Laws against terrorism; Savagery of legal systems

A comparison of anti terrorism laws among major legal systems of world

Lori Wigbers

PUBLIC ADVOCACY INITIATIVES FOR RIGHTS AND VALUES IN INDIA (PAIRVI)
G-30, 1st Floor Lajpatnagar-III, New Delhi
Telephone: +91-11-28841266/+91-11-56151897
Email: pairvidelhi@rediffmail.com
Website: www.pairvi.org

Executive Summary

Terrorism is a complex and multi-faceted phenomenon; it does not stem from a single causal framework, nor do its proponents belong to a singular group. Attempting to produce an internationally recognized definition, which accounts for all instances and the differing motivations of the terrorists themselves, runs the risk of being over-inclusive. To complicate matters, each nation takes different approaches to distinguish between acts of terror on the part of state and non-state actors, the internal motivators for these actors, the legality and availability of violent instruments, and political, ethnic or religious framework of terrorist events.

In light of these structural difficulties, traditional policy responses to incidents of political violence have generally proceeded along two lines:

a. To either increase coercive legal measures, which are designed to punish or deter terrorist activity;
b. To meet some or all of the dissident demands.

This report will suggest a third option for states which are secure in the underlying legitimacy of their position: focus on the criminal element, and treat terrorism like any other law enforcement problem. In this pursuit it may be necessary to impose additional measures of social control, but here the watchword must remain "moderation". As many political observers have commented: "Both analysis and history tell us that that lack of confidence and over-reaction in the face of terrorist attacks are at least as dangerous as many of the attacks themselves."[1]

In *The Mini-Manual of the Urban Guerrilla*, the Brazilian communist Carlos Marighela explicitly encouraged terrorist groups to mount attacks designed to provoke state authorities into overreaction.[2] Marighela theorized that a repressive state response would alienate the government from its population and generate support for the terrorists, and that declining governmental legitimacy would strengthen the terrorist cause. If Marighela's theory is correct, one would expect to see a correlation between a draconian state response and both the resilience and intensity of terrorist campaigns.

With Marighela's theoretical framework in mind, the following report will examine the experiences of seven democratic states – India, the United States, the United Kingdom, Canada, Israel, Pakistan and Afghanistan – in their approaches to counter-terrorism law, the relative successes and failures of each, and the state of human rights throughout this process. It will demonstrate that democratic states, through their international, foreign and domestic policies of confronting terrorism, have the potential to be, quite literally, their own worst enemies.

The report will proceed in the following format:

- **Section I:** Comparison of counter-terrorism strategies in the above-mentioned countries using specific legal mechanisms, such as:

    a. Legal definition of terrorism;

[1] Wardlaw, Grant (1989).Political Terrorism: Theory, Tactics, and Counter-Measures. Second Edition, Cambridge: Cambridge University Press, pp. 186
[2] Marighela, Carlos (1970). Minimanual of the Urban Guerrilla. Havana: Tricontinental, pp. 35–36.

b. Search and seizure law;
c. Arrest procedure;
d. Length of pre-charge detention;
e. Presence of sunset clauses;
f. Bail procedures for terrorist suspects.

- **Section II:** Examination of the legal issues within counter-terrorist practice, particularly those with a strong potential for human rights violations.

- **Section III:** International civil society opinion of counter-terrorist policy, highlighting specific concerns from each country.

- **Section IV:** Current judicial opinion and precedent in the application of counter-terrorist law.

- **Section V:** Case studies, highlighting incidents of human rights infringement within the practical application of counter-terrorist policy.

Finally, this report will demonstrate that, in the name of countering terrorism, a wide range of laws, policies and practices have eroded human rights protections as governments claim the security of some can only be achieved by violating the rights of others. The voices of human rights defenders, political opposition leaders, journalists, people from minority groups and others have been stifled, or intimidated into silence. Harsh legal responses have undermined the rule of law and violate numerous international treaties; they pose significant challenges to the protection of human rights in numerous countries across the globe.

Counter-Terror in the United States of America

> *"The administration of President Bush, in developing its interpretations of U.S. and international law, and the Congress in enacting certain changes to U.S laws sought by the administration, have pursued policy preferences in the "war on terror" with little or no regard or respect for the USA's international legal obligations. This has led to failure to comply with some of the most fundamental, absolute, and non-derogable rules of international law, such as, the rule that anyone deprived of his or her liberty must be treated with humanity and with respect for the inherent dignity of the human person, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the prohibition of enforced disappearance, and the prohibition of arbitrary detention."*[3]

In a world community which has adopted global measures to counter terrorism, the United States is a leader. This position carries with it a special responsibility to also take leadership in the protection of human rights while countering terrorism. Despite the existence of a long tradition within the United States of respect for the rule of law, and the presence of self-correcting mechanisms under the United States Constitution, it is most regretful that a number of important mechanisms for the protection of rights have been removed from both law and practice since the events of 11 September, including under the USA PATRIOT Act of 2001 and the Military Commissions Act of 2006.These two pieces of legislation form the basis of U.S. foreign policy, and are the legal guidelines by which the "War on Terror" is waged. This report will examine each Act at length, and the human rights issues which arise from their enforcement.

The USA PATRIOT Act of 2001

Signed into law by George W. Bush on October 26 2001, the USA PATRIOT Act remains the principal piece legislation which determines U.S. counter-terror policy. The Act increases the ability of law enforcement agencies to search telephone, e-mail communications, medical, financial, and other records; eases restrictions on foreign intelligence gathering within the United States; expands the Secretary of the Treasury's authority to regulate financial transactions, particularly those involving foreign individuals and entities; and enhances the discretion of law enforcement and immigration authorities in detaining and deporting immigrants suspected of terrorism-related acts. The act also expands the definition of terrorism to include domestic terrorism, thus enlarging the number of activities to which the expanded law enforcement powers can be applied.[4]

Although the Act was supported by members of both the Republican and Democratic parties, it has been criticized for weakening protections of civil liberties, as well as being overboard in regard to its application. In particular, opponents of the law have criticized the authorization of indefinite detentions of immigrants; searches through which law enforcement officers search a home or business without the owner's or the occupant's permission or knowledge; and the expanded use of National Security Letters, which allows the FBI to search telephone, e-mail, and financial records without a court order;

---

[3] Amnesty International (2008). USA: Investigation, prosecution, remedy; Accountability for human rights violations in the "War on Terror". 4 December 2008, AI Index: AMR 51/151/2008

[4] USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, 120 Stat. 278 (9 March 2006).

Since its passage, several legal challenges have been brought against the act, and Federal courts have ruled that a number of provisions are unconstitutional.[5]

The Military Commissions Act of 2006

Drafted in the wake of the Supreme Court's decision on *Hamdan v. Rumsfeld*, President Bush signed this Act of Congress into law on October 17, 2006. The Act's stated purpose was "To authorize trial by military commission for violations of the law of war."[6] It changes pre-existing law by explicitly forbidding the invocation of the Geneva Conventions in the case of any persons captured during hostilities. The Act contains provisions removing access to the courts for any alien detained by the United States government who is determined to be an enemy combatant, or who is "awaiting determination" regarding enemy combatant status. This allows the United States government to detain such aliens indefinitely without prosecuting them in any manner.

The MCA has also been criticized for allegedly making it harder to prosecute and convict officers and employees of the US government for misconduct in office. First, the MCA has changed the definition of war crimes for which U.S. government defendants can be prosecuted. Under previous law, any violation Article 3 of the Geneva Conventions was considered a war crime and could be criminally prosecuted. The MCA has amended the law so that only actions specifically defined as "grave breaches" of Article 3 could be the basis for a prosecution, and it made that definition retroactive to November 26, 1997. The specific actions termed as "grave breaches" include torture, cruel or inhumane treatment, murder, mutilation or maiming, intentionally causing serious bodily harm, rape, sexual assault or abuse, and the taking of hostages. According to Human Rights Watch, the effect is "that perpetrators of several categories of what were war crimes at the time they were committed, can no longer be punished under U.S. law."[7]

I. Mechanisms for Comparison

1. Definition of Terrorism: Title VIII of the Act redefines the term "terrorism", and re-establishes the rules on how to deal with it. Included in the overly broad definition is the use of mass destruction, as well as assassination or kidnapping, as a terrorist activity. The definition encompasses activities that are "dangerous to human life that are a violation of the criminal laws of the United States or of any State" and are intended to "intimidate or coerce a civilian population," "influence the policy of a government by intimidation or coercion," or are undertaken "to affect the conduct of a government by mass destruction, assassination, or kidnapping" while in the jurisdiction of the United States. Terrorism is included in the definition of racketeering, and offences relating to cyber-terrorism are also redefined. Indeed, the U.S. definition of terrorist activity is over-inclusive and

[5] USA patriot act. (21 December 2008). In Wikipedia, The Free Encyclopedia. Retrieved 14 July 2009, available at: http://en.wikipedia.org/w/index.php?title=Usa_patriot_act&oldid=259307848.
[6] The Military Commissions Act of 2006, 10 U.S.C. 948a.
[7] Mariner, Joanne (2006). "The Military Commissions Act of 2006: A Short Primer (Part Two)". October 25 2006. FindLaw. Retrieved 14 July 2009, at http://writ.news.findlaw.com/mariner/20061025.html.

exceptionally broad, making it perhaps the least specific definition of terror in the Western world.

2. Search and Seizure:

a. *"Sneak and Peek" Warrants:* The "sneak and peek" policy allowed for delayed notification of the execution of search warrants. The period before which the FBI must notify the recipients of the order was previously unspecified in the Act — the FBI field manual says that it is a flexible standard — although recent reauthorization of the Act has explicitly stated that this period must be no longer than 30 days after the execution of the warrant.
b. *Roving Wiretap Orders:* Under the Act, roving wiretap orders need not specify all common carriers or third parties in the initial orders; as the investigation progresses, the initial wiretap order is all that is needed to search individual and business records. This provision was enacted as an attempt to curb the ability of terrorists to avoid detection through traditional wiretap orders by rapidly changing location or communication devices, such as cell phones. Critics, however, view the practice as violating the particularity clause of the Fourth Amendment.
c. *National Security Letters:* A hotly contended issue in search and seizure policy is the use of National Security Letters as a means to elicit restricted information. Unlike other subpoenas and warrants, no approval from the judicial branch is required to issue an NSL. The FBI can make an order "requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities". Normal checks and balances do not apply until after the letter has been issued, and a gag order clause forbids the recipient of the order to acknowledge its contents or existence.

Under the Act, U.S. forfeiture law has been amended to allow authorities to seize all foreign and domestic assets from any group or individual that is caught planning to commit acts of terrorism against the U.S. or U.S. citizens. Assets may also be seized if they have been acquired or maintained by an individual or organization for the purposes of further terrorist activities. The scope of search warrants has also been expanded, allowing the FBI to gain access to stored voicemail through a search warrant, rather than through the more stringent wiretap laws.

3. Arrest: There is no warrant requirement for any person arrested for a terrorism-related offence under the Act. Additionally, the police need not inform the suspect of the charges against them or provide them access to a lawyer, a flagrant violation of due process rights.

4. Pre-Charge Detention: The Act expanded the authority of law enforcement agencies to use administrative detention for the stated purpose of fighting terrorism in the United States and abroad. Under the Act, any person (citizen or alien) suspected of terrorist connections may be administratively detained for up to seven days without the benefit of an habeas corpus proceeding. The Attorney General, at his discretion, may extend this

seven-day period to six months, and this extension itself may be renewed indefinitely – legally creating the possibility of lifetime imprisonment without ever facing charges. One of the criticisms of the PATRIOT Act is that the Attorney General's decision is not subject to any judicial review, unlike other democratic countries which have similar administrative detention laws

5. Sunset Clause: Many of the Act's provisions were to sunset beginning December 31, 2005, approximately 4 years after its passage. In the months preceding the sunset date, supporters of the Act pushed to make these provisions permanent, while critics sought to revise various sections to enhance civil liberty protections. Reauthorized in 2006, it contains minor modifications to the sections of the Act which had previously been struck down by courts and deemed unconstitutional. In this way, the Bush administration was able to sidestep the rulings of the court and reintroduce many of the restrictive measures contained in the first incarnation of the PATRIOT Act. The current legislation is slated to sunset on December 31 2009.

6. Bail: In the name of "untying the hands of law enforcement", The PATRIOT Act gives legal permission for the courts to hold a suspect without bail. Furthermore, any person who is deemed to be a material witness in an ongoing terrorism case can be arrested and detained without bail until they are called upon to testify.

II. U.S. Counter-Terror Legislation and the Incompatibility with Human Rights

Much of the controversy surrounding this piece of legislation stems from the aspects of law defined below:

1. National Security Letters

One of the most contentious aspects of the Patriot Act is the use of National Security Letters, an administrative subpoena which demands the requested organization to submit any data or information pertaining to an individual. In practice, the use of these Security Letters essentially allows investigative agencies to search medical, telephone, email and financial records without warrant, probable cause or judicial oversight. National Security Letters can be issued to investigate virtually any person residing, traveling, or transiting through the U.S., even those people who are not subject to any criminal investigation. The letters also contain a clause which forbids the recipient of revealing the contents or even the receipt of the order itself. In particular, the non-disclosure clause has prevented the full extent of the NSL program from becoming known.[8]

2. Administrative Detention

In contrast to criminal incarceration, which is imposed upon conviction following trial, administrative detention is a forward-looking mechanism. Many democratic countries have incorporated this practice into their counter-terrorism policy, and the

[8] *Supra* note 3.

United States is no exception. The PATRIOT Act expanded the authority of law enforcement agencies to use administrative detention for the stated purpose of fighting terrorism in the United States and abroad. Therefore, any person, whether citizen or alien, suspected of terrorist connections may be administratively detained for up to seven days without the benefit of an habeas corpus proceeding. The Attorney General, at his discretion, may extend this seven-day period to six months, and this extension itself may be renewed indefinitely – legally creating the possibility of lifetime imprisonment without ever facing charges. One of the criticisms of the PATRIOT Act is that the Attorney General's decision is not subject to any judicial review, unlike the situation in other democratic countries which have similar administrative detention laws.

Administrative detention is also used liberally in the context of immigration concerns. Pursuant to the Act, once the Attorney General has certified that he has reason to believe that a foreign national may facilitate acts of terrorism in the United States, the suspect will be taken into custody, and can be detained initially for seven days. During this time, the Attorney General must initiate deportation proceedings, or charge the suspect with a crime — or else the person must be released. However, as long as the Attorney General initiates removal proceedings within the seven-day period, he can continue to detain a person throughout those proceedings and even after they are completed. Indeed, even if an immigration judge concludes that that person is eligible for relief from removal, the Attorney General nevertheless has explicit authority to continue detention. The Act is also ambiguous on an important question: What happens when the Attorney General has detained someone as a terrorist and the immigration judge has found that the changes of removability are unfounded? It appears from the current draft of the legislation that the person certified by the Attorney General can be detained indefinitely, until either de-certified by the Attorney General or released by the court.[9]

3. The Designation of Unlawful Combatants

In the wake of the September 11 attacks, President Bush issued a Presidential Military Order which expanded the criteria for classifying captives as illegal combatants.[10] Individuals captured around the world are now classified as such if U.S. intelligence officials believe they have sufficient evidence to tie the individual to terrorism. This is a clear violation of the third Geneva Convention, which require that all captives be eligible for prisoner of war status, guaranteeing a certain standard of treatment and rights, until their case can be heard by a competent tribunal.[11] By deeming every captured combatant to be "unlawful", the government is effectively disregarding the third Geneva Conventions altogether.

The Order also legitimizes the use of indefinite detention by allowing "individuals to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals".[12] The Order fails to specify, however, the length of time for which this detention can continue is not specified, which opens the door for

---

[9] Concluding observations of the Human Rights Committee, United States of America, (CCPR/C/79/Add.50, paras. 278-279, 292)

[10] President George W. Bush's Military Order of 13 November 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism; 66 FR 57833

[11] Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

[12] President George W. Bush's Military Order of 13 November 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism; 66 FR 57833

human rights abuses. Internal critics within the US military and government argue that failing to afford POW protections to combatants captured in the global war on terror could endanger American soldiers, when they were captured, in current and future conflicts.[13]

4. Interrogation Policy and Allegations of Torture

International law, in addition to U.S. law, prohibits torture and other ill-treatment of any person in custody in all circumstances. A fierce debate regarding non-standard interrogation techniques exists within the U.S. civilian and military intelligence community, with no general consensus as to what practices under what conditions are acceptable. In recent years, there has been an alarming amount of reports which accuse U.S. military intelligence agencies and the CIA of abusive interrogation policy, including techniques such as water boarding, prolonged isolation and sleep deprivation, sensory bombardment, and cultural humiliation. Many investigators contend that the seeds of the policy originated in a February 7 2002 memo signed by President Bush, declaring that the Geneva Conventions, which outline standards for the humane treatment of detainees, did not apply to captured al-Qaeda and Taliban fighters.

Particularly controversial is the inclusion of military tactics in the SERE (Survival, Evasion, Resistance and Escape) program as a guideline for the interrogation of unlawful combatants. The SERE program, established by the U.S. Air Force, is specially designed for special operations soldiers at high risk of enemy capture; among other things, it teaches how to avoid "breaking" under torture. The program's chief psychologists helped to devise various interrogation strategies that are allegedly used by U.S. military personnel, using tools such sexual humiliation, exploitation of phobias, forced nakedness and painful stress positions to break down detainees. Although ex-Secretary of State Condoleeza Rice has acknowledged that the use of the SERE program techniques to conduct interrogations in Iraq was discussed by senior White House officials in 2002 and 2003, any overt use of the program has been categorically denied.[14]

5. Guantanamo Bay Detainment Facility

The high-security U.S. detainment facility in Guantanamo Bay has been arguably one of the biggest human rights dilemmas in the last decade. Its very existence has been criticized as a flagrant violation of international law, and numerous reports from the UN and governments around the world call for its immediate closure. Amid allegations of torture and the systematic abuse of inmates, Guantanamo Bay is indeed the largest obstacle to human rights in the current U.S. counter-terror policy.

The problems with Guantanamo essentially stem from the assertion of the Bush administration that detainees are not legally entitled to the protections of the Geneva Convention. While opening the door for harsh interrogation techniques, indefinite detention without charge and denial of access to legal resources, this assertion has also undermined the rule of law, and is a blow to human rights across the world.[15] As a leader in the fight against global terror, the reality of conditions in Guantanamo set a dangerous

---

[13] *Supra* note 4.

[14] Aldrich, Greogory.. "The Taliban, Al Qaeda, and the determination of illegal combatants". American Journal of International Law, Vol. 96, 2002, p. 892.

[15] *Supra* note 4.

precedent for countries who strive to emulate the example of the United States. In his 2008 Presidential campaign, Barack Obama pledged to close the facility in 2009, and bring to a close what he calls a "sad chapter in American history".[16] At the time of this report, President Obama had suspended any ongoing prosecutions of Guantanamo detainees for 120 days in order to assess each case and determine how the prosecutions should continue.

6. Extraordinary Rendition

"Extraordinary rendition:" is the term used to describe the apprehension, detention, interrogation and extrajudicial transfer of a person from one state to another. The United States employs this practice to circumvent the law and retain custody of suspected terrorists, often transferring them to states where no laws exist to prevent the use of torture while in custody. While the U.S. has used legal rendition since the 1980s as a method of dealing with foreign defendants, the current process of extraordinary rendition is a wholly extra-judicial practice which differs in its nature and usage as a tool in the U.S. War on Terror. As the transfers never take place on American soil, the judiciary can never be invoked.[17]

Under a staggering amount of international scrutiny, the program of extraordinary rendition has prompted several official investigations in Europe into alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states. A June 2006 report from the Council of Europe estimated 100 people had been kidnapped by the CIA on E.U. territory, and rendered to other countries, often after having transited through secret detention centers. According to the separate European Parliament report of February 2007, the CIA has conducted 1,245 flights, many of them to destinations where suspects could face torture, in violation of article 3 of the United Nations Convention Against Torture. Within days of his inauguration, President Obama signed an Executive Order opposing rendition torture and establishing a task force to provide recommendations about processes to prevent this practice. At the time of this report, no official order has been issued to stop the practice of extraordinary rendition and it remains a feature of U.S. counter-terror policy.

III. Concerns from Human Rights Organizations

1. Council of Europe

(i) Extraordinary Rendition

The Council of Europe has repeatedly expressed concern over the complicity of E.U. member states in cases of extraordinary rendition of terrorist suspects. In June of 2006, the Parliamentary Assembly of the Council of Europe published a report accusing the U.S. of operating a "clandestine spider-web of disappearances, secret detentions and

---

[16] Bruce, Mary (January 11, 2009). "Obama: Gitmo Likely Won't Close in First 100 Days". ABC News. . Retrieved 10 July 2009, at: http://abcnews.go.com/ThisWeek/Economy/story?id=6619291&page=1

[17] Extraordinary rendition. (25 August 2008). In Wikipedia, The Free Encyclopedia. Retrieved 17 July 2009, from http://en.wikipedia.org/w/index.php?title=Extraordinary_rendition&oldid =234171770.

unlawful inner-state transfers".[18] The report called for the E.U. regulations governing foreign intelligence be strengthened, and suggested that "human rights clauses" be incorporated into any future military base agreements with United States. Additional recommendations are listed below:

a. Dismantling, by the U.S. government, of its system of detentions and transfers.
b. A review of bilateral agreements between Council of Europe member states and the U.S., particularly on the status of U.S. forces stationed in Europe and on the use of military and other infrastructures, to ensure they conform to international human rights norms.
c. Official apologies and compensation for victims of illegal detentions against whom no formal accusations, nor any court proceedings, have ever been brought.
d. An international initiative, expressly involving the United States, to develop a common, truly global strategy to address the terrorist threat which conforms to democracy, human rights and the rule of law.[19]

2. Report of the United Nations Special Rapporteur's Opinion of Political Affairs, Martin Schnieder

(i) Military Detention Facilities

The UN Special Rapporteur finds that the United States has termed all detainees held at the Guantanamo Bay military detention facility as alien enemy combatants", regardless of the circumstances of their capture. While such persons may not be entitled to prisoner of war status, they nevertheless enjoy a certain standard of minimum protections in respect to detention and trial. The Special Rapporteur considers that the detention of persons for a period of several years without charge fundamentally undermines the right of fair trial. He also states that serious concerns about the ability of detainees at Guantanamo Bay to seek a judicial determination of their status, and of their continuing detention. Additionally, The Special Rapporteur supports initiatives to return detainees to their countries of origin, but also concludes that although the United States has advised that it will not do so in breach of the principle of non-refoulement, the current United States standard applied under this principle fails to comply with international law. He emphasizes that the United States has the primary responsibility to resettle any individuals among those detained in Guantanamo Bay who are in need of international protection. Finally, The Special Rapporteur urges the United States to pursue similar action to prisoners who are currently detained in Afghanistan and Iraq.[20]

(ii) The Use of Military Commissions to Try Terrorist Suspects

---

[18] Resolution 1507 (2006), Council of Europe. Assembly debate on 27 June 2006 (17th Sitting).
[19] Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, Council of Europe Parliamentary Committee on Legal Affairs and Human Rights, 7 June 2007.
[20] Special Rapporteur on the Promotion and Protection of Human rights While Countering Terrorism, "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the rights to development''. Martin Schienin. U.N.G.A. Doc. A/HRC/6/17/Add.3 (22 November 2007).

By Military Order in 2001, President Bush established military commissions for the purpose of trying enemy combatants.[21] These commissions, along with the new offences created in the PATRIOT Act (such as providing material support for terrorism, wrongfully aiding the enemy, spying, and conspiracy) have firmly established criminal offences outside the traditional laws of war. The vague definition of "unlawful enemy combatant" means that civilians may find themselves under the purview of military tribunals instead of the criminal justice system. Additionally, military commissions have been given authority under the Order to apply criminal law retroactively; this practice breaches Article 15 of the ICCPR, and universally acknowledged general principles of law.[22]

Further concern is expressed as to the independence and impartiality of these tribunals, especially in light of recent Human Rights Committee rulings that the right to a fair trial is so central to the due process of law that it is an absolute right which can suffer no exception. For example, certain evidence, due to its classified status, may not be disclosed to trial or defence counsel. This is problematic since such evidence may be exculpatory or otherwise beneficial to the defence case. Although evidence which has been obtained by torture is categorically inadmissible, evidence obtained by other forms of coercion may, by determination of the military judge, be admitted into evidence. The ability of the military tribunals to impose the death penalty upon conviction is a violation of ICCPR jurisprudence, which clearly states that the death penalty can only be applied in cases where a fair trial is guaranteed. Given that any appeal rights subsequent to conviction are limited to matters of law, coupled with the concerns pertaining to the lack of fair trial guarantees in proceedings before military commissions, the Special Rapporteur concludes that any imposition of the death penalty as a result of a conviction by a military commission is likely to be a massive violation of human rights. Finally, the Special Rapporteur notes with concern that the acquittal of a person by a military commission or the completion of a term of imprisonment following conviction does not result in a right of release; this amounts to the arbitrary detention of individuals.[23]

(iii) Immigration Refugee Status

There are a number of troubling developments in the law and practice of the United States concerning the treatment of immigrants, those applying for visas, and those claiming refugee status. The USA PATRIOT Act amended provisions of the Immigration and Nationality Act, expanding the definition of terrorist activity beyond the bounds of conduct which is truly terrorist in nature, in particular in respect of the provision of "material support to terrorist organizations". The definition captures, for example, the payment of a ransom to have a family member released by a terrorist organization, or the providing of funds to a charity organization which at the time was not classified as a terrorist organization. The PATRIOT Act provides for the mandatory detention of those suspected of such conduct and the refusal of refugee status for such persons. The Special Rapporteur is troubled by the lack of transparency and judicial remedies in the

---

[21] Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (13 November 2001), 66 Fed. Reg. 57833.

[22] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Art. 4, 21 UN GAOR, 21st Sess., Supp. No. 16, at 52, UN Doc. A/6316 (1966) (entered into force Jan. 3, 1976).

[23] *Supra* note 18.

application of such a waiver to persons, some of whom may themselves be victims of terrorist conduct.

3. The American Civil Liberties Union

(i) The Failure of the United States to Comply with the Conventions Against Torture

The ACLU contends that the U.S. government, in the aftermath of the 9/11 attacks, decided to fight terrorism by picking and choosing what principles of humanitarian and human rights law to apply. "There was a before-9/11 and an after-9/11. After 9/11 the gloves came off," testified Cofer Black, former director of the CIA's counterterrorist unit, in prepared testimony to Congress in 2002.[24] Torture and cruel, inhuman or degrading treatment or punishment are prohibited at all times under human rights law, even in war or when fighting terrorism. The abuse of detainees in U.S. custody, therefore, was directly facilitated by the government's decision not to apply the Geneva Conventions.[25] ACLU review of more than 100,000 pages of unclassified but redacted government documents released after lengthy litigation shows that harsh treatment of detainees was ordered as part of an approved list of interrogation methods to "soften up" detainees in U.S. custody in Afghanistan, Guantanamo, and Iraq. According to the Schlesinger Commission, which was tasked to examine Department of Defense detention operations, coercive interrogation methods approved by ex-Defense Secretary Donald Rumsfeld for use on prisoners at Guantanamo—including the use of guard dogs to induce fear in prisoners, stress techniques such as forced standing and shackling in painful positions, and removal of clothing for long periods—"migrated to Afghanistan and Iraq, where they were neither limited nor safeguarded,"[26] and contributed to the widespread and systematic torture and abuse at U.S. detention centers there.[27]

(ii) Deaths in U.S. Custody in Iraq and Afghanistan

At the time of this ACLU report in April of 2006, about one hundred detainees are known to have died in U.S. military and CIA custody. This estimate is based on government autopsy reports produced to the ACLU, reports by human rights organizations, and reports in the press.[28] The Bush Administration publicly acknowledged that twenty seven of these deaths have been investigated as homicides.[29] According to U.S. army autopsy reports of forty-four detainees produced to the ACLU, twenty-one appear to be homicides. Eight of the homicides appear to be the direct result of abusive techniques used on detainees, in some instances, by the CIA, Navy Seals and

---

[24] Pre 9/11 Intelligence Failures: Hearing before the U.S. House and Senate Intelligence Committees, 107th Congress (2002) (statement of Cofer Black, former Director of the CIA's Counterterrorist Center).
[25] U.N. Committee against Torture, Concluding Observations concerning the United States 180(a), U.N. Doc. No. A/55/44 (May 2000)
[26] James R. Schlesinger, et al., Final Report of the Independent Panel to Review DoD Detention Operations at 8-9 (Aug. 2004).
[27] American Civil Liberties Union (2006). "Enduring abuse: torture and cruel treatment by the United States at home and abroad", The United States of America's Second Periodic Report to the Committee Against Torture, April 2006.
[28] Prisoner Deaths in U.S. Custody, Associated Press, Mar. 16, 2005.
[29] U.S. Army, Criminal Investigation Division, Army Criminal Investigators Outline 27 Confirmed or Suspected Detainee Homicides for Operation Iraqi Freedom, Operation Enduring Freedom (Mar. 25, 2005).

military intelligence personnel. The autopsy reports list the cause of deaths as strangulation," "hypothermia," "asphyxiation," and "blunt force injuries." (See Annex A for chart of detainee deaths and prosecutions). A large number of deaths were attributed in the autopsy reports to "Arteriosclerotic Cardiovascular Disease"—coronary heart disease. However, the ACLU report found that the government rarely undertook any investigation into events preceding the person's collapse to determine what circumstances may have induced or exacerbated the heart attack.[30]

4. Amnesty International

(i) Accountability for Human Rights Violations in the War on Terror

In a December 2008 report, Amnesty International takes a clear stance against the current U.S. counter-terrorist strategy, and suggests that the new administration under Barack Obama carefully weigh the U.S. commitment to upholding the standards of international law in the War on Terror. The document outlines the importance of immediately initiating effective independent criminal investigations, including into crimes under international law such as torture and enforced disappearance committed by individuals acting for or on behalf of the USA; removing potential obstacles in existing U.S. law to successful investigation and prosecution of all such cases; and ultimately bringing perpetrators to justice. Some recommendations from this report are listed below:

a. Upholding truth and accountability as rule of law principles.
b. Rejection of impunity for government, military and intelligence officials who have been implicated in human rights abuses.
c. Establishing an independent commission of inquiry for conduct and practices during the War on Terror.
d. Provide adequate redress and remedy to the victims of human rights violations.[31]

IV. Judicial Opinion

Rasul v. Bush, 542 U.S. 466 (2004): This case represents the very first *habeas corpus* to reach the Supreme Court of the United States, In early 2002, the Center for Constitutional Rights filed two *habeas corpus* petitions, challenging the U.S. government's practice of holding foreign nationals, who were captured in Afghanistan during the war against the Taliban regime and Al-Qaeda, in indefinite administrative detention. The detainees had been designated enemy combatants and did not have access to counsel, the right to a trial or knowledge of the charges against them. The Supreme Court, over the administration's objections, agreed in hear the cases and in June 2004 ruled that the United States Constitution entitled the detainees to challenge the validity of their detention. Although this landmark ruling has reinforced the minimum standards of treatment to detained "enemy combatants", it is a ruling which has yet to be transformed into practice.

[30] *Supra* note 21.
[31] *Supra* note 1.

American Civil Liberties Union v. Department of Defense 04-CV-4151: In this federal court case, the American Civil Liberties Union sued the Department of Defense and the Central Intelligence Agency under the Freedom of Information Act for the release of still-secret materials —specifically those related to abuse at Abu Ghraib prison in Baghdad, Iraq, during the U.S. military occupation. According to public reports, the abuse began in mid 2003 and was ended in late 2003. Public news reports of the abuse first appeared in April 2004. In late September, 2005, Federal Judge Alvin Hellerstein, found that the ACLU case for was stronger, and that the materials should be disseminated. At the time of this report, however, the materials have yet to be made public.

Doe v. Ashcroft 18 U.S.C. 2709: This lawsuit, filed on behalf of an unknown party by the American Civil Liberties Union, reinforces the unconstitutionality of the use of National Security Letters as a means to procure information. The unknown party, an Internet service provider, was subject to National Security Letters from the FBI requiring the release of private information and under a gag order forbidding any public discussion of the issues. In September 2004, Judge Victor Marrero of the struck down the NSL provisions of the USA PATRIOT Act., citing them as a breach of individual rights. This prompted Congress to amend the law to allow limited judicial review of NSLs in the USA PATRIOT Improvement and Reauthorization Act of 2005. Despite this amendment, however, Judge Marrero struck down the NSL provision of the revised Act in September of 2007, ruling that even with limited judicial review granted in the amended law, it was still a violation of separation of powers under the United States Constitution and the First Amendment. At the time of this report, the ruling has not yet been enforced, pending a possible government appeal.

Hamdan v. Rumsfeld, 548 U.S. 557 (2006): In this case, the Supreme Court of the held that military commissions set up by the Bush administration to try detainees at Guantanamo Bay lack the power to proceed, largely because its structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949. This ruling has serious implications for other contentious policy aspects of the War on Terror, such as the legal arguments for domestic wiretapping without warrants by the National Security Agency. On June 5 2007, the charges against the defendant were dismissed. This ruling represents an important victory for human rights in the context of counter-terrorism.

Boumediene v. Bush, 553 U.S. (2008): This case concerns the military detention of Lakhdar Boumediene, a naturalized citizen of Bosnia and Herzegovina, by the United States at Guantanamo Bay. The case challenged the legality of Boumediene's detention, as well as the constitutionality of the Military Commissions Act of 2006. On December 5 2007, the Supreme Court held that prisoners held in military detention facilities also have a right to *habeas corpus* under the United States Constitution, and that the Military Commissions Act was an unconstitutional suspension of that right. Boumediene was eventually released from custody in May of 2009.

V. Annex

Case Studies: Misuse of the USA PATRIOT Act

1. The Case of Omar Khadr

A Canadian citizen born in Toronto, Omar Khadr is the youngest detainee, and only Western citizen, currently held in the Guantanamo Bay detention facility. He has been charged with war crimes and providing support to terrorism after allegedly throwing a grenade that killed a U.S. soldier in the village of Ayub Kheyl, Afghanistan. In 2005, the United States announced that they were assembling the necessary framework to hold newly crafted Guantanamo military commissions. Believing that Khadr's case represented one of the "easiest cases to prove", the United States selected him as one of ten detainees to be charged under this new system.[32] However, following the ruling in *Hamdan v. Rumsfeld*, the commissions were struck down as unconstitutional and the charges were dismissed; Khadr remained in administrative detention. After the enactment of the Military Commissions Act of 2006, new charges were brought against him, despite a petition to the Supreme Court to review the legal status of the tribunal and his ongoing detention. In February 2008, the Pentagon accidentally released documents that revealed that although Khadr was present during the firefight, there was no other evidence that he had thrown the grenade which killed a U.S. soldier.[33] In fact, military officials had originally reported that another of the surviving militants had thrown the grenade just before being killed.[34] In light of this evidence, the Canadian government has begun formal discussions about the possibility of repatriating Khadr.

2. The Case of Maher Arar

The case of Maher Arar, a telecommunications engineer with dual Syrian and Canadian citizenship, is perhaps the most infamous abuse of human rights under the U.S. policy of extraordinary rendition. Arar was detained during a layover at John F. Kennedy International Airport in September 2002, on his way home to Canada from a family vacation in Tunis. He was held in solitary confinement in the United States for nearly two weeks, questioned, and denied meaningful access to a lawyer. The U.S. government suspected him of being a member of Al Qaeda and deported him to his native Syria, despite the fact the Syrian government is known to use torture.[35] He was detained in Syria for almost a year, during which time he was tortured, according to the findings of the Arar Commission, until his release to Canada.[36]

---

[32] Rana, Abbas (21 April 2008). The Hill Times, "Why Canadian federal political leaders should be talking about Omar Khadr now".

[33] Edwards, Steven (4 February 2008). "Second al-Qaida fighter implicated in Khadr incident, secret document shows". Canwest News Service. Retrieved 14 July 2009, from: http://www.canada.com/story.html?id=95f582ec-c987-4bd4-8f17-157a87a73618.

[34] Melia, Michael (13 March 2008). "Lawyer: Khadr report altered". Toronto Star. Retrieved 14 July 2009, from http://www.thestar.com/article/345838.

[35] Country Reports on Human Rights Practices - 2001 (Syria). United States Department of State, Bureau of Democracy, Human Rights, and Labor. 2001. http://www.state.gov/g/drl/rls/hrrpt/2001/nea/8298.htm.

[36] "Maher Arar will not testify before the Commission of Inquiry". Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/maher_arar/07-09-13/www.ararcommission.ca/eng/PressReleaseFinal_sept-06-2007.pdf.

Once in Syria, Arar claims he was blindfolded, shackled and put in a van. He was transferred to a prison, where he claims he was beaten for several hours and forced to falsely confess that he had attended an Al Qaeda training camp in Afghanistan. Arar described his cell as a three-foot by six-foot "grave" with no light and plenty of rats. During the more than 10 months he was imprisoned and held in solitary confinement, he was beaten regularly with shredded cables. Through the walls of his cell, Arar could hear the screams of other prisoners who were also being tortured.[37] While he was imprisoned, Arar's wife Monia Mazigh had been conducting an active campaign in Canada to secure his release; he was eventually returned to Canada in October of 2003.

The government of Canada ordered a commission of inquiry which substantiated Arar's claims of torture while in U.S. custody.[38] The commission of inquiry also publicly cleared Arar of any links to terrorism. Additionally, The Syrian government reports it knows of no evidence which links of Arar to terrorism.[39] Despite the Canadian court ruling, however, the United States government has not exonerated Arar; on the contrary, the Bush administration has made public statements which decry their belief that Arar is affiliated with members of terrorist organizations.[40] As of February 2009, Arar and his family remain on a watchlist. His U.S. lawyers at the Center for Constitutional Rights are currently pursuing his case, *Arar v. Ashcroft*, which seeks compensatory damages on Arar's behalf and also a declaration that the actions of the U.S. government were illegal and violated his constitutional, civil, and international human rights.

3. The Scandal at Abu Ghraib Prison, Baghdad

Beginning in 2004, accounts of physical, psychological, and sexual abuse, including torture, rape, sodomy, and homicide of prisoners held in the Abu Ghraib prison in Iraq came to public attention.[41] These acts were committed by personnel of the 372nd Military Police Company of the United States Army together with additional US governmental agencies.[42] Among the reports of severe torture and abuse, the American Civil Liberties Union also published a report which states that at least 28 detainees were killed at Abu Ghraib.[43] The incidents at this prison are perhaps the most high profile, and certainly the most well documented, of U.S. human rights abuses to date.

---

[37] "His Year in Hell" (21 January 2004). CBS News. Retrieved 18 July 2009, available at: http://www.cbsnews.com/stories/2004/01/21/48hours/main594974.shtml.

[38] "Report of the Events Relating to Maher Arar: Report of Professor Stephen J. Toope Fact Finder". 2006. http://www.ararcommission.ca/eng/ToopeReport_final.pdf.

[39] Report of the Events Relating to Maher Arar: Factual Background, Volume 1. 2006. ISBN 0-660-19648-4. http://www.ararcommission.ca/eng/Vol_I_English.pdf. see page 218, note 282.

[40] Macdonald, Neil (20 April 2009). "Interview with U.S. Homeland Security Secretary Janet Napolitano". CBC News. Retrieved 14 July 2009, from: http://www.cbc.ca/canada/story/2009/04/20/f-transcript-napolitano-macdonald-interview.html.

[41] Hersh, Seymour Myron (25 June 2007). "The general's report: how Antonio Taguba, who investigated the Abu Ghraib scandal, became one of its casualties". The New Yorker. Retrieved 14 July 2009, from: http://www.newyorker.com/reporting/2007/06/25/070625fa_fact_hersh?printable=true.

[42] Hersh, Seymour M. Chain of Command: The Road from 9/11 to Abu Ghraib. New York: HarperCollins, 2004. ISBN 0060195916.

[43] American Civil Liberties Union (24 October 2005). "Autopsy reports reveal homicides of detainees in U.S. custody". http://action.aclu.org/torturefoia/released/102405/.

The New York Times, in a report on January 12 2005,[44] reported testimony suggesting that the following events had taken place at Abu Ghraib:

a. Urinating on detainees
b. Jumping on detainee's leg, which was already wounded from gunfire, with such force that it could not thereafter heal properly
c. Pounding detainee's wounded leg with collapsible metal baton
d. Pouring phosphoric acid on detainees
e. Sodomization of detainees with a baton
f. Tying ropes to the detainees' legs or penises and dragging them across the floor

Additionally, the American Civil Liberties Union released copies of FBI internal memos they had obtained under the Freedom of Information Act concerning alleged torture and abuse at Guantanamo Bay, in Afghanistan and in Iraq. One memo dated May 22, 2004 was from someone whose name was blanked out but was described in the memo as "On Scene Commander – Baghdad".[45] He referred explicitly to an Executive Order that sanctioned the use of extraordinary interrogation tactics by U.S. military personnel. The methods explicitly mentioned sleep deprivation, hooding prisoners, playing loud music, removing all detainees' clothing and forcing them to stand in so-called "stress positions". The author also claimed that the Pentagon had limited use of the techniques by requiring specific authorization from the chain of command. This was the first internal evidence since the scandal became public that forms of abusive coercion and torture of captives had been mandated by the President of the United States.[46]

Reaction from the U.S. government characterizes the Abu Ghraib torture scandal as an isolated incident uncharacteristic of American actions in Iraq; this view is widely disputed, notably in Arab countries, but also by organizations such as the International Red Cross, and Human Rights Watch, which state that they have been making representations about abuse of prisoners for several years.[47] A former military intelligence officer with experience at Guantanamo Bay and Abu Ghraib alleges a systematic failure caused by a combination of inexperienced troops arresting innocent Iraqis, who are then interrogated by inexperienced interrogators. [48] Regardless of the genesis for the abuses, the scandal has remained a unavoidable black mark on the face of U.S. counter-terror policy.

---

[44] Zernike, Kate. (12 January 2005). "Detainees Depict Abuses by Guard in Prison in Iraq". New York Times.
[45] American Civil Liberties Unions, document available at: http://www.aclu.org/torturefoia/released/FBI.121504.4940_4941.pdf.
[46] American Civil Liberties Union (12 July 2005). ACLU Interested Persons Memo on FBI documents concerning detainee abuse at Guantanamo Bay.
[47] Human Rights Watch (18 June 2004). Report: "The Road to Abu Ghraib". Retrieved 19 July 2009 available at: http://www.hrw.org/en/reports/2004/06/08/road-abu-ghraib.
[48] Amnesty International (18 March 2004). Report: "Iraq: One year on the human rights situation remains dire". AI Index: MDE 14/006/2004.

Counter-Terrorism Law in Canada

> *"We need global consensus and co-operation to prevent and prosecute terrorist crimes. Counter-terrorism has a military component, but this cannot solely define international efforts. The multi-pronged fight against terrorism must include diplomacy, intelligence, security and law enforcement, customs and immigration, transportation, justice and finance expertise. All these branches of government must work together to identify and arrest terrorists; to stop their operations; to protect and defend people, societies, and economies from terrorist attack; and to mitigate effects of any attack. All of our domestic and international efforts must support good governance and be grounded in the rule of law. Counter-terrorism measures must follow international law, in particular human rights, humanitarian and refugee law."*[49]

After the events of September 11 2001, Canada was under intense pressure to make a bold statement against terrorism. The enactment of the Anti-Terrorism Act occurred amidst an enormous public outcry from opposition government and human rights groups alike, criticizing the Act's hard-line approach and legal reforms.[50] Receiving Royal Assent on 18 December 2001 as Bill C-36, the Act greatly extended the powers of government and institutions within the Canadian security establishment to respond to the threat of terrorism. The expanded powers were widely perceived as incompatible with the Canadian Charter of Rights and Freedoms, in particular for the Act's provisions allowing for secret trials, preemptive detention, and expansive security and surveillance powers.[51]

In the wake of the terror attacks, the Government of Canada quickly implemented its Anti-Terrorism Plan, with five clear objectives:

a. To prevent terrorists from getting into Canada;
b. To protect Canadians from terrorist acts;
c. To bring forward tools to identify, prosecute, convict and punish terrorists;
d. To keep the Canada-U.S. border secure and open to legitimate trade; and
e. To work with the international community to bring terrorists to justice and address the root causes of terrorism.[52]

In order to achieve these goals, a number of legislative amendments were passed, including amendments to the Canada Evidence Act, the National Defence Act and the Canadian Human Rights Act, in the name of enhancing security. While aspects of the Anti-Terrorism Act were given a sunset clause, the Act itself was grafted onto existing criminal law in such a manner as to make it a permanent feature.[53] Together with the Public Safety Act of 2002, the Anti-Terrorism Act has become the basis for much of

---

[49] Department of Foreign Affairs and International Trade Canada. Proactive Disclosure: Terrorism. Retrieved on 22 July 2009, available at: http://www.international.gc.ca/crime/terrorism-terrorisme.aspx?lang=eng.
[50] Colacott, Martin (2006). Canada's Inadequate Response to Terrorism: The Need for Policy Reform. The Fraser Institute.
[51] Bell, Colleen (2004), Subject to Exception: Security Certificates, National Security and Canada's Role in the "War on Terror". *Canadian Journal of Law and Society*, 21(1), pp. 63-83.
[52] Department of Foreign Affairs and International Trade Canada . Backgrounder: Canada's Actions Against Terrorism Since September 11 2001. Retrieved on 22 July 2009, available at: http://www.dfait-maeci.gc.ca/anti-terrorism/canadaactions-en.asp.
[53] *Supra* note 3.

Canada's foreign policy, and has provided the procedural framework in dealing with suspected terrorists.

The Anti-Terrorism Act 2001

The Act created several new categories of criminal offences, such as collecting property for the purpose of carrying out a terrorist activity; facilitating acts of terrorism; and harbouring or concealing a suspected terrorist. Stronger laws against hate crimes and production of propaganda were also established, making both offences punishable under the Act. Additionally, changes were made to the Official Secrets Act to counter intelligence-gathering activities by foreign powers and terrorist groups, to prohibit the unauthorized disclosure of special operational information by individuals bound to secrecy.[54]

The legislation was built upon the premise that existing criminal law was inadequate to deal with the current threat of global terrorism after September 11, 2001. Both with respect to the murder of a cabinet minister during the 1970 October Crisis and with respect to the 1985 bombing of Air India, Canada had relied on the ordinary criminal law to deal with individuals accused of terrorism, and employed the normal Canadian legal process to charge, prosecute, convict and punish the offenders. Ordinary criminal law functioned under the traditional principle that motive is not relevant to a given crime, and that a political or religious motive could not excuse the commission of such an act. In contrast, the Anti-Terrorism Act requires proof that terrorist crimes were committed for religious or political motives; it requires police to investigate the religion and politics of terrorist suspects. Critics of the Act have constantly invoked this argument to demonstrate the legislative incompatibility with the Canadian Charter of Rights and Freedoms.[55]

While the Act is particularly restrictive, especially considering Canada's past record of protecting civil liberties, there are a number of legislative safeguards. It is important to note that Canada, in dramatic contrast to many other Western nations, affords the same due process and civil rights protections to any persons accused under counter-terrorism legislation. Those accused of terrorism-related offences have the same substantive and procedural rights as any other criminal accused in Canada, including the presumption of innocence, equality before the law and trial by an independent and impartial tribunal. The burden of the State to prove its case beyond a reasonable doubt applies to every essential element of a criminal case.[56]

National Security Policy and the Public Safety Act 2002

Canada's first official national security policy, which was released in 2004, focuses on emergency preparedness as one of its principal themes. This is part of Canada's all-risks approach to security, recognizing that not all threats are terrorist-based. The Policy identifies the SARS (severe acute respiratory syndrome) outbreak as an example of

---

[54] Gabor, Thomas (31 March 2004). Report: Views of Canadian Scholars on the Impact of the *Anti-Terrorism Act*. Research and Statistics Division, Department of Justice Canada.
[55] *Supra* note 4.
[56] *Supra* note 4.

threats transmitted across the globe with alarming ease. The Policy also identifies critical infrastructure instability, natural disasters and pandemics as additional threats to Canada's national security. This all-risks approach calls for a rational allocation of resources to the broad range of threats to human security, and attempts to reduce the tendency to focus on dramatic acts of terrorism without adequate regard to the probability of their occurrence or the amount of damage they would cause.[57]

Unlike the American Homeland Security approach, the Canadian method does not mandate that all government departments focus on terrorism. For example, health departments do not necessarily have to allocate resources to biological or chemical terrorism if they can demonstrate that a pandemic is more likely to occur and would be more damaging in its effects. In this way, each and every department of government is allowed to examine what the next threat to security may be, and decide the most effective means of prevention.[58]

Another advantage to the all-risks approach is that it tends to employ less coercive policy than those approaches focused solely on preventing terror. Much of the Canadian national security plan involves administrative regulation to enhance transport security, public health and border security. Specific elements of the Policy are outlined below:

a. Administrative regulation of sites and substances vulnerable to terrorism, such as better protection of hazardous materials and critical infrastructure;
b. Emergency Preparedness, such as the creation of a government-wide operations center, an integrated threat assessment center, a cyber incident response center and a new public health center;
c. Effective review of national security activities, including the establishment an independent review body. [59]

The all-risks approach attempts to prevent and minimize harms, whether they were intentionally caused or accidentally inflicted through collateral damage. The goal is to provide a greater range of legislative tools to government departments; this will allow for a drastically different reaction to terrorist acts than Canada's initial response to September 11, which focused on enacting new criminal laws and enhancing police powers.[60]

I. Mechanisms For Comparison:

1. Definition of Terrorism: The definition of "terrorist activity" in the Criminal Code of Canada states it to be an action that takes place either within or outside of Canada, and which is an offence under one of the UN anti-terrorism conventions and protocols. It also specified that terrorist actions are ones that are based on "political, religious or ideological purposes" and those which result in intimidation of the public, or the compelling of a government to act. An interpretive clause clarifies that an expression of

[57] Canada Privy Council Office (2004). Securing An Open Society: Canada's National Security Policy.
[58] National Research Council (2002). Making The Nation Safer: The Role Of Science And Technology In Countering Terrorism.
[59] *Supra* note 9.
[60] *Supra* note 9.

political, religious or ideological beliefs alone is not a "terrorist activity", unless it is part of a larger conduct that meets all of the requirements of the definition. This definition can be problematic, as it implies that an investigation of a terrorists' religious or political motivations must be investigated in order for the Act to be applicable.

2. Search and Seizure: Search warrants are still required under the current Act. The Criminal Code of Canada stipulates that anyone seeking a warrant "is under an obligation to make full and frank disclosure of all information to the justice of the peace or the judge". There has been much controversy surrounding search warrants in terms of counter-terrorism efforts, as reports emerge of selective disclosure on the part of investigators. This is particularly relevant in the case of Maher Arar, where the Royal Canadian Mounted Police allegedly obtained warrants which "relied heavily on information received from a country with a poor human rights record".[61]

3. Arrest: The Act gives provisions for preventive arrest when there are reasonable grounds to believe that a terrorist activity will be carried out, and there is reasonable suspicion to believe that the "arrest or the imposition of recognizance conditions is necessary to prevent [it]". No arrest warrant is needed on the part of police or intelligence agencies. The period of preventive arrest under the Canadian law is shorter than in other Western nations, such as the United Kingdom, and is limited to 72 hours; however, the effects of a preventive arrest can last much longer as the suspect can be required by a judge to enter into a recognizance or peace bond for up to a year

4. Pre-Charge Detention: Under the Act, a person may be held without charge for up to three days; after this point, the suspect must either be charged or released.

5. Sunset Clause: The Anti-Terrorism Act was not made subject to a general sunset clause. The government has suggested that Canadian law enforcement and national security agencies need to anticipate and respond effectively to the threat of international terrorism, and that this can only be achieved through permanent legislation. Indeed, the government has stated that a sunset clause is ineffective as "it would be irresponsible and dangerous to suspend the whole Act, thereby running the risk of not having effective laws in place for extended periods of time". The Department of Justice has gone so far as to state that "a sunset clause for the entire Act would have put Canada in violation of our international obligations under United Nations international conventions, as well as the UN Security Council resolutions".[62]

Certain provisions in the act, however, were subject to sunset clauses as well as parliamentary review. The provisions regarding preventative arrest and investigative hearings generated much controversy, and as a result were slated for review in early 2007. On February 27 of that year, the House of Commons voted 159 - 124 against renewing the provisions, which later led to their expiration.

---

[61] Stribopoulos, John (2006). "RCMP used 'disturbing' tactics to get warrants; Didn't tell judges information came from Syrian agents". Osgoode Hall Law School. Retrienved 30 July 2009, available at: http://osgoode.yorku.ca/media2.nsf.

[62] Department of Justice Canada. The Anti-Terrorism Act: Frequently Asked Questions. Retrieved 30 July 2009, available at: http://canada.justice.gc.ca/eng/antiter/faq/index.html.

6. Bail: While bail can be granted under the Act, it is usually done with a plethora of restrictive conditions. These conditions include extensive surveillance by police and immigration officials, as well as virtual house arrest. Depending on the severity of the charges, a judge may also impose conditions which require an adult family member to act as a surety, or supervisor, for the accused.

II. Counter-Terrorist Legislation and the Incompatibility with Human Rights

1. "Passenger Protect"

Commonly referred to as the Canadian no-fly list, Passenger Protect is a government initiative to identify individuals who may be an "immediate threat to aviation security" and prevent them from boarding a flight. The program consists of two main components: a "Specified Persons List" which includes the name, birth date, and gender of individuals believed to pose a security threat, as well as a set of "Identity Screening Regulations", requiring all passengers who appear to be 12 years of age or older to present valid government-issued ID before they are allowed to board a flight.[63] Individuals who are denied boarding because their name appears on the list can submit an appeal.[64]

For this list, the criteria include:

a. A person who is or has been involved in a terrorist group;
b. A person who has been convicted of life-threatening crimes against aviation;
c. A person who has been convicted of one or more serious offences who may attack an air carrier.[65]

Omitted from the policy are assurances from the government that the list will not be shared with other countries, or merged with the no-fly list which is currently enforced in the United States.[66]

A number of civil society organizations have raised objections to the Passenger Protect program, citing concerns about civil liberties, privacy, racial profiling, and the perceived failure of the US no-fly list.[67] Particularly troublesome is the program's secretive use of personal information in a way that will profoundly impact privacy and other related human rights, such as freedom of association and expression and the right to mobility. Critics of the program also voice their concerns regarding the lack of rights of

---

[63] Passenger Protect. "Identity Screening Regulations". Retrieved 24 July 2009, available at: http://www.passengerprotect.gc.ca/identity.html.
[64] Passenger Protect. "Re-Consideration and Appeals". Retrieved 24 July 2009, available at: http://www.passengerprotect.gc.ca/identity.html.
[65] CTV News (17 June 2007). 'No-fly' list could blacklist innocents: critics. Retrieved 24 July 2009, available at: http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070617/nofly_list_ 070617?s_name=&no_ads=.
[66] CTV News (28 June 2007). "Privacy watchdogs want Ottawa to halt no-fly list". Retrieved 24 July 2009, available at: http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070628/ no_fly_privacy_070628/.
[67] The Tyee (28 June 2007). "Grounding the no-fly list". Retrieved 24 July 2009, available at: http://thetyee.ca/News/2007/06/18/No-Fly/.

appeal, independent adjudication or compensation for out-of-pocket expenses or other damages.[68]

2. Security Certificates

One of the most controversial aspects of Canadian counter-terrorist policy is the use of security certificates, which are essentially a legal mechanism by which the Government of Canada can detain and deport suspected terrorists who are foreign nationals. Any permanent resident or foreign national who is suspected of violating human rights, of having membership within organized crime, or is perceived to be a threat to national security may have a certificate issues against them. The certificates make an individual inadmissible to Canada, and therefore subject to a removal order. Where the government has reasonable grounds to believe that the individual named in the certificate is a danger to national security, to the safety of any person or is unlikely to participate in any court proceedings, the individual can be detained. The entire process is subject to a limited form of review by the Federal Court. [69]

In the case of refugees and refugee applicants, the named person is automatically detained, without the opportunity to apply for release on bail until 120 days after the certificate is upheld by a Federal Court judge. In the case of Permanent Residents, where the government has reasonable grounds to believe that the individual named in the certificate is a danger to national security, to the safety of any person or is unlikely to participate in any court proceedings, the individual can be detained, with the opportunity to apply for release on bail every six months. Under a security certificate, an individual may be held for several years without any criminal charges before a review of their case is completed.[70]

In practice, individuals are neither released from prison nor are they deported after the certificate is upheld; this is due to the fact that the accused often faces a genuine risk of torture if deported to their home country, as well as a limited legal opportunity to challenge the detention itself. As a result, the families of detainees, supported by thousands of individuals across Canada, have campaigned against the use of security certificates. They argue that security certificates violate the guarantees of equality and fundamental justice which are enshrined in the Canadian Charter of Rights and Freedoms, and create a two-tiered justice system; this allows individuals to be detained indefinitely, on the basis of secret suspicions and under threat of deportation to torture. Additional criticisms, related to violations of civil liberties and due process, include the fact that allegations are vague, general and are not disclosed to the suspect, the fact that information provided to the court can include hearsay and is known to have included information produced under torture, and the lack of appeal. [71]

3. The War in Afghanistan

---

[68] *Supra* note 12.

[69] Ministry of Public Safety and Emergency Preparedness - Keeping Canadians Safe. Retrieved 24 July 2009, available at: http://www.psepc.gc.ca/prg/ns/seccert-en.asp.

[70] Wikipedia, The Free Encyclopedia (3 June 2009). Security certificate. Retrieved 24 July 2009, available at: http://en.wikipedia.org/w/index.php?title=Security_certificate&oldid=294191092.

[71] Canadian Press (2 January 2009). "Last terror suspect held on national security certificate to be freed". Retrieved 24 July 2009, available at: http://www.google.com/hostednews/canadianpress/article/ALeqM5itfui3x0sqbXBOhPkT70-hhzdzEA.

Perhaps the best example of counter-terrorism policy is the current Canadian involvement in the war in Afghanistan, as it is a timely and sensitive issue in the Canadian political arena. For all the historic and contemporarily valid reasons why Canada stepped forward in Afghanistan, the politicians and the military did not expect a conflict the duration, intensity and cost of which, in lives and resources, Canada is now confronted with. During the initial commitment phase in 2002, the Liberal government under Jean Chretien had expected an "early in, early out" deployment to help stabilize a post-Taliban government. Seven years later, the Conservative government under Stephen Harper has likewise not anticipated the level of armed resistance the Canadian forces are facing as part of their new combat role. Even General Rick Hillier, Chief of Defence Staff, is quoted as saying that "Nobody predicated the resurgence of the Taliban . . . It came as a complete surprise".[72]

Indeed, some who advocate withdrawal from Afghanistan would like to see a renewed commitment, including militarily, to the so-called traditional Canadian role in supporting United Nations peacekeeping operations. Especially if there is to be a long war, the government may seek to reduce Canada's military footprint in Afghanistan in favour of UN operations elsewhere. Even though it is difficult to see how the mission could involve any less combat or be any less dangerous, there are those in Canada who say they would prefer to see the Canadian military in Darfur rather than Kandahar. It has been suggested in the media that, in 2006, the Harper government declined participation in peacekeeping missions in Lebanon and Darfur, apparently on the advice of General Hillier who argued that the Canadian forces were "fully committed in Afghanistan"; this stance broke a promise made to the Canadian public in 2005 that participation in Afghanistan would not prevent deployment of forces to "UN missions elsewhere".[73]

In the past when Canada deployed forces overseas, the government tended to decide on the level of the commitment by determining the minimum threshold needed to satisfy allies as well as avoiding domestic opposition. This approach has long been a key component of Canadian national security policy, and one which most Canadian citizens support.[74] In the face of waning support for the military effort in Afghanistan, and the end of Canada's formal military commitment which expired in February 2009, the issue of continued Canadian involvement in the area promises to be a highly debated topic.[75]

III. Concerns from Human Rights Organizations

1. United Nations Human Rights Committee

(i)Non-Disclosure of Information

The UN Human Rights Committee has expressed its concerns over amendments to the Canada Evidence Act, which prevent the disclosure of information to anyone accused

---

[72] Gross Stein, Janice & Lang, Eugene (2007). The Unexpected War: Canada in Kandahahar. Toronto: Viking Canada.

[73] Byers, Michael (2007). Intent for a Nation: A Relentlessly Optimistic Manifesto for Canada's Role in the World. Vancouver, BC: Douglas & Martin.

[74] Sokolsky, Joel (June 2004). Realism Canadian Style: National Security and the Chretien Legacy. *Policy Matters* 5(1), pp. 36-48.

[75] Jockel, Joseph & Sokolsky, Joel (2008). Canada and the war in Afghanistan: NATO's odd man out steps forward. *Journal of Transatlantic Studies*, 6(1), pp. 100-115/

of terrorism related activities. Specifically, the Committee is concerned that withholding of evidence during investigative or criminal proceedings could cause irreparable damage to international relations, national defence or national security. The Committee maintains that the current form of the Canada Evidence Act violates the suspect's right to a fair trial, as the accused may be condemned on the basis of information to which they do not have full access. The Committee urges the Canadian government to review the constitutionality of the Canada Evidence Act, and make changes accordingly. [76]

(ii) Deportation

The Committee also identified the Canadian practice of deportation as a source for concern. According to current counter-terrorism policy, is a possible for a person to be deported in exceptional circumstances to a country where they could potentially face cruel, degrading or inhuman treatment; this violates the principle of non-refoulement, and amounts to a breach of human rights. The Committee goes on to reinforce the absolute prohibition on torture, which can never be justified on the basis of a balance between individual rights and security. No person, even those suspected of presenting a danger to national security, may be deported to a country where they may run the risk of being subjected to degrading treatment; this applies even during times of emergency. The Committee urges the government to enact this principle into law.[77]

2. Human Rights Watch

(i) Diplomatic Assurances Against Torture

Human Rights Watch has openly criticized the government's regime of security certificates, which permits the deportation of terror suspects to places where they are at risk of torture, despite an international ban on transfers to such countries. To stem criticism in some of these cases, the government has sought assurances against torture from receiving states such as Morocco and Egypt; however Human Rights Watch submits that these assurances are far from enough.

Prior to deportation, Canadian immigration authorities normally conduct a protection assessment to determine whether an individual would be at risk of torture upon return. However, if a security certificate is deemed "reasonable" by a judge, the ability to successfully claim protection from deportation based on Canada's non-refoulement obligations is significantly reduced. Human Rights Watch is quick to point to the Canadian government's so-called "silent diplomacy" on behalf of Omar Khadr, a child detainee at Guantanamo Bay, as an example. According to the Canadian Department of Foreign Affairs, when stories of mistreatment at Guantanamo Bay first surfaced, the Canadian government sought and received assurances of humane treatment for Khadr from the U.S. authorities. But Khadr's allegations of abusive treatment in detention, including being shackled in painful positions, threatened with rape, and being used as a "human mop" after he urinated on the floor during an interrogation, have led his lawyers

[76] United Nations Human Rights Committee (2 November 2005). Concluding Observations: Canada. (CCPR/C/SR.2312-2313).
[77] *Supra* note 24.

to conclude that "Canada was more interested in helping the Americans get information from Khadr than confirming his well-being".[78]

Human Rights Watch urges the Canadian government to prohibit reliance upon diplomatic assurances against torture and ill-treatment, particularly if any of the following circumstances prevail in the receiving country:

a. There is substantial and credible evidence that torture and prohibited ill-treatment in the receiving country are systematic, widespread or endemic problems;
b. Governmental authorities do not have effective control over the forces in their country that perpetrate acts of torture and prohibited ill-treatment;
c. The government consistently targets members of a particular racial, ethnic, religious, political or other identifiable group for torture or prohibited ill-treatment and the person subject to transfer is associated with that group;
d. In any case where there is a risk of torture or prohibited ill-treatment upon return directly related to a person's particular circumstances.[79]

3. Amnesty International

(i) Extra-Territorial Protection of Human Rights

Amnesty International has expressed concern over the legal obligations towards human rights protections for Canadian military personnel serving overseas. In a recent court ruling about the handling of prisoners apprehended by the Canadian military in Afghanistan, the Attorney General accepted the government's position that the Canadian Charter of Rights and Freedoms does not apply to soldiers outside Canada; the ruling is currently under appeal. [80] Courts have held that Canada's international obligations can only be enforced in Canadian courts through the provisions of the Charter of Rights or other domestic laws. The government's position, therefore, dramatically restricts the extra-territorial enforcement of Canada's international human rights obligations.[81]

(ii) The Protection of Human Rights While Countering Terrorism

Amnesty International has repeatedly urged Canada to ratify several international agreements which would reinforce the state of human rights in the fight against terrorism. Specifically, the organization has lobbied for the ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, as well as Convention on the Protection of All Persons from Enforced Disappearances. At the time of writing, this report found that the Canadian government has yet to ratify either of these conventions. Amnesty International has called for the following changes in Canadian counter-terrorism strategy to improve the state of human rights:

---

[78] Human Rights Watch (14 April 2005). Report: Still at Risk: Diplomatic Assurances No Safeguard Against Torture, Vol 17 No. 4 (D).
[79] *Supra* note 30.
[80] Amnesty International Canada and British Columbia Civil Liberties Association and Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada, 2008 FC 336, 12 March 2008.
[81] Amnesty International (8 September 2008). Canada: Amnesty International Submission to the UN Universal Periodic Review. AI Index: AMR 20/004/2008.

a. Reform immigration security certificate system to meet international fair trial standards;
b. Suspend prisoner transfers in Afghanistan until concerns about torture are adequately addressed;
c. Seek the repatriation of Omar Khadr from Guantanamo Bay;
d. Implement outstanding recommendations from public inquiry into case of Maher Arar.[82]

IV. Judicial Opinion

Canada (Attorney General) v. Khawaja, 2007 FCA 388: This case was an application for the court to confirm the statutory prohibition on disclosure of information. The respondent was arrested in Ottawa on 29 March 2004, and was facing criminal charges in relation to a conspiracy to commit terrorist acts in the United Kingdom. Five other individuals were convicted in the U.K. of terrorism related offences, and had been sentenced to lengthy prison terms. A large quantity of material had been assembled during the investigation and disclosed to the respondent, some of which had already been used as evidence in the U.K. trial. The documents included information obtained in confidence from foreign intelligence and law enforcement agencies, some of which had been redacted. The Attorney General maintained that seeking the disclosure of the information that would reveal sensitive investigative techniques, or the identity of any undercover operatives of law enforcement and/or intelligence agencies, could compromise other investigations and constitute a threat to national security. The respondent asserted, however, that the withholding of the redacted material was not justifiable given the prosecutor's concession that it was relevant. The Court held that a large quantity of material contained in the documents would be irrelevant to the respondent's case, and could not reasonably be used as part of his defence; as such, the Court supported the prohibition of disclosure.

Suresh v Canada (Minister of Citizenship and Immigration) [2002] 1 S.C.R. 3: This case is a leading constitutional decision of the Supreme Court of Canada. The Court held that under the Canadian Charter of Rights and Freedoms, in most circumstances the government cannot deport someone to a country where they risk being tortured; however, it was ruled that refugee claimants can be deported to their homelands if they are a serious security risk to Canadian society. The petitioner in this case was a Tamil native of Sri Lanka who had been granted refugee status in Canada under the Refugee Convention standards, but later was the object of a security certificate based on his membership in the Liberation Tigers of Tamil Eelam (LTTE), a proscribed terrorist group. After a lengthy hearing, the certificate was found to be reasonable, and he was placed into deportation proceedings, all the while arguing a substantial risk of torture and/or death were he deported to Sri Lanka, based on his affiliation with the LTTE and his Tamil ethnicity. While recognizing that deporting an individual to a country where they would be tortured is generally unconstitutional, the Canadian Supreme Court noted that it was permissible to engage in a balancing test that took into account Canada's national security interests.

[82] *Supra* note 33.

Ahani v Canada (Minister of Citizenship and Immigration) [2002] S.C.C. 2: This is an accompanying case to *Suresh v. Canada*. The Supreme Court found that the petitioner, as an admitted member of a terrorist group (the Iranian government's external security organization), was not entitled to relief and should be deported, based on the fact that the risk to him of harm upon return to Iran was minimal. The Canadian Supreme Court clearly did not credit the petitioner's allegation of torture and distinguished his situation from that of the petitioner in Suresh, holding that the risk of harm to Canada's national security was too great to allow him to remain in the country.

Charkaoui v. Canada (Minister of Citizenship and Immigration) [2007] S.C.C. 9: The ruling in this case represents a landmark decision of the Supreme Court of Canada on the constitutionality of procedures for determining the reasonableness of a security certificate, and for reviewing detention under a certificate. Adil Charkaoui was arrested and imprisoned under a security certificate; the evidence upon which the certificate was issued was secret, disclosed neither to Charkaoui nor his lawyers. Public summaries of the evidence issued by the Federal Court alleged a connection with "the bin Laden network". Charkaoui appealed his detention three times before being released on the fourth try in February 2005, having spent almost two years in custody. The Court held that the security certificate process, which prohibited the named individual from examining evidence used to issue the certificate, violated the right to liberty and *habeas corpus* under section 7, 9 and 10 of the Canadian Charter. However, the Court rejected the appellant's arguments that the extension of detentions violated the rule of law. The certificate against Charkaoui has never undergone any judicial review; the Federal Court suspended its review process in March 2005, pending a new decision from the Minister of Immigration on Charkaoui's deportability.

V. Annex

Case Studies: Misuses of The Anti-Terrorism Act 2001

1. *Canadian Afghan Prisoner Abuse Scandal*

In 2007, the Conservative government, headed by Stephen Harper, weathered a storm of controversy over allegations of questionable military conduct during operations in Afghanistan. The story first gained national attention in February 2007 with the revelation that, despite the prior assurances of Defence Minister Gordon O'Connor, the International Committee of the Red Cross did not monitor Afghan detainees transferred from Canadian to Afghan custody. In the week of April 23 to April 27, 2007, *The Globe and Mail* released a series of stories detailing allegations of torture and a censored Canadian government report on treatment of detainees. These revelations led to intense discussions within the Canadian political scene, particularly following contradictory statements by government ministers about the allegations.

The rumours of abuse surfaced after a Canadian newspaper published a series of interviews with former Taliban suspects, who stated that they were beaten by Afghan interrogators after being handed over by the Canadian military. The 30 men interviewed by Toronto's *Globe and Mail* newspaper were captured by Canadian forces in the

southern Afghan province of Kandahar and turned over to the Afghan National Directorate of Security, where they say they were physically beaten, starved and subjected to electric shocks during their detentions, which lasted anywhere between three days and six months. The Afghan government officially denied the allegations.[83]

Prisoner transfers between Canada and Afghanistan fall under a 2005 agreement, requiring prisoners captured by Canadian soldiers to be handed over to local authorities after an initial interrogation. Under the agreement, Canadian officials are afforded no rights to inquire on the status or treatment of detainees after the transfer of custody; however, the agreement is still subject to the Geneva conventions, which state that an army is prohibited from handing over prisoners if there is suspicion that these prisoners may be tortured. The crux of the controversy surrounded statements made by then-Defence Minister Gordon O'Connor, who insisted that the International Committee of the Red Cross is responsible for supervising the treatment of prisoners once they are in the hands of the Afghan authorities. He maintained that "if there is something wrong with their treatment, the Red Cross or Red Crescent would inform us and we would take action".[84]

That claim has been persistently and vigorously disputed by political opposition and human-rights groups, which contend the ICRC never divulges its findings either publicly or to third parties and that the minister is misrepresenting its role. Simon Schorno, a spokesperson for the ICRC, stressed that the ICRC is precluded from making known its assessments or interventions, except to the government whose facilities it is visiting; it is prohibited under its own charter, and by decades of confidential practice, from disclosing its findings to third parties. Despite these public statements, Defence Minister O'Connor never retracted his statements.[85]

The transfer procedures for Afghan detainees in Canadian custody have been condemned by Amnesty International, Canadian academics, and various other human rights organizations.[86] It is encouraging to note that due to the public outcry over this scandal, the military has since changed its agreement with Afghani security forces. This agreement occurred in the midst of an injunction from Amnesty International and the British Columbia Civil Liberties Association to stop the Canadian Forces from passing any more detainees into Afghan custody.[87] At the time of writing, this report could not find any current allegations of prisoner abuse or torture.

2. The Case of Omar Khadr

The case of Omar Khadr represents a drastic failure on the part of the Canadian government, intelligence services, and legal system, and has drawn a large amount of negative international attention. Khadr was captured by U.S. armed forces at the age of 15 following a four-hour firefight with militants in the village of Ayub Kheyl,

---

[83] Stairs, James (27 April 2007). "Canada denies rights violations in Afghan abuse scandal". Retrieved 27 July 2009, available at: http://www.monstersandcritics.com/news/americas/features/article_1297296.php /Canada_denies_rights_violations_in_Afghan_abuse_scandal.

[84] Koring, Paul (31 March 2008). "Red Cross contradicts Ottawa on detainees". The Globe and Mail. Retrieved 27 July 2009, available at: http://www.theglobeandmail.com/news/national/article746018.ece.

[85] *Supra* note 25.

[86] *Supra* note 24.

[87] CBC News (3 May 2007). "Canada has new Afghan detainee deal, court told". Retrieved 27 July 2009, available at: http://www.cbc.ca/canada/story/2007/05/03/detainees-court.html.

Afghanistan.[88] He has spent six years in the Guantanamo Bay detention center, charged with war crimes and providing support to terrorism after allegedly throwing a grenade that killed a US soldier. A Canadian citizen born in Toronto, he is the youngest prisoner held in Guantanamo Bay and has been frequently referred to as a child soldier. [89] The only Western citizen remaining in the facility, Khadr is unique in that Canada has refused to seek extradition or repatriation despite the urgings of Amnesty International, UNICEF, the Canadian Bar Association and other prominent organizations.[90] In April 2009, the Federal Court of Canada ruled that international law made it obligatory for the government to immediately demand Khadr's return.[91]

Khadr was wounded by U.S. soldiers during the firefight, and taken into U.S. custody on 27 July 2002. During his capture he was shot three times and is nearly blind in one eye as a result of his injuries. The United States military contends that Omar Khadr killed a US soldier, Sergeant Christopher J. Speer, in the operation; however Khadr's involvement in Sgt. Speer's death is highly contended.[92] Although Khadr was seriously injured, he states that his interrogation started as soon as he was taken into custody. Omar Khadr alleges the following human rights abuses since he has been detained in Guantanamo Bay:

a. He was denied pain medication for his wounds after numerous requests;
b. U.S. personnel placed a bag over his head during interrogations;
c. Dogs were brought into the room to frighten him during interrogations;
d. Cold water was thrown on him;
e. His hands were tied above a door frame and he was forced to stand in this position for hours;
f. He was not allowed to use the bathroom and was forced to urinate on himself.[93]

Canada's three main political opposition parties have all condemned Prime Minister Stephen Harper for refusing to demand the United States turn Khadr over to Canadian authorities.[94] According to recent polls, 64% of Canadian citizens support the decision to repatriate Khadr to stand trial in Canada, particularly if the Guantanamo Bay detention facility is closed.[95] At the time of writing, this report found that the Canadian government has officially begun formal discussions about the possibility of repatriating Omar Khadr.

---

[88] CBC News (7 February 2008). "Khadr patriarch disliked Canada, says al-Qaeda biography".
[89] Gorham, Beth 18 January 2008). "Khadr was child soldier, his lawyers say". The Toronto Star.
[90] UNICEF, (5 February 2008). Report: UNICEF Defends the Rights of a Child Soldier Held in Guantanamo.
[91] Yule, Kate (23 April 2009). "Harper must repatriate Khadr: Judge". CFRA Talk Radio. Retrieved 27 July 2009, available at: http://www.cfra.com/?cat=3&nid=64692.
[92] Edwards, Steven (February 4, 2008). "Second al-Qaida fighter implicated in Khadr incident, secret document shows". Canwest News Service. Retrieved 14 July 2009, available at: http://www.canada.com/story.html?id=95f582ec-c987-4bd4-8f17-157a87a73618.
[93] Amnesty International (November 2005). News, USA: Who Are the Guantanamo Detainees? Case Sheet 14: Canadian National: Omar Khadr. AI Index: AMR 51/184/2005.
[94] Liberal Party of Canada (30 April 2008). Press Release: Khadr Must Be Repatriated to Receive Just Treatment.
[95] Ipsos Reid (20 January 2009). If Obama closes Guantanamo, 64% say Prime Minisnter Harper should ask to bring Omar Khadr back to Canada.

3. The Case of Maher Arar

The case of Maher Arar, a telecommunications engineer with dual Syrian and Canadian citizenship, is constantly put forward as an example of incompatibility between human rights and the U.S. practice of extraordinary rendition. However, Arar's case also represents a failure on the part of the Canadian government to extradite a Canadian citizen despite evidence of torture and abuse. Arar was rendered at the airport in New York City while returning to Canada from a family vacation in Tunis, held in solitary confinement in the United States for nearly two weeks, questioned, and denied meaningful access to a lawyer. Suspected of being a member of Al Qaeda, the U.S. government deported him to Syria. He was detained in Syria for almost a year, during which time he was tortured, according to the findings of the Arar Commission, until his release to Canada.[96]

The events that resulted in Arar's rendition allegedly began over Arar's 12 October 2001 meeting with Abdullah Almalki, an Ottawa engineer and fellow Syrian national residing in Canada. This meeting placed Arar under close scrutiny with at least two separate federal agencies: the Royal Canadian Mounted Police (RCMP) and the Canadian Security and Intelligence Service (CSIS). CSIS had been monitoring Almalki with respect to his relationship with Ahmed Said Khadr, an Egyptian-born Canadian and alleged senior associate of Osama bin Laden. Almalki, however, was purely a person of interest and was not, in fact, the target of the investigation. Nonetheless, Almalki's meeting with Arar appears to have prompted a wider investigation, with Arar also becoming a "person of interest".[97]

Acting on information supplied by the RCMP, the United States Immigration and Naturalization Service (INS) detained Arar in New York, repeatedly questioning him about his connection to certain members of al-Qaeda. His interrogators claimed that Arar was an associate of Abdullah Almalki, the Syrian-born Ottawa man whom they suspected of having links to al-Qaeda, and therefore potentially an al-Qaeda member himself. When Arar protested that he only had a casual relationship with Almalki, having once worked with Almalki's brother at an Ottawa high-tech firm, the officials produced a copy of Arar's 1997 rental lease which Almalki had co-signed. The fact that U.S. officials had a Canadian document in their possession was later widely interpreted as evidence of the active participation by Canadian authorities in Arar's detention.[98]

Arar was released without charge after 374 days in U.S. custody; following his release, Prime Minister Harper notified President Bush that Canada intended to lodge a formal protest over Arar's treatment. Harper told reporters that Canada wants "the United States government [to] come clean with its version of events, to acknowledge... the deficiencies and inappropriate conduct that occurred in this case, particularly vis-à-vis its

---

[96] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (6 September 2007). "Maher Arar will not testify before the Commission of Inquiry". http://epe.lacbac.gc.ca/100 206/301/pco-bcp/commissions/maher_arar/07-09- 3/www.ararcommission.ca/eng/PressReleaseFinal_sept-06-2007.pdf.

[97] Butler, Don (8 December 2006). "The Arar Chronicles: Person of Interest (Part 1)". Ottawa Citizen.

[98] *Supra* note 40.

relationship with the Canadian government". In particular, Canada wants United States assurances, said Harper, that "these kinds of incidents will not be repeated in the future"[99]

Prime Minister Harper also ordered a commission of inquiry into Arar's treatment at the hands of U.S. authorities, which officially concluded that he was tortured during his prolonged detention.[100] Despite the Canadian court ruling, however, the United States government has not exonerated Arar; on the contrary, U.S. authorities have made public statements as to their belief that Arar is affiliated with members of terrorist organizations. As of February 2009, Arar and his family remain on a watchlist as well as the U.S. no-fly list.

In 2004, the results of an internal RCMP investigation by RCMP Chief Superintendent Brian Garvie were published. Though the version released to the public was censored, the Garvie Report documented several instances of impropriety by the RCMP in the Arar case, namely that:

a. The RCMP was responsible for giving American authorities sensitive information on Arar with no attached provisos about how this information might be used;
b. Richard Roy, the RCMP liaison officer with the Department of Foreign Affairs, may have known of the plan of removing Arar to Syria but did not contact his supervisors;
c. Deputy RCMP Commissioner Garry Loeppky lobbied hard, in the spring of 2003, to convince the government not to claim in a letter to Syria, that it "had no evidence Arar was involved in any terrorist activities" because Arar "remained a person of great interest".[101]

The aftermath of this and other reports was considerable. The RCMP issued a formal apology to the Arar family; shortly afterwards, the RCMP Chief Commissioner resigned over contradictions in his testimony to the House of Commons Committee on Public Safety and National Security.[102] At the time of writing, this report found that Arar's name still appears on American watch lists.

4. The Case of Juliet O'Neill

The treatment of Juliet O'Neill, a reporter with the *Ottawa Citizen*, at the hands of the RCMP brought Maher Arar's public ordeal to new heights of controversy. O'Neill published an article in the 8 November 2003 edition of the *Ottawa Citizen*, containing information about Arar's case which was leaked to her from an unknown security source, possibly within the RCMP. The secret documents provided by her source suggested Arar was a trained member of an al-Qaeda terrorist cell. The RCMP later raided O'Neill's house, pursuant to sealed search warrants obtained under the Anti-Terrorism Act of 2001

---

[99] CBC News (5 October 2006). "Come clean on Arar, Harper asks U.S." Retrieved 27 July 2009, available at: http://www.cbc.ca/canada/story/2006/10/06/harper-bush.html.
[100] "Report of the Events Relating to Maher Arar: Report of Professor Stephen J. Toope Fact Finder". 2006. http://www.ararcommission.ca/eng/ToopeReport_final.pdf.
[101] *Supra* note 40.
[102] CBC News (6 December 2006) "RCMP's embattled chief quits over Arar testimony". Retrieved 27 July 2009, available at: http://www.cbc.ca/canada/story/2006/12/06/zaccardelli.html.

to investigate the leak. During the raid, they seized hard drives, notebooks, files and other materials.[103]

The search and seizure were widely contested in the media. In November 2004, Ontario Superior Court Judge Lynn Ratushny ruled that the sealing of the search warrants was unacceptable; the search violated guarantees of a free press, freedom of expression and the public's right to an open court system. All materials that were seized during the initial search were subsequently ordered returned to O'Neill, after Judge Ratushny struck down Section 4 of the Security of Information Act, ruling that it was "unconstitutionally vague" and an infringement of freedom of expression.[104] In May 2008, the RCMP closed the investigation without concluding who leaked the false information.[105]

[103] CTV News (22 January 2004). "RCMP raids reporter's offices over Arar case". Retrieved 27 July 2009, available at: http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20040122/arar_sues040121?s_name=&no_ads=.

[104] MacLeod, Ian (20 October 2006). "Decision offers chance to overhaul security act". The Ottawa Citizen. Retrieved 27 July 2009, available at: http://www.canada.com/ottawacitizen/news/story.html?id=5f16f753-ce2a-48c3-85d3-b070889403b0&p=1.

[105] Bronskill, Jim (3 September 2008). "Mounties close probe into damning Arar leaks". The Canadian Press. Retrieved 27 July 2009, available at: http://www.theglobeandmail.com/servlet/story/RTGAM.20080903.warar0803/BNStory/National/?page=rss&id=RTGAM.20080903.warar0803.

Counter-Terrorism Law in Israel and the Occupied Territories

"…In Judea, Samaria, and Gaza there are two legal systems and two types of people: there are Israeli citizens with full rights, and there are non-citizens, non-Israelis with non-rights." – MK Amnon Rubintstein[106]

Any discussion of current counter-terrorism policy would be incomplete without mentioning Israel, since it has perhaps the greatest experience with incidents of terrorism than any other modern nation. Its desire to contain and prevent terrorist attacks against its citizens has generated international criticism, particularly concerning its state-sponsored assassinations of known terrorists in other countries and use of coercive interrogation to gather information. Criticisms have generally stemmed from human rights groups and independent organizations, but Israeli counter-terrorist policy has also been subject to much rigorous review by the United Nations and Amnesty International. Given Israel's unique geographic location, political situation and intimate knowledge of terror, it is a perfect example of the legislative potential for human rights infringements.

Indeed, there are two main branches of law which govern the actions of Israel in the Occupied Territories: international human law and international humanitarian law. Since its military occupation of the area began in 1967, Israel has been accused of a plethora of human rights abuses under the following legislative frameworks:

a. The Universal Declaration of Human Rights of 1948;
b. The International Covenant on Civil and Political Rights of 1966;
c. The International Covenant on Economic, Social and Cultural Rights of 1966;
d. The Hague Regulations of 1907;
e. The Fourth Geneva Convention of 1949;
f. International Convention on Rights of the Child 1989;
g. European Convention on Human Rights 1950;

There has also been much speculation as to the degree to which Israel upholds its position as an occupying power, and the necessary human rights protections that go along with this authority. As an occupying power, Israel as a duty to protect the individual rights of Palestinians and ensure that the rule of law is not compromised in the name of security. Indeed, this is a defining principle of international humanitarian law, and the biggest source of criticism for Israeli conduct within the Occupied Territories. A thorough examination of Israel's counter-terrorism policy will demonstrate the gap between the enforcement of law and the protection of human rights in this process; it will also provide the basis for constructive policy analysis.

The Defence (Emergency) Regulations of 1945

Israel's history with harsh counter-terrorism law, and the international criticism it has generated, is a long and exhaustive one. Since its inception, Israel has suffered attacks

[106] David Kretzmer (April 2002). Occupation of Justice: The Supreme Court of Israel and the Occupied Territories. State University of New York Press, ISBN 0791453383.

along its borders with more frequency and severity than any other country in the world. As a result, the Defence (Emergency) Regulations of 1945 were adopted to mitigate the rising violence and curb attacks on the state, both terrorist and otherwise. An expansive set of regulations that were first enacted by the authorities in British Mandate Palestine on 27 September 1945, the legislation was incorporated into Israel's domestic law after the state's establishment in 1948. Although the law has been amended over the years, the original sets of regulations are still in place today, and the main elements have remained largely unchanged.[107]

Provisions in the Defence Regulations of 1945 permit the establishment of military tribunals to try civilians without the right to appeal, prohibitions on the publication of books and newspapers, house demolitions, indefinite administrative detention, extensive powers of search and seizure, the sealing off of territories and the imposition of curfews.[108] After military rule ended in 1966, the Ministry of Justice established a committee charged with examining and proposing amendments to the regulations that would have lead to their partial repeal; however, the outbreak of the Six-Day War in June of 1967 brought the committee's work to an end. Following the war, the Israeli military governor in the Occupied Territories immediately issued a military order "freezing" the legal situation there; the Israeli government consequently argues that the Defence Regulations were a part of the domestic law in these territories prior to occupation. This argument is constantly invoked to justify the harsh military control of the area, and subjecting the residents in these areas to living conditions which are subject to continued state of occupation.[109]

Recent Amendments to the Prevention of Terrorism Ordinance 1948

As the main body of regulations from which counter-terrorism operations draw their authority, the Prevention of Terrorism Ordinance of 1948 is the foundation upon which the Israeli government has constructed its foreign policy. As a reflection of the ever-fluctuating dynamics of power in the Occupied Territories, there have been a number of notable amendments which have a very real capability to subvert the progress of human rights within the area:

1. Civil Wrongs (Liability of the State) (Amendment No. 7) Law, 5765 – 2005: The amendment grants the state and its security forces sweeping immunity against claims of Palestinians who sustained damages in "zone of conflict" areas of the West Bank or the Gaza Strip. The immunity will apply not only to damages related to hostilities in the Occupied Territories, but also to military acts such as looting, abuse at checkpoints, negligent gunfire, and unnecessary damage to property. The amendment grants the state almost total immunity from claims made by subjects of an enemy state and by a person who is "active in, or a member of, a terrorist organization", even when the damage is

---

[107] Yaniv, Avner (1993). National Security and Democracy in Israel. Lynne Riener Publishers. p. 175. ISBN 1555873944.

[108] B'tselem: The Israeli Information Center for Human Rights in the Occupied Territories (2007). "Defence (Emergency) Regulations". Retrieved 16 July 2009, available at: http://www.btselem.org/english/Legal_Documents/Emergency_Regulations.asp.

[109] S*upra* note 1.

unrelated to the conflict between the State of Israel and the enemy state or organization. The amendment applies retroactively to events that took place after September 2000, including incidents as to which claims have already been filed but the taking of evidence in court has not yet begun.

2. Civil Wrongs (Liability of the State) Law, 5712-1952: This version of the temporary order blocks family unification for Israeli residents and their spouses from the Territories and prevents them from cohabitating in Israel or East Jerusalem. Only Palestinian women over 25 and men over 35 married to Israelis may receive a temporary permit to remain in Israel, which grants no civil status or social benefits. The law discriminates on the basis of ethnic origin. It also sanctions collective punishment – denial of applications if there is a claim that the non-Israeli applicant or anyone from his extended family might be considered a security risk.

3. Proposed Criminal Procedure (Enforcement Powers – Detention) (Non-Resident Detainee Suspected of Security Offense) (Temporary Provision) Law, 2005 – 576: A proposed bill seeks to worsen the conditions of interrogation and detention of persons who are not residents of Israel. The purpose of the bill is to apply the severe restrictions of military law, which pertain to the Occupied Territories, primarily to residents of the Gaza Strip. This law was enacted despite a recent announcement that military occupation of the Gaza Strip has ended, thus contradicting international policy. Equally troubling are the provisions which would grant authority to the Courts to extend a person's detention without his presence.

4. Nationality and Entry into Israel Law (Temporary Order) (Amendment), 5765 – 2005: In the amendment, the Knesset facilitates, to some degree, family unification of Israeli residents and citizens with their spouses living in the Occupied Territories, which was completely prohibited in the temporary order of 2003. However, the amendment only grants the possibility of obtaining a permit to stay, which does not grant legal status in Israel or guarantee any social rights. The amendment also contains a provision that enables the denial of almost every request for a permit if Israeli officials determine that the resident of the Occupied Territories or their spouse, parent, child, brother, sister, brother-in-law, sister-in-law, is liable to constitute a security threat.

II. Mechanisms for Comparison

1. Definition of Terrorism: The term "terrorism" is loosely defined as including direct acts of violence, as well as threats of violence, against an individual or a group. The law also criminalizes membership in a terrorist organization, and provides an extensive list of what may constitute direct or material support for such an organization.

2. Search and Seizure: Search and seizure law in Israel is particularly vague, especially in terms of procedures for suspects of terrorist activities. The underlying fact is that the Israeli police, military and elite security forces hold the power to search and seizure anything which they believe might be used for, or a produced by, a terrorist group. This

includes the search and seizure of homes, vehicles, personal property and documents, as well as electronic devices such as mobile phones and personal computers.

Officially, under the Ordinance, the state of Israel may seize any property which has served a terrorist organization or its members; this includes a place of "action, propaganda, or storage", and also any property found to be in the possession of, or under the control of, an individual of a terrorist group or the group itself. In the case of seizure, the onus is on the accused to prove that the property in question was wrongfully seized. Additionally, the Ordinance gives power to The Chief of the General Staff of the Defence Army of Israel, the Inspector-General of the Israel Police, a military governor or a military commander of an area to close any place which is found to service a terrorist group or its members. Nothing more than written notice is necessary in this case.

3. Arrest: The arrest and detention of Palestinian terror suspects in the West Bank, with the exception of those from East Jerusalem, is governed to a large extent by military orders. These orders do not require Israeli authorities to inform the person at the time of arrest of the charges against them. Any soldier or policeman may arrest without warrant anyone who violates the Security Provisions Order, or is suspected of doing so, "regardless of the likelihood that the detainee committed the offense, or of its seriousness". The order covers an array of offenses, some of them vague, such as "an act liable to impair the public safety". In practice, this policy is only applied to Palestinians living in the Occupied Territories.

4. Pre-Charge Detention: Under Israeli law, a suspect may be held for up to 96 hours before being brought before a judge. The suspect may also be denied access to a lawyer for up to 21 days, and may be held for up to 35 days without an indictment. Since the accused is not allowed to have access to a solicitor until a formal indictment has been filed, this creates a situation whereby a detainee may be held without any contact with the outside world for weeks at a time.

While the initial period of pre-charge detention is formally stated as 6 months, it can be extended for further 6 months at the discretion of the military commander. Since the law does not explicitly state the maximum amount of time that a person may be held under administrative detention, it is possible that indefinite detention without charge could occur. Additionally, the grounds for detention are purposefully vague, stating only "reasonable grounds to presume that the security of the area or public security require the detention".

5. Sunset Clause: A 1980 amendment to the Ordinance extended its validity for as long as "an emergency exists in the State", without clearly delineating what constitutes an emergency situation. Later amendments to the Law and Public Administration Ordinance give discretion to the Head of State and senior military officials to declare what is, or what is not, considered an emergency.

6. Bail: The power to release on bail before trial, during trial or pending a court judgment is left to the discretion of the military prosecutor. If an application for release is denied, then the accused may submit an application to the Chief of General Staff of the Defence

Army of Israel. In practice, however, bail is rarely granted to any persons accused under the Ordinance.

II. Israeli Counter-Terror Legislation and the Incompatibility with Human Rights

Outlined below are some issues within Israeli counter-terrorist policy which have been given international media attention:

1. Demolition of Houses

House demolition is a controversial tactic used by the Israeli Defence Forces (IDF) against Palestinians in Jerusalem, the West Bank and the Gaza Strip. Official IDF explanations for house demolitions include:

a. As a counter-insurgency security measure to impede or halt militant operations;
b. As a regulatory measure to enforce building codes and regulations;
c. As a deterrent against the resistance movement in the occupied territories by punishing those suspected of aiding militants, and their families. [110]

Human rights organizations have criticized the use of house demolitions as a violation of international law, and have suggested that Israel's actual motivations are both a means of collective punishment against Palestinians, and Israeli demographic objectives to seize property for the expansion of Israeli settlements.[111]

The policy of house demolitions in the Occupied Territories includes the demolition or sealing of houses as a punitive measure where an occupant of the house was involved, or suspected of being involved, in acts of violence. The demolition is based on Section 119 of the Emergency Defense Regulations of 1945, which grants the military broad discretion in demolishing or sealing all or part of a structure.[112] Demolitions pursuant to this section are not carried out following a court order; the decision of the military commander is sufficient. The demolition is not implemented in place of criminal punishment, but in addition to it. Worst of all, the main victims of the demolitions are the occupants of the demolished structure, and not the persons whom Israel claims were involved in acts of violence, who are dead or are in custody and await, in most cases, long prison sentences.

The demolition of houses violates the rules of international law applying in territory under belligerent occupation, which prohibits the destruction of private or public

[110] Amnesty International, (18 May 2004) Report: Israel and the Occupied Territories Under the rubble: House demolition and destruction of land and property.
[111] Human Rights Watch (October 2004). Razing Rafah: Mass home demolitions in the Gaza Strip.
[112] Defence (Emergency) Regulations. (2009, June 12). In Wikipedia, The Free Encyclopedia. Retrieved 15 July 2009, from http://en.wikipedia.org/w/index.php?title=Defence_(Emergency)_Regulations&oldid=295931008

property, except where rendered absolutely necessary by military operations.[113] However, the policy is typically justified by the Israeli Defence Forces on the grounds of:

a. Deterrence, achieved by harming the relatives of those who carry out, or are suspected of involvement in carrying out, attacks;
b. Counter-terrorism, by destroying militant facilities such as bombs labs, headquarters, and offices;
c. Forcing out an individual barricaded inside a house, which may be rigged with explosives, without risking the lives of soldiers;
d. Self-defence, by destroying possible hideouts and RPG/gun posts;
e. Combat engineering, clearing a path for tanks and heavy APCs. [114]

Except for rare cases, the Israeli High Court of Justice rejects petitions filed against house demolitions, and refrains from questioning the position of the security forces it is a legitimate deterrent tactic against Palestinians who would commit violent acts.[115] However, over the years, the petitions have achieved some results. The HCJ has set limitations on the exercise of the broad discretion given to the military commander, by requiring him to issue a detailed Demolition Order that states the reason for the demolition, its scope, and the source of authority for the demolition. Furthermore, the HCJ has required that the occupants of the house be given an opportunity to be heard before the house is demolished, and to appeal to the HCJ if the military commander rejects their arguments. In addition, if the right to be heard is not granted prior to demolition, the legal advisor for the West Bank must state reasons in writing for denying that right.[116]

Despite the rulings of the HCJ in these matters, many houses of Palestinians have been demolished as a punitive measure despite the fact that no demolition order was issued, before the occupants were allowed to state their arguments opposing the demolition, and without even giving them the opportunity to remove their possessions. This has resulted in damage to nearby areas and adjacent apartments, houses and structures.

2. Respect for the Dead

In rulings of the Supreme Court, it was held that the fundamental principle of human dignity – a constitutional right in Israel – includes not only the dignity of a person when alive, but also the dignity following a person's death. This is a reflection of the special importance the state of Israel gives to respect for the dead; indeed, Israel makes a great effort to bring fallen security forces to burial in Israel, and shows great concern for bereaved families by perpetuating the memory of the fallen.

---

[113] International Committee of the Red Cross. Article 33 of the Fourth Geneva Convention. Retrieved 17 July 2009, available at: http://www.icrc.org/ihl.nsf/WebART/380-600038?OpenDocument..

[114] B'Tselem - The Israeli Information Center for Human Rights in the Occupied Territories (17 February 2005). "House Demolitions as Punishment" available at: http://www.btselem.org/English/Punitive_Demolitions/Index.asp.

[115] *Supra* note 4.

[116] House demolition in the Israeli–Palestinian conflict. (17 June 2009). In Wikipedia, The Free Encyclopedia. Retrieved 07/16/2009, from http://en.wikipedia.org/w/index.php?title= House_demolition_in_the_Israeli%E2%80%93Palestinian_conflict&oldid=296935613.

In great contrast to the above, the manner in which Israel handles the bodies of Palestinians killed during violent action has been termed degrading and disrespectful. Following an unclear policy that lasted for years, Israel ceased almost completely the practice of returning the bodies of Palestinians to their families for burial. The state has defended this practice as a means of deterrence, stating that the military often uses the bodies in negotiating future exchanges.[117] However, the deliberate withholding of Palestinian bodies as bargaining chips is a form of collective punishment, and violates a plethora of international statues.

As of late 2004, the policy was changed; the court decided that Palestinian bodies will be returned to their families with a state imposed condition: scientific identification. For most cases this involves a DNA test, the high cost of which must be covered by the family.[118] In many instances, there is no problem identifying a body based on administrative evidence, documents found on the body, or a public statement from an organization stating that the person killed was one of its members. This policy, while significantly less harmful than its predecessor, still puts an unnecessary burden on the deceased's family.

3. Construction of the Security Fence

The Israeli West Bank barrier is a highly controversial project. Supporters suggest that the barrier is a necessary tool in the protection of Israeli civilians from Palestinian terrorism, including suicide bombing attacks, which increased significantly during the al-Aqsa Intifada.[119] Indeed, supporters of the project also point to the significantly reduced number of incidents of suicide bombings from 2002 to 2005, while the fence was being constructed.[120] However, critics argue that the barrier is an illegal attempt to annex Palestinian land under the guise of security, that its presence violates international law, has the intent or effect to pre-empt final status negotiations, and severely restricts Palestinians who live nearby, particularly their ability to travel freely within the West Bank and to access work in Israel.[121]

The separation wall being built in the West Bank has created enormous changes in surrounding areas. The wall penetrates deeply into occupied territory, creating land enclaves and imprisoning Palestinians in land space cut off from the State of Israel and isolated from the rest of the Occupied Territories. The wall tramples on the property rights of Palestinians living near it, seizing vast amounts of land and destroying plantations, crops, and fields. The living conditions of Palestinians who live near the wall have become intolerable; many residing east of the wall are unable to reach and cultivate their farmland, and those living west of the wall have trouble accessing West Bank cities, schools, and medical care. They are separated from their relatives, due to the limited

---

[117] Amnesty International (2005). Report: Israel and the Occupied Territories.

[118] HaMoked – Center for the Defence of the Individual. "Respect for the dead". Retrieved 07/16/2009, available at: http://www.hamoked.org/.

[119] Israeli Ministry of Defence (22 February 2004). "Questions and Answers:. Israel's Security Fence". Retrieved 17 July 2009, available at:. http://www.securityfence.mod.gov.il/Pages/ENG/questions.htm.

[120] Nissenbaum, Dion (10 January 2007). "Death toll of Israeli civilians killed by Palestinians hit a low in 2006". Washington Bureau. McClatchy Newspapers. Retrieved 16 July 2009, available at: http://www.realcities.com/mld/krwashington/16429529.htm.

[121] Bedell, Geraldine (15 June 2003). "Set in stone". The Guardian. Retrieved on 17 July 2009 available at: http://www.guardian.co.uk/israel/Story/0,2763,976105,00.html.

hours in which the gates of the wall are open and the need for special permits to travel back and forth.[122] From these examples alone, it is clearly evident that the wall infringes on the residents' fundamental rights to movement, to gain a living, to education, health, and to a minimal degree of dignity.

The construction of the wall has generated numerous petitions to the Israeli High Court of Justice. Some of the petitions request that the state dismantle the wall in certain areas in which residents' rights have been violated, while other petitions oppose the arbitrary policy in opening the gates in the wall. Still others contend that the construction of the wall in occupied territory is illegal, and demand that the regime instituted by Israel be cancelled. Current international opinion is outlined below:

a. **Israeli Opinion**: Israeli public opinion has been very strongly in favor of the barrier, partly in the hope that it will improve security and partly in the belief that the barrier marks the eventual border of a Palestinian state. Most Israelis believe the barrier, along with intensive activity by the Israel Defense Forces, to be the main factors in the recent decrease of successful suicide attacks from the West Bank. Proponents of the barrier insist that reversible inconveniences to Palestinians should be balanced with the threats to lives of Israeli civilians, and believe that the barrier is a non-violent way to stop terrorism and save innocent lives. However, there are some Israelis who oppose the barrier. The Israeli Peace Now movement has stated that while they would support a barrier that follows the 1949 Armistice lines, the "current route of the fence is intended to destroy all chances of a future peace settlement with the Palestinians and to annex as much land as possible from the West Bank" and that the barrier would "only increase the blood to be split on both sides and continue the sacrificing of Israeli and Palestinian lives for the settlements".[123]Additionally, many Israelis living in settlements, such as the Gush Etzion area, oppose the fence because it separates them from the rest of Israel. They argue that building the fence defines a border, and that they are being left out. According to most settlers, all of the West Bank belongs to Israel, and separating any of it with a fence is the first step in giving the land away.[124]

b. **Palestinian Opinion**: The Palestinian population and its leadership are essentially unanimous in opposing the barrier. A significant number of Palestinians have been separated from their own farmlands or their places of work or study, and many more will be separated as the barriers near Jerusalem are completed. Furthermore, because of its planned route as published by the Israeli government, the barrier is perceived as a plan to confine the Palestinian population to specific areas. More broadly, Palestinian officials, supported by many in the Israeli left wing and other organizations, claim that the hardships imposed by the barrier will

---

[122] B'Tselem (December 2005). Publications: "Under the Guise of Security: Routing the Separation Barrier to Enable Israeli Settlement Expansion in the West Bank". Retrieved on 16 July 2009, available at: http://www.btselem.org/english/Publications/summaries/200512_Under_the_Guise_of_Security.asp.
[123] S*upra* note 16.
[124] Women In Green (21 June 2002). Media Releases: "Building the Ghetto Wall of Auschwitz". Retrieved 16 July 2009, available at: http://www.womeningreen.org/sayjune02.htm.

breed further discontent amongst the affected population and add to the security problem rather than solving it.[125]

c. **The United Nations**: In December 2003, an emergency special session was convened in order to discuss the construction of the barrier and the potential for human rights infringements. Resolution ES-10/14 was adopted by the United Nations General Assembly, which included a request to the International Court of Justice "to urgently render an advisory opinion"[126]. On 20 July 2004, the UN General Assembly accepted another resolution condemning the barrier, with 150 countries voting in favour of the resolution. Only 6 countries voted against: Israel, the US, Australia, Micronesia, the Marshall Islands and Palau.[127]

d. **The International Committee of the Red Cross**: On February 18, 2004, The International Committee of the Red Cross stated that the Israeli barrier "causes serious humanitarian and legal problems" and goes "far beyond what is permissible for an occupying power".[128]

e. **American Opinion**: On July 25, 2003, then-President of the United States George W. Bush stated "I think the wall is a problem. And I discussed this with Ariel Sharon. It is very difficult to develop confidence between the Palestinians and Israel with a wall snaking through the West Bank".[129] The following year, addressing the issue of the barrier as a future border, he stated in a letter to Sharon on April 14, 2004 that it "should be a security rather than political barrier, should be temporary rather than permanent and therefore not prejudice any final status issues including final borders, and its route should take into account, consistent with security needs, its impact on Palestinians not engaged in terrorist activities".[130]

f. **Canadian Opinion**: Canada recognizes Israel's right to protect its citizens from terrorist attacks, including the use of methods such as the restriction of access to its territory, and by building a barrier on its own territory for security purposes. However, Canada opposes the barrier's incursion into and the disruption of occupied territories. Regarding the West Bank as "occupied territory", Canada

---

[125] Kalman, Matthew (9 March 2004). "Israeli fence puts 'cage' on villagers: More Palestinians scrambling to keep barrier from going up". San Francisco Chronicle, Retrieved 16 July 2009, available at: http://www.sfgate.com/

[126] International Court of Justice (19 December 2003). "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory". United Nations Information System on the Question of Palestine, A/RES/ES-10/14.

[127] United Nations News Center (20 July 2004). "UN Assembly votes overwhelmingly to demand Israel comply with ICJ ruling". Retrieved 16 July 2009, available at: http://www.un.org/apps/news/story.asp?NewsID=11418&Cr=middle&Cr1=east.

[128] BBC News (18 February 2004). "Red Cross slams Israel barrier" Retrieved on 16 July 2009, available at: http://news.bbc.co.uk/2/hi/middle_east/3498795.stm.

[129] Bush, George (25 July 2003). Press Release: "President Bush Welcomes Prime Minister Abbas to White House; Remarks by President Bush and Prime Minister Abbas". United States White House Archives.

[130] BBC News (15 September 2005). Q&A: What is the West Bank barrier? Retrieved 16 July 2009, available at: http://news.bbc.co.uk/2/hi/middle_east/3111159.stm.

> considers the barrier to be contrary to international law under the Fourth Geneva Convention. Canada opposes the barrier, as well as the expropriations and the demolition of houses and economic infrastructure preceding its construction.[131]

In July of 2004, the International Court of Justice in The Hague published its advisory opinion on the wall. It held that construction of the wall, and the regime that Israel instituted to accompany it, violate international law.[132] The ICJ also recommended that Israel must tear it down and compensate the Palestinians who suffered loss as a result of its construction. Completely ignoring the ICJ's advisory opinion, and despite delays in construction resulting from petitions to the Israeli courts, the wall is still being built. With its de facto annexation of areas into the State of Israel, the gross violations of the residents' rights continue.

4. Obscure Legal Status of the GSS

There is much concern over the obscure legal statutes of the internal Israeli security service, otherwise known as Shin Bet (GSS). The GSS was created as a division of the Israeli Defence Forces during the Israeli declaration of independence in 1948, and has legally defined roles including:

a. Safeguarding state security
b. Exposing terrorist rings;
c. Interrogating terror suspects;
d. Providing intelligence for counter-terrorism operations in the West Bank and the Gaza Strip;
e. Counter-espionage;
f. Personal protection of senior public officials;
g. Securing important infrastructure and government buildings, and
h. Safeguarding Israeli airlines and overseas embassies. [133]

Unlike other countries, such as Great Britain, where there is a robust system of public control over the secret services, in Israel there is not only an absence of legislation which may have defined the limits and methods of the GSS, but public accountability of the security service is only partial.[134] A frail constitutional infrastructure enables the widespread existence of the phenomenon of 'provocative policing'; that is, actions not necessarily designed to gather anti-terrorist evidence for the sake of prosecution, but

---

[131] Department of Foreign Affairs and International Trade (4 July 2007). "Canadian policy on key issues in the Israeli-Palestinian Conflict". Retrieved 16 July 2009, available at: http://www.dfait-maeci.gc.ca/middle_east/can_policy-en.asp#08.

[132] International Court of Justice (9 July 2004). Cases: "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion". Archived from the original on 2004-07-04. http://www.icj-cij.org/docket/index.php?pr=71&p1=3&p2=1&case=131&p3=6. Retrieved on 16 July 2009.

[133] Ostfeld, Zehava (1994). An Army is Born (Vol. 1). Israel Ministry of Defense. pp. 103–110. ISBN 965-05-0695-0.

[134] Pedahzur, A. and Ranstorp, M.(2001) A Tertiary Model for Countering Terrorism in Liberal Democracies: The Case of Israel. *Terrorism and Political Violence*, 13(2), pp. 1- 26.

rather in order to serve the intelligence aims of the security forces.[135] Furthermore, the absence of a genuine system of accountability may inadvertently condone actions which verge upon the illegal, without the checks and balances in other democratic systems.

5. Administrative Detention

The Israeli policy of administrative detention is significantly more forceful than similar policies in other nations. In practice, it is the Israeli military that controls the conditions of detention, and the system allows for the imprisonment of an individual up to 6 months. However, this period may be extended, and judicial approval is not necessary for an indefinite extension. In addition to the potential for indefinite detention without charge, this particular Israeli policy violates the accused's right to a fair trial, as solicitors are not given access to the evidence against their clients. [136] Amnesty International has repeatedly voiced its concern for so-called "prisoners of conscience" who are being held are being "solely for the non-violent exercise of their right to freedom of expression and association".[137] Additionally, the IDF has been criticized by other international organizations for its failure to recognize Palestinian prisoners as having prisoner of war status.[138]

In 2007, the number of Palestinians under administrative detention averaged about 830 per month, including women and minors under the age of 18.[139] By March 2008, more than 8,400 Palestinians were held by Israeli civilian and military authorities, of which 5,148 were serving sentences, 2,167 were facing legal proceedings and 790 were under administrative detention, often without charge or knowledge of the suspicions against them.[140]

6. Targeted Killings

In the course of the Israeli-Palestinian conflict, the Israel Defense Force has employed the tactic of targeted killings as part of its counter-terror strategy. Indeed, On December 14, 2006, the Supreme Court of Israel ruled that targeted killing is a legitimate form of self-defense against terrorists, and outlined several conditions for its use.[141] While the policy has been termed a legitimate tool in the fight to defend Israel's borders, there has been much recent debate as to the extent to which the policy violates international human rights law.

---

[135] Chalk, Peter (1998). The Response to Terrorism as a Threat to Liberal Democracy. *Australian Journal of Politics and History*, 44(3), pp.373–88.

[136] Fédération Internationale des ligues des Droits de l'Homme (FIDH) (July 13, 2003). "Palestinian Prisoners in Israel: The Inhuman Conditions Being Suffered by Political Prisoners". Retrieved 16 July 2009, available at: http://www.fidh.org/spip.php?article1894.

[137] Amnesty International (30 April 1997). Report: Administrative detention: Despair, uncertainty and lack of due process. Retrieved 16 July 2009, available at: http://web.amnesty.org/library/Index/eng MDE15003 1997?Open Document&of=COUNTRIES\ISRAEL\OCCUPIED+TERRITORIES.

[138] S*upra* note 30.

[139] B'Tselem (December 2007). 2007 Annual Report: Human Rights in the Occupied Territories, Special Report.

[140] BBC News (3 December 2008). Who are the Mid-East prisoners: Palestinian prisoners. Retrieved 16 July 2009, available at: http://news.bbc.co.uk/2/hi/middle_east/5211930.stm.

[141] Stahl, Adam (2006). Questioning the Efficacy of Israeli Targeted Killings Against Hamas' Religio-Military Command as a Counter-terrorism Tool. *Journal of International Studies*, 12(1), pp. 55-70

Proponents of the strategy argue that targeted killings are a measured response to terrorism threat, by focusing on the actual perpetrators of militant attacks while largely avoiding innocent casualties. They point out that targeted killings prevent some attacks against Israel, weaken the effectiveness of militant groups, keep potential bomb makers on the run, and serve as deterrence against terrorist operations. They also argue that targeted killings are less harmful toward Palestinian non-combatants than full scale military incursion into Palestinian cities to root out militant infrastructure.[142] Similarly, the IDF claims that targeted killings are only pursued to prevent future terrorism acts, not as revenge for past activities. It also claims that this practice is only used when there is absolutely no practical way of preventing future acts of violence by traditional means, such as arrest. Additionally, military officials claim that the practice is only used when there is a certainty in the identification of the target, in order to minimize harm to innocent bystanders.[143] Furthermore, proponents of targeted killings argue that because many of the Palestinians who have targeted Israel over the years have enjoyed the protection of Arab governments, extraditing them for trial in Israel has often proved impossible. It is important to note that these IDF claims have never been monitored or validated by an independent authority, and the IDF deliberations about the killings remain secret.[144]

The majority of criticism for Israel's policy of targeted killings cites the Geneva Conventions, which protect civilians from military targeting. Critics contend that the strikes are not part of an established public judicial system; instead, the actions are carried out by extrajudicial means. They hold that such strikes do not reduce terrorism, but encouraging more recruits to join militant factions, and are a setback to the Mideast Peace Process.[145] Finally, opponents of the policy cite that targeted killings actually destabilize the areas in which they occur, and eventually result in more violence.[146]

7. The Use of Human Shields

Article 27 of the Fourth Geneva Convention states that "civilians who find themselves in the hands of one of the parties are entitled, in all circumstances, to respect...They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof". [147] Despite this international consensus, however, the Israeli Defence Forces have often been accused of using unarmed civilians as human shields during military operations. For example, in April of 2004, Israeli soldiers used 13-year-old Muhammed Badwan as a human shield during a demonstration in the West Bank village of Biddu. The soldiers tied Badwan to the front windscreen of their jeep to discourage Palestinian demonstrators from throwing stones in their

---

[142] Inbar, Efraim (2003). "Israel's policy of targeted killings". Democracies and Small Wars: Taylor & Francis, ISBN 0714684236, pp 144, 157

[143] *Supra* note 35.

[144] Byman, Daniel (2006). Do targeted killings work? *Foreign Affairs*, 85(2), pp. 95-112.

[145] *Supra* note 38.

[146] Luft, Gale (2003). The Logic of Israel's Targeted Killing. *Middle East Quarterly*, 10(1), pp. 44-67.

[147] Dugard, John (2002). "Question of the violation of human rights in the occupied Arab territories, including Palestine". Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in the Palestinian territories occupied by Israel since 1967. United Nations General Assembly. Fifty-seventh session Item 111 (c) of the provisional agenda. Retrieved 17 July 2009. http://domino.un.org/unispal.nsf/0/5189f43f72a68a2785256c61005a58ea?OpenDocument.

direction.[148] There were also reports by the human rights organization B'Tselem that the IDF has systematically used human shields as part of their strategy to combat insurgents, particularly in the 2002 Battle of Jenin and Operation Defensive Shield.[149]

The media fallout from these and other events prompted several different investigations into IDF tactics, and resulted in an Israeli High Court ruling against the practice.[150] However, it is clearly evident that the IDF continues to employ the use of human shields in their counter-terrorism efforts. On July 17, 2006 the Israel Defense Force soldiers used six civilians, including two minors, as human shields during an incursion into Beit Hanun. Two boys, one aged 14 and the other aged 16, were ordered to lead soldiers into an area where a heavy firefight with Palestinian militants had just taken place.[151] The Guardian has released detailed video footage and testimony from civilians in the area, alleging Israeli war crimes such as the use of Palestinian children as human shields, the targeting of medics and hospitals, and drone aircraft deliberately firing on civilians.[152]

III. Concerns from Human Rights Organizations

As this report will demonstrate, there is an enormous amount of criticism for Israeli policy which is generated from human rights organizations around the globe. Indeed, it is a nearly impossible task to examine all the arguments, even a small sampling of rights-based groups. With these limitations in mind, this report will attempt to provide an overview of some alleged human rights abuses and other pertinent issues which have arisen from the debate surrounding Israel's military presence in the Occupied Territories.

1. United Nations Special Rapporteur of the Situation of Human Rights in the Palestinian Territories Occupied since 1967, Richard Falk

(i) Refugee Denial

In unprecedented display of belligerent policy, Israel refused to allow the entire civilian population of Gaza, with the exception of 200 foreign wives, to leave the war zone during the 22 days of continuous attack that commenced on 27 December 2008. As the United Nations High Commissioner for Refugees stated on 6 January 2009, Gaza is "the only conflict in the world in which people are not even allowed to flee". All crossings from Israel were kept closed during the attacks, except for rare and minor exceptions. By so doing, children, women, invalids and disabled persons were unable to avail themselves of the refugee option to flee from the locus of immediate harm resulting from the military operations. This condition was worsened due to a lack of places to hide

---

[148] Johnston, Cynthia (2004). "Activists say Israel held boy as human shield". Swiss Info. Retrieved 17 July 2009, available at: http://www.swissinfo.ch/eng/index.html?siteSect=143&sid=4886007.
[149] B'Tselem (2006). "News 20 July 2006: Israeli Soldiers use civilians as Human Shields in Beit Hanun".
[150] BBC News (2005). "Israel bans use of human shields". Retrieved 17 July 2009, available at: http://news.bbc.co.uk/2/hi/middle_east/4314898.stm.
[151] *Supra* note 43.
[152] Chassy, Clancy (23 March 2009). "Guardian investigation uncovers evidence of alleged Israeli war crimes in Gaza". The Guardian. Retrieved 17 July 2009, available at: http://www.guardian.co.uk/world/2009/mar/23/israel-gaza-war-crimes-guardian.

from the ravages of war in Gaza, given its small size, dense population and absence of natural or man-made shelters.[153]

(ii) Obligations of Israel towards the Gaza Population

The Special Rapporteur expresses a further concern with respect to the nature of the legal obligations of Israel towards the Gazan population. Israel officially contends that, after the implementation of its disengagement plan in 2005, it is no longer an occupying Power, and is therefore not responsible to observe the obligations set forth in the Fourth Geneva Convention. That contention has been widely rejected by expert opinion, as well as the *de facto* realities of effective control. Since 2005, Israel has completely controlled all entry and exit routes by land and sea, and asserted control over Gazan airspace and territorial waters. By imposing a blockade since the summer of 2007, it has profoundly affected the life and well-being of every single person living in Gaza. Therefore, regardless of the international status of the Occupied Palestinian Territory with respect to the use of force, the obligations of the Fourth Geneva Convention, as well as those of international human rights law and international criminal law, are fully applicable.[154]

2. Human Rights Watch

(i) Military Investigations into Palestinian Deaths

Human Rights Watch has often criticized Israel's policy during armed conflicts, and among the organization's many concerns is the demonstrated lack of integrity during the IDF's investigations into Palestinian civilian deaths. In a 2005 report, the organization stated that between 29 September 2000 and 30 November 2004, more than 1600 Palestinian civilians not involved in hostilities, including at least 500 children, were killed by Israeli security forces, and thousands more were seriously injured.[155] The IDF informed Human Rights Watch that as of May 10, 2004, it had criminally investigated just seventy-four alleged cases of unlawful use of lethal force, less than 5 percent of the civilian deaths in nearly four years of what is commonly known as the al-Aqsa Intifada.[156] Human Rights Watch expresses their grave concern that such a low number of inquiries into the actions of IDF soldiers, despite the thousands of substantiated reports of

---

[153] Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Richard Falk: Human Rights Situation in Palestine and other Occupied Arab Territories. U.N. G. A., Human Rights Council: Tenth Session. A/HRC/10/20, 11 February 2009.

[154] *Supra* note 47.

[155] The IDF does not appear to keep statistics on the number of Palestinian civilians killed, but several Israeli and Palestinian NGOs have attempted to calculate the number. The figures vary depending on methodology, access to victims and witnesses, and other factors. According to the Israeli human rights organization B'Tselem, between the beginning of the Intifada and the end of November 2004, 3,040 Palestinians were killed by Israeli security forces, including 606 children, in the Occupied Palestinian Territories. According to their investigations at least 1,661 of those killed (including 531 children under the age of 18) were not involved in hostilities when they were killed. According to the Palestinian Center for Human Rights, Israeli forces have killed 2,191 Palestinian civilians in the Occupied Palestinian Territories between the beginning of the Intifada and April 2004 (including 493 children under the age of 17). The most detailed and up-to-date statistics are those of the Palestine Red Crescent Society, which put the number of deaths of children under eighteen at 612 through the end of October 2004.

[156] Human Rights Watch (June 2005). Report: Promoting Impunity: The Israeli Military's Failure to Investigate Wrongdoing. Vol 17 No. 7(E).

the disproportionate use of force against Palestinians, are indicative of a fundamental problem with the system of Israeli military investigations.[157]

At the heart of the problem is the system itself, which relies on soldiers' own accounts as the threshold for determining whether serious investigation is warranted. Instead of initiating impartial investigations in such cases, the IDF relies on operational debriefings, which Israeli officials have misleadingly referred to as "operational investigations," "field investigations," or "military investigations." The frequent discrepancies between IDF accounts of civilian deaths and injuries, on the one hand, and video, medical, and eyewitness evidence on the other hand, is the result in part of the IDF's practice of asking soldiers to "investigate" other soldiers from the same unit or command, without seeking and weighing testimony of external witnesses. Exculpatory claims of soldiers are taken at face value, potentially delaying and or preventing prompt and impartial investigation. So-called "operational investigations" may serve a useful military purpose, but they do not constitute proper investigations: they are wholly inadequate to determine whether there is evidence of a violation of human rights or humanitarian law, and they serve as a pretext for maintaining, incorrectly, that an investigation has taken place. Another critical weakness of this current system is the absence of victim involvement in the investigative process, and the demonstrated failure of the IDF to solicit or take seriously testimonies of victims, or non-IDF witnesses as a basis for checking the reliability of soldiers' accounts.[158]

Human Rights Watch reiterates that Israel's duty to investigate alleged wrongdoing by its soldiers is reinforced by its obligations under international human rights law, as various Israeli administrations have signed and ratified a number of treaties that oblige it to investigate violations and bring perpetrators to justice. These treaty obligations together form an effective deterrent against unlawful killings, torture, and other serious human rights abuses. These are the obligations to:

a. Investigate serious human rights violations;
b. Bring to justice and discipline and punish those responsible;
c. Provide an effective remedy for the victims of human rights violations;
d. Provide fair and adequate compensation to the victims and their relatives; and
e. Establish the truth about what happened.[159]

The IDF has responded by arguing that investigating civilian deaths would harm the special nature of combat operations, and that only "exceptional" cases should be pursued; however, they have failed to indicate what the criteria for "exceptional" cases would be. While it is true that not all deaths or injuries of civilians need trigger an independent investigation, the IDF's position cannot be reconciled with Israel's obligations under the international human rights and humanitarian law treaties that it has ratified. There are clearly established standards for determining whether particular actions have violated these laws in situations of armed conflict, or if an individual's actions constitute unlawful use of force in policing situations. Human Rights Watch urges the IDF to adhere to those standards, and to implement the following policies:

---

[157] *Supra* note 50.
[158] *Supra* note 50.
[159] *Supra* note 50.

a. Establish an independent body to receive and investigate complaints of serious human rights abuses committed by IDF soldiers and the agents of the Israel Security Service;
b. Ensure that international norms are reflected in the operational and training manuals of the Military Police;
c. Publicize widely information on how to file complaints, including in the Hebrew and Arabic media and on the internet;
d. Ensure that when a complaint is not upheld after an investigation, the complainant is given a reasoned decision in writing, in his or her own language, which sets out the evidence as well as the investigative findings;
e. Establish clear guidelines and procedures for all individuals involved in organizing and obtaining witness testimony of individuals residing in areas which are under Palestinian Authority jurisdiction; and
f. Compensate all individuals who have suffered harm as a result of unlawful or criminal behavior by state agents – and amend current laws that make such compensation effectively inaccessible or unavailable to victims.[160]

3. Amnesty International

(i) The Security Fence

Amnesty International has repeatedly expressed its grave concern over the construction of the security fence within the Israeli Occupied Territories. According to the Israeli authorities, the fence is "a defensive measure, designed to block the passage of terrorists, weapons and explosives into the State of Israel".[161] They state its sole purpose as: "to provide security".[162] However, most of the fence is not being constructed between Israel and the West Bank along the Green Line (the 1949 armistice line which separates the State of Israel from the occupied West Bank); Almost 80 per cent of it is located on Palestinian land inside the West Bank, separating Palestinian towns, villages, communities and families from each other; cutting off Palestinian farmers from their land; hindering access to education and health care facilities and other essential services; and separating Palestinian communities from reservoirs and sources of clean water.[163]

Because of the fence's meandering route, it is more than double the length of the Green Line. It is a complex structure, 50 to 100 meters in width and including barbed wire, ditches, trace paths and tank patrol lanes on each side as well as additional buffer zones of varying depths. Its route has been designed to encompass more than 50 Israeli settlements, where some 80 per cent of Israeli settlers live, and large areas of land around

---

[160] *Supra* note 50.
[161] Israeli Ministry of Defense (31 July 2003). News briefs. Retrieved 20 July 2009, available at: http://www.seamzone.mod.gov.il/Pages/ENG/news.htm.
[162] Israel's Security Fence: Purpose. Retrieved 20 July 2009, available at: http://www.seamzone.mod.gov.il/Pages/ENG/purpose.htm.
[163] For maps and further details about the consequences of the fence/wall see, among other sources: http://www.ochaopt.org/?module=displaysection&section_id=130&format=html. Retrieved 20 July 2009.

them. This will create territorial contiguity of these settlements with Israel while cutting the area off from the rest of the West Bank.[164]

Amnesty International researchers who visited the West Bank between mid-2002 and mid-2003 found that Palestinians whose land was directly affected by the fence had received little or no information about it from the Israeli authorities. Most had found land seizure orders, as well as maps of the proposed route, pinned to trees or left under stones by the Israeli army in areas where construction was about to begin. The maps were unclear, generally poor-quality photocopies, and did not contain a scale or other details necessary to establish the exact route of the fence. Only when Israeli army bulldozers began to uproot trees and dig could Palestinians deduce where the fence would be located.[165]

Amnesty International contends that Palestinians who live in villages affected by the fence's construction essentially live in a virtual state of siege. Their land, their children's schools and medical clinics are all outside the enclave. They need permits to continue living in their homes, permits to go out of the enclave into the rest of the West Bank and return back home, and permits to go in and out of the enclave by car. They and any goods they bring home are inspected by Israeli soldiers at the gates and often passage is refused for certain goods, such as gas canisters for cooking. They also need permits to receive Palestinian visitors or build new homes, and these are difficult or impossible to obtain. Some homes have been demolished and others are under threat of demolition because they were built – before the fence – without the permits, which the families have no hope of obtaining.[166]

In its recommendations, Amnesty International calls for the Israeli government to immediately stop the construction of the fence inside the West Bank, which results in "unlawful restrictions on the right to free movement of Palestinians and the arbitrary destruction or seizure of their homes and property; and which undermines other rights, including the rights to adequate housing, to work, to an adequate standard of living and to respect for family life". The organization also suggests the removal of sections of the completed fence which violate any of these above-mentioned rights.[167]

(ii) Israeli Settlements

Another highly contended issue is the Israeli settlements within Gaza and the West Bank, and Amnesty International has been particularly outspoken in regards to this facet of Israeli policy. The organization contends that the establishment of Israeli settlements in the Occupied Territories violates international humanitarian law and fundamental human rights provisions, including the prohibition of discrimination, enshrined in international treaties which Israel has ratified and is obliged to uphold. Israel's settlement policy in the Occupied Territories is characterized by discrimination on grounds of nationality, ethnicity and religion. Settlements are for Jews only, who are entitled to Israeli nationality and to the protection of Israeli law even if they are migrants from other countries without ever having resided in the State of Israel. Palestinians, who are subject

---

[164] Amnesty International (2007). Report: Enduring Occupation: Palestinians Under Siege in the West Bank. AI Index MDE 15/033/2007.
[165] *Supra* note 58.
[166] *Supra* note 58.
[167] *Supra* note 58.

to military law rather than Israeli civilian law, are not allowed to enter or approach Israeli settlements or to use settlers' roads, and are thus restricted in their movement. Settlers also receive substantial financial and other benefits, and are allowed to exploit land and natural resources that belong to the Palestinian population.[168]

Some 135 officially recognized Israeli settlements and 100 settlement "outposts" (unauthorized but state-sponsored and funded by government ministries) have been established in the West Bank, including East Jerusalem, in violation of international law and in defiance of UN resolutions, since the beginning of Israel's occupation in 1967. Israeli settlers number about 450,000, of whom some 200,000 live in settlements in and around East Jerusalem. Some settlements have fewer than 100 residents. Others, such as Ariel, Maale' Adumim and Pisgat Ze'ev, with 15,000 to 30,000 residents, have become well-established and well-resourced towns.[169]

The unlawful appropriation of Palestinian land for Israeli settlements and "bypass" roads, and of crucial resources such as water, has had a devastating impact on the local Palestinian population, including their rights to an adequate standard of living, to adequate food, water and housing, to the highest attainable standard of health, to education and to work. For example, some 60,000 Palestinians who live in 16 villages located along a short section of Road 60 south of Hebron have not had vehicular access to Road 60 for years; the Israeli army has blocked the entrances to the road. By building a network of settlements and a network "bypass" roads around all the Palestinian towns and villages, Israel has removed the possibility of Palestinian territorial sovereignty in the West Bank, constrained the growth of Palestinian towns and villages and ensured effective Israeli control of the entire West Bank are – and of the lives of more than two million Palestinians who live there.[170]

In addition to the officially recognized 135 Israeli settlements, some additional 100 settlements of varying size have been established without the official approval of the Israeli authorities. These are generally referred to as settlement "outposts", and more than half of them have been established in the past eight years. Even though these "outposts" are unauthorized, the Israeli army provides them with around-the-clock protection and many have been allowed to connect to electricity, telephone and water supply networks and to build roads connecting them to main roads and to other settlements. It is important to note that many of the officially recognized settlements started in much the same manner. The Israeli government has made repeated promises to dismantle and evacuate all the unauthorized settlements, especially in the framework of the internationally sponsored Road Map for Peace plan of 2003. However, little or no action has been taken to this effect beyond a few half-hearted attempts; the "outposts" reestablished soon after. In the meantime, new "outposts" have continued to appear on unlawfully appropriated Palestinian land.[171]

Amnesty International calls for an immediate halt on the construction or expansion of Israeli settlements and related infrastructure in the Occupied Territories as a first step to removing Israeli civilians living in these settlements.[172]

---

[168] *Supra* note 58.
[169] *Supra* note 58.
[170] *Supra* note 58.
[171] *Supra* note 58.
[172] *Supra* note 58.

(iii) Checkpoints

The organization points to the arbitrary nature of Israeli checkpoints as an obstacle to human rights in the Occupied Territories, stating the checkpoints, disrupt all aspects of Palestinian life, including important social and family events. Amnesty International highlights two individual stories as examples of failures of the policy:

a. 'Adel 'Omar, aged 21, died on 17 February 2007 after Israeli soldiers delayed his passage at the gate between the village of Azzun 'Atmeh and the nearby town of Qalqilya. 'Adel 'Omar had been injured in a tractor accident. The village is surrounded by the security fence, and the only way out of it is through a gate which closes at 10pm. 'Adel arrived at the checkpoint after 10pm and the soldiers did not open the gate for over an hour. He was still alive when he was allowed to pass, but died before reaching the hospital, only a few kilometers from the gate.[173]

b. Rula 'Ashtiya, was forced to give birth on the ground, on a dirt road by the Beit Furik checkpoint, after Israeli soldiers refused to allow her through the checkpoint in the early morning of 26 August 2003. Her baby girl died soon after. Rula was in labour and was on her way to Nablus hospital, only a few minutes away, when she arrived at the checkpoint. The soldiers manning the checkpoint took no notice of her condition and obvious distress, or of her husband's pleading. They did not ask to check their IDs, and simply told them they could not pass. Only after Rula had given birth and her baby had died did the soldiers allow her and her husband and their dead baby to pass through the checkpoint.[174]

The United Nations Office for the Coordinator of Humanitarian Affairs (OCHA) records the number of checkpoints and blockades in the West Bank. In March 2007 there were 549. Of these, 84 were manned checkpoints and 465 were unmanned blockades, such as locked gates, earth mounds or ditches that make roads impassable, as well as cement blocks and other obstacles that block access to roads.[175] In addition, thousands of temporary checkpoints, known as "flying checkpoints", are set up every year by Israeli army patrols on roads throughout the West Bank for a limited duration – ranging from half an hour to several hours.[176] The nature of these checkpoints makes it almost impossible to know whether travel will be permitted or not in any given area.[177]

The Israeli army also declares "general closures" in the Occupied Territories, usually on Israeli national or religious holidays. When such general closures are imposed, no movement is allowed for Palestinians through checkpoints into East Jerusalem and Israel, except for emergencies. However, when checkpoints are closed it is difficult and time-

---

[173] *Supra* note 58
[174] *Supra* note 58.
[175] Report No 34, Implementation of the Agreement on Movement and Access (21 February- 6 March 2007), issued by OCHA, 14 March 2007, at: http://www.ochaopt.org/documents/AMA_34.pdf.
[176] OCHA's Summary data tables of March 2007, available at: www.ochaopt.org/documents/OCHA_oPt_PoC_MonthlyTablesFeb07.pdf.
[177] *Supra* note 58.

consuming for Palestinians to contact the appropriate Israeli army officials to notify them of the emergency and obtain the necessary authorization to pass.[178]

In light of the potential for rights abuses within the Israeli checkpoint policy, Amnesty International suggests the implementation of regulatory and international monitoring procedures. This will ensure Palestinian ease of access to lands within the Occupied Territories, particularly in emergency situations.[179]

4. B'Tselem

(i) Harm to Medical Personnel

International law is unequivocal on matters related to the protection of medical teams: medical teams are not to be unnecessarily delayed or harmed, unless they participate directly in military actions. Indeed, international humanitarian law grants immunity to the sick, wounded, and medical teams involved in transporting them.[180] There are, however, two exceptions to these rules. First, during hostilities, it is permissible to delay ambulances from entering a certain area to evacuate the wounded.[181] Second, when ambulances, medical teams, sick, or wounded participate in hostile acts, they lose their immunity and may be delayed and even harmed.[182]

B'Tselem contends that the IDF has used these narrowly defined exceptions to justify their actions. Official sources repeatedly state the claim that Palestinians use ambulances to transport weapons and explosives, without actually providing any substantial proof. The army's contentions easily lead the soldiers to act with suspicion, violence, and disdain toward ambulances and ambulance teams. Challenging the status of ambulances as rescue vehicles critically harms the medical system in the West Bank., as freedom of movement is essential to the success of emergency medical care.[183] B'Tselem has documented many cases of the following:

a. Delay of ambulances, due to IDF policy which requires every Palestinian to explain at the checkpoints why they want to be examined by a physician, and to present medical documentation supporting the request;
b. Assaults on ambulance teams, including the beating and humiliation of medical personnel and deliberate damage to the ambulance and medical equipment;
c. Use of ambulances by IDF soldiers for non-medical purposes, including as shields for soldiers, and as transport to and from locations in the Occupied Territories.[184]

---

[178] *Supra* note 58.
[179] *Supra* note 58.
[180] Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 1949, Articles 16-17; First Additional Protocol to the Geneva Conventions, of 1977, Article 10. Articles 18 and 20 of the Protocol deal with the protection granted to hospitals.
[181] First Additional Protocol, Article 15.
[182] Fourth Geneva Convention, Article 20. See also, Jean S. Pictet, Commentary, Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva: International Committee of the Red Cross, 1958) 161.
[183] B'Tselem (May 2001). Report: Standard Routine: Beatings and Abuse of Palestinians by Israeli Security Forces during the Al-Aqsa Intifada.
[184] B'Tselem (December 2003). Report: Harm to Medical Personnel: The Delay, Abuse and Humiliation of Medical Personnel by Israeli Security Forces.

B'Tselem contends that the IDF uses "security considerations" to defend its operations in the Occupied Territories, as well as the harm it has perpetrated to ambulances and medical teams. B'Tselem and Physicians for Human Rights urge Israel's security forces to respect international law regarding the sick, wounded, and medical teams.[185]

5. World Bank

(i) Movement and Access Restrictions in the West Bank

In a recent report on the economic impact of Israeli blockades and checkpoints in the Palestinian Authority, the World Bank concludes that unacceptable amounts of damage are occurring to the Palestinian economy due to the Israeli occupation. Currently, freedom of movement and access for Palestinians within the West Bank is the exception rather than the norm, contrary to the commitments undertaken in a number of Agreements between Government of Israel and the Palestinian Authority. In particular, the World Bank points to both the Oslo Accords and the 2003 Road Map, which were based on the principle that normal Palestinian economic and social life would be unimpeded by restrictions. In economic terms, the restrictions arising from the current system of closures not only increase transaction costs, but create such a high level of uncertainty and inefficiency that the normal conduct of business becomes exceedingly difficult and prevents the growth and investment which is necessary to fuel economic revival.[186]

The World Bank also mentions the legislation under which current Israeli military occupation is seen as contrary to the law. Specifically, the Oslo Accords provided that the movement of people and vehicles in the West Bank "will be free and normal, and shall not need to be effected through checkpoints or roadblocks".[187] The Road Map specified that the Israeli government would take measures to improve the humanitarian situation, including easing restrictions on movements of persons as well as goods.[188] The fact that movement restrictions have continued, and have resulted in greater economic hardship is evidenced by the need for a third agreement between the parties in November 2005 — the Agreement on Movement and Access (AMA) — with the sole aim of "facilitating the movement of goods and people within Palestinian Territories". While recognizing that Israel had legitimate reasons to take steps to protect its citizens from violence, it was likewise recognized that this could not take place against the backdrop of Palestinian economic hardship and collapse. In particular, the AMA provided that, "consistent with security needs Israel will facilitate the movement of people and goods within the West Bank and minimize disruption to Palestinian lives".[189] The common basis for all these undertakings is the acknowledgement that without efficient and predicable movement of

---

[185] *Supra* note 78.
[186] World Bank (9 May 2007). Movement and Access Restrictions in the West Bank: Uncertainty and Inefficiency in the Palestinian Economy.
[187] The Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Annex I, Article IX(2)(a).
[188] A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, Phase 1: Ending Terror and Violence, Normalizing Palestinian Life and Building Palestinian Institutions, Present to May 2003.
[189] Agreement on Movement and Access, 15 November 2005.

people and goods, there is very little prospect for a sustainable Palestinian economic recovery.

Under occupation, administrative restrictions on movement are defined and implemented by orders of the Military Commander of the West Bank. These orders are published and have essentially the same effect as law. Additionally, the orders are supplemented by *ad hoc* measures, which are communicated verbally to Palestinians, but are not supported by published rules or procedures. Together, military orders and *ad hoc* measures create a system of movement restrictions which is non-transparent and highly unpredictable. The practical effect of this shattered economic space is that on any given day the ability to reach work, school, shopping, healthcare facilities and agricultural land is highly uncertain and subject to arbitrary restriction and delay. The report points to specific administrative impediments which obstruct the natural development of the Palestinian economy, such as:

a. Control of the population registry, including the issuing of permits for marriages, education and employment outside of Gaza and the West Bank;
b. The permit regime, including the necessity of permits for movement within the West Bank and the challenges which arise from the system of "flying checkpoints";
c. The issue of family reunification and establishment of residency in Gaza and the West Bank, and the current Israeli policy of granting reunification requests only in "exceptional humanitarian cases";
d. The absolute prohibition of Palestinian presence in or around Israeli settlements in Gaza and the West Bank;
e. Restrictions on Palestinians access to some 41 sections of roads in the West Bank, covering an approximate distance of 700 km;
f. The construction of the Separation Barrier and subsequent "seam zones" – a "closed area" for an indefinite period of time pursuant to military occupation orders;
g. Exclusion of Palestinians from entering into the Jordan Valley;
h. The legal status of Palestinians in East Jerusalem, who are considered neither residents of the West Bank or Gaza, and are not necessarily eligible for Israeli passports nor allowed to accept Palestinian passports or travel documents.[190]

The World Bank concludes that the Israeli policy of closure is indeed impeding the stabilization f the Palestinian economy. Economic recovery and sustainable growth will require a fundamental reassessment of closure practices, a restoration of the presumption of movement, and review of Israeli control of the population registry and other means of dictating the residency of Palestinians within West Bank and the Gaza Strip.[191]

6. HaMoked

(i) Family Reunification in the Occupied Territories

[190] *Supra* note 81.
[191] *Supra* note 81.

In 2006, the Israeli NGO HaMoked published a report on Israel's prohibition of family reunification in the Occupied Territories. Shortly after the outbreak of the Second Intifada, Israel decided to stop processing requests submitted by Palestinian residents for family unification with their spouses and family members living abroad, and not to issue visitor's permits to these non-residents. Israel has not explained the reasoning behind the "freeze policy", merely stating that "because of recent incidents [the outbreak of the Second Intifada], the handling of requests for family unification in Judea and Samaria has stopped". [192] HaMoked contends that such a policy leads to an intolerable level of government intrusion into the lives of ordinary Palestinians, subverts basic human rights, discriminates on the basis of ethnicity, and makes thousands of Palestinian lives impossible. [193]

One of the harsh consequences of the freeze policy is the forced breakup of the family unit when one spouse is not a resident of the Occupied Territories. Foreign spouses who lived in the area before the family unification request submitted on their behalf was approved, or who were staying abroad when Israel implemented the freeze policy, have remained "stuck" outside the area since then. Israel's refusal to issue visitor permits prevents many from visiting their families abroad, out of fear that they will not be allowed to return to their children and spouse. Additionally, thousands of spouses who are not residents of the Occupied Territories have become prisoners in their own homes; they cannot renew their visitor's permits or arrange their status under the family unification procedure. They cannot lead normal lives; HaMoked contends that they live with the constant threat of expulsion hanging over their heads.[194]

In the report, HaMoked claims that the two branches of law which apply to Israel regarding its actions in the Occupied Territories – international humanitarian law and international human rights law – require that Israel respect the rights of residents to marry and found a family.[195] Specifically, HaMoked finds Israeli policy fails both the requirements of proportionality and the test of military necessity. Other than vague statements about the need for security the government has thus far failed to explain the grounds for the policy, consequently making it arbitrary and illegal. As an occupying power, Israel is also under obligation to enable, as much as possible, the proper functioning of civilian life. HaMoked concludes that a reassessment of family unification is in order to ensure that Israel is upholding international statutes. The organization also asserts that Israel must ignore political and demographic considerations, and weigh only its security needs against the balance of human rights in the development of new policy.[196]

IV. Judicial Opinion

---

[192] Letter of 24 April 2001 to HaMoked: Center for Defence of the Individual, from the office of the legal advisor for the West Bank.

[193] HaMoked & B'Tselem (July 2006). Report: Perpetual Limbo: Israel's Freeze on Unification of Palestinian Families in the Occupied Territories. ISSN 093-520X.

[194] *Supra* note 89.

[195] Ben-Naftali, Orna & Shani, Yuval (2004). Living in Denial: The Application of Human Rights in the Occupied Territories. *Israeli Law Review*, 37(1), pp. 62-87.

[196] *Supra* note 89.

As a result of the unending criticism for its policies, Israeli courts have undertaken a closer examination of current cases. Recent rulings indicate that several pieces of restrictive legislation are on the road to being overturned by the courts. Some recent decisions are discussed below:

HJC 5100/94: Public Committee Against Torture in Israel v. The State of Israel: In this judgment, the state had claimed that only a "moderate amount of physical pressure" is used during physical interrogations conducted by the General Security Service. The court found that GSS investigators do indeed possess the authority to interrogate those suspected of terrorist activity, but the sources of this general power do not provide for the methods of interrogation described in this particular case. In a landmark ruling, the court also noted that as a democracy, Israel must wage its war on terrorism with self-restraint in order to safeguard human rights.

HCJ 10856/02: Hass v. IDF Commander in West Bank: The Israeli Supreme Court noted that within the framework of the IDF commander's responsibility for the well-being of area residents, the commander must provide proper defense of the inhabitants' constitutional human rights, subject to the limitations posed by the conditions and factual circumstances on the ground. These protected constitutional rights include "freedom of movement, freedom of religion and worship, and property rights".

HCJ 3116/02: The Palestinian Organization for the Defense of Human Rights v. The State of Israel: The court held that the respondents were responsible, under international humanitarian law, for the proper location, identification and burial of bodies. The identification process should be completed as quickly as possible, and should ensure the dignity of the dead as well as the security of the armed forces. No differentiation will be made between the bodies of civilians and the bodies of armed terrorists.

PP (Haifa) 598/05 - Samara v. Commander of Kishon Detention Center: During this controversial case regarding the location of detainees, the court criticized the holding of a prisoner in the investigations wing of Kishon Detention Center without making a formal record of his presence. The court ruled that, in accordance with statutory law and case law, a precise record of every person being held in every detention facility must be maintained so that the detainee's family can know his whereabouts and act to protect his rights. The court also held that, as a rule, a detainee whose interrogation has ended and is being held until the end of the legal proceedings should not be kept in an interrogations wing, but handed over to the Israel Prison Service.

HCJ 2936/02 - Physicians For Human Rights et al. v. The Commander of the IDF Forces in the West Bank Judgment: The HCJ heard petitions dealing with various human rights infringements during Operation Defensive Shield, where military forces fired at Red Crescent and Red Cross medical crews, prevented evacuation for medical treatment and removal of corpses, and prevented the supply of medical equipment to besieged hospitals. The HCJ did not discuss the specific events but emphasized that the military is obliged to obey humanitarian rules regarding treatment of the wounded, the sick and corpses. It was further ruled that even if, as the military maintained, medical

personnel were misused, this does not in and of itself justify sweeping breaches of humanitarian law.

HCJ 2056/04 Beit Sourik Village Council v. Government of Israel [2004] IsrSC 58(5) 807: In this landmark decision, the Court dealt with a series of petitions from Palestinian residents of the Territories against the expropriation of their land in order to construct the security fence. In its ruling, the Israeli Supreme Court recognized that "both international law and the fundamental principles of Israeli administrative law recognize proportionality as a standard for balancing between the authority of the military commander in the [Territories] and the needs of the local population". The Court then stated the route of most parts of the fence as non-proportional, deciding that the "relationship between the injury to the local [Palestinian residents] and the security benefit from the construction of the separation fence along the route, as determined by the military commander, is not proportionate."

The Court explained that "the route undermines the delicate balance between the obligation of the military commander to preserve security and his obligation to provide for the needs of the local inhabitants." The Court based its approach "on the fact that the route which the military commander established for the security fence - which separates the local inhabitants from their agricultural lands - injures the [Palestinians] in a severe and acute way, while violating their rights under humanitarian international law." The Court ruled that these injuries are not proportionate, since they can be decreased substantially either by the alternate route presented by the experts on behalf of the petitioners or the route set out by the military commander.

V. Annex

Case Studies: Incidents of Misuse of the Defence (Emergency) Regulations of 1945

1. The Case of Rachel Corrie

The events leading to the death of Rachel Corrie point to the inherent dangers in the Israeli counter-terrorism policy of home demolitions. Corrie, a 23 year old American member of the International Solidarity Movement, traveled to the Gaza Strip during the Second Intifada to protest the Israeli occupation of the area. She was killed by a bulldozer operated by the Israel Defense Forces while attempting to prevent a home demolition in March of 2003.[197] The details of the events surrounding Corrie's death are highly disputed. ISM eyewitnesses assert that the Israeli soldier driving the bulldozer deliberately ran Corrie over twice while she was acting as a human shield to prevent the destruction of the home of local pharmacist Samir Nasrallah.[198] The Israeli Government and the IDF, however, deny this version of events and describe Corrie's death as an

[197] Myre, Greg (17 March 2003). "Israeli Army Bulldozer Kills American Protesting in Gaza". The New York Times. Retrieved 17 July 2009, available at: http://www.nytimes.com/2003/03/17/world/israeli-army-bulldozer-kills-american-protesting-in-gaza.html?scp=12&sq=rachel+corrie+crushed&st=nyt.

[198] CNN (25 March 2003). Israeli bulldozer kills American protester: Israeli bulldozer runs over 23-year-old woman. Retrieved 17 July 2009, available at: http://www.cnn.com/2003/WORLD/meast/03/16/rafah.death/.

accident. The official Israeli response has stated that Corrie was killed by debris pushed over by the bulldozer, that the driver did not see her, and that the bulldozer was clearing brush and not engaged in a demolition when Corrie blocked its path.[199]

The IDF convened an investigation into Corrie's death, but this too has been criticized for a lack of impartiality. In particular, Human Rights Watch alleged in a 2005 report that the investigation lacked an appropriate amount of preparation; that "hostile," "inappropriate," and "mostly accusatory" questions were asked of witnesses; that the investigators omitted to get witnesses to draw maps or identify locations on a map of how it occurred; and that the investigators displayed a blatant disinterest in reconciling soldiers' testimonies with those of other eyewitnesses.[200]

2. Case Study: Operation Cast Lead

Operation Cast Lead represents a very recent even in Israeli counter-terrorism history which has been termed a war crime by international media, as well as independent governing bodies. The Gaza War, codenamed Operation Cast Lead, began on December 27 2008 when Israel launched a military strike on the Gaza Strip. The stated aim of the attack was to stop Hamas rocket attacks on southern Israel, and to prevent illegal arms smuggling into Gaza. The Israeli operation began with an intense bombardment of the Gaza Strip, targeting Hamas bases, police training camps, police headquarters, and offices. Civilian infrastructure, including mosques, houses, medical facilities, and schools, were attacked and destroyed, according to Israel because many of them were being used by combatants, and as storage spaces for weapons and rockets.[201] The fighting ended on January 18, after Israel and Hamas, announced unilateral ceasefires. At the end of the conflict, between 1,166 and 1,417 Palestinians and 13 Israelis were killed,[202] more than 400,000 Gazan residents were left without running water, and over 4000 homes were destroyed , leaving tens of thousands of people homeless.[203]

There were multiple economic, industrial and medical effects of the Gaza War. For example, the United Nations Development Programme warned that there will be long-term consequences of the attacks on Gaza because the livelihoods and assets of tens of thousands of Gaza civilians have been affected.[204] There have been widespread water and power shortages, leaving hospitals and other areas of refuge unable to perform basic duties. Sanitation problems have exacerbated the number of casualties; many people who survived the initial conflict are dying from infection and other diseases, mostly from corpses decomposing into the water supply and which cannot be moved to proper burial areas due to blockades.[205]

---

[199] Wenig, Gaby (12 September 2003). "Human Rights Activists or Aids to Terrorists?". The Jewish Journal of Greater Los Angeles.

[200] Human Rights Watch (22 June 2005). Promoting Impunity: The Israeli Military's Failure to Investigate Wrongdoing. Retrieved 17 July 2007, available at: http://www.unhcr.org/refworld/country,,HRW,COUNTRYREP,ISR,4562d8cf2,42c3bd100,0.html#_ftnref2

[201] Harel, Amos (28 December 2008). "Most Hamas bases destroyed in 4 minutes." Haaretz,

[202] Lappin,Yaakov (26 March 2009). "IDF releases Cast Lead casualties". The Jerusalem Post.

[203] Beaumont, Peter (5 July, 2009). "A life in ruins". The Observer; BBC News (19 January 2009) "Scale of Gaza destruction emerges".

[204] United Nations Office for the Coordination of Humanitarian Affairs (21 January 2009). Press Release: UN Humanitarian Chief Visits Gaza in Wake of Military Operation.

[205] United Nations Office for the Coordination of Humanitarian Affairs (2 January 2009). Report: Gaza Humanitarian Situation. Retrieved on 18 July 2009, available at: http://www.webcitation.org/5dYZRlFLB.

Most notably, however, is the humanitarian impact of the war, and the devastating effects that the conflict has had upon basic freedoms and fundamental rights. The United Nations Office for the Coordination of Humanitarian Affairs (OCHA) reported that the situation in the Gaza strip is a "human dignity crisis", entailing "a massive destruction of livelihoods and a significant deterioration of infrastructure and basic services". Fear and panic are widespread; 80 percent of the population cannot support themselves and are dependent on humanitarian assistance.[206] The International Red Cross has called the situation "intolerable" and a "full blown humanitarian crisis". [207] The importation of necessary food and supplies continues to be blocked even after the respective ceasefires; indeed, the OCHA has described the Israeli entrance procedures for humanitarian organizations bringing supplies into Gaza as inconsistent and unpredictable. The procedures severely impede the UN's ability to effectively plan a humanitarian response, and obstruct the efforts to address the crisis brought by the 18 months of blockades and Israel's military operation.[208]

The UN Human Rights Council along with many non-governmental organizations, such as Amnesty International and Human Rights Watch, have accused Israel of violating international law regarding collective punishment, targeting civilians, proportionality, of prohibiting access to medical assistance, and of using civilians as human shields.[209] More specifically, criticisms of Israeli policy during the war in Gaza generally cite one of following violations:

a. Failure to provide adequate supply of food, essential supplies, medicine and medical care to the population of Gaza, as well as deliberate impediment of emergency relief and humanitarian assistance;[210]
b. The "wanton and deliberate" destruction of Palestinian homes and property, which "could not be justified on the grounds of military necessity";[211]
c. Employing restricted weapons, such as white phosphorous and flechette shells, the use of which is strictly controlled under international law;[212]
d. Failure to protect children in war zones, including allegations of shooting children, using children as human shields, bulldozing homes with women and children still inside, and shelling a building that the IDF had ordered civilians to take refuge in a day earlier;[213]

---

[206] United Nations Office for the Coordination of Humanitarian Affairs (2 January 2009), *supra* note 57.
[207] BCC News (6 January 2009). "Gaza clashes spark 'major crisis'". Retrieved on 18 July 2009, available at: http://news.bbc.co.uk/1/hi/world/middle_east/7813671.stm.
[208] United Nations Office for the Coordination of Humanitarian Affairs (2 February 2009). "Field Update On Gaza From The Humanitarian Coordinator". Retrieved on 18 July 2009, available at: http://www.webcitation.org/5eWGIhb7g.
[209] The Times (2 July 2009) "Gaza Israel and Hamas 'both guilty of war crimes', Amnesty". Retrieved 18 July 2009, available at: http://www.timesonline.co.uk/tol/news/world/middle_east/article6621805.ece.
[210] *Supra* note 60.
[211] BBC News (2 July 2009). "Amnesty details Gaza 'war crimes'". Retrieved 18 July 2009, available at: http://news.bbc.co.uk/2/hi/middle_east/8128210.stm.
[212] The Times (24 January 2009). "Israel admits using white phosphorous in attacks on Gaza". Retrieved 18 July 2009, available at: http://www.timesonline.co.uk/tol/news/world/middle_east/article5575070.ece.
[213] *Supra* note 61.

e. Refusing to honour the code of medical ethics, and preventing the evacuation of besieged and wounded families, as well as preventing Palestinian medical teams from reaching the wounded;[214]
f. Serious attacks on UN property, resulting in the deaths of official UN personnel.[215]

Israel has responded to these accusations by stating that the Gaza conflict was an act of self-defense, rather than an act of reprisal or collective punishment.[216] To investigate these claims, the UN commissioned an investigation as to whether Israel and Hamas committed war crimes during the Gaza war. Israel has stated that UN Human Rights Council, which commissioned the investigation, has a history of bias against Israel and will not participate in the inquiry. Israel has also emphasized its refusal to cooperate with the mission, citing its founding resolution, which calls on the mission "to investigate all violations of international human rights law and international humanitarian law by the occupying power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression".[217] The UN team was subsequently deprived of access to military sources and victims of Hamas rockets in Israel, and denied entrance to the Gaza Strip via Israeli Occupied Territories. To complicate matters, Hamas security often accompanied the investigative team during their visit to Gaza, suggesting that the ability of witnesses to freely describe the events is questionable. At the end of a four-day fact-finding trip to Gaza, the head of the team expressed his shock by the scale of the destruction in Gaza areas; the UN inquiry team stated that such missions are hard to conduct, especially due to the lack of access to military records.[218] At the time of writing, the UN report is still forthcoming.

3. The Case of Mohammed Bsharat

Mr. Mohammed Bsharat was the executive director of Nafha, one of several NGOs that represent Palestinian detainees in Israeli courts and advocate on behalf of Palestinians in Israeli prisons and detention centers. On 2 August 2007, Israeli soldiers arrested Mr. Mohammad Bsharat without an arrest warrant, and without informing him as the reasons for his arrest. He was then detained and interrogated at the Huwara detention centre in Nablus; during his time there, no charges were brought against him. According to his lawyer, it is safe to assume he would have been questioned about his human rights activities. On 12 August and again on 19 August 2007, Mr. Bsharat's detention was extended. During the last hearing, the military court ordered that he be detained administratively, without any explanation regarding the duration of the detention, nor any official reason. Rights-based organizations, such as the Observatory for the Protection of Human Rights, have expressed a deep concern at the arbitrary detention of Bsharat, as it

[214] Lewis, Ori (3 March 2009). "Israeli troops broke medical ethics: rights group". Reuters. http://www.reuters.com/article/newsMaps/idUSTRE52M0M020090323.
[215] Israel Defence Forces (22 April 2009). Press Release: The IDF Releases Information on Military Investigations. Retrieved 18 July 2009, from: http://dover.idf.il/IDF/English/News/today/09/ 4/2201.htm
[216] Jurist (11 January 2009). Legal Aspects of 'Operation Cast Lead' in Gaza. Retrieved 17 July 2009, available at: http://jurist.law.pitt.edu/forumy/2009/01/legal-aspects-of-operation-cast-lead-in.php.
[217] Washington Post, (9 June 2009). "UN's Gaza war crimes investigation faces obstacles".
[218] *Supra* note 70.

seemed to be a way of sanctioning his human rights activities. Moreover, the Observatory also voiced concerns for his physical and psychological integrity, as Mr. Bsharat suffered from chronic hyper-sensitivity and severe renal spasms as a result of kidney stones and was in need of constant medical attention. He was eventually released in February of 2008, without every being charged.[219]

On 8 July 2008, Israeli authorities closed down the Nafha Society for the Defense of Prisoners and Human Rights, on the basis of a military order issued by the Israeli Army Commander in the West Bank. The order alleged that the grounds for the closure of Nafha, together with six other organizations, were due to the fact that they were being used to "finance terrorist organisations". Nafha strongly denied this allegation.[220]

4. The Case of Iain Hook

In November of 2002, Iain Hook was working as a project manager with the United Nations Relief and Works Agency for Palestine Refugees in the Near East, and rebuilding the Jenin refugee camp in the West Bank. He was killed by an IDF sniper, in the midst of a battle with Palestinian Islamic Jihad gunmen. Accusations surrounding his death formed the basis for a United Nations Security Council resolution condemning Israel, which was vetoed by the United States.[221] Consistent with other incidents of unarmed aid workers killed by the IDF, Hook's death remains shrouded in controversy.

Israel maintains that Islamic Jihad militants were firing at IDF troops from inside the UNRWA compound, and this formed the basis for their attack on the enclosure.[222] The Israeli military later claimed that the sniper who fired the shot at Hook mistook the man's cell phone for a handgun or grenade.[223] The United Nations disputes that gunmen were firing at Israeli troops, as well as the story that the shooting was a mistake; Hook was shot in the back by a sniper with a scoped rifle, from a distance of 20 meters.[224] Co-workers evacuated Hook through the hole in the wall made by militants, but he died of a gunshot wound to the abdomen before reaching a hospital.

The United Nations claimed they had immediately arranged an ambulance for evacuation, and accused Israel soldiers on the field for delaying the ambulance and changing its route.[225] The UN contended that they had:

> …immediately arranged for an ambulance to evacuate the wounded staff member but the IDF soldiers on the ground refused immediate access for the ambulance and there appears to have been a delay before the staff member could be evacuated by an alternative route. Sadly, he died before arrival at the hospital. It is not known at this time whether the delay resulted in the death.[226]

---

[219] *Supra* note 72.
[220] *Supra* note 72.
[221] McGrael, Chris (7 May 2003). "Why was an unarmed Briton shot in the back?". The Guardian. Retrieved 18 July 2009, available at: http://www.guardian.co.uk/world/2003/may/07/israel.foreignpolicy1.
[222] Fisher, Ian (24 November 2002). "Israel admits one of its soldiers killed U.N. officer in Jenin". New York Times. Retrieved 18 July 2009, available at: http://query.nytimes.com/gst/fullpage.html?res=9E04E1D61039F937A15752C1A9649C8B63&scp=2&sq=%22Iain%20Hook%22&st=cse.
[223] The Mirror (13 December 2005). "Killing 'no accident'". Retrieved 18 July 2009, available at: http://www.mirror.co.uk/news/top-stories/2005/12/13/killing-no-accident-115875-16478051/.
[224] *Supra* note 78.
[225] United Nations (22 November 2002). Press Statement: Death of a UN Worker.
[226] *Supra* note 82.

The claim was later echoed by UN Secretary General Kofi Annan in New York. Israeli military officials have denied the charge.[227]

More than sixty United Nations workers wrote a letter criticizing Israeli troops for "senseless" and "wanton" behavior, citing incidents of humiliation and abuse of power. Israel responded by releasing to newspapers what the New York Times called a "damning intelligence report", documenting UNRWA operations being used as cover for Palestinian terrorists, including smuggling arms in UN ambulances and hosting meetings of Tanzim in UN buildings.[228] The United Nations internal report on the matter was itself the subject of controversy, as the initial version stated that peace activists in the compound were bringing young Palestinian men into the compound through a hole created by Palestinian militants. The report was rewritten following protests by UNWRA staff.[229]

5. The Case of James Miller

James Miller was a Welsh cameraman, killed by a single shot fired by a soldier from the Israel Defense Forces on 2 May 2003. He was filming a documentary in Rafah entitled *Death in Gaza*.[230] Due to the nature of his work, the moments leading up to his death were recorded. Even in spite of the record of events, the causes leading to his death are still widely debated by U.K. and Israeli officials.

The footage depicts Miller and his colleagues leaving the home of a Palestinian family in the Rafah refugee camp after dark, carrying a white flag. They had walked about 20 meters from the veranda when the first shot rang out. For 13 seconds, there was silence broken only by a cry: "We are British journalists". Then came the second shot, which hit Miller in the front of his neck.[231] The bullet was Israeli issue and fired, according to a forensic expert, from less than 200 meters away. Immediately after the shooting, the IDF said that Miller had been shot in the back during crossfire; officials later retracted that assertion. According to witnesses there was no crossfire at the time, and none can be heard on the audio recording.[232]

Due to significant outcry from the U.K. government, an investigation was launched almost immediately into Miller's death. An autopsy proved that Miller died from a "classic sniper's shot", and that the bullet was indeed consistent with the standard issue ammunition used by the IDF.[233] Independent investigator Chris Cobb-Smith, who had previously served in the British Army and as an Iraq weapons inspector, found there was no way the soldier fired by accident. He told the court, "This was calculated and cold-blooded murder, without a shadow of a doubt". He added, "These shots were not fired by

---

[227] *Supra* note 79.
[228] Wines, Michael (January 4, 2003). "Killing of U.N. Aide by Israel Bares Rift With Relief Agency". New York Times. Retrieved on 17 July 2009, available ar: http://query.nytimes.com/gst/fullpage.html?res=9C05EFDB1F3FF937A35752C0A9659C8B63&sec=&spon=&pagewanted=all.
[229] *Supra* note 78.
[230] Michael Smith (5 August 2007). "Britain tells Israel to try soldier for killing film-maker". The Guardian. Retrieved on 18 July 2009, available at: http://www.timesonline.co.uk/tol/news/uk/article2199243.ece.
[231] John Sweeney (30 October 2003). "Silenced Witnesses". The Independent. Retrieved 18 July 2009, available at: http://news.independent.co.uk/world/middle_east/article93639.ece.
[232] *Supra* note 88.
[233] Richard Alleyne (4 April 2006). "Israeli's destroyed evidence, claims filmmaker's widow". The Daily Telegraph. Retrieved 17 July 2009, available at: http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/04/04/nmiller04.xml&sSheet=/news/2006/04/04/ixhome.html.

a soldier who was frightened, not fired by a soldier facing incoming fire - these were slow, deliberate, calculated and aimed shots ... He should not have been firing anywhere near a lit building, anywhere near where he knew there were women, children or foreign journalists". [234] Daniel Edge, Miller's assistant producer, added further testimony that Israeli soldiers put pressure on him to say that the shot came from Palestinians. He told the inquest: "They purposefully tried to get me to say the sentence 'James could have been shot by a Palestinian', which I refused to say".[235]

On 6 April 2006, the jury returned a verdict of unlawful killing, finding that James Miller had been murdered. His family requested that the British government ensure his killer is prosecuted, accusing the Israeli authorities of "an abject failure to uphold the fundamental and unequivocal standards of international humanitarian and human rights law".[236] The Israeli military issued a statement shortly thereafter, stating the soldier suspected of firing the shot would not be indicted as they could not establish that his shot was responsible, though he would be disciplined for violating the rules of engagement and for changing his account of the incident.[237]

6. The Case of Tha'ir, Mustafa, and Iyad al-Samudi

Tha'ir Khalil Salih al-Samudi, aged 27, was beaten so badly while under the control of Israeli forces that he lost an eye. His case was followed extensively in the media and by the Palestinian human rights group Al-Haq. Even though he was in the custody of Israeli officials and they were aware of the alleged beatings, no attempt was made to investigate them IDF's conduct.[238]

Tha'ir al-Samudi was a member of the Palestinian Authority civil police in Jenin. Tha'ir's cousin, Iyad al-Samudi, also worked for the Palestinian Authority, on the drug police squad in Ramallah. Mustafa al-Samudi was an uncle to both men. The Oslo Accords permit Palestinian Authority police and security officials to be issued firearms. Following the outbreak of Al-Aqsa Intifada in September 2000, this became a dubious privilege: carrying weapons reportedly allowed IDF forces to shoot the Palestinian bearer, including security forces, on sight. This policy was only modified in late April or early May 2005.[239]

In the early morning of June 23, 2002, Israeli forces raided their home village al-Yamun. At approximately 5.30 a.m., Iyad, Tha'ir, and Mustafa left the village to walk to a neighboring village. After some fifteen minutes, the three men were in a hilly open area, when they heard a soldier's voice ordering them, in Lebanese-accented Arabic, to "Stop! Raise your hands! Come here!"[240] The men obeyed. They walked a few steps forward, side by side, and were surprised to hear the sound of gunfire coming in their direction, despite their compliance with the requests of the IDF soldiers. The three men

---

[234] BBC (4 April 2006). "Film-makers death 'was murder'." Retrieved 18 July 2009, available at: http://news.bbc.co.uk/1/hi/england/devon/4876176.stm.
[235] *Supra* note 90.
[236] *Supra* note 87.
[237] Committee to Protect Journalists (9 March 2005). "Israel: No criminal charges against IDF soldier in journalist's shooting death". Retrieved 18 July 2009, from: http://www.cpj.org/news/2005/Israel09mar05na.html.
[238] *Supra* note 50.
[239] *Supra* note 50.
[240] Human Rights Watch interview, identity withheld, al-Yamun, July 5, 2003.

tried to run, crouching, back to the road. Mustafa, who had been hit in the shoulder, was hit a second time in the leg. After several hundred meters of running, Tha'ir reached Iyad, who had also fallen after being shot in the shoulder. Tha'ir continued on until ran into a second group of IDF soldiers, who ordered him on his knees.[241]

From this point, the sequence of Tha'ir's recollections becomes confused. He can remember being picked up by the arms and legs, heaved forward, and falling heavily onto the rocky ground. This happened six or seven times, until he began to lose consciousness. While he was being beaten, Tha'ir heard the sound of a single shot, corroborated in a separate interview with Mustafa al-Samudi. Later, while waiting to be transferred to an ambulance, Tha'ir saw Iyad's body, shot in the head. Both men believe Iyad was extrajudicially executed.[242]

The soldiers did not keep Tha'ir in custody. Instead, they transferred him to the main road some time before 9.30 a.m., where he was picked up by a Palestinian ambulance and taken first to the Jenin government hospital, then to al-Shifa private hospital in Jenin. According to his medical report, Tha'ir arrived with (among other injuries) severe nasal bleeding, multiple facial fractures, and a ruptured right eye. His eye was removed during six hours of surgery. When Human Rights Watch interviewed Tha'ir al-Samudi in July 2003, he also had partially lost his hearing, had restricted movement of his neck and upper body, was injured in the right leg, and suffered from frequent involuntary trembling.[243]

During Tha'ir's recuperation, the events in Yamun were well publicized. Tha'ir al-Samudi was interviewed by journalists, television crews, and the Palestinian human rights group al-Haq.[244] Tha'ir al-Samudi was arrested two months later, on August 19, 2002. He was taken for questioning to an Israeli base at Salem, near Jenin. Tha'ir's captors asked him several times about his injuries and appeared to have heard of his case. But they did not, to Tha'ir's knowledge, ever suggest the case be investigated or refer the information to investigators. "I have never heard that the Israelis were going to investigate. When the Israeli army took me to prison, they wanted me to say I had fallen from a wall."[245] Both in Salem and later in detention at Kishon, Tha'ir's captors reiterated several times that he had been injured by falling from a roof. Tha'ir's strong impression was that both interrogators wanted to intimidate him into accepting their version of events: "They already knew what had happened to me, but they wanted me to confess what they wanted me to say."[246]

Tha'ir told Human Rights Watch that he spent twenty-three days in an isolation unit inside Kishon detention facility, before a fellow prisoner told the International Committee of the Red Cross (ICRC) of his medical situation. After the ICRC intervened, Tha'ir was transferred to Rambam hospital in Haifa before being returned to Kishon detention center and, finally, Megiddo prison. During his interview, Tha'ir told Human Rights Watch he had been expecting to face trial before a military court, but instead was released as soon as his hearing commenced. He then traveled to Austria for two months of medical

---

[241] *Supra* note 50.
[242] *Supra* note 50.
[243] *Supra* note 50.
[244] Al-Haq (2003). Case Study: Beating and Willful Killing in Yamoun Village. Retrieved 20 July 2009, available at http://www.alhaq.org/publications/Yamoun%20Village.htm.
[245] Human Rights Watch interview, Tha'ir Khalil Salah al-Samudi, al-Yamun, July 5, 2003.
[246] *Supra* note 108.

treatment, arranged by the Palestinian Authority. He has since returned to the Occupied Territories, although he faces ongoing difficulties due to his need for continuing medical treatment and the severe restrictions on freedom of movement in the West Bank.[247]

7. The Case of Nuha al-Muqadama

Nuha al-Muqadama lived with her family in Block Three of Bureij refugee camp in Gaza. The al-Muqadama home was one of four semi-detached housing unites, each one next to the other. Almost nine months pregnant, she was killed when the IDF destroyed the house of a neighbor as a form of collective punishment. Her death occurred after IDF sappers demolished the adjoining house of `Adil `Abdullah `Abd al-Salam, whose son had carried out a suicide attack against Israeli soldiers on 9 February 2003 in the name of Islamic Jihad.

Her death provoked a massive amount of attention from the international media, particularly as it occurred during a period of heightened violence and civilian casualties in Gaza. In fact, both the U.S. and the U.K. governments cited the incident in calling on Israel to minimize civilian casualties, end indiscriminate actions, and abide by international law.[248] One week later, the Israeli newspaper Ha'aretz reported that the IDF admitted al-Muqadama had been killed as a result of a house demolition; the soldiers who blew up the Taha residence claimed that the quantity of explosives used should not have caused such widespread damage to the neighboring houses. The IDF also stated their belief that the force of the explosion was compounded as a result of bombs stored in the house by Hamas operatives.[249] At the time of writing, this report could find no up-to-date information as to whether an IDF inquiry has begun into her death.

---

[247] *Supra* note 50.

[248] Straw, Jack (4 March 2003). Ministerial Statement: "Israel Must Act Within International Law". Retrieved 20 July 2009, available at: http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391638&a=KArticle&aid=1046455333900

[249] Harel, Amos (11 March 2003). "Inquiry: Palestinian bomb, not tank fire, caused Jabalya deaths," Ha'aretz.

Counter-Terrorism Law in the United Kingdom

> *"In view of these inherent qualms about measures of 'control', societies such as the United Kingdom and the United States would be well advised to adopt a criminal justice approach as the core response to terrorism rather than resorting to exceptional or extraordinary measures. A criminal justice response carries the important moral platform of legitimacy and fairness, whilst also offering a practical response to danger."*[250]

The Counter-Terrorism Act of 2006, which was enacted in the aftermath of the July 7 2005 London bombings, has proven to be a highly controversial piece of legislation. The U.K. government has justified the Act by citing it as a response to an unparalleled security threat, though many have criticized it as an undue imposition of civil liberties. The Act has also drawn considerable media attention, as one of its key votes resulted in the first defeat of the government of Tony Blair on the floor of the House of Commons. Indeed, this piece of legislation has essentially divided the government along political fault lines, with critics from both parties publicly voicing their dissent.

The Act itself created several new categories of offences, intending to aid police in their investigations and arrests of terrorist subjects. These offences are related to the encouragement, preparation and training for terrorist acts and are extraterritorial offences; this means that although persons may engage in these activities abroad, they commit an offence which is triable before United Kingdom courts. Greater power is also given to the Home Secretary to proscribe what constitutes a terrorist group, and allows this proscription to continue even when the group has changed its name.[251]

The Act's recent amendments in 2008 contain several notable provisions. Under current U.K. law, it is now a requirement for any person convicted of a terrorism-related offence to register their names in a database much like the Violent and Sex Offender Registry. This serves as a monitoring mechanism once offenders have been released on bail, and serves to track their movements across the country.[252] A separate provision has now made it an offence to elicit, attempt to elicit, or publish information about which may be useful to potential terrorists about the armed forces or police.[253] This particular provision sparked a firestorm of controversy from journalists and photographers, who have accused the government of attempting to curb their rights to freedom of speech.[254]

I. Mechanisms for Comparison

---

[250] Walker, Clive (2007). Keeping control of terrorists without losing control of constitutionalism. *Stanford Law Review*, 59, 1395- 1463.

[251] "Counter-Terrorism Bill 2007-08". House of Commons. http://services.parliament.uk/bills/2007-08/counterterrorism.html.

[252] Casciani, Dominic (14 October 2008). "Terror bill – What's left. BBC News. http://news.bbc.co.uk/2/hi/uk_news/politics/7207659.stm.

[253] Counter-Terrorism Act 2008, from http://www.opsi.gov.uk/acts/acts2008/ukpga_20080028_en_9#pt7-pb3-l1g76. Retrieved 15 July 2009.

[254] Counter-Terrorism Act 2008. (19 May 2009). In Wikipedia, The Free Encyclopedia. Retrieved 14 July 2009, from http://en.wikipedia.org/w/index.php?title=Counter-Terrorism_Act_2008&oldid=290957754.

1. Definition of Terrorism: The definition of terrorism as stated in the Terrorism Act of 2000 has become the standard for all subsequent anti-terror legislation in the UK. The term "terrorism" refers to the use or threat of action where the action is designed to influence the government or advance a political, ideological or religious cause. The scope of this definition is broad and extremely vague, and allows for a large degree of subjective interpretation.

2. Search and Seizure: More flexibility is given to police in terms of search warrants, as warrants now allow for the search of other properties under the control of the same suspect. Police are also allowed to search where the possession of terrorist materials is suspected. Warrants to intercept communications are now given more wide-ranging effect. Any cash which has been deemed to be a resource of, or intended for, a proscribed terrorist group can be seized under the Act. The court can also impose a freezing order on any known associates, friends or family members of the suspect, making it an offence to provide them with any financial assistance. If convicted under the Act, the court can order the forfeiture of any property owned or held by the accused.

3. Arrest: No arrest warrant is needed if a person is suspected to have violated any provisions of the Act. The Act explicitly states that this suspicion need only be "reasonable", but fails to define the parameters of what constitutes a reasonable suspicion in terms of this particular piece of legislation.

4. Pre-Charge Detention: Prior to the Act, the maximum time period for detention without charge was 14 days; this time period was effectively doubled to 28 days. The police need not inform the suspect of the charges against him until this time period has lapsed.

5. Sunset Clause: The Act provides a mechanism for review, and explicitly states that the duration of sections dealing with control orders and the newly created offences should expire 12 months after its enactment. However, these sections can be further extended for a period of one year at the discretion of the Secretary of State, pending further review.

6. Bail: Pursuant to the conditions defined in the Terrorism Act of 2000, any person charged under the current Act can be granted bail at the judge's discretion. However, the judge is able to dictate strict conditions upon the suspect's release: the imposition of a control order which is tantamount to house arrest. The conditions in the control order often restrict access to mobile phones and internet, and prevent the suspect from leaving their own property even for educational, medical or religious purposes. Furthermore, any visitors to the home must first clear strict security requirements with police and intelligence agencies. For most individuals charged with a terrorism-related offence, the slightest breach in their bail conditions or control order will result in re-arrest and internment in a high-security facility.

II. The Counter-Terrorism Act of 2006 and the Incompatibility with Human Rights

1. Control Orders

The government's ability to issue control orders is a key features of current UK anti-terror law; it has also proven to be the source of much international scrutiny. Control orders can impose a plethora of restrictions on terrorist suspects, even those who have not been formally charged with an offence. The orders can contain restrictions which range from restrictions on work and business arrangements, a requirement to submit to property searches and seizures at any time, a requirement to surrender one's passport, and severe restrictions on an individual's freedom of movement.[255] A suspect is also required to report to officials at a specified time and place, and must submit to electronic tagging so that their movements can be monitored at all times. Control orders also provide for limitations on an accused's right to appeal and the complete absence of double jeopardy restrictions. Despite the fact that control orders infringe heavily upon legislation laid down in Article 5 of the European Convention on Human Rights, the U.K. government has granted hundreds to date.

The issuing of control orders is in direct violation of the European Convention on Human Rights, which states that the government cannot deprive any person of their liberty without due process of law.[256] This process must include informing the person of the accusation against them, giving them access to legal assistance to prepare their defense, and giving them the right to have their case heard and decided in public before a competent court. However, the government has continually defended the necessity of control orders, claiming that allegations of terrorist involvement are of such a nature and from such sources that they cannot be prosecuted "because that would mean revealing sensitive and dangerous intelligence".[257]

2. Pre-Charge Detention

Another feature of U.K. law which is often criticized is the section which extends the powers of law enforcement officials, who now have the right to detain terror suspects for up to 28 days without a formal charge. In particular, Amnesty International has expressed its concern that "prolonged period of pre-charge detention creates a climate for abusive practices that can result in detainees making involuntary statements, including confessions".[258] International treaties to which the U.K. is a party require that a person who is detained in connection with a criminal offence are either charged promptly and are tried in proceedings which fully comply with international fair trial standards, or released without prejudice.[259] The current counter-terrorism legislation subverts international law by denying these rights to any person accused under the Act.

---

[255] Control order. (22 June 2009). In Wikipedia, The Free Encyclopedia. Retrieved 15 July 2009, from http://en.wikipedia.org/w/index.php?title=Control_order&oldid=298002927

[256] European Convention on Human Rights. (2009). In Encyclopædia Britannica. Retrieved 15 July 2009, from Encyclopædia Britannica Online: http://www.britannica.com/EBchecked/topic/196087/European-Convention-on-Human-Rights.

[257] John Reid Written Ministerial Statement, 12 June 2006 col. 48WS Control Order Powers (11 March 2006-19 June 2006).

[258] Amnesty International (2004). (United Kingdom -- Summary of concerns raised with the Human Rights Committee). AI Index: EUR 45/024/2001.

[259] International Covenant on Civil and Political Rights. (13 July 2009). In Wikipedia, The Free Encyclopedia. Retrieved 13 July 2009, from

III. Concerns from Human Rights Organizations

1. Amnesty International

(i) Extraordinary Rendition

Since the end of 2005, the government has had to face an increasing number of accusations that it is allowing the U.S. to use U.K. territory for the purpose of extraordinary renditions. The rendition process, which is a feature of U.S. counter-terror policy, involves the secret transfer of individuals from one country to another for the purpose of coercive interrogation. Amnesty International has voiced grave concerns that extraordinary rendition flagrantly violates the rule of law and judicial process, and is highly illegal in both domestic and international law. It is a global system of arbitrary and secret detention, designed to elicit information from people free from any legal restrictions. It also subjects terrorist suspects to torture, abuse, and prolonged periods of detention incommunicado.[260]

Amnesty International has reported that a Gulfstream V turbojet made 78 stopovers at U.K. airports while en route to or from such locations such as Tashkent in Uzbekistan, Baku in Azerbaijan, Karachi in Pakistan, Doha in Qatar, and Riyadh in Saudi Arabia. At least three of the above-mentioned 78 flights have been directly connected to known cases of rendition[261]:

a. On 23 October 2001, witnesses saw Jamil Qasim Saeed Mohammed being bundled on board the Gulfstream V turbojet, registration N379P, by a group of masked men in a remote corner of Karachi International airport. The plane flew Jamil Qasim Saeed Mohammed to Jordan. The following day, the same Gulfstream turbojet flew to Glasgow Prestwick in the UK to refuel, then flew back to Dulles International near Washington DC in the USA. Amnesty International has repeatedly requested information from the US authorities about the current whereabouts and legal status of Jamil Qasim Saeed Mohammed, but has received no reply.
b. On 18-19 December 2001, according to an inquiry conducted by the Swedish Parliamentary Ombudsmen, the above-mentioned Gulfstream turbojet took Ahmed Agiza and Mohammed al-Zari from Sweden to Cairo in Egypt. Amnesty International's records show that the plane had made several trips between Cairo and Prestwick earlier in the month, and stopped to refuel at Prestwick after leaving the two detainees in Cairo, where they were reportedly tortured.
c. On 12 January 2002, according to Indonesian security officials, the above-mentioned Gulfstream V turbojet, took Muhammad Saad Iqbal Madni from Jakarta to Cairo. Amnesty International records confirm previous media reports that when the plane left Cairo, it flew to Prestwick to refuel. Muhammad Saad

---

http://en.wikipedia.org/w/index.php?title=International_Covenant_on_Civil_and_Political_Rights&oldid=301811976.

[260] Amnesty International (February 2006). Report: United Kingdom. "Human rights: a broken promise". AI Index: EUR 45/004/2006.

[261] *Supra* note 5.

> Iqbal Madni has since been returned to US custody, and is currently being held at Guantánamo Bay. He does not have a lawyer, and other detainees have said in the last month that he is in poor condition and "at risk of losing his mind".

Given the mounting evidence that U.K. territory has been used in the process of unlawful transportation of detainees to countries where they may face "disappearance", torture or other ill-treatment, Amnesty International has urged the U.K. government to launch an immediate, thorough and independent investigation into this matter. At the time of writing, this report found that no such investigation is forthcoming.

(ii) UK Armed Forces in Iraq

Amnesty International has also published several reports which call into question the conduct of U.K. military personnel during operations in Iraq. There have been many well-substantiated allegations of human rights abuses on the part of U.K. soldiers; in spite of this fact, the government has repeatedly asserted, even in open court proceedings, that the European Convention on Human Rights and the U.K. Human Rights Act of 1998 do not apply to the conduct of U.K. personnel in Iraq.[262]

The organization is concerned that the U.K. authorities have, to date, failed to establish prompt and effective investigations into alleged human rights violations, and to ensure adequate reparations to victims and their families. The military's response to suspected unlawful killing of civilians has undermined, rather than upheld, the rule of law. The U.K. authorities have failed to conduct investigations into all credible allegations of serious human rights violations, and the investigations that have been carried out have failed to ensure that justice has been done in the eyes of victims' families, the Iraqi and U.K. public. The investigations have been shrouded in secrecy; some victims have not even been aware that they have been occurred. As a result, Amnesty International has called for the establishment of a civilian-led mechanism to conduct independent, impartial and thorough investigations into serious allegations of human rights violations at the hands of U.K. armed forces personnel abroad. It has also recommended that the government provide reparations, including compensation and guarantees of non-repetition, to the victims of these violations.[263]

2. Human Rights Watch

(i) Definition of Terrorism

Human Rights Watch has publicly criticized the current definition of terrorism held in U.K. legislation, stating that it forms the basis for creating a large number of criminal offences, particularly those termed "encouraging terrorism". The organization contends that the current definition extends law enforcement powers to an unacceptable level, granting police the ability to stop and search without suspicion and arrest without warrant. Human Rights Watch advocates for a narrow, precise definition of terrorism in order to help the public understand what conduct is prohibited and to limit the potential

---

[262] Gillan, Audrey. "Soldiers in Iraq abuse case sent to prison", The Guardian, 26 February 2005. Retrieved 15 July 2009.

[263] *Supra* note 5.

for arbitrary and discriminatory enforcement, as recommended by the Joint Committee for Human Rights.[264]

(ii) Secret Inquests

Provisions in the current legislation also give the Home Secretary the ability to conduct secret coroner's inquests, closed to public scrutiny. Any inquests which might concern "in the interests of national security, in the interests of the relationship between the U.K. and another country, or otherwise in the public interest" could be conducted behind closed doors.[265] Under the European Convention on Human Rights the U.K. has an obligation to investigate, thoroughly and independently, any deaths resulting from the use of force.[266] The next-of-kin also have a right to participate in this process, a right which must be safeguarded to ensure they always have access to the investigation. Human Rights Watch recommends that the provision legalizing secret coroner's inquests be removed from the legislation, as it is a blatant infringement on human rights.

3. Article 19

(i) The Use of Anti-Terror Laws to Stifle Legitimate Protest

The human rights organization Article 19 has investigated numerous reports throughout the U.K. that police have been using their powers to stop and search in order to put an end to lawful protest. Particularly following the London bombings, there has been an ever-increasing amount of police involvement in trivial public order disturbances. Article 19 has recommended that the legislation and statutory powers be narrowed, so as to provide clear guidance for law enforcement by defining what constitutes a legitimate threat to security.[267]

(ii) The Encouragement, Glorification, and Justification of Terrorism

Of particular concern to Article 19 is the section of legislation which criminalizes the encouragement, glorification and justification of acts of terror. Specifically, the organization states that the legal definition of these new crimes is broad and over-inclusive. Indeed, the term "indirect encouragement or other inducement", as written verbatim from the Act, is so vague as to be almost completely without meaning.[268] The creation of these new offences is likely to criminalize perfectly lawful statements, including, in the current political climate, statements intended to initiate a debate regarding the use of suicide bombings. Article 19 has also expressed a concern that the Act will criminalize offensive, insulting or abusive statements by Muslim clerics who are critical of the liberal western way of life.[269] This law will have a direct effect on freedom of speech, which is enshrined in international human rights law.

---

[264] Human Rights Watch (22 October 2007). Report: Counter the Threat, or Counterproductive? Available at http://www.hrw.org/en/reports/2007/10/22/uk-counter-threat-or-counterproductive.
[265] *Supra* note 15.
[266] *Supra* note 7.
[267] ARTICLE 19 (2006). Submission to ICJ Panel of Eminent Jurists on Terrorism, Counter-Terrorism and Human Rights. London, 2006 –Index Number: LAW/2006/0424.
[268] Home Office List of Unacceptable Behaviours, as published in Tackling Terrorism – Behaviours Unacceptable in the UK, Press Release 124/2005, 24 August 2005.
[269] *Supra* note 5.

IV. Judicial Opinion

There has been a plethora of recent case law which illustrates the conflict between human rights and U.K. counter-terror legislation. The courts have been faced with a variety of cases in which they must determine whether rights and freedoms can be subjugated to the greater need for security. Some recent cases are discussed below:

Re MB (Sullivan J) [2006] EWHC 1000 (Admin): This case concerned the Secretary of State's decision to make a non-derogating control order against MB, who he believed intended to travel to Iraq to fight against coalition forces. In his judgment, Mr. Justice Sullivan issued a statement alleging that the use of control orders against terrorist suspects is incompatible with the right to fair proceedings under article 6 of the European Convention on Human Rights. Although the court supported Mr. Justice Sullivan's ruling, it is still subject to appeal by the Home Office.

R (Al-Skeini) v. Secretary of State for the Defence [2005] EWCA Civ 1609: One of six cases brought forward by families of Iraqi citizens who were alleged to have died in custody during the U.K. occupation of South-Eastern Iraq, the Court of Appeal ruled that the European Convention on Human rights as well as the U.K. Human Rights Act of 1998 apply to all areas under de facto control of the U.K. authorities. The Court also found that the system for investigating deaths at the hand of U.K. military personnel was seriously deficient, as the investigation still falls under the purview of the commanding officer.

A and others v Secretary of State for the Home Department (House of Lords) [2004] UKHL 56: This case deals with the issue of detention of foreign nationals who had been certified by the Secretary of State as suspected international terrorists, and who could not be deported without subjecting them to possible torture or death in their home countries. They were detained without charge or trial in accordance with a control order. The court found this practice to be disproportionate, as it permitted the detention of suspected international terrorists in a way that discriminated on the ground of nationality or immigration status. The provisions dealing with indefinite detention of foreign nationals were eventually repealed by the Prevention of Terrorism Act 2005, which put in place a new regime of control orders.

R v Ibrahim and others [2008] EWCA Crim 880; [2008] WLR (D) 127: The Court of Appeal upheld a decision to admit evidence against the accused which was collected prior to a consultation with his solicitor. The conviction was held, as the manner in which the evidence was collected was not found to violate the accused's right to a fair trial. This ruling also upholds Schedule 8 of the Terrorism Act of 2000, which explicitly states that evidence collected against the accused without the presence of their solicitor is admissible to secure public safety.

R v K [2008] EWCA Crim 185; [2008] WLR (D) 47: The Court of Appeal overturned the accused's previous conviction of three counts of possessing a document or record of

information of a kind likely to be useful to a person committing or preparing an act of terrorism, contrary to section 58 of the Terrorism Act 2000. The court stated that unless these documents were providing practical assistance to a person committing or preparing an act of terror. A document which simply encourages acts of terrorism does not fall under the purview of the Act. This ruling is especially important given the recent case of Samina Malik, the first woman charged under U.K. terrorism legislation. During a search of her home, police found a library of books on techniques of terrorism, firearms and heavy weapons, poisons, and hand-to-hand combat. Many of these books and manuals are written by and for extremist Islamic groups. A large number of poems and personal writings were also found; in several poems, Malik expressed her admiration for the Mujahideen, her desire to be a martyr, her approval of beheadings, and her contempt for non-Muslims.[270] While she was originally convicted of possessing records likely to be used for terrorism her conviction was overturned upon appeal, based largely upon the case law precedent set forward R. v. K.

Secretary of State for the Home Department v AF (No 3) Same v AN, Same v AE [2009] UKHL 28; [2009] WLR (D) 180: The Court of Appeal ruled in favour of the defendants, who appealed their convictions based on the fact that they were not provided enough information on their respective cases to give effective instructions on the special advocate ordered to represent them. The defendants were under control orders and as such, the police and courts did not divulge the details of the cases against them in the "interests of national security. The Court of Appeal held that the requirements of a fair trial were not met, despite the presence of control orders restricting the access to information, and the case has been referred to the High Court for further consideration.

Lord Alton of Liverpool and others v Secretary of State for the Home Department [2008] EWCA Civ 443; [2008] WLR (D) 141: This case involves the state's ability to proscribe an organization as terrorist in nature under the Section 4 of the Terrorism Act of 2000. The court held that an organization, who has no capacity to carry out terrorist activities and is taking no steps to acquire such capacity to promote or encourage terrorist activities, could not be said to be "concerned in terrorism" simply because its leaders had the contingent intention to resort to terrorism in the future. The People's Mojahadeen Organisation of Iran (PMOI), previously known as Mujaheddin-e-Khalq, had stated its purpose to be the replacement of the Iranian theocracy with a democratically elected government. The PMOI had engaged in military activity against the Iranian government prior to 2001, as the only means available to them to oppose tyranny and oppression. Since 2001, however, it had dissolved all its operational units inside Iran and successive secretary generals had denounced terrorism. The court held, therefore, that the Secretary of State's concern that "terrorist activities [of the group] may had been suspended for pragmatic reasons and might be resumed in the future" was not sufficient to keep the PMOI on the list of proscribed terrorist organizations.

From the cases mentioned above, it is clear that the courts are trying to apply the legislation in a fair and equal manner. While certain rulings indicate the court's

[270] Crown Prosecution Service (17 June 2008), "CPS Response to Samina Malik appeal". http://www.cps.gov.uk/news/pressreleases/143_08.html. Retrieved 13 July 2009.

reluctance to convict, other rulings have set an alarming precedent for any individual who may find they are facing a charge under the Act. The wide range of rulings in current case law is an accurate reflection of the sentiments of U.K. society, who find themselves deeply divided on these issues.

V. Annex

Case Studies: Incidents of Misuse of the Counter-Terrorism Act 2008

1. The Case of Walter Wolfgang

In 2005, Walter Wolfgang attended the 2005 Labour Party Conference as a visitor. During a speech made by Foreign Secretary Jack Straw, Wolfgang was overheard to make a loud, anti-war statement. In full view of the cameras, Conference security officers, who were on alert for anyone attempting to disrupt the speech, physically picked up and forcibly removed the 82-year old Wolfgang and confiscated his security pass. Labour Party Chairman Steve Forrest, who was seated nearby, was also forcibly removed for voicing his objects to Wolfgang's treatment. When Wolfgang attempted to re-enter the Conference later that same day, his security pass showed that he had been previously removed and he was briefly detained by police under Section 44 of the Terrorism Act.[271]

2. The Case of Lofti Raissi

On September 21 2001, Raissi was arrested on suspicion of involvement in terrorist activities. After seven days of extended questioning, he was eventually released without charge and immediately re-arrested on the basis of a warrant requesting his extradition to the USA. At the time of his arrest, U.S. authorities claimed to have sufficient evidence to show not only association with some of the September 11 pilots, but also direct links to the Al Qaida network, including telecommunications, video footage, and correspondence. The extradition warrant, however, was not based on any such charges; U.S. authorities brought instead "holding charges" in connection with Raissi's failure to disclose on an application for a U.S. pilot's license, a conviction for minor theft (for which he was fined ten years earlier) and a knee surgery to repair an old tennis injury. Amnesty International expressed concern that U.S. authorities' reasons for extraditing Raissi were based upon identity profiling. Indeed, Raissi's identity and profession fit the so-called "target group" for investigation after September 11th: an Algerian Muslim, pilot and flight instructor in the USA. To date, U.S. authorities have failed to substantiate any of the allegations made against Lofti Raissi.[272]

3. The Case of "A"

"A" is an Algerian man, who was arrested and detained in December of 2001 by U.K. authorities under the Anti-Terror Crime and Security Act. He was held without charge in high-security facility until his release in March of 2005. His release was subject to the imposition of a severe control order, which remained in place until August of 2005 when he was rearrested and detained under immigration powers pending deportation on national security grounds. During his latest detention, "A" was placed on suicide watch,

[271] *Supra* note 11.
[272] *Supra* note 11.

and medical evidence has suggested his mental health has deteriorated as a result of prolonged imprisonment. He was granted release on bail in October of 2005, partly due to these medical grounds, but only under a subsequent control order which was tantamount to conditions of house arrest. Despite four years of imprisonment, the government of the U.K. has yet to present any charges against him.[273]

4. The Case of "G"

"G" is an Algerian torture survivor, who fled to the U.K. in search of refuge and protection. He was afflicted with polio as a child, and suffers from a weakened right leg as a result. He was initially arrested and detained in December 2001 under the Anti-Terror Crime and Security Act, and held without charge until his release on bail in April of 2004. Subject to a control order, his bail conditions amounted to house arrest. He was eventually rearrested and detained in August 2005, under immigration powers pending deportation on grounds of national security. He was detained at Long Lartin prison, where he made a serious attempt on his life. In October of 2005, due to severe depression and the worsening condition of his leg, he was released on bail on exceptional medical grounds. As a result of inadequate access to medical facilities during his house arrest and detainment, he is now confined to a wheelchair. To date, "G" is awaiting the appeal on the decision to deport him. It is important to note that "G" has never been charged with a criminal offence.[274]

4. The Case of Benyam Mohammed al-Habashi

Al-Habashi, an Ethiopian, sought asylum in the U.K. and was granted temporary residence. He left the U.K. in 2001 to travel, and while the reasons for his trip are in dispute, British and U.S. authorities contend that Mohamed admitted to receiving paramilitary training in the al Farouq training camp.[275] As he was about to return to the U.K. in April of 2002, he was arrested in Karachi airport by Pakistani immigration officials. He alleges that he was tortured and beaten on a daily basis for the following two years, and flown to different facilities in Morocco and Afghanistan as a victim of the U.S. policy of extraordinary rendition.[276] He eventually ended up at Guantanamo Bay, without access to a solicitor or court system to contest his detention. Although he was formally charged in 2007 and then again in 2008, his charges were dismissed both times due to the his allegations that his confession was elicited under torture.[277] In February of this year, almost seven years after his arrest, he was finally repatriated to the U.K.

5. The Case of Jean Charles de Menezes

On July 22 2005, the day after a series of serious security threats occurred in London, plainclothes police officers shot and killed de Menezes, an unarmed young Brazilian

---

[273] *Supra* note 11
[274] *Supra* note 11
[275] Amnesty International (21 September 2005). "Ethiopian national/UK resident: Benyam Mohammed al Habashi".
[276] Summary of Evidence memo prepared for Mohamed Ahmed Binyam's Combatant Status Review Tribunal - 10 November 2004 - page 135.
[277] Rosen-Molina, Mike (29 July 2008). UK Guantanamo detainee asks court to order turnover of 'torture' evidence." The Jurist, retrieved 13 July 2009, available at: http://jurist.law.pitt.edu/paperchase/2008/07/uk-guantánamo-detainee-asks-court-to.php.

man, after he was restrained on board a London underground train on his way to work. Initial police reports claimed that de Menezes was a suspect in the events of the previous day. It was also reported that he had evaded arrest, and was wearing a bulky winter jacket despite the summer heat in order to conceal explosive devices. However, two days later the Chief Commissioner of the Metropolitan Police stated that he had been shot dead as a result of a mistake, and acknowledged that he had not acted in any way to arouse suspicion.

Much public outrage was voiced as a result of the incident. In particular, the media discussion following the shooting centered on the rules of engagement by armed police when dealing with suspected suicide bombers. Roy Ramm, a former commander of specialist operations for the Metropolitan Police, said that the rules had been changed to permit officers to "shoot to kill" potential suicide bombers, because a head shot is the only way to disable the bomber without risking detonating their explosives.[278] During the 2008 inquest into de Menezes' death, passengers who were traveling in the same carriage also contradicted police accounts, saying that they heard no warnings, and that de Menezes gave no significant reaction to arrival of the policemen. One passenger said that de Menezes appeared calm even as a gun was held to his head, and was clear that the police officers did not shout any warnings before shooting him.[279]

[278] "Will police now shoot to kill?". BBC News. 22 July 2005. Retrieved 14 July 2009, available at: http://news.bbc.co.uk/2/hi/uk_news/4707781.stm.

[279] Walker, Peter (4 November 2008), "Driver of De Menezes train thought police were terrorists", The Guardian. Retrieved 14 July 2009, available at: http://www.guardian.co.uk/uk/2008/nov/04/menezes-police-terrorists-underground-driver .

Counter-Terrorism in Afghanistan

"The military commanders call themselves the original and pure representatives of the people because, according to them, they defended the freedom of Afghanistan in the past against the Soviet Union. And now they consider themselves the future protectors of Afghan freedom too. On the contrary, they are neither the representatives of the Afghan people, nor the protectors of Afghan freedom. They are simply gunmen."

—Civil society organizer, Kabul, March 15, 2003[280]

Afghanistan has suffered from over two decades of war. This is the typical opening of most articles, reports, speeches and treaties written about Afghanistan today. The statement, which is usually used to help explain the country's post-Taliban challenges, is repeated so frequently that it has become a cliché. Yet few efforts have been made to study the history itself, and its profound impact on Afghanistan's current situation. Even more remarkably, despite the fact that this three-decade period was marked by widespread human rights abuses, war crimes, and crimes against humanity, the statement is rarely followed by suggestions that perpetrators of past crimes, most of whom are still alive, should be brought to justice. Afghanistan's past is often invoked, but rarely addressed.

Most certainly, Afghanistan is a country which, for over three decades, has been embroiled in armed conflict while the world has watched. It is almost impossible to understand the true nature of terrorism in Afghanistan, state-sponsored or otherwise, without a deeper look into the country's recent history of conflict. However, it is important to note that this report is not a comprehensive documentation of the history of warfare in Afghanistan; nor is it a complete account of the human rights abuses which have taken place over this period. In fact, there is simply no way in which this report could fully address either of these important topics. Comprehensive documentation of the serious atrocities committed in Afghanistan since the 1970s will require the full support of the Afghani government, as well as its partners within the international community. When such a history is written, it will not fit between the covers of a book; it will fill bookshelves.

A Brief History of the Conflict in Afghanistan

The history of modern armed conflict in Afghanistan began in April 1978, when Soviet backed Afghan communists took control of the government in a coup, overthrowing the President of Afghanistan. The "Saur Revolution" (named for the Afghan calendar month when it occurred) went badly from the start. The communists who seized power in Kabul consisted of two opposed political parties—Khalq and Parcham. Each had little popular support, especially outside of Kabul and other main cities, and many segments of the country's army and police opposed the coup. As is usually the case, the new government soon came to be dominated by a ruthless Khalq leader, Hafizullah Amin; he sought to create a communist economy in Afghanistan virtually overnight through purges, arrests, and terror. An insurgency was launched against the new regime, and in 1979, the Soviet Union invaded Afghanistan to support

[280] Human Rights Watch (July 2003). Report: "Killing You is a Very Easy Thing for Us": Human Rights Abuses in Southeast Afghanistan. Vol 15. No.5(c).

the failing revolution and government, and installed a new leader from the Parcham party, Babrak Karmal.[281]

Unfortunately it was too late to stop the insurgency, which was already well-advanced and widespread. The rebels included former officers and troops of the Afghan military, members of exiled Islamist groups in Pakistan and Iran, and militias of numerous other disgruntled political groups. Loosely allied under a common theme — defenders of Islamic and Afghan values against Soviet occupation and ideology — these diverse parties enjoyed widespread support within and outside Afghanistan; they came to be known as "the *mujahedin*".[282]

There was never any real unity between the *mujahedin* parties: some were openly hostile while others were not, and they occasionally fought battles against each other. But for most of the 1980s, the *mujahedin* groups — with the indispensable support of the United States, as well as the United Kingdom, Saudi Arabia, China, Iran, and Pakistan — fought an effective and often brutal guerrilla war against Soviet and Afghan national forces, attacking convoys, patrols, arms depots, government offices, airfields, and even civilian areas.[283] The Soviet and Afghan national armies, for their part, regularly attacked or bombed *mujahedin* bases and villages, and harshly suppressed *mujahedin* organizations and other antigovernment activities. By the 1980s, much of the countryside had become a battle zone.[284]

The Soviet occupation had a devastating effect on the Afghani people. Over 5 million Afghans fled their country to Pakistan, Iran and other parts of the world, and well over 1 million people were killed throughout the course of the conflict. It is also estimated that 7 million Afghani civilians were displaced from their homes.[285] Faced with mounting international pressure and great number of casualties on both sides, the Soviets withdrew in 1989. The Soviet withdrawal from was largely seen as an ideological victory in the United States, which had backed the *mujahedin* through three U.S. presidential administrations in order to counter Soviet influence in the vicinity of the oil-rich Persian Gulf.[286]

The conflict also filled the country with weapons. When the communist coup had begun in the 1970s, Afghanistan was not particularly militarized nation. In 1979, the *mujahedin* were severely under-equipped to fight a standing Soviet army, and the communist Afghan government was severely disorganized and poorly outfitted.[287] However, all this would change dramatically. In the 1980s, the United States and Saudi Arabia, and to a lesser extent Iran and China, allocated an estimated $6 to $12 billion U.S. dollars in military aid to *mujahedin* groups, while the Soviet Union sent approximately $36 to $48 billion of military aid into the country to support the

---

[281] Human Rights Watch (2005). Report: Blood –Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity.
[282] *Supra* note 2.
[283] Goodson Larry (2001). Afghanistan's Endless War: State Failure, Regional Politics, and the Rise of the Taliban. Seattle: University of Washington Press, pp. 63 and 99.
[284] *Supra* note 2.
[285] *Supra* note 2.
[286] Crile, George (2003). Charlie Wilson's War: The Extraordinary Story of the Largest Convert Operation in History. New York: Atlantic Monthly Press.
[287] *Supra* note 4.

government.[288] Pakistan, where some of the *mujahedin* parties set up exile headquarters, arranged large military training programs for the *mujahedin* and controlled how much of the Saudi and U.S. assistance was delivered. During the 1980's, Afghanistan likely received more light weapons than any other country in the world, and by 1992 it was estimated that there were more light weapons in Afghanistan than in India and Pakistan combined.[289]

Despite the Soviet withdrawal, through 1989-1991 battles between *mujahedin* and government forces continued. The *mujahedin* parties made few attempts at compromise, and then-President Najibullah stubbornly refused to step down as his power eroded. The *mujahedin*, deeply divided with historical rivalries and religious, ethnic, and linguistic differences, also increasingly began to fight among themselves as they took more territory from the government. The U.S. began to turn its attention away from Afghanistan, even as it, along with Pakistan, Saudi Arabia, and Iran, continued to arm the *mujahedin* forces. The Soviet Union continued its support for Najibullah. It is important to note that there were few international attempts to mediate or prevent the increasing fragmentation of armed groups in Afghanistan; peacemaking efforts were mostly put in the hands of the U.N. Secretary-General's office, which lacked the political clout to force the parties to compromise. The war — which was steadily becoming a multi-party civil war — went on.[290]

The disunity among the *mujahedin* — a key obstacle to peace-making efforts — was aggravated throughout this period by the continuing policy of the United States, Pakistan, and Saudi Arabia to give a disproportionate amount of military assistance to one particular *mujahedin* party: the Hezb-e Islami of Gulbuddin Hekmatyar.[291] Through the 1980's, Hekmatyar received the majority of assistance from these countries, and in 1991, the CIA (with Pakistani support) was still channeling most U.S. assistance through Hekmatyar, including large shipments of Soviet weapons and tanks the United States captured in Iraq during the first Gulf War. [292] It was obvious that as the Soviet Union withdrew, there were increasing signs that the war it started in Afghanistan would last for a long time, even as the regime it supported collapsed.

The emergence of the Taliban – originally a group of Islamic scholars – had brought, at first, a measure of stability after nearly two decades of conflict. Their extreme version of Islam attracted widespread criticism as did their hosting of Osama bin Laden, who is generally believed to have been behind the bombing of US embassies in Africa in 1998 and then the attacks on the U.S. on 11 September 2001. After the Taliban's refusal to hand over bin Laden, the U.S. initiated aerial attacks in October 2001, paving the way for opposition groups to drive the Taliban from power.[293]

Since the fall of the Taliban administration, adherents of the hard-line Islamic movement have re-grouped. There is now a strong, highly trained and heavily equipped resurgent force, particularly in the south and east, fuelled in part by funds from the drugs

---

[288] *Supra* note 4.
[289] *Supra* note 2.
[290] *Supra* note 2.
[291] Azimi, Mohammed Zaher (1998). Afghanistan va Reeshey-e Dardha 1371-1377 ("Afghanistan and the Roots of the Misery 1992-1998"). Peshawar: Markaz-e Nashrati Mayvand.
[292] Coll, Steve (1 October 1991). "Afghan Rebels Said to Use Iraqi Tanks," The Washington Post.
[293] The Rule of Law in Armed Conflicts Project (2009). Country Profile: Afghanistan. Available at: http://www.adh-geneva.ch/RULAC/state.php?id_state=1.

trade. A fledgling government, with the support of some 70,000 foreign troops serving in a NATO force (ISAF) as well as the US-led Operation Enduring Freedom, faces the challenges of extending its authority beyond the capital and of forging national unity.[294]

At the time of writing, this report has found that the conflict continues to intensify. Insurgents continue to target police, police recruits, government ministers, parliamentarians, civil servants, and civilians including urban crowds. Terrorists, often supported by criminal gangs, increasingly turned to kidnapping Afghans and foreigners; most notably several reporters and at least one district governor were kidnapped in 2008.[295] Insurgents also continue to target international NGOs, Afghan journalists, government workers, UN workers, and recipients of NGO assistance. They attack teachers, pupils (especially girls), and schools. They threaten and often brutally kill those who have worked for religious tolerance, including ex-insurgents, tribal leaders, and moderate imams, mullahs, and religious scholars. Insurgents couple threats and attacks against NGOs with the continued targeting of Provincial Reconstruction Teams, de-mining teams, and construction crews working on roads and other infrastructure projects.[296] It is discouraging to note that the violence shows no signs of abating.

The Future of Counter-Terrorism in Afghanistan

Intrinsically tied with counter-terrorism efforts in Afghanistan are efforts to eradicate the illicit drug trade. It is the opinion of this report that counter-terrorism and counter-narcotics are so linked within the country that the successful eradication of one depends on entirely on the simultaneous eradication of the other. In a country where 70 percent of the population lives below the poverty line, drugs represent a lucrative and crucially reliable source of livelihood. Although good weather and favorable international market conditions can cause legal agricultural products such as saffron, specialty fruits, or even wheat to sometimes at higher prices than opium, other structural factors strongly favor the cultivation of illicit crops. A huge explosion of opium poppy cultivation since the fall of the Taliban has led President Hamid Karzai, the United States, and the United Kingdom —the lead nation responsible for counter-narcotics activity in Afghanistan under the UN Assistance Mission in Afghanistan (UNAMA) framework — as well as major international organizations to declare that drugs now constitute the greatest threat to Afghanistan's democratic consolidation and economic development.[297]

The explosion of drug cultivation in Afghanistan has been ignited both by opportunity and necessity. The state's critical weakness and the existence of powerful local sponsors have provided the opportunity, while the devastation of the Afghan economy has left the impoverished Afghan people with little alternative to survive. Afghanistan's legal economy has been ruined, first in the 1980s when Soviet counterinsurgency policy attempted to deprive the *mujahedeen* of resources and popular support by destroying rural agriculture and depopulating the countryside,[298] then by the civil war of the 1990s, and

---

[294] *Supra* note 2.
[295] United States Department of State (30 April 2009). *Country Reports on Terrorism 2008 - Afghanistan, ,* available at: http://www.unhcr.org/refworld/docid/49fac6a7c.html.
[296] *Supra* note 16.
[297] Gall, Carlotta (19 November 2004). "Afghan Poppy Growing Reaches Record Levels, U.N. Says," The New York Times.
[298] MacDonald, Scott (1992). "Afghanistan," in *International Handbook on Drug Control*, eds.

subsequently by the fundamental neglect of economic development and the brutalization of women under Taliban rule.[299]

The opium poppy cultivation boom not only negatively affects Western interests in reducing their own domestic drug consumption, but it also has had negative consequences for Afghanistan's security, politics, and economics. Regional warlords reap vast benefits from drug production, threatening Afghanistan's fragile security environment.[300] With profits in the tens of millions of dollars, local strongmen can easily finance their militias and buy their popularity by subsequently investing a portion of the profits in local development projects such as schools, sewage and irrigation systems, and clinics. Even after the partial demobilization of some of the most prominent warlords' militias, accumulated profits make it simple for many warlords to reconstitute them. Adding to the state's difficulty in maintaining security is the problem of border patrol, given Afghanistan's rough terrain. Drug-smuggling routes used in the 1980s to move drugs in one direction and weapons in the other via Pakistan, Iran, and Central Asia are similarly used today.[301]

Burgeoning drug production also threatens Afghanistan politically by providing an avenue for criminal organizations and corrupt politicians to enter the political scene and undermining the democratic process. These actors, who enjoy the financial resources generated by sponsoring the illicit economy, frequently experience great success in the political process and are able to secure official positions of power as well as wield influence from behind the scenes. Consequently, the legitimacy of the political process is subverted. The problem perpetuates itself as successful politicians bankrolled with drug money make it more difficult for other actors to resist participating in the illicit economy, leading to endemic corruption both at the local and national levels.[302]

It should come as little surprise that the Taliban have profited immensely from drug production in territories under its control throughout the course of the conflict in Afghanistan. After an initial year of religious zealousness to try to eradicate the burgeoning poppy cultivation in 1994–1995, the Taliban decided that eradication was both financially unsound and politically unsustainable.[303] The fundamentalist religious movement progressively shifted its attitude toward tolerating poppy cultivation, then to levying a 10–20 percent *zakat*, or tax, on cultivation and processing, and finally to actively encouraging poppy cultivation and even teaching farmers how to achieve greater yields.[304] Profits from the opium trade, estimated at $30–200 million a year, were roughly comparable to the Taliban's profits from illegal traffic of legal goods under the Afghan Transit Trade Agreement, and constituted a major portion of the country's gross domestic

---

Scott B. MacDonald and Bruce Zagaris (Westport, Conn.: Greenwood Press, 1992), pp. 315–324.

[299] Felbab-Brown, Vanda (2005). Afghanistan: When counter-narcotics undermines counter-terrorism. *The Washington Quarterly*, Vol. 28(4), pp. 55-72.

[300] Ahmed, Samina (May 2004). "Warlords, Drugs, and Democracy," *The World Today*, Vol 60(5), p 15–17.

[301] Haq, Ikramul (October 1996). "Pak-Afghan Drug Trade in Historical Perspective," *Asian Survey*, Vol. 36(10), pp. 945–963.

[302] *Supra* note 20.

[303] *Supra* note 20.

[304] Rashid, Ahmed (2001). Taliban. New Haven: Yale University Press, pp. 117–127.

product (GDP) and income.[305] In 2000–2001, when the Taliban finally declared poppy cultivation illegal to placate the international community, receive recognition as a legitimate government, boost opium prices, and possibly also consolidate its control over Afghanistan's drug trade, it had already stored enough heroin to maintain its money supply without new poppy cultivation for many years.[306]

Indeed, the fight against terrorism in Afghanistan is intertwined with the fight against illicit drug production. This report suggests that unsuccessful "eradication" policies, such as that which is currently being employed by the United States, serve only to marginalize rural populations. The farmers are driven into the hands of the warlords in an attempt to protect their livelihood; security forces in charge of the eradication efforts are often in danger of meeting with armed resistance. Eradication efforts can also compromise intelligence gathering, which currently relies heavily on the cooperation of local militias and their leaders. It is evident that a new approach is needed to broach the problem of opium production, which will necessitate an alternative counter-terrorism strategy.

Afghani Counter-Terrorist Policy

Afghanistan does not have counter-terrorist legislation per se; indeed, 20 years of internal conflict has made it almost impossible to establish any binding law whatsoever. However, increased pressure from the United States, as well as other NATO countries such as Canada, Great Britain and other EU member states, has caused the Afghani government under Hamid Karzai to adopt a clear plan to eradicate terrorism and improve the state of human rights. As a result, in December 2004, Afghanistan adopted a new Constitution that explicitly commits the government to observe the UN Charter, the Universal Declaration of Human Rights and international human rights treaties to which Afghanistan is a party.[307] Article 58 of the Constitution enshrined the establishment of the Independent Human Rights Commission of Afghanistan (AIHRC) and expanded its mandate from focus on transitional justice to monitoring the "respect for human rights in Afghanistan". In 2006, the Interim Afghanistan National Development Strategy, the country's road map for development, and the Afghanistan Compact, a political agreement between Afghanistan and donor countries, established a human rights benchmark for the government, the AIHRC, and its international supporters to strengthen the country's capacity "to comply with and report on its human rights treaty obligations" by the end of 2010.[308]

Despite these encouraging actions, the progress of human rights protections within Afghanistan remains severely impeded due to a large number of structural factors. For

---

[305] Rubin, Barnett (2000). "The Political Economy of War and Peace in Afghanistan," *World Development*, Vol. 28(10), pp. 1789–1803.

[306] *Supra* note 20.

[307] Afghanistan has ratified, inter alia, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Rights of the Child and its two Optional Protocols.

[308] Amnesty International (3 November 2008). Public Statement: Afghanistan Submission to the UN Universal Periodic Review Fifth session of the UPR Working Group of the Human Rights Council May 2009. AI Index: ASA 11/014/2008.

example, in areas of the country controlled by the government, impunity prevails at all levels of administration. Arbitrary arrest and detention by the police and other official security agencies, as well as semi-official militias, are widespread. The Afghan judicial and security sectors lack the personnel, infrastructure and political will to protect and promote human rights. Additionally, more than 600 detainees are being held at the U.S.-run Bagram military airbase[309] and other U.S. military facilities outside the protection of international human rights laws and domestic laws.[310]

The Ministry of Justice, which serves as the Government's lead agency for implementation and mainstreaming of human rights, does not sufficiently collaborate with the AIHRC. Citizens lack confidence in the formal justice institutions and regard them as slow, ineffective and often corrupt. Most Afghans, and particularly women, have difficulty accessing courts and legal assistance; most cannot afford court fees or the transportation costs for attending often distant courts. Traditional community-based assemblies (*jirgas* and *shuras*) handle an estimated 80 percent of all disputes in Afghanistan, but they operate in isolation of state courts and without benefit of minimal standards of due process or evidence.[311]

The Action Plan for Peace, Reconciliation, and Justice in Afghanistan 2005

The Afghan government approved the Action Plan on Peace, Reconciliation and Justice on December 12, 2005, but delayed implementing it in part because Kabul and its international backers feared that calling for justice would further weaken Afghanistan's precarious security situation.[312] Since 2001, the Afghan government, the United Nations and the international community, led by the United States, have pursued a counter-productive policy of relying on war criminals, human rights abusers, and drug-traffickers instead of prosecuting them.[313] To complicate matters, President Karzai has mistakenly tried to bring all political forces under his umbrella, while the U.S. has brokered secret deals with many such individuals as part of its "War on Terror." As a drastic departure from previous policy, the recent Action Plan encompasses five measures:

a. According dignity to victims, including through commemoration and the building of memorials;
b. Vetting human rights abusers from positions of power and encouraging institutional reform;
c. Truth-seeking;
d. Reconciliation;

---

[309] The ICRC reports, in its July 2008 operational update, that it is visiting 600 detainees at Bagram military airbase.
[310] *Supra* note 2.
[311] *Supra* note 2.
[312] Rawa News (2009). Afghanistan: Justice for War Criminals Essential to Peace: Karzai Must Hold Officials Accountable for Past Crimes. Available at: http://www.rawa.org/temp/runews/2006/12/12/ afghanistan- justice-for-war-criminals-essential-to-peace.html.
[313] *Supra* note 33.

e. Establishing a task force to recommend an additional accountability mechanism.[314]

Despite the momentous achievement signified by the government's adoption of the action plan, much difficult work remains to effectively implement a strong, comprehensive, and integrated transitional justice program for Afghanistan. One of the main challenges will be to achieve criminal accountability, which remains a controversial issue in Afghanistan, with many powerful sectors lobbying against the plan. This is particularly relevant given the 2007 introduction of the Amnesty Bill, which grants immunity from prosecution for alleged war crimes; coupled with the declining security situation, the Amnesty Bill has hampered transitional justice efforts.[315]

The Afghanistan Compact 2006

The Afghanistan Compact was the outcome of the London Conference on Afghanistan in 2006. It was the result of consultations of the Afghani government under Hamid Karzai with the United Nations and the international community. The Compact has established the framework for international cooperation with Afghanistan for the following five years, and is a political commitment of the participants rather than an actionable treaty. The Compact also provides basic benchmarks for ongoing Afghani counter-terrorism efforts. The Compact encompasses the following goals:

a. Increased security, while respecting Afghanistan's sovereignty as a nation; this includes strengthening dialogue and cooperation between Afghanistan and its neighbour countries to promote lasting peace in the sub-continent;
b. Upholding democratic governance and the protection of human rights as the cornerstone of sustainable political progress in Afghanistan; this includes the coordinated establishment in each province of functional institutions such as civil administration, police, prisons and judiciary, as well as reforming the legal system;
c. Sustainable economic and social development, including the reduction of poverty, expansion of employment and enterprise creation, and enhancement of opportunities in the region which improve the well-being of all Afghans;
d. Formulation of an effective counter-narcotic policy, recognizing the effect that the drug trade has upon national, international and especially regional security, while upholding the rule of law.[316]

This agreement is particularly relevant in the context of counter-terrorism, as it recognizes counter-narcotics efforts as central to the battle against terrorist groups.

---

[314] International Center for Transitional Justice (2009). Afghanistan: ICTJ Activity. Available at: http://www.ictj.org/en/where/region3/507.html.
[315] *Supra* note 35.
[316] The London Conference on Afghanistan (31 January - 1 February 2006). The Afghanistan Compact. PDF available at: http://www.ands.gov.af/admin/ands/ands_docs/upload/UploadFolder/The%20Afghnistan%20Compact%20-%20Final%20English.pdf.

The Amnesty Bill 2007

In 2007, the Afghani parliament passed an amnesty law that prevents the state from independently prosecuting people for war crimes committed during conflicts in recent decades. The law recognizes the rights of victims to seek justice and to bring cases against those alleged to have committed war crimes; however in the absence of a complaint by a victim, Afghan authorities are now banned from prosecuting accused war criminals on their own. Additionally, the new amnesty law places the burden of proof in war crimes trials upon victims rather than on state prosecutors.[317]

This Amnesty Bill essentially grants blanket amnesty for human rights violations to all sides in more than two decades of fighting in Afghanistan. Consequently, its adoption into Afghani law was met with explosive debates. While supporters maintained the law would help bring national reconciliation, critics pointed out that alleged war criminals in the parliament are only trying to protect themselves from prosecution. Whatever the underlying motives for the law, tens of thousands of Afghans rallied at a Kabul stadium to both protest and demonstrate support for the measure, many of them carrying placards of prominent warlords and former *mujahedin*; this indicates the highly charged nature of the topic which has polarized the Afghani people along political fault lines.[318]

The 12-point resolution contains four primary clauses dealing with the amnesty issue.

a. All "opponents who fought each other for different reasons in the last two and a half decades" are called upon to forgive each other and consider the Karzai-backed national-reconciliation process. Such "opponents" technically include communists, *mujahedin*, and the Taliban antagonists and their allies. They are then offered immunity from any "legal or judicial" proceedings. Also, those involved in the jihad or resistance to protect Afghanistan's religion or territorial integrity are to be lauded by Afghanistan's "history and people". The law even goes as far as prescribing that such people "should not be subjected to any criticism".
b. The resolution rejects reporting by the New York-based group Human Rights Watch (HRW). HRW has taken an extremely active role in Afghanistan. And made numerous recommendations that Afghan authorities hold accountable a number communist and *mujahedin* figures accused of major human rights abuses since 1979. The Amnesty Bill calls the HRW reports "inaccurate" and based "on malicious intentions".
c. The resolution invites "all parties that are against the Islamic Republic of Afghanistan", without exception, to join the national-reconciliation process by abiding by constitutional and other laws. After this condition is met, all "opposition parties and armed groups" would be granted the blanket amnesty.
d. The Bill states that following the establishment of the Afghan National Assembly in 2005, "all laws and international principles should be compared with constitutional and other Afghan legislation", to avoid local norms being

[317] Synovitz, Ron (17 March 2007). "Afghanistan: Amnesty law draws criticism, praise." Eurasianet.org, available at: http://www.eurasianet.org/departments/insight/articles/pp0317.7.shtml.
[318] Tarzi, Amin (23 February 2007). Afghanistan: Amnesty Bill Places Karzai In Dilemma. Radio Free Europe, available at: http://www.rferl.org/content/article/1074897.html.

> superseded by Afghanistan's international obligations. Those obligations include the Universal Declaration of Human Rights. The clause also stipulates that laws approved by the National Assembly should be respected by the government of Afghanistan. In this manner, the resolution appears to attempt to circumvent Afghanistan's international obligations.[319]

Nowhere in the resolution is there any mention of human rights, the suffering of the Afghan people, or any public aspirations of justice - even if merely symbolic. The bill grants full pardons to those who murdered, raped, and maimed their countrymen - and then goes on to laud them as heroes. Indeed, the introduction of the Amnesty Bill required President Karzai to face a thorny dilemma; he could either approve the Bill, thus making it part of his country's laws - or reject it, inviting opposition from powerful elements within and outside his own government.[320]

Human Rights Watch, whose work is attacked in the new resolution, stated in a brief on December 12 that according to the 2005 Action Plan, the Karzai administration is required to implement and complete a transitional justice process by 2009. The organization pointed out that this includes publicly commemorating public suffering during the three decades of war, vetting the civil service to exclude serious human rights abusers, documenting past events to establish accountability, promoting reconciliation and national unity, and establishing a mechanism for justice and accountability. The Amnesty Bill is a clear violation of these requirements.[321]

I. Mechanisms for Comparison

1. Definition of Terrorism: At the time of writing, this report could not find any explicit definition of terrorism within Afghani law. However, it is reasonable to assume that due to the large influence of non-state actors, such as the United States and the United Kingdom, that the Afghani government has adopted a working definition of terrorism which meets international criteria. It is also important to note that through an examination of terrorist activities in Afghanistan, as a well as an examination of the policies used to combat them, that the Afghani government does not make a distinction between terrorism on the part of state and non-state actors.

2. Search and Seizure: While the Constitution protects against unreasonable search and seizure, this report found that arbitrary searches and seizures of property, goods and financial instruments was endemic throughout Afghanistan; these crimes are committed by both militias as well as security forces.

3. Arrest: At the time of writing, this report found that arbitrary arrest was widespread throughout the country, particularly in areas where there is strong militia presence.

4. Pre-Charge Detention: Police have the right to detain a suspect for up to 72 hours to complete a preliminary investigation. If they decide to pursue a case against the detainee,

---

[319] *Supra* note 39.
[320] *Supra* note 39.
[321] *Supra* note 39.

the file is transferred to the prosecutor's office, which must see the suspect within 48 hours. The investigating prosecutor can then continue to detain a suspect without formal charges for 15 days from the time of arrest while continuing the investigation. The prosecutor must file an indictment or drop the case within 30 days of arrest. In practice, however, many detainees do not benefit from any or all of these legal safeguards. Prison authorities often detain individuals for several months without charging them. Additionally, there is little consistency in the length of time detainees are held before trial or arraignment. In a March 2007 report, the UN Secretary General stated in many cases there was prolonged pretrial detention during which time suspects had not been given access to lawyers.

5. Sunset Clause: This report could not find any mention of sunset clauses within current Afghani counter-terrorist policy.

6. Bail: At the time of writing, this report could not discover the bail procedures afforded to terrorism suspects, if any.

II. Afghani Security Policy and the Incompatibility with Human Rights

Abuses against Civilians by Police, Military Forces, and Former Fighters

The most pressing problem in Afghani security policy stems from the culture of impunity for armed forces and police alike. Impunity is the root cause of the majority of human rights violations, and it pervades even the highest levels of military structures. It is no exaggeration to state that a climate of fear exists in much of Afghanistan, particularly in the southeastern provinces. Troops and police in many parts of the region, and parts of Kabul itself, are invading private homes, usually at night, and robbing and assaulting civilians. By force or by ruse, soldiers and police gain entry into homes and hold people hostage for hours, terrorizing them with weapons, stealing their valuables, and sometimes raping women and girls. On the roads and at proliferating official and unofficial checkpoints, local soldiers and police extort money from civilians under the threat of beating or arrest. Troops and police also extort money from shopkeepers and arbitrarily arrest and hold people for ransom, possibly torturing some. Rape of women, girls, and boys, often in connection with the above-described abuses, is common and almost never reported.[322]

The plethora of allegations which exist against Afghani police, military, former *mujahedin*, and other militias are far too numerous to list here, and are beyond the scope of this report. However, any mention of Afghanistan's security policy and its implicit rights violations must give a brief outline of these key issues.

(i) Arbitrary arrests and detentions in secret prisons

Afghans interviewed by Human Rights Watch described numerous cases of soldiers and police arresting, beating, and holding people for ransom, and the existence of "private prisons" in Kabul city, and in Laghman, Paktia, and Nangarhar provinces.[323]

---

[322] *Supra* note 1.

[323] "Private prisons" is a term used by U.N. officials, the Afghan Independent Human Rights Commission, and Afghan government officials to describe unofficial detention sites, including detention sites on military

Additionally, Human Rights Watch found a pattern of arbitrary arrests by local police and army troops under the command of Hazrat Ali, the military commander for the Eastern Region of Afghanistan, and his brother-in-law, Musa, a high-level military commander in Nangarhar.[324] Residents of Nangarhar, U.N. staff, and even government officials described soldiers and police regularly arresting people, often on the pretext that they were suspected of being members of the Taliban, beating them, and ransoming them to their families for money. U.N. humanitarian officials in Kabul told Human Rights Watch that they had documented cases of arbitrary or illegal detention of villagers throughout Nangarhar, as well as in neighboring Kunar and Laghman provinces.[325]

(ii) Abductions and "Disappearances"

In addition to the war violence, the fighting between small *mujahedin* factions, such as that between Ittihad and Wahdat through 1992, has had an especially terrible effect on civilians: ethnic abductions. Ittihad and Wahdat forces were increasingly abducting civilians and holding them for ransom or exchange. Many of the civilians abducted by the two sides during this time were never seen again. Some did manage to be released, however, usually after prisoner exchanges or personal interventions by government officials or religious or tribal leaders with connections to those detained.[326]

(iii) Rape

Many civil society groups, especially Human Rights Watch, have received numerous credible reports of soldiers and commanders raping young girls, boys and women throughout the many years of armed conflict. These reports are notoriously difficult to substantiate in face-to-face interviews with the victims, due to cultural barriers which prevent the discussion of such issues. However, human rights groups are often able to obtain a large amount of information by interviewing other sources, such as neighbors and close friends of victims, U.N officials, NGOs, and witnesses to abductions.[327]

The interviews suggest that sexual violence against women, girls, and boys is both frequent and almost never reported. The victims are usually are abducted outside of their homes in broad daylight and sexually assaulted; in some areas girls have been abducted on the way to school. Women and girls are raped in their homes, typically during the evening or night during armed robberies. Attacks are also frequently used to silence women's rights activists.

In Afghanistan, as in many other countries, documenting sexual violence is a challenge in part because of women's subordinate status, family concern with "honor" and "dishonor," cultural taboos about discussing sex, and women's and girls' own reluctance to share or relive details of a traumatic assault. According to independent

---

bases; unofficial jails located at military checkpoints, in houses, or in local commanders' compounds; or other sites not officially designated as a police property or property under the control of the Ministry of Interior or Ministry of Justice. Existing Afghan law does not authorize detention by entities other than the police, such as the Ministry of Defense or insurgent groups.

[324] Human Rights Watch interview with U.N. humanitarian official, March 13, 2003. Name withheld due to security concerns.

[325] Human Rights Watch interview with U.N. humanitarian official, Kabul, March 29, 2003. Name withheld due to security concerns.

[326] *Supra* note 2.

[327] *Supra* note 1.

studies, Afghan women symbolize their families' and societies' honor, with Pashtun communities in particular placing a high value on women's chastity.[328] Historically, some communities have sanctioned "honor" killings in which a woman could be killed by her own relatives for bringing "dishonor" upon the family by conduct perceived as breaching community norms of sexual behavior — including being a victim of sexual violence.[329] At a minimum, a girl or woman who has been raped may be considered unmarriageable or may be cast out by her husband. Boys who are raped can also face discrimination, but the social penalties are not nearly as harsh. In many areas, social penalties are meted out even for the perception that a marriageable girl or woman is at risk, both on the woman or girl and on her family, who may be perceived as having failed to protect her adequately.[330]

As with the other abuses mentioned above, victims of sexual violence at the hands of security forces have nowhere to seek redress. Furthermore, the consequences of sexual violence are dire for women and girls not only in terms of direct physical harm but also in terms of curtailed participation in civil society and the public sphere, including in the reconstruction of Afghanistan. Sexual violence also places limitations upon their rights to education, to work, and to health care.[331]

(iv) Armed Robbery and Home Invasions

Robberies and home invasions by security forces are commonplace in many parts of Afghanistan. In most cases, the police or military which provide security through the day turn to robbery at night time, stealing clothing, food, supplies, jewelry and whatever cash they can find.[332] Not only does it prove to be financially lucrative for the participating soldiers, but it serves to intimidate the local population. Typically, it is troops from nearby checkpoints, local military garrisons, or police stations who are the thieves. As a result, thousands of communities live in a constant state of fear. There are no safe avenues of complaint for fear of worse reprisals, so the majority of lootings go unreported. [333]

(v) Extortions

Human Rights Watch has documented numerous cases of extortion by soldiers and police in almost every district in the southeast of Afghanistan — Ghazni, Wardak, Paktika, Paktia, Logar, Kabul, Laghman, and Nangarhar.[334] Two major kinds of extortion were documented: extortion of drivers at roadside checkpoints, and extortion of small businessmen — usually shopkeepers — in cities and villages. Afghan military and police in many places maintain official checkpoints ostensibly to stop cars to check for weapons or to identify criminal suspects. Most "checkpoints" in the southeast, however, are

---

[328] Emadi, Hafizulla (1993). Politics of Development and Women in Afghanistan. New York: Paragon House.
[329] Grima, Benedicte (1998). The Performance of Emotion Among Paxtun Women. Karachi: Oxford University Press, pp. 150-154, 163-165
[330] Human Rights Watch interview with gender expert, Kabul, March, 29, 2003. Name withheld for security purposes.
[331] *Supra* note 1.
[332] *Supra* note 1.
[333] *Supra* note 1.
[334] *Supra* note 1.

unofficial sites set up by police or the army to collect illegal bribes. As in other countries with this problem, there is little that infuriates the local population more than the accumulated cost of checkpoint extortion, which can rob drivers of most and at times all of their earnings from their work. Human Rights Watch interviewed scores of taxi, truck, and bus drivers on the main roads between Kabul, Gardez, Ghazni, and Jalalabad, in bazaars, and at taxi, truck, and bus stations in Kabul. Almost without exception, they complained that army and police troops at official and unofficial roadside checkpoints regularly extorted money and goods from them. Their stories were often similar, involving frequent stops by soldiers and police, and threats and beatings if drivers refused to pay.[335]

Human Rights Watch also documented several cases of police or soldiers in Kabul ordering truck drivers to work for them, either by hauling materials or troops.[336] Truck drivers said that in Kabul, police often commandeered them for compulsory labor, but that they could escape service for a substantial bribe. It is clearly a significant problem, especially considering that virtually every driver interviewed for a 2003 HRW report admitted to being robbed at some point by security forces.[337]

Shopkeepers are also targeted; Afghan journalists, government officials, and U.N. staff have confirmed that this is especially common in Kabul city, in Nangarhar province, and Gardez city.[338] Police from the Interior Ministry have been accused of targeting certain shops, and taking money every week. Commonly targeted shops include butchers shops, cosmetic shops for women's clothing and toiletries, cassette shops, video game shops, and shops selling fuel, gas, and propane.[339] Despite credible information that extortion is a widespread and common problem throughout parts of Afghanistan, particularly those which include demands for large sums of money under threats of beatings or arrests, these abuses are extraordinarily difficult to document. Many shopkeepers readily admit to fear of retaliation if they speak openly.[340]

(vi) Illegal Seizure and Forcible Occupation of Land

Security forces have also been known to seize land and property, either for their own use, to rent, or to distribute to subordinate members and supporters. This seems to be especially prevalent in Nangarhar province, and seriously impacts the return of refugees to the area.[341] Often, security forces will seize homes or land belonging to people who worked for or supported the former Soviet-backed government regime; this is widely perceived as a loose justification for the continuing repression of civilians.

According to humanitarian officials reporting on security conditions in Ghazni province, army and police commanders there have seized land and property; This affects

---

[335] *Supra* note 1.
[336] Human Rights Watch interview with U.H.A., bus driver from Jalalabad, Kabul, March 26, 2003; Human Rights Watch interview with A.J.B., bus driver from Jalalabad, Kabul, March 26, 2003; Human Rights Watch interview with E.D.A.Z., truck driver, Kabul, March 27, 2003.
[337] *Supra* note 1.
[338] Human Rights Watch interview with R.G.D., journalist, Gardez, March 9, 2003; Human Rights Watch interview with I.A.L., journalist, Kabul, March 18, 2003.
[339] Human Rights Watch interview with G.A.D., Kabul, March 29, 2003.
[340] *Supra* note 1.
[341] Human Rights Watch interview with U.N. official, Jalalabad, May 5, 2003.

the decisions of refugees about whether to return to their home districts.[342] Officials with the UNAMA who are familiar with the situation in Ghazni have confirmed these findings.[343]

2. Human Rights Abuses and the Impact on Returning Refugees and Internally Displaced Persons

A little-mentioned effect of Afghanistan's security policy is the impact of human rights abuses on returning refugees. It is the opinion of this report that while given little attention in the international media, it is a subject which merits a small discussion. The abuses mentioned in the earlier portion of this section have had a profound effect on many refugees, who are returning from Iran and Pakistan and decide to settle in Kabul instead of their home provinces. Among the rampant abuse which is perpetrated by military and police alike, returning refugees also cite the following reasons for choosing to abandon their land and settle in larger cities:

a. Lack of educational opportunities for women;
b. Lack of medical services, especially for women;
c. Ongoing security concerns;
d. Fundamentalist culture which is imposed by armed militias and the clergy;
e. Political persecution;
f. Land seizures;
g. Forced marriages of girls and young women.[344]

These concerns are echoed by United Nations humanitarian officials who are working throughout Afghanistan.[345]

III. Concerns from Human Rights Organizations

1. Afghanistan Independent Human Rights Commission

(i) Intimidation and Murder of Civilians

The AIHRC has documented cases of widespread and systematic intimidation by Taliban insurgent forces against Afghan civilians. The techniques include:

a. Abductions;
b. Shootings;
c. Beheadings;
d. Hangings;
e. Mutilations;
f. Suicide attacks;

---

[342] Human Rights Watch interview with U.N. humanitarian official, March 13, 2003; Human Rights Watch interview with U.N. humanitarian official, Kabul, March 29, 2003.
[343] Human Rights Watch interview with UNAMA official, Kabul, May 24, 2003; Human Rights Watch interview with UNAMA official, Kabul, May 26, 2003.
[344] *Supra* note 1.
[345] *Supra* note 1.

g. Indiscriminate rocket attacks.[346]

Insurgents generally begin their campaigns of intimidation by issuing individuals with warnings and threats to cease any links with the government or international forces; they also issue collective threats against entire communities. Warnings most often come in the form of "night letters" placed at a person's door. In some cases they are found at mosques—a technique used to ensure the threat quickly ripples throughout the community. Verbal threats, either through direct contact or over the phone, are somewhat less common than "night letters," but frequently tend to be more "tailored" to their target and thus even more intimidating for their recipients. If warnings are not heeded, then intimidation is frequently just a prelude to more serious actions by insurgents. In some cases the escalation of threats happens more slowly. Abductions and destruction are both means favored by insurgents to reinforce the seriousness of their threats.[347]

As part of their intimidation campaign, insurgents have abducted civilian government employees, government aligned community elders, and family members of those working for the government. People who are released have often been told to deliver threatening messages to their community; in other cases, the abducted are executed. In addition to these abductions and threats, insurgent forces often blow the doors off of civilian homes to emphasize their seriousness.[348]

Finally, insurgents intentionally kill civil servants, Ulema Council members, community elders, members of the clergy, civilian suppliers and day laborers of development projects and military bases. The AIHRC has documented numerous cases of defenseless individuals who were intentionally shot while traveling on a road, beheaded or hanged; mutilated while in the captivity; or killed and wounded by IED and suicide bomb attacks. It is often impossible to determine if a killing was committed in retribution for a person not heeding a previous threat or, alternatively, if it was used to send a message to a community. In many cases it is both; and, regardless, the end result is the same. Life is lost and communities live in fear of it happening again if they do not cooperate with the insurgents.[349]

The AIHRC has expressed its grave concern over the targeting of civilians by Afghan insurgent forces. The organization asserts that these abuses specifically target people who are protected under international humanitarian law. Insurgents duplicitously seek the protection of these laws when it benefits them, while disregarding them and casting them aside as imposed Western ideas when they launch attacks against non-combatants. Regardless of such double standards, the insurgent forces also ignore the fact that the vast majority of the basic protections provided to civilians by international humanitarian law are also enshrined as clear rules in Islamic Shari 'a law. The following acts are a sample of those which are explicitly forbidden by Islamic law:

a. Cruel deeds and killings;
b. The killing of civilians;

---

[346] Afghanistan Independent Human Rights Commission (December 2008). Report: Insurgent Abuses against Afghan Civilians.
[347] *Supra* note 67.
[348] *Supra* note 67.
[349] *Supra* note 67.

c. Beheading of captives;
d. Mutilation of human and animals;
e. Burning of captive human beings and animals aiming to kill.[350]

In light of these facts, the AIHRC urges the Taliban and other insurgent groups to respect the rule of international law, and cease all indiscriminate attacks that result in disproportionate civilian casualties.[351]

(ii) Social and Economic Impacts of Insurgent Human Rights Abuses

The AIHRC has also reported on the devastating impacts that result from insurgent attacks across the country. The damage caused by attacks on hospitals, doctors, medical and other humanitarian aid targets, civilian supply lines, truck drivers, teachers, and schools reaches far beyond the physical targets themselves; the organization contends that the insurgents are fully aware of this. The number of increasing insurgent attacks, combined with the already extremely serious impact of three decades of war, results in mounting cumulative damage affecting the civilian population.[352]

The AIHRC lists the following as examples of the collateral humanitarian damage of insurgent attacks:

a. Due to limited employment opportunities, when one truck driver is killed for bringing supplies from Pakistan to Afghanistan, other truck drivers cease their activities. The result is a cutting off of civilian supply lines, unemployment, and lack of family income.
b. Due to a weak health system, attacks on hospital emergency rooms threaten to severely limit the ability of many civilians to access medical care.
c. The intimidation of doctors and the blocking of the transporting of medical supplies have a detrimental effect on remote populations.
d. Due to low rates of education, assassinations of teachers limit even further the ability of students to attend classes.
e. Attacks against day laborers and the development projects they are working on shatter public service initiatives that are aimed at improving the lives of entire communities and regions.[353]

In light of these concerns, the AIHRC urges the Taliban and other insurgent forces to cease all attacks that intentionally target civilian objects in violation of Shari'a and international humanitarian law. The leadership should specifically instruct their fighters to cease the destruction, confiscation, or disturbance of civilian objects such as schools, medical and other humanitarian aid, civilian supply lines, and civilian development projects.[354]

2. Amnesty International

[350] Asar-ul-harb P 472 Qastulani V 5 P 152.
[351] *Supra* note 67.
[352] *Supra* note 67.
[353] *Supra* note 67.
[354] *Supra* note 67.

(i) Afghani Criminal Justice System

Amnesty International has consistently stated its belief that long-term security and development in Afghanistan will only be achieved in a climate in which human rights and the rule of law are respected. The organization asserts that a massive overhaul of the Afghani criminal justice machine is needed to ensure that access to justice – and the administration of justice in accordance with international human rights law and standards – is guaranteed for all. Amnesty International points to serious failings in the criminal justice system which continue to hamper the delivery of effective justice and rule of law in Afghanistan, including:

a. A judiciary with unqualified judicial personnel, susceptible to external pressure;
b. A poorly trained, poorly paid police force, susceptible to external pressure;
c. The threat to judicial independence by pressure from armed groups, persons holding public office, warlords and private individuals;
d. Unfair trial procedures, including violations of the right to call and examine witnesses and the denial of defendants' rights to legal defence and access to information;
e. Lack of confidence in or access to the formal justice system resulting in reliance on informal justice systems, especially in rural areas;
f. A continued culture of impunity, notably the passing of the February 2007 Amnesty Bill, which absolved the Afghan government of responsibility to bring to justice suspected perpetrators of past human rights violations and crimes under international law, including war crimes and crimes against humanity.[355]

In order to accelerate progress, Amnesty International, as a matter of urgency, calls on the Government of Afghanistan and its international partners to co-ordinate efforts to reform the justice sector and establish the rule of law and provide sustained financial support that will result in meaningful change.[356]

(ii) Threats to the Independence of the Judiciary

Amnesty International is concerned that the judiciary does not currently receive the required support to resist the pressures upon it. The failure of the international community to terminate the influence of armed groups and to improve the national security situation has left the judiciary extremely vulnerable. In addition, the failure to ensure proper security for the courts, judicial personnel, victims and witnesses has undermined further the capacity of the judicial system to act independently. The organizations points to specific threats to the independence of the judiciary:

a. Pressure, including threats and intimidation of armed groups;
b. Interference in the judicial process by people holding public office;
c. Pressure on the judiciary by family members;
d. Judicial corruption;

---

[355] Amnesty International (29 June 2007). Public Statement: Afghanistan: Justice and rule of law key to Afghanistan's future prosperity. AI Index: ASA 11/007/2007.
[356] *Supra* note 76.

e. Lack of resources for members of the judiciary, including low salaries.[357]

As a consequence, certain individuals remain above the law because of their place in the community or because they are able to use threats, intimidation and other forms of pressure to influence judicial proceedings. Amnesty International calls on the government of Afghanistan, as well as its international partners, to emphasize the need for an independent judiciary. This will be achieved by addressing the above-mentioned threats, and providing sound strategies to limit the effects of armed groups on a fair and impartial judicial process.[358]

3. Human Rights Watch

(i) Individual Criminal Responsibility under International Law

Human Rights Watch has criticized the government of Afghanistan, the United Nations, and other international monitoring mechanisms for failing to hold individuals accountable for war crimes during the ongoing Afghan conflict. In a report which focuses primarily on abuses in Kabul between 1992 and 1993, the organization has demonstrated a distinct lack of accountability on the part of the Afghani security forces to protect civilians against abuses.[359]

The organization states that all individuals, including factional leaders, military commanders, soldiers and civilians, are subject to prosecution for war crimes, crimes against humanity, and applicable domestic crimes. Individual criminal responsibility for war crimes committed during internal armed conflicts has been explicitly provided for in a number of international treaties since the early 1990s. These include the statutes for the international criminal tribunals for the former Yugoslavia and Rwanda, as well as the international criminal court, and multilateral treaties such as Amended Protocol II to the Convention on Certain Conventional Weapons. During the armed conflict in Afghanistan, various entities called on all parties to the conflict to respect international humanitarian law.[360]

As such, persons who commit war crimes may be held criminally liable; they may also be held criminally responsible for assisting in, facilitating, aiding, or abetting the commission of a war crime.[361] In addition, leaders, commanders and troops who deliberately order or commit widespread or systematic murder, enslavement, mutilation, or rape of civilians can also be held individually liable for crimes against humanity. Crimes against humanity give rise to universal jurisdiction, do not have a statue of limitations, and do not admit the defense of following superior orders.[362]

Commanders and other leaders may be criminally responsible for war crimes or crimes against humanity committed by troops under their command; this is known as command responsibility. For the doctrine of command responsibility to be applicable,

---

[357] Amnesty International (14 August 2003). Report: Afghanistan: Re-establishing the Rule of Law. AI Index: ASA 11/021/2003.
[358] *Supra* note 78.
[359] *Supra* note 2.
[360] International Committee of the Red Cross. Press Release no. 1712, May 5, 1992, cited in ICRC, Customary International Humanitarian Law, vol. 2, ch. 43, sec. 138.
[361] International Committee of the Red Cross, Customary International Humanitarian Law, rule 151.
[362] *Supra* note 2.

two conditions must be met. A de facto superior-subordinate relationship must exist, and the superior must exercise effective control over the subordinate. Effective control includes the ability to give orders or instructions, to ensure their implementation, and to punish or discipline subordinates if the orders are disobeyed.[363]

The organization contends that the military structure within Afghanistan is such that both conditions are met, and therefore military commanders are criminally liable for any human rights violations which occur under their supervision. It is also of note that insurgent groups follow the same pseudo-military structure, and are therefore liable under the same humanitarian law. Consequently, Human Rights Watch calls for the strengthening of international monitoring mechanisms, as well as increased vigilance on the part of international governments, to hold individuals accountable for war crimes.[364]

(ii) Effects on Free Expression, Security, and Political Activity

Human Rights Watch is particularly concerned about threats and abuses against journalists and political actors in the heated political environment in Afghanistan, particularly in the lead-up to and during the elections. In a 2003 report, the organization documented many cases of several commanders and high-ranking Kabul officials repeatedly targeting Afghan journalists and other members of the media.[365] Many political organizers and civil society organizations have also been targeted, and members of these groups have been given death threats and found themselves under arbitrary arrest. Additionally, activists for women's rights have been intimidated and silenced.[366]

Outside of Kabul, local commanders also stifle media activity. In several provinces, Human Rights Watch documented incidents of local leaders threatening journalists, and found a climate of pervasive fear among journalists and political and civic activists. This has created in many places an atmosphere in which free expression and political organization are essentially impossible. Fears essentially stem not only from ongoing abuses, but also from the memory of abuses committed by current rulers when they were previously in power in the early 1990s, before the Taliban seized power. As one woman in a rural area explained: "We are afraid because we remember the past."[367] In light of these fears, Human Rights Watch calls upon the government of Afghanistan, as well as its international parties, to end the culture of impunity which suppresses freedom of speech.[368]

(iii) The Failures of Afghan and International Actors

---

[363] The International Criminal Tribunal for the former Yugoslavia (ICTY) has defined "effective control" under existing international law as the superior "having the material ability to prevent and punish the commission" of violations of international humanitarian law: A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by subordinates. It follows that there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offense and, accordingly, cannot properly be considered their "superiors."

[364] *Supra* note 2.

[365] *Supra* note 2.

[366] *Supra* note 2.

[367] Human Rights Watch interview with H.D., Kabul, March 13, 2003. The names of persons interviewed for this report have been disguised with initials not derived from their real names to ensure their security.

[368] *Supra* note 1.

Human Rights Watch contends that not enough is being done to address Afghanistan's ongoing human rights and security problems. The Afghanistan Independent Human Rights Commission, which significantly increased its activities in the first half of 2003, has little power to affect the situation beyond cautiously monitoring abuses and calling for change. The commission has little protection, and commission members are understandably fearful of challenging warlords on their own. The United States and the international community, as major power brokers in Afghanistan, have put too little pressure on military leaders outside of Kabul to obey President Karzai's authority, to uphold human rights standards, or to relinquish power. Their continued funding, joint operations, and fraternizing with warlords has sent, at best, mixed messages about their goals and intentions.[369]

Of particularly concern to Human Rights Watch is the failure of Provincial Reconstruction Teams (PRTs) to fulfill their international obligations. The deployment of international military-civilian PRTs has had mixed results at best; however, this should not be surprising given the size and scope of their current mandate. It is still unclear if these teams — which number approximately sixty to one-hundred troops and officials, and focus primarily on humanitarian and development work — will be able to improve security significantly or to monitor disarmament. Human Rights Watch believes the way to address the limitations of the International Security Assistance Force (ISAF) is to expand it to provinces outside Kabul, as called for by the U.N. mission. Until this is done, Human Rights Watch urges the United States and other PRT contributors to expand the numbers of PRT teams and their size and to limit their mandates to security, disarmament, and human rights protection rather than humanitarian or development efforts. The latter are more appropriately handled by the Afghan government, the U.N., and non-governmental organizations (NGOs).[370]

Human Rights Watch urges Afghanistan's warlords — many of whom were leaders in the fight against the Taliban and Soviet Union — to step aside and allow civilian governance. The organization also reminds international third parties that the message should be clear from both Kabul and the world's capitals: the future of Afghanistan does not lie in militarization and rule of the gun, but in demilitarization and rule of law. Tens of thousands of former fighters and their commanders have to be demobilized, disarmed, and integrated back into society, and Afghanistan has to be put firmly under civilian rule. Only then — when troops and commanders from the past are made civilians — will both endemic fighting and endemic human rights abuses by security forces be put to an end.[371]

IV. Judicial Opinion

The Trial of Assadula Sarwari: This 2005 trial marks the first of its kind for war crimes after three decades of continuous conflict in Afghanistan. A former intelligence chief, Sarwari faced charges of torture and war crimes connected to killings which occurred during the country's former communist government. Sarwari had been in detention in Afghanistan since 1992, when *mujahedin* factions overthrew the Soviet-backed communist regime. Appearing before the National Security Court on 26 December 2005,

[369] *Supra* note 1.
[370] *Supra* note 1.
[371] *Supra* note 1.

Sarwari stated that his incarceration was illegal and continued to deny the charges against him. For his role in the regime under former communist ruler Nur Mohammad Taraki, Sarwari was sentenced to death on 25 February 2005.[372]

The trial itself was the source of much controversy, and produced divided opinions among human rights groups working in Afghanistan. Indeed, observers on both sides agreed that the trial marked a turning point as Afghanistan tries to come to grips with its bloody past. Nader Nadery, a spokesman for Afghanistan's Independent Human Rights Commission, said the Sarwari trial was a significant that the culture of impunity may be ending in Afghanistan. He added that the trial demonstrates a "commitment to justice, by the Afghan government in that there will be no amnesty for crimes against humanity and war crimes".[373]

Human Rights Watch, however, expressed a different opinion. In a March 2 press release, the organization expressed its concern over the trial of Asadullah Sarwari, suggesting that it "violated basic fair-trial and due-process standards". According to HRW, Sarwari did not have legal counsel at his trial because he could not afford a lawyer and the court could not find a lawyer willing to represent him. Sam Zarifi, the research director of Human Rights Watch's Asia division, stated "A notorious human rights abuser has been convicted but his trial was so flawed that it actually represents a setback for the cause of justice in Afghanistan". Human Rights Watch called for the court of appeals to throw out this conviction and "show that in today's Afghanistan, the rule of law applies, even to the most notorious former leaders".[374]

The Trial of Habibullah Jalalzoy: From 1979 until 1992, under the regime of Soviet-backed president Najibullah, Jalazoy was the head of a unit charged with interrogations within the military intelligence of the KhAD (Khedamat-e Etelea'at-e Dawlati, the regime's secret police set up in 1980 to suppress its internal opponents). In 1996, Jalalzoy applied for asylum in the Netherlands but was turned down in 2000 due to his role in the KhAD and suspicions of human rights abuses. He continued, however, to live in the Netherlands. He was arrested in late 2004 following investigations undertaken by the Netherlands National Investigation Team for War Crimes, a special team set up to investigate and prosecute war crimes and crimes against humanity with a special mandate to screen asylum seekers. His arrest occurred under a law allowing the Dutch justice system to prosecute asylum seekers for war crimes and crimes against humanity allegedly committed in their home countries.[375]

Dutch prosecutors accused him of a catalogue of war crimes and crimes against humanity, including killings and incidents of brutal torture. His trial generated some controversy, as his defence lawyers argued that a large amount of the evidence against him was inadmissible. His defense counsel also claimed that the Prosecutor be discharged from his post for unlawfully amending the indictment and making inappropriate use of immigration files. Despite these pleas, however, Jalalzoy was convicted and handed a

---

[372] Radio Free Europe (2 March 2006). Newsline: "Human rights group calls death sentence against former Afghan communist spy chief 'flawed'". Available at: http://www.rferl.org/content/article/1143585.html.
[373] *Supra* note 93.
[374] Radio Free Europe (28 December 2005). Report: (Un)Civil Societies Report: War Crimes Trial Marks Break with Past. Vol 6(18), available at: http://www.rferl.org/content/article/1347190.html.
[375] Trial Watch (2009). "Habibullah Jalalzoy". Retrieved 18 August 2009, available at: http://www.trial-ch.org/en/trial-watch/profile/db/facts/habibullah_jalalzoy_392.html.

sentence of 9 years. He appealed his conviction on the grounds that Dutch judges had no jurisdiction over his case; his appeals to the Supreme Court were denied.[376]

The Trial of Heshamuddin Hesham: From 1983 until 1991, under the regime of Soviet-backed president Najibullah, Heshamuddin Hesam was the head of the Afghan military intelligence of the KhAD (Khedamat-e Etelea'at-e Dawlati). He later became secretary of state attached to the security ministry before going to Moscow as a military attaché. According to human rights groups investigating the allegations of war crimes throughout the country, Afghan intelligence workers tortured more than 200,000 people during that period, of which 50,000 were killed. The court summons explicitly stated that Hesham was responsible for the death of one particular detainee who had been beaten with sticks and had his skin ripped off with pliers. The summons also alleged that Hesham had ordered the deaths of many others, who were subjected to electric shocks.[377]

In 1992, after Islamic *mujahedin* guerrilla forces closed in on Kabul after 14 years of civil war against the Soviet-backed Communist government, Heshamuddin Hesam applied for asylum in the Netherlands. His application was denied but for years he continued to live with his family in the central Dutch town of Boskoop. He was arrested in late 2004 following investigations undertaken by the Netherlands National Investigation Team for War Crimes, and charged in conjunction with Habibullah Jalalzoy.

His defence counsel argued that the allegations were "vague", that several alleged victims' identities were unclear, and that some of the witnesses had died since the alleged crimes took place. Counsel also contested whether the allegations fell within the scope of the law, and called into question the jurisdiction of the Dutch courts over the case. Despite these arguments, however, Hesham was convicted on all counts and given a sentence of 12 years. His appeals to the Supreme Court over his sentence were unsuccessful.[378]

The Trial of Faryadi Zardad: After the withdrawal of Soviet troops from Afghanistan, Sarwar Zardad, a former *mujahedin* fighter, rejoined the group of warlord Gulbuddin Hekmatyar known as the Hezb-I-islami. From 1992 to 1998, he was in control of a checkpoint located in Sarobi on the route between Kabul and Pakistan. Known as Commander Zardad or Zardad Khan, he controlled more than one thousand men who terrorized, tortured, imprisoned, blackmailed and killed civilians passing by this important route.[379] One widely publicized allegation regarding Zardad, was that one of his militia, Abdullah Shah, viciously bit prisoners and had even eaten at least one victim's testicles.[380]

As a result of the Talibans' rise to power in Afghanistan in 1996, Zardad arrived to the United Kingdom in 1998, fearing persecution and seeking asylum with a faked passport. He was eventually arrested in July 2003, in a small town south of London. The day after

---

[376] *Supra* note 96.
[377] Trial Watch (2009). "Heshamuddin Hesham". Retrieved 18 August 2009, available at: http://www.trial-ch.org/en/trial-watch/profile/db/facts/heshamuddin_hesam_391.html.
[378] *Supra* note 98.
[379] BBC News (18 July 2005). "Afghan warlord guilty of torture". Available at: http://news.bbc.co.uk/1/hi/uk/4693239.stm.
[380] *Supra* note 100.

his arrest, he was charged with 16 offences relating to his time as a military commander during the Afghan civil war.[381]

Although his crimes took place outside of the U.K., there is much international precedent to support that the crime of torture falls under universal jurisdiction; as such, the U.K. is obliged to uphold the United Nations Conventions Against Torture, and prosecute the accused. The trial commenced in October of 2004, with Zardad pleading not guilty to all charges.[382]

Zardad's first trial resulted in a hung jury, and the trial judge suspended the case until a further date. He was eventually retried in 2005, and the second trial heard evidence from 16 witnesses via video link to the embassy in Kabul. The trial included evidence of:

a. Summary executions and hostage taking;
b. The killing of 10 or 11 men in a minibus while their families stood on the side of the road;
c. An elderly man whipped and locked in a metal cupboard;
d. A man having petrol poured over him whilst Zardad's militia joked about setting fire to him;
e. A small boy witnessing his father's ear being cut off.[383]

The second jury found him guilty and sentenced him to 20 years imprisonment. Additionally, the trial judge ordered Zardad to be deported to Afghanistan upon his release.[384]

V. Annex

Case Studies: Human Rights Abuses in the name of Afghani Security

During the normal course of research, this report discovered a staggering amount of allegations of human rights abuses. It is certain that many, many more exist, and are simply unreported in any official medium. The three case studies mentioned below have been substantiated by civil society organizations, and highlight areas of Afghani security policy which have not previously been mentioned in the course of this report.

1. The Case of Mohammed S.

Mohammed S., a politically active leader in Kabul who tried to organize a new political group before the *loya jirga*, has claimed that agents of the Amniat-e Melli arrested, interrogated, imprisoned and threatened him with torture for his political activities. He has also alleged the agents questioned him about his activities and forced him to name his follow organizers. He was detained for just over three months and

[381] Sturcke, James (18 November 2004). "Afghan warlord could face retrial". The Guardian. Availablat at: http://www.guardian.co.uk/afghanistan/story/0,,1354414,00.html.
[382] Tighe, Andy (18 July 2005). "No impunity for warlords in UK". BBC News, available at: http://news.bbc.co.uk/1/hi/uk/4007065.stm.
[383] Wikipedia, The Free Encyclopedia (18 July 2009). "Faryadi Sarwar Zardad" Retrieved 18 August 2009, from http://en.wikipedia.org/w/index.php?title=Faryadi_Sarwar_Zardad&oldid=302764759.
[384] Haynes Deborah (20 July 2005). "Afghan warlord-pizza man gets 20 years jail in UK". Middle East Times. Available at: http://metimes.com/print.php?StoryID=20050720-033648-3285r.

eventually released in June of 2002, although he continued to receive constant threats throughout the following year.[385] He alleged that his conditions while imprisoned amounted to torture, and included the following incidents:

a. No food or water for two days;
b. No access to toilet facilities;
c. Shackling to the ceiling, requiring the detainee to stand on the tips of his toes, and remain in this position throughout the night;
d. The use of fully charged electric wires to elicit confession and information;
e. Beatings with various instruments, including a whip made from a piece of tire.[386]

After Mohammed S. was released, he continued to fear that Amniat-e Melli agents would kill him. In late 2002, his brother, who was also involved in political organizing, was shot and killed in his car in Kabul. Mohammad S. has now curtailed most of his political organizing activities, and admitted to Human Rights Watch that he continues to meet fellow political sympathizers in secret.[387]

2. The Case of H. Rahman

In late 2002, a small political party in Kabul, in association with some members in other provinces, began publishing a bulletin with commentary and articles about political issues in Afghanistan.[388] In November 2002, the party published a series of articles criticizing the makeup of the Afghan cabinet, specifically criticizing the fact there were several members of the government who were involved in fighting around Kabul in the early 1990s. The party leader, "H. Rahman,"[389] began to receive threats in late November 2002, including threats from the current education minister and Shura-e Nazar leader, Younis Qanooni. In fact, Qanooni himself was alleged to have called Rahman and utter the following threat: "Your paper is a source of scattering and division between the *mujahedin* and the people. You create conflict between us that can not be solved and will finally result in catastrophe."[390]

Despite almost daily threats which were made in person, through letters and over the phone, the political party continued to publish information which was unfavorable to the government. In late May 2003, Rahman was driving into Kabul city after visiting a friend in neighboring Logar when he was followed by soldiers in a car who threatened him with Kalashnikovs. Rahman tried to flee, he said, and after a car chase, he made it to a bazaar, where the soldiers crashed into his car and surrounded him, guns drawn. The soldiers took Rahman out of his car, threw him to the ground, and beat him severely with kicks and rifle butts.[391]

Due to the confidential nature of the interview which appeared in a 2003 Human Rights Watch publication, this report could not determine if the political party is still active or not.

---

[385] *Supra* note 1.
[386] *Supra* note 1.
[387] *Supra* note 1.
[388] Human Rights Watch interview with H.O.R., Kabul, February 19, 2003.
[389] The name of the interviewee has been changed for security reasons.
[390] *Supra* note 1.
[391] *Supra* note 1.

3. The Case of Aftab Newspaper

The newspaper *Aftab* ("the Sun") is an independent Kabul paper. In March 2003, *Aftab* began publishing editorials and opinion pieces increasingly critical of former *mujahedin* commanders and religious leaders in Kabul, especially those involved in fighting in Kabul in the early 1990s. The articles criticized a range of people, including the Minister of Defense Mohammad Qasim Fahim, Minister of Education Younis Qanooni, Minister of Planning Haji Mohammad Mohaqiq, Vice-President Mohammad Karim Khalili, former president Burhanuddin Rabbani, and Abdul Rabb al-Rasul Sayyaf. For example, in its March 18, 2003 issue, *Aftab* published an article about connections between religion and military power in Afghanistan, claiming that religious leaders "legitimized warlordism."[392] In its March 27 issue, *Aftab* published an article strongly critical of former president Rabbani, with a pencil drawing of Rabbani destroying houses in Kabul in the early 1990s, and an article critical of Sheikh Mohammad Asef Mohseni, a Shi'a *mujahedin* leader and original head of the political organization Harakat-e Islami.[393] In the first week of April, *Aftab* published an article entitled "Secularism as a third approach," and in the next issue, on April 12, an article critical of the conservatism and past military activities of Sayyaf and his party, Ittihad-e Islami.[394]

During this time, *Aftab*'s editor, Sayeed Mir Hussein Mahdavi, began to receive anonymous death threats over his mobile telephone.[395] According to Mahdavi, another journalist told him that Education Minister Qanooni had complained about *Aftab* during a public meeting of the Shura-e Nazar (a political subgroup of the Jamiat-e Islami) and that the Agricultural Minister Sayeed Hossein Anwari was furious with him. At the end of March, the electricity to *Aftab*'s office was cut. When Mahdavi asked utility personnel in Kabul for an explanation, they told him that Anwari ordered them to cut off *Aftab*'s electricity. Mahdavi then visited Anwari, who, he claims, angrily told him that he "could no longer tolerate seeing someone from the commonwealth of Muslim people talk against Islam."[396]

After months of steadily increasing threats and intimidation, a terrified Mahdavi contacted other journalists and international organizations for help. The case began to receive international media attention,[397] and the threats tapered off. But then, on June 17, Kabul police arrested Mahdavi and another *Aftab* editor, Ali Payam Sistany, after *Aftab* printed a set of articles calling for political pluralism, discussing manifestations of Islamic undamentalism in Afghanistan, and criticizing Fazel Hadi Shinwari, the Chief Justice of Afghanistan, and clerical leaders in Afghanistan generally.[398] According to other officials familiar with the case, the chief justice of Afghanistan, Fazel Hadi Shinwari, asked police officials in Kabul to arrest Mahdavi and Sistany for charges of

---

[392] Aftab, March 18, 2003.
[393] Aftab, March 27, 2003.
[394] Aftab, April 9, 2003; Aftab, April 12, 2003.
[395] Human Rights Watch interview with Sayeed Mir Hussein Mahdavi in Kabul on April 17, 2003.
[396] *Supra* note 1.
[397] Pitman, Todd (7 May 2003) "Afghan journalists test boundaries of press freedom in post-Taliban era," Associated Press.
[398] Aftab, "Sacred Fascism," and "Religious Government Equals Despotism," June 15, 2003 (translation on file with Human Rights Watch).

"blasphemy" after he had received complaints from several clerical leaders in Kabul.[399] Shirwari then convinced the Attorney General's Office to file charges of blasphemy against Mahdavi and Sistany.[400] Kabul police held the two editors for a week. President Karzai ordered them released on June 25, but said that they would still have to stand trial for blasphemy. At the time of writing, this report could not determine the present status of their charges, if any.

[399] Human Rights Watch interview with U.N. officials and Afghan government officials, Kabul, June 22 and 23, 2003.
[400] *Supra* note 107.

Counter-Terrorism Law in Pakistan

> *"This is a recipe for turning an innocent person into a suspect, and a suspect into a culprit -- even a dead culprit. The law almost assumes guilt. It makes things as difficult for the accused as possible behind the figleaf of due process."* [401]

Pakistan has been termed a persistently failing state; that is, a state that exhibits many of the features of a "failed state"[402] but that somehow manages not to collapse and disintegrate.[403] As South Asia correspondent Stephen Cohen wrote in 2002, the Pakistani state has been failing for many years and the collapse of the state would 'be a multidimensional geostrategic calamity, generating enormous uncertainties', but 'it is simply too big and potentially too dangerous for the international community to allow it simply to fail'.[404] Once again, analysts fear that Pakistan is on the brink of disaster and even cautious voices are airing the possibility that this time the state may be unable to draw back from the edge of the abyss.

Certainly, the signs are ominous: the Taliban are back in force along the Pakistan – Afghanistan border; the power of pro-Taliban militants and tribal groups is growing within Pakistan; subnational violence—including the relatively new phenomenon of suicide bombing—has reached Islamabad and Rawalpindi; al-Qaida are resurgent within Pakistan; the Pakistan Army is bruised, weary and riven by internal dissent as a result of its operations in the tribal areas and the civil conflict in Balochistan. Faced with a resurgent Taliban in Afghanistan and undeniable evidence that Pakistani territory shelters the same, the government is under severe pressure from the United States for making insufficient progress in the 'War on Terror'. Offstage, voices continue to be raised about Pakistan's ongoing role in proliferating nuclear weapons technology,[405] and about the destabilising impact of Pakistan within South Asia and across the international system

Indeed, Pakistan is no stranger to terrorist acts; the country has been rife with conflict since its inception in 1947. From ongoing conflict in Pakistan-controlled Kashmir to tribal conflict along the Afghan border to recent military upheaval in the Swat valley, Pakistan has endured more than its fair share of internal conflict and threats to its borders. As a result from international pressure and increasing state-wide violence, the Anti-Terrorism Act of 1997 was enacted to deal with the issue of terrorist activity.

Described as "appropriate administrative and judicial measures" adopted in the fight against "a spate of terrorist activities and commission of heinous offences in Pakistan"[406], these anti-terrorism laws have opened the door for grave violations of human rights including the right to life, the prohibition of torture, the right to liberty and security and

---

[401] Siddiqui, Aziz (17 August 1997). Human Rights Commission of Pakistan, as quoted in Dawn.
[402] Hehir, Aidan (June 2007). "Is Pakistan a Failed State?" Pakistan Security Research Unit Briefing Paper No 15. http://spaces.brad.ac.uk:8080/download/attachments/748/Brief15finalised1.pdfi.
[403] Talbot, Ian (1998). Pakistan: A Modern History (New York: St Martin's Press.
[404] Cohen, Stephen (2002). 'The nation and the state of Pakistan', *The Washington Quarterly*, Vol 25, No 3, pp.109, 118.
[405] Adrian Levy and Catherine Scott-Clark (2007). Deception: Pakistan, the United States and the Global Nuclear Weapons Conspiracy (London: Atlantic Books).
[406] Interior Minister Chaudhry Shujaat Hussain, during the presentation of the 1997 Anti Terrorism Bill to the Houses of Parliament.

the right to fair trial. The Act has also classified many criminal actions, which are under the purview of the Pakistan Penal Code, as terrorism offences.[407]

In addition to the human rights concerns raised in the framework of counter-terrorist law, there are additional concerns raised by Pakistani policy in pursuit of the US-led "War on Terror". The Pakistani government has committed numerous violations of human rights protected in the Constitution of Pakistan and in international human rights law, including the right to life and the security of the person; to be free from torture and other cruel, inhuman or degrading treatment or punishment; to be free from enforced disappearance and to challenge the lawfulness of detention. Victims of human rights violations in the "war on terror" include Pakistani and non-Pakistani terror suspects, men and some women, children of terror suspects, sometimes held as hostages, journalists who have reported on the "war on terror" and medical personnel who allegedly treated terror suspects.[408]

While Pakistan bears full responsibility for such human rights violations, its partners in the coalition pursuing the "War on Terror" must bear their share of responsibility for assisting or condoning Pakistan's human rights violations. This report will show that Pakistan's foreign allies, chief among them the USA and the United Kingdom, have encouraged, condoned or acquiesced in grave violations of human rights and failed to use their influence to end them.

The Anti-Terrorism Act of 1997

On 18 January 1997, Mehram Ali, a foot soldier of the Shia militant organization Tehrik Nifaz Fiqh-i-Jafaria (TNFJ), detonated a remote controlled pipe bomb in the grounds of the district court complex in Lahore. When the debris settled, the bodies of twenty-three victims were found, and fifty-five others were injured in the blast. Mehram Ali was caught at the scene, but his trial before the Sessions court dragged on for a considerable amount of time. The case generated considerable press coverage and provided the context, perhaps the pretext, for the government's introduction of the Anti-Terrorism Act of 1997, which came into effect on 20 August. The Mehram Ali case was transferred to the newly constituted special Anti-Terrorism Court (ATC) in late August, where Ali was awarded a death sentence, convicted for twenty-three counts of murder, and various other sentences related to the bombing. Although the Supreme Court upheld his death sentence, the court also declared most of the 1997 Anti-Terrorism Act unconstitutional.[409]

The motives for the introduction of the Anti-Terrorism Act were mixed. Clearly, Pakistan had suffered from very significant communal and sectarian violence for the past several years, and the regular criminal justice system had not been able to curb such violence. In this context, the ATCs, with their "promise" of speedy justice, unencumbered by the procedural niceties of the regular court system, would serve as a

---

[407] Amnesty International (September 2006). Report: Pakistan: Human Rights Ignored in the War on Terror. AI Index: ASA 33/036/2006.

[408] Quoted in The Washington Post, 8 September 2006.

[409] Kennedy, Charles (2004). "The Creation and Development of Pakistan's Anti-terrorism Regime, 1997–2002", in Religious Radicalism and Security in South Asia. Asia Pacific Center for Security Studies: Hawaï.

deterrent to would-be terrorists. However, the Act was also seen as a vast departure from the normal legal system.[410] New crimes included within the purview of the act were:

a. Murder;
b. The malicious insult of the religious beliefs of any class;
c. The use of derogatory remarks in respect of the holy personages;
d. Kidnapping; and
e. Various statutes relating to "robbery and dacoity."[411]

Clearly, terrorism as defined by the act was in the "eyes of the prosecutor," that is, the terms of the act could be interpreted to include virtually any violent act, or encouragement of the commission of a violent act. The Anti-Terrorism Act also incorporated a definition of "terrorism" so broad that the Act itself is accused of violating a number of human rights.[412]

I. Mechanisms for Comparison

1. Definition of Terrorism: As stated in the Act, the definition of terrorism is overly broad and problematic. An act of terrorism includes any act which is designed to strike terror, alienate, or "adversely affect harmony among different sections of the people". The compelling of a public servant, through the use or threat of force, to carry out specific actions or preventing them from discharging their lawful duties is also considered an act of terrorism. The definition goes on to list a litany of devices and weapons which might be used to carry out these objectives.

2. Search and Seizure: If there are reasonable grounds for suspecting that a person has possession of written material or a recording in contravention of section 8 of the Act, any officer of the police, armed forces or civil armed forces may enter and search the premises and take possession it. There is a clause in the act which requires that "the concerned officer first record in writing his reasons and serve a copy thereof either on the person or on the premises", this rarely enforced. Essentially, Security forces may, without needing court approval, restrict the activities of terrorism suspects and seize their assets.

3. Arrest: The seizure of terror suspects is routinely carried out without an arrest warrant, the arrest is not formally registered in a police station, no information is given to the detainee as to the grounds of arrest and no criminal charges are filed and investigated. Furthermore, the arrested person has no opportunity to contact a lawyer and to inform the family of their fate or whereabouts. The legal requirements of arrest, which are required by the Pakistani constitution, are circumvented in the case of terror suspects because the investigative work of police and other security agencies has been deemed as insufficient to secure convictions; in order to avoid having to release suspects, they were held unlawfully without reference to any law. Human rights groups have suggested that

[410] Anti-Terrorism Act, 1997 (20 August 1997). PLD 1997 Central Statutes (unreported) 535.
[411] *Supra* note 7.
[412] *Supra* note 7.

officials may be encouraged to arrest people who are completely unconnected to terrorist groups just to show the country's "success" in the "War on Terror".[413]

4. Pre-Charge Detention: Those suspected of terrorism offences can be held for up to one year without trial under the Anti-Terrorism Act, if their name is listed as belonging to a banned group and provided the government is satisfied that "it is necessary so to do". However, the police are required to give notice to a detainee of such detention and provide grounds which the detainee can challenge arrest. In practice, however, this is rarely the case. Under the Anti-Terrorism Act, security forces may, without needing court approval, detain a suspect for as long as one year without charges.

5. Sunset Clause: The Anti-Terrorism has not been fitted with a sunset clause; it has become a permanent piece of legislation in Pakistan.

6. Bail: The Act states that only special courts may grant bail to anyone tried for offences under the Act, but a defendant may not be released on bail "if there are reasonable grounds for believing that he has been guilty of the offence with which he has been charged" and unless the prosecution has been given an opportunity to object to the person's release.

II. Pakistani Counter-Terror Legislation and the Incompatibility with Human Rights

1. Arbitrary Arrests and Detentions

Anyone held in Pakistan for alleged links to al-Qa'ida or the Taliban have been arrested and detained without reference to any national or international human rights guarantees. Custodial safeguards have been blatantly ignored, and the protection of the law has been routinely denied. According to domestic Pakistani law, arrests are required to be carried out in most cases by police presenting a valid arrest warrant; yet most of the hundreds of terror suspects detained since 2001 have not been arrested in this way. In fact, most were charged with a recognizable criminal offence. In addition to their detention going unrecorded in secret detention facilities, they were held incommunicado - denied access to a lawyer and family.[414]

Many detainees appear to have been held solely in order to obtain information without any intention of bringing criminal charges against them – for which there is no provision in Pakistani law. Many have been detained by Pakistani intelligence agencies – often on behalf of, or in the presence of, U.S. personnel. The fate and/or whereabouts of many of these detainees remain unknown.[415]

2. Involvement of U.S. Personnel

Of concern to human rights organizations, particularly Human Rights First, is the alleged involvement of U.S. personnel in the arbitrary arrest and detention of terrorist

[413] *Supra* note 5.
[414] *Supra* note 5.
[415] *Supra* note 5.

suspects, as well as the maintenance of U.S. secret detention facilities in Kohat and Alizai.[416] U.S. intelligence agents are also alleged to have taken control of known places of detention in Pakistan, without declaring such places to be under U.S. control, and to have held terror suspects in incommunicado detention there. They are also alleged to have been aware of or participated in torture or other ill-treatment, and to have moved detainees to other unofficial or secret detention centres, including in Afghanistan.

The use of Kohat prison by U.S. personnel has been reported by various sources. For example, journalists in Peshawar have told Amnesty International that ordinary detainees and staff were moved from sections of Kohat prison in late 2001.[417] Human Rights First claimed that around that time, U.S. officials freely questioned terror suspects at Kohat prison and determined which amongst them were to be moved to Guantanamo Bay.[418] Javed Ibrahim Paracha, a former member of parliament from Kohat, alleged in January 2002 that 15 detainees accused of links with al-Qa'ida or the Taliban, including Shaikh Salah, were transferred from Kohat prison to the airport in a humiliating manner in the middle of the night. He said that Shaikh Salah was "handcuffed, shackled and stripped of almost all his clothes when he was being taken to the airport". At the airport the men were, Paracha alleged, handed over to U.S. officials waiting in planes.[419] According to Pakistan media reports, in September 2003, US officials were given full authority over Kohat airport.[420]

The involvement of U.S. authorities in Pakistan implies that Pakistani officials may be complicit in human rights abuses. It also violates the UN Human Rights Committee's statement in July 2006 that the USA should "immediately abolish all secret detention and secret detention facilities".[421] Finally, it is also a violation of the ICCPR, which holds that secret detention is tantamount to torture.[422]

3. Implementation Problems:

Similar to the problem facing Indian counter-terrorism policy, the real barrier to policy effectiveness in Pakistan is tied to the infrastructure of law enforcement and intelligence agencies. Most notably, Pakistan's deficient and flawed law enforcement capacity in the Federally Administered Tribal Areas (FATA) and the adjacent North West Frontier Province (NWFP) have helped Pakistani Taliban and other terrorist groups expand their influence and strongly challenge the state's writ. Outgunned and out-financed, on average 400 police officers have been killed every year in terrorist attacks since 2005.[423] Controversial and haphazard Pakistani military action in the area has led to more instability, and limited resistance in FATA has now become a growing ethnic

---

[416] Human Rights First (June 2004). Report: Ending Secret Detentions.
[417] *Supra* note 3.
[418] Global News Wire (4 July 2002), as cited in Human Rights First. Report: Ending secret detentions, June 2004.
[419] *Supra* note 16.
[420] Director General Inter-Services Intelligence (ISI) Public Relations (ISIPR) Major-General Shaukat Sultan denied the handing over of Kohat airport to US control. (BBC, 19 September 2003.)
[421] Unite Nations Human Rights Committee, General Comment 20, Article 7.
[422] *Supra* note 5.
[423] Gannon, Kathy (5 December 2008). "AP IMPACT: Pakistan police losing terrorism fight," AP. Available at: www.aol.com.au/news/story/AP-IMPACT-Pakistan-police-losing-terrorismfight/1395141/index.html.

insurgency. As is clear from the turmoil in the NWFP's Swat district, any army action can provide no more than a breathing space to the state; only police and law enforcement actions can help the state reestablish its writ and stabilize the area

Indeed, the police infrastructure is one of Pakistan's most poorly managed organizations. It is aptly described as ill-equipped, poorly trained, deeply politicized, and chronically corrupt.[424] It has performed well in certain operations; overall, however, that is a rare phenomenon. Arguably, the primary reason for this state of affairs is the government's persistent failure to invest in law enforcement reform and modernization. It is ironic that despite frequent internal crises ranging from ethnic confrontations and sectarian battles to a sharp rise in criminal activity and growing insurgencies, both political and military policymakers have never given this sector top priority. Hence, poor police performance in counterterrorism and counterinsurgency is not surprising.

In a recent paper for the Institute for Social Policy and Understanding, Hassan Abbas has identified barriers to effective law enforcement in Pakistan:

a. Reliance on the outdated law of the Police Act of 1861, which provides the framework for an oppressive and authoritarian law enforcement mechanism;
b. Half-hearted implementation of the Police Act of 2002, which was intended to monitor policing activities;
c. Political manipulation;
d. Structural problems, such as responsibilities for each of Pakistan's four provinces falling to provincial policing agencies with different mandates and which independently from each other;
e. The policing *thana* culture, allegedly based on corruption, high-handedness and immunity from civilian reprisals;
f. Inadequate training and investigation facilities;
g. Lack of funding.[425]

Until these issues are addressed and resolved, counter-terrorism efforts cannot be fully effective.

4. Indemnity for Acts Done in "Good Faith"

Section 39 of the Act states that "no suit, prosecution or other legal proceedings shall lie against any person in respect of anything which is in good faith done or intended to be done under this act"; this is tantamount to providing impunity to the security forces for abuses, including extrajudicial killings. To explicitly place the acts of police or other law enforcement personnel, including acts of lethal force, outside scrutiny and accountability may give law enforcement personnel the impression that they may commit such acts with impunity. In this respect, the legislation breaches a fundamental requirement of the rule of law: its applicability to everyone, irrespective or position or status.[426]

---

[424] Rohde, David (30 September 2002). "Threats and Responses: Law Enforcement; Pakistan's Police Force Struggles to Find the Resources It Needs to Combat Terrorism," New York Times.
[425] Abbas, Hassan (April 2009). Police and Law Enforcement Reform in Pakistan: Crucial for Counterinsurgency and Counterterrorism Success. Institute for Social Policy and Understanding.
[426] Ortega, Kellie (2002). Anti-terrorist laws in Pakistan. Seminar Maganize, Issue no. 512.

5. Special Courts and Independence of Judiciary:

The Anti-Terrorism Act allows the government to use special streamlined courts to try violent crimes, terrorist activities, acts or speech designed to engender religious hatred, and crimes against the state. Cases brought before these courts are to be decided within seven working days, but judges are free to extend the period as required. Human rights activists criticized this expedited parallel system, charging that it is more vulnerable to political manipulation.[427]

The right to be tried by an independent and competent tribunal is also compromised by the Anti-Terror Act. Not only does the Act provide for the establishment of a special courts system to try terror offences, it also prevents people convicted and sentenced from using their right to appeal. Section 31 prohibits the appellate process in the judiciary, stating that any "judgment or order passed, or sentence awarded, by a special court, subject to the result of an appeal under this act shall be final and shall not be called in question in any court." This excludes the possibility of appealing to the regular high courts and the Supreme Court of Pakistan.[428]

On 31 January 2002, the Pakistan Government issued an ordinance for inclusion of military officers in panels of judges. Moreover, under Section 10(b) of the Pakistan Anti-Terrorism (Amendment) Ordinance, 1999, "the judge may be removed from office prior to the expiry of the said period in consultation with the Chief Justice," raising serious questions about the independence of judiciary. Under the current legislation, it is highly likely that the government could appoint any judge or military officer with government sympathies to try the case of suspected terrorists.

Article 14(1) of the ICCPR provides that "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law." It is evident that the Pakistani system of special courts is in clear violation of these principles.

6. Enforced Disappearances

Human rights organizations and others in civil society have loudly decried the government practice of enforced disappearances. Indeed, there is much evidence to suggest that while the practice of enforced disappearances began as a policy initially practiced in the context of the US-led "War on Terror", the military has begum to employ it as a tactic against activists involved in pushing for greater ethnic or regional rights.[429] Amnesty International claims that the Pakistani government has subverted human rights and the rule of law in the following ways:

a. Employing the tactic of enforced disappearances on children;
b. Failing to abide by judicial directions to end the practice;
c. Concealing the identity of detaining authorities;
d. Hiding the detained;

---

[427] *Supra* note 25.
[428] *Supra* note 25.
[429] Amnesty International (2008). Report: Denying the Undeniable: Enforced Disappearances in Pakistan. AI Index: ASA 33/018/2008.

e. Silencing the victims of enforced disappearances, through intimidation, threats, and extrajudicial killings;
f. Laying of spurious criminal charges to keep the detained in custody;
g. Failing to hold intelligence agencies to account.[430]

Official Supreme Court transcripts[431] obtained by Amnesty International, together with affidavits from people released following periods of enforced disappearance and communications from lawyers representing persons subjected to enforced disappearance show that government officials, particularly from the country's security forces, when called before the Supreme Court of Pakistan and the provincial high courts, resorted to a variety of means to avoid enforced disappearances being exposed.[432]

7. Arbitrary or Unlawful Deprivation of Life

There is overwhelming evidence to suggest that police routinely commit extrajudicial killings. In a 2008 U.S. State Department report on the state of human rights in Pakistan, it is alleged that targeted killings of political dissidents resulted from staged encounters and excessive physical abuse while in official custody. [433] In November the Pakistani human rights group Society for Human Rights and Prisoners' Aid (SHARP) reported 64 civilian deaths after encounters with police, and 101 deaths in jails. The police stated these deaths occurred when suspects attempted to escape, resisted arrest, or committed suicide. Human rights observers, family members, and the media, however, reported security forces staged many of the deaths.[434]

These deaths do not go completely unnoticed; the government frequently investigated, and sometimes convicted, police officials for extrajudicial killings. In August 2008, the inspector general of the Punjab Police reported its provincial police force disciplined 973 officials for a variety of crimes. Lengthy trial delays and failures to discipline and prosecute those responsible for abuses, however, consistently contributed to a culture of impunity.[435]

III. Concerns from Human Rights Organizations

1. The United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions Bacre Waly Ndiaye

(i) Use of Death Penalty

---

[430] *Supra* note 22.
[431] The cases of enforced disappearances including related constitutional petitions before the Supreme Court were amalgamated under Saqlain Mehdi v. The Federation of Pakistan through Secretary Ministry of Interior and others, Human Rigths case No 965 of 2006. Amnesty International obtained copies of order sheets (Supreme Court proceedings record) for the period 26 March to 11 October 2007.
[432] *Supra* note 22.
[433] U.S. Department of State (31 March 2008) Country Reports on Human Rights Practices: Pakistan. Available at: http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119139.htm.
[434] *Supra* note 31.
[435] *Supra* note 31.

As noted in his December 1996 report, the UN Special Rapporteur expressed concerned about the imposition of the death penalty on sentences passed by Pakistani special courts. The jurisdictions of these courts are often set up as a response to acts of violence committed by armed opposition groups or in situations of civil unrest, in order to speed up proceedings leading to capital punishment. Such special courts often lack independence, since sometimes judges are accountable to the executive or judiciary. Time limits, which are sometimes set for the conclusion of the different trial stages before such special jurisdictions, gravely affect defendants' right to an adequate defence. The Special Rapporteur also expressed concern about limitations of the right to appeal in the context of special jurisdictions. This is particularly troublesome, as the courts are generally convened in situations where rampant human rights violations already exist.[436]

2. Amnesty International

(i) Torture and Ill-Treatment

Amnesty International calls into question the treatment of detainees while in Pakistani custody, alleging that torture and other ill-treatment in the custody of law enforcement, security and prison personnel are endemic in Pakistan.[437] The organization cites lack of training and forensic and other facilities as the reason why law enforcement and security services rely almost exclusively on confessions to obtain convictions in court. Torture, including rape, is habitually used to extract confessions. As documented by the Human Rights Commission of Pakistan (HRCP), torture is also used to intimidate, humiliate, frighten and punish prisoners.[438]

The Constitution of Pakistan prohibits torture, albeit in a limited way: Article 14(2) provides, "No person shall be subjected to torture for the purpose of extracting evidence". Amnesty International reminds the government of Pakistan tat binding international law prohibits torture absolutely at all times and in all circumstances.

The secrecy surrounding the detention of terror suspects provides conditions which make "abuse not only likely, but virtually inevitable".[439] Holding detainees in secret detention and transferring them to other countries for interrogation facilitates the practice of torture and ill-treatment. People suspected of belonging to terrorist organisations are considered valuable sources of information by Pakistan, the USA and other states cooperating in the U.S.-led "War on Terror." The Government of Pakistan nevertheless bears full responsibility for any torture or ill-treatment committed by its agents or at their instigation, or with their consent or acquiescence. While torture is usually carried out by Pakistani officials, it has been committed in some cases with the knowledge or in the presence of U.S. personnel. In such cases, the United States carries responsibility for being complicit in acts of torture.[440]

---

[436] 'Extrajudicial, Summary or Arbitrary Executions, Report of the Special Rapporteur', UN Doc. E/CN.4/1997/60.

[437] The Human Rights Commission of Pakistan stated in a press release of 4 February 2006, accompanying the release of its annual report for 2005 that "Torture was endemic, with many deaths caused by brutality apparently passed off as suicides".

[438] *Supra* note 35.

[439] Human Rights First (June 2004). Report: Ending secret detentions.

[440] See for instance International Law Commission, Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission on the Work of Its Fifty-third Session,

Amnesty International urges the government of Pakistan to officially and publicly condemn torture and ill-treatment, and order that these practices cease. This would make it clear to the international community that these activities are prohibited absolutely and will not be tolerated under any circumstances.[441]

(ii) Enforced Disappearances

Amnesty International remains concern about the fate of people who were arbitrarily arrested, detained in secret and have become victims of enforced disappearance. The HRCP noted in its report on 2004 that, "a relatively new form of violation of citizens' most fundamental rights … was the phenomenon of disappearance, something that was not witnessed before or at least not to the extent now recorded".[442] The organization contends that the Government of Pakistan has consistently failed to acknowledge that enforced disappearances have occurred, despite glaring evidence to the contrary.[443]

Enforced disappearances affect not only the victim, but also the agencies carrying out the act. They weaken the trust of the public in the state's commitment to upholding the rule of law. In *habeas corpus* proceedings, state representatives have consistently denied knowledge of the fate and whereabouts of detainees, despite eyewitness accounts of arrests and even in cases where the persons held have subsequently reappeared. Ex-Interior Minister Aftab Ahmed Khan Sherpao, when questioned in 2005, said "Whatever the government is doing is in accordance with the law and we have the Anti-Terrorism Act which provides for various powers in this respect. … We don't know which people these families are talking about and under what circumstances they were arrested".[444] He also said he was unaware of intelligence agencies holding detainees for long periods of time before producing them in court.[445]

To be unaware of the fate and/or whereabouts of a family member for a prolonged period of time, and to fear for his or her life and safety may in itself amount to cruel, inhuman or degrading treatment or punishment. 319 The knowledge that torture is routinely used in Pakistan adds to the fear of the relatives. Indeed, Amnesty International recognizes that relatives of those who have "disappeared" may suffer from:

a. Anxiety;
b. Frustration;
c. Social exclusion;
d. Economic hardship;
e. Ineffective remedies, due to the suspension of due process during the "War on Terror". [446]

UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), Articles 16, 17.

[441] *Supra* note 5.

[442] Human Rights Commission of Pakistan (2005). Report: The state of human rights in 2004.

[443] *Supra* note 5.

[444] Herald, October 2005; the theme of this issue is "Missing: What has happened to hundreds of people picked up by security agencies since 2001?" It contains cases histories and an interview with the Interior Minister.

[445] *Supra* note 42.

[446] *Supra* note 5.

In addition to taking responsibility for the fate of those who have disappeared, Amnesty International urges the government of Pakistan to end the practice of enforced disappearances.

(iii). Unlawful Transfers to Other Countries

Amnesty International constantly investigates reports of complicity on the part of Pakistani authorities in the U.S. process of extraordinary rendition. Indeed, many of the individuals arbitrarily arrested and detained for alleged terrorist activities or links in Pakistan are subsequently handed over to other countries, mostly to the USA.[447] Amnesty International believes that Pakistani authorities have deliberately obscured their unlawful rendition of detainees to U.S. custody, in spite of mounting evidence to the contrary.

It is not clear whether Pakistani officials were aware that some of those unlawfully handed over to U.S. custody would be subjected to renditions. However, by transferring the detainees into the custody of the USA while there was growing evidence that that state was committing systematic human rights violations in the "War on Terror", Amnesty International suggests that Pakistan must be considered to be complicit in the human rights violations suffered by the victims of rendition. Amnesty International believes that the number of people handed over to U.S. custody by Pakistan could number several hundred. Lawyers analyzing data made available by U.S. authorities have shown that around 66 per cent of the detainees in Guantanamo Bay were captured in Pakistan – that is, just under 500 people. In addition, international organizations have documented that about two dozen persons subjected to enforced disappearance were originally captured in Pakistan and handed over to US custody where they remain in secret detention centres.[448]

The secrecy surrounding the transfer of people suspected of involvement in terrorism has made it very difficult for families to track the whereabouts of their relatives, for human rights organisations to press for respect for the detainees' human rights and for the general public to know about human rights violations of detainees. In some cases, details of arrest and transfer to U.S. custody only came to light when detainees contacted their families through the International Committee of the Red Cross (ICRC) or when they were released from custody. In light of this fact, Amnesty International recommends that the Pakistani government stop unlawful transfers of detainees to other countries in violation of the principle of non-refoulement and in circumvention of Pakistan's extradition law.[449]

2. Human Rights Watch

(i)Restrictions on Freedom of Expression

Human Rights Watch has expressed concern over the continued repression of government critics in Azad Kashmir. Tight controls on freedom of expression have been a hallmark of the Pakistani government's policy in the area, although this control is highly selective. Militant organizations have had free rein—particularly between 1991 and 2001—to propagate their views and disseminate literature. However, those supportive of independence for a united Kashmir, or otherwise critical of the Pakistani

[447] *Supra* note 5.
[448] *Supra* note 5.
[449] *Supra* note 5.

government, have faced continual repression. Examples of this repression include the following tactics:

a. *Loyalty Oath*: No person in Azad Kashmir can be appointed to any government job, including the judiciary, unless he or she expresses loyalty to the concept of Kashmir's accession to Pakistan.
b. *Print Media and Publishing Censorship:* In order to publish within the territory, newspapers and periodicals need to be granted permission by the Kashmir Council and the Ministry of Kashmir Affairs in Islamabad. These bodies are unlikely to grant permission to any proposed publication likely to be sympathetic to any discourse on Kashmir and its affairs other than that sanctioned by the Pakistani government. The same rules apply to the publication of books.
c. *Electronic Media and Telecommunications:* State-run radio and television news programs present news according to priorities of state protocol rather than newsworthiness— that is, a news bulletin will begin with the engagements and observations of the president of Pakistan and make its way down the official pecking order to the local level. The influx of and consequent competition from satellite channels has, as yet, not resulted in a change in the news culture of state-controlled media.
d. *Public Protest:* Pakistani police are authorized to use *lathis* (canes) and rifle butts to break up peaceful demonstrations.[450]

Additionally, there are restrictions on the right to participate in electoral processes. These grave intrusions on the fundamental human right of freedom of expression are of deep concern to Human Rights Watch. The organization suggests the repeal of constitutional curbs on freedom of association, expression and assembly in Azad Kashmir so that the constitution and Azad Kashmir law are consistent with international human rights standards.[451]

(ii) Pakistan's Support of the Taliban

Human Rights Watch has been intensely critical of the Pakistani government's tacit support of the war in Afghanistan. In particular, the organization rejects the government's repeated denial that it provides any military support to the Taliban in its diplomacy regarding its extensive operations in Afghanistan.[452] In fact, of all the foreign powers involved in efforts to sustain and manipulate the ongoing fighting, Pakistan is distinguished both by the sweep of its objectives and the scale of its efforts, which include soliciting funding for the Taliban, bankrolling Taliban operations, providing diplomatic support as the Taliban's virtual emissaries abroad, arranging training for Taliban fighters, recruiting skilled and unskilled manpower to serve in Taliban armies,

[450] Human Rights Watch (September 2006). "With Friends Like These…" Human Rights Violations in Azad Kashmir. Volume 18, no. 12 (C).
[451] *Supra* note 48.
[452] Pakistan's Interior Minister, for example, in a statement on May 3, 2001, denied that Pakistan was providing Afghanistan with either weapons or funds, and reiterated his government's position that Afghanistan was a sovereign state over which Pakistan had no control. Interior Minister Moinuddin Haider, cited in "Pakistan denies helping Taliban," Gulf News (Dubai), May 4, 2001.

planning and directing offensives, providing and facilitating shipments of ammunition and fuel, and on several occasions directly providing combat support.[453]

In April and May of 2001, Human Rights Watch sources reported that as many as thirty trucks a day were crossing the Pakistan border; sources inside Afghanistan reported that some of these convoys were carrying artillery shells, tank rounds, and rocket-propelled grenades. Such deliveries are in direct violation of U.N. sanctions.[454] Pakistani landmines have been found in Afghanistan; they include both antipersonnel and antivehicle mines.[455] Pakistan's army and intelligence services, principally the Inter-Services Intelligence Directorate (ISI), contribute to making the Taliban a highly effective military force. Finally, senior Pakistani military and intelligence officers helped plan and execute major military operations.[456]

In late 2001, ex-President Musharraf pledged full cooperation with United States against global terrorism. This not only entailed a complete U-turn in 20 years of clandestine support, but also an abrupt halt to the *jihadi* culture which has sustained Pakistan's policy in Kashmir and Central Asia.[457] Although official support for the Taliban has waned, the notoriously porous border with Afghanistan has facilitated the transshipment of men and materiel regardless of government stance. Compounding this problem, the territories contiguous with that border are formally designated "tribal agencies," semi-autonomous regions administered directly by a political agent appointed by the federal government. The ethnic identity of the population in the agencies is for practical purposes identical to that across the border in Afghanistan. The less formal administration of these agencies has facilitated a variety of illegal cross-border activities, particularly the smuggling of people and weapons.[458]

Human Rights Watch calls for a comprehensive, international embargo on arms and other military supplies to Taliban forces in Afghanistan. The organization suggests that Pakistan in particular should be put under pressure to comply with the embargo. Pakistan should also be urged to accept U.N. monitors to work alongside its own customs personnel, and steps should be taken to penalize Pakistan if it fails to comply with the embargo. Such measures should be designed to minimize any adverse humanitarian impact in Pakistan. Pakistan has already publicly agreed to an arms embargo against both sides in the civil war; what remains is to hold Pakistan to its word.[459]

IV. Judicial Opinion

---

[453] Human Rights Watch (July 2001). Afghanistan: Crisis of Impunity: The Role of Pakistan, Russia and Iran in Fueling the Civil War. Vol. 13, No. 3(C).

[454] *Supra* note 50.

[455] Human Rights Watch interview with a military expert with experience in Afghanistan, February 2001. These mines include P2 Mk2 A/T (antitank, or antivehicle) blast mine m/m (minimum metal), P2 Mk2 A/P (antipersonnel) blast mine m/m, P3 Mk2 A/T blast mine m/m, and P4 Mk1 A/P blast mine m/m.

[456] Human Rights Watch conducted interviews with Western diplomatic sources and military experts, and with journalists and other observers in the region in 1999 and 2000. Human Rights Watch also spoke with a Taliban official in Kabul in 2000 who confirmed that senior Pakistan army and intelligence officers were involved in planning Taliban offensives. All of these sources requested anonymity.

[457] Rashid, Ahmed (20 September 2001). "Pakistan, the Taliban, and the US". *The Nation*. Retrieved 7 August, available at: http://www.thenation.com/doc/20011008/rashid.

[458] *Supra* note 51.

[459] *Supra* note 51.

Mehram Ali versus Federation Pakistan (PLD 1998 SC 1445): This case is considered have marked the importance of the independence of a judiciary from executive branch, particularly in reference to the Article 175 of the Constitution of Pakistan. On January 18, 1997, Mehram Ali, a member of an extreme Shia organization, detonated a remote-controlled bomb in the vicinity of the Lahore courts where the two leaders of the Sipah-e-Sahaba Pakistan (SSP), an anti-Shia group of Sunnis, were brought for a hearing before the additional session judge. The explosion killed twenty-three people, including the two Sunni leaders, and injured more than fifty civilians. He was tried under the newly created Anti-Terrorist Court system, convicted, and given a death sentence.

Mehram Ali then filed a writ petition before the Lahore High Court claiming, among other things, that the formation of the special courts violated the provisions of the Constitution. The Lahore High Court claimed jurisdiction to hear the appeal, but held that the conviction should still stand. However, the Court also declared certain sections of Anti-Terrorism Act of 1997 to be unconstitutional and in need of amendment. It was declared that the newly constituted anti-terror court would be subject to the rules and procedures of the existing constitutionally established judicial system, including:

a. The judges of such courts would have fixed and established tenure of service;
b. Such special courts would be subject to the same or similar procedural rules as regular courts, including rules of evidence, etc;

The decisions of specials courts would be subject to appeal before the relevant constitutionally mandated regular courts.[460]

The Court also held that no parallel legal system can be constructed that bypasses the operation of the existing criminal justice machine. Against this backdrop, the government amended the Act, and incorporated the changes as suggested by the Supreme Court. Under the new ordinance, anti-terrorism courts remained in place and the judges of such courts were granted tenure of office; special Appellate Tribunals were disbanded and appeals against the decision of the anti-terror courts would be submitted to the respective High Courts; and restrictions were placed on Anti-Terrorism Act of 1997's provisions regarding trials in absentia to accord with regular legal procedures.[461]

Sheikh Liaquat Hussain v. Federation of Pakistan (PLD 1999 SC 504): This case effectively reversed the ruling which had provided for the establishment of anti-terrorism courts. The court held that under Article 245 of the Constitution, the Armed Forces may be required to act in aid of civil power but they have no power to impose emergency in the country. At the time of this case, the government had declared a Proclamation of Emergency; however the court maintained that this is tantamount to superseding relevant constitutional functionaries. In fact, the Armed Forces had taken over the civil administration of the country. The ruling in Liaquat Hussain v. Federation of Pakistan holds that under the 1973 Constitution the Armed Forces can only be called in aid of the

[460] Fayyaz, Shabana "Responding to Terrorism: Pakistan's Anti-Terrorism Laws: Part I". Perspectives on Terrorism.
[461] *Supra* note 58.

civil power, and therefore must have a limited role to play. There is nothing in the Constitution which makes the Armed Forces supreme authority.

V. Annex

Case Studies: Misuse of Pakistani Counter-Terror Policy

1. The Case of Yusuf al-Khalid and Abed al-Khalid

The case of Yusuf and Abed al-Khalid illustrates the alleged complicity between the Pakistani and foreign governments in the "War on Terror". These two children were arbitrarily detained, apparently to put pressure on their families to comply with the with Pakistani intelligence agencies. Yusuf al-Khalid, aged nine, and Abed al-Khalid, aged seven, the sons of alleged al-Qa'ida leader Khalid Sheikh Mohammad, as well as their mother, were reportedly arrested on 11 September 2002 together with Ramzi Binalshibh in a raid on an apartment in Karachi where their father was believed to be hiding. It is unclear when the boys were transferred to U.S. custody.

While some Pakistani media reported that they were handed over immediately,[462] other sources claim that they were transferred to custody in the U.S. over the weekend of 10 March, after the arrest of their father on 1 March, allegedly to force their father "to talk".[463] According to reports, CIA interrogators confirmed that the boys were staying at a secret location and were "encouraged" to talk about their father's activities. Their father was reportedly told about the boys' detention.[464] Sunday Telegraph journalist Olga Craig reported being told by CIA officials that "we are handling them with kid gloves. After all, they are only little children, but we need to know as much as possible about their father's recent activities. We have child psychologists at hand at all times and they are given the best of care."[465] Other U.S. authorities have denied that Yousef and Abed were in the custody of U.S. officials, either in the U.S. or anywhere else, or that the boys had been interrogated by U.S. officials.[466]

2. The Case of Hayatullah Khan

The body of journalist Hayatullah Khan, a 32-year-old father of four, was found on 16 June 2006 near Mirali, North Waziristan after more than six months' enforced disappearance.[467] His body was reportedly emaciated, he was hand-cuffed and had apparently been shot five times in the back of his head. He had been abducted by armed men in civilian clothing on 5 December 2005 while on his way to cover a rally in Mirali Bazaar protesting against a missile attack four days earlier, and was travelling with his brother who reported the abduction. At the time of his disappearance, Hayatullah Khan was working for the English language daily *The Nation*, the Urdu language newspaper

---

[462] The Friday Times, 28 March – 3 April 2003.
[463] The Sunday Times, London, 9 March 2003.
[464] Dawn, 11 March 2003.
[465] Sunday Telegraph, 10 March 2003. She reported that the sons' detention was being used to force their father to talk.
[466] *Supra* note 38.
[467] See Amnesty International, urgent actions, AI Index: ASA 33/030/2005, ASA 33/009/2006, ASA 33/022/2006.

Ausaf and the European Press Photo Agency. He was also the Secretary General of the Tribal Union of Journalists.[468]

Hayatullah Khan was the first journalist to photograph pieces of shrapnel which local villagers said they had found in the rubble of a house in Haisori, North Waziristan, which was destroyed in a missile attack on 1 December 2005; alleged al-Qa'ida operative Abu Hamza Rabia was reportedly killed in the attack. The shrapnel found at the site was stamped with the words "AGM-114", "guided missile" and the initials "US", and was reported to belong to a Hellfire missile. Villagers told journalists that they heard at least two explosions and saw a white streak of light coming from an aircraft before the building was hit. Even in light of this evidence, Pakistani government officials claimed that Abu Hamza Rabia and others were killed when making a bomb and denied that there had been an attack by a U.S. drone – a version which was directly contradicted by Khan's evidence.[469] Family members told reporters that Khan had received anonymous threats for the last few months, warning him not to cover the security situation in the area. His brother stated that, on the day before his abduction, Khan expressed his concern that intelligence agencies might take action against him for sending photographs of the shrapnel to media organisations. [470]

In March 2006, Hayatullah Khan's brother told the media that senior officials of a Pakistani intelligence agency had told him that Hayatullah Khan was now "outside their jurisdiction" and indicated that he might be in US custody, being interrogated about his links with al Qa'ida or "being grilled by the US to confirm the death of [alleged al-Qa'ida operative] Abu Hamza Rabia in the missile attack" of 1 December 2005.[471] There was no indication as to where this was taking place. In April 2006, Khan's brother told the Committee to Protect Journalists (CPJ) that a Pakistani colonel, who did not wish to be named, had told him that Hayatullah Khan had been "taken by helicopter from a secret government holding place in Rawalpindi to Kohat and that he was turned over to the Americans soon after that. … The colonel said that Hayatullah has been in American custody since about the first week of February. He said he was being held by the FBI or the CIA, but he did not know which one".[472] The CPJ said that both Pentagon and FBI sources had denied holding Hayatullah Khan, while the CIA declined to comment. In May, the U.S. consul in Peshawar denied any involvement in Hayatullah Khan's enforced disappearance.[473]

His family believes that Hayatullah Khan was killed after having escaped form custody and being recaptured. After countrywide protests by journalists and by tribal groups, the federal government on 19 June 2006 announced a judicial inquiry under a Peshawar High Court judge and the provincial government set up a departmental inquiry. The former reportedly sent his report to the federal government on 18 August, while the provincial inquiry submitted its report on 9 September.[474] At the time of writing, this

---

[468] *Supra* note 5.
[469] *Supra* note 5.
[470] *Supra* note 5.
[471] Los Angeles Times, 24 March 2006.
[472] Committee to Protect Journalists, press release, 11 April 2006.
[473] US consul Mike Spangler said, "we have seen reports regarding the disappearance of Mr Hayatullah Khan and allegations of US involvement in his detention. Hayatullah is not known to the United States. We have no information about his whereabouts." (The News, Dawn, 10 May 2006).
[474] *Supra* note 5.

report could not determine if the final drafts of the above-mentioned reports had been made public.

Counter-Terrorism Law in India

> *"Instead of bestowing greater powers on executive agencies already lacking in accountability, and thus increasing the potential for abuse and social harm, the plethora of extraordinary powers already in existence might be better replaced with reforms of the ordinary criminal justice system and police institutions. Only where justice is accessible to all, and state institutions are viewed to work impartially in the interests of all, can India increase its legitimacy in the eyes of the broader population and consequently reduce the threat that the aggrieved will resort to violence against the State."*[475]

As one of the world's most ethnically, linguistically, and religiously diverse countries, India has dealt with numerous separatist and insurgent movements over the past 30 years.[476] Indeed, India's experience with political violence and terrorism long pre-dates the current era of terrorism's preponderance on the world stage. A brief examination of the scope of terrorism in India reveals that it is highly complex and varied issue. The insurgency in Kashmir, which has claimed between 40-67 thousand lives between 1989 and 2007,[477] is only one aspect of many that comprise India's understanding of the terrorist threat. Some examples of other causes for violence and terrorism can be found in the religious identity and political power struggles characterizing Sikh militancy in the 1980s, the economic and political agendas that have given rise to separatist movements such as the United Liberation Front of Assam (ULFA) in Assam, the poverty and social oppression coupled with extreme left-wing political ideology that has come to be known as 'Naxalism' throughout many parts of the country, and ethnic armed opposition groups seeking independence from India such as in Manipur and Nagaland. The multitude of forms and causes for violence are reflective of the huge diversity that exists in India, which has more than 1600 language groups, six major religions, and entrenched social divisions.[478]

In the wake of the Mumbai terrorist attacks in November of 2008, the Indian government was faced with a crisis: what is the proper way to deal with the ever-increasing terrorist threat? As a response the government implemented two pieces of legislation: The Unlawful Activities (Prevention) Act (UAPA) and the National Investigative Agency Act (NIA). The legislation incorporates a number of provisions from previous, unsuccessful anti-terrorist legislation, drawing criticism from across the country. Both statutes were speedily enacted, and intended to give government agencies additional powers to prevent and combat terrorist threats at home and abroad. However, a thorough look at both Acts will reveal some particularly stringent provisions which undermine the state of human right and civil liberties in India.

The hard-line approach to combating terror has drawn its fair share of criticisms, mostly from human-rights based organizations. The UAPA, in conjunction with the NIA,

---

[475] Asia Pacific Human Rights Network (5 September 2008). Counter-Terrorism and Human Rights Does India Need Another Counter-Terrorism Regime? HRF 187/08.
[476] Curtis, Lisa (9 December 2008). Backgrounder: After Mumbai: Time to Strengthen U.S.–India Counterterrorism Cooperation. The Heritage Foundation. No. 2217.
[477] Project Ploughshares, Armed Conflicts Report (January 2007). India – Kashmir. Availalbe at: http://www.ploughshares.ca/libraries/ACRText/ACR-IndiaKashmir.html#.
[478] *Supra* note 1.

have been likened to the Bush Administration's Patriot Act, accused of taking advantage of the social upheaval caused by acts of terrorism in order to drastically reduce civil liberties. This argument is not without merit; the broad definitions of terrorism contained in the Indian counter-terrorist policy can lead to the infringement of fundamental rights and freedoms, such as freedom of speech. By and large, the biggest fear for human rights advocates is that the slightest criticism of the government could bring a citizen under investigation as a terrorist suspect.[479]

Current counter-terrorism policy in India is characterized by several different pieces of legislation, which are outlined below:

The Unlawful Activities (Prevention) Amendment Act, 2008

The Unlawful Activities (Prevention) Act, 1967, was originally conceived to fulfill the need to install reasonable restrictions in the interests of India's sovereignty and integrity, such as restrictions on the freedom of speech and expression; the right to assemble peaceably and without arms; and the right to form associations or unions. Parliament amended the Act in 2004, following the repeal of the Prevention of Terrorism Act. This amendment changed the original character of the Act completely, by making it a piece of specifically anti-terror legislation without a sunset clause. This was troubling, as a sunset clause would have implied a periodical review by Parliament and an in-built safeguard against abuse.[480]

The latest amendment to the UAPA, which took place in late 2008, has been termed a knee-jerk reaction to the Mumbai attacks; indeed, the amendment makes several key changes to the original legislation. The maximum period of custodial interrogation of a terror suspect has been increased from 90 days to 180, and formal mechanisms deny bail to foreign nationals detained under the Act. Additionally, provisions have been included in the amendment which will allow the government to freeze the funds, assets and economic resources of terror suspects. There are also provisions which advise harsh prison terms for any person convicted under the Act, as well as special courts to try terror offences quickly.[481]

The National Investigation Agency Bill 2008

As a further response to the terror attacks in Mumbai during November of 2008, the National Investigative Agency Bill was passed late that same year. The enactment of this Bill allowed for the creation of a special investigative agency given extraordinary jurisdictional powers. Any offence which can endanger the State, namely terrorist threats, issues of atomic energy, hijacking and weapons of mass destruction fall under its purview. The NIA, on its own and without seeking the state government's permission,

---

[479] Dhavan, Rajeev (19 December 2008). India's Unlawful Activities Prevention Act (UAPA): The Return of POTA & TADA. Retrieved 30 July 2009, available at: http://focusweb.org/india/index2.php?option=com_content&do_pdf=1&id=1097.

[480] Madhavan, Geeta (23 December 2008). "Spotlight on the New Anti-Terror Laws". South Asia Analysis Group. Paper no. 2990.

[481] *Supra* note 6.

can investigate and prosecute offences relating to terror, counterfeiting Indian currency, narcotics smuggling and hijacking of aircrafts across states. It can also set up special courts to try cases under its jurisdiction, as well as take charge of a police station anywhere in the country.[482]

The Armed Forces (Special Powers) Act 1958

Any discussion of counter-terrorism legislation within India would be incomplete without examining the Armed Forces (Special Powers) Act. Originally enacted in 1958 to deal with uprisings across the country, there has been a strong demand over the years since to repeal it in favour of less restrictive measures. The Act grants enough powers to the armed forces to jeopardize the state of civil society, giving the military virtually unrestricted ability to carry out their operations. Under this document, the military has:

a. An unrestricted ability to arrest, detain, search and shoot to kill once an area has been declared as "disturbed";
b. An ability to open fire upon civilians, or use other kinds of force;
c. An ability arrest without a warrant anyone who has committed certain offences or is suspected of having done so;
d. To enter and search any premise, at any time, in order to make such arrests.[483]

Any individual may be arrested without warrant and can be shot at mere suspicion, even by a non-commissioned officer. Furthermore, military personnel are protected with impunity from legal reprisals, as any actions carried out under this law are not subject to prosecution or judicial review.

Human Rights Watch has tirelessly documented many cases of human rights abuses under the name of this Act, particularly in the Jammu and Kashmir region; it has termed the law to be "a tool of state abuse, oppression, and discrimination".[484] On 23 March 2009, The United Nations Commissioner for Human Rights Navnetham Pillay supported the opinion of Human Rights Watch and requested India to repeal the Act, stating the law to be a "dated, colonial-era law that breaches contemporary international human rights standards"[485]. As a response to these criticisms, it is encouraging to note that the current Indian government is taking practical steps to phase out the Act.

The Jammu and Kashmir state government has recently tabled a clear roadmap for a phased withdrawal of the AFSPA, beginning with the districts which have registered little or no violence over the past few years. While the state has reiterated its appreciation for military resources in fighting terrorism, it has also contended that local police should be at the forefront of all anti-insurgency operations. It will take some time to redefine the roles and legal parameters of state police and military engagement; nevertheless, it brings

---

[482] *Supra* note 6.
[483] "The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990" Indian Ministry of Law and Justice Published by the Authority of New Delhi.
[484] Bajoria, Jayshee (11 September 2008). "Crisis in Kashmir. Council on Foreign Relations. Retrieved 30 July 2009, from: http://www.cfr.org/publication/17155/crisis_in_kashmir.html.
[485] *Supra* note 4.

the region one step closer to a lasting resolution and begins to reaffirm the place of human rights within security-oriented legislation.

Chhattisgarh State Public Security Act 2005

Since 2005, Chhattisgarh, especially the Bastar-Dantewada forest area, has experienced an escalation of violence between the Maoists and the *Salwa Judum*. Civilians have been routinely targeted on both sides, resulting in at least 300 deaths. Additionally, 30,000 *adivasis* displaced from their homes continue to live in special camps where they face increased risk of violence. Despite these human rights abuses, the Chhattisgarh state government has claimed that it enacted the Chhattisgarh State Public Security Act (CSPSA) to take action against the Maoists; however all Maoist groups operating in Chhanttisgarh had previously been declared as unlawful organizations after the 2004 amendments to the UAPA. It is reasonable to assume, then, that the government enacted the legislation to stifle all political dissent in the region.[486]

The CSPSA allows for arbitrary detention of persons suspected of belonging to an unlawful organization or participating in its activities or giving protection to any member of such an organization. Human rights organizations in India have demanded the repeal of CSPSA as it contains several provisions which violate international human rights law, including:

a. Vague and sweeping definitions of "unlawful activities" for which organizations may be rendered "unlawful". Such definitions enable the government to arrest and detain individuals on grounds that may not be fully clear, in violation of the principle of certainty in criminal law as contained in the ICCPR;
b. Threats, as a result, to other key human rights including freedom of expression and association, provided in Articles 19 and 22 of the ICCPR, respectively;
c. All offences under the CSPSA are "cognizant and non-bailable"; hence all those charged under the Act are detained, often for months, before being tried.[487]

The Commonwealth Human Rights Initiative (CHRI) has expressed its reservations about the Act, and said it may become a potential instrument to throttle the right to free speech, legitimate dissent, and trample the fundamental rights enshrined in Articles 14, 19 and 21 of the Constitution.[488] The Act has also drawn criticism from the International Federation of Journalists, which has hotly contested the legislation's ban on carrying reports of any kind of "unlawful activities".[489]

Jammu and Kashmir Public Safety Act 1978

---

[486] Chhattisgarh Special Public Security Act. (13 June 2009). In Wikipedia, The Free Encyclopedia. Retrieved 1 August 2009, available at: http://en.wikipedia.org/w/index.php?title=Chhattisgarh_Special_Public_Security_Act&oldid=296101914.

[487] Amnesty International (14 May 2008). Public Statement: India: Concern over the arrest of filmmaker and human rights defender T.G. Ajay in Chhattisgarh. AI Index: ASA 20/010/2008.

[488] Commonwealth Human Rights Initiative (2005). "Repeal Chhattisgarh Special Public Security Act 2005". Available at: http://www.cgnet.in/N1/CHRIpsa/document_view.

[489] *Supra* note 12.

The Jammu and Kashmir Public Safety Act of 1978 (PSA) is the main law relating to preventive detention in Jammu and Kashmir, and permits administrative detention without trial:

a. For a period of up to one year if a person is to be prevented from acting in a manner deemed "prejudicial to the maintenance of public order"; or
b. Up to two years if their actions are likely to be "prejudicial to the security of the State".
c. The detention period is often renewed at the end of the two-year period by issuing a new PSA arrest warrant, meaning individuals spend years in detention without ever having the chance to appear before a court and contest the allegations against them.[490]

A 2006 Human Rights Watch report alleged that that there were 4,500 suspected militants in jail, awaiting trial. The organization contends that many of them have been in custody for ten or more years and some have never been produced in court.[491] Without evidence to secure a conviction or to prevent them from being released on bail, they are often held under the PSA for years at a time. The PSA provides for a review of cases, but nothing that would come close to a fair trial under international human rights law. Within four weeks of detention an advisory board, composed of present or former high court judges and two other similarly qualified persons, must determine whether there exists sufficient cause for detention. The advisory board is not an independent body, but is simply constituted "whenever necessary" by the government, and its proceedings are to remain secret. Although the detainee may appear before the board, he or she has no right to counsel. The Act makes no provision for appeal against a determination of the advisory board, nor does it permit the detainee to confront witnesses against him.[492]

Under the PSA, the fundamental legal safeguards of international law are routinely violated, including the right to be brought promptly before a judicial authority, to communicate with counsel of one's choosing, and to be charged and tried without undue delay. Once a detention order under the PSA expires, new orders are often brought against a detainee. In many cases the total period of detention ends up being greater than the maximum allowed under the law if the person had been tried and convicted for the applicable criminal offense, such as weapons possession or conspiring to act against the state. In addition to the loss of liberty and hardship of being detained in poor detention facilities, the delay in securing a release can cause great hardship for family members who rely on the detainee for the family income. Unlike in some cases of unlawful killings by the security forces, no compensation is offered for arbitrary detentions, even when a detention order is quashed by the courts or there is undue delay in releasing a detainee after a court order is issued.[493]

---

[490] Human Rights Watch (September 2006). Report: "Everyone Lives in Fear"; Patterns of Impunity in Jammu and Kashmir. Volume 18, No.11(C).
[491] *Supra* note 16.
[492] Jammu and Kashmir Public Safety Act (8) (3)(b)(i).
[493] *Supra* note 16.

It is encouraging to note that as a part of the current state government's "healing touch policy", dozens of alleged militants, including some who served more than two years under the PSA, have been released. The state government claims that of the nearly 1,200 individuals held in detention when it came to power in November 2002, only 376 alleged militants remained in custody under the PSA at the end of 2005. These figures include nearly two hundred foreigners, most of them of Pakistani origin. Human rights defenders insist the number of those in custody is larger, but since no central record is maintained, it is impossible to independently verify the claims. One indication of the current scope of the problem is that 443 *habeas corpus* petitions were filed to challenge detentions in 2005.[494]

I. Mechanisms for Comparison

The following mechanisms for comparison refer to the 2008 amendment of the Unlawful Activities (Prevention) Act:

1. Definition of Terrorism:

a. *The Physical Element*: The definition of a terrorist act is described as a physical act of a hazardous nature, or of "whatever nature". This sentence essentially stipulates that any physical act could be construed to have terrorist intent, as long as the government can satisfy the extraordinarily low burden of proof threshold; the act itself only needs to be "likely" to cause terror in the public.
b. *The Mental Element*: An act must be carried out with the intention to "threaten the unity, integrity, security or sovereignty of India" or "to strike terror in the people" to be considered terrorist in nature. The amendment goes even further to state that any act which is "likely" to strike terror in the people or any act which is "likely" to threaten is also considered terrorist in nature. This allows for a large degree of subjectivity within the definition.

2. Search and Seizure: Property searches may be conducted "at any time, on the basis of any document, article or any other thing which may furnish evidence of the commission of an offence under the Act". Contrary to the Indian constitution, a court order is not necessary to execute any of these searches. Additionally, the police may also require any organization, firm, establishment, public authority or individual to furnish any information requested of them in relation to the offence committed. This amendment is particularly dangerous in the case of journalists, who are required to maintain the integrity of their sources.

The Act also grants power to the Central Government to freeze, seize and prohibit the use of funds, financial assets or economic resources of individuals "suspected to be engaged in terrorism". However, there is no legislative guideline on the definition of suspicion, or what would constitute a reasonable suspicion of terrorist acts.

3. Arrest: A police officer may arrest an individual on the basis of "personal knowledge", or "from any document, article or any other thing which may provide evidence of the

[494] *Supra* note 16.

commission of an offence". This provision allows the arresting officer an unprecedented and potentially dangerous amount of discretion, as the requirement of an arrest warrant has been waived for offences under the Act. Furthermore, the officer need not immediately inform the suspect of the charge against them, only "as soon as may be".

4. Pre-Charge Detention: The 2008 UAPA amendment extends the maximum period of pre-charge detention to 180 days after 90 days. To extend detention, the prosecutor need only show that the case has progressed, rather than demonstrating that there is adequate evidence to pursue a criminal charge against the accused.

5. Sunset Clause: As per the 2008 amendments, the current Act has no sunset clause and has been fitted with limited mechanisms for internal review.

6. Bail: Under this Act, a person may be denied bail if a court believes the evidence against the accused is prima facie true. This is a violation of the accused's rights, since under Indian law the purpose of a bail hearing is to determine whether or not the accused will flee or commit any further offences. Additionally, no person may be released on bail on their own bond, unless the prosecutor has been given an opportunity to object to the application of such release. The Act also provides for the courts to deny bail to foreigners without a hearing and at the court's discretion; this is a violation of the principle of non-discrimination on the grounds of nationality.

II. Indian Counter-Terror Legislation and the Incompatibility with Human Rights

1. Lack of Judicial Review

Periodic review of emergency legislation has long been a hallmark of democratic states. For example, under the UK Terrorism Act of 2000, a person must be appointed to review the legislation at least once every 12 months; the review must then be brought before Parliament. Additionally, the UK's Joint Committee on Human Rights has recommended that all terrorism legislation should be limited to a life span of maximum five years. An examination of current Indian legislation reveals no such stipulation. The UAPA and NIA Acts, in an attempt to crack down on terror, have reinstated provisions from earlier legislation which were repealed due to a staggering amount of misuses by police and courts alike. No longer merely temporary legislative frameworks, these Acts have been enshrined as permanent features of the Indian criminal justice system. While earlier Acts were fitted with the mechanisms for internal review, the current anti-terrorism law holds no such mechanisms. This illustrates the fundamental problem of merging criminal and emergency legislation; unless safeguards are provided, the very rule of law has been compromised.[495]

As a result, any person who has been charged under UAPA, or who finds themselves under investigation by the National Investigation Agency, will have no lawful recourse to challenge their treatment. The UAPA goes so far as to grant immunity to the Indian and

[495] Amnesty International (18 December 2008). Public Statement: India: New anti-terror laws must meet international human rights standards. AI Index No: ASA 20/031/2008.

State governments, government employees, and members of the armed forces. Any individual who may have been wrongfully arrested, accused, detained or imprisoned has virtually no legal channels to seek compensation or combat impunity. While the UAPA does provide a review mechanism for executive misuse of the Act, the reviewing authority must be appointed by government. It is highly probable that such a review will merely be a formality, as it involves no real judicial scrutiny. Finally, the 2008 UAPA amendments have no sunset clause; in fact, the provisions have been grafted onto ordinary criminal law in such a way as to make them a permanent feature.[496]

2. Presumption of Innocence and Burden of Proof

The UAPA has also been criticized for the removing the presumption of innocence before the law, as well as reversing the burden of proof. The United Nations Human Rights Committee's General Comment No. 32 stipulates that the presumption of innocence is a fundamental human rights principle; the burden of proving guilt must be placed on the prosecution, and guilt must be proven beyond reasonable doubt.[497] Under the 2008 amendments, this presumption is denied to the accused by the UAPA. During the parliamentary debates, the Home Minister Mr. P. Chidambaram justified this reversal of the burden of proof on the grounds that in the past, terrorists have evaded conviction because they were permitted to remain silent. Mr. Chidambaram stated that if evidence points to the accused "then the accused has a duty to enter the box or let an evidence to say that I am giving contrary evidence".[498] In addition to shifting the burden of proof, this would also deny the accused the right to remain silent.

The right to a fair trial, which includes both the presumption of innocence and the right to silence, is also protected under Article 14 of the ICCPR. The Human Rights Committee, in its 2007 General Comment No. 32, states that while Article 14 is not listed as a non-derogable right, breaching "fundamental principles of fair trial… is prohibited at all times", including public emergencies".[499] Under this framework, the recent amendments to the Indian counter-terror legislation are seen as a breach of fundamental human rights.

3. Implementation Problems

Human rights activists have long stated that current criminal provisions in India are enough to tackle the ongoing threat of global terrorism. They contend that the problem is not in lack of legislation; the difficulty in preventing terrorism lies in the cracks which permeate India's internal security situation. Critics point to inherent problems in the implementation and application of the rule of law, including low rates of police efficiency, lack of intelligence capabilities, funding problems, and scarceness of infrastructure and equipment.[500]

---

[496] *Supra* note 20.
[497] United Nations Human Rights Committee, 'General Comment No. 32 - Article 14: Right to equality before courts and tribunals and to a fair trial' (23 August 2007) UN Doc CCPR/C/GC/32 (2007), para. 30.
[498] Parliamentary Debate (17 December 2008) Retrieved 31 July 2009, available at: http://164.100.47.134/newls/textofdebatedetail.aspx?sdate=12/17/2008.
[499] United Nations Human Rights Committee, 'General Comment No. 32 - Article 14: Right to equality before courts and tribunals and to a fair trial' (23 August 2007) UN Doc CCPR/C/GC/32 (2007), para. 6.
[500] India News Online (22 December 2008). "Indian Parliament passes anti-terror Bills." Retrieved 30 July 2009, available at: http://news.indiamart.com/news-analysis/indian-parliament-pa-20715.html.

In a recent report, the Belfer Center for Science and International Affairs identifies structural problems within India's counter-terrorism policy which serve as impediments to the prevention of terror. The report contends that India's police and internal security system is highly fragmented and often poorly coordinated, which restricts their effectiveness. The federal political system leaves most policing responsibilities to the states, which usually possess their own counterterrorism and intelligence units; however these forces, especially local police, are often poorly trained and equipped. Local personnel are frequently hired on the basis of political patronage, and are notorious for high levels of corruption. The report mentions that budgetary constraints have also had a negative effect on the efficiency of Indian law enforcement agencies. Compared to the budgets of even much smaller developed countries, India simply does not provide sufficient money for its security agencies on a per capita basis.[501] This causes them to under-train and under-staff their personnel, leading to corruption and a reliance on crude and often counterproductive policing techniques.[502]

Finally, the report also points to the sheer number of central investigative, law enforcement, and intelligence agencies as an obstacle to policy implementation. While state and central authorities are ostensibly coordinated through joint committees, task forces, subsidiary intelligence bureaus, and a Multi-Agency Center, the coordinating mechanisms are often slow and cumbersome. States and the central agencies frequently compete over resources and bureaucratic autonomy, and they both do a highly uneven job of cooperating with one another. In addition to these organizational challenges, many of the security institutions at all levels of government are understaffed, under-trained, and technologically backward.[503]

The report suggests that any implementation reforms are likely to be unsuccessful unless they contain the following characteristics:

a. Sustained, institutional capacity building of the anti-terrorism apparatus, including training and properly equipping personnel;
b. The securing of proper resources for reform efforts, both internationally as well as domestically;
c. Firm commitment from India's political leadership to push past bureaucratic and state-centered rivalries.[504]

The report concludes by suggesting that Indian leadership is best advised to "manage a pair of distinct projects—first, building on the short-term changes in coordination that can leverage existing assets and capabilities, and second, engaging in the much lengthier and broader task of improving training and technical capacities across India's security apparatus".[505] Conflating the two into one grand reform agenda is likely to slow both down and undermine the overall effort. India must pursue a series of discrete,

---

[501] Swami, Praveen (11 December 2008). "Will India's Security Overhaul Work?" BBC News.
[502] Staniland, Paul (April 2009). "Improving India's Counterterrorism Policy after Mumbai". CTC Sentinel Vol 2(4), pp. 11-14.
[503] Swami, Praveen (6 December 2008). "Lethal Lapse," Frontline.
[504] *Supra* note 16.
[505] *Supra* note 16.

manageable tasks if it is to fortify itself against the threats flowing both from across the border and from among its own population.[506]

3. Extrajudicial Killings

The most alarming human rights problem, particularly in Jammu and Kashmir, remains the high number of unlawful killings by security forces.[507] During fighting between government forces and militants, the laws of war—specifically common article 3 of 1949 Geneva Conventions and customary laws of war—apply. These laws prohibit attacks on civilians, as well as attacks that do not discriminate between civilians and valid military targets. Civilians have been victims of fighting in which they were shot in the crossfire, but they have also been killed when security forces have failed to take all feasible precautions to distinguish between civilians and militants. The security forces have then often sought to claim that those shot were militants or civilians who died in crossfire.[508]

So pervasive is the problem of faked encounters—not just in Jammu and Kashmir, but in other parts of India where security forces are engaged in containing crime or insurgencies—that the National Human Rights Commission has issued guidelines on investigating such incidents and punishing those making false claims. As Parvez Imroz, president of the Public Commission on Human Rights (a nongovernmental organization), says:

> There are a number of cases where we believe disappeared persons have been killed in faked encounters. In fact, there are cases pending in the High Court but the judiciary has not been particularly productive, merely directing the state or police to investigate. Of course, despite court orders, the progress in such investigations is always slow.[509]

Fake encounter killings might even be encouraged by the military command structure through decorations, gallantry citations or promotions of personnel credited for the death of militants. Such incentives may lead to abuses.[510]

International human rights standards demand a "thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions," including cases where complaints by relatives or other reliable reports suggest death in such circumstances.[511] The Indian government's investigative practices do not meet

---

[506] *Supra* note 16.

[507] "Extrajudicial Killings in Jammu and Kashmir Since November 2002," Public Commission on Human Rights, Srinagar, says there were at least 127 cases of killings by security forces between the November 2002 elections and January 2006. Copy on file with Human Rights Watch.

[508] *Supra* note 16.

[509] Human Rights Watch email interview with Parvez Imroz, President, Jammu and Kashmir Coalition of Civil Society, January 19, 2006.

[510] In May 2004, the Indian government admitted that troops from the Indian army had made false claims about an entirely fictitious 2003 encounter with Pakistani soldiers to win accolades. Maj. Surinder Singh was found guilty of faking the armed exchange by an army court. Major Singh blamed his senior officers. "Army Major Seeks Fair Trial in Fake Encounter Scam," ANI, May 11, 2004, [online] http://in.new.yahoo.com/040511/139/2d0xo.html.

[511] Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, adopted by the U.N. Economic and Social Council on May 24, 1989, in resolution 1989/65 and endorsed by the U.N. General Assembly on December 15, 1989, in resolution 44/162, principle 9.

accepted international standards in alleged extrajudicial killings, including the right of the deceased's family to be informed and have access to the investigation, and for the publication of a report "within a reasonable period of time" on the scope and findings of the investigation.[512]

4. Torture, Degradation and Inhumane Treatment

Human rights defenders have also long complained that Indian law and jurisprudence do not have an express definition of torture.[513] However, India is a state party to several major international human rights treaties that prohibit torture, including the ICCPR.[514] Additionally, India has signed, but not ratified, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention against Torture).[515] As a signatory to the Convention against Torture, India is "obliged to refrain from acts which would defeat the object and purpose of the treaty".[516] In fact, there is such a strong international consensus on the prohibition against torture that it is considered to be binding customary international law on all states, including those that have not ratified the Convention against Torture.[517]

Despite binding international precedent, torture remains endemic to the Indian criminal justice system, particularly in areas which see heavy armed conflict. Torture and other mistreatment usually takes place in interrogation centers operated by the security forces, and often occurs in the first hours or days after the victim is detained. Detainees are usually first interrogated by the detaining security force for periods of time that may range from several hours to several weeks. During this time the detainee is not produced before a court or given access to anyone outside the interrogation center. This violates guidelines laid down by the Supreme Court on arrest and detention.[518] According to the Armed Forces Special Powers Act, individuals picked up by the army have to be immediately handed over to police custody. This rule is routinely flouted while security troops interrogate, and often torture, a detainee.[519]

III. Concerns from Human Rights Organizations

---

[512] *Supra* note 16.

[513] South Asia Human Rights Documentation Center (17 August 2005). Human Rights Features, "Prevention of Torture". http://www.hrdc.net/sahrdc/hrfeatures/HRF124.htm.

[514] International Covenant on Civil and Political Rights (ICCPR) (1976), http://www.ohchr.org/english/law/ccpr.htm.

[515] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987. http://www.unhcr.ch/tbs/doc.nsf/0/082560404004ff315c12563b005e1c83? India signed the convention in 1997.

[516] Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, entered into force January 27, 1980, Article 18. Although India is not a party to the Vienna Convention, its provisions are considered customary international law.

[517] Rodley, Nigel. The Treatment of Prisoners under International Law (Oxford: Clarendon, 1999).

[518] The common law on treatment of people taken into custody is provided under Supreme Court guidelines in the 1996 case of D.K. Basu v. State of West Bengal. The Basu guidelines, as they are called, lay down specific requirements for arrest, detention or interrogation of any person taken into custody, to prevent torture.

[519] *Supra* note 16.

1. Human Rights Watch

(i) "Disappearances" in Jammu and Kashmir

Human Rights Watch has consistently taken a stand against the "disappearance" of many Kashmiri citizens since the beginning of the insurgency; indeed, over the years thousands of Kashmiris have gone missing. Of course, not all of these persons are victims of "enforced disappearance" by the security forces: some have left without telling their family or friends, often to join the militants, or simply to find jobs. Consequently, with such instances of erroneous reporting, substantial controversy remains about the problem's exact prevalence. But as Human Rights Watch has reported in the past, "enforced disappearance" by troops has been widespread since the early years of the conflict.[520]

The "disappeared" are often initially held in army or paramilitary camps, or in interrogation centers run by police specially deployed in counter-insurgency operations; this makes it virtually impossible for relatives and lawyers to locate or gain access to them.[521] When a person goes missing, relatives often go to the camps of the security forces—the army and paramilitaries based in Jammu and Kashmir—to search for the missing person. If the person is not released or is not produced before a magistrate, relatives go to the police to report that the person is missing. They also often go to the courts for a writ of *habeas corpus* to be issued ordering the authorities to produce the person in court. In most cases the army or other security forces claim that they do not have the person in their custody.[522]

Human Rights Watch notes that determined efforts of the Srinigar-based Association of Parents of Disappeared Persons (APDP), as well as others in civil society, to confront the problem of disappearances appear to be making a difference. According to the APDP, the number of new enforced disappearances dropped from eighty-one in 2003 to forty-one in 2004 to eighteen in 2005. But, crucially, thousands of cases remain unresolved. According to APDP, at least eight thousand people have "disappeared" since the insurgency began.[523] In February 2003, the government told the state legislative assembly that 3,744 persons had gone missing in Jammu and Kashmir in the period 2000-2002 alone.[524] Human Rights Watch urges the Indian government to respond promptly to *habeas corpus* petitions in cases of "disappearance" and those filed to challenge detentions, as well as swift and public action against all state officials who have obstructed or ignored judicial orders to produce detainees in court.[525]

(ii) Arbitrary Detentions

A further issue of concern to Human Rights Watch is the ongoing use of arbitrary detention by Indian military forces in Jammu and Kashmir. The organization states that in

---

[520] *Supra* note 16.
[521] National Human Rights Commission (17 September 2003). "NHRC's Directions on enforced or involuntary disappearances in J&K". http://www.nhrc.nic.in/disparchive.asp?fno=588 .
[522] *Supra* note 16.
[523] Asian Human Rights Commission (23 April 2003). Urgent Appeals Desk, "Justice: Action Against Enforced Disappearance," http://www.ahrchk.net/ua/mainfile.php/2003/434/.
[524] The Daily Excelsior, (26 February 2003) "3744 Persons Missing Since 2000". Available at: http://www.dailyexcelsior.com/web1/03feb27/state/state#htm#9.
[525] *Supra* note 16.

cases of alleged militancy, the army, paramilitaries, and police often detain individuals without any legal basis; they also resist the judicial application of provisions in the Indian legal code which designed to ensure against arbitrary detention. These provisions include bringing persons promptly before a magistrate, ensuring access to lawyers, and providing a prompt trial. The police say that prosecutions are stymied because they often find it difficult to find witnesses willing to testify against alleged militants, either out of support for the militants or because they fear retribution. However, Human Rights Watch reaffirms that it is the obligation of the authorities to address such prosecutorial concerns; prolonged, indefinite detention is not the solution.[526]

Indian law on the detention of criminal suspects is frequently evaded by the ready use of a preventive detention law. Section 57 and Section 167 of the Criminal Procedure Code provide that each individual detained must be produced before a magistrate within twenty-four hours or, if the investigation cannot be completed with twenty-four hours, must inform the magistrate of the detention.[527] Yet in cases involving alleged militancy in Jammu and Kashmir, this provision is seldom followed. This is because the government usually invokes the 1978 Jammu and Kashmir Public Safety Act (PSA), and its preventive detention law that permits detention of a person without trial for a period of up to two years "with a view of preventing him from acting in any manner prejudicial to the security of the State or the maintenance of public order."[528] Human Rights Watch calls for the repeal of this act, as well as the strengthening and empowering of the State Human Rights Commission to independently investigate allegations of abuse by security forces.[529]

(iii) Legal Weaknesses in the Human Rights Protection Act

In 1993, responding to increasing criticism of human rights violations committed by its security forces, the Indian government established the National Human Rights Commission (NHRC) through the Human Rights Protection Act (HRPA).[530] Human

---

[526] International human rights law requires that persons deprived of their liberty be allowed to challenge their detention before a court. Article 9(4) of the International Covenant on Civil and Political Rights (ICCPR) mandates that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." Article 14(2) of the ICCPR states that, "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." Article 14(3)(c) states that "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:… (c) To be tried without undue delay. Persons apprehended during fighting between government forces and militants in Kashmir are similarly protected. International humanitarian law for non-international (internal) armed conflicts prohibits the arbitrary deprivation of liberty. Consistent with international human rights law, during an internal armed conflict the state has obligations to inform a person who is arrested of the reasons for arrest; to bring a person arrested on a criminal charge promptly before a judge; and to provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention. See ICRC, Customary International Humanitarian Law, pp. 347-352.

[527] Section 57 of the Criminal Procedure Code provides that every person who is arrested and detained in custody should be produced before the nearest magistrate within a period of twenty-four hours of such arrest. Magistrates are permitted under Section 167 of the Criminal Procedure Code to remand persons arrested for a further period of up to fifteen days of police custody.

[528] Public Safety Act, 1978, Chapter IV, Power to make orders detaining certain persons, Section 8(a).

[529] *Supra* note 16.

[530] Human Rights Act (1993) available at: http://nhrc.nic.in/HRAct.htm.

Rights watch contends that while this is a major step forward, there are several restrictions in the law which prevent the Commission from performing a meaningful role in addressing impunity. The National Human Rights Commission has repeatedly said that certain provisions of the HRPA need to be reexamined, "as they were, in fact, tending to militate against the purposes of the Act itself."[531]

Under Section 19 of the HRPA, when the Commission receives a complaint of a human rights violation by the armed forces, it cannot independently investigate the case but can only seek a report from the central government and make recommendations. This is in direct violation of the international standards for national human rights institutions. The "Paris Principles" on national human rights institutions provide that national institutions shall have the responsibility to submit to the government reports and opinions on "any situation of violation of human rights which it decides to take up."[532] Human Rights Watch therefore urges the Indian government to address the inconsistencies within the Human Rights Protection Act.

2. Amnesty International

(i) The National Investigative Agency Bill

Amnesty International has voiced its concern over the speed at which the NIA Bill was enacted, and the powers which it grants to the newly created agency. The Bill allows the Indian executive authorities to set up special courts, in consultation with the judiciary, to try terrorist offences. While international human rights law and standards do not prohibit per se the establishment of special courts, they require that all courts are competent, independent and impartial, and that they afford applicable judicial guarantees so as to ensure fair trials. The UN Human Rights Committee has clarified that while the ICCPR does not prohibit trials of civilians in special courts, the trying of civilians by such courts should be very exceptional and take place in proceedings which afford the full guarantees stipulated in Article 14 of the ICCPR.[533] Amnesty International contends that the new legislation on National Investigating Agency authorizes special courts to close hearings to the public without defining or limiting the grounds under which they may do so. As a result, the organization requests Indian authorities to extensively review the provisions in this Bill which are incompatible with human rights.[534]

(ii) The Armed Forces Special Powers Act

Amnesty International contends that the AFSPA has facilitated grave human rights abuses in disturbed areas, both on the part of armed groups as well as government forces. While the organization recognizes the duty of all states under international human rights law to protect their populations from violent criminal acts, including those committed by armed groups. It stresses that such measures should be implemented within the framework of the Universal Declaration of Human Rights. In its concluding observations on India in 1997, the Human Rights Committee (HRC) recognized that "terrorist

---

[531] National Human Rights Commission, Annual Report, 2001-2002, Chapter 2, (2.5), p. 10.
[532] National institutions for the promotion and protection of human rights, G.A. res. 48/134, 48 U.N. GAOR Supp. (No. 49) at 252, U.N. Doc. A/48/49 (1993) ("Paris Principles"), Principle 3(c).
[533] *Supra* note 35.
[534] *Supra* note 9.

activities in the border states that have caused the death and injury of thousands of innocent people, force the State Party to take measures to protect its population" yet emphasized that "all measures adopted must be in conformity with the State Party's obligations under the Covenant".[535]

Amnesty International expresses particular concern that the AFSPA violates the following tenets of international human rights law, as contained in the ICCPR:

a. Non-derogable right to life;
b. Right to liberty and security of person;
c. Prohibition on torture, ill-treatment and "disappearance" of persons;
d. Right to legal remedy;
e. Freedom from an undeclared state of emergency for undefined reasons and for unlimited periods.[536]

In light of these violations, Amnesty International recommends that the Government of India repeal the AFSPA. The organization also recommends that the Government of India ensure that any future legislation complies fully with international human rights and humanitarian law treaties to which India is a state party, especially the ICCPR and the four Geneva Conventions.[537]

IV. Judicial Opinion

People's Union for Civil Liberties & A.N.R. V. Union of India [2003] INSC 644: In this batch of Writ Petitions, the PUCL challenged the Constitutional validity of various provisions of the Prevention of Terrorism Act, 2002 (POTA). They contended submitted that terrorist activity is confined only to the state level, and therefore only states have the competence to enact legislation. The PUCL had advocated that the human rights abuses under previous counter-terrorism legislation were not, in fact, diminished or rectified by the enactment of POTA, and called for it to be struck down. However, the Attorney General refuted their contention, submitting that acts of terrorism, which are aimed at weakening the sovereignty and integrity of the country cannot be equated with mere breaches of law and order and disturbances of public order or public safety. He argued that the concept of "sovereignty and integrity of India" is distinct and separate from the concepts of "public order" or "security of State". Therefore, the legislative competence of a state to enact laws for its security cannot override the requirement of Parliament to enact laws to safeguard national security and sovereignty of India by preventing and punishing acts of terrorism.

V. Annex

Case Studies: Incidents of Misuse of Indian Counter-Terrorism Policy

1. The Case of Dr. Binayak Sen

---

[535] Concluding observations of the Human Rights Committee: India, Report of the Human Rights Committee, UN Doc. A/52/40 (1997), paras. 416-450, at para. 419.
[536] Amnesty International (2005). Report: India: Briefing on the Armed Forces (Special Powers) Act, 1958. AI Index: ASA 20/025/2005.
[537] *Supra* note 62.

Binayak Sen is a pediatrician, public health specialist and national Vice-President of the People's Union for Civil Liberties (PUCL) based in Chhattisgarh state. Sen was noted for extending health care to the poorest people, monitoring the health and nutrition status of the people of Chhattisgarh, and as an activist defending the human rights of tribal and other poor people. In May 2007, he was detained for allegedly violating the provisions of the Chhattisgarh Special Public Security Act 2005 (CSPSA) and the Unlawful Activities (Prevention) Act 1967.[538] His detention has been declared in breach of international law by Amnesty International, and his release has been championed by human rights organizations from across the globe.[539]

In conjunction with the PUCL, Dr. Sen had helped to draw national attention to the unlawful killing of several *adivasis* in Santoshpur, Chhattisgarh. Upon orders from the State Human Rights Commission, bodies of the victims were exhumed from a mass grave in the week immediately preceding Sen's arrest. According to a police official monitoring the investigation, autopsy reports confirmed that three of the victims were hit by bullets at close range on the head and waist while others were axed to death; this account was corroborated by a videotaped interview with several village members.[540] The police official also told the press: "It's certain that some police personnel crossed the limits and killed innocent villagers branding them as Maoist militants ... Now the government has to decide whether the cops involved in killings should be arrested or not."[541] Shortly after this statement was released to the media, Chhattisgarh Home Minister Ramvichar Netam replied that "the government will not arrest the policemen involved in the killings", unleashing a massive public outcry.[542]

Sen was detained on 14 May 2007, under provisions of the Chhattisgarh Special Public Security Act, 2006 (CSPSA). His arrest was based on the suspicion that he had been passing letters from Narayan Sanyal, a detained Naxalite leader whom Sen had been treating medically in the Raipur jail, to Pijush Guha, an alleged Naxalite under detention since 1 May 2007. Much international attention was generated over his arrest, and letters of appeal were sent by 22 Nobel Prize Laureates in protest over his detainment. Noam Chomsky and several other prominent figures issued a press statement dated 16 June 2007 alleging that "The fake encounters, rapes, burning of villages and displacement of *adivasis* in tens of thousands and consequent loss of livelihoods have been extensively chronicled by several independent investigations. Dr Sen's arrest is clearly an attempt to intimidate PUCL and other democratic voices that have been speaking out against human rights violations in the state."[543]

---

[538] Urgent Appeals Programme: Asian Human Rights Commission (15 May 2007). "Forwarded Appeal (India): Arrest of a prominent human rights activist over oppressive laws". Asian Human Rights Commission. http://www.ahrchk.net/ua/mainfile.php/2006/2392/.

[539] Suroor, Hasan (25 April 2009). "Amnesty calls for the release of Binayak Sen". The Hindu. http://www.thehindu.com/2009/04/25/stories/2009042554792400.htm.

[540] Indo-Asian News Service (9 May 2007). "Chhattisgarh wants to avoid Gujarat-like situation over 'fake encounter'". http://www.indiaenews.com/india/20070509/50895.htm.

[541] *Supra* note 66.

[542] *Supra* note 66.

[543] "'Release Binayak Sen': Noam Chomsky". Savebinayak.ukaid.org. Retrieved 3 August 2009, availavlt at: http://www.savebinayak.ukaid.org.uk/4.html.

Due to the increasing international attention to Dr Sen's case, The Supreme Court of India, on 25 May 2009, granted him bail.[544] At the time of writing, this report found that although Dr Sen had been released, the charges against him had yet to be dropped.

2. The Massacres at Chattisinghpora and Pathribal

The controversy surrounding massacres at Chattisinghpora illustrate the weaknesses of accountability mechanisms in Indian counter-terrorism policy. The incidents described below have been condemned by a number of international governments, particularly the United States, as the massacre at Chattisinghpora occurred on the eve of then-President Bill Clinton's visit to India.[545] The massacres remain an example of attempts, both on the part of police and military, to keep the truth from the public.

On the evening of 20 March 2000, between 15 and 17 unidentified gunmen, dressed in Indian army fatigues, entered the village of Chattisinghpora. The villagers, most of them Sikhs, were told that it was a routine investigation and identity check. Male residents were asked to come out of their homes with their identification cards. Once they were lined up outside, however, the gunmen opened fire, killing 36 people and injuring several others. The sole survivor of the massacre, Nanak Singh Aulakh, recounted the events to reporters, and stated that a unit of Indian paramilitary Rashtriya Rifles stationed nearby failed to intervene during the attack.[546] It was the first time in more than a decade of violence in Jammu and Kashmir that the Sikh community had come under attack.[547]

The killings shocked many Kashmiris, and were widely condemned by the Indian and Pakistani governments as well as the leaders of the Kashmiri separatist movement. Although the Government of India and the state government of Jammu and Kashmir had not yet launched any official investigation into the massacre, they immediately accused two Islamist terrorist organizations, Lashkar-e-Taiba and Hizbul Mujahideen.[548] The All Parties Hurriyat Conference however, accused the Indian government of carrying out the massacre to discredit the Kashmiri independence movement, while Syed Salahuddin, head of Hizbul Mujahedin publicly stated: "Mujahedin have nothing against the Sikh community which sympathizes with our struggle. We assure them that there never was and there will never be any danger to Sikhs from Kashmiri freedom fighters."[549]

Five days after the events at Chattisinghpora, Indian military forces killed five men in Pathribal village in the Anantang district, claiming that the victims were the "foreign militants" responsible for the attacks. Farooq Khan, senior superintendent of police in Anantnag, told journalists that assault rifles, grenades, and two wireless sets had been recovered from the militants who all belonged to the Abu Maaz unit of a foreign militant group.[550] They had been hiding inside a hut that later caught fire. Khan also stated that a

---

[544] Times of India (25 May 2009). "Civil rights activist Binayak Sen gets bail" Retrieved 3 August 2009, from: http://timesofindia.indiatimes.com/India/Civil-rights-activist-Binayak-Sen-gets-bail/articleshow/4574543.cms.

[545] Dugger, Celia (22 March 2000). "Pall Cast by Sikh Slaying Settles Over Clinton Visit," The New York Times.

[546] Amnesty International. (15 June 2000). Report: A trail of unlawful killings in Jammu and Kashmir: Chithisinghpora and its aftermath.

[547] *Supra* note 16.

[548] *Supra* note 72.

[549] *Supra* note 71.

[550] Swami, Praveen (14 April 2000)."The Massacre at Chattisinghpora." Frontline. Volume 17, Issue 07.

member of the Hizb-ul-Mujahedin had provided information about the militant hideout. All of the militants were "probably foreigners," he said, adding: "It is certain that they were the killers."[551] The daily update for March 25, 2000, on an army website claims: "5 foreign terrorists (Harkat-ul- Mujahideen and Lashkar-e-Taiba group) killed. These terrorists were involved in the massacre of 36 innocent Sikhs on the night of 20 March."[552] Official reports claimed that security forces had, after a gun fight, blown up the hut where the men were hiding, and had retrieved five bodies that had been charred beyond recognition. The bodies were buried separately without any postmortem examination.[553]

Local observers and political activists, however, doubted the Indian government's official reports, pointing out that if there had been a gunfight, some of the security force personnel would have sustained injuries - but none were injured. Over the following days, local villagers began to protest, claiming that the men were ordinary civilians who had been killed in a fake encounter, not "foreign militants." According these villagers, up to 17 men had been detained by the police and "disappeared" between the 21 and 24 of March. [554] On March 30, local authorities in Anantnag relented to growing public pressure, and agreed to exhume the bodies and conduct an investigation into the deaths.

DNA samples were collected from the five bodies, as well as 15 relatives of the missing young men, and were submitted to forensic laboratories in Kolkata and Hyderabad. However, in March 2002 it was discovered that the DNA samples allegedly taken from the bodies of the Pathribal victims, all of whom were men, had been tampered with; according to a report from the Times of India, lab workers found that samples had in fact been collected from females.[555] Fresh samples were collected in April 2002, which, upon testing, conclusively proved that the victims were innocent local civilians, and not foreign militants as the Indian government had been claiming for the past two years.[556]

The parties responsible for the initial massacre at Chattisinghpora remain unidentified - various theories have been put forward accusing both Pakistani Islamist militants, and Indian renegades - surrendered militants who cooperate with Indian armed forces. In August 2000, the Indian government announced that it had captured two Pakistan-based Lashkar-e-Toiba operatives, who had allegedly admitted to carrying out the attacks.[557] However, some human rights organizations have expressed doubt about the veracity of these admissions. Independent inquiries by human rights activists from Punjab and the Ludhiana-based International Human Rights Organization have found that it is unlikely that the attacks were carried out by Indian security forces themselves, and that the

---

[551] Chicago Tribune (26 March 2000)"Troops Kill 5 Rebels Linked to Massacre in Kashmir," reproducing New York Times News Service.
[552] "Army in Kashmir, Events in Jammu & Kashmir as on March 25, 2000," [online] Retrieved 3 August 2009 at: http://www.armyinkashmir.org/updates/25032000.html.
[553] *Supra* note 71.
[554] *Supra* note 71.
[555] BBC News (8 March 2002). "Kashmir massacre samples faked".
[556] BBC News (16 July 2002). "Kashmir massacre suspects 'innocent'".
[557] Rediff (31 December 2000). "Lashkar militant admits killing Sikhs in Chittisinghpora".

perpetrators were most likely renegades.[558] In 2006, five Indian military officers were found guilty of killing innocent civilians in the fake encounter at Pathribal.[559]

4. The Massacre at Barakpora

The events that occurred in Barakpora were a direct result of the widely perceived failure on the part of the Indian government to properly investigate the deaths at Chattisinghpora and Pathribal. With no action being taken with regards to the promised investigation into the Pathribal deaths, the local population grew increasingly restless. On 3 April 2000, an estimated 3,000 to 4,000 protesters marched into the Anantnag district, where they intended to present a memorandum to the Deputy Commissioner demanding the exhumation of the bodies. When they reached the town of Barakpora, three kilometers from Anantnag, some protesters began throwing stones at an Indian paramilitary camp. Members of the Central Reserve Police Force responded by opening fire on the protesters, killing 8 and injuring at least 15 more.[560]

Former High Court judge S.R. Pandian was asked to head the commission set up to investigate the police shooting. His report, issued on 27 October 2000, concluded that:

> There can be no second opinion that the incident that had taken place in front of the SOG [Special Operations Group] and CRPF Camp at Brakpora/Bulbul Nowgam, Anantnag is nothing but a sort of butchery [by the troops] in which eight innocent persons had laid down their lives and 14 persons sustained injuries, some of them very seriously. The loss to life is irrevocable.[561]

Justice Pandian, who examined the causes that led to the incident at Barakpora, said that its "direct root causes" were linked to the Chattisinghpora massacre and the faked encounter killings in Pathirabal.[562] His commission fixed responsibility on seven people: three policemen and four members of the CRPF. The commission findings were unequivocal, stating that the shooting was "nothing short of an unwarranted brutal attack amounting to murder, attempt to murder and causing grievous and simple hurt, without any justification and authority."[563] The Pandian Commission report was placed before the state cabinet on 31 October 2000, at which time Chief Minister Farooq Abdullah, affirmed that the cases relating to the four CRPF personnel would be forwarded to the central government for appropriate action. Murder charges, he said, would be brought against the police personnel found responsible for the shooting. [564] Nearly six years on, the three policemen have yet to be arrested or charged. At the time of writing, this report could find no available information regarding any legal action taken against CRPF personnel.

5. Terrorist Attacks in Mumbai: 26/11

---

[558] *Supra* note 71.
[559] *Supra* note 71.
[560] *Supra* note 71.
[561] Justice S. R. Pandian, Report on the Inquiry Commission, October 27, 2000, p.108.
[562] *Supra* note 87.
[563] *Supra* note 87.
[564] Amnesty International. "Impunity Must End in Jammu and Kashmir."

The most recent terrorist event in India, the attacks in Mumbai have illustrated the drastic need for a reformatting of Indian counter-terrorism policy. Indeed, the November 2008 events brought into clear focus the inability of the Indian security apparatus to anticipate and appropriately respond to major terrorist incidents. As one prominent analyst wrote, the government's responses to the Mumbai attacks were "comprehensive failures from the point of view of India's security establishment."[565] While some Indian analysts and politicians prefer to focus on Pakistan's role as a haven for a variety of militant groups, it is clear that India needs to dramatically enhance its domestic counterterrorism infrastructure.

For example, The National Security Guard commandos are an elite counter-terrorism united based in Mehram Nagar, Palam Airport, Delhi. It is this unit which should be mobilized to deal with a terrorist threat, however it took NSG officers over 10 hours to reach the terrorists.[566] Although the policy is for an IL-76 plane to be permanently on the ground in Delhi in the event of a terrorist incident, the officers had to wait for 3 hours, until 03:15, for the aircraft to arrive from Chandigarh. The NSG commandos landed at Mumbai Airport at 05:15, but had to wait a further hour for the Bombay Police to arrange for armored transport. They reached the Taj Mahal hotel and the Oberoi Trident hotel at 07:00, but initially were not given detailed maps of the hotels.[567] Furthermore, the operations in the Taj Mahal hotel and Nariman House were conducted under full glare of the media, which may have assisted the terrorists by taking away the element of surprise.[568] This lack of preparedness and coordination may very well have contributed to the high number of lives claimed during the attack; counter-terrorism experts state that unless counteraction starts within 30 minutes, the attackers can take up key defensive positions.[569]

The lack of adequate preparation, as well as the lack of communication between local and state authorities was evident in the failure to prevent or appropriately respond to the Mumbai attacks.[570] There was, in fact, significant intelligence suggesting a seaborne terrorist attack was likely, and even that prominent sites such as the Taj Hotel would be targeted. This information, however, was ignored by several key bureaucratic actors—including the Coast Guard and the Maharashtra state director-general of police—because it was deemed unactionable.[571] Others enforcement agencies, such as the Maharashtra Anti-Terrorism Squad, at least attempted some kind of preparation.[572] The differences in readiness highlight the extent of fragmentation among the security apparatus. Even when Mumbai police tried to take preventive action, they lacked the manpower to sustain increased security at the hotels. Once the attack occurred, the security forces did not have

---

[565] Sahni Ajai (1 December 2008). "The Uneducable Indian," Outlook.
[566] Economic Times of India (30 November 2008). "Why did NSG take 10 hours to arrive?".
[567] *Supra* note 92.
[568] Rao, Raghavendra (6 December 2008). "NSG says media got in the way, wants guidelines". The Indian Express, http://www.indianexpress.com/news/its-official-nsg-says-media-got-in-the-way-wants-guidelines/394899.
[569] *Supra* note 92.
[570] Oberoi, Vijay (2 December 2008). "Never Again", Indian Express.
[571] Datta, Saikat et. al. ("The Armies of the Night," Outlook, December 15, 2008.
[572] The Mumbai police put extra guard on prominent sites and met with hotel officials. The extra guard was not maintained, however, because of the strain it put on manpower. Swami, Praveen (30 November 2008). "Pointed Intelligence Warnings Preceded Attacks," The Hindu.

sufficient night-vision equipment, heavy weaponry, or information about the attack sites, leading to a long response time and the emergence of a disastrous siege.[573]

In light of the effects of the Mumbai attacks, it is understandable that a rash of restrictive new security measures would be instituted. However, a more effective response would be to review India's internal security policy and identify the areas which require a more streamlined response.

[573] BBC News, (2 December 2008) "'Rot' at Heart of Indian Intelligence".