

Terror/Torture

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ABSTRACT

In the face of terrorism, human rights law's requirement that states "respect and ensure" rights necessitates that states take active steps to safeguard their populations from violent attack, but in so doing do not violate rights. Security experts usually emphasize the aspect of *ensuring* rights while human rights advocates largely focus on *respecting* rights. The trick, which neither side in the debate has adequately referenced, is that states have to do both at the same time. In contrast to these largely one-sided approaches, adopting a radical universalist stance, this Article argues that both contemporary human rights and security discourses on terrorism must be broadened and renewed. This renewal must be informed by the understanding that international human rights law protects the individual both from terrorism and the excesses of counter-terrorism, like torture. To develop this thesis, the Article explores the philosophical overlap between both terrorism and torture and their normative prohibitions. By postulating new discourses around the paradigm of terror/torture, it begins the project of creating a new human rights approach to terrorism.

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I.

INTRODUCTION: THE LIGHT OF EL MANARA

In the Algerian film *El Manara*,¹ three young friends' lives are forever transformed by terror and torture in the context of Algeria's civil war. In that real-life North African conflict, the forces of the state battled the forces of armed fundamentalism² for a decade beginning in the early 1990s.³ One hundred thousand people or more perished in what one Algerian academic described as "a September 11th every year for a decade."⁴ Terrorist bombings and murders, carried out by non-governmental armed groups, claimed countless victims.⁵ Both the army and its opponents routinely tortured their respective captives.⁶ Though fundamentalist ideology⁷ represented a particular assault on concepts of human

1. EL MANARA (Production Machaho 2004). For a discussion of issues surrounding the making of this film, see Michel Amarger, *Rencontre avec Belkacem Hadjaj, L'Algérie face à son histoire récente* (Apr. 9, 2005), available at <http://www.africine.org/?menu=art&no=4367>. Amarger, the editor of *Africine*, the official website of the African Federation for Film Criticism, says that the characters' trajectories "allow us to relive the events which threw Algeria into violence." *Id.* (translated by author).

2. For definition of this controversial term, see *infra* notes 244-249 and accompanying text.

3. See, e.g., MAHFOUD BENNOUNE, *ESQUISSE D'UNE ANTHROPOLOGIE DE L'ALGÉRIE POLITIQUE* (Editions marinoor 1998); Hugh Roberts, *Under Western Eyes: Violence and the Struggle for Political Accountability in Algeria*, MIDDLE E. REP., Spring 1998, at 39-42; WOMEN LIVING UNDER MUSLIM LAWS (WLUML), *COMPILATION OF INFORMATION ON THE SITUATION IN ALGERIA* (1995).

4. These are the words of Dr. Mahfoud Bennoune, cited in Karima Bennoune, "A Disease Masquerading as a Cure": *Women and Fundamentalism in Algeria: an Interview with Mahfoud Bennoune*, in *NOTHING SACRED: WOMEN RESPOND TO RELIGIOUS FUNDAMENTALISM AND TERROR* 75, 86 (Betsy Reed ed., 2002).

5. Mahfoud Bennoune, *Comment l'intégrisme a produit un terrorisme sans précédent*, EL WATAN, Nov. 6, 1994, at 7.

6. On torture of women by armed groups, see Karima Bennoune, *S.O.S. Algeria: Women's Human Rights Under Siege*, in *FAITH AND FREEDOM: WOMEN'S HUMAN RIGHTS IN THE MUSLIM WORLD* 184 (Mahnaz Afkhami ed., 1995); see also *COMPILATION OF INFORMATION*, *supra* note 3.

7. In the Algerian context, the fundamentalist political movements advocated banning the mixing of the sexes in public places and strict clothing restrictions for women, and opposed women working. See Rabia Abdelkrim-Chikh, *Les enjeux politiques et symboliques de la lutte des femmes pour l'égalité entre les sexes en Algérie*, *Peuples méditerranéens*, Nos. 48-49, July-Dec. 1989. Moreover, their supporters carried out attacks on women who lived outside their paradigm. See *Testimony on the Case of Oum Ali, an Algerian Woman, Vienna, June 1993*, in *DEMANDING ACCOUNTABILITY: THE GLOBAL CAMPAIGN AND VIENNA TRIBUNAL FOR WOMEN'S HUMAN RIGHTS* (Charlotte Bunche & Niamh Reilly eds., 1994). Meanwhile, their associated armed groups carried out widespread attacks on civilians, including many women, as well as attacks on the Algerian military, to further this agenda. See Miriam Shahin, *Algerian Women Fight Terror*, *JORDAN TIMES*, Nov. 13, 1994, at 1; Youssef Ibrahim, *Bareheaded, Women Slain in Algiers: Killings Follow Islamic Threat*, *N. Y. TIMES*, Mar. 31 1994, at A3. This was true both before and after the cancellation of the elections of 1992 which the Islamic Salvation Front (FIS) was likely to have won. See Louisa Aït-Hamou, *Women's Struggle against Muslim Fundamentalism in Algeria: Strategies or a Lesson for Survival?*, in *WARNING SIGNS OF FUNDAMENTALISMS* 117 (Ayesha Imam et al. eds., 2004). For a thorough discussion of the human rights impact of fundamentalisms more broadly, including termi-

rights, in practice, both sides committed grave abuses.⁸ The circle of death was complete.

These events reverberate through the lives of the main characters of *El Manara*. In the film, two male friends, Fawzi and Ramdane, compete for the affection of fellow student Asma in the years leading up to the conflict. Ultimately, Fawzi becomes a journalist and marries Asma, while Ramdane turns to fundamentalism and joins one of the armed groups that terrorizes the country. This extremist militia later abducts Asma and Fawzi. When his father pays his ransom, Fawzi is released, and must leave Asma behind in the custody of the fundamentalist armed group. Asma's fate is similar to that of many women abducted by armed groups⁹ in the actual Algerian civil war: she is raped by her captors.¹⁰ One of the rapists is Ramdane, her former suitor.

Subsequently, remorse overcomes Ramdane and, fearing for his own life from even more extreme elements, he helps Asma escape. But as they flee, he is captured by the Algerian army. Fawzi, the journalist and former human rights activist, who does not yet know his wife has been freed, gains access to the cell where his onetime friend is now being held by the military. Moved by his desperation to find and save Asma, he tortures Ramdane with a blow torch. Ultimately, everyone's life is destroyed. The circle of destruction is complete.

As unlikely as *El Manara*'s plot may sound, similar scenarios played out in too many true stories during Algeria's "*décennie noir*."¹¹ I saw the film in Al-

nological problems, see *infra* notes 243-258 and accompanying text; *Human Rights and Fundamentalisms*, 100 PROC. AM. SOC. INT'L. L. 407-421 (2006); RIGHTS AND DEMOCRACY, FUNDAMENTALISMS AND HUMAN RIGHTS: REPORT OF THE MEETING (2005).

8. The Algerian government also engaged in a range of grave human rights abuses, including "disappearances," extra-judicial executions and torture. See, e.g., HUMAN RIGHTS WATCH, HUMAN RIGHTS IN ALGERIA: NO ONE IS SPARED (1994). The efforts of the mainstream human rights movement during this time focused largely on these abuses.

9. LEILA HESSINI, FROM UNCIVIL WAR TO CIVIL PEACE: ALGERIAN WOMEN'S VOICES 28 (1998). Hessini, and many other Algerian feminists, have been very critical of what they see as the failures of mainstream human rights organizations to document armed group abuses against women during the conflict. *Id.* at 26-27. Central to the argument in this essay, she calls for "a more comprehensive approach to human rights abuses . . . to document and render visible the manifold types of violence that women experience" in such situations. *Id.* at 27.

10. Here we begin to see the overlaps between terror and torture. This rape, carried out by an armed group as part of a strategy to subjugate and punish the female population, was clearly an act of terrorism. See, e.g., Amy Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 AM. U. L. REV. 793 (1997). But, in accordance with international humanitarian law, and understandings from the field of women's human rights, it may also be seen as an act of torture. See, e.g., United Nations Economic and Social Council, *Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1992/32*, ¶¶ 15-24, U.N. Doc. No. E/CN.4/1995/34. For more information on these questions, see the detailed discussions of the international law definitions of terrorism and torture, *infra* notes 76-109 and 130-147 and accompanying text.

11. The online version of Al Ahrām, one of Egypt's most important newspapers, described *El Manara* as "a faithful and brutally direct depiction of Algerian society during the rise of fundamentalist Islam" *Abortive Reunions*, AL-AHRAM WEEKLY ONLINE, Dec. 9-15, 2004,

giers in May 2005. Of course, audiences were only able to go to a movie theater because part of Algeria's coercive struggle against terrorism had been successful.¹²

This article begins with *El Manara* because the debate about terrorism and human rights in the U.S. often proceeds on the tacit assumption that the U.S. situation post-September 11 is *sui generis*.¹³ Furthermore, much international law scholarship in English frames terrorism as a largely East-West phenomenon that mainly targets Western liberal democracies.¹⁴ Such a view is both ahistorical and unhelpful. For years, many countries around the world, Algeria being but one of them, have been contending with horrific patterns of terrorism, including fundamentalist terrorism, which have claimed tens of thousands of lives.¹⁵ Governments of many political stripes have been regularly responding to (or provoking, depending on your viewpoint) this violence with atrocity.¹⁶ This is a global problem requiring a global response.

I also begin with *El Manara* because it displays the terrible complexity of the web of human rights issues that arise out of terrorism and counter-terrorism, a web more tangled than either human rights or security discourses acknowledge. Furthermore, it explicitly confronts the particular impact of terrorism and torture on women, even re-enacting a rape by an armed group—a radical depiction for Algerian cinema. It neither shies away from this grim reality, nor balks at exploring the human rights implications of religious fundamentalism. Most of all, though, this article begins with the film *El Manara* because of the absence of selectivity in its moral outrage regarding attacks on human dignity, whether

<http://weekly.ahram.org.eg/2004/720/cu4.htm>.

12. After initially failing to respond to the problem of terrorism, the Algerian government and military, as well as paramilitary organizations, responded vigorously to the armed groups with a domestic version of the "war on terror." This both improved security in many areas for the civilian population, and led to gross violations of human rights. See, e.g., AMNESTY INTERNATIONAL, ALGERIA: TORTURE IN THE "WAR ON TERROR": A MEMORANDUM TO THE ALGERIAN PRESIDENT, AI Index MDE 28/008/2006 (Apr. 18, 2006).

13. For an example of such a view, see Ruth Wedgwood, *Countering Catastrophic Terrorism: An American View*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM 103 (Andrea Bianchi ed., 2004).

14. For an example of such scholarship, see PHILIP B. HEYMANN, TERRORISM AND AMERICA (2000).

15. Such countries include Sri Lanka, Uganda, Afghanistan, and Colombia. See HUMAN RIGHTS WATCH, IMPROVING CIVILIAN PROTECTION IN SRI LANKA (2006); HUMAN RIGHTS WATCH, THE SCARS OF DEATH: CHILDREN ABDUCTED BY THE LORD'S RESISTANCE ARMY IN UGANDA (1997); AMNESTY INTERNATIONAL, AFGHANISTAN: INTERNATIONAL RESPONSIBILITY FOR HUMAN RIGHTS DISASTER (1995); AMNESTY INTERNATIONAL, COLOMBIA: POLITICAL VIOLENCE: MYTH AND REALITY (1994).

16. See, e.g., AMNESTY INTERNATIONAL, "DISAPPEARANCES" AND POLITICAL KILLINGS: HUMAN RIGHTS CRISIS OF THE 1990S (1994) 2-46 (discussing "counter-insurgency" related human rights violations in Sri Lanka and Colombia); see generally NOAM CHOMSKY, PIRATES AND EMPERORS, OLD AND NEW: INTERNATIONAL TERRORISM IN THE REAL WORLD (2002) (providing a critical perspective on terrorism and counter-terrorism).

those attacks come in the form of terrorism, or of torture.¹⁷ It is against this backdrop that I wish to think through contemporary difficulties regarding the human rights response to terrorism and counter-terrorism.

As a human rights lawyer, I begin with the notion that the human rights movement and its fellow-traveling scholars need to radically rethink approaches to terrorism and human rights.¹⁸ We must comprehend and respond to terrorism as a human rights violation, in and of itself.¹⁹ At the same time, security proponents need to expand their notion of safety to include fundamental aspects of human rights, including the right to be free from torture.²⁰ Those who justify torture, and other atrocities, in the name of fighting terror undermine the very respect for human dignity and the universality needed to sustain comprehensive global norms against terrorism. Neither the human rights depiction of current events nor the security one is multifaceted enough to comprehend the situation now facing the international community.

Furthermore, abuses on which the human rights movement classically focuses, like torture, rest on the same philosophical assumption as practices, like terrorism, which claim the attention of many concerned with security. This assumption is the permissibility of instrumentalizing severe and deliberate human suffering. Such a commonality suggests that, to take the approach that best champions human dignity, one must look attentively at the human rights impact of both what is labeled “terrorism” and what is labeled “counter-terrorism.”

Though most often considered the discrete starting points of separate discussions, in the current moment the two halves of terror/torture are woven together in a fabric of callousness and othering.²¹ To eradicate one, we must eradi-

17. This is in stark contradistinction to the many particularist responses to outrages since September 11. *See infra* note 64.

18. I fully recognize that this is a time when the human rights community feels that both it and the norms it invokes to defend victims of human rights abuse are under attack. *See, e.g.*, INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, HUMAN RIGHTS AFTER SEPTEMBER 11, 19-38 (2002). Human rights groups, including those whose practices related to terrorism are reviewed here, have made tremendous contributions to safeguarding these rules and exposing violations related to counter-terrorism in the years since September 11. The critique below should be read in this context.

19. *See infra* notes 192-217 and accompanying text.

20. This is similar to the claims made by advocates of the concept of human security. According to the Human Security Centre, “While national security focuses on the defense of the State from external attack, human security is about protecting individuals and communities from any form of political violence. . . . [h]uman security and national security should be—and are—mutually reinforcing.” THE HUMAN SECURITY CENTRE, THE HUMAN SECURITY REPORT 2005, WAR AND PEACE IN THE 21ST CENTURY, WHAT IS HUMAN SECURITY? (2005), *available at* <http://www.humansecurityreport.info/content/view/24/59/>. An even fuller understanding has been promulgated by the United Nations Development Programme (UNDP). It “equates security with people rather than territories.” UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT (1994), *available at* <http://hdr.undp.org/reports/global/1994/en/>.

21. Discourses of othering are central to justifications of both terrorism and torture. These are often based on discriminations of various kinds, including on the basis of race, religion, ethnicity, social class and gender. *See infra* notes 65 and 185-188 and accompanying text. For an exploration

cate the other. Examined holistically, this is the clear message of human rights law. Such an understanding should lead intrinsically to staunch rejection of both terror practices and torturous ones. The human rights community should oppose the circles of death and destruction depicted in *El Manara* by presenting an alternative: the circle of decency.

Instead of offering such a holistic response that encompasses the threats to human dignity from both terrorism and the “war on terror,” international law writers either seem to engage with terrorism *or* with counter-terrorism, with security *or* with human rights, with terror *or* with torture, with the abuses of one side *or* with another. Many security-oriented commentators write only about what non-state actors are doing, while many human rights commentators seriously scrutinize only, or primarily, what states are doing. These narrow perspectives, focusing only on one side of the “war on terror,”²² sharply limit the inter-

of the relationship between torture and discrimination, see NIGEL RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 14-15 (1999); AMNESTY INTERNATIONAL, *COMBATING TORTURE: A MANUAL FOR ACTION* (2003), available at http://www.amnesty.org/resources/pdf/combating_torture/sections/section1-3.pdf. The latter report notes that “Torture feeds on discrimination. Torture involves the dehumanization of the victim, the severing of all bonds of human sympathy between the torturer and the tortured.” *Id.* Exactly the same thing may be said of terrorism. For an interesting discussion of how terrorist groups “dehumanize the group’s purported enemies”, see JESSICA STERN, *TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL* 9-31 (2003). The challenge is to overcome these discourses and try to think about these issues in universal terms. Part of this involves forcing ourselves to ponder whether we would want to be treated in the way we are advocating for others. Universality radically alters one’s sense of the discourses that are acceptable here. See *infra* notes 185-188 and 278-282 and accompanying text.

22. This label is used by the Bush Administration to describe the fight against Al Qaeda and other terrorist groups. Eric Schmitt and Thom Shanker, *U.S. Officials Retool Slogan for Terror War*, N.Y. TIMES, July 26, 2005, available at <http://www.nytimes.com/2005/07/26/politics/26strategy.html>. Other versions of the phrase, such as “war against terrorism” and the “global war on terror” (or even the jaunty acronym “G-WOT”) are sometimes used interchangeably. In 2005, some had suggested substituting a term that would emphasize the ideological aspects of the battle, such as “a global struggle against violent extremism.” In 2005, some had suggested substituting a term that would emphasize the ideological aspects of the battle, such as “a global struggle against violent extremism,” or a “global struggle against the enemies of freedom.” See *id.*; Matthew Davis, *New Name for ‘War on Terror’*, BBC News Online, July 27, 2005, <http://news.bbc.co.uk/2/hi/americas/4719169.stm>. However, none of these alternatives has caught on. President Bush continues to use the phrases “the war on terror” and “the global war on terror.” See, e.g., President Bush Visits National Defense University, Discusses Global War on Terror, Oct. 23, 2007, <http://www.whitehouse.gov/news/releases/2007/10/20071023-3.html>. The 2006 National Strategy for Combating Terrorism also employs this term. THE NATIONAL STRATEGY FOR COMBATING TERRORISM 1 (2006), available at <http://www.whitehouse.gov/nsc/nsct/2006/>. In fact, all of these terms are highly contested, and criticized from diverse points of view on a wide range of grounds, including that this struggle should not be considered a “war”, that war cannot be declared on a phenomenon or tactic (terror), that it is misapplied to provide justifications for unrelated actions, such as the 2003 invasion of Iraq, and that it is unlimited in scope or duration. See, e.g., *U.S. Officials Retool Slogan for Terror War*, *supra* (detailing the objections of Gen. Richard B. Myers to the term); Mike Allen, *Edwards Rejects the ‘War on Terror’*, TIME, May 2, 2007, available at <http://www.time.com/time/nation/article/0,8599,1616724,00.html> (referencing the “hostility” of “many Democrats” to the term “War on Terror,” and the “skepticism” of “some Republicans” about it also); Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*,

national lawyer's ability to grasp or convey the range of perils in the current moment, and therefore diminish her power to analyze them adequately and devise or contribute to strategies to respond to them.

In contrast, in Part I, this Article adopts a radical universalist stance and argues that both contemporary human rights discourses and security discourses on terrorism and human rights must be broadened and renewed. In Part II, it explains how this renewal must be informed by the understanding that international human rights law protects the individual both from terror *and* from torture: in other words, both from terrorism and the excesses of counter-terrorism.

As an example of this novel approach, Part III embarks on an analysis of the philosophical overlap between both terrorism and torture and their normative prohibitions. Next, the Article considers the definitional controversies that have plagued both debates about terrorism and about torture, and shaped the discourses critiqued herein. Part IV refutes the justifications of torture born out of the "war on terror," and explains how maintaining an absolute approach to the ban on torture is essential to preserving absolute bans on terrorism. Subsequently, Part V critiques the human rights movement's insufficient response to terrorism, suggesting that a better response is urgently needed, both as a matter of human rights principle and to strengthen work against abuses, like torture, that arise out of counter-terrorism. Finally, this Article considers the implications of two key questions that are often neglected: the gender dimension of terrorism, discussed in Part V.C; and the problems associated with addressing the particular challenge to human rights from terrorism that Muslim fundamentalist armed groups carry out, described in Part VI. By critiquing old discourses on security and human rights, and postulating new ones around the paradigm of terror/torture, this Article ultimately begins the project of creating a human rights approach to terrorism.

II.

DOUBLE BURDENS, SINGULAR ANALYSES: TOWARD A MORE BALANCED APPROACH TO INTERNATIONAL LAW AND TERROR/TORTURE

Dutch sociologist W.H. Nagel wrote in 1980 that "[t]he profile of terrorism is circular. Terrorism creates counterterrorism and counterterrorism is pregnant with future terrorists."²³ Some would suggest that it is rather state violence that

14 EUR. J. INT'L L. 241, 248 (2003) (critiquing the "war against terrorism" as unprecedentedly open-ended). Hence, though the term "war on terror" will be employed in this Article, it will be used only in quotation marks. This emphasizes the ongoing debates and critiques of the notion, and is an attempt to distinguish such a construct from the broader, international (and often popular) struggle against terrorism. In contrast, below I discuss why it is, however, inappropriate in most contexts to employ quotation marks around the word "terrorism." See discussion *infra* notes 118-130 and accompanying text.

23. W.H. Nagel, *A Socio-legal View on the Suppression of Terrorists*, 8 INT'L J. OF THE SOC. OF L. 213, 221 (1980).

gives birth to terrorism in the first place (at least sometimes).²⁴ Nevertheless, this unresolved chicken-and-egg debate does not undermine Nagel's basic thesis about circularity.

Circularity is a crucial refrain in this article: circles of threats, circles of decency, circles of causality, and the comprehensive legal obligations needed to address them.²⁵ However, much of the legal analysis has instead been flat, failing to reflect this dimension. Such linear analysis cannot adequately respond to round conundrums or to complexity. This Article attempts to think through a range of what are usually seen as dichotomies, but are often in fact points on the circumference of the same circle: terror/torture, terror/counter-terror, security/human rights, state action/non-state action.²⁶ Frequently, assumptions are made that practices can only fit on one side or another of these dividing lines, and that they should be legally categorized and strategically prioritized differently based on this placement. Such a narrow understanding is unhelpful. Menaced by both the Scylla of terror and the Charybdis of counter-terror, by terror and torture, by the actions of armed groups and states, you cannot navigate today's troubled international seas without recognizing and contending with both.²⁷ Security should be understood not in opposition to human rights, but rather as a human rights value. Hence, sometimes counter-terror programs may be necessary to protect human rights. But conversely, enjoyment of human rights is a basic part of the notion of security, and must serve as a limit on counter-terrorist strategies.

Such an understanding also makes sense when one considers the very difficult double burden that human rights law puts on states, and how that burden is affected by the phenomenon called terrorism. The International Covenant on

24. See, e.g., Chomsky, *supra* note 16.

25. See *infra* notes 28-34 and accompanying text.

26. We must be careful of easy assumptions. For example, states should be understood as capable of committing both terror and torture, as should non-state armed groups. On the "attenuate[d] . . . impact of the public/private distinction" in the general prohibition of torture, see, for example, James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR. J. INT'L L. 435, 440 (1999).

27. Scylla and Charybdis were monsters placed, according to Greek mythology, on either side of the Strait of Messina. Scylla had twelve feet and six heads and lived underneath a dangerous rock. On the other hand, Charybdis sucked in all the water three times a day creating a devastating whirlpool. Sailors had to navigate carefully between these perils to avoid destruction. When the goddess Circe advised Odysseus to veer towards Scylla's cliff so as to only lose a few men rather than losing his entire ship to Charybdis, Odysseus pleaded with her. He asked: "goddess . . . tell me truly – could I somehow escape this dire Charybdis and yet make a stand against the other [Scylla] when she sought to make my men her prey?" HOMER, *THE ODYSSEY* 145 (Walter Shewring trans., Oxford University Press 1980). Odysseus and his ship made it through the Strait of Messina by navigating according to Circe's suggestion. However, when Scylla consequently tortured and murdered some of his men, Odysseus grieved terribly: "Scylla swung my writhing companions up to the rocks, and there at the entrance began devouring them as they shrieked and held out their hands to me in their extreme agony. Many pitiful things have met my eyes in my . . . searchings through the seapaths, but this was the most pitiful." *Id.* at 148. The modern challenge is to find a better route, to confront both Scylla and Charybdis, or perhaps to remove the monsters themselves.

Civil and Political Rights (ICCPR), in its second article, calls on states to both “respect and ensure” the rights in the Covenant.²⁸ This means states have to take affirmative acts to protect the rights of those within their jurisdiction from impingement by others.²⁹ But, in so doing, the state must not violate rights itself.

In the face of terrorism, the double burden of respecting and ensuring rights requires states to take active steps to safeguard their populations from violent attack by non-state armed groups as, *inter alia*, a matter of human rights law. However, in so doing, the state must not itself contravene the rights guaranteed in the ICCPR. In our time of terror, security experts usually emphasize the aspect of *ensuring* rights (though not often using such language) while human rights advocates largely focus on *respecting* rights (though they usually at least acknowledge, *en passant*, that governments must protect their populations). The trick, which neither side in the debate has adequately referenced, is that states have to do both—respect rights and ensure rights—and at the same time.

Human rights discourse often minimizes discussion of ensuring rights to protection from terrorist violence by the enforcement of international law, and is instead largely or solely a critique of state policies in response.³⁰ This discourse is firmly entrenched on the “respect” side of the coin. While such a critique is essential today—in a world in which torture³¹ and other human rights abuses have become part of counter-terrorism policy and the judiciary is failing to offer remedies³²—it also offers an insufficient response to the current moment. A complicated balancing³³ process between respecting and ensuring rights is nec-

28. The relevant language from Article 2(1) sets out that: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant” International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR]. Those rights covered in the ICCPR include the rights to be free from arbitrary deprivations of life (Article 6), and from torture and ill-treatment (Article 7), and the rights to liberty and security of person (Article 9). *Id.*

29. MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 38 (1993).

30. On this point, see *infra* notes 189-217 and accompanying text.

31. See, for example, the recent *New York Times* exposé of secret Justice Department memos authorizing the torture and cruel, inhuman or degrading treatment of terror suspects. Scott Shane, David Johnston and James Risen, *Secret U.S. Endorsement of Severe Interrogations*, N.Y. TIMES, Oct. 4, 2007, available at www.nytimes.com/2007/10/04/washington/04interrogate.html?_r=1&hp=&adxnnl=

32. See, for example, the Supreme Court’s recent unwillingness to hear the appeal of Khaled al-Masri, a Lebanese-born German citizen who accuses the CIA of kidnapping and torturing him, a refusal which commentators have noted can be understood as “an endorsement of the Bush Administration’s argument that state secrets would be revealed if the case were allowed to proceed.” *US Court Rejects CIA Kidnap Case*, BBC News, Oct. 9, 2007, available at <http://news.bbc.co.uk/2/hi/europe/7036051.stm>. This decision terminates Mr. Masri’s lawsuit. *Id.*

33. Some challenge the appropriateness of the methodology of balancing altogether or appeal for great care in any such process. See, e.g., Speech by Lord Chancellor and Secretary of State for Constitutional Affairs, Lord Falconer of Thoroton, Royal United Services Institute, London, Feb. 14, 2007, available at <http://www.dca.gov.uk/speeches/2007/sp070214.htm>.

essary to chart a course through the maze of complex contemporary reality reflected by *El Manara*'s Byzantine plot. The human rights movement will be unable to engage convincingly in the raging debates about balancing if it is only (or is only seen to be, or is primarily seen to be) engaged with one side of this double responsibility. Neither side of the equation—neither the responsibility to respect nor to ensure rights—may be left out. At the same time, any balancing process should be accompanied by the understanding that some values and rights are so fundamental as to be unbalanceable.³⁴

Furthermore, the only protection from fulfilling Nagel's prophecy that counter-terrorism is pregnant with future terrorists may be respect for clearly established international legal norms and a radical commitment to universality. Yet recent governmental disregard for human rights standards and broader principles of international law in the battle against terrorism, along with the horror that modern terrorism itself represents, have undermined the delicate balancing process required to both respect and ensure rights. The same is true for the security discourses that have championed or justified these policies (or even inspired them).³⁵ These factors have also conspired to destabilize the notion that some rights are unbalanceable. Ultimately, this may doom the "war on terror" to fulfilling Nagel's prophesy, and hence to failure.

I believe that we need to get away from the politics of polarization—where you are either tough or soft, with us or against us. The debate where liberty and security can be traded off against either as if balancing an equation. As I said, this is a complex problem that requires a more nuanced analysis . . . Liberty and security are not transferable. Diminution of one does not necessarily lead to the other. We must get away from the false dichotomy in which security and basic freedoms are seen as being in opposition. It is important that we recognize that national security does not automatically lead to the negation of our human rights . . . Neither tough nor soft, but right. *Id.*

And indeed, in view of the holistic approach advocated here, one must be careful of a zero-sum approach to security and human rights. Nevertheless, some opponents of the balancing methodology sometimes seek to avoid it by simply omitting one side of the equation altogether, a clearly mistaken approach. Moreover, as one of the dominant paradigms in today's public discourse about security and human rights, the theme of balancing is difficult to avoid. As even then-U.N. Secretary General Kofi Annan has asserted, "particular attention needed to be given to balancing anti-terrorism measures and the observance of human rights standards." As paraphrased in Leslie Palti, *Combating Terrorism While Protecting Human Rights*, U.N. Chronicle Online Edition, <http://www.un.org/Pubs/chronicle/2004/issue4/0404p27.html>. Even Lord Falconer concedes, "Withdrawing individual freedoms must be *balanced* against the practical purpose that will be served in so doing." Speech by Lord Falconer, *supra* (emphasis added).

34. This is the essence of nonderogability, as found, for example in Article 4(2) of the ICCPR. Under this provision, no suspension of the human rights to be free from arbitrary deprivation of life and to be free from torture and cruel, inhuman or degrading treatment or punishment, *inter alia*, is permitted, even "[i]n time of public emergency which threatens the life of the nation . . ." ICCPR, *supra* note 28, at art. 4(1)-(2). In other words, neither instrumental killings amounting to terrorism, nor torture, can ever be justified by the approach of "balancing." For a critical discussion of the limits of balancing, see Susan Marks, *Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights*, 15 OXFORD J. LEGAL STUD. 69 (1995).

35. For a discussion of all the U.S. government "torture memos," which were certainly such security discourses, see *A Guide to the Memos on Torture*, NYTimes.com, <http://www.nytimes.com/ref/international/24MEMO-GUIDE.html> (last visited Nov. 15, 2007).

A. To Respect and To Ensure

The rethinking of human rights and security discourses that is necessary to avoid the pitfalls described above begins in the crucial language of Article 2 of the ICCPR.³⁶ In his authoritative commentary on the ICCPR, Manfred Nowak has written that Article 2, which establishes the responsibility to both respect and ensure rights, provides the “systematic context”³⁷ of all the Covenant’s substantive provisions. The “respect” side of its equation establishes what have been termed “duties of forbearance.”³⁸ “It means that the State Parties must *refrain* from restricting the exercise of these rights where such is not expressly allowed.”³⁹ This speaks to what are termed negative rights or negative liberties in the language of U.S. constitutional law.⁴⁰

On the other hand, the duty to ensure rights is a reminder of the oft-overlooked reality that guarantees of civil and political rights do require states to take affirmative steps.⁴¹ This responsibility applies to all of the substantive

36. Of course, many economic, social and cultural rights are also heavily impacted by both terrorism and counter-terrorism. The basic obligation of States Parties to the International Covenant on Economic, Social and Cultural Rights is, according to the Committee on Economic, Social and Cultural Rights, “to respect, to protect and to fulfill” all of the rights in the Covenant. Committee on Economic, Social and Cultural Rights, General Comment No. 12, ¶ 15, U.N. Doc. E/C.12/1999/5 (1999). The obligation to protect includes the responsibility to ensure that the relevant rights of individuals are protected from non-state actors. *Id.*

37. NOWAK, *supra* note 29, at 28.

38. *Id.* at 36.

39. *Id.* The commentary notes that the meaning of this obligation varies depending on the nature of the underlying substantive right in question. It is either entirely protected and subject to no limitation whatsoever (*i.e.* the obligation not to torture); subject to non-arbitrary limitations (*i.e.* the right to life or to privacy) or subject only to expressly stated, negotiated limitations (*i.e.* freedom of expression). *Id.* at 34.

40. Sotirios Barber, *The Negative-Liberties Model of the Constitution*, in SOTIRIOS BARBER, WELFARE AND THE CONSTITUTION 5-8 (2005).

41. As Nowak explains, “States Parties are obligated to take positive steps to give effect to the rights.” NOWAK, *supra* note 29, at 36-7. Some provisions of international human rights law make the obligation for the state to act to protect individuals from harms by non-state actors explicit. For example, Article 5(b) of the International Convention on the Elimination of All Forms of Racial Discrimination requires states to “guarantee the right of everyone . . . [to] security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.” International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195; G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. (No. 14) at 47, U.N. Doc. A/6014 (1966), at Art. 5(b); see also the general discussion in ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1996), and Stephanie Farrior, *State Responsibility for Human Rights Abuses by Non-State Actors*, 92 AM. SOC’Y OF INT’L. L. PROC. 299 (1998). This full approach to the obligations created by both civil and political rights and economic, social and cultural rights has been further supported by the case law of the European Court of Human Rights (*Osman v. United Kingdom*, App. No. 0023452/94, Eur. Ct. H.R., (1998)), and the Inter-American Court of Human Rights (*Velásquez-Rodríguez Case*, 1988 Inter-Am.Ct.H.R. (Ser. C) No. 4 (July 29, 1988), available at http://www1.umn.edu/humanrts/iachr/b_11_12d.htm).

Notwithstanding this jurisprudence, civil and political rights are often still described by commentators as functionally the equivalent of negative liberties requiring only that states refrain from violative conduct. See, e.g., Cass Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35 (1993);

rights guaranteed by the ICCPR and requires the agents of the state to protect individuals from private abuses.⁴² Nowak labels this, “the requirement to take positive measures to protect against private interference.”⁴³ In 2004, the Human Rights Committee, which monitors implementation of the ICCPR, explicitly spelled this out in its authoritative interpretation of Article 2:

The legal obligation under article 2, paragraph 1, is both negative and positive in nature [T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights⁴⁴

Though the ICCPR text itself was drafted long before a sophisticated understanding of such human rights problems prevailed, this approach represents the only one capable of adequately responding not only to terrorism by non-state actors, but also to many violations of women’s human rights in the family and community, and to abuses by private actors like transnational corporations.⁴⁵ This aspect of the Covenant makes clear that “rights are not protected only from violations by the State,”⁴⁶ implicating a panoply of international actors.

While our reconsideration of security and human rights paradigms begins with appreciation of the specific nature of Article 2 of the Covenant, we must also transcend its parameters. Beyond the strict framework of the ICCPR, in the context of the explicitly global “war on terror,” this notion “is projected across the international community by the idea of universality.”⁴⁷ Hence, in balancing

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989). In the much-criticized latter case, Justice Rehnquist suggested that “the Due Process Clauses [of the United States Constitution] generally confer no affirmative right to governmental aid, even where . . . necessary to secure life, liberty or property interests of which the government itself may not deprive the individual.” *Id.* at 196.

42. NOWAK, *supra* note 29, at 37.

43. *Id.* at 38.

44. U.N. Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶¶ 5, 8, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (May 26, 2004).

45. With regard to women, see the important discussion in HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 218-243 (2000).

46. NOWAK, *supra* note 29, at 38.

47. The touchstone instrument of the human rights framework, the Universal Declaration of Human Rights clearly grounds this assertion. It seeks to promote human rights “for all peoples and all nations . . .” *i.e.* across frontiers in a transnational sense. Universal Declaration of Human Rights, G.A. Res. 217A, pmb., U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948). Furthermore, it stipulates that “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration [which include both the right not to be arbitrarily deprived of one’s life, and to be free from torture and cruel, inhuman or degrading treatment or punishment] can be fully realized.” See UDHR, art. 28. For discussion of a transnational understanding of human rights, see Karima Bennouna, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT’L L. & POL. 171, 196-210 (2004), and Ruti Teitel, *Humanity’s Law: Rule of Law for the New Global Politics*, 35 CORNELL INT’L L.J. 355 (2001-2002).

respect for rights with ensuring rights, we must give consistent consideration to the concerns and safety of both the Palestinian refugee camp resident⁴⁸ and the Israeli bus passenger,⁴⁹ the New Yorker⁵⁰ and the resident of Kabul,⁵¹ and those in cities whose tribulations are forgotten by the international community, like Algiers.⁵² Human dignity must be seen from all these vantage points, rather than from one alone.

*B. Protecting the Pretences of Civilization When the Angel of Death
Sounds His Trumpet*

Bernard Shaw wrote that “when the angel of death sounds his trumpet the

48. Palestinian civilians, especially those in refugee camps, have often been victims of Israeli policies claimed to be undertaken in the name of countering terrorism, including torture, arbitrary detention, deliberate and arbitrary killings, and prolonged use of curfews and checkpoints. All this has had a grave impact on their human rights. *See, e.g.*, International Court of Justice, Advisory Opinion: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 20, ¶¶ 79-85 (July 9) and THE ASSOCIATION OF ISRAELI-PALESTINIAN PHYSICIANS FOR HUMAN RIGHTS, TORTURE: HUMAN RIGHTS, MEDICAL ETHICS AND THE CASE OF ISRAEL (Neve Gordon & Ruchama Marton eds., 1995). These policies have been carried out in the name of protecting the victims of the terrorism as described in sources cited *infra* note 49.

49. Palestinian armed groups have regularly targeted civilian transportation in Israel for terrorist attack with devastating results. *See* JESSICA STERN, TERROR IN THE NAME OF GOD, WHY RELIGIOUS MILITANTS KILL 32-62 (2003); *Israelis on Living with Bombers*, BBC News Online, July 19, 2005, http://news.bbc.co.uk/2/hi/middle_east/4679373.stm. For recent attacks, see, for example, *Tel Aviv Suicide Bomber Kills 9*, BBC News Online, Apr. 17, 2006, http://news.bbc.co.uk/2/hi/middle_east/4915868.stm. Many of these attacks have been claimed to be carried out in response to steps taken as described in sources cited *supra* note 48.

50. New York City is a city “widely recognized as [a] prime terrorist target . . .” Dan Eggen & Mary Beth Sheridan, *Anti-Terror Funding Cut in D.C. and New York*, WASH. POST, June 1, 2006 at A01. This concern has greatly increased since September 11, 2001. Ernest Sternberg, *Always a Target (What Draws Terrorists to NY?)*, N.Y. SUN, Feb. 21, 2007, available at <http://www.freerepublic.com/focus/f-news/1788546/posts>. Terrorist threats against the city are often justified in the name of what is done by Western forces in countries like Afghanistan, discussed *infra* note 51.

51. Residents of Kabul have fallen prey to unthinkable levels of terrorist violence by non-state armed groups over the last thirty years, currently again on the rise. *See, e.g.*, AFGHANISTAN: INTERNATIONAL RESPONSIBILITY FOR A HUMAN RIGHTS DISASTER, *supra* note 15; Ian MacWilliam, *Upsurge in Afghan Suicide Attacks*, BBC News Online, Feb. 27, 2007, http://news.bbc.co.uk/2/hi/south_asia/6400257.stm. In addition, they have suffered from counter-terrorist operations both by the United States and its allies, and by the Afghan government. *See, e.g.*, Human Rights Watch, *U.S.: Failure to Provide Justice for Afghan Victims*, Feb. 16, 2007, available at <http://hrw.org/english/docs/2007/02/15/usint15351.htm>. The latter are sometimes justified in the name of protecting Americans in cities like New York, discussed *supra* note 50.

52. Such a global view serves as a retort to what Richard Falk has criticized as “the spatial focus” which “preoccupie[s] discussions of world order.” RICHARD FALK, HUMAN RIGHTS HORIZONS: THE PURSUIT OF JUSTICE IN A GLOBALIZING WORLD 28 (2000). Re-conceptualizing human rights beyond this limited focus and in a truly transnational way is critical to an effective response to the jurisdictional and spatial games states have played during the “war on terror” in an effort to immunize their counter-terror practices from legal scrutiny. *See, e.g.*, United Nations Commission on Human Rights, Working Group on Arbitrary Detention, *Situation of Detainees at Guantánamo Bay*, ¶ 11, U.N. Doc. E/CN.4/2006/120, 15 (Feb. 2006).

pretences of civilization are blown from men's heads into the mud like hats in a gust of wind."⁵³ The tragedies that beset *El Manara*'s protagonists, and too many televised atrocities since and including the events of September 11, 2001, testify to the truth of his admonition. In the post-September 11 era, international human rights law can mitigate the potential damage to the "pretences of civilization" Shaw invoked, such as "constitutional guarantees of liberty and well-being,"⁵⁴ only if human rights is understood not simply as a language to critique government counter-terror policies but also as a tool against terror itself. Otherwise, we will inevitably see more of the key principles that comprise the rule of law, as Shaw warned, "blown . . . into the mud."

In many countries where people are genuinely threatened by violence from non-governmental armed groups, or have been convinced by their governments that they are, our "pretences of civilization" will not seem relevant and it will be difficult to sustain outrage when they are trampled in the dirt unless we are balanced. Among many other consequences, Michael Reisman reminds us that September 11 shattered "the emotional foundation on which [the] sense of security [of many in the Global North] rested."⁵⁵ Of course, this has also been true of the effect of other September 11ths in other places. Human rights discourse must be responsive to that reality. On the other hand, this emotional reality cannot be allowed to vitiate the rules of the game in the way that some security narratives suggest.

Both would-be terrorists advancing a goal they see as vital, and some putative counter-terrorists who see themselves as defending states and innocents, often argue that there are no relevant rules, or in any case that such rules do not apply to them given their higher purpose, or do not apply in the instant situation, which is invariably "exceptional."⁵⁶ These actors are trapped in a symbiotic relationship that threatens the very fiber of the normative order.

What the counter-terrorist must remember as she constructs her strategy is that the suspension of rules also deconstructs the concept of terrorism. If there are no absolutes, no inherently foul acts (like torture), if the ends really do justify the means, then it is just a question of who has better ends—and there will always be widely divergent views about that question across the international community. Instead, some acts must be absolutely forbidden, whatever their alleged goal. As the former U.N. High Commissioner for Human Rights Mary Robinson has noted, "the essence of human rights is that human life and dignity must not be compromised and that certain acts, whether carried out by State or non-State actors, are never justified no matter the ends."⁵⁷

53. GEORGE BERNARD SHAW, *HEARTBREAK HOUSE*, at xxv (1919).

54. *Id.* at xxiv.

55. Michael Reisman, *In Defense of World Public Order*, 95 AM. J. INT'L L. 833, 833 (2001).

56. See the discussion and critique of the argument that the "war on terrorism" renders international law rules "inapplicable" in PHILIPPE SANDS, *LAWLESS WORLD* 206 (2005).

57. U.N. High Commissioner for Human Rights, *Report of the United Nations High Commis-*

This Article argues above all for a holistic, congruous approach. It asks how we can, in the era of the “war on terror,” move towards a thick analysis that embodies the ambit of responsibilities in human rights law, that responds to the range of challenges to human dignity, that confronts Scylla and Charybdis. A key strategy may be to consider the similarities between abuses that are ordinarily seen as being on opposite sides of the line between state and non-state abuses in our current context. The best candidates for this rethinking are the twin processes of terrorism and torture. The concept of terror/torture provides a prism for seeing the limitations of current discourses and suggests possibilities for more comprehensive ones.

III.

TERROR/TORTURE: MEANINGS AND MODALITIES

Terror/torture represents a spectrum of brutalizing practices often justified in the name of a greater good or higher purpose.⁵⁸ Torture terrorizes, and terrorism often involves a kind of torturing.⁵⁹ Both sets of practices can be said to provoke the “three expanding circles of effects” that Michael Reisman postulates for terrorism.⁶⁰ What he terms the immediate effects are on the victims themselves who are maimed or murdered in the process.⁶¹ The intermediate effects serve to intimidate many others, especially those who share characteristics with the victims, a ripple magnified in the era of mass media.⁶² Finally, both ter-

sioner for Human Rights and Follow-Up to the World Conference on Human Rights, *Human Rights: A Uniting Framework*, ¶ 5, E/CN.4/2002/18 (Feb. 27, 2002).

58. The justification for torture in the context of terrorism is very often the protection of society and of innocent life. Terrorists too often claim an important moral goal. See LOUISE RICHARDSON, *WHAT TERRORISTS WANT* 41-44 (2006).

59. See, for example, the description of the suffering of Daniel Pearl during captivity in *Complaint at 200, Mariane Pearl v. Ahmed Omar Saeed Sheikh et al*, No. 6639 (S.D.N.Y. July 24, 2007); see also Jeff McMahan’s argument that “[p]erhaps the worst form of torture is terrorist torture, whose instrumental function is fulfilled when the mutilated bodies of the victims are strewn in public places as a means of intimidating others. Jeff McMahan, *Torture, Morality, and Law*, 37 *CASE W. RES. J. INT’L L.* 241, 242 (2006).

60. W. Michael Reisman, *International Legal Responses to Terrorism*, 22 *HOUS. J. INT’L L.* 3, 6 (1999).

61. For example, consider both the harrowing descriptions of the wounded, the dead, and family members searching for lost loved ones after the February 2007 terrorist attack on a Pakistan-bound Indian train, Santik Biswas, *India Blast Victims’ Security Questions*, BBC News Online, Feb. 19, 2007, http://news.bbc.co.uk/2/hi/south_asia/6376273.stm, and the graphic descriptions of victims of torture given by the United Nations Special Rapporteur on torture, in BBC News Online, *Iraq Torture “Worse after Saddam,”* Sept. 21, 2006, http://news.bbc.co.uk/2/hi/middle_east/5368360.stm.

62. See, for example, the words of an Algerian woman journalist who said she was so distressed by the fundamentalist terrorist atrocities against women and journalists that she, “thought of buying poison so I can kill myself if taken by them alive, so all they get is a corpse. I am losing my hair from nerves.” FAITH AND FREEDOM, *supra* note 6, at 185. Similarly, torture can provoke such fear in society at large that dictators often rule through its use. For example, Saddam Hussein terrorized the Iraqi population into submission with, *inter alia*, grizzly and massive use of torture. Bill

ror and torture have “an aggregate effect of undermining inclusive public order,”⁶³ to borrow Reisman’s formulation. (Recent events all too aptly demonstrate this point.⁶⁴)

The similarities between the practices of terror and torture are significant and defining. These include the visitation of severe pain on victims, the intentionality of doing so, and the tremendous fear deliberately provoked in victims, survivors and those around them. Terrorism and torture both share some characteristics with hate crimes.⁶⁵ Both torture and terror involve the infliction of extreme suffering, often on a victim chosen on a basis which may include discriminatory motives, often with a message intended for a broad audience,⁶⁶ and meant to impact the lives of many.⁶⁷

On the other hand, instances of torture and particular acts of terrorism may differ in important ways. Terrorism most often occurs in public, while much torture is often a more hidden, secretive practice.⁶⁸ Some terrorists crave great pub-

Neely, *Inside Saddam’s Torture Chamber*, BBC News Online, Apr. 9, 2003, http://news.bbc.co.uk/2/hi/middle_east/2930739.stm.

63. Reisman, *supra* note 60, at 6.

64. For interwoven examples, one can pick the atrocities which occurred on September 11, 2001, that led to calls for the rules of international law to be rewritten, and to a resurgence of Islamophobia in many parts of the Western world on the one hand; and the atrocities at Abu Ghraib, that led to particular anger at the United States in the Muslim world, a rise of Occidentalism and some acts of terrorism. Unfortunately, the cumulative result of all this highly televised suffering has, for the most part, not been a universalist backlash against all forms of inhumane treatment authored by anyone, but rather polarization and selective reaction. For further discussion of this problem, see Karima Bennouna, *Making the World Safe for the Dallas Cowboy Cheerleaders*, Address Before the Michigan Journal of International Law Conference: “Dueling Fates: Should the International Legal Regime Accept a Collective or Individual Paradigm to Protect Women’s Rights?” (Apr. 6, 2002), in 24 MICH. J. INT’L L. 461, 465 (2002).

65. As Andrew Taslitz has explained, “Hate criminals generally use their criminal conduct to express their contempt for, and perceived superiority over, various identifiable groups, based on, for example, their race, ethnicity, gender, religion, or sexual orientation. Andrew Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U.L. REV. 1283, 1284 (2000). While the individual victim is the immediate target, the intended audience may be much broader, and the ripples of fear created may travel far. The analogy may seem easier to terrorism than to torture. However, as explained above, much torture, like much terrorism, has an intimate relationship to a variety of forms of discrimination. See discussion *supra* note 21. This is certainly true in the era of the “war on terror.” See, e.g., American-Arab Anti-Discrimination Committee (ADC), Fact Sheet: The Condition of Arab Americans Post 9/11 (Mar. 27, 2002), available at <http://www.adc.org/index.php?id=282>.

66. Those who favor the use of torture or ill-treatment in combating terrorism reveal this very truth about torture, when they suggest that Al Qaeda has a strategic advantage because its supporters believe that in U.S. hands they will not be tortured (an assumption it seems increasingly difficult to sustain). In other words, spreading fear among potential informants is, in this universe, a reason to torture. Heather MacDonald, *Too Nice for Our Own Good*, WALL ST. J., Jan. 6, 2005, available at http://www.findarticles.com/p/articles/mi_kmopi/is_200501/ai_n13294616.

67. Taslitz describes this aspect of hate crimes as “expressive violence.” Taslitz, *supra* note 65, at 1288.

68. See Steven Watt, *Torture, “Stress and Duress,” and Rendition as Counter-Terrorism Tools*, in AMERICA’S DISAPPEARED 72, 95 (Rachel Meeropol ed., 2005).

licity for their claims of responsibility,⁶⁹ while many torturers seek to conceal what they have done.⁷⁰ Some torturers have direct and long-term contact with their victims while some terrorists may have none. One should, of course, be wary of generalizations with regard to these differences. Some terrorists may spend protracted periods of time with hostages, for example, or may even die along with their victims. And in the era of Abu Ghraib, certain acts of torture are clearly displayed for a wide audience, inadvertently or otherwise.⁷¹

Terrorists often target busy public places like restaurants and markets with explosives, usually hurting numerous individuals who are in those locales at that time and also causing vast property damage.⁷² In contrast, torturers more often directly target the body of a specific individual, or the bodies of small groups of victims.⁷³ However, this difference may not always be so clear either. Consider the infamous National Stadium in Chile during the reign of Pinochet where many victims were simultaneously tortured and subjected to the horror of the torture of the hundreds around them.⁷⁴ This distinction between torture and terror is also blurred by the fact that, some terrorists may indeed target particular individuals for assassination or abduction.⁷⁵

Ultimately, the concrete results of what is called torture and what is called terrorism are often experienced as much the same: the devastation of the bodies and minds of those targeted by these practices; grave physical and psychological injury to many with profound and lasting sequelae for survivors, some of which may be invisible to the eye; and the spread of fear among many others of falling victim to the same fate.⁷⁶ These consequences—and the shared characteristics

69. This is exemplified by the practice of some suicide bombers who leave behind videotaped claims of responsibility. See, e.g., Paul Reynolds, *Bomber Video 'Points to al-Qaeda'*, BBC News Online, Sept. 2, 2005, http://news.bbc.co.uk/2/hi/uk_news/4208250.stm.

70. See, e.g., *U.S. Denies 'Prison Torture' Charges*, BBC News Online, Feb. 14, 2003, <http://news.bbc.co.uk/2/hi/americas/2760301.stm>.

71. See Diane Amann, *Abu Ghraib*, 153 U. PENN. L. REV. 2085, 2085 (2005). Historically, when torture was legally sanctioned (and even mandated) it was sometimes openly performed, especially when prescribed as punishment. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 3-31 (1978).

72. See, e.g., *'Passover Massacre' at Israeli Hotel Kills 19*, CNN.com, Mar. 27, 2002, <http://archives.cnn.com/2002/WORLD/meast/03/27/mideast/>.

73. AMNESTY INTERNATIONAL, *ISRAEL AND THE OCCUPIED TERRITORIES: DEATH BY SHAKING: THE CASE OF 'ABD AL-SAMAD HARIZAT*, AI Index: MDE 15/23/95 (1995).

74. See *Soldier Confirms Chile Stadium Killings*, BBC NEWS ONLINE, June 27, 2000, <http://news.bbc.co.uk/2/hi/americas/807599.stm>; Katherine Hite, *Chile's National Stadium: As Monument, As Memorial*, *ReVista: Harvard Review of Latin America*, Spring 2004, available at <http://www.drclas.harvard.edu/revista/articles/view/704>.

75. See, e.g., Pearl v. Sheikh, *supra* note 59.

76. On the direct impact of torture, see, for example, Eyad El-Sarraj, *Torture and Mental Health: a Survey of the Experience of Palestinians in Israeli Prisons*, in *TORTURE: HUMAN RIGHTS, MEDICAL ETHICS AND THE CASE OF ISRAEL*, *supra* note 48 at 104-107. With regard to the human repercussions of terrorism, see, for example, the recitation of facts in *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1, 7-8 (D.D.C. 1998) (describing the death of 21 year-old Alisa Flatow in a suicide bombing of the bus on which she was traveling in Gaza) and Syed Shoaib Hasan, *Struggling to*

described above—are why terrorism and torture matter, and why both practices are beyond the pale in international law. We turn now to definitional questions that have plagued the debates about both these practices, first regarding terrorism and then concerning torture.

A. The Definitional Debates

From a global perspective, both terrorism and torture must be understood as somewhat controversial phenomena. International public opinion reflects some division on the acceptability of these practices. For example, a global BBC poll found that “59 [percent] of the world’s citizens say ‘no’” to torture, while some 29 percent think that governments should be allowed to use torture in some cases.⁷⁷ Meanwhile, attacks perceived by some as heinous terrorist acts seem acceptable to others for political reasons.⁷⁸

Mirroring these divides in public opinion, controversy has also swirled around the definitions of these concepts. Yet, both terrorism and torture have been defined—and unequivocally prohibited—in international law. While questions remain about these definitions, they have served as the bases for a range of prohibitions and criminalizations. For those who position themselves primarily as opponents of terrorism, the meaning of the term is clear, or clear enough. The relevant discussion for this group revolves around how to end it. For those who focus on ending torture, its definition is similarly so established as to be above question. In contrast, those who are wary of either the concept of torture or of terrorism tend to underscore the definitional problems with the respective term, and sometimes thereby erect conceptual roadblocks to the operational process, intentionally or otherwise.

1. The Question of Legal Definitions of Terrorism

Judge Rosalyn Higgins, current President of the International Court of Justice, suggested in her 1997 academic writings that “[t]errorism’ is a term with-

Cope with Bomb Horror, BBC News Online, Oct. 19, 2007, http://news.bbc.co.uk/2/hi/south_asia/7053308.stm (describing the aftermath of the Oct. 18, 2007 suicide bombings in Karachi directed at supporters of Benazir Bhutto that killed more than 130 people).

77. This was out of a sample of 27,000 people in 25 countries. Jonathan Marcus, *Heated Debate over Use of Torture*, BBC News Online, Oct. 19, 2006, <http://news.bbc.co.uk/2/hi/europe/6063800.stm>.

78. See Nabil Charaf Eddine, *A force de louer la “résistance irakienne,”* ELAPH, reprinted in *Courrier International*, No. 767, July 13-20, 2005, at 32 (detailing the shock of Iraqis traveling abroad at the failure to universally condemn armed group terrorism against civilians in Iraq because of these groups’ opposition to the American occupation). *Newsweek Magazine* cites a Pew Research Survey result which claims that 26 percent of Muslims in the United States, aged 18 to 29, believe that suicide bombing can be justified in some circumstances. Lisa Miller, *American Dreamers*, NEWSWEEK, July 30, 2007, at 31. Note that this cited result is controversial, and critiqued by some Arab-American community leaders. *Id.*

out legal significance.”⁷⁹ Her words epitomize a view often articulated in the human rights literature today, despite the many developments in law and fact since the time of her writing.⁸⁰ The human rights community sometimes deploys this argument as an excuse either for not using the word “terrorism,” or as an explanation for not campaigning more actively against the practice.⁸¹

The U.N. High Level Panel on Threats, Challenges and Change set out to put such a notion about the legal meaning of the term “terrorism” to rest in December 2004 by proposing a consensus definition.⁸² This definition labels as terrorism

any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.⁸³

Notably, the U.N. High Level Panel definition excludes state violence on the grounds that other instruments already cover such conduct.⁸⁴ The report argues that “the legal and normative framework against State violations is far stronger than in the case of non-State actors”⁸⁵ Additionally, it rejects any possible justification for terrorism by non-state actors, specifically excluding military oc-

79. Rosalyn Higgins, *The General International Law of Terrorism, in TERRORISM AND INTERNATIONAL LAW* 13, 28 (Rosalyn Higgins & Maurice Flory eds., 1997).

80. *See, e.g., infra* notes 107-110 and 119 and accompanying text.

81. *See id.*

82. *See* U.N. High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, ¶ 164, U.N. Doc. No. A/59/565 (Dec. 2, 2004).

83. *Id.* ¶ 164(d). Other definitions include those found in the International Convention for the Suppression of the Financing of Terrorism: “Any . . . act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.” International Convention for the Suppression of the Financing of Terrorism, art. 2(B), Dec. 9, 1999, U.N. Doc. A/Res/54/109, 39 I.L.M. 270 (2000), *available at* <http://untreaty.un.org/ENGLISH/Status/Chapter xviii/treaty11.asp>. Interestingly, U.N. Security Council Resolution 1373, by which the international community collectively responded to September 11, 2001, and in which it adopted certain coercive measures under Chapter VII of the U.N. Charter to be undertaken by all nations to “combat [terrorism] by all means, in accordance with the Charter of the United Nations,” saw no need to define the concept. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001). The United States Code defines terrorism as “activities that – (A) involve violent act or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; and (B) appear to be intended – (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping. . . .” 18 U.S.C. § 2331, (as amended by the USA PATRIOT ACT of 2001, H.R. 3162, § 802).

84. High Level Panel, *supra* note 82, ¶¶ 159-61.

85. *Id.* ¶ 160.

cupation as a legal excuse.⁸⁶

While the omission of exemptions for “freedom fighters” is thoroughly laudable, the exclusion of state conduct from the scope of the definition raises concerns.⁸⁷ It makes moral and legal sense to restate, as the U.N. High Level Panel definition does, that no *casus belli*, specifically including a military occupation, is a valid justification for violence targeted against civilians.⁸⁸ In that respect the ban is absolute, and justifiably so.

However, the panel assesses that sufficient norms already govern state conduct, and that separating out such violence normatively coheres.⁸⁹ Juridically, this may be true. Nevertheless, in today’s political reality, the word “terrorism” carries a special stigma—just as the European Court of Human Rights once said of the term “torture.”⁹⁰ Hence, there is a significant downside to the exclusion of state violence from this legal category. Part of the justification for this exclusion is that the Rome Statute of the International Criminal Court⁹¹ regulates state violence.⁹² Such an argument fails to convince, however, in a world where three of the five permanent members of the Security Council, and some ninety states overall, have not ratified that treaty.⁹³

In any case, these outstanding questions do not mean that we have no international legal definition of terrorism, as conventional wisdom in some circles suggests.⁹⁴ Even prior to the High Level Panel report, Antonio Cassese asserted that, “a definition of terrorism does exist” in international law.⁹⁵ He emphasized that disagreement persists only with regard to the exceptions to that definition. In his view,

[I]logically, to say that because there is no consensus on the exception a general notion has not evolved would be a misconception. It is as if one were to say that, since in international criminal law it is doubtful whether murder may exceptionally be justified by duress, as a result one could not define murder.⁹⁶

To support his thesis, he points to the number of treaties and other legal texts

86. *Id.* ¶ 160.

87. For arguments about the prevalence of state terrorism, see *WESTERN STATE TERRORISM* (Alexander George ed., 1991).

88. High Level Panel, *supra* note 82, ¶ 160.

89. *Id.* ¶ 159-161.

90. *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 41, ¶ 167 (1978).

91. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90.

92. High Level Panel, *supra* note 82, ¶ 158.

93. Of the permanent members of the U.N. Security Council, the only states which have ratified the Rome Statute are France and the United Kingdom. China, Russia and the United States have all failed to do so. *See The States Parties to the Rome Statute*, <http://www.icc-cpi.int/asp/statesparties.html> (last visited Oct. 29, 2007).

94. Higgins, *supra* note 79, at 27.

95. Antonio Cassese, *Terrorism as an International Crime*, in *ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM*, *supra* note 13, at 213-14.

96. *Id.* at 214-15.

that not only prohibit but in some cases criminalize terrorism.⁹⁷ Current U.N. High Commissioner for Human Rights, Louise Arbour, came to a similar conclusion when she stressed that “many of the elements of the crime of terrorism are already established.”⁹⁸ *Inter alia*, she points to the decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Galic*, the first international criminal tribunal conviction for the crime of terror.⁹⁹ Significantly, the ICTY specifically “rejected claims that convicting a person on the basis of this crime violated the principle of *nullum crimen sine lege*.”¹⁰⁰

Still, other scholars continue to raise the definitional problems as an ongoing threat to the appropriate enforcement of international law. Andrew Clapham, for example, underscores the concern in the human rights field with “overly flexible definitions of ‘terrorism’ and ‘terrorist groups’ . . . adopted at the national level.”¹⁰¹ This, he fears, may lead to continued violation of the freedom of expression of opposition figures around the world.¹⁰²

Indeed, enough of an international consensus exists on the core of a definition of terrorism for enforcement efforts to proceed.¹⁰³ However, the perceived lack of consensus, based largely on the General Assembly’s failure to adopt a final definition for the draft Comprehensive Convention on International Terrorism (Comprehensive Convention), discussed below, remains profoundly destabilizing to the global discussion of terrorism. It is no doubt for largely political reasons, rather than for filling an actual substantive gap, that the U.N. High Level Panel report urged the adoption of the Comprehensive Convention defini-

97. These include the Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; the Protocol Additional to the Geneva Conventions of August 12, 1949, The Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609, 16 I.L.M. 1442, June 8, 1977 (Protocol II) Article 4(2)(d); the Statute of the International Criminal Tribunal for Rwanda, Article 4, U.N. Doc. S/RES/955 (1994) (Annex), 33 I.L.M. 1598; and the International Convention for the Suppression of the Financing of Terrorism, *supra* note 83, at Article 2. He also cites the conclusion of the Supreme Court of Canada that the latter definition is “workable” and “fair.” Cassese, *supra* note 95, at 216.

98. Louise Arbour, U.N. High Commissioner for Human Rights, Keynote Address: Security Under the Rule of Law (Aug. 27, 2004), at 3, *available at* www.hchr.org.co/publico/comunicados/2004/cp0431.pdf.

99. *Prosecutor v. Galic*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-98-29-T (Dec. 5, 2003).

100. Arbour, *supra* note 98, at 3. This maxim translates as, “There can be no crime committed without a violation of the penal law as it existed at the time.”

101. Andrew Clapham, *Terrorism, National Measures and International Supervision*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, *supra* note 13, at 296.

102. *Id.*

103. Note in particular the pragmatic reductionist approach to the regulation of terrorism wherein some international instruments “target manifestations of the practice rather than treat it as a generic whole,” as described in Richard Garnett and Paul Clarke, *Cyberterrorism: A New Challenge for International Law*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, *supra* note 13, at 465-66.

tion.¹⁰⁴ As the High Level Panel itself noted, “[l]egally, virtually all forms of terrorism are prohibited by one of 12 international counter-terrorism conventions, international customary law, the Geneva Conventions or the Rome Statutes [sic].”¹⁰⁵

Nevertheless, this perception of outstanding definitional lacunae leads to nervousness about even using the word “terrorism,” with the definitional challenges in question sometimes exaggerated. Hence, Amnesty International’s (AI) boilerplate explanation of why it used to avoid using the term “terrorism” overstated the outstanding problems with the definition of the term, and understated the degree of legal agreement about elements of that definition.¹⁰⁶ For example, in a 2002 report on attacks on Israeli civilians by Palestinian armed groups, AI noted that it

does not use the term [terrorism] because it does not have an internationally agreed definition and in practice is used to describe quite different forms of conduct. States and commentators describe acts or political motivations that they oppose as “terrorist”, while rejecting the use of the term when it relates to activities or causes they support. This is commonly put as ‘one person’s terrorist is another person’s freedom fighter’. . . . Recent attempts at the United Nations to finalize a comprehensive international convention on ‘terrorism’ stalled in part because of disagreements between governments about the definition.¹⁰⁷

Obviously, there are potential hazards involved in utilizing the word in the context of the Israeli-Palestinian conflict, where the term is highly charged.¹⁰⁸ Still, this quoted language, variations of which AI has reiterated, overstates the extent of the definitional problem, as human rights proponents sometimes do.¹⁰⁹ It also fails to concede that there is substantial international consensus about labeling as terrorism most of the types of attacks on civilians by armed groups documented and condemned in the same report. In fact, there are international legal norms that require the prevention and punishment of such acts as terrorism or as

104. High Level Panel, *supra* note 82, ¶ 163.

105. *Id.* ¶ 159.

106. This argument makes even less sense when one recalls that a number of contentious terms in international human rights law have not yet been conclusively defined either. A case in point is the term “minority,” which is nevertheless a category subject to the protection of human rights law, and which benefits from human rights advocacy. *See, e.g.*, Mary Ellen Tsekos, *Minority Rights: The Failure to Protect the Roma*, 9 No. 3 Human Rights Brief 26 (2002), available at <http://www.wcl.american.edu/hrbrief/09/3roma.cfm>.

107. Amnesty International, *Without Distinction: Attacks on Civilians by Palestinian Armed Groups*, AI Index: MED 02/003/2002, July 2002, at 7.

108. Note the analysis of the use of “terrorism” in this context in Chomsky, *supra* note 16 at 135-141. Most recently, Hamas has banned outdoor prayers in Gaza as a way of stifling protest by its Palestinian opponents based on the claim that, *inter alia*, such outdoor prayers “were used for the purpose of . . . practicing terrorism.” BBC News Online, *Hamas bans Gaza outdoor prayers*, Sept. 4, 2007, http://news.bbc.co.uk/2/hi/middle_east/6978540.stm.

109. *See, e.g.*, Touro Law Center Institute for Human Rights, *There is No UN Definition of Terrorism*, <http://www.eyeontheun.org/facts.asp?1=1&p=61> (last visited Nov. 15, 2007).

terrorist acts.¹¹⁰

As the human rights movement pushes international law forward in areas where it perceives the need to protect human rights, it should be careful about ducking behind a shield of legality. If the law is insufficient, human rights advocates should be supporting standard setting. To announce a legal lacuna and then walk away from this problem is neither a responsible nor a persuasive approach.

a. Current Developments: The Definition of Terrorism in the Comprehensive Convention

The draft Comprehensive Convention is an effort to combine and expand the twelve existing U.N. counter-terrorism treaties and offer a “legally uniform regime for judicial cooperation and prosecution of terrorist activities.”¹¹¹ Government negotiators have agreed upon much of the text. However, crucial outstanding issues remain.

The major political fault line in the drafting has been between Western states on the one hand, and the Organization of the Islamic Conference (OIC) and the League of Arab States on the other. The former bloc of states has sought to exclude state conduct from the definition of terrorism, while the latter has sought to include state terrorism, and to find ways to exempt actions for self-determination from the category. However, in the wake of the 2005 London bombings, the head of the Arab League endorsed a separate text which affirmed that targeting civilians “cannot be justified by any cause or grievance.”¹¹² Here he seemed to embrace an absolutist vision. Many states in the Arab League, such as Algeria, now face non-state actor terrorism from the victims’ perspective, and this reframes the politics of the definitional debate.¹¹³

In February 2007, the General Assembly’s Ad Hoc Committee on Terror-

110. See, e.g., International Convention for the Suppression of Terrorist Bombings, art. 2, Dec. 15, 1977, U.N. Doc. A/RES/52/164, 37 I.L.M. 249; International Convention for the Suppression of the Financing of Terrorism, *supra* note 83.

111. Center for Transatlantic Relations, *SHOULDER TO SHOULDER: VIEWS FROM GOVERNMENTS AND CIVIL SOCIETY ON COOPERATIVE SECURITY* (Ctr. For Transatlantic Relations, D.C.), September 2003, at 1, available at http://transatlantic.sais-jhu.edu/PDF/publications/mewlsetterseptember_2003.pdf. The drafting process began in 1996; negotiations now proceed on the basis of a text introduced by India in 2001. For a critique of that draft, see AMNESTY INTERNATIONAL, UNITED NATIONS GENERAL ASSEMBLY, 56TH SESSION 2001, DRAFT COMPREHENSIVE CONVENTION ON INTERNATIONAL TERRORISM: A THREAT TO HUMAN RIGHTS STANDARDS (2001), available at <http://web.amnesty.org/802568F7005C4453/0/C2B5C77098FC83D480256AEF0050ED19?Open>. Critique of the subsequent draft is found in Letter from Amnesty International & Human Rights Watch, *Comprehensive Convention Against International Terrorism* (Jan. 28, 2002), available at <http://www.hrw.org/press/2002/01/terror012802-ltr.htm>.

112. *Arab Chief Clears Terrorism Definition*, AL-JAZEERA, July 25, 2005, <http://english.aljazeera.net/English/Archive/Archive?ArchiveID=13727>.

113. Reisman, *supra* note 60, at 22.

ism met to work further on the draft Convention.¹¹⁴ Delegates, including the representative of the OIC, “reaffirmed [their] determination to make every effort to resolve outstanding issues related to the legal definition of terrorism.”¹¹⁵ During this meeting, the Ad Hoc Committee recommended the establishment of a working group to finalize the draft Convention at the sixty-second session of the General Assembly beginning in September 2007.¹¹⁶

In any case, just because governments have not yet agreed upon the article defining terrorism in the draft Comprehensive Convention does not mean the specified conduct is not already prohibited by other international law, either conventional or customary. Even absent agreement on the Comprehensive Convention, the pre-existing definitions, found in other documents, prevail.¹¹⁷

b. “Terrorism”/Terrorism: Language, Law and Ambiguity

As noted above, given the continuing suggestion that terrorism still lacks a definition in international law, some human rights advocates have been wary of even using the word. This is a mistake. After the London bombings, Palestinian intellectual Khaled Hroub published an article in the Arab press that called for “banishing all ambiguity” from how such acts are discussed, an appeal that is relevant here.¹¹⁸

Amnesty International has recently decided to stop using quotation marks around the word “terrorism,” which it had previously used to indicate that the exact meaning of the term remains contested.¹¹⁹ This practice was unintentionally reminiscent of a letter I received from Congressman Joe Knollenberg (R-MI), in response to my correspondence on torture concerns, in which he put the word “torture” in quotation marks every time it appeared. In that context, human rights activists would instantly recognize the denial such punctuation can seem

114. Press Release, General Assembly, Considering Sixth Committee Reports, Adopts Text on Criminal Accountability of U.N. Officials, Experts on Mission, U.N. Doc. GA/10544 (Dec. 4, 2006). They also discussed holding a high-level international conference on terrorism in Cairo. *Id.*

115. Press Release, U.N. Department of Public Information, Ad Hoc Committee Negotiating Comprehensive Anti-Terrorism Convention Opens Headquarters Session (Feb. 5, 2007), available at <http://www.un.org/News/Press/docs/2007/L3112.doc.htm>.

116. Report of the Ad Hoc Committee Established by General Assembly Resolution 51/210 of 17 December 1996, U.N. Doc. A/62/37, 2007, at 4.

117. See, for example, the definitions in many of the sources cited *supra* note 83.

118. Khaled Hroub, *Appeler le crime par son nom*, AL HAYAT, reprinted in COURRIER INT’L, July 13-20, 2005, at 6. William Schulz, former Executive Director of Amnesty International USA, writing in his personal capacity, called on the human rights movement to “have no hesitation using the word terrorism and roundly condemning it.” WILLIAM SCHULZ, TAINTED LEGACY: 9/11 AND THE RUIN OF HUMAN RIGHTS 182 (2003).

119. Previously, for example, in its report, *Iraq: In Cold Blood: Abuses by Armed Groups*, it only used the word “terrorism” when it indicated that it avoids the term because “there is no internationally agreed definition of what constitutes ‘terrorism’ and in practice the term is used to describe different forms of conduct.” AMNESTY INTERNATIONAL, IRAQ: IN COLD BLOOD: ABUSES BY ARMED GROUPS 5 (July 25, 2005) (AI Index: MDE 14/009/2005).

to suggest, intentionally or otherwise. Hence, AI is to be commended for ceasing the use of its questioning punctuation marks,¹²⁰ even while it rightfully continues to critique unwarranted uses of the term “terrorism” to repress people who may be non-violent dissidents.¹²¹

The U.N., including its human rights experts and mechanisms, uses the term “terrorism” (without quotation marks) regularly.¹²² Many other international human rights non-governmental organizations (NGOs) also use the word, though sparingly.¹²³ A review of the websites of Human Rights Watch, Human Rights First, the International Commission of Jurists and the International Federation for Human Rights (FIDH) indicates that they all use the word, but only to a limited extent.¹²⁴ Most human rights organizations seem to use the word “terrorism” when speaking generally, but avoid labeling particular atrocities as such.¹²⁵

In contrast, some prominent local and regional NGOs seem to be more comfortable using the word “terrorism”—and also seem to be stepping up their efforts to oppose it. For example, a 2005 statement by the Asian Centre for Hu-

120. Note that, as explained above, this article does use quotation marks around “war on terror” and related terms, due to the controversy about those terms and their parameters. Unlike “terrorism,” those terms are certainly not legal terms of art nor do they have international consensus definitions. See discussion *supra* note 22.

121. See AMNESTY INTERNATIONAL, UK: JUSTICE PERVERTED: APPEALS UNDER THE ANTI-TERRORISM, CRIME AND SECURITY ACT 2001 (Dec. 11, 2003) (AI Index: EUR 45/029/2003). Another problem is that the term “terrorism” is sometimes applied selectively so as not to apply to actions against one’s opponents. See, e.g., Posting of Marjorie Cohn, *Fighting Terror Selectively: Washington and Posada*, May 10, 2007, available at <http://marjoriecohn.com/2007/05/fighting-terror-selectively-washington.html>.

122. In 2005, Kofi Annan launched a major U.N. strategy to combat terrorism. See Kofi Annan, Secretary-General’s Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security: A Global Strategy for Fighting Terrorism (Mar. 10, 2005), available at <http://www.un.org/apps/sg/prints/gststs.asp?nid=1345> [hereinafter *Global Strategy for Fighting Terrorism*]. Note also the litany of United Nations Conventions banning terrorism, and aspects of terrorism *qua* terrorism. See, e.g., International Convention for the Suppression of Terrorist Bombings, *supra* note 110. The U.N. High Level Panel devoted an entire section of its report to “[t]errorism,” arguing that it “attacks the values that lie at the heart of the Charter of the United Nations: respect for human rights; the rule of law; rules of war that protect civilians; tolerance among peoples and nations; and the peaceful resolution of conflict.” High Level Panel, *supra* note 82, ¶ 145.

123. See, e.g., INTERNATIONAL CRISIS GROUP, TERRORISM IN INDONESIA: NOORDIN’S NETWORKS (2006), available at <http://www.crisisgroup.org/home/index.cfm?l=1&id=4092>; INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, HUMAN RIGHTS AFTER SEPTEMBER 11 (2002), available at http://www.ichrp.org/paper_files/118_p_01.pdf.

124. See, e.g., International Commission of Jurists, *Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, Leading Jurists Begin Terrorism Inquiry in Moscow*, Jan. 29, 2007, available at http://ejp.icj.org/hearing2.php3?id_article=104&lang=en, and Fédération internationale des ligues des Droits de l’Homme, *Counter-Terrorism Measures and Human Rights: Keys for Compatibility*, http://www.fidh.org/article.php3?id_article=2784 (last visited Nov. 15, 2007). When they do employ the term, however, it is used without quotation marks.

125. See, e.g., International Commission of Jurists, *Human Rights Lawyers Condemn Bomb Attacks in London*, July 7, 2005, www.icj.org/news.php3?id_article=3728&lang=en (condemning the London “bomb attacks” without labeling them as terrorism).

man Rights (AHCN), entitled *Jehadi Terror in Bangladesh*, which responded to the 400 coordinated bombings across that country on August 17, 2005, makes frequent use of the words “terrorism” and “terrorist” without quotation marks.¹²⁶ ACHR’s statement laments the failure of the Bangladesh government to confront both fundamentalism—an issue that it specifically references in the statement—and terrorism: “[H]igh profile cases of terrorism do not lead to prosecution, the perpetrators of the attacks on the NGOs, journalists and liberal thinkers have been roaming scot-free.”¹²⁷ Additionally, many individual victims, as well as NGOs comprised of victims, identify themselves as “victims of terrorism.”¹²⁸

Despite the remaining grey areas, the word “terrorism” is now part of both legal and public discourse, and cannot be avoided. Rosalyn Higgins’s deconstruction of the term is now surpassed by the Cassese approach that asserts the existence of an overarching definition, subject only to the remaining debates about exceptions. Given that approach, it is indeed still a legitimate endeavor to continue to raise concerns about the outstanding challenges to the fundamental definition,¹²⁹ and, in particular, about the expanding scope of some municipal law definitions to encompass non-violent forms of dissent.¹³⁰ The latter abuse of the term “terrorism” does great violence to the reality that extremist movements that target civilians do exist, and must be stopped. However, the response should not be to downplay the very real threat posed by such movements, but rather to reclaim the vigilant universalist high ground.

2. Defining Torture

In a warped mirror image of sorts,¹³¹ security experts and apologists for

126. Asian Centre for Human Rights, *Jehadi Terror in Bangladesh*, ACHR REVIEW, Review 89/05, Sept. 7, 2005, available at <http://www.achrweb.org/Review/2005/89-05.htm>.

127. *Id.*

128. See, e.g., *The Madrid Declaration*, Adopted by the First World Congress of Terrorism Victims, Jan. 2004, available at http://www.coe.int/t/e/legal_affairs/legal_co-operation/fight_against_terrorism/3_codexter/working_documents/2004/CODEXTER%20_2004_%20Inf%2002%20E%20Madrid%20manifesto.pdf.

129. For example, the definition of “terrorist” is a profoundly more difficult question. Who is a terrorist? Someone found guilty of a terrorist offense in a court in accordance with internationally accepted fair trial norms? Someone purportedly planning such acts? Someone who belongs to an organization which has engaged in such acts in the past? Someone who advocates such behavior? For a discussion of related issues, see Silvia Borelli, *The Treatment of Terrorist Suspects Captured Abroad: Human Rights and Humanitarian Law*, in ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM, *supra* note 13 at 39, 39-62.

130. See, e.g., Clapham, *supra* note 101, at 296.

131. A note of caution: the definitional discourses of human rights advocates and security proponents critiqued here are also radically different. Human rights discourse does not condone terrorism, but often fails to pay adequate attention to it. However, some of the security discourses based on definitional challenges to torture and CIDTP actually justify violations of *jus cogens* norms.

harsh counter-terror strategies sometimes justify torture and cruel, inhuman or degrading treatment or punishment (CIDTP) by alleging that there are definitional problems with these terms. Such questioning rips the fabric of fundamental international law norms. Human Rights Watch argues that the absolute prohibition of torture and CIDTP is a cornerstone of international human rights standards, and “one of the most fundamental of all human rights.”¹³² Torture is undoubtedly the most rigorously codified of international human rights,¹³³ it rises to the level of *jus cogens*; it is subject to universal jurisdiction.¹³⁴ An entire human rights treaty regime under the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) seeks to achieve its total abolition.¹³⁵ Furthermore, moving from rules to values, the prohibition of torture must be at the heart of any conception of human dignity.

The Convention against Torture defines torture, in relevant part, as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹³⁶

Although this definition is the imperfect product of a difficult decision process, it is workable.¹³⁷ There is more controversy about the definition of terrorism in international law than about the definition of torture, yet some policymakers and commentators quibble about the latter while declaring war on the former.

Interestingly, despite the recent congressional debate on the meaning of CIDTP,¹³⁸ at the international level the U.S. government remains committed to

132. Human Rights Watch, *Torture and Other Cruel, Inhuman or Degrading Treatment*, <http://www.hrw.org/about/projects/womrep/General-86.htm> (last visited Nov. 17, 2007).

133. As Sands argues, “[t]his is one area in which the rules of international law are clear.” SANDS, *supra* note 56, at 207.

134. U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 5-8, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

135. There are currently 145 States Parties to this treaty. See U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Ratifications or Reservations, <http://www.ohchr.org/english/bodies/ratification/9.htm> (last visited Oct. 29, 2007).

136. Convention against Torture, *supra* note 134, at art. 1(1).

137. On the difficult drafting history, see J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* (Martinus Nijhoff 1988). On imperfections in the definition as diagnosed by human rights experts, see Ahcene Boulesbaa, *Analysis and Proposals for the Rectification of the Ambiguities Inherent in Article 1 of the UN Convention on Torture*, 5 FLA. J. INT’L. L. 293 (1990). For a contemporary overview of definitional questions, see GAIL MILLER, *DEFINING TORTURE* (2005).

138. See Alfred McCoy, *The Bush Legacy of Legalized Torture*, Feb. 8, 2006, http://www.tomdispatch.com/post/57336/tomdispatch_alfred_mccoy_on_how_not_to_ban_torture_i

agreed understandings. As it stated in its May 2005 report to the U.N. Committee against Torture, “The definition of torture accepted by the United States upon ratification of the Convention . . . remains unchanged.”¹³⁹

With regard to CIDTP, a murkier area than torture, the Convention against Torture does not offer a definition.¹⁴⁰ For guidance on its meaning, a footnote to the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment stipulates that CIDTP should be interpreted so as to extend the widest possible protection against abuses.¹⁴¹ The U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also explains that “Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.”¹⁴² CIDTP is then part of the same continuum of practices as torture. Both are illegal, but CIDTP is lower on the scale with regard to either the required severity of the pain and suffering inflicted, or the intentionality of its infliction.

While this broad and open approach to understanding CIDTP poses some danger, both in terms of legitimate confusion about acceptable detention practices and bad faith governmental evasion, it is hard to imagine an exact definition that provides the needed flexibility and is not even more amenable to manipulation. This was precisely the conclusion of the Working Group of the Commission on Human Rights that studied early draft texts of the Convention against Torture.¹⁴³ The Human Rights Committee also rejected an enumerative approach.¹⁴⁴ Such a list could never be completely inclusive. The human imagination for cruelty stuns us all.¹⁴⁵ Interestingly, the recent U.S. report to the U.N.

n_congress.

139. United States of America, *Second Periodic Report to the U.N. Committee Against Torture* [hereinafter *CAT Report*], ¶ 11, U.N. Doc. No. CAT/C/48/Add.3 (June 29, 2005).

140. This too should make human rights advocates cautious when making arguments against using the word terrorism because of a claimed insufficiency in the definition.

141. U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 173, U.N. GAOR, 43d Sess., 76th plen. mtg., U.N. Doc. A/RES/43/173 (Dec. 9, 1988).

142. U.N. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G. A. Res. 3452, at 91, art. 1(2), U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034 (Dec. 9, 1975).

143. See BURGERS & DANIELIUS, *supra* note 137, at 70.

144. General Comment 20 (Article 7), U.N. GAOR, Hum. Rts. Comm., 44th Sess., ¶ 4, U.N. Doc. HRI/GEN/1/Rev.1 (1992).

145. Just to list some of the findings of the Taguba report detailing torture at Abu Ghraib illustrates this point. Methods of torture and ill-treatment that Major General Taguba reported included, “Breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees; beating detainees with a broom handle and a chair; threatening male detainees with rape; . . . sodomizing a detainee with a chemical light and perhaps a broom stick, and using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.” Report of Major General Antonio M. Taguba as cited in Seymour Hersch, *Torture at Abu Ghraib*, NEW YORKER, May 10, 2004, available at <http://www.newyorker.com/printable/?fact/040510fa>.

Committee against Torture does not critique the concept of CIDTP. Rather, the report restates the “commitment of the United States . . . to prevent and prosecute serious abuses, whether or not they fall within these definitions of torture or cruel, inhuman or degrading treatment or punishment.”¹⁴⁶

Here, skepticism about an overly literal approach to rules may be appropriate. This critical stance should not override the rules, but rather shape our interpretive process, especially where the legal principles in question are difficult to apply. As Rosalyn Higgins has rightly suggested, where specific rules alone cannot answer every question, the lacuna should be filled by a decisional process that meets the goals of the normative system of international law.¹⁴⁷ For this process to work, however, there must be some shared understanding of, and a real commitment to, these goals. If President Bush is actually as unclear about the meaning of “outrages upon human dignity,” as he claimed to be in the controversy over Common Article 3 of the Geneva Convention, we face a major problem in realizing such a process with regard to torture and CIDTP.¹⁴⁸

Despite all these definitional debates, we can conclude from the brief overviews above that both terrorism and torture are defined sets of practices that are unequivocally prohibited and criminalized by a range of international treaties and principles of customary international law. This reality is also reflected in both national and international case law. Though more can be done to refine our understanding of the terms “terrorism” and “torture,” both concepts already have strong legal grounding. Philosophically, these terms are also symbiotic, as noted above. Consequently, as discussed below, the absolute prohibition of one can only be sustained in today’s world by the absolute approach to the other.

IV. TORTURED LEGAL ARGUMENTS

Notwithstanding this interrelationship between the norms against terrorism

146. *CAT Report*, *supra* note 139, ¶ 18.

147. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 1-12 (1995).

148. President George W. Bush, Press Conference of the President (Sept. 15, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html>. See also the “glossary of the unique Bush administration definitions” related to torture and CIDTP in David Luban, *Torture, American-Style*, WASH. POST, Nov. 27, 2005, at B01. Luban asks:

What does humane mean? Not much, it seems. Amazingly, the Army’s Schmidt report declared that none of the tactics used in Guantanamo were ‘inhumane.’ Along similarly minimalist lines, Gonzales defined ‘humane treatment’ as requiring nothing more than providing food, clothing, shelter and medical care. In the Bush lexicon, therefore, sexual humiliation, acute sleep deprivation and threats to have a detainee’s mother kidnapped and imprisoned are humane.

Id. Attorney General Michael Mukasey’s “refusal to declare waterboarding to be torture” during his confirmation hearings fits into the same category. See *Mukasey Stays Vague on Waterboarding*, CNN.com, Oct. 30, 2007, <http://www.cnn.com/2007/POLITICS/10/30/senate.mukasey/index.html>.

and those against torture, in the “war on terror” we have seen many methods deployed in the name of defeating terrorism that instead echo its rationale. As a result, terrorism has won a great victory in the last six years, because some of the world’s leading democracies have proved willing, in the face of terrorism, to undermine the rule of law in a manner that terrorists could never have achieved by themselves. Fearing more attacks against civilians in the post-September 11 era, states, including liberal democracies, have curtailed a range of human rights protections, both de jure and de facto.¹⁴⁹

There are many examples of these assaults on human rights. Perhaps the worst from a normative perspective is the undermining of the peremptory norms banning torture and CIDTP.¹⁵⁰ This questioning of legal norms is also reflected in practice. We know now that torture and CIDTP are widespread in the context of the “war on terror.”¹⁵¹ Deaths in custody in Bagram Air Base in Afghanistan and an alarming suicide attempt rate in Guantanamo Bay confirm that such detention practices are taking their toll.¹⁵²

A. Post-September 11 Justifications of Torture

Some legal academics have contributed to the environment that facilitates such abuses by assaulting the absolute position against torture, often while claiming to oppose the practice in general. Famously, Harvard Law Professor Alan Dershowitz has hypothetically suggested the use of dental drills on unanaesthetized teeth à la the Nazi dentist of The Marathon Man in the interrogation of certain terrorist suspects.¹⁵³ Rather than being denounced, he appears

149. See, e.g., Amnesty International, USA: *Five Years on ‘the Dark Side’: A Look Back at ‘War on Terror’ Detentions*, AI Index: AMR 51/195/2006, Dec. 13, 2006, available at <http://web.amnesty.org/library/Index/ENGAMR511952006?open&of=ENG-USA>.

150. For a thorough overview of these norms, see Mary Ellen O’Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L. J. 1231 (2005).

151. See, e.g., Detainee Abuse and Accountability Project, *By the Numbers: Findings of the Detainee Abuse and Accountability Project*, (Apr. 26, 2006) (Human Rights Watch Index No. G11802), available at <http://hrw.org/reports/2006/ct0406/ct0406web.pdf>; the Online Archive of Documents on Prisoners of the War on Terror Posted by the University of Minnesota’s Center for Bioethics and Human Rights Center, www1.umn.edu/humanrts/OathBetrayed/index.html (last visited Nov. 17, 2007).

152. See, e.g., Amnesty International, *Terror and Counter-Terror: Defending Our Human Rights* (Aug. 26, 2006) (AI Index No. ACT 40/009/2006), available at <http://web.amnesty.org/library/Index/ENGACT400092006?open&of=ENG-313>; Amnesty International, *Worldwide Appeal, Afghanistan: Detained at Bagram* (Nov. 2004), available at <http://web.amnesty.org/appeals/index/afg-010704-wwa-eng>; International League for Human Rights, *Human Rights Groups Write to Bush on Abuse of Iraqi Prisoners* (May 7, 2004), available at http://64.233.169.104/search?q=cache:qaXhyRaX5NQJ:www.ilhr.org/ilhr/regional/centasia/protests/abu_graib.htm+human+rights+watch+suicide+bagram+air+base+detainees&hl=en&ct=clnk&cd=6&gl=us (alleging that “[n]umerous detainees have been killed or attempted suicide in custody in Afghanistan, Iraq and Guantanamo Bay prompting unprecedented expressions of concern by the International Committee of the Red Cross . . .”).

153. ALAN DERSHOWITZ, *WHY TERRORISM WORKS* 144 (2002).

everywhere, and Nobel Prize winner Elie Wiesel has even lauded his book.¹⁵⁴ Dershowitz has gone so far as to call for judicial torture warrants that would legalize the use of some torture in what he sees as extreme cases.¹⁵⁵ Though the Harvard Professor is most famous for this, Oren Gross of the University of Minnesota Law School has expressed a similar view. In his oral presentation at the American Society of International Law (ASIL) 2005 Annual Meeting, he urged his audience to confess that if *their* children were kidnapped, they would want the abductors tortured to elicit information that could locate them.¹⁵⁶

I thought about Gross's argument when I saw the film *El Manara* several months later in Algiers. The impulse he ascribed to his audience was exactly that which led Fawzi to apply a blow torch to Ramdane in the movie, to disastrous effect.¹⁵⁷ How dangerous it is to suggest that the extreme human emotions provoked by unbearable risks to our own families become official policy. Much like the attempt to force Michael Dukakis in his 1988 debate with George H.W. Bush to endorse the death penalty for his wife's hypothetical rapist and murderer, Gross at the ASIL meeting exhorted his audience to show they cared (about their children) by embracing brutality—a frequent refrain in this debate.¹⁵⁸ He insisted, as do many who make similar arguments, that we all really want exceptions to the ban on torture if we truly search our hearts.¹⁵⁹ And thus the completely understandable reactions of individual family members were conflated with acceptable responses of the state, much like what happened so tragically in *El Manara*.

Yet, paradoxically, Gross insisted that he was otherwise in complete agreement with Nigel Rodley, former U.N. Special Rapporteur on torture, with whom he shared the podium at the ASIL meeting.¹⁶⁰ Alan Dershowitz too claims that he does not advocate torture, while suggesting scenarios in which sterile needles could be inserted under terror suspects' fingernails during inter-

154. *Id.* at back cover.

155. *Id.* at 156-60.

156. Oren Gross, Remarks on Panel: Torture, Violence and the Global War on Terror, Washington, DC (Apr. 2, 2005) (notes of oral presentation on file with the author). The print version, which uses different language, is available in Oren Gross, *Lecture Commentary by Oren Gross*, 99 AM. SOC'Y INT'L L. PROC. 407 (2005).

157. *El Manara*, *supra* note 1.

158. Transcript of Second Bush-Dukakis Presidential Debate, Los Angeles, CA, (Oct. 13, 1988), available at <http://www.presidency.ucsb.edu/showdebate.php?debateid=14>. Journalist Bernard Shaw asked: "Governor, if Kitty Dukakis were raped and murdered, would you favor an irrevocable death penalty for the killer?" *Id.*

159. Gross, *supra* note 156; *Lecture Commentary*, *supra* note 156, at 408.

160. Unlike Dershowitz, Gross supports an absolute ban on torture in law. But in exceptional cases, he holds that the ticking time bomb scenario should provide a basis for the mitigation of punishment of official perpetrators of torture. Gross, *supra* note 156; *Lecture Commentary*, *supra* note 156, at 409. As Nigel Rodley indicated on the same panel, to codify such an approach provides an invitation to torture. Remarks on Panel, *supra* note 156. While Gross's stance maintains the absolute ban in law—which is important—it renders this ban a fiction. See also Nigel Rodley, *Torture, Violence and the Global War on Terror*, 99 AM. SOC'Y INT'L L. PROC. 402, 406 (2005).

rogation.¹⁶¹ In the pre-September 11 environment, such intellectual justifications of torture were largely recognized as outside the parameters of decency, ineluctably an affront to human dignity.¹⁶² However, among its many terrible legacies, September 11 has shifted those parameters.

Media commentators from left and right demonstrate this sad reality. For example, in November 2001, the liberal columnist Jonathan Alter wrote a much-discussed piece for *Newsweek* entitled *Time to Think About Torture*. In this article, he suggested we should not be too squeamish about interrogation practices (though he protested that he was not actually condoning torture) and he actually advocated the consideration of what have become known as “extraordinary renditions.”¹⁶³ In 2005, after the Abu Ghraib scandal had broken, after serious allegations of U.S. human rights abuses surfaced in the *Washington Post*¹⁶⁴ and elsewhere, the *Wall Street Journal* published a commentary on U.S. detention practices in the “war on terror,” by conservative author Heather MacDonald, called *Too Nice for Our Own Good*. In it, she railed:

Our terrorist enemies have declared themselves enemies of the civilized order. In fighting them, we must hold ourselves to our own high moral standards—without succumbing to the utopian illusion that we can prevail while immaculately observing every precept of the Sermon on the Mount.¹⁶⁵

Here, in the name of exigency, we see undermined the basic notion that

161. See, e.g., Alan Dershowitz, *Tortured Reasoning in TORTURE: A COLLECTION* 257, 266 (Sanford Levinson ed., 2004). To be fair to Dershowitz, he suggests that allowing for judicial warrants to engage in torture in exceptional situations will lead to less torture than currently used. Alan Dershowitz, *Torture Without Visibility and Accountability is Worse Than With It*, 6 U. PA. J. CONST. L. 326 (2003-2004). As he argues, “[i]f we are to have torture, it should be authorized by the law.” Alan Dershowitz, *Is There a Torturous Road to Justice?*, LA TIMES, Nov. 8, 2001, at 19. However, this accepts torture as a moral and effective practice. It also sidesteps the issue of the terrible harm to victims. He briefly notes the use of torture by France in Algeria during the 1954-62 war, quoting a French general who said, “The best way to make a terrorist talk when he refused to say what he knew was to torture him.” Alan Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275, 293 (2003-2004). However, Professor Dershowitz omits discussion of the terrible suffering of Algerians who were systematically tortured by the French Army. For the story of one such young Algerian woman, see SIMONE DE BEAUVOIR, *DJAMILA BOUPACHA* (1962). On the utility of using torture, Dershowitz overlooks the fact that the moral outrage over the practice hurt France domestically and internationally, and ultimately, the Algerian FLN won the war.

162. See, e.g., SCHULZ, *supra* note 118, at 157; José Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175 n.1 (2006), and Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1684-87 (2005).

163. Jonathan Alter, *Time to Think About Torture*, NEWSWEEK, Nov. 5, 2001, at 45. On renditions, he wrote, “[W]e’ll have to think about transferring some suspects to our less squeamish allies, even if that’s hypocritical.” *Id.*

164. See, e.g., Dana Priest & Barton Gellman, *U.S. Decries Abuse But Defends Interrogations; ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A1.

165. MacDonald, *supra* note 66. In a similar vein, see David Rivkin, Jr. and Lee A. Casey, *Getting Serious About ‘Torture’*, Oct. 22, 2007, WALL STREET J., at A19. Even more extreme, see the argument in Charles Krauthammer, *The Truth About Torture*, WKLY. STANDARD, Dec. 5, 2005, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/006/400rhqav.asp>.

human dignity is not only technically non-derogable, but also an essential value, a timeless and central goal and as such non-negotiable. This notion is all too *à propos* when Congress passed legislation in 2006 that may or may not have legalized certain acts of torture and CIDTP,¹⁶⁶ but at the very least has clearly exercised the judicial safeguards that might prevent these practices.¹⁶⁷

In such a universe, only an absolute rejection of torture constitutes any opposition to the practice at all. Just as there is no room in a definition of terrorism for a “freedom fighters” exception, there is no room for exceptions in the definition of torture, even—and perhaps especially—in fighting terror. For the most part, in most situations, it is precisely in the allegedly “exceptional” moments (albeit sometimes writ large) that torture is used: on political opponents who pose “unique” threats to order, on particularly evil criminals who are concealing especially vital information, on the much discussed suspect with information about ticking bombs. (This last is a hypothetical I have never understood because, except on television, we will never know for sure whether we are in such a situation until after the fact, and in any case, nowadays most bombs do not tick.¹⁶⁸)

The ticking bomb hypothetical is a deeply flawed device used to shift the moral high ground away from those who oppose torture.¹⁶⁹ This rhetorical tool is persuasive to many despite the fact that torture is understood by a plethora of experts—including those who authored a 1983 CIA interrogation manual¹⁷⁰—to

166. See McCoy, *supra* note 138.

167. See *The U.S. Senate Has Passed Controversial Legislation Endorsing President George W. Bush's Proposals to Interrogate and Prosecute Foreign Terror Suspects*, BBC News Online, Sept. 29, 2006, <http://news.bbc.co.uk/2/hi/americas/5390848.stm>. This concern is magnified by the recent opinion of the United States Court of Appeals for the District of Columbia which upheld the provision of the Military Commissions Act of 2006 that strips the rights of all Guantanamo detainees to have their habeas corpus petitions heard in U.S. federal courts. See *Boumediene v. Bush*, No. 05-5062, 2007 U.S. App. LEXIS 3682 (D.C. Cir. 2007). The Supreme Court heard oral argument in the appeal of *Boumediene v. Bush*, consolidated with another case, on Dec. 5, 2007. See Center for Constitutional Rights, *Press Release: Guantánamo Attorneys to Justices: Restore the Constitution*, Dec. 5, 2007, available at <http://ccrjustice.org/newsroom/press-releases/guant%C3%A1namo-attorneys-justices%3A-restore-constitution>.

168. Bob Cochrane, co-creator of the popular television show “24,” admits, “Most terrorism experts will tell you that the ‘ticking time bomb’ situation never occurs in real life . . . But on our show it happens every week.” Jane Mayer, *Whatever It Takes*, NEW YORKER, Feb. 19, 2007, available at www.newyorker.com/printables/fact/070219fa_fact_mayer. This dramatic representation has become dangerous in the real world, as according to top U.S. military officials, DVDs of “24” circulate among American soldiers in Iraq, some of whom have emulated the frequent and gruesome torture on the show on real detainees. *Id.* As a result, top military officials recently met with the producers of “24” to implore them to change their plot lines, and for example “do a show where torture backfires.” *Id.*

169. See Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE W. RES. J. INT'L L. 231 (2006) (Symposium: “Torture and the War on Terror”).

170. According to excerpts of the “Human Resource Exploitation Training Manual,” reprinted in Harper’s Magazine, “Intense pain is quite likely to produce false confessions, fabricated to avoid additional punishment. This results in a time-consuming delay while an investigation is conducted and the admissions are proven untrue.” *Psychological Torture, CIA-Style*, HARPER’S MAG., Apr.

be ineffective at producing reliable information in such a situation.¹⁷¹ It is also incredibly dangerous to assume one is actually in the hypothetical situation in the real world of torture.¹⁷² The many mistakes, especially those on the basis of discrimination, that have allegedly been made in pursuit of terror suspects in the last few years starkly underscore the incredible danger of giving in to this alleged exception.¹⁷³ Moreover, it is the first push down a dangerous slippery slope of abhorrent human behavior. Quite simply, there is no way to cabin the practice. Torture spreads “like a cancer.”¹⁷⁴

Finally, the ticking bomb hypothetical shifts the argument away from the key question of the morally repugnant nature of the violence called torture, to questions of effectiveness. Human rights advocates are then forced to respond to the discourse of effectiveness by arguing that torture is not productive. They grapple with whether or not to even engage in this debate. Such a line of argument can be persuasive with the public, but it is also a major concession because it obscures the peremptory nature of the international ban on torture and the moral reasons for the ban. In other words, if it could be proved to be effective, would we then have to accept it?

B. Arguments for Torture, Arguments for Terror

To allow for torture in exceptional situations is quite simply to allow tor-

1997, at 23-24.

171. U.S. Army Brigadier General Patrick Finnegan, the dean of the United States Military Academy at West Point, has argued that torturing in a “ticking time bomb case” is “particularly pointless,” as the suspect would be even less willing to talk. “They know if they can simply hold out several hours, all the more glory—the ticking time bomb will go off!” Mayer, *supra* note 168. Top FBI interrogator Joe Navarro has also asserted that “torture was not an effective response.” *Id.* (as paraphrased).

172. Even after a full trial, in numerous capital cases defendants have been found to be wrongfully convicted, frequently on discriminatory grounds. *See, e.g.,* Michael Radelet, Hugo Adam Bedau & Constance Putnam, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987), and FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

173. Consider the case of Maher Arar, a Canadian national of Syrian origin who was arrested on suspicion of Al Qaeda membership while traveling through the United States. He was subsequently sent to Syria where he was detained and tortured for more than a year. The Canadian government later concluded that Arar had no connection to terrorism. *See Maher Arar: Timeline*, Jan. 26, 2007, cbc.ca, <http://www.cbc.ca/news/background/arar/>. During an October 2007 House Foreign Affairs Committee hearing on Arar’s rendition, Secretary of State Condoleezza Rice admitted that the U.S. government mishandled his case. *U.S. Handling of Arar Case “by no means perfect,”* CBC News Online, Oct. 24, 2007, <http://www.cbc.ca/world/story/2007/10/24/rice-arar.html>. *See also* Adam Liptiak & Leslie Eaton, *Mistrial is Latest Terror Prosecution Misstep for U.S.*, N.Y. TIMES, Oct. 24, 2007, available at http://www.nytimes.com/2007/10/24/washington/24justice.html?_r=1&ref=us&oref=slogin.

174. Oxford Professor Henry Shue has argued that though initially defended as an exceptional measure, torture spread through the French security apparatus during Algeria’s war of independence “like a cancer” until it became normal practice. *See* Alex Bellamy, *No Pain, No Gain? Torture and Ethics in the War on Terror*, 82 INT’L AFF. 122, 142 (2006).

ture.¹⁷⁵ Hence, absolute opposition to it remains essential. As the Convention against Torture sets out in one of its most important articles,

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.¹⁷⁶

The choice of language here is deliberate. Without it, we have no real prohibition of torture. This is precisely the sort of norm whose literal language we need to protect in the current moment.

However, like many international lawyers,¹⁷⁷ I subscribe to an ethical, humanist understanding of this prohibition, beyond literal language. My commitment to combating these practices is both a rules-based and a values- and goals-driven one. Still, it is not necessary for others to share my underlying reasoning to arrive at the same conclusion. There are additional, pragmatic reasons to champion the absolute ban on torture. Playing the counter-terrorism game outside the rules of international law often makes the situation worse as a practical matter.¹⁷⁸ The most recent and worrying example of this is found in the view of U.S. intelligence agencies that the “war on terror” as fought in Iraq has increased the risk of terrorism.¹⁷⁹ Respect for international norms could have helped to avoid or mitigate that outcome.

Undoubtedly, the absolute position against torture is also integral to absolute positions against terrorism. The two halves of terror/torture are interdependent. Though they are set out in opposition to one another in the war against terrorism-era debate about torture, they are much the same at root. As noted above, both torture and terror are based on the identical philosophical assumption: the permissibility of instrumentalizing severe and deliberate human suffering. Similarly, the rejections of terrorism and of torture also share the same premise: that there is something *apart* about intentionally inflicting such suffering. There can be no room for justifications of either half of terror/torture; apologia for one provokes and sustains apologia for the other.

Another shared aspect of the two practices is the unbridled coerciveness of

175. Gross’s attempt to both rebut Dershowitz’s suggestion of using torture warrants by defending an absolute legal ban, and simultaneously suggest official action in contravention of that ban in extreme situations, while commendable for its extraordinary gymnastics, is not a solution either. Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481 (2003/04). His logic is akin to that of defenders of terrorism who argue that such violence is “tragic,” but necessary to save lives, or end murderous occupations. See *infra* note 188 and accompanying text.

176. U.N. Convention against Torture, *supra* note 134, at art. 2(2).

177. See, e.g., David Luban, *Essay: Liberalism, Torture and the Ticking Bomb*, 91 VA. L. REV. 1425 (2005), and Richard Bilder & Detlev Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689 (2004).

178. For an eloquent critique of the “war against terrorism” as a “war without rules,” see Fitzpatrick, *supra* note 22, at 248.

179. On the NIE leaks, see Paul Reynolds, *Terror Report Clouds Bush Narrative*, BBC News Online, Sept. 27, 2006, <http://news.bbc.co.uk/2/hi/americas/5384548.stm>.

both terror and torture.¹⁸⁰ Both the High Level Panel definition of terrorism and the Convention against Torture definition of torture turn on notions of intimidation, compulsion, and coercion. As sociologist Lisa Hajjar has argued, the right not to be tortured “invests people, regardless of their social status, their political identity or affiliations, with a kind of sovereign right over their bodies and minds”¹⁸¹ This right is implicated by one of McDougal’s explanations of his understanding of human dignity, that is that it “refers to a social process . . . in which private choice, rather than coercion, is emphasized as the predominant modality of power.”¹⁸² Such a social process then can leave no room whatsoever for terror or torture.

To get around these absolutes, the distinction sometimes made is that the victims of terror are “innocent” whereas the victims of torture, we are assured by the proponents of its use in exceptional cases, are “guilty,” or at least possess guilty knowledge. Of course terrorists and *their* apologists often suggest that the “innocent” civilian victims are somehow culpable, whether because they voted for governments, or failed to overthrow them, or benefit from those governments’ policies which the terrorists claim to oppose, or perhaps they are guilty merely by identity.¹⁸³ The latter is an unspoken assumption made by the justifiers of torture as well. In the current moment, when we talk about torture as a tool of counter-terror, we often assume we are discussing treatment to be meted out to brown-skinned foreign Muslim men, after all. Discrimination may then shape notions of “guilt” and indeed of acceptable conduct toward terror suspects. What is essential about both norms against torture and those against terrorism is that they reject these extra-legal categorizations of innocent versus guilty and deem instead that certain treatment cannot be meted out to any per-

180. Rhonda Copelon similarly focused on such commonalities when she made her influential argument that in certain circumstances gross patterns of domestic violence were like torture and should be categorized as such. Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COLUM. HUM. RTS. L. REV. 291, 337 (1993-1994).

181. Lisa Hajjar, *Torture and the Future*, MIDDLE E. REP., May 2004, http://www.merip.org/mero/interventions/hajjar_interv.html.

182. MYRES MCDUGAL, *STUDIES IN WORLD PUBLIC ORDER* 16 (1960).

183. See, e.g., Posting of Ward Churchill, “Some People Push Back,” On the Justice of Roosting Chickens, <http://www.kersplebedeb.com/mystuff/s11/churchill.html> (last visited Nov. 15, 2007). In this infamous selection Churchill considers the attacks of September 11 in turn.

As to those in the World Trade Center True enough, they were civilians of a sort. But innocent? Gimme a break They formed a technocratic corps at the very heart of America’s global financial empire . . . to which the military dimension of U.S. policy has always been enslaved—and they did so both willingly and knowingly If there was a better, more effective, or in fact any other way of visiting some penalty befitting their participation upon the little Eichmanns inhabiting the sterile sanctuary of the twin towers, I’d really be interested in hearing about it.

Id. Just as Dershowitz protests that he does not advocate torture, Churchill has said that he does not actually believe that the twin towers were a legitimate target. See DemocracyNow.org, *The Justice of Roosting Chickens: Ward Churchill Speaks*, <http://www.democracynow.org/article.pl?sid=05/02/18/157211> (last visited Nov. 16, 2007). Nevertheless, his rhetoric here is reminiscent of the rhetoric of terrorism.

son, or at least in the case of some terrorism rules, to any civilian.¹⁸⁴ They embrace the absolute and universal nature of human dignity.

Furthermore, these same distinctions of guilt and innocence, read as good motives versus bad, provide no license for any would-be perpetrators of either practice. Righteousness is no requirement for protection from torture or terror, nor is it a justification for performing either. Any arguments that break down these holistic constructs vis-à-vis torture give ammunition to those who seek to insert analogous distinctions in definitions of terrorism (such as the attempts to carve out “freedom fighter” exceptions in the Comprehensive Convention’s definition of terrorism).

Whatever the values they seek to defend, the intellectual proponents of weakening the absolute ban on torture in order to confront terror fail to grasp that, as explained above, diluting the prohibition of torture inherently destabilizes the notion of terror and why it is wrong. In a transnational debate, we cannot convince the requisite broad constituency to oppose a practice selectively, on the mere basis of shared ideas about innocence or guilt of the victims; but rather only on the basis that, as profoundly simple as it sounds, human beings must not do certain things to other human beings, no matter what. I think back to the film *El Manara*. Ramdane, the young fundamentalist who raped his abducted friend Asma, had himself been tortured during a previous detention by the state. Fawzi, who had previously denounced state torture while a young activist, became a torturer himself when confronted with the horror of his wife’s captivity. Easy assumptions about guilt and innocence cannot help us out of this morass.

Instead, in the context of the “war on terror,” it is imperative that we staunchly reject utilitarian justifications for deliberately inflicting severe suffering.¹⁸⁵ Such a rejection is an essential part of defusing potential ticking time bomb situations in the first place. Furthermore, it is the only universalizable position, a truth that becomes starkly obvious when one recognizes the likeness and interconnection between terror and torture. The same arguments can be made by many terrorists and torturers to justify their violence: the argument that severe instrumental violence against an individual or a group of individuals, though perhaps regrettable, is necessary to save the lives, or protect the rights, of

184. The fact that terrorism definitions are often limited to attacks on civilians, suggests an approach which is not entirely absolutist. This underscores that armed conflict and the legal rules that govern it already represent a problematic acceptance of the infliction of some extreme suffering for instrumental reasons. However, this broad topic goes far beyond the scope of this paper. For more discussion, see Bennoune, *supra* note 47.

185. Utilitarian justifications of torture have a long history. Jeremy Bentham wrote in the mid 1770s that there were “two Cases in which Torture may with propriety be applied,” both of which involve inducing the victim to take action in the public interest. See *Bentham on Torture* (W.L. Twining & P.E. Twining eds.), 24 N. IRELAND LEG. Q. 305, 314 (1973). Stanley Cohen, co-founder of the Public Committee Against Torture in Israel argues that “The defence of necessity as a moral and legal justification for torture is, of course, as old as the phenomenon itself . . . torture always has to be justified in instrumental, utilitarian terms . . .” Stanley Cohen, *The Social Response to Torture in Israel*, in *MEDICAL ETHICS AND THE CASE OF ISRAEL*, *supra* note 48, at 20-22.

many more.¹⁸⁶ As D.H. Munro wrote in his critique of ethical egoism, “[O]ther people are likely to feel justified in treating us as we treat them, so that the actual consequence of adopting a particular policy is, as a rule, to be on the receiving end of it.”¹⁸⁷ Ultimately, utilitarian rationalizations of torture in the name of fighting terror fail because they are not universalizable. The utilitarian argument here is not only morally repugnant, but it will justify the very practice that its proponents claim they seek to combat.¹⁸⁸ More torture may produce more ticking bombs in the long run, just as more hypothetical ticking time bombs will produce more torture.

V.

THE OTHER END OF THE SPECTRUM: *TERROR/TORTURE*

Turning to the other end of the spectrum, those international lawyers who position themselves primarily as opponents of torture and other state counter-terror abuses often fail to fully reflect on or engage with the exigencies of terrorism.¹⁸⁹ Though different from those critiqued above in that they do not seek to *justify* terror, their understating of the impact of terrorism is also destabilizing. All too often, they overlook the fact that the actual struggle to end terrorism is itself a human rights struggle, even though leaders with terrible human rights

186. In both cases we may well question the factual basis for such assertions, but the claims made often echo one another. I am not arguing that terrorism is a direct result of human rights violations, like torture, as a general rule, though this may be a contributing factor in certain circumstances. See *infra* notes 270–274 and accompanying text. However, one justificatory discourse can easily bolster the terms of reference of the other, especially in the eyes of communities to which terrorists look for support and legitimacy. Osama bin Laden has tried to justify Al Qaeda crimes as follows: “Just as you violate our security, we violate yours. Whoever toys with the security of others, deluding himself that he will remain secure, is nothing but a foolish thief.” Osama Bin Laden, *Speech Addressed to the American People* (Oct. 29, 2004), in *AL QAEDA NOW: UNDERSTANDING TODAY’S TERRORISTS* 242 (Karen Greenberg ed., 2005). Cumulatively, these instrumental rationalizations of severe, deliberate suffering can shred what remains of the basic and universal notions of decency and fundamental considerations of humanity, ideas that are so necessary today.

187. D.H. MONRO, *EMPIRICISM AND ETHICS* 232 (1967). As Munro suggested, “[O]ne useful way to explore the implications of a policy is to ask ourselves whether we would be prepared to accept the role of any of the persons affected by such a policy.” *Id.* See also his discussion of universalizability, *Id.* at 147-207.

188. Bin Laden has used the following specific justification for Al Qaeda atrocities:

As I was looking at those destroyed towers in Lebanon [by Israel and the United States during the 1982 Israeli invasion and its aftermath], I was struck by the idea of punishing the oppressor in the same manner and destroying towers in the U.S., to give it a taste of what we have tasted and to deter it from killing our children and women.

AL QAEDA NOW, *supra* note 186, at 242-43. While one can question indeed whether this is Bin Laden’s real motivation, it is a frequent refrain in his justificatory discourse. See also the assertion by Sidney Jones that “atrocities in Abu Ghraib and other U.S.–controlled detention centers, “ghost” prisons, and other horrors unquestionably helped the jihadist cause.” Sidney Jones, *Asking the Right Questions to Fight Terror*, *JAKARTA POST*, Jan. 9, 2006, available at <http://www.crisisgroup.org/home/index.cfm?id=3863>.

189. For a notable, highly principled exception, see SCHULZ, *supra* note 119, at 173-94.

records sometimes claim to champion this cause.

Some may argue that governments already pay sufficient attention to the problem of terrorism, and therefore the human rights movement and its intellectual compatriots need to utilize their limited resources to complement that picture by focusing exclusively on the “other” side of the problem. There is no question that this is a moment of extreme difficulty for the human rights movement.¹⁹⁰ However, to fail to account fully for the human rights impact of terrorism itself means overlooking serious and widespread human suffering, appearing partial and, ultimately, being less effective.

I recall the words of an Algerian woman journalist I interviewed in Algiers in 1994 during a terrible phase in that country’s armed conflict. She was faced with the government’s closure of her newspaper and also with constant threat of brutal murder at the hands of armed groups. Despairing over the lack of international solidarity in the face of armed group terrorism in Algeria, she said:

I am no intellectual, but I believe other people were told elsewhere in other times that the evil and fear around them would pass. As far as I know, it did not pass. It got worse. I believe it will get worse unless someone hears us.¹⁹¹

The human rights community, as a matter of basic principles of human rights, must hear (and respond to) the voices of victims of terrorism, their survivors, and all those who live in fear of such violence—just as it hears and responds to the voices of victims of counter-terrorism, their survivors and all those who live in fear of that violence. Condolences and condemnations are not enough. As Kofi Annan, then U.N. Secretary-General, said of victims of terrorism:

To all victims around the world, our words of sympathy can bring only hollow comfort. They know that no one who is not so directly affected can truly share their grief. . . . We must respect them. We must listen to them. We must do what we can to help them. We must resolve to do everything in our power to spare others from meeting their fate. Above all, we must not forget them.¹⁹²

Furthermore, a human rights lens on the problem of terrorism can illuminate aspects not highlighted in governmental security discourses, such as the impact of terrorism on women, discussed below. A human rights analysis of terrorism centers the discussion on victims and human dignity, instead of only on national security.

A. Terrorism as a Violation of Human Rights

Terrorism should be understood as a human rights violation,¹⁹³ something

190. See *supra* notes 18 and 31-32 and accompanying text.

191. Bennoune, *supra* note 6, at 201 (citing Fatima B).

192. Annan, *supra* note 122.

193. For discussion of this point, see William G. O’Neill, *Terrorism and Human Rights*, in *HUMAN RIGHTS, THE UNITED NATIONS AND THE STRUGGLE AGAINST TERRORISM* 1, 3 (International Peace Academy 2003); see also William G. O’Neill, *Appendix I: Conference Concept Paper*, in

which might shock only the most old-school international human rights lawyers who still defend the notion that only states can violate human rights. Terrorist attacks, depending on the nature of a particular incident, have the potential to decimate human dignity and to violate human rights across all categories: civil, cultural, economic, political and social rights, as well as individual and group rights, women's rights, and children's rights. Those rights most often affected include the rights to life and to security of person, the rights to be free from torture and ill-treatment and arbitrary detention, the right to humane treatment, the right to be free from discrimination, the rights to be free from violence against women and to free consent in marriage, the rights to freedoms of opinion and expression and assembly and conscience and religion and belief and movement, the rights to take part in public affairs and to vote, the right to health, the right to education, the right to work, the right to take part in cultural life, the right to protection of the family, the right to development, and the right to peace. Specifically, the U.N. General Assembly has recently agreed that "every person, regardless of nationality, race, sex, religion or any other distinction, has a right to protection from terrorism and terrorist acts."¹⁹⁴

That reality notwithstanding, some human rights lawyers do continue to insist that non-state actors are not legally capable of violating human rights,¹⁹⁵ and thus terrorism by non-state actors cannot be considered to do so. However, a general trend toward understanding terrorism as a human rights violation is unmistakable in the resolutions of some U.N. and regional¹⁹⁶ bodies, in interna-

HUMAN RIGHTS, THE UNITED NATIONS AND THE STRUGGLE AGAINST TERRORISM, *supra*, 9, 10-12, available at http://www.ipacademy.org/pdfs/HUMAN_RIGHTS.pdf.

194. G.A. Res. 59/195, ¶ 13, U.N. Doc. A/RES/59/195 (Mar. 22, 2005). Note, however, that the vote on this resolution was 127 to 50, with 8 abstentions. See U.N. GAOR, 59th Sess., 74th plen. mtg. at 19, U.N. Doc. A/59/PV.74 (2004).

195. See Fédération Internationale des ligues des droits de l'Homme, in REPORT: INTERNATIONAL FACT-FINDING MISSION, MEXICO, THE NORTH AMERICAN FREE TRADE AGREEMENT: EFFECTS ON HUMAN RIGHTS 19 (2006) (indicating that among the lawyers on Mexico's National Commission of Human Rights "the attitude exists . . . that only states can violate human rights"); Mary Aileen Diez-Bacalso, A Convention Protecting Persons from Enforced Disappearances – An Imperative, www.afad-online.org/voice/may_05/internationallobby.htm (last visited Nov. 17, 2007) (recounting that during the negotiations of the new international treaty to prevent forced disappearances some "delegations opposed inclusion of non-state actors on the basis that only states can violate human rights"); Amnesty International, Amnesty International Response to Andrés Ballesteros, Jorge A. Restrepo, Michael Spagat, Juan F. Vargas, The Work of Amnesty International and Human Rights Watch: Evidence from Colombia, CERAC, Colombia, February 2007, AI Index: AMR 23/00602007, Feb. 21, 2007. The latter document states that "AI's position . . . is that non-state actors "abuse" human rights . . . while state actors "violate" human rights (because only states are party to human rights treaties). . . . Although such language may appear legalistic . . . it does correspond to legal definitions in international human rights law . . ."

196. For example, in the 1995 Declaration of Quito, the Organization of American States condemned terrorism on the grounds that "it violates basic human rights." Final Declaration of the Ninth Meeting of Heads of State and Government of the Rio Group, held in Quito on 4 and 5 September, U.N. GAOR, 50th Sess., ¶ 5, U.N. Doc. A/50/425-S/1995/787 (Sept. 13, 1995), available at <http://www.un.org/documents/ga/docs/50/plenary/a50-425.htm>. This language was "recalled" in the subsequent Declaration of Lima to Prevent, Combat and Eliminate Terrorism, Apr. 26, 1996, avail-

tional legal scholarship, and beyond. As early as 1993, the U.N. Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission) condemned “all acts, methods and practices of terrorism in all its forms and manifestations as gross violations of human rights.”¹⁹⁷ This is a substantial statement. Other actors in the contemporary international decision process have also labeled such acts violations. For example, the World Conference on Human Rights “expresse[d] its dismay and condemnation” in regards to what it called “gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights . . . includ[ing] . . . terrorism . . .”¹⁹⁸

The U.N. High Commissioner for Human Rights has noted that “[t]errorism is a *threat* to the most fundamental human right, the right to life.”¹⁹⁹ The precise distinction between threat and violation is not made clear, but seems to imply that such non-state conduct, however lamentable, is not carried out by actors that have direct legal responsibility under international human rights standards.

Euphemisms of “obstacle” and “threat” aside, many today see terrorism as a human rights *violation*. This has very different implications from conceiving of it as a threat to international peace and security, as the issue has been framed by the Security Council in repeated resolutions.²⁰⁰ It prioritizes the human concern over the statist concern. Given the understanding of terrorism as a human rights violation, both U.N. and regional human rights bodies have demanded that governments prevent it, always emphasizing the role of international law as the parameter of this effort. The Sub-Commission “call[ed] . . . upon Governments, in accordance with international standards of human rights and internationally recognized principles of due process, to take all necessary and effective measures to prevent and combat terrorism.”²⁰¹

The General Assembly’s 2004 resolution on human rights and terrorism combines these concerns in a holistic manner. Its preamble recalls “the reference . . . of the [U.N.] Secretary-General . . . to the fact that terrorism is itself a violation of human rights and must be combated as such and that efforts at combating

able at http://www.yale.edu/lawweb/avalon/terrorism/t_0013.htm.

197. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Human Rights, *Consequences for the Enjoyment of Human Rights of Acts of Violence Committed by Armed Groups that Spread Terror among the Population*, ¶ 1, Res. 1993/13, U.N. ESCOR, 26th mtg. (1993) (adopted without a vote).

198. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 30, U.N. Doc. A/CONF.157/23 (July 12, 1993).

199. U.N. Econ. & Soc. Council, High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights, Human Rights: A Uniting Framework*, ¶ 2, U.N. ESCOR, 58th Sess., Agenda Item 4, U.N. Doc. E/CN.4/2002/18, (2002) (emphasis added).

200. See, e.g., Threats to International Peace and Security Caused by Terrorist Acts, S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

201. Sub-Comm’n on Human Rights Resolution 1993/13, *supra* note 197, ¶ 2.

it must be pursued . . . in full compliance with established international norms . . .”²⁰² In fact, the Sub-Commission’s outgoing Special Rapporteur on terrorism and human rights recently noted that “all General Assembly and Commission [on Human Rights] Resolutions on ‘human rights and terrorism’, as well as some of the early Sub-Commission resolutions under the same title, speak of terrorism as a violation of human rights.”²⁰³ Still, she submits that “the exact meaning . . . and legal implications” of such an assertion “remain very controversial.”²⁰⁴

While some U.N. and regional bodies were characterizing terrorism as a human rights violation as far back as 1993, human rights NGOs have generally remained wary of using the terminology of violations even after September 11, 2001. Other constructs have been used to describe the problem. For example, the International Commission of Jurists’ Berlin Declaration states that, “Terrorism poses a serious threat to human rights.”²⁰⁵ Similarly, Human Rights Watch has noted that “[c]ontemporary terrorism and government responses to it pose a major threat to human rights values.”²⁰⁶ Notwithstanding this “major threat,” in practice, most international human rights NGOs have focused largely on the human rights violations associated with counter-terror rather than those associated with terrorism itself. For example, sixteen of the first twenty hits for the term terrorism on the website of Human Rights Watch yield criticisms of counter-terror.²⁰⁷ As the U.N. Sub-Commission’s outgoing rapporteur on terrorism and human rights²⁰⁸ related in her final report, “the overall human rights

202. *Human Rights and Terrorism*, G. A. Res. 59/195, U.N. GAOR, 59th Sess., preamble, U.N. Doc. A/RES/59/195 (2004).

203. Kalliopi Koufa, *Final Report of the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights*, Terrorism and Human Rights, U.N. ESCOR, ¶ 54, U.N. Doc. E/CN.4/Sub.2/2004/40, (2004).

204. *Id.*

205. International Commission of Jurists, *The Berlin Declaration: The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, preamble (Aug. 28, 2004), available at http://www.icj.org/news.php?id_article=3503?en.

206. Human Rights Watch, Job Posting, Terrorism/Counterterrorism Project Director, www.hrw.org/jobs/prog_projectdirector-tct2005-06-30.htm (last visited Sept. 14, 2005).

207. See www.hrw.org (last visited Oct. 10, 2007). This is an improvement from March 1, 2007 when the first twenty hits produced by the same search all focused on counter-terror. A similar search on the website of Amnesty International, also using the term “terrorism,” still yields 20 hits out of the first 20 that pertain to critiques of counter-terror. See www.amnesty.org (last visited Nov. 2, 2007).

208. In fact, her successor, Martin Schenin, the new U.N. Special Rapporteur on the promotion and protection of human rights while countering terrorism, interprets his mandate to refer largely to the human rights violations committed by states while countering terrorism, rather than the impact of terrorism itself on human rights. His mandate, enumerated in CHR Resolution 2005/80, focuses on counter-terrorism. However, his reports could be important in developing a human rights approach to terrorism itself if he interpreted that mandate holistically. U.N. Commission on Human Rights Resolution 2005/80, *Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, ¶ 14, (July 2, 2005). In his initial report, the rapporteur did note that “States’ obligation to protect and promote human rights requires them to take effective measures to combat terrorism.”

movement may have been concentrating, possibly for too long, on the repressive measures adopted by Governments only, without paying much attention to the means used by those opposing them.”²⁰⁹

Fortunately, most organizations are aware that this is a problem, and some are starting to address it.²¹⁰ This process should be accelerated and intensified.

While the international lawyer cannot overlook the particular nature of governmental obligation in the human rights realm, or the fact that states are the only parties formally bound by most human rights treaties, we need to revisit the refusal to label terrorism a “violation.”²¹¹ To recognize terrorism in this way is consistent with a view of human rights centered on the rights holders instead of on the perpetrators and recognizes the severity of the harm.²¹² In fact, in some

Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, ¶ 2, appended to U.N. Doc. A/60/370 (Sept. 21, 2005). He also envisaged a possible future thematic study on “the threat of suicide attacks as a specific challenge to the protection and promotion of human rights . . . while countering terrorism.” *Id.* ¶ 10.

209. Here she is, *inter alia*, quoting as important a human rights figure as Asbjorn Eide. Kallopo Koufa, *Final Report of the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights*, U.N. ESCOR, 56th Sess., Agenda Item 6(c), ¶ 55, U.N. Doc. E/CN.4/Sub.2/2004/40 (2004). Some leading human rights activists have described this problem as a pattern in which two sentences are spent criticizing terrorism, while pages are dedicated to cataloguing government counter-terrorist violations. For an abbreviated example of this, see Human Rights First, *Human Rights First Statement on the Fifth Anniversary of September 11* (Sept. 8, 2006).

210. Note, for example, the recent conference of experts organized by Amnesty International USA at New York University Law School which, for the first time, brought together leading human rights groups, including AI, Human Rights Watch, and Human Rights First, to develop a human rights approach to terrorism. The conference, *Navigating Between Scylla and Charybdis: Confronting Terrorism as a Human Rights Issue*, convened February 16-17, 2007, available at http://www.amnestyusa.org/Local_Events/Roundtable_Discussion/page.do?id=1102220&n1=5&n2=50. Currently, the International Council on Human Rights Policy is undertaking a major study of the international human rights movement’s engagement with the issue of terrorism, complete with recommendations for better tackling the issue in future. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, *TALKING ABOUT TERRORISM – RISKS AND CHOICES FOR HUMAN RIGHTS ORGANISATIONS* (forthcoming 2008).

211. Failing to recognize terrorism as a human rights violation when committed by non-state actors evokes the often-criticized formalism of the state action doctrine in U.S. constitutional jurisprudence. As Edwin Chemerinsky has opined, “under any theory of rights—positivism, natural law, or consensus—the requirement for state action makes no sense” Edwin Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 519 (1985). “[E]liminating the state action doctrine enhances protection of liberty by focusing attention directly on the valued rights.” *Id.* at 540. Justice Harlan indicates in his dissent in the Civil Rights Cases that the requirement risks giving a green light for powerful private actors to deprive people of rights. *The Civil Rights Cases*, 109 U.S. 3, 25-62 (1883) (Harlan, J., dissenting). While other legal concepts can be used to oppose non-state terrorism, exclusion of these acts from the category of human rights violation risks seeming to deprioritize the gravity of the threat they pose to human rights.

212. See, e.g., August Reinisch, *The Changing International Legal Framework for Dealing With Non-State Actors*, in *NON-STATE ACTORS AND HUMAN RIGHTS* 37 (Philip Alston ed., 2005). He notes a “new awareness of the need to protect human rights, beyond the classic paradigm of the powerful state against the weak individual, to include protection against increasingly powerful non-state actors.” *Id.* at 38. In other words, as Stephanie Farrior, former legal director at Amnesty International’s International Secretariat, has argued, “[i]f human rights are rights that we all hold by virtue of being human, then human rights law can and should provide protection against violations of

instances, such as the September 2001 attacks in the U.S., Amnesty International has characterized these events as “the gravest abuses of fundamental human rights,”²¹³ and that is often how victims experience them.²¹⁴

Picayune linguistic distinctions between “abuses,” “threats” and “violations” must not appear to minimize the seriousness of the underlying acts, nor to unintentionally display ambivalence toward terrorism, nor to lower the level of urgency needed to address such practices. Efforts to be legally precise should not obscure the basic nature of human rights. To consider only one concrete example, the hideous mass trampling of nearly 1,000 Shiite pilgrims in Baghdad on August 30, 2005, in response to the rumor of the presence of suicide bombers in their midst, shows just what damage successive terrorist attacks can do to the collective psyche and how terrible a toll the fear they cause may take upon basic human rights to life and security of the person.²¹⁵

Moreover, what human rights advocates say about terrorism also has implications for what they can say about other non-state action in the future, like corporate abuses or “private” violence against women. Some of these practices have already been labeled violations, indeed “particularly grave human rights violation[s].”²¹⁶ Referencing the responsibility of the state remains an important paradigm for human rights. However, the reality in the globalized world is that many other actors are increasingly powerful and hence pose particular risks for human rights.²¹⁷ Human rights law cannot today be reduced simply to a critique

those rights—not just by the state, but by any other power-holder.” Stephanie Farrior, Unpublished lecture on terrorism as a human rights violation (copy on file with the author). See also Philip Alston’s warning that “[a]n international human rights regime which is not capable of effectively . . . ensuring that private actors are held responsible, will not only lose credibility in the years ahead but will render itself unnecessarily irrelevant in relation to important issues.” Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in NON-STATE ACTORS AND HUMAN RIGHTS, *supra*, at 1, 19. Finally, in a report about torture, the NGO Redress has underscored what is at stake in this debate beyond terminology: “The question whether and if so how, human rights should apply directly to non-state actors is significant in responding to violations such as torture. From the victims’ perspectives, it is important to acknowledge conceptually that individual and collective rights have been *violated*. However, it is even more critical that mechanisms will be put in place at all levels that offer genuine protection, combat impunity and provide effective remedies for *violations*.” LUTZ OETTE, NOT ONLY THE STATE: TORTURE BY NON-STATE ACTORS 11 (Carla Ferstman ed., REDRESS 2006) (emphasis added).

213. AMNESTY INTERNATIONAL, USA: AMNESTY INTERNATIONAL APPALLED AT DEVASTATING ATTACKS AGAINST CIVILIANS (2001), *available at* <http://web.amnesty.org/library/print/ENGAMR511342001>.

214. *See, e.g., The Madrid Declaration, supra* note 128.

215. *See 965 Dead in Baghdad Stampede*, CNN.com, Aug. 31, 2005, <http://www.cnn.com/2005/WORLD/meast/08/31/iraq.main/>.

216. AMNESTY INTERNATIONAL, MAKING RIGHTS A REALITY: THE DUTY OF STATES TO ADDRESS VIOLENCE AGAINST WOMEN 11 (2004), *available at* [http://web.amnesty.org/library/pdf/ACT770492004ENGLISH/\\$File/ACT7704904.pdf](http://web.amnesty.org/library/pdf/ACT770492004ENGLISH/$File/ACT7704904.pdf) (emphasis added).

217. Note for example the claim by the new US intelligence chief that Al Qaeda represents the most serious threat to US interests. *Al-Qaeda the ‘worst threat’ to US*, BBC News Online, Feb. 27, 2007, <http://news.bbc.co.uk/2/hi/americas/6401427.stm>. The U.N. High Level Panel also highlighted

of government counter-terrorism projects if it is to fulfill its own claims to universality. It must also be the basis for a human rights-based approach to counter-terrorism.

B. The Relevant Legal Framework

The terminological quagmire described above springs from the larger question of whether human rights law can be applied directly to non-governmental entities. The traditional view among some human rights lawyers has been that human rights law applies only to states and not to non-state armed groups, because only states can be parties to most human rights treaties. However, counter-practice shows increasing application of general human rights standards to armed opposition groups.²¹⁸ For example, Bacre N'diaye, former U.N. Special Rapporteur on extrajudicial, summary or arbitrary executions, called on both the Sri Lankan government and the armed opposition group fighting against it, the Liberation Tigers of Tamil Eelam (LTTE), to “comply with . . . human rights standards.”²¹⁹ The discussion of LTTE abuses by Philip Alston, current U.N. Special Rapporteur on extrajudicial, summary, or arbitrary executions, has been very progressive in this direction. He noted that his mission to Sri Lanka “clarified both the complexity and the necessity of applying human rights norms to armed groups,”²²⁰ and he has explicitly called on the LTTE to “refrain from *violating* human rights.”²²¹ The Inter-American Commission on Human Rights has called on Colombian armed groups to respect the right to life of hostages.²²² Even the U.N. Security Council has called on Afghan armed groups to “end . . . violations of human rights . . . and to adhere to the internationally accepted norms and standards in this sphere.”²²³

However, human rights experts use this language predominantly, as these examples illustrate, in situations of armed conflict, especially where the groups in question control territory. With regard to terrorism happening outside the

Al-Qaeda as a particular threat to the United Nations. High Level Panel, *supra* note 82, ¶ 146.

218. LIESBETH ZEGVELD, THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 47 (2002). For general discussion about the “Direct Accountability of Non-State Actors under International Law and before International Tribunals”, see Reinisch, *supra* note 212, at 82-87.

219. See ZEGVELD, *supra* note 218 at 48.

220. Extrajudicial, Summary or Arbitrary Executions, Report submitted by Special Rapporteur Philip Alston, Mission to Sri Lanka, U.N. Doc. E/CN.4/2006/53/Add.5, para. 26.

221. *Id.* at para. 85, emphasis added. Here he specifically references the rights to freedom of expression, peaceful assembly, freedom of association, family life and the right to vote. *Id.* Note also his more general assertion that “in some contexts it may be desirable to address the activities of [armed] groups within some parts of the human rights equation.” Extrajudicial, Summary or Arbitrary Executions, Report submitted by Special Rapporteur Philip Alston, U.N. Doc. E/CN.4/2005/7, para. 76.

222. Annual Report of the Inter-American Commission on Human Rights 1996, OEA/Ser.L/V/II.95, doc. 7, rev., (March 14, 1997) at 818-19.

223. S.C. Res. 1193, ¶ 14, U.N. Doc. S/RES/1193 (Aug. 28, 1998).

scope of an armed conflict, they remain reticent to do so. Creative legal thinking is needed to develop an effective response to the grave human rights violations being perpetrated by terrorists in such contexts also. Mary Robinson argued in 2002 that “human rights should act as a unifying framework within which we can address the human insecurity that results from terrorism”²²⁴ This can only happen if lethal acts of terrorism are recognized as contravening human rights norms. The Universal Declaration of Human Rights preamble provides a crucial starting point when it proclaims that “every individual and every organ of society . . . shall strive . . . to promote respect for these rights and freedoms . . . and . . . to secure their universal and effective recognition and observance”²²⁵ This grounds a human rights approach to non-governmental abuses, but offers little in the way of specifics. Much more legal thinking is needed here, bringing together, *inter alia*, soft law, relevant principles of customary international law, general principles of law, and a forward-looking approach to the interpretation of all human rights standards.

International humanitarian law (IHL) and international criminal law concepts like crimes against humanity have been deployed, as an alternative to human rights law, to characterize and critique terrorism. With regard to the former, IHL does not apply outside the realm of armed conflicts.²²⁶ With regard to the latter, the term “crimes against humanity,” while conveying the gravity of the acts in question, has neither the same popular resonance nor the exact same set of legal consequences as “terrorism,” making it an insufficient alternative.

Hence, human rights lawyers must construct an approach to terrorism as a human rights violation. Such a naming would reflect the values and goals associated with the fundamental principles of human rights at stake, and would recognize this very real manifestation of threats to human dignity today. As noted above, the importance of a human rights approach to terrorism includes its ability to focus attention on neglected but essential aspects of these threats to dignity, such as the impact of terrorism on women’s human rights, to which the article now turns.²²⁷

C. The Gender Dimension of Terror/Torture

Opponents of recognizing women’s rights as human rights often used the

224. Mary Robinson, U.N. High Commissioner for Human Rights, Introductory Statement, U.N. ESCOR, Comm’n on Hum. Rts., 58th Sess., Agenda Item 4 (Mar. 20, 2002).

225. Universal Declaration of Human Rights, *supra* note 47.

226. The Geneva Conventions of August 12, 1949, Common Article 2, Oct. 21, 1950, 75 U.N.T.S. 31. A few provisions do apply in peacetime such as the obligation to disseminate the Conventions.

227. The absence of discussion about the specific impact of terrorism on women is mirrored in the argued absence of women’s voices in debates about terrorism. See, e.g., Jennifer L. Pozner, *Missing Since 9-11: Women’s Voices*, NEWSDAY, Dec. 13, 2001, available at <http://www.commondreams.org/views01/1213-04.htm>.

same arguments now proffered to exclude non-state terrorism from the human rights framework.²²⁸ Thus, it is no accident that some of the most vocal proponents of developing a human rights approach to terrorism have been women's human rights advocates.²²⁹ Over time, the trajectory of women's human rights has begun to change the contours of mainstream human rights discourse, including the discourse about torture.²³⁰ Hopefully, we are on the cusp of a similar development with regard to terrorism and human rights. Just as a women's human rights perspective has changed our thinking about torture,²³¹ so it can change our thinking about terror. The intersection of terrorism and women's lives, then, is a useful place to focus attention.

Women are frequent targets of terrorist activity, either as part of the civilian population generally, or when particularly targeted as women. Gender-based terrorism, such as attacks on women's health clinics that perform abortions or killings of women based on their refusal to conform to "dress codes," should be of particular concern to the human rights movement, especially because these issues are often downplayed or neglected altogether within the security paradigm of terrorism.²³² Governments and the media rarely label such acts as terrorism.

Women face particular consequences of terrorism, consequences to which all actors have paid inadequate attention.²³³ Terrorism exacerbates other viola-

228. See Catherine MacKinnon, *Are Women Human?*, in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 171 (Barend van der Heijden & Bahia Tahzib-Lie eds., 1999). These arguments included the fact that the perpetrators are often not states and therefore the acts are not classical human rights violations; that tackling these abuses will muddle human rights and that the human rights movement does not know how to work on these kinds of acts. No matter how grave the suffering, it occurred outside the accepted paradigm and hence was to be overlooked or de-emphasized.

229. See, e.g., Gita Sahgal, Speech for Public Roundtable, AIUSA Meeting: "Navigating Between Scylla and Charybdis: Confronting Terrorism as a Human Rights Issue," Feb. 16, 2007 (on file with the author). Sahgal is the director of Amnesty International's gender unit, and a founding member of Women Against Fundamentalisms.

230. See, e.g., Report of the first U.N. Special Rapporteur on Violence against Women, U.N. Doc. E/CN.4/1996/53, at 12 (arguing that international law experts consider reconceptualizing severe forms of domestic violence as torture). The explicit inclusion of numerous gender-specific harms in the statute of the international criminal court is also the direct result of women's human rights advocacy. See HILARY CHARLESWORTH & CHRISTINE CHINKIN, *supra* note 45, at 309-37.

231. See Copelon, *supra* note 180.

232. See, e.g., Anissa Hélie, *The U.S. Occupation and Rising Religious Extremism: The Double Threat to Women in Iraq*, June 24, 2005, ZNet.org, <http://www.zmag.org/content/showarticle.cfm?SectionID=41&ItemID=8158>. She details attacks by an Iraqi group, the Council of Fighters, against unveiled Iraqi women and Iraqi Christian women.

233. Work within the mainstream human rights movement to combat violence against women has produced some important documentation of terrorism against women by non-state armed groups, though not necessarily using the label of terrorism. Amnesty International's campaign to Stop Violence Against Women is one example of such work. See, e.g., AMNESTY INTERNATIONAL, COLOMBIA: "SCARRED BODIES, HIDDEN CRIMES": SEXUAL VIOLENCE AGAINST WOMEN IN THE ARMED CONFLICT (2004), available at <http://web.amnesty.org/library/print/ENGAMR230402004>. The challenge is to bring the insights from this body of work into the work on the "war on terror," a merger which has not happened thus far.

tions of women's human rights and tends to create an environment that threatens those rights. For example, Women's International League for Peace and Freedom has argued that terrorism, along with other factors like armed conflict, forces increasing numbers of women to turn to prostitution.²³⁴ As women are displaced, forced to leave rural areas and abandon other jobs, they may have fewer options to sustain their families. Furthermore, such terrorism-caused displacement puts them at a higher risk of sexual violence and exploitation.²³⁵ Of course, sexual violence and torture may themselves constitute forms of terrorism against women, similar to Asma's experience in *El Manara*

Feminist international lawyers have argued that violence against women should be seen as a warning sign for armed conflict.²³⁶ The same may be said of terrorism. Groups that engage in these sorts of attacks on civilians as a whole often pursue misogynist agendas and carry out, or advocate, severe forms of violence against women. For example, some argue that had effective action been taken to end the Taliban's gender apartheid, such action could well have disrupted the activities of Al Qaeda or brought them to light, and conceivably September 11 might have been avoided.²³⁷ Furthermore, women's organizations are often among the first to document and warn of the rise of terrorist organizations. For example, Women Living Under Muslim Laws, an international NGO active on women's human rights issues in the Muslim world and diaspora communities, had "been warning since at least the early 1990s about the existence of an 'Islamist international' with the organizational, human, financial, and military means to threaten secularists, feminists and democrats."²³⁸ They further identified Saudi Arabia as a prime sponsor of such groups. The world failed to heed their warning, to disastrous effect.

Empowering women is purported to be a vital way of combating terrorism. It offers a kind of counter-terror method that is antithetical to those based on human rights abuses, like torture. As Valentine Moghadam, head of the gender unit at UNESCO, has written, "Women's peace movements in particular constitute an important counter-movement to terrorism, and they should be encouraged and funded."²³⁹ Most security efforts and much counter-terrorism are con-

234. Women's International League for Peace and Freedom, *Terrorism and War Increases Prostitution*, June 22, 2005, available at www.peacewomen.org/news/International/July05/TERRORISM.html.

235. *Id.*

236. For an elaboration of this thesis, see Felicity Hill, *Women's Contribution to Conflict Prevention, Early Warning and Disarmament*, in UNITED NATIONS INSTITUTE FOR DISARMAMENT RESEARCH, DISARMAMENT FORUM (2003), available at <http://www.unidir.org/pdf/Gender/4%20Hill.pdf>.

237. See Amy Caiazza, *Why Gender Matters in Understanding September 11: Women, Militarism and Violence*, I908 Inst. for Women's Pol'y Res Briefing Paper 1 (2001).

238. Valentine Moghadam, *Violence and Terrorism: Feminist Observations on Islamist Movements, States and the International System*, ALTERNATIVES: TURKISH J. INT'L REL., Summer 2002, at 20.

239. *Id.* at 16.

ceived of in decidedly masculinist ways.²⁴⁰ Using a women's human rights lens to unpack such approaches, even while similarly deconstructing terrorist projects, can be a useful critical tool.

Thoughtful women's human rights analysis takes us closer to the position we must occupy in the current historical moment: a position of true radical universalism that rejects terror and torture, and has high standards for all actors. Rosalind Petcheskey's speech in New York City two weeks after September 11 provides an excellent example of this sort of theorizing. She said:

I [do not] believe we should succumb to the temptation of casting our current dilemma in the simplistic, Manichean terms of cosmic Good vs. Evil. Currently, this comes in two opposed but mirror-image versions: the narrative, advanced not only by the terrorists and their sympathizers but also by many on the left in the U.S. and around the globe, that blames U.S. imperialism and economic hegemony for the 'chickens coming home to roost'; versus the patriotic right-wing version that casts U.S. democracy and freedom as the innocent targets of Islamist madness. Both these stories erase all the complexities that we must try to factor into a different, more inclusive ethical and political vision. The Manichean, apocalyptic rhetorics that echoed back and forth between Bush and Bin Laden in the aftermath of the attacks—the pseudo Islamic and the pseudo Christian, the jihad and the crusade—both lie.²⁴¹

VI.

A BRIEF NOTE ON MUSLIM FUNDAMENTALIST TERRORISM²⁴²

This brings us to the question of specifically what or whom governments are fighting in the current "war on terror." Very few authors in international law make this clear.²⁴³ While I appreciate the intention of many writers not to single out Islamist groups or to stereotype Muslims as perpetrators, and to attempt to include the many other terrorisms—in places like Sri Lanka and Colombia—in

240. For gendered analyses of responses to terrorism, see Ratna Kapur, *Un-Veiling Women's Rights in the 'War on Terrorism'*, 9 DUKE J. GENDER L. & POL'Y 211 (2002); Catherine MacKinnon, *Women's September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT'L. L. J. 1 (2006), and Hilary Charlesworth & Christine Chinkin, *Sex, Gender and September 11*, 96 AM. J. INT'L L. 600 (2002).

241. Rosalind Petcheskey, *Phantom Towers: Feminist Reflections on the Battle between Global Capitalism and Fundamentalist Terrorism*, in NOTHING SACRED, *supra* note 4 at 357, 358.

242. For further discussion of these questions, see Karima Bennoune, *Book Review: Enforcing International Law Norms Against Terrorism*, 100 AM. J. INT'L L. 507 (2006); HAIDEH MOGHISSI, *FEMINISM AND ISLAMIC FUNDAMENTALISM: THE LIMITS OF POSTMODERN ANALYSIS* (1999), and MANSOOR MOADDEL, *ISLAMIC MODERNISM, NATIONALISM AND FUNDAMENTALISM: EPISODE AND DISCOURSE* (2005).

243. For an exception to this rule, see Michael Reisman, *Plenary Speech to the Inaugural Meeting of the European Society of International Law, International Law in the Shadow of Empire: The Shadows Looming over International Law* (May 2004), in 6 BALTIC Y.B INT'L L. 7, 12 (2006). While I could not agree with some of his conclusions and assertions—the most objectionable of which was that Osama Bin Laden may know more about Islam than George Bush or Tony Blair when the latter heads of state assert that radical jihadists do not represent the religion—Reisman's naming of the problem was useful.

this discussion, the fact that the “war on terror” targets an enemy whose name we dare not speak has clouded our thinking. Hence, a brief discursion on the “other” side in this “war” is warranted.

A. Contemporary Transnational Fundamentalist Terrorism

There is much violence that could be labeled “terrorism” happening in the many armed conflicts around the world, but now when we talk about *international* terrorism, we very often must confront the violence of certain fundamentalist²⁴⁴ Muslim jihadi groups. Today, the acts of such groups are those that most often incite, or serve as the justification for, the undermining of basic international norms by governments around the world, including norms on torture.²⁴⁵ Furthermore, such groups have repeatedly committed acts of violence across many regions, including in Morocco, Algeria, Tunisia, Egypt, Israel/Palestine, Iraq, Afghanistan, Pakistan, Bangladesh, Indonesia, and beyond.²⁴⁶ This phenomenon is too pervasive and has too great an impact on human rights to be ignored. However, the human rights consequences of Muslim fundamentalism and fundamentalist terrorism represent complex topics that should be the subject of a much longer study. They can only be addressed here in a schematic way, focusing on the unique challenges these phenomena pose today for a holistic discussion of terror/torture.

Merieme Hélie-Lucas has defined fundamentalisms as “political movements of the extreme right, which, in a context of globalization . . . manipulate religion . . . in order to achieve their political aims.”²⁴⁷ The term refers to vari-

244. While some object to the use of this term, many opponents of such movements from within the Muslim world prefer this label. It is seen as more accurate than “Islamist” which is both derogatory of Islam and privileges “Islamist” claims of authenticity. See Bennoune, *supra* note 4, at 76. Furthermore, the term “fundamentalist” situates such movements in a broader global context. Others who use the term “fundamentalist” still recognize that it is potentially laden with negative meanings, and has been used pejoratively by some only to talk about Muslims or to refer to all or most Muslims. See, e.g., Amrita Basu, *Hindu Women's Activism in India and the Questions It Raises*, in APPROPRIATING GENDER: WOMEN'S ACTIVISM AND POLITICIZED RELIGION IN SOUTH ASIA 167, 167 (Routledge 1997).

245. Reminiscent of Nagel's prognosis, these groups in turn subsequently benefit from increased recruitment. Paul Reynolds, *Iraq War 'Helped al-Qaeda Recruit'*, BBC News Online, Oct. 19, 2004, http://news.bbc.co.uk/2/hi/middle_east/3756650.stm.

246. For discussion of efforts to recruit for such groups in the United States, see Michael Moss & Souad Mekhennet, *An Internet Jihad Aims at U.S. Viewers*, N.Y. TIMES, Oct. 15, 2007, available at <http://www.nytimes.com/2007/10/15/us/15net.html?ex=1350100800&en=9d040360579f3a9b&ei=5088&partner=rssnyt&emc=rss>.

247. Marieme Hélie-Lucas, *What is Your Tribe? Women's Struggles and the Construction of Muslimness*, DOSSIER 23-24, available at <http://www.wluml.org>. Scottish sociologist Steve Bruce has written that “fundamentalisms rest on the claim that some source of ideas, usually a text, is inerrant and complete . . . fundamentalists also claim the existence of some perfect social embodiment of the true religion of the past.” *What is Fundamentalism?*, in STEVE BRUCE, FUNDAMENTALISM 13-14 (2000).

ous theocratic projects found in all of the world's religious traditions, though here we focus especially on those in the Muslim context. Though not without its own set of difficulties, the importance of the terminology of fundamentalisms is that it speaks across religious boundaries about movements within many traditions.²⁴⁸ Many in the women's human rights community, and others who oppose fundamentalisms, have roundly criticized human rights organizations for failing to recognize and respond to the unique challenges posed by these movements.²⁴⁹ While nearly all these movements and their component parts push agendas that threaten human rights, not all of them engage in violence or terrorism.²⁵⁰ Ultimately, however, we will have to confront both these ideologies and the tactic of terror that their proponents sometimes employ if we are to rise to the significant human rights challenge that they together pose.

Among Muslim fundamentalist groups that engage in terrorism, many are related to (however loosely) or inspired by Al Qaeda, and share a lethal mix of purported legitimate grievances, fascist²⁵¹ and misogynist ideology, nihilism, and frightening levels of funding, training and technological prowess. In circular fashion, they use and justify terror and torture, even as they elicit governmental torture and terror (both of which they claim to be responding to). Al Qaeda itself has now splintered into a thousand shards of glass, each still capable of inflicting serious injury such as attacks like the Madrid train bombing.²⁵² Prominent new Al Qaeda affiliates—for example Al Qaeda in the Islamic Maghreb, which seeks to rekindle the horrors of Algeria's civil war as depicted in *El Manara*—demonstrate their emergence with new acts of terror.²⁵³

248. See, e.g., FUNDAMENTALISMS AND HUMAN RIGHTS, *supra* note 7.

249. This includes the Hindu right, portions of which has been involved in atrocities against Muslims in Gujarat; the fundamentalist portion of the Jewish settler movement in the West Bank and Gaza some of whom have been involved in attacks on Palestinians; and Christian fundamentalists in the United States (who are among the most politically powerful fundamentalists in the world) some of whose most extreme partisans have engaged in terrorism against women's health clinics. See FUNDAMENTALISMS OBSERVED (Martin Marty & R. Scott Appleby eds., 1991); KEVIN PHILLIPS, AMERICAN THEOCRACY: THE PERIL AND POLITICS OF RADICAL RELIGION, OIL AND BORROWED MONEY (2006); CHETAN BHATT, LIBERATION AND PURITY: RACE, NEW RELIGIOUS MOVEMENTS AND THE ETHICS OF POSTMODERNITY 77-107 (1997).

250. For a useful typology of Muslim fundamentalist groups, see Awaaz – South Asia Watch, *The Islamic Right – Key Tendencies*, June 2006, available at http://www.awaazsaw.org/awaaz_pia4.pdf.

251. This is a word with powerful historical connotations. Nevertheless, critics of such movements from within the Muslim world have been using this term to describe extremist movements. For example, in the wake of the London bombings, the Arabic-language international media, like *Asahrq al Awsat* and the website *Elaph*, published articles by Arab writers about “Islamic fascism.” See *Un fascisme musulman? Un tabou est tombé*, COURRIER INT'L, July 13-20, 2005, at 12.

252. See Lee Keath, *Bin Laden Wants 'Caravan' of Martyrs*, ASSOCIATED PRESS, Sept. 11, 2007, available at <http://apnews.myway.com/article/20070911/D8RJ8QL81.html> (“the network is growing in strength, intensifying its efforts to put operatives in the United States and plot new attacks.”)

253. *Un camion piégé fait 34 morts et 60 blessés à Dellys*, EL WATAN, Sept. 9, 2007 (detailing a series of bloody attacks by this group in Algeria during 2007). *'Dozens killed' in Algeria blasts*,

Most international lawyers, including human rights lawyers, have failed to grapple with the specific challenges to international law posed by such movements.²⁵⁴ Despite valid concerns about the very real problems of Islamophobia²⁵⁵ in the current moment and about discriminatory conduct of counter-terrorism initiatives, we must specifically recognize these Muslim fundamentalist terrorist groups as a particular threat to human rights. However, such a discussion needs to be conducted with self-criticism and impartiality, and without discriminatory overtones. Ordinary Muslims or the Muslim religion as a whole must not be confused with these specific fundamentalist political or armed movements and their adherents. Most usefully, international lawyers should conceptualize the problem of Muslim fundamentalism in the context of tackling the human rights implications of fundamentalisms more globally. ASIL's willingness to host a panel on human rights and fundamentalisms at its recent centennial meeting indicates some movement in this direction, but international lawyers must give much more consideration to these issues.²⁵⁶

On the other hand, some responses to these Muslim fundamentalist groups suffer from what B.S. Chimni has called a kind of hegemonic construct of human dignity.²⁵⁷ Some use their critique of Muslim fundamentalist violence and ideology as a springboard for racist discourses about Muslims and the Muslim world writ large,²⁵⁸ or as a justification for human rights violations, like torture.

BBC News Online, Dec. 11, 2007, <http://news.bbc.co.uk/2/hi/africa/7137997.stm>.

254. The major exception has been scholarship in the women's human rights field. *See, e.g.,* RELIGIOUS FUNDAMENTALISMS AND THE HUMAN RIGHTS OF WOMEN (Courtney Howland ed., 2001).

255. The term denotes hostility towards Islam and Muslims generally, often resulting in assaults and restriction of civil rights. *See* COMMISSION ON BRITISH MUSLIMS AND ISLAMOPHOBIA, ISLAMOPHOBIA: ISSUES, CHALLENGES, AND ACTION 7-8 (2004), available at <http://www.insted.co.uk/islambook.pdf>, and Commission on Human Rights Resolution 2004/6, Combating Defamation of Religions, ¶¶ 6, 16, U.N. Doc. E/CN.4/RES/2004/6 (Apr. 13, 2004). However, some prominent dissidents of Muslim heritage have staunchly criticized the concept of Islamophobia as "confus[ing] criticism of Islam as a religion and stigmatization of those who believe in it." *See, e.g.,* *Writers Issue Cartoon Row Warning*, BBC News Online, Mar. 1, 2006, available at <http://news.bbc.co.uk/1/hi/world/europe/4763520.stm>.

256. For the proceedings of this panel, see *Human Rights and Fundamentalisms*, *supra* note 7.

257. B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 120 (1993). For an example of this sort of flawed critique of Muslim fundamentalism, see Wedgwood, *supra* note 13, at 103.

258. "Islamofascism Awareness Week," organized on U.S. college campuses in October 2007 by conservative activist David Horowitz, provides a prime example. The subject of its critique slips easily and mistakenly from fundamentalist terrorists to "Islam." For a description of this event by its protagonists, see <http://www.terrorismawareness.org/islamo-fascism-awareness-week/> (last visited Oct. 26, 2007). For criticism of this event, see Ali Eteraz, *Laughing at Islamofascism Awareness Week*, Oct. 8, 2007, http://www.huffingtonpost.com/ali-eteraz/laughing-at-islamofasci_b_67565.html. To critique such an event is not to deny that there are some Muslim fundamentalist armed groups that could be labeled fascist, as noted above. *See supra* note 251. Unfortunately, the absence of a systematic and principled human rights based critique of these movements at the international level has left the terrain vacant, to be filled by discourses like those associated with Islamofascism Awareness Week.

Again, in renewed circular fashion, we see that apologies for torture weaken criticism of terror. Such a hypocritical approach to Muslim fundamentalism narrows the space for legitimate critiques of these movements, including of their resort to terrorism, which then are deemed to risk blending in with the hegemonic discourses. The latter narratives lack self-consciousness about a range of failings closer to home including human rights violations in the “war on terror,” the role of other religious fundamentalisms in liberal democracies, and Western contributions to the rise of Muslim fundamentalism.

B. The Causes of a “Disease Masquerading as a Cure”

The problem of fundamentalist movements in the Muslim world, especially those that engage in terrorism, has both endogenous and exogenous causes. Both the current encounter with globalization and past encounters with colonialism arguably contributed to its emergence.²⁵⁹ Furthermore, initial support for such ideological movements from many of the governments that are now fighting terrorism greatly exacerbated the situation. Western powers long believed, whether in the context of colonialism or of the Cold War, that they could nourish fundamentalists in the Arab and Muslim world as a counterbalance to secular nationalists and leftists whom they perceived as posing a greater threat to their interests.²⁶⁰

The classic example of this is the now-infamous training, supported by the U.S. (with significant British, Pakistani and Saudi involvement), of anyone willing to fight the Soviet Union in Afghanistan—no matter how extreme their ideology.²⁶¹ The Afghan war is crucial to understanding how this problem metastasized so quickly. Many of those founding or leading terror cells from the Philippines to Morocco fought in Afghanistan, where they built a sophisticated and dangerous network, and then took their training home with them.²⁶² Today, we must remember that failed U.S. Cold War policy was partially responsible for the emergence of these terrorist movements in the first place—a historical fact with which we have utterly failed to come to terms. Such proof of the law of unintended consequences also suggests a pragmatic reason to proceed with great caution in determining current policy.

The other major contributing factor from outside the Muslim world, par-

259. Olivier Roy, *Why Do They Hate Us? Not Because of Iraq*, N.Y. TIMES, July 22, 2005, at A21.

260. See, e.g., Richard Sale, *Analysis: Hamas History Tied to Israel*, UNITED PRESS INT’L, June 18, 2002; HUMAN RIGHTS WATCH, BACKGROUNDER ON AFGHANISTAN: HISTORY OF THE WAR (2001), available at <http://www.hrw.org/backgrounder/asia/afghan-bck1023.pdf>, and ROBERT DREYFUSS, DEVIL’S GAME: HOW THE UNITED STATES HELPED UNLEASH FUNDAMENTALIST ISLAM (2005).

261. See, e.g., AFGHANISTAN: INTERNATIONAL RESPONSIBILITY FOR HUMAN RIGHTS DISASTER, *supra* note 15

262. See Godfrey Jansen, *The “Afghans” – an Islamic Time Bomb*, MIDDLE E. INT’L, Nov. 20, 1992, at 16.

ticularly to recruitment and sympathy for Muslim fundamentalist armed groups, and the apologetics on their behalf from various quarters, is that of disastrous Western policies toward Muslim countries. Examples include 2003's illegal invasion of Iraq²⁶³ and failure to equitably resolve the Palestinian-Israeli conflict.²⁶⁴ Many international human rights activists recognize the legitimacy of grievances about these policies, and the bases for some of these grievances in international law. However, these causes are latched on to by fundamentalist movements that seek to advance their own agendas.²⁶⁵ Their project rather is to construct theocratic, despotic states of their own that would deny the human rights of women,²⁶⁶ minorities, and freethinking members of the majority.²⁶⁷ As Algerian anthropologist Mahfoud Bennoune often said, such an ideology is "a disease masquerading as a cure."²⁶⁸ While the underlying sources of frustration must be addressed, including by and with international human rights law, these movements represent a grave threat to international human rights themselves. Furthermore, endogenous causes of fundamentalism in the Muslim world must not be forgotten, such as bad governance, lack of adequate religious reform, discriminatory attitudes about women and non-Muslims, as well as lack of enjoyment of human rights.²⁶⁹

Any struggle against terrorism that does not seek to comprehend and address its causes and context is doomed to failure. There is no question that we must address the root causes that contribute to the decision of some to turn to terrorism or of others to support that violence. However, we must not forget that extremist ideology is also to blame. And we should be wary of drawing a straight causal line between poverty or other human rights problems and a proclivity for terrorism.²⁷⁰ Many who turn to fundamentalist terrorism are not the most downtrodden, but frustrated middle class professionals and educated persons.²⁷¹ Moreover, as Wilder Tayler, former Legal and Policy Director for Human Rights Watch, reminds us, terrorism is always a choice; it is not inevita-

263. On the legality of the war, see Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 608 (2003).

264. See, e.g., THE IRAQ STUDY GROUP REPORT 54-55 (2006).

265. See, e.g., Nahda Younis Shehada, *The Rise of Fundamentalism and the Role of the 'State' in the Specific Political Context of Palestine*, in WARNING SIGNS OF FUNDAMENTALISMS 135 (Ayesha Imam et. al. eds., 2004), and BHATT, *supra* note 248, at 136-45.

266. For an argument about the impact of fundamentalist movements on women's human rights, see Courtney Howland, *The Challenge of Religious Fundamentalism to the Liberty and Equality Rights of Women: An Analysis under the United Nations Charter*, 35 COLUM. J. TRANSNAT'L L. 271 (1997) (especially 305-16).

267. See, e.g., BHATT, *supra* note 248, at 107, and Moghissi, *supra* note 242, at 64-76.

268. See Karima Bennoune, *supra* note 4.

269. Marc Saghie, *Un Siècle d'Islam Politique*, June 15, 2003, COURRIER INT'L, available at <http://www.mafhoum.com/press5/150S22.htm>.

270. See Sidney Jones, *Asking the Right Questions to Fight Terror*, JAKARTA POST Jan. 9, 2006, available at <http://www.crisisgroup.org/home/index.cfm?id=3863>.

271. PETER MANSFIELD, A HISTORY OF THE MIDDLE EAST 377-78 (2d ed. 2003).

ble.²⁷² Many who seek to combat and end the most egregious human rights violations do not make this choice.²⁷³

International lawyers must neither overlook the terrible toll that terrorism has exacted within societies in the global South, nor make easy assumptions about attitudes and priorities in the broader Muslim and Arab worlds and communities. Many in those communities are hardcore opponents of terrorism and fundamentalism,²⁷⁴ and have looked to the international community to recognize the threats that they themselves face from such movements.²⁷⁵ For them, this is not an East-West clash of civilizations, but a political struggle within their own community over the human rights framework of society. As a group of dissident Muslim intellectuals, including Salman Rushdie, recently wrote in response to the controversy regarding Danish cartoons of the Prophet Mohamed:²⁷⁶ "It is not a clash of civilisations nor an antagonism between West and East that we are witnessing, but a global struggle that confronts democrats and theocrats."²⁷⁷

C. The Radical Universalist Response

In such an environment, advocates of international human rights law need to make clear that human rights law protects proponents of fundamentalist views from torture and other human rights abuses, but *at the same time* protects women, religious minorities and freethinkers from the terror of any such proponents who employ it. For example, these advocates must support protection of the human rights of Palestinians from the Israeli military and of Israeli civilians from suicide bombings by Palestinian armed groups; they must be outraged both by U.S. torture at Abu Ghraib and armed group murders of Iraqi civilians, and

272. Wilder Tayler, Notes on the Human Rights Movement and the Issue of Terrorism, presented at the International Council on Human Rights Policy, International Meeting on Human Rights and Political Violence, Lahore, May 20-22, 2005, at para. 71 (citing Bill O'Neill), available at http://www.ichrp.org/public/workingpapers.phplang=FR&search_auteur=wilder+tayler&search=go.

273. O'Neill, *Conference Concept Paper*, supra note 193, at 11.

274. See the words of Mohammed Sayed Tantawi, the Grand Imam of Egypt's al-Azhar, on Sept. 12, 2001. "[K]illing civilians is a horrific, hideous act that no religion can condone." Quoted in James Reston Jr., *Seeking Meaning from a Grand Imam*, WASH. POST, Mar. 31, 2002, at B04. See also the writing of Algerian journalist Mohamed Sifaoui, including, MOHAMED SIFAOU, *INSIDE AL QAEDA, HOW I INFILTRATED THE WORLD'S DEADLIEST TERRORIST ORGANIZATION* (2004), and *Oui, c'est cette terreur que nous avons vécue seuls et isolés: Le témoignage accablant de Cherifa Kheddar*, Speech by Cherifa Kheddar, Director of the Djazairouna Association of the Families of Victims of Terrorism, to the International Conference Against Terrorism, Paris, Sept. 11, 2007. In part, recognizing terrorism as a human rights violation is an important means of offering support for such voices.

275. See Charaf Eddine, supra note 78.

276. For a definitive description and analysis of the cartoon controversy, see JEANNE FAVRET-SAADA, *COMMENT PRODUIRE UNE CRISE MONDIALE AVEC DOUZE PETITS DESSINS* (Les Prairies ordinaires 2007).

277. *Writers Issue Cartoon Row Warning*, supra note 255.

they must campaign actively against both.²⁷⁸ This is the radical universalism needed to weather the dark days of post-September 11 polarization.

International human rights lawyers cannot afford to be (or to appear) naïve about the identities and agendas of *some* of the victims on whose behalf we work in the context of human rights and counter-terrorism. Some of these same individuals in other situations have been, or will be, or seek to be, perpetrators or advocates for grave abuses (such as violence against women, or discrimination, or indeed, attacks on civilians). That does not mean that we should not defend their non-derogable human rights, but rather that human rights theorists must be thoughtful and balanced about the broader context of our work and must responsibly consider the arguments regarding proposed derogations of derogable rights.

For an example of a key issue of balance, while human rights advocates are right to express concerns that governments will use counter-terrorism laws to weaken asylum law and invalidate or slow legitimate asylum claims,²⁷⁹ we must also recognize and take into account that refugee status is not available for those who have participated in human rights violations.²⁸⁰ *Non-refoulement* protection may still be available, preventing the individual's return should he or she be able to establish a risk of abuse.²⁸¹ However, if we are demanding *non-refoulement* of individuals who may have participated in human rights abuses such as terrorism, we must systematically demand that, though the person not be returned and their human rights be protected from torture and the like, they still must be investigated and brought to justice in accordance with international standards in a jurisdiction that will respect their human rights.²⁸² This allows us to stand by both sets of victims and to take seriously our own impunity claims—that there should not be exemption from punishment for grave human rights abuses. Human rights advocates must remember those claims and combat impunity, whether the abuses in question are acts of terror, or of torture.

The human rights movement must begin to work with victims of terrorism,

278. Human rights organizations have done some very good work documenting the non-state abuses mentioned in this litany, even if not labeling them as terrorism or as human rights *violations*. See, e.g., *supra* note 107 and *infra* note 289. However, much remains to be done, especially in the campaigning sphere.

279. HUMAN RIGHTS FIRST, ABANDONING THE PERSECUTED: VICTIMS OF TERRORISM AND OPPRESSION BARRED FROM ASYLUM (2006), available at www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf.

280. Article 1(F) of the Convention Relating to the Status of Refugees stipulates, in relevant part, that “[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that : a) He has committed a crime against peace, a war crime, or a crime against humanity . . . c) He has been guilty of acts contrary to the purposes and principles of the United Nations.” Convention Relating to the Status of Refugees, art. 1(F), July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

281. See, e.g., U.N. Convention against Torture, *supra* note 134, at art. 3.

282. For further discussion of these issues, see Rene Bruin & Kees Wouters, *Terrorism and the Non-derogability of Non-refoulement*, 15 INT’L J. REFUGEE L. 5 (2003).

recognizing them as victims of human rights violations, and using many of the tools developed to defend other victims to defend their rights to truth, justice and rehabilitation.²⁸³ In the current moment, this requires a willingness to deal in complexity rather than simplicity. As Cherifa Kheddar, the director of Djazairouna—an Algerian association of the families of victims of terrorism—recently said at the International Conference Against Terrorism, held in Paris on Sept. 11, 2007, “neither the cowardice of institutions, nor their simple condemnations of terrorist acts, will end fundamentalist violence, in the absence of a courageous politics, both at the regional and international levels.”²⁸⁴

There have been some important efforts in this direction. For example the Spanish section of Amnesty International reportedly sent observers to parts of the trial of the perpetrators of the Madrid bombings not only to make sure that the rights of the defendants were being respected, but also to show solidarity with victims and determine whether their needs were being taken into consideration.²⁸⁵ Such models should be repeated and elaborated. The best response to the particularist approach of some governments that only recognize the threats from terrorism, and not from unfettered counter-terrorism, is not a particularist human rights response that focuses only on the damage wrought by counter-terrorism. Instead, the best response is a radical universalist approach that brings attention to both halves of terror/torture. This does not mean that human rights advocates should soften their critique of government counter-terrorism. Both critiques spring from the very same set of commitments: opposition to the deliberate, instrumental infliction of severe suffering on human beings.

VII.

CONCLUSION: THINKING THE NEW

In the wake of September 11, philosopher and political scientist Seyla Benhabib challenged intellectuals to “think the new.”²⁸⁶ The international legal

283. The human rights movement has focused much attention on these rights in general in recent years. See, e.g., *The Basic Principles and Guidelines on the Right to a Remedy and to Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Commission on Human Rights, Resolution 2005/35, Apr. 19, 2005.

284. Kheddar, *supra* note 274, at 5 (translated from French by the author).

285. Conversation with Esteban Beltrán, Director of Amnesty International – Spain, Aug. 2007 (notes on file with the author).

286. Seyla Benhabib, *Unholy Wars*, in NOTHING SACRED, *supra* note 4 at 397, 397. Here she was calling for creative engagement with the challenges posed by transnational fundamentalist terror networks. This is not to be confused with discourses that suggested abandoning fundamental precepts of international law in the wake of September 11, exemplified by writers like Michael Glennon. See, e.g., Michael Glennon, *Why the Security Council Failed*, FOREIGN AFF, May/June 2003. There have indeed been some important attempts to push international human rights law thinking forward. See, e.g., NON-STATE ACTORS IN THE HUMAN RIGHTS UNIVERSE (George Andreopoulos et al. eds., 2006). However, as a discipline, we have yet to come to terms with the challenge of terrorism. As Susan Waltz notes in her blurb on the back cover of the Andreopoulos volume,

academy has struggled to meet this challenge. If international human rights lawyers, in particular, do not do so, we risk, as Benhabib presages, continuing with a “tired paradigm,”²⁸⁷ easily criticized as dating from the prelapsarian time before September 11.

Classically-minded human rights lawyers need to carefully rethink their reified emphasis on the state to the extent that it minimizes the threats to human rights from other actors. In fact, we must grapple with a complicated contemporary landscape in which globalization and a range of transnational threats (like terrorism) mean that, in some situations, some non-state actors may be more powerful relative to the state—and even more so relative to victims—than we have heretofore seen, and hence may pose a significant threat to human rights. The state/non-state actor power differentials vary widely, as do the actual risks from terrorism versus government representations of such risks. In many situations we continue to face truly uneven power differentials and need to be careful of artificial equivalencies. Still, new thinking is warranted, given that some non-state entities like Al Qaeda and related groups may have as much destructive power as some states, and as much ability to shape international events and harm human rights.

Speaking of Al Qaeda and related groups, Benhabib argued that a novel approach is necessary because

[t]he emergence of non-state agents capable of waging destruction at a level hitherto thought to be only the province of states and the emergence of a supranational ideological vision with an undefinable moral and political content, which can hardly be satisfied by ordinary political tactics and negotiations, are the unprecedented aspects of our current condition.²⁸⁸

Rigid legal rules, and the thinking that goes with them, confined to the old international model, will be relatively useless to confront this reality.

As Algeria’s civil war—chronicled in *El Manara*—underscores, we are now often genuinely between Scylla and Charybdis, and must employ creativity and a rigorously principled universality to navigate between—and confront—both. Even as some opponents of terror have neglected the torture side of ter-

“[s]cholarship has not kept pace with the politics . . .” *Id.* at back cover.

287. Benhabib, *supra* note 286. In Benhabib’s words, “[t]his is the task at which Susan Sontag, Fred Jameson, and Slavoj Zizek have failed us by interpreting these events along the tired paradigm of an anti-imperialist struggle by the ‘wretched of the earth.’ Neglecting the internal dynamics and struggle within the Islamic world and the history of regional conflicts in Afghanistan, Pakistan, India, and Kashmir, these analyses assure us that we can continue to grasp the world through our usual categories These analyses help us neither to grasp the unprecedented nature of the events unfolding since September 11, 2001 nor to appreciate the internal dynamics within the Arab-Muslim world which had given rise to them.” *Id.* (footnote omitted). For this Article, the challenge of “thinking the new” also arises in regard to security discourses (and their purveyors) whose worldview is a sort of negative of the one Benhabib critiques. These security discourses project the image of an undifferentiated mass of “Muslim” terrorists facing off against Western liberators, the latter being empowered by their opposition to the former to use exceptional means outside of ordinary law and morality. See *supra* notes 163-165 and 257-258 and accompanying text.

288. Benhabib, *supra* note 286, at 401.

ror/torture, some human rights advocates have downplayed the terror side and *its* profound threat to human rights. *Some* very good work has been done by some human rights organizations on the human rights impact of terrorism itself.²⁸⁹ Many organizations are developing their work in this area, which is positive (though most still fail to reckon with the particular challenge from jihadist movements). Still, the full development of what Gita Sahgal has called “a human rights account of terrorism”²⁹⁰ remains an outstanding task.

On the security side, there can be no minimizing the horrors suffered by the victims of terrorism and their families whether on September 11, 2001, or on too many similar though smaller-scale dates that we may not remember. Yet to respond to inhumanity with inhumanity, to meet lawlessness with lawlessness, to oppose terror with torture, can lead nowhere that we want to go. We must find other effective means—that are in accordance with national and international law and do not but create more victims—to prevent and punish terrorist atrocities. We are legally, morally and practically bound to say an absolute no to torture, as to terror. Human Rights Watch’s statement, issued on September 12, 2001 from its office in the tallest building left standing in New York City, eloquently sums up this view:

People committed to justice and law and human rights must never descend to the level of the perpetrators of such acts. . . . There are people and governments in the world who believe that in the struggle against terrorism, ends always justify means. But that is also the logic of terrorism. Whatever the response to this outrage, it must not validate that logic. Rather, it must uphold the principles that came under attack yesterday, respecting innocent life and international law. That is the way to deny the perpetrators of this crime their ultimate victory.²⁹¹

Ultimately, “thinking the new” should lead intrinsically to a novel and fuller discourse on the intersection of security, terrorism and human rights: a discourse that consistently recognizes and addresses the threats of both halves of terror/torture, even as it absolutely rejects both.

289. See Sahgal, *supra* note 229; HUMAN RIGHTS WATCH, ERASED IN A MOMENT: SUICIDE BOMBING ATTACKS AGAINST ISRAELI CIVILIANS (2002); INTERNATIONAL WOMEN’S HUMAN RIGHTS LAW CLINIC, THE CENTER FOR CONSTITUTIONAL RIGHTS AND THE INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, SHADOW REPORT ON ALGERIA SUBMITTED TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE (1999), available at <http://www.ilhr.org/ilhr/reports/shadow/>; Amnesty International, Sri Lanka: A Climate of Fear in the East, Feb. 3, 2006, AI Index: ASA 37/001/2006. Note that this work is often done outside of the paradigm of “terrorism.” See also the discussion of *Jane Doe v. Islamic Salvation Front and Anwar Haddam*, a groundbreaking case in which the Center for Constitutional Rights represented nine Algerian women and an Algerian women’s organization in their ultimately unsuccessful civil suit against an Algerian fundamentalist group and one of its leaders, available at [http://ccrjustice.org/ourcases/current-cases/doe-v.-islamic-salvation-front-\(fis\)-and-anwar-haddam](http://ccrjustice.org/ourcases/current-cases/doe-v.-islamic-salvation-front-(fis)-and-anwar-haddam).

290. Sahgal, *supra* note 229, at 3.

291. Human Rights Watch, *Response to Attacks on the U.S.*, Sept. 12, 2001, available at <http://hrw.org/english/docs/2001/09/13/usint2106.htm>.

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VIII.

EPILOGUE: RETURN TO EL MANARA

At the end of the film *El Manara*, Asma has fled as a refugee to France. She has run from both her former friend Ramdane, who terrorized and tortured her, and her former husband Fawzi, who became a torturer on her behalf. She is a victim and survivor of both halves of terror/torture. Alone, she has given birth to a daughter from her wartime rape. Finally, she receives an anonymous message. "Come back to El Manara." Here "El Manara" is a reference both to the North African version of the celebration of the birthday of the Prophet Mohamed, deemed heretical by fundamentalists, and to the Arabic word for lighthouse, specifically the one which stands outside the Algerian coastal town of Cherchell, from which she, Fawzi, and Ramdane all originate. Thus the message is a timely exhortation to come back to light, to carefully navigate dangerous waters, to hold to one's values even after horror. I think it is significant that we are never told for sure whether the source of the message is Fawzi or Ramdane, a repentant torturer or a repentant terrorist. Whatever the source, "come back to El Manara," is a reminder of which we are all in need today.