence yet exists among the human rights bodies to set the boundaries for when extraterritorial conduct by

³⁹ For example, an application under the ECHR by Abdullah Öcalan, regarding his abduction in Kenya and transfer to Turkey by Turkish authorities has been declared admissible by the European Court of Human Rights and is pending. *Öcalan v. Turkey*, ECHR App. No. 46221/99, Decision on Admissibility of 14 December 2000. The European Commission on Human Rights declared inadmissible as manifestly unfounded an application by 'Carlos the Jackal', claiming that his rendition from Sudan to France violated ECHR Art. 5(1), although the Commission recognized that the conduct of French agents in Sudan was covered by the ECHR. *Sánchez Ramírez v. France* (1996) DR 86-A, 155.

⁴⁰ *López Burgos v. Uruguay*, Comm. No. 52/1979, 36 UN GAOR Supp. No. 40, at 182 para. 12.3, UN Doc. A/36/40 (1981).

⁴¹ Lyons and Rottman, 'The Inter-American Mechanisms', in J. Fitzpatrick (ed.), *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (2002) 439, at 453 (footnotes omitted).

⁴² *Loizidou v. Turkey*, ECHR (1995) Series A, No. 310; *Cyprus v. Turkey*, ECHR (Judgment of 10 May 2001), at <http://www.echr.coe.int/Eng/Judgments.htm>.

⁴³ Meron, 'Extraterritoriality of Human Rights Treaties', 89 *AJIL* (1995) 78, at 80–81 (footnotes omitted).

military and law enforcement agents implicates the jurisdiction of the state party, and when human rights obligations do not attach or apply only in a diluted form. The clearest case, however, would appear to be the Guantánamo situation, in which a state creates offshore detention facilities to which it forcibly transports persons seized in various countries, detains them indefinitely without charge or access to counsel, and exercises complete dominion over their treatment and fate.

The *Bankovic* admissibility decision of the European Court of Human Rights, however, signals that the extraterritorial use of military force by Western governments may be addressed rather reluctantly by human rights bodies.⁴⁴ It remains to be seen whether the impact of *Bankovic* will be limited to aerial bombings, and whether it expresses a peculiarly limited regional vision. Where ECHR states engage in extraterritorial detention or other law enforcement conduct, the European Court of Human Rights finds jurisdiction to exist.

President Bush has suggested that the United States will not respect the exclusive law enforcement authority of states that do not take adequate steps to control terrorists.⁴⁵ Unconsented abductions and assassinations, in the territory of other states, appear to be an integral strategy of the ‘war against terrorism’. The Inter-American Commission on Human Rights may clarify regional norms concerning the territorial scope of the prohibition on arbitrary detention (although not under the American Convention on Human Rights (ACHR)). Clarification of the International Covenant on Civil and Political Rights’ (ICCPR) reach is hindered by the failure of the United States to recognize the right of individual petition under the First Optional Protocol.

Additional issues implicating the territorial scope of human rights obligations raised by recent counter-terrorism tactics include state complicity for human rights violations resulting from the forced return of individuals to states in which they will suffer deprivations of fundamental rights, such as summary execution and torture. Some reconceptualization of consular access and diplomatic protection as human rights may also occur, as counter-terrorism policies emphasize detention of non-citizens.⁴⁶

Finally, the due diligence standard for human rights complicity in the acts of non-state actors — a subject of much debate in relation to gender-based violence, death squads, and multinational corporations — requires more careful delineation in relation to the acts of international terrorist groups operating on national territory.

⁴⁴ *Bankovic v. Belgium*, App. No. 52207/99, ECHR Decision on Admissibility, 12 Dec. 2001, 41 *ILM* (2002) 517.

⁴⁵ George W. Bush, Address before a Joint Session of the Congress on the State of the Union (29 Jan. 2002), 38 *Weekly Comp. Pres. Doc.* (2002) 133.

⁴⁶ For example, the family of Guantánamo captive Feroz Abbasi unsuccessfully sought a judicial direction to the UK Government to make representations to the US Government seeking his release. The Court of Appeal held that it lacked jurisdiction to grant the requested relief, but characterized the detention as ‘in apparent contravention of fundamental principles recognised by both jurisdictions and by international law. . . .’ *Queen on the Application of Abbasi & Anor v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department*, [2002] EWCA Civ. 1598 para. 64.

The September 11 attacks apparently were planned not only by Al Qaeda leaders in Afghanistan, but also by operatives in European states, including Germany. Exactly what level of toleration of the presence of suspected international terrorists will give rise to state responsibility for ensuing attacks is far from clear under existing standards. The International Law Commission suggests a high standard of direction, cession of governmental authority, or acknowledgement and adoption of harmful conduct.⁴⁷ The US Government, at least selectively, appears to demand that other states eradicate terrorist cells present in their territory, under threat of forcible action in preventive self-defence.

E Non-discrimination and Guilt by Association

The non-discrimination norm is central to human rights, but its applicability to non-citizens has never been adequately clarified in international human rights law.⁴⁸ Many enforcement measures adopted in the aftermath of the September 11 attacks have targeted non-citizens, despite the fact that nationality is a poor predictor of involvement in terrorist groups. Ethnicity and religion, conjoined with alienage, have exposed particular groups of non-citizens to differential application of harsh enforcement measures, which have involved arrest, irregular rendition, pretextual or opportunistic criminal charges, administrative detention, asset seizure, and selective admission and deportation policies, some involving unusual secrecy. Nevertheless, the September 11 hijackers fit a certain nationality, ethnic and religious profile, and law enforcement officials can hardly be expected to ignore that reality. Association with terrorists, for example at worship services or in other expressive activities, may legitimately arouse suspicion, even if it is truly innocent and protected by human rights norms.

Many societies have confused strangers with enemies. The link between racism and xenophobia, and its consequences for the human rights of migrants, were noted at the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which took place shortly prior to the September 11 attacks.⁴⁹ The polarized atmosphere at that Conference, and the fault lines over the Middle East divide, were a grim precursor to the charged human rights atmosphere following September 11. The Committee on the Elimination of Racial Discrimination (CERD) has since repeatedly reminded states parties of their obligations not to discriminate on the

⁴⁷ Report of the International Law Commission, Fifty-third Session, 56 UN GAOR Supp. No. 10, UN Doc. A/56/10 at 103–122 (2001) (commentary on Arts 8–11 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts).

⁴⁸ See, generally, R. Lillich, *The Human Rights of Aliens in Contemporary International Law* (1984); C. Tiburcio, *The Human Rights of Aliens under International and Comparative Law* (2001).

⁴⁹ Durban Declaration against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 8 Sept. 2001, paras 24–33.

basis of ethnicity, religion and race, and also to take affirmative steps to protect minorities from private violence linked to terrorism stereotypes.⁵⁰

Terrorism is not a problem of migration, and deportation is a remarkably shortsighted response to international terrorism.⁵¹ However, Al Qaeda and other transnational terrorist networks exploit the tools of a globalizing world (international travel, false documents, student and business visas, e-mail, wire transfers) to plot mass destruction. Migration control and other enforcement measures targeted at non-citizens will undoubtedly remain an integral aspect of the ‘war against terrorism’. I will sketch here a human rights framework for counter-terrorist strategies that incorporate nationality, ethnicity or religious distinctions, or that rely heavily on migration control elements.⁵²

Human rights law does not forbid all distinctions between nationals and non-citizens. In general, differential treatment is permissible where the distinction is made pursuant to a legitimate aim, the distinction has an objective justification, and reasonable proportionality exists between the means employed and the aim sought to be realized. The provisions of the ICCPR, for example, can be divided into five categories as they apply to non-citizens: (1) rights that must be provided on an equal basis to citizens and non-citizens, either because the right is absolute or because selective denial is never reasonable or proportionate; (2) provisions that prohibit ‘arbitrary’ state action, permitting narrow distinctions between citizens and non-citizens, for example with respect to detention for purposes of immigration control;⁵³ (3) distinctions that may be justified under limitations clauses permitting restriction on grounds such as national security or public order — in this regard, the question whether non-citizens may be expelled for having engaged in expressive activity that is protected for citizens is unclear; (4) certain political rights are explicitly reserved to citizens; and (5) some provisions specifically protect non-citizens (most significantly, the right to give reasons against expulsion)⁵⁴ or specifically protect classes of non-citizens, such as settled immigrants (for example, internal freedom of movement under ICCPR Art. 12(1)).

The derogation norms are constructed on the traditional understanding of international armed conflict, in which ‘enemy aliens’ may be subjected to special

⁵⁰ See, e.g., CERD, Concluding Observations on Canada, UN Doc. CERD/C/61/CO/3 (2002); Belgium, UN Doc. CERD/C/60/CO/2 (2002); Denmark, UN Doc. CERD/C/60/CO/5 (2002); Switzerland, UN Doc. CERD/C/60/CO/14 (2002).

⁵¹ Osama Bin Laden took up residence in Afghanistan in 1996 upon his expulsion from Sudan, under US pressure; Saudi Arabia declined his rendition, preferring to expatriate him rather than to try him.

⁵² See Fitzpatrick, ‘The Human Rights of Migrants’, in T. A. Aleinikoff (ed.), *International Legal Norms and Migration* (forthcoming).

⁵³ Prolonged detention of migrants without a showing of necessity and periodic review may be impermissibly arbitrary. *A v. Australia*, Comm. No. 560/1993, Human Rights Committee, UN Doc. CCPR/C/59/D/560/1993 (1997).

⁵⁴ See Art. 13 of the ICCPR. The European Court of Human Rights held that ‘[n]ational authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved. . . .’ *Al-Nashif v. Bulgaria*, ECHR, Judgment of 20 June 2002, App. No. 50963/99.

control measures.⁵⁵ The liberal democracies had interned enemy aliens during the Second World War and did not intend to outlaw the practice in human rights treaties, if the detentions satisfied the criteria of legality, proportionality and consistency with other international obligations (most relevantly, humanitarian norms on civilian internment in the Fourth Geneva Convention). Nationality is deliberately not included in the list of status grounds in the non-discrimination provisions of the derogation clauses.

But how does this derogation framework operate in the ‘war against terrorism’? Al Qaeda has no citizens; indeed, it is strikingly multinational both in membership and in operations. Moreover, other heterogeneous groups are also encompassed in the broad definition of the enemy.

Some distinctions should be drawn between law enforcement measures (criminal prosecution or administrative detention) and migration control measures (deportation and denial of admission). Selective denial of fair trial rights to non-citizens violates the derogation clauses, both because certain fair trial rights are functionally non-derogable and because the strict proportionality requirement cannot be satisfied.⁵⁶ Selective exposure to trial by an *ad hoc* military commission on a ‘war’ theory is likewise dubious, and the oft-cited *Quirin* case is not to the contrary — the ‘unlawful combatants’ tried there included a US citizen.⁵⁷ Derogation norms require judicial supervision of all detentions, and limiting administrative detention to non-citizens is vulnerable to challenge on grounds of non-derogability, proportionality and discrimination.

The picture with respect to migration control measures is less clear. Distinctions in this legal context between citizens and non-citizens are inherent. Distinctions among persons of different nationalities are also common.⁵⁸ One troubling set of counter-terrorist policies is the selective arrest, deportation and prosecution of persons fitting a certain ethnic or religious profile, on grounds unrelated to terrorism. In the United States, immigration policy since September 11 has strikingly been characterized by the discriminatory application of broadly defined inherent authority to detain, deport, exclude and prosecute, rather than the application of specific anti-terrorism measures that have been crafted to balance security and fairness.⁵⁹ Many terrorist suspects have

⁵⁵ See, e.g., 50 U.S.C. §21 (successor to a 1798 statute that codified international customary law that defines alien enemies as citizens or subjects of a state or government with which the United States is engaged in a ‘declared war’).

⁵⁶ *Castillo Petruzzi*, *supra* note 25 (trial of Chilean terrorist suspects by ‘faceless’ military judges in Peru).

⁵⁷ *Ex parte Quirin*, 317 U.S. 1 (1942). The selection of citizens and non-citizens for ordinary criminal trial, detention without charge, or trial by an *ad hoc* military commission appears highly arbitrary.

⁵⁸ The United States has recently implemented a controversial policy of heightened registration and monitoring of citizens of certain Arab or Muslim states who enter the United States. U.S. Dept. of Justice, Immigration and Naturalization Service, ‘Registration of Certain Nonimmigrant Aliens from Designated Countries: Notice’, 67 *Fed. Reg.* (2002) 66765, 70525.

⁵⁹ For example, the Attorney General has never exercised his authority to ‘certify’ non-citizens suspected of terrorism under the USA PATRIOT Act, a power that is subject to *habeas corpus* review. Pub.L. No. 107–56, 115 Stat. 272 (2001), §412(a)(3) (amending 8 U.S.C. §1226A(a)(2001)).

been expelled or rendered irregularly across national boundaries.⁶⁰ The particular dangers such policies pose for refugees and asylum-seekers are addressed in the following section.

F *Asylum*

Refugee protection is profoundly affected by the trend toward ‘securitizing international migration’.⁶¹ Matthew Gibney observes four developments that linked asylum policy to security even prior to September 11:⁶² (1) negotiations linking asylum and immigration matters with discussions of organized crime, illegal migration and terrorism; (2) the shift in attention from superpower rivalry to secondary security threats, including that allegedly posed by asylum-seekers; (3) the Security Council’s use of Chapter VII powers to confront refugee-generating internal crises as threats to international peace and security; and (4) fears voiced by electorates that refugees and other migrants pose threats to national security or identity.

The ‘war against terrorism’ aggravates the tendency to perceive migration as a security threat, symbolized by the transfer of the Immigration and Naturalization Service from the U.S. Department of Justice to the newly created Department of Homeland Security. Refugee protection may be affected in three ways: (1) the exclusion clauses of Article 1F of the 1951 Convention relating to the Status of Refugee may be given an overly broad interpretation; (2) *non-refoulement* claims by persons suspected of terrorist involvement may be rejected without fair process; and (3) cessation of refugee protection may be precipitously imposed on the basis of shallow victories, such as the tenuous transition in Afghanistan.

None of the September 11 hijackers was a refugee or asylum-seeker. Amnesty International reports that most, if not all, of the persons administratively detained under the United Kingdom’s post-September 11 legislation are either refugees or asylum-seekers.⁶³ This disconnection between reality and policy response threatens the integrity of refugee protection.

Security Council Resolution 1373 ‘twice makes explicit reference to the need to safeguard the system of international refugee protection from abuse by terrorists.’⁶⁴ The 1951 Refugee Convention was never intended to provide safe haven to persons who had committed crimes against humanity, serious non-political crimes, or acts contrary to the purposes or principles of the United Nations; its Article 1F codifies these three exclusion categories. Terrorist acts, under certain restrictive circum-

⁶⁰ Tension arose between the United States and Canada when a Canadian citizen was summarily deported to Syria, while attempting to change airplanes at a US airport, and subsequently detained by the Syrian Government. Wakin, ‘Tempers Flare after U.S. Sends a Canadian Citizen Back to Syria on Terrorism Suspicions’, *NY Times*, 11 Nov. 2002, available in LEXIS, News Library, Majpap File.

⁶¹ Faist, ‘“Extension du domaine de la lutte”: International Migration and Security before and after September 11, 2001’, 36 *IMR* (2002) 7.

⁶² Gibney, ‘Security and the Ethics of Asylum after 11 September’, 13 *Forced Mig. Rev.* (2002) 40.

⁶³ Amnesty International, *United Kingdom: Rights Denied: The UK’s Response to 11 September 2001*, AI Index: EUR 45/016/2002 (2002) 5.

⁶⁴ Zard, ‘Exclusion, Terrorism and the Refugee Convention’, 7 *Bender’s Immig. Bull.* (2002) 933.

stances, might fit any of these categories. However, over-broad interpretations of exclusion grounds, or truncated status determination processes, create a risk that persons might be excluded without reliable proof of their personal involvement in genuinely exclusionary conduct.

Protection against *refoulement* for persons who are not refugees but who may face grave human rights violations, such as torture, is also under strain following September 11. This risk is especially severe for persons who are informally rendered across borders without being granted an extradition or expulsion hearing. The Human Rights Committee and the Committee against Torture (CAT) have repeatedly warned states parties that measures they adopt to comply with Security Council Resolution 1373 must be consistent with their obligations under the ICCPR and CAT, specifically in relation to *refoulement* to torture, summary execution, or other grave human rights violations.⁶⁵

The fate of Afghan asylum-seekers in the aftermath of September 11 raises concern about premature cessation of refugee protection. The conflict in Afghanistan is still cited as proof of a continuing 'war against terrorism' justifying emergency measures derogating from human rights. At the same time, states have simultaneously sought to withdraw or deny refugee protection to Afghan asylum-seekers on the ground that the routing of the Taliban and the installation of the Karzai Government provide a fundamental, durable and effective change in conditions permitting return of refugees in safety and dignity.⁶⁶ Two million Afghans have repatriated, although international relief has fallen short of necessary levels to permit their reintegration consistent with basic economic and social rights, with concomitant risks to political stability.⁶⁷ While the Taliban and the regime of Saddam Hussein are priority targets of the 'war against terrorism', asylum-seekers fleeing those regimes have met a hostile reception in states such as Australia.⁶⁸

The generally restrictionist atmosphere toward asylum-seekers since September 11 has, for example, drawn the United States and Canada toward a 'safe third country' agreement, which had previously been stalled.⁶⁹ Perceived associations between

⁶⁵ See, e.g., Human Rights Committee, Concluding Observations on New Zealand, UN Doc. CCPR/O/75/NZL (2002); Yemen, UN Doc. CCPR/CO/75/YEM (2002); Sweden, UN Doc. CCPR/CO/74/SWE (2002); Committee against Torture, Conclusions and Recommendations on Sweden, UN Doc. CAT/C/CR/28/6 (2002).

⁶⁶ Some states suspended consideration of Afghan asylum claims. Faquiri, 'Afghan Refugees in Europe', 13 *Forced Mig. Rev.* (2002) 22.

⁶⁷ Amnesty International, *Afghanistan: Continuing Need for Protection and Standards for Return of Afghan refugees*, AI Index: ASA 11/014/2002 (July 2002).

⁶⁸ Peyser, "'Pacific Solution'? The Sinking Right to Seek Asylum in Australia', 11 *Pac. Rim L. & Pol. J.* (2002) 431.

⁶⁹ See http://www.ins.usdoj.gov/graphics/lawsregs/US_Canada_Draft.htm (visited 16 Sept. 2002).

terrorism and migration also fuel concerns over migrant smuggling and the presence of undocumented immigrants, already at high levels.⁷⁰

3 Institutional Impacts

Human rights crises have sometimes wrought significant institutional changes in the international human rights regime. The Greek coup of the 1960s and South African apartheid inspired ECOSOC Resolution 1235, which permits public debate in the UN Commission on Human Rights of human rights problems in specific states, and ECOSOC Resolution 1503, which creates a confidential procedure to examine patterns of gross human rights violations. Grave violations associated with the states of siege in Chile and Argentina prompted the establishment of country and thematic working groups and rapporteurs, transforming the UN Charter-based bodies into active monitors as well as standard setters. Humanitarian crises linked to ethnic conflict brought new vigour to the UN collective security regime after the end of the Cold War, resulting in the creation of ad hoc international criminal courts.

The ‘war against terrorism’ has not yet yielded such demonstrable institutional impacts. The changes are largely atmospheric rather than concrete. However, seven developments deserve brief mention: (1) difficulties in integrating human rights concerns into UN counter-terrorism initiatives; (2) fissures over international criminal tribunals; (3) aggravated US exceptionalism; (4) European efforts to adopt common policies with entrenched human rights values; (5) polarization of UN political bodies; (6) unholy alliances between the anti-terrorist coalition and repressive states; and (7) tests of the relevance and capacities of human rights treaty bodies.

The Security Council’s Counter-Terrorism Committee represents a post-September 11 institutional innovation, but with troubling human rights implications. Security Council Resolution 1267 and Security Council Resolution 1373 obligate all UN Member States to freeze assets of individuals and organizations listed by any other Member State, on the basis of alleged ties to terrorist groups. The UN High Commissioner for Human Rights publicly urged the inclusion of a human rights perspective on the Counter-Terrorism Committee in February 2002, but she did not receive an adequate response.⁷¹

As it became clear that persons and organizations (including financial networks transmitting migrant and refugee remittances) were suffering severe consequences from listing, without notice, hearing or appeal, the Counter-Terrorism Committee adopted a de-listing policy in August 2002. This policy follows a diplomatic protection model: the state of origin must be induced to petition the listing state for de-listing,

⁷⁰ The U.S. Department of Justice cited the demands of the ‘war against terrorism’ as justification for imposing expedited removal against irregular migrants arriving by boat, on grounds that these irregular arrivals divert the attention of the Coast Guard. U.S. Dept. of Justice, Immigration and Naturalization Service, ‘Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act’, 67 *Fed. Reg.* (2002) 68924.

⁷¹ *Supra* note 8, Annex.

with the Counter-Terrorism Committee as initial arbiter and the Security Council as final arbiter in case of refusal.⁷² While it is heartening to observe certain individuals and entities with aggressively championing governments removed from the list, the process remains deeply flawed.⁷³ The inaccessibility and opaqueness of the listing and de-listing processes open troubling avenues for governments to repress dissidents, and to compel other UN Member States to follow suit.

Liberal internationalists perceived a ray of hope in the devastation of September 11 — that shared revulsion at the atrocity would open an important space for multilateralism, consistent with human rights principles, offering a chance to prove the unique value of international criminal tribunals to try crimes against humanity.⁷⁴ No such possibility emerged for the September 11 attacks, and suggestions for an ad hoc tribunal have not been seriously taken up.

The Statute of the International Criminal Court (ICC) entered into force in July 2002, creating the possibility that future terrorist acts that meet the definition of crimes against humanity could be tried before the ICC. However, the entry into force of the ICC Statute also triggered increasingly aggressive US efforts to exempt American politicians and soldiers from the ICC's jurisdiction, first through manoeuvres in the Security Council and later through the negotiation of bilateral agreements for non-rendition.⁷⁵

The perverse battle over the ICC highlights another negative trend associated with the 'war against terrorism' — the aggravation of US tendencies toward corrosive unilateralism and exceptionalism. The attacks of September 11 appeared at first to have a chastising effect, convincing the Bush Administration of the need for international solidarity against the terrorist threat. But military success in Afghanistan caused a reversion to more deeply held values — realist dismissal of international law, unilateralism and American exceptionalism to human rights constraints. The anti-ICC campaign stems from peculiar US political pathologies, but it also more broadly reflects a troubling US hostility to judicial (domestic or international) constraints upon military and political action since September 11 and the long-standing US resistance to external scrutiny of its human rights compliance.

US excesses open space for European leadership, and differing views on human rights (including the death penalty) have created strains in transatlantic relationships. The Council of Europe Committee of Ministers in July 2002 disseminated guidelines for states to preserve human rights values while fighting terrorism.⁷⁶ European states act in awareness that the European Court of Human Rights will

⁷² UN Security Council Press Release SC/7487 (2002); SC/7490 (2002).

⁷³ Sweden successfully challenged the US listing of persons involved in the Swedish branch of the Al-Barakaat Somali remittance network. U.S. Treasury, Office of Foreign Assets Control, Recent OFAC Actions, <http://www.ustreas.gov/offices/enforcement/ofac/actions/20020827.html>.

⁷⁴ Drumbl, 'Judging the September 11 Terrorist Attack', 24 *HRQ* (2002) 323.

⁷⁵ SC Res. 1422 of 12 July 2002; Human Rights Watch, *United States Efforts to Undermine the International Criminal Court: Article 98(2) Agreements* (July 2002).

⁷⁶ Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism (15 July 2002), [http://press.coe.int/cp/2002/369a\(2002\).htm](http://press.coe.int/cp/2002/369a(2002).htm).

ultimately decide whether their counter-terrorism measures comply with the ECHR. European publics appear more concerned with the human rights consequences of counter-terrorist military action, reflecting Europe's increasingly multilateral orientation as well as resentment of US hegemony.

Political polarization, hypocrisy, and unholy alliances to shield violators from deserved criticism are nothing new in the UN political human rights bodies. The question is whether September 11 has resulted in a significant deterioration in these tendencies that will have a lasting effect on the human rights regime. The departure of High Commissioner Mary Robinson, widely linked to her candid criticism of abuses connected to the 'war against terrorism', is noteworthy. The thematic mechanisms of the UN Commission on Human Rights clearly feel beleaguered,⁷⁷ and violator governments appear emboldened both with respect to their policies and their ability to avoid human rights scrutiny. Liberal democracies sacrifice their leverage over repressive governments by adopting policies antithetical to the rule of law and by crassly agreeing to tone down or silence criticism in exchange for cooperation in counter-terrorist strategies.

The UN Commission on Human Rights has come increasingly under the sway of repressive governments, including some with sorry records of complicity in international terrorism.⁷⁸ In this poisoned atmosphere, it is difficult to imagine the successful and balanced negotiation of paradigm-shifting human rights norms directly governing the conduct of transnational terrorist networks. Moreover, it appears unlikely that the human rights bodies will fundamentally reorient themselves away from their traditional state-centred approach, and tackle the daunting issues that would be involved in prescribing human rights obligations for terrorist non-state entities and monitoring their conduct.

Polarization is also heightened by the new prominence of the crisis in the Middle East. Always a looming presence in UN human rights fora, the Israeli–Palestinian struggle dominated the World Conference on Racism and clearly must be a focal point of any serious efforts to deal with the root causes of Islamist terrorism. Since September 11, the peace process has been seriously damaged, and prospects for a political settlement seem poor. What appears more likely than peace is that Israel will successfully export its previously distinctive anti-terrorist tactics, such as assassination of terrorist suspects, with collateral civilian casualties.

In the past year, the human rights treaty bodies have not exerted a strong influence on state behaviour, and the 'war against terrorism' instructively illuminates constraints on their resources and mandates. Eventually, the European Court of Human Rights may clarify the applicability of derogation norms, and the reconciliation of human rights and humanitarian law norms in this new type of conflict, through its mandatory jurisdiction over individual complaints. The UK counter-

⁷⁷ Amnesty International, *2002 UN Commission on Human Rights: Rights at Risk*, AI Index: IOR 41/025/2001 (2001) 2.

⁷⁸ Human Rights Watch, *New U.N. Human Rights Chief Urged to Speak Out*, <http://www.hrw.org/press/2002/09/unhchr0912.htm> (visited 12 Sept. 2002).

terrorist legislation of 2001 may provide the vehicle for norm clarification, especially in relation to prolonged administrative detention. But any judgment will come only after an extended period of exhaustion of domestic remedies and deliberation by the European Court.

The situation for the UN and other regional human rights bodies is even less satisfactory. The Human Rights Committee and other bodies have urged states whose reports have come under review in the past year to conform their counter-terrorist policies to their human rights obligations, but the submission of reports and scheduling of reviews are unrelated to the severity of human rights crises. The treaty bodies proceed slowly and with inadequate resources, and no effective procedural mechanisms have been established to deal systematically with derogations. The IACHR faces the risk that even its most sophisticated evaluation of the Guantánamo detention policy will simply be ignored by the United States. The United States has failed to file a derogation notice under the ICCPR, despite the official proclamation of an emergency and the imposition of a wide range of legislative and executive policies derogating from rights protected by the Covenant. In the absence of a highly unlikely interstate complaint against the United States under Article 41, an international forum to contest Guantánamo as a 'rights-free zone' appears unavailable under the ICCPR.

Under the principle of subsidiarity, the remoteness of the treaty bodies should not be an obstacle to human rights protection, because vindication of treaty rights should be available in domestic courts. However, the initial efforts of Guantánamo captives to enforce their rights, under the ICCPR and customary international law, have been unsuccessful because of peculiarly strained interpretations of *habeas corpus* jurisdiction.⁷⁹ The slowness of the human rights treaty bodies, and the uncertain import of their decisions, make it all the more vital that domestic courts recognize their responsibility to enforce international human rights obligations directly.⁸⁰

4 Conclusion

The legalist approach of the human rights regime provides limited leverage against either transnational terrorist networks or states seeking to eradicate them in the 'war against terrorism'. Yet, the human rights regime cannot desist from reiterating fundamental principles and the pivotal importance of the rule of law. The semantic move to an armed conflict paradigm, and away from an international crime control approach, has undermined the effectiveness and clarity of human rights constraints on counter-terrorist strategies, at least for the time being.

The substantive impacts of the 'war against terrorism' on human rights are varied,

⁷⁹ *Rasul et al. v. United States*, 2002 U.S. Dist. LEXIS 14031 (D.D.C. 2002).

⁸⁰ While the judgments of the European Court of Human Rights and the Inter-American Court of Human Rights are legally binding on states parties accepting their jurisdiction, the UN treaty bodies and the IACHR have great difficulty in securing state compliance with their observations, recommendations, and decisions in individual communications.

and this essay has addressed six: (1) the consequences of pre-emptive control strategies on liberty and fundamental fairness; (2) the lack of clarity in humanitarian rules for internment of terrorist suspects and the possible erosion of protective derogation norms; (3) the prospect of a permanent emergency and the impact on principles of legality, non-derogability, proportionality, consistency with other international obligations, and non-discrimination in derogation measures; (4) the need to clarify the territorial aspects of human rights protection; (5) refinement of concepts of non-discrimination on the basis of nationality and problems of guilt by association; and (6) threats to the integrity of refugee protection and excessively broad interpretations of the grounds for exclusion from *refoulement*.

In institutional terms, the impact of the ‘war against terrorism’ remains unclear. However, seven trends deserve mention: (1) procedural unfairness in asset seizures pursuant to Security Council Resolution 1267 and Security Council Resolution 1373; (2) missed opportunities to enhance the role of international criminal courts; (3) the aggravation of US exceptionalism to human rights constraints; (4) the opening for European leadership to preserve human rights while combating terrorism; (5) increased polarization of UN bodies, especially around the Middle East conflict; (6) silencing of criticism to secure cooperation of repressive states in counter-terrorism; and (7) marginalization of human rights treaty bodies.