

Chapter Eight

More Law or Less Law? The Resilience of Human Rights Law and Institutions in the 'War on Terror'

Andrew Byrnes *

Introduction

In the years since the events of September 2001 shocked the United States (US) and many other states into the adoption of wide-ranging measures to respond to actual and perceived threats of international terrorism, the deployment of law has been a central part of the design and justification of those responses, as well as of attempts to moderate and restrain their excesses. While legal responses at the international and national levels have only been a part of the array of measures adopted, the volume of law-making that has taken place has been remarkable.¹ At the international level the extent of regulatory activity around terrorism has been striking: it includes new regulations for container shipping, civil aviation, financial transactions, customs, immigration and passports, use of the internet, and cyberterrorism, as well as provisions for the designation of many new criminal offences and the establishment of transnational law enforcement cooperation arrangements.

The number of institutions involved in efforts to respond to terrorism is also impressive. Nearly every international or regional institution has been caught up in the regulatory network in one way or another, and many have adopted new programs or considerably expanded existing ones in the area.² Much of the activity of these organisations has involved the adoption and implementation of new norms, frequently embodied in new international instruments.

* Professor of International Law, Faculty of Law and Australian Human Rights Centre, The University of New South Wales, Sydney, Australia. This research was funded by the ARC Discovery Project DP0451473 'Terrorism and the Non-State Actor: the Role of Law in the Search for Security'.

¹ See United Nations Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, UN Doc E/CN.4/2004/3 (2004), [50].

² Eg, the OSCE Action Against Terrorism Unit lists 43 international or regional partner bodies and organisations with which it is cooperating on the subject. The Unit, established in 2002, 'is the Organization's focal point for the co-ordination and facilitation of OSCE initiatives and capacity-building programmes relevant to the struggle against terrorism': <<http://www.osce.org/atu/>>. The United Nations Counter-Terrorism Implementation Task Force, established in 2005 to coordinate counter-terrorism activities across the UN system, lists 24 parts of the UN system that are members of the Task Force: <<http://www.un.org/terrorism/cttaskforce.html>>.

The forms of legal responses seen in the prosecution of the so-called 'war on terror' can be broadly seen as falling into two categories: (a) the *regulation* of terrorism and terrorist activities; and (b) the *amelioration* of counter-terrorism measures.

The category of *regulation of terrorism* encompasses those measures relating to the prevention, investigation and punishment of acts relating to terrorism. It includes the development and application of new legal standards and procedures to aid in identifying persons engaged in terrorist acts or acts preparatory to them, and in investigating and prosecuting, or rendering them harmless. It also involves measures to protect infrastructure and particular forms of social activity from terrorist attacks, or at least to attempt to reduce the risk of such acts, to minimise their impact, and to be prepared to cope with the aftermath of terrorist attacks.

The *ameliorative* category comprises measures that involve efforts to moderate or restrain the excesses of the regulatory measures referred to above, from a number of perspectives, including:

- from a human rights or rule of law perspective (challenging many of the measures as unjustifiable limitations on the enjoyment of fundamental human rights and freedoms);
- from a regulatory impact perspective (resisting the additional burden in terms of red tape/regulatory impact and additional expense that counter-terrorism laws and policies may impose);
- from an instrumentalist and pragmatic perspective (questioning whether the measures are likely to be effective in reducing the threat of terrorism); and
- from other perspectives such as the broader political perspective of questioning whether the allocation of public and private resources to counter-terrorism and security measures is justifiable in the light of other equally or more pressing social problems.

Many factors have contributed to the speed and vigour with which governments have acted to adopt wide-ranging counter-terrorist measures: powerful political imperatives at the international and national level to respond to attacks and to be seen to provide as high a level of security for their populaces as possible against the perceived threats of serious terrorist attacks; the political and financial incentives offered by the United States; the domestic political expediency of being able to invoke a counter-terrorist discourse to legitimate a policy of political repression of minorities or political opponents; and the reputational advantages of being seen to be 'robust' in dealing with terrorists.³ In justifying these measures, many governments have unapologetically challenged accepted

³ See R Foot, 'Human Rights and Counterterrorism in Global Governance: Reputation and Resistance' (2005) 11 *Global Governance* 291, 299-302.

frameworks for the protection of human rights and existing assumptions and interpretations of the limits they impose.

Actions that violate rights and cause immediate (and longer-term) injury to individuals and institutions can be taken very quickly.⁴ On the other hand, the (re)assertion of human rights and rule of law values in response to serious violations of human rights, may require time: to establish facts, to hold governments accountable, and to provide reparation to victims.

The development of new structures to pursue the counter-terrorist agenda and to stimulate states to adopt effective measures to achieve specific goals towards that end, have presented critical challenges to human rights norms and institutions. The priorities of counter-terrorism bodies and programs are not the same as those of human rights bodies, and counter-terrorism mandates frequently make no explicit reference to the role that human rights standards might or should play in the struggle against terrorism. The surge of political energy, and financial and other resources devoted to counter-terrorism efforts, and the associated claims to normative priority of the counter-terrorism agenda, have presented human rights institutions and actors with major challenges.

Counter-Terrorism Strategies and Human Rights Responses: An Overview

This chapter is organised around an analysis of three types of counter-terrorism strategies, and examines the manner in which specific human rights responses to these strategies have been developed at the international level through a combination of institutional, procedural or normative engagement by different international actors. While the three strategies reflect different approaches to the relevance of international law to the counter-terrorism enterprise, they all fall into the category of regulatory measures described earlier. They involve the regulation of terrorism:

- a. *through international law* — by the development of new international norms and procedures with a specific focus on addressing terrorism issues;
- b. *despite international law (distorted legalism)* — by engagement with the human rights discourse, seeking to argue that counter-terrorist measures are in conformity with human rights law by invoking extreme or distorted interpretations of the law, or by disregarding authoritative interpretations or rulings on particular issues or in individual cases; or
- c. *outside, or in disregard of, international law* — by adopting pragmatic measures without regard to, or in flagrant disregard of, their illegality under international (human rights) law.

⁴ O Gross and F Ni Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press, 2006) 8.

The human rights responses to these strategies are examined in the light of actions taken by a number of international human rights bodies. These counter-strategies, each roughly corresponding to the strategies set out above, can be characterised as:

- a. *mainstreaming* of human rights norms and expertise into counter-terrorism mandates and bodies;
- b. *critical engagement* with states through existing human rights procedures over disputed issues of law; and
- c. *fact-finding and exposure* of activities outside the law as a form of exacting public accountability.

These types of responses overlap, and the same actors may employ the various strategies at different times and in relation to different bodies. But they provide useful categories for understanding some of the major forms of reaffirmation of human rights values at the international level.

Regulating Terrorism *through* International Law

The resort to law has been a marked feature of the international response to September 11 2001 (9/11) and its aftermath. While there was already an extensive body of international law addressing terrorism before then, there has been a surge of law-making internationally and regionally since that time. At the United Nations (UN) level, the completion of conventions on terrorist bombing and nuclear terrorism followed quickly upon the attacks on New York and Washington, adding these two new conventions to the 11 existing UN anti-terrorism conventions.⁵ The numbers of states parties to the terrorism conventions increased rapidly, and work on the drafting of a comprehensive anti-terrorism convention was given additional stimulus (though this process has continued to move slowly toward a conclusion, bedevilled by the difficulties of defining terrorism and solving political issues largely mired in the situation in the Middle East).⁶ Regional conventions have been adopted by the Organisation of American States and by the Council of Europe, and specialised agencies and other bodies have adopted a range of measures to minimise the risk of terrorism and to enhance efforts to identify, disrupt and bring to justice persons engaged in terrorist activities.

⁵ See the list of the (now) 13 counter-terrorism conventions and other details of the United Nations' responses to terrorism at UN Action Against Terrorism <<http://www.un.org/terrorism>>.

⁶ Report of the Ad Hoc Committee established by GA Res 51/210 of 17 December 1996, 10th session (27 February-3 March 2006), UN Doc A/61/37 (2006); Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, 11th session, (5, 6 and 15 February 2007), UN Doc A/62/37 (2007). See A Byrnes, 'United Nations Reform and Human Rights' in M Smith (ed), *Human Rights 2005 – The Year in Review* (Melbourne: Castan Centre for Human Rights, 2006) 31, available at <<http://www.law.monash.edu.au/castancentre/events/2005/byrnes-paper.html>>.

These instruments represent the traditional broadly-based form of international law-making that involves participation of a large number of states in the legislative process, the absence of any obligation to join the resulting treaty regime, and an instrument containing substantive obligations that often reflect the least common denominator. However, an equally — indeed, perhaps more — important form of law-making has come to prominence post-9/11 in relation to terrorist issues, namely the use of 'executive', 'Great Power' law-making, through the UN Security Council.

In a series of resolutions adopted under Chapter VII of the *UN Charter* (and thus formally binding all member states as a matter of international law), the Security Council has legislated wide-ranging obligations for states in relation to terrorism. In significant respects, these obligations extended well beyond the obligations that many states had individually or collectively accepted under existing treaties. In addition, the establishment of supervisory institutions by the Council to monitor the implementation of these measures has meant that the decisions have become much more than powerful political exhortations.

The development of this 'legislative' function by the Council — largely driven by the efforts of the US to use the authority of the Council to advance an energetic agenda against terrorism — is controversial for various reasons, including that it is seen as pushing a predominantly US/Western agenda and endeavouring to impose it on the rest of the world.⁷

The adoption of new international law in the form of a treaty or other programmatic instruments does not necessarily bring with it the institutional structure to drive the implementation of obligations accepted or political undertakings given by states parties or the states which have supported the adoption of the instrument. Even if institutions are established, they may be under-resourced or limited in their functions and powers.

However, the recent Security Council resolutions, which form the centrepiece of the Council's response to terrorism are an exception,⁸ since each of them established a committee of the Council to monitor its implementation.

The most important of these has been the Counter-Terrorism Committee (CTC), established under the far-reaching Resolution 1373, adopted on 28 September 2001. The role of that Committee is to monitor the implementation by states of the extensive obligations imposed on member states by the Council in Resolution

⁷ See A Bianchi, 'Security Council's Anti-terror Resolutions and their Implementation by Member States: An Overview' (2006) 4 *Journal of International Criminal Justice* 1044, 1059-70; A Conte, *Counter-Terrorism and Human Rights in New Zealand* (Wellington: New Zealand Law Foundation, 2007) 37-49; E Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism' (2003) 97 *American Journal of International Law* 333; Gross and Ní Aoláin, above n 4, 404.

⁸ SC Res 1267 (1999) (Al Qaida and Taliban Sanctions Committee); SC Res 1373 (2001), establishing the Counter-Terrorism Committee (CTC); and SC Res 1540 (2004) (Weapons of Mass Destruction and Non-State Actors).

1373. The Committee initially received significant resources to support its work, and has continued to benefit from such support.

Since its establishment in 2001, the Committee has been able to persuade all member states to report at least once (and many more than once) on the steps they have taken to implement Resolution 1373; these reports have been reviewed by the Committee through its sub-committees. Expert advisers assist the Committee; in its evaluation of the reports, the Committee offers comments, recommends that states obtain technical assistance to assist the implementation of their obligations, and facilitates that process; and the Committee also carries out visits to member states.

The CTC is now well-established and has entered that stage of institutional development during which a body ensures that it will continue to exist by the identification of constantly shifting or emerging new needs that it is able to fulfil. With the CTC this evolution seems well underway: in 2004 the Committee sought permission to 'revitalise' itself, something which involved the establishment of a substantial Counter-Terrorism Executive Directorate (CTED). That 'revitalisation' took place in late 2005, and it is clear that the CTC and CTED will be with us for the long-haul. The CTC's tasks include putting pressure on states to report, analysing reasons for states' non-reporting, carrying out technical needs assessment, visiting states, and providing them with guidance on implementation.

The role of human rights in the mandate and practice of the CTC has been the subject of analysis by a number of commentators.⁹ In the resolution establishing the CTC, there was only limited reference to the relevance of human rights to the work of the Committee,¹⁰ and there seemed initially to be little interest in making human rights scrutiny a significant part of the supervisory and support work of the CTC.

The scope of the mandate and the assumptions of CTC members at an early stage in the Committee's work about the relevance of human rights are exemplified by a statement made on 18 January 2002 to the Security Council by Sir Jeremy Greenstock, at the time United Kingdom Permanent Representative to the UN and the first chair of the CTC:

⁹ R Foot, 'The United Nations, Counter Terrorism and Human Rights: Institutional Adaptation and Embedded Ideas' (2007) 29 *Human Rights Quarterly* 489; E J Flynn, 'The Security Council's Counter-Terrorism Committee and Human Rights' (2007) 7 *Human Rights Law Review* 371; Conte, above n 7, 37-49, 144-49; Bianchi, above n 7; P Mathew, 'Resolution 1373 — a Call to Preempt Asylum Seekers? (or, "Osama the Asylum Seeker")', in J McAdam (ed), *Forced Migration, Human Rights and Security* (Oxford: Hart Publishing, 2008) 19.

¹⁰ Operative para 3(f) of resolution 1373 contains the only specific reference to human rights: '[The Security Council] [c]alls upon on all States to ... (f) Take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum seeker has not planned, facilitated or participated in the commission of terrorist acts.'

the Counter-Terrorism Committee is mandated to monitor the implementation of resolution 1373 (2001). Monitoring performance against other international conventions, including human rights law, is outside the scope of the Counter-Terrorism Committee's mandate. But we will remain aware of human rights concerns, and we will keep ourselves briefed as appropriate. It is, of course, open to other organizations to study States' reports and take up their content in other forums ... I would encourage them to do so.¹¹

Early on in the international response to 9/11, a number of international human rights bodies and non-government organisations (NGOs) saw clearly the danger posed to human rights by the possibility of excessive reactions to those events, and sought to remind international organisations and national governments of the importance of complying with human rights in designing their responses to terrorism. The Security Council, in particular its counter-terrorism committees, was seen as an especially important forum to engage with.

Among the important interventions¹² were the actions taken by the then UN High Commissioner for Human Rights, Mary Robinson, who shortly after the adoption of Resolution 1373 expressed concern about the potential impact of the resolution on human rights, and in September 2002 presented the CTC with material on the human rights issues relevant to counter-terrorism measures, including a proposal to supplement the guidance already given to states as to what they should include in their reports to the CTC.¹³ As Human Rights Watch

¹¹ Security Council, 4453rd meeting, 18 January 2002, UN Doc S/PV.4453, 5. The Chair also noted that the Committee had 'established the practice of acting with maximum transparency': *ibid* 4. In a similar speech delivered in June 2002, he reiterated that human rights monitoring fell outside the Counter-Terrorism Committee's mandate, but that the Committee would remain aware of the concerns through its contacts with the OHCHR and would 'welcome parallel monitoring of observance of human rights obligations', and that 'the CTC is also operating transparently and openly so that NGOs with concerns can bring them to our attention or follow up with the established human rights machinery': Ambassador Greenstock, then Chairman of the CTC (Speech delivered at the Symposium 'Combating International Terrorism: The Contribution of the United Nations', Vienna, 3-4 June 2002 <<http://www.un.org/Docs/sc/committees/1373/ViennaNotes.htm>>. The position outlined by the Ambassador Greenstock still appears as current on the CTC's website: <<http://www.un.org/sc/ctc/humanrights.shtml>>.

¹² See generally, on the range of interventions, Foot, above n 9, 501-7; Flynn, above n 9, 376-8, 382-4.

¹³ Office of the High Commissioner for Human Rights, *Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective On Counter-Terrorist Measures* (23 September 2002) <<http://www.un.org/Docs/sc/committees/1373/ohchr1.htm>>; *Proposals for 'Further Guidance' for the submission of reports pursuant to paragraph 6 of Security Council Resolution 1373 (2001) (intended to supplement the Guidance of 26 October 2001)* (23 September 2002) <<http://www.un.org/Docs/sc/committees/1373/ohchr2.htm>>. See also the Joint statement by Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights (29 November 2001) <<http://www.unhchr.ch/hurricane/nsf/view01/4E59333FFC5341A7C1256B13004C58F5>>.

points out, while the document was posted on the CTC's website, the Committee was not prepared to circulate it as an official document to member states.¹⁴

In January 2002 Amnesty International also called on the CTC to appoint human rights experts to its staff and to incorporate human rights standards into its guidance.¹⁵ Robinson's successor as Human Rights Commissioner, Sergio Vieira de Mello, addressed the CTC in October 2002 calling on the Committee to incorporate a human rights approach in its work.¹⁶ In June 2003 Sir Nigel Rodley, Vice-Chair of the Human Rights Committee and former Special Rapporteur on Torture, also appeared before the Committee to urge the CTC to assume responsibility for ensuring that counter-terrorism measures complied with human rights and to question states on the human rights dimensions of their anti-terrorism measures.¹⁷ In the same year the Office of the High Commissioner for Human Rights (OHCHR) released its digest of jurisprudence of human rights norms relevant to counter-terrorism activities.¹⁸ Louise Arbour, de Mello's successor, has also spoken out consistently on the need for counter-terrorism measures to fully respect human rights. The Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, appointed in 2005, has also engaged with the Committee, through meetings and in his reports. Various states, such as Mexico, Chile and Germany, have also consistently supported the need for the CTC to take into account human rights standards as part of its work.¹⁹

This sustained pressure from a variety of sources appears to have had an impact on the work of the CTC, at least in formal terms. The relevance of human rights norms to the implementation of Resolution 1373 and the work of the CTC was partly clarified in early 2003 by Resolution 1456, which stated that counter-terrorist measures should comply with international human rights law,²⁰ although Flynn suggests that 'there remained ambiguity as to whether it gave

¹⁴ Human Rights Watch, *The Security Council's Counter-Terrorism Effort* (10 August 2004) 2, <www.hrw.org/background/un/2004/un0804/2.htm>.

¹⁵ Flynn, above n 9, 376.

¹⁶ Sergio Vieira de Mello, High Commissioner for Human Rights (Address to the Counter-Terrorism Committee of the Security Council, 21 October 2002) <<http://www.un.org/Docs/sc/committees/1373/HC.htm>>.

¹⁷ 'Human Rights and Counter-Terrorism Measures', Security Council Counter-Terrorism Committee UN Headquarters, 19 June 2003, Briefing by Sir Nigel Rodley, Vice-Chairperson Human Rights Committee <<http://www.unhcr.ch/hurricane/hurricane.nsf/0/EE1AC683F3B6385EC1256E4C00313DF5?opendocument>>.

¹⁸ OHCHR, *A Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights While Countering Terrorism* (2003) <<http://www.ohchr.org/english/about/publications/docs/digest.doc>>.

¹⁹ See Foot, above n 9, 507-10.

²⁰ Operative para 6 of SC Res 1456 provided: 'States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law'.

the Committee a firm basis to inquire into human rights-related matters'.²¹ That ambiguity he sees as put beyond doubt by Resolution 1624, adopted on 14 September 2005 following the London bombings of July 2005. Under the Resolution, the Council stressed that states should ensure that any measures they take to implement the resolution 'comply with all of their obligations under international law, in particular international human rights law, refugee law, and humanitarian law' and directed the CTC to '[i]nclude in its dialogue with Member States their efforts to implement this resolution'.²²

Internally, it had also been suggested in 2004 as part of the proposed 'revitalisation' of the CTC that there would be close cooperation with the OHCHR and the creation of a specific human rights position in the CTED.

In his report to the 62nd session of the Commission on Human Rights, submitted in late 2005, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,²³ Martin Scheinin, set out his analysis of the roughly 640 reports, which had been submitted to the CTC by member states under Resolution 1373 by the time he submitted his report.²⁴ The purpose of the examination was 'to assess the role of the CTC in promoting methods of counter-terrorism that are in conformity with human rights, insensitive to human rights or, in the worst case, hostile to human rights'.²⁵ The examination of the impact of the CTC's scrutiny was not based on the CTC's questions or comments — despite the CTC's stated commitment to transparency and openness, these are not publicly available — but on the responses of states in their reports. Scheinin noted four categories of responses from states relevant to human rights issues:

- cases in which the CTC had explicitly promoted responses to terrorism that were in conformity with human rights ('few in number ... but a promising sign that the CTC is willing to give recognition to and promote response to terrorism that respect human rights');²⁶
- cases where the implementation of CTC recommendations had been 'met with human rights-based criticism or resistance at the domestic level';²⁷
- 'perhaps the most problematic category': cases in which 'subsequent reports by a State suggested that the CTC's questions and recommendations to the

²¹ Flynn, above n 9, 380.

²² SC Res 1624 (2005) [4], [6(a)].

²³ The office of the Special Rapporteur on the promotion and protection of human rights while countering terrorism was established by CHR Res 2005/80 for three years from 2005. For the various reports submitted by the Special Rapporteur, Martin Scheinin of Finland, see <<http://www.ohchr.org/english/issues/terrorism/rapporteur/srchr.htm>>.

²⁴ UN Doc E/CN.4/2006/98, [57]-[63].

²⁵ Ibid [57].

²⁶ Ibid [58].

²⁷ Ibid [59].

State in question might have been insensitive to human rights', particularly where the CTC appeared to be urging the adoption of a wide range of criminal investigation techniques that may have serious human rights implications, but without any reference to those limitations;²⁸ and

- cases in which reports to the CTC showed that the CTC 'has shown little, if any, interest in the definition of terrorism at the national level', something which Scheinin considered problematic because of the vagueness of some definitions and the potential for misuse of the term terrorism to outlaw political opposition, repress religious groups and permit or provide cover for other abuses.²⁹

Scheinin remained concerned that 'the CTC has not always been sufficiently clear in respect of the duty to respect human rights while countering terrorism' and that '[some] States may even have understood the CTC as promoting measures of counter-terrorism irrespective of their adverse consequences for human rights'.³⁰

Following the Council's approval of the 'revitalisation' of the CTC at the end of 2005, the Committee adopted guidance on incorporating human rights in its work, and a human rights expert has been appointed to the staff of the CTED. The relevant document reiterates the need for states to ensure that counter-terrorism measures comply with human rights law, and also requires the CTED to provide the CTC with advice on how to ensure that states do this, to liaise with the OHCHR, and to include human rights into their communications strategy.³¹

It is too early yet to tell whether the specific incorporation of human rights within the overall mandate of the Committee and the practice and personnel of the CTED will have a significant impact in terms of ensuring appropriate human rights scrutiny of states' actions by the Committee, or more importantly the observance of human rights by states in their counter-terrorism measures. It seems that some significant progress has been made in the institutional design, but it will take some time before the effects of those changes can be seen.³² On 20 December 2006, the outgoing Chair of the CTC, Ambassador Ellen Margrethe Løj from Denmark, told the Security Council that '[it] has now become routine to include human rights aspects of States' implementation of resolution 1373

²⁸ Ibid [60]-[61].

²⁹ Ibid [62].

³⁰ Ibid [63].

³¹ 25 May 2006, UN Doc S/AC.40/2006/PG.2 <<http://www.un.org/sc/ctc/pg25may06.html>>.

³² Flynn above n 9: 'While there have been tangible gains, the Committee's activities are to a large extent invisible to the public and the impact of heightened attention to human rights concerns is difficult to gauge': at 384.

(2001) in the work of the Committee'.³³ While there is a standard description of the relevance of human rights to the work of the CTC and CTED in the CTC's 2006 report to the Security Council,³⁴ there is little detail of exactly how these considerations have been built into the work of the CTC and CTED.

Nevertheless, it is clear that the advances made from the original Resolution 1373, and early attitude of the CTC to the relevance of human rights to its work, has been significantly moved along through a process of mainstreaming. This has been the result of interventions by a wide range of actors: human rights bodies and individual experts, NGOs, and governments committed to ensuring that counter-terrorism priorities did not simply displace human rights values. Since the CTC and related bodies are politically important and well-resourced actors in the counter-terrorism realm, it has been important to seek to insert human rights values in their normative framework and practices. Close scrutiny at international and national levels will be needed to ensure that these changes have a significant effect, and to continue to urge the full respect for human rights while supporting effective counter-terrorist measures. The broader lesson to be drawn from this is the importance of ensuring that human rights standards and expertise are mainstreamed into those bodies whose primary mission is counter-terrorism.

Regulating Terrorism *Despite* Law and While Engaging with Human Rights Law

The response of human rights institutions to counter-terrorism measures has been far more extensive than efforts to mainstream human rights standards and expertise into the work of specific counter-terrorism initiatives and law enforcement operations, such as the CTC. A variety of human rights actors (such as the UN human rights treaty bodies and the UN thematic mechanisms of the Human Rights Council) have sought to engage with states, both on an ad hoc basis and as part of their regular activities, on counter-terrorism issues.

In this context, one can identify another way in which some leading governments use law to bolster the legitimacy of their counter-terrorism measures. They claim not only that their actions are effective counter-terrorism measures, but at the same time they do not violate human rights and, indeed, promote the enjoyment

³³ Security Council, 5601st meeting, 20 December 2006, UN Doc S/PV.5601, 4; quoted in Flynn, above n 9, 383.

³⁴ Report of the Counter-Terrorism Committee to the Security Council for its consideration as part of its comprehensive review of the Counter-Terrorism Committee Executive Directorate, UN Doc S/2006/989, [26]; Semi-Annual Comprehensive Report on the Work of the Counter-Terrorism Committee Executive Directorate for the Period 1 January to 30 June 2006, UN Doc S/2006/989, Appendix I, 24; Semi-Annual Comprehensive Report on the Work of the Counter-Terrorism Committee Executive Directorate for the Period 1 July 2006 to 31 December 2006, UN Doc S/2006/989, Appendix II, 51.

of the human rights of the community.³⁵ A related stratagem by some states has been to seek to remove themselves from external scrutiny by maintaining that a treaty has no application to particular activities, with the consequence in some cases that the external body seeking to scrutinise that behaviour is argued to have no jurisdiction to do so. These positions are characterised by the adoption of interpretations of the law, which are simply wrong, which are so extreme that they cannot be justified on any reasonable interpretive account, or which are accepted by few or no other members of the international community and other interpreters.

This section examines the controversies over a number of critical issues of human rights law and the manner in which the US in particular has sought to put forward extreme or distorted interpretations of human rights law to argue that its actions are not inconsistent with human rights law, and fall outside the remit of human rights bodies seeking to scrutinise those actions. The responses of the UN Working Group on Arbitrary Detention, the Inter-American Commission on Human Rights, and the UN Human Rights Committee and Committee against Torture (CAT) are examined.

Among the issues which have been critical to determining the international legality of the actions of the US and others are the following (my discussion focuses on the first two):

- the applicability of human rights law to situations of armed conflict to which international humanitarian law also applies;
- the applicability of obligations under UN human rights treaties to actions of the state party that take place outside the territory of the state party;
- the extent of the obligations with respect to torture and other forms of cruel, inhuman or degrading treatment or punishment under international treaties (CAT and the International Covenant on Civil and Political Rights (ICCPR));³⁶ and
- the acceptability of diplomatic assurances in the context of treaty obligations relating to *non-refoulement*.

In relation to nearly all of these issues, there is an overwhelming preponderance of legal opinion about the meaning of the relevant obligations. Yet the US and some other countries have sought to justify their actions as consistent with human rights or to avoid scrutiny of them by relying on constructions of the relevant obligations, which distort the meaning of the relevant obligations and fall outside the range of acceptable international legal interpretation, even in the face of highly authoritative pronouncements to the contrary. While some of

³⁵ See, eg, the analysis of the Australian Attorney-General's approach in G Carne, 'Reconstituting "Human Security" in a New Security Environment: One Australian, Two Canadians and Article 3 of the Universal Declaration of Human Rights' (2006) 25 *Australian Year Book of International Law* 1.

³⁶ *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976).

these issues have arisen directly as a result of the measures taken to address terrorism post-9/11, many of the disputes of interpretation are continuing ones, which predate the latest 'war on terror'.

The controversies over these specific issues have taken place against the broader canvas of how one characterises the post-9/11 world and the nature of the dangers that the international community (or certain sectors of it) now face. The US has tended to argue that the 'world changed forever' on 9/11 because of the nature and extent of the terrorist threats illustrated by the events of that day, and that the ongoing emergency justifies extraordinary measures. Others have argued that, while 9/11 was a significant event, it does not represent a seismic shift in world affairs, at least so far as the need for an entirely new legal approach to responding to emergencies or threats is concerned: terrorism and violence have been prevalent in many other countries for many decades, and the current situation does not require us to abandon older models of emergency and law to ensure a reasonable level of community safety.

There has been much rhetoric, as well as serious debate, over whether the events of 9/11 and the non-state terrorist threats they manifest represent an epochal shift in the threats to security that confront our world. There is something to be said for the argument that the threat of decentralised, and loosely coordinated terrorist networks prepared to engage in violence against civilian targets with scant regard for traditional forms of warfare, poses new challenges and threats, and that failure to address this threat may well result in considerable loss of life or injury if terrorist attacks are successfully launched.

But whether these developments represent an epochal change is another matter entirely. Such a view is ahistorical, as well as myopic, and is a largely US-centric viewpoint, given the recent and enduring experience of insurgencies, conflict between state and non-state actors, and terrorist activity in many parts of the world over the last decades. For example, it fails to recall the atmosphere of fear that was widespread just over 30 years ago during the period of significant terrorist activity in the 1960s and 1970s.³⁷ There are no doubt differences — every new form of violence has its distinctive motivations and forms — but the critical point is that asymmetric non-state violence directed at times against civilians is not without parallel in recent times. States have had to deal with it, and have done so in ways that have been of varying success and involving various levels of compliance with human rights standards.

It has frequently been remarked that the risk to life and limb from terrorism in Western countries is far less than the risk of death from other avoidable

³⁷ Anthony Aust notes that in 1968 and 1969 there were 122 aircraft hijackings — one a week: A Aust, 'Comment on the Presentation by Volker Röben' in C Walter (ed), *Terrorism as a Challenge for National and International Law: Security Versus Liberty* (Berlin: Springer, 2004) 824.

activities.³⁸ Even in non-Western countries where the toll from terrorist incidents has been far higher consistently over recent decades than in Western countries, the major risks to life and health come from other causes: poverty, disease (including HIV/AIDS, malaria and other avoidable or treatable disease), maternal mortality, vulnerability to flooding, earthquakes and tsunamis, and rising sea levels.³⁹

In any case, even if the world has not fundamentally changed, the widespread perception that it may have (leading to actions based on that assumption), has added a new dimension to argumentation over appropriate responses to perceived threats of terrorism.

One of the argumentative strategies adopted by a number of the human rights bodies is to place current threats of terrorism in an historical context, and to assert the normality (or commonality, at any rate) of terrorism, and the need for a principled approach to such emergencies. The point is made that the relevant bodies of law, including human rights law, contain adequate provision for responding to crises in a principled, measured and effective way. Law's role is thus to define the existence of an emergency or exceptional situation and to regulate it through rules (albeit general and flexible) developed for such situations, rather than simply to define the existence of such a situation and step back from any attempt to regulate what takes place within that context.

United Nations Working Group on Arbitrary Detention

One body that has adopted this analysis is the UN Working Group on Arbitrary Detention, one of the thematic mechanisms of the former UN Commission on Human Rights,⁴⁰ established in 1991.⁴¹ Comprising five independent experts, its mandate empowers it to investigate complaints by individuals that they have been detained arbitrarily or in a manner inconsistent with the Universal Declaration of Human Rights (UDHR)⁴² or other relevant legal instruments. The Working Group has also adopted an urgent action procedure, and may visit a state at the invitation of its government. The Working Group adopts Opinions

³⁸ See, eg, in relation to developed countries, N Wilson and G Thomson, 'Deaths from International Terrorism Compared to Road Crash Deaths in OECD Countries' (2005) 11 *Injury Prevention* 332, 332-3; 'The Epidemiology of International Terrorism Involving Fatal Outcomes in Developed Countries (1994-2003)' (2005) 20 *European Journal of Epidemiology* 375; 'Policy Lessons from Comparing Mortality from Two Global Forces: International Terrorism and Tobacco' (2005) 1 *Global Health* 18.

³⁹ See also World Health Organisation, 'Causes of Death', December 2004, <<http://www.who.int/healthinfo/statistics/bodgbddeathdalyestimates.xls>>.

⁴⁰ See generally and in relation to the Working Group on Arbitrary Detention, J Gutter, *Thematic Procedures of the United Nations Commission on Human Rights and International Law: In Search of a Sense of Community* (Antwerp: Intersentia, 2006); B Rudolf, *Die thematische Berichterstattung und Arbeitsgruppen der UN-Menschenrechtskommission – Ihr Beitrag zur Fortentwicklung des internationalen Menschenrechtsschutzes* (Berlin: Springer, 2000) 199-334.

⁴¹ Commission on Human Rights Resolution 1991/42 of 5 March 1991. The Working Group now comes under the aegis of the UN Human Rights Council.

⁴² GA Res 217A(III), UN Doc A/810 (1948).

in individual cases after seeking information from the government concerned and other relevant parties. It also adopts Deliberations, its reflections 'on matters of a general nature involving a position of principle in order to develop a consistent set of precedents and assist States, for purposes of prevention, to guard against the practice of arbitrary deprivation of liberty'.⁴³ In recent years, it has also adopted formal Legal Opinions on a number of matters, including issues relating to counter-terrorism measures and arbitrary detention.

The Working Group has grappled with issues resulting from the vigorous pursuit of the 'war on terror' since 2001, including in relation to allegations made against the US and its close allies in the pursuit, capture and interrogation of terrorist suspects. The arguments put to the Working Group in individual cases reflect a number of the issues, which have arisen in other contexts, and the Working Group's responses in those cases and in two Legal Opinions illustrate how a number of UN human rights bodies have dealt with them.

The Working Group has engaged with the argument that the circumstances facing the world post-9/11 represent a changed world, in which the nature and extent of the threat require and justify responses that might not have been seen as acceptable in the pre-9/11 world. It has also contested the attempts by some governments to avoid accountability for their actions by limiting external review of their actions (a result achieved by taking advantage of physical remoteness of detention facilities and their invisibility — secret detention centres), rejecting the applicability of certain bodies of law and the jurisdiction of responsible international bodies, and governments' refusal to provide any details of the intelligence that is often relied on to justify administrative detention. The Working Group has also set out what it considers to be the rights that are of primary importance in the fight against terrorism and the approach that should be taken when it is proposed to limit those rights.⁴⁴

The Working Group has gone to some trouble to challenge government claims that the threat faced in the post-9/11 world is completely unprecedented. It has underlined the fact that it has itself been addressing issues of arbitrary detention in the context of counter-terrorist measures since its inception. In its 2004 report, for example, the Working Group observed that it had confronted issues relating to detention in the context of the fight against terrorism well before 9/11, noting that in its experience 'when action is taken and/or legislation is adopted to combat what States rightly or wrongly qualify as terrorism, subversive activities or attacks against State security, there is an increase in human rights violations'.⁴⁵ The report continued:

⁴³ OHCHR, Working Group on Arbitrary Detention, *Fact Sheet No 26*

<<http://www.ohchr.org/english/about/publications/docs/fs26.htm#note>>.

⁴⁴ Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2004/3, [50]-[71].

⁴⁵ UN Doc E/CN.4/2003/3, [55] (referring to its 1995 report, UN Doc E/CN.4/1995/31, [25(d)]).

Its experience from the outset has been that the main causes of arbitrary deprivation of liberty are the abuse of states of emergency, the exercise of the powers specific to a state of emergency without a formal declaration, recourse to military, special or emergency courts, non-observance of the principle of proportionality between the gravity of the measures taken and the situation concerned, and loose definitions of offences that are often described as infringements of State security.⁴⁶

Throughout its report the Working Group refers to the situation both before and after 9/11,⁴⁷ thereby seeking to portray the normality (or at least frequency) of emergency situations and terrorist threats. By doing this, it is challenging the myopic view of the US. More importantly, it is at the same time arguing that existing international law provides for emergency situations in ways that allow states to take the measures necessary to address the problem of terrorism while still working within a human rights framework. This framework, in the Working Group's view, should form part of the tools that need to be used in developing counter-terrorism strategies and laws, rather than the adoption of laws and policies that reject existing constraints and interpretations.

In 2002 the Inter-American Commission on Human Rights articulated a similar approach to how emergencies should be approached. It noted that the Commission had dealt with issues of terrorism by state and non-state actors for decades, that terrorism continued to be a serious threat to the protection of human rights, and that the events of 9/11 'suggest that the nature of the terrorist threat faced by the global community has expanded both quantitatively and qualitatively, to encompass private groups having a multinational presence and the capacity to inflict armed attacks against states'.⁴⁸

This approach — while recognising that there are significant new elements in patterns of international non-state terrorism that may ultimately give rise to new international law — nevertheless posits that the existing framework under human rights law for dealing with terrorist activities and threats is, on the whole, adequate and that there is considerable experience in the region on which to draw.⁴⁹

The Applicability of International Human Rights Law in Situations of Armed Conflict

One of the issues over which there has been contention between certain states (in particular the US) and international and regional human rights bodies, is the

⁴⁶ UN Doc E/CN.4/2003/3, [59] (referring to its 1995 report, UN Doc E/CN.4/1995/31, [14]).

⁴⁷ See UN Doc E/CN.4/2003/3, [58], [59], [64], [67].

⁴⁸ Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc 5 rev. 1 corr, [1]-[3] (2002).

⁴⁹ It appears to correspond in large measure to the 'Business as Usual' model of responding to emergency situations articulated by Gross and Ní Aoláin, above n 4.

extent to which human rights law, and in particular specific treaty obligations, apply in situations of armed conflict. While it is clear that international humanitarian law (IHL) will apply in situations of armed conflict once the relevant threshold is reached, there has been much discussion of whether and how human rights law can operate contemporaneously. The US in particular has maintained in a number of international fora that those detained as a result of its prosecution of the 'war on terror' have been detained in the course of an armed conflict, that IHL provides the *lex specialis* in that context, and therefore human rights law has no application.

This position is contentious for a number of reasons. The first is that many of the detainees in question were not detained anywhere near any of the relevant battlefields (for example, Afghanistan), so they could hardly have been detained as part of an armed conflict. Second, the notion that, apart from clear cases involving armed conflict such as Afghanistan and Iraq, loosely organised terrorist networks are engaged in an armed conflict more generally with the US, seems to go well beyond the accepted position under IHL of what constitutes an 'armed conflict', the existence of which is a precondition for the application of IHL.⁵⁰ Even in relation to those persons captured on the battlefield or clearly involved in an armed conflict, the argument that human rights law has no application is contentious.

The US has argued for the non-applicability of human rights law for at least two reasons. The first is that it saw IHL as offering it greater freedom to detain and to interrogate detainees than if human rights law applies as the governing regime (since in an armed conflict, it is permissible to detain belligerents from the other side until the end of the conflict without needing to charge them with criminal offences or to otherwise justify their detention).⁵¹ The second reason is a

⁵⁰ 'International humanitarian law recognises two categories of armed conflict – international and non-international. Generally, when a state resorts to force against another state (eg, when the 'war on terror' involves such use of force, as in the recent US and allied invasion of Afghanistan) the international law of international armed conflict applies. When the 'war on terror' amounts to the use of armed force within a state, between that state and a rebel group, or between rebel groups within the state, the situation may amount to non-international armed conflict a) if hostilities rise to a certain level and/or are protracted beyond what is known as mere internal disturbances or sporadic riots, b) if parties can be defined and identified, c) if the territorial bounds of the conflict can be identified and defined, and d) if the beginning and end of the conflict can be defined and identified. Absent these defining characteristics of either international or non-international armed conflict, humanitarian law is not applicable.' G Rona (Legal Adviser, ICRC), 'When is a War Not a War? – The Proper Role of the Law of Armed Conflict in the 'Global War on Terror' (Workshop on the Protection of Human Rights While Countering Terrorism, Copenhagen, 15-16 March 2004) <<http://www.icrc.org/web/eng/siteeng0.nsf/html/5XCMN>>. See generally H Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge; Cambridge University Press, 2005), 217-228.

⁵¹ This approach can be seen from the account given by John Yoo, who served as Deputy Assistant Attorney-General in the Office Legal Counsel in the Justice Department and was closely involved in the drafting of the so-called 'torture memos'. See J Yoo, *War By Other Means* (New York: Atlantic Monthly Press, 2006) 171-2 ('The harder question was what interrogation methods fell short of the torture ban and could be used against Al-Qaeda leaders ... Legally, we are not required to treat captured terrorists engaged in a war against us as if they were suspects held at an American police station'). To

jurisdictional one: in contrast to the IHL regime, which does not have specialised bodies for the receipt and adjudication of alleged violations — human rights law does have such bodies and the US is subject to the jurisdiction of a number of them under a variety of procedures. The corollary of the argument that human rights law does not apply to persons detained in the 'war on terror' is that human rights bodies that seek to review the actions taken by the US have no jurisdiction to do so, since their mandate is to review observance with specific human rights standards, not with IHL standards.

The argument is not a new one, yet the international consensus on the interrelation of human rights law and IHL has been clear in principle for some years now: IHL and human rights law can both apply in situations of armed conflict, although the interpretations given to human rights guarantees will necessarily be informed by IHL as the *lex specialis*.⁵² This position has been confirmed by the International Court of Justice (ICJ),⁵³ the European Court of Human Rights, the Inter-American Commission⁵⁴ and Court of Human Rights, and a number of UN human rights treaty bodies.⁵⁵

Yet the US has persisted in making the jurisdictional argument, including in cases which have been brought to the Working Group on Arbitrary Detention and the Inter-American Commission on Human Rights against the US on behalf of persons detained by the US and other countries as part of counter-terrorist operations.

While the Working Group on Arbitrary Detention has taken the view that its mandate extends to the review of alleged arbitrary detention in situations of armed conflict, it does not generally deal with complaints relating to situations of international armed conflict where the International Committee of the Red Cross (ICRC) has a role to play.⁵⁶ However, where persons caught up in

similar effect, J Goldsmith (who followed Yoo in the OLC), *The Terror Presidency: Law and Judgment Inside the Bush Administration* (New York and London: W W Norton & Co, 2007), 102-15.

⁵² The many discussions include F Hampson and I Salama, 'Working Paper on the Relationship Between Human Rights Law and International Humanitarian Law', UN Doc E/CN.4/Sub.2/2005/14; N Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 *International Review of the Red Cross* 860, 737-54.

⁵³ See International Court of Justice, 'Legality of the Threat or Use of Nuclear Weapons', Advisory Opinion of 8 July 1996; International Court of Justice, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory', Advisory Opinion of 9 July 2004 [Wall Advisory Opinion], [66]-[100], [102]-[13] (holding that the ICCPR, ICESCR, and CRC applied in the Israeli Occupied Territories). See also the Separate Opinion of Judge Simma in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, International Court of Justice, Judgment of 19 December 2005, [30]-[31].

⁵⁴ See generally the Commission's Report on Terrorism and Human Rights, above n 48, [61]-[62]. See also the discussion below.

⁵⁵ See, eg, Human Rights Committee, General Comment No 31 (2004), [11].

⁵⁶ See the Working Group's Revised Methods of Work, in OHCHR, Fact Sheet No 26, above n 43, Annex IV, [16]. See, eg, the Working Group's refusal to a consider complaint by former Iraqi Prime Minister Tariq Aziz and former President Saddam Hussein during the period of international armed conflict resulting from the invasion of Iraq in 2003: *Tariq Aziz v Iraq and the United States of America*, Opinion

international armed conflict do not in fact enjoy the protections of IHL, it has been prepared to examine complaints of arbitrary detention.⁵⁷

In *Ayub Ali Khan and Azmath Jaweed v United States of America*⁵⁸ the Working Group considered a complaint from two persons who had been arrested in the US in connection with the events of 9/11 and had been detained 'for more than 14 months, apparently in solitary confinement, without having officially been informed of any charge, without being able to communicate with their families and without a court being asked to rule on the lawfulness of their detention'.⁵⁹ The Working Group found the detention arbitrary. The Working Group also considered the position of a number of persons detained in Guantánamo Bay at the same time, indicating its view that the appropriate legal framework was either the Third Geneva Convention⁶⁰ or the ICCPR.⁶¹ Subsequently, the US government indicated its disagreement with the Legal Opinion of the Working Group, arguing that as the Detaining Power under the law of armed conflict it was 'not obliged to prosecute detained enemy combatants or release them prior to the end of the conflict', and that it was important not to conflate international human rights law and humanitarian law.⁶²

In *Mourad Benchellali et al v United States of America*⁶³ a number of persons detained in Guantánamo Bay who had been captured or arrested in Afghanistan or Pakistan complained that they had been held without charge or access to legal assistance, and had not been brought before a court. The Working Group concluded that the detention was arbitrary, in violation of Article 9 of the UDHR and Article 9 of the ICCPR.⁶⁴ Although the US authorities provided no

No 45/2005, 30 November 2007, A/HRC/4/40/Add 1, [27], [23], [34]; and *Saddam Hussein al-Tikriti v Iraq and United States of America*, Opinion No 46/2005, 30 November 2005, A/HRC/4/40/Add 1, 34, [26], [40].

⁵⁷ *Abdul Jaber al-Kubaisi v Iraq and United States of America*, Opinion No 44/2005, 30 November 2005, A/HRC/4/40/Add 1, [14]. In such cases the Working Group has examined the extent of compliance with the specific protections prescribed by IHL (eg, the limitations under art 78 of the *Fourth Geneva Convention* on administrative detention of civilians in occupied territories) and related them to the more general standards set out in the ICCPR. (Al Kubaisi, [15]-[18]). Other examples are *Bdurahman Nacer Addallah al-Dahmane al-Chehri et al v Saudi Arabia*, Opinion No 12/2006, 11 May 2006, A/HRC/4/40/Add.1, 63 (detention by Saudi authorities in Riyadh for the purposes of interrogation in relation to his brother-in-law who was detained in Guantánamo Bay — no charge, no court appearance, and no access to legal assistance — held to be arbitrary); *Walid Mohammed Shahir Muhammed al-Qadasi et al v Yemen*, Opinion No 47/2005, 30 November 2005, A/HRC/4/40/Add.1, 41.

⁵⁸ Opinion No 21/2002, 3 December 2002, UN Doc E/CN.4/2004/3/Add.1, 20.

⁵⁹ *Ibid* [15].

⁶⁰ *Convention Relative to the Treatment of Prisoners of War*, 75 UNTS 135 (entered into force 21 October 1950).

⁶¹ 'Legal Opinion Regarding the Deprivation of Liberty of Persons Detained in Guantánamo Bay', Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2003/8, [61]-[64].

⁶² Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2004/3, [17]-[18].

⁶³ Opinion No 5/2003, 8 May 2003, UN Doc E/CN.4/2004/3/Add.1, 33.

⁶⁴ Opinion No 5/2003, 8 May 2003, UN Doc E/CN.4/2004/3/Add.1, [12].

information in response to the original request from the Working Group, following the adoption of the Opinion, they responded in detail.⁶⁵

In its response the US restated its position that the mandate of the Working Group was confined to issues of human rights law and '[did] not include competence to address the Geneva Conventions of 1949 or matters arising under the law of armed conflict', which was the applicable law in this context; the Working Group had simply misunderstood the constraints permissible under the law of armed conflict and mistakenly conflated the two bodies of law.⁶⁶ At the same time, although it rejected the jurisdictional competence of the Working Group, the response nevertheless did engage with many of the substantive issues raised about the extent to which the guarantees of IHL had been observed. Indeed, this has been a feature of a number of the US government responses to human rights bodies: while rejecting the jurisdiction, they have addressed many of the substantive issues raised by those bodies.

In a later communication brought against both Iraq and the US in relation to the detention (possibly in Camp Cropper) of Abdul Jaber al-Kubaisi,⁶⁷ a newspaper owner and political activist opposed to the US-led military occupation of Iraq, the Working Group rejected the restated US position that persons held in Iraq were held by the multinational force in Iraq under the authority of IHL and Security Council Resolution 1546, and therefore fell outside the mandate of the Working Group.⁶⁸ The Working Group asserted once again that the two bodies of law were not mutually exclusive and, that where there was a conflict, then IHL as *lex specialis* would normally be applied.⁶⁹

Apart from these cases, the Working Group has also expressed its views on other aspects of the fight against terrorism. For example, in its 2005 report the Working Group articulated its concerns about the increasing resort by states to administrative detention and to emergency legislation limiting review rights, broad definitions of terrorism, and the misuse of terrorism legislation to silence political opponents and other groups challenging government authority.⁷⁰

Attempts to limit the application of human rights law in armed conflict and thereby avoid international scrutiny by ousting the jurisdiction of an external

⁶⁵ U.S. Response to Opinion No. 5/2003 of May 8, 2003 and the Communication of January 8, 2003 of the Working Group on Arbitrary Detention, UNHRC (August 2003) <<http://www.state.gov/s/l/2003/44335.htm>>.

⁶⁶ Ibid.

⁶⁷ *Abdul Jaber al-Kubaisi v Iraq and United States of America*, Opinion No 44/2005, 30 November 2005, A/HRC/4/40/Add 1, at 24 (2007).

⁶⁸ Ibid [10], [13].

⁶⁹ The Working Group had asserted the applicability of its mandate to situations of armed conflict before 9/11: see, eg, 'Legal Opinion Regarding Detention at El-Khiam Prison, Report of the Working Group on Arbitrary Detention', UN Doc E/CN.4/2000/4, [11]-[18] (relating to detention by forces of the South Lebanon Army).

⁷⁰ Report of the Working Group on Arbitrary Detention, UN Doc E/CN.4/2005/6, [61]-[65].

body have also been seen in other contexts. For example, in a case involving a request for precautionary measures in relation to detainees at Guantánamo Bay, the Inter-American Commission on Human Rights has consistently asserted its jurisdiction and requested the US to take appropriate action.⁷¹ In response, the US has continued both to articulate its view that IHL governs the situation and that therefore the Commission has no jurisdiction, and also to contest in detail the accuracy of the alleged violations of humanitarian or human rights law.⁷²

The US has also met with criticism from other human rights bodies in relation to its position on the same issues.⁷³ In response to these findings the US has reiterated the position that it is IHL, which is the governing body of law relating to detention in Guantánamo Bay.⁷⁴ The UN Human Rights Committee has also criticised the US for its unwillingness to concede that the ICCPR may apply in situations of armed conflict,⁷⁵ as has the Committee against Torture in relation to the Convention against Torture.⁷⁶

⁷¹ For the orders of the Commission, see Inter-American Commission on Human Rights, 'Pertinent Parts of July 23, 2002 Reiteration of Precautionary Measures regarding Detainees in Guantanamo Bay, Cuba' (2006) 45(3) *International Legal Materials* 667; 'Pertinent Parts of March 18, 2003 Reiteration of Precautionary Measures and Request for Additional Information (Detainees In Guantanamo Bay, Cuba)' (2006) 45(3) *International Legal Materials* 669; 'Pertinent Parts of July 29, 2004 Reiteration and Amplification of Precautionary Measures and Request for Additional Information: (Detainees In Guantanamo Bay, Cuba)' (2006) 45(3) *International Legal Materials* 671; 'Pertinent Parts of October 28, 2005 Reiteration and further Amplification of Precautionary Measures (Detainees In Guantanamo Bay, Cuba)' (2006) 45(3) *International Legal Materials* 673. The full text of the documents is available at <http://www.ccr-ny.org/v2/legal/september_11th/sept11Article.asp?ObjID=7lt0qaX9CP&Content=134>.

⁷² Response of the United States to Request for Precautionary Measures – Detainees in Guantánamo Bay, Cuba, (12 April 2002) <http://www.ccr-ny.org/v2/legal/september_11th/docs/4-15-02GovernmentResponse.pdf>; Response of the Government of the United States of America to Inter-American Commission on Human Rights Detainees in Guantánamo Bay, Cuba, Precautionary Measures No 259 (2004) <http://www.ccr-ny.org/v2/legal/september_11th/docs/IACHR_goverresponsePM.pdf>; Response of the Government of the United States of America to Inter-American Commission on Human Rights Detainees in Guantánamo Bay, Cuba, Precautionary Measures No 259 (October 19, 2005) <http://www.ccr-ny.org/v2/legal/september_11th/docs/IACHR_Govts101905response.pdf>.

⁷³ See the 2005 report by five mandate-holders of the UN Human Rights Commission: Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, UN Doc E/CN.4/120 (2005), discussed in Mathew Chapter 9 this volume.

⁷⁴ See Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba (March 10, 2006) <<http://www.asil.org/pdfs/ilib0603212.pdf>> and (2006) 45(3) *International Legal Materials* 742; Response of the United States of America dated October 21, 2005 to Inquiry of The UNCHR Special Rapporteurs dated August 8, 2005 Pertaining to Detainees at Guantanamo Bay, Cuba, 2–4 <<http://www.asil.org/pdfs/ilib0603211.pdf>> and (2006) 45(3) *International Legal Materials* 769.

⁷⁵ Human Rights Committee, 'Concluding Observations on the Second and Third Periodic Reports of the United States of America' (2006) CCPR/C/USA/CO/3/Rev.1, [10].

⁷⁶ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS 85 (entered into force 26 June 1987). Committee against Torture, 'Concluding Observations on the Second Report of the United States of America', A/61/44, [37(14)], [37(15)] (affirming applicability of the Convention in time of armed conflict in all territories under State party's jurisdiction). The

Resistance to the Extraterritorial Applicability of Human Rights Norms

Another argument advanced by the US to attempt to rebuff scrutiny of its actions by human rights bodies has been the claim that certain of its treaty obligations do not apply to its actions in territory that does not form part of the sovereign territory of the state. The argument has been that the ICCPR in particular has no application to its actions in Guantánamo *ratione loci*.

This argument — the non-applicability of a state party's obligations to actions of its organs in territory that is not part of its sovereign territory⁷⁷ — has been firmly rebuffed by a number of international bodies, including human rights bodies.⁷⁸ In the context of the ICCPR, the issue was addressed generally by the Human Rights Committee in its General Comment No 31 (adopted in March 2004), in which it made clear that the ICCPR applies to the actions of a state in territory that is not part of its sovereign territory but is under its jurisdiction on a long-term basis (such as the long-term administration of Guantánamo Bay by the US) or if in effective control of territory or persons in a situation of armed conflict or occupation. In that General Comment — in which it responded indirectly to some of the jurisdictional issues raised by the arguments of the US in relation to the applicability of the ICCPR to Guantánamo Bay — the Committee stated:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party ... This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.⁷⁹

Both the Human Rights Committee and the ICJ have taken a similar view in relation to the application of the ICCPR (the Court also with regard to the

Committee against Torture has also reached the same conclusion in relation to Israel's obligations under the Torture Convention applied in the Occupied Territories.

⁷⁷ See generally F Coomans and M Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004).

⁷⁸ The assertion by the US of this position is not the only recent instance of the claim: Israel has maintained that certain of its treaty obligations do not extend to the Occupied Territories, in part because it has delegated control over those areas to the Palestinian Authority. This argument was decisively rejected by the ICJ in its Advisory Opinion on the Wall, and has been rejected by the various UN human rights treaty bodies. See the sources referred to in the Wall Advisory Opinion, above n 53, [102]-[113].

⁷⁹ Human Rights Committee, General Comment No 31 (Nature of the General Legal Obligation imposed on State Parties to the Covenant), [10], HRI/GEN/1/Rev.8, at 233 (2006).

International Covenant on Economic, Social and Cultural Rights (ICESCR)⁸⁰ and the CRC) to the actions of Israeli authorities in the West Bank and Gaza.⁸¹

In its 2005 report to the Human Rights Committee, the US reasserted at length its position that Article 2 of the Covenant made it clear that the treaty imposed obligations only in relation to persons 'within the territory and subject to the jurisdiction' of the state party, and did not apply outside its territory.⁸² The Committee addressed this issue with some attention in the dialogue with the US delegation in July 2006,⁸³ during which the US maintained its position⁸⁴ though nevertheless provided relevant information to the Committee 'as a courtesy'.⁸⁵ In its concluding observations the Committee called on the US 'to review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose' and to 'acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war', and 'to consider in good faith the interpretation of the Covenant provided by the Committee pursuant to its mandate'.⁸⁶ The unusual, and double, reference to the concept of good faith in treaty interpretation may be a sign of the exasperation felt by the Committee in the face of the US intransigence on this issue.

There has been a similar interpretive tussle between the Committee against Torture and the US in relation to the scope of the Convention against Torture.⁸⁷ The US has asserted that those provisions of the Convention, which include the phrase 'territory under the State's party's jurisdiction', are limited in their operation to the sovereign territory of the state, and that further the obligation

⁸⁰ 993 UNTS 3 (entered into force 3 January 1976).

⁸¹ See Human Rights Committee, Concluding Observations on the Second Periodic Report of Israel (2003) CCPR/CO/78/ISR, [11]; Wall Advisory Opinion, above n 53, [103]-[113]. The CEDAW Committee has taken the same view with respect to the provisions of the CEDAW Convention: CEDAW/C/SR.685 (2005) and Concluding Comments on the Third Periodic Report of Israel (2005) A/60/38, [243]-[244]. See *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 UNTS 513 (entry into force 3 September 1981).

⁸² Third periodic report of the United States of America under the ICCPR (2005) CCPR/C/USA/3, [130].

⁸³ See List of issues to be taken up in connection with the consideration of the second and third periodic reports of the United States of America (2007) CCPR/C/Q/3, [4]-[5] <<http://www.ohchr.org/english/bodies/hrc/hrcs87.htm>>.

⁸⁴ One member of the Committee, Sir Nigel Rodley noted that 'some of the delegation's responses had been dogged reaffirmations of positions already stated in the report and the written responses to the list of issues. He hoped that any requests for a review of those positions in the Committee's concluding observations would not be met with the same dogged rejection': (2007) CCPR/C/SR.2380, [64].

⁸⁵ Third periodic report of the United States of America under the ICCPR (2005) CCPR/C/USA/3, [130].
⁸⁶ (2006) CCPR/USA/CO/3/Rev.1, [10].

⁸⁷ Art 2(1) of the Convention provides: 'Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction'.

of *non-refoulement* under Article 3 of the Convention⁸⁸ is similarly limited to the sovereign territory of the state party. This interpretation has had particular relevance in relation to transfers of persons who have come into the custody of the US and who have then been sent to third countries where there is at least an expectation that they will be subject to torture and, some claim, where it is intended that they will be subject to interrogation by national authorities in ways that would not be permissible in US custody. The Committee against Torture has emphatically rejected these views,⁸⁹ in which the US persists.

In these examples we see the importance of the engagement by human rights bodies in the interpretive struggle. The views that have been advanced by the US and some other states are, to put it at its highest, minority views, which find little support among states parties, or in the practice and jurisprudence of the treaty bodies, or of international courts. Yet the privileged position of the state under international law and the lack of a formally binding interpretation of the disputed provisions permit the state to continue to assert an untenable position, and to base its policies on that when it wishes. The human rights bodies have energetically and persistently engaged with these interpretations and challenged the states concerned over them — not with a lot of obvious success at this stage (though the passage of time may tell a different story) — but in doing so they have also engaged the states in substantive discussion of the implementation of the disputed standards in the territories where the alleged violations are occurring.

Regulating Terrorism *outside* International Law

A third strategy in the struggle against terrorism has been regulation *outside* the law: the adoption of counter-terrorism measures that simply ignore international legal prescriptions and are undertaken covertly and with the deliberate purpose of avoiding international scrutiny or accountability. The practices of extraordinary rendition and secret detention centres are two major examples.

From very early on in the military and counter-terrorist measures that were taken after 9/11, concerns began to emerge about the manner in which persons captured on the battlefield or elsewhere were being processed. There were a number of dimensions of this problem: an awareness that there were specific detention facilities in places such as Guantánamo Bay but little knowledge of the identities of persons who were being held in those facilities. Second, there

⁸⁸ Art 3(1) of the Convention provides: 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.

⁸⁹ Concluding observations on the second report of the United States of America, A/61/44, [37(20)] (*non-refoulement* applies outside the state party's sovereign territory). See also Draft General Comment No 2 (2007) CAT/C/GC2/CRP.1/Rev.2, [6], [16] (affirming the application of the Convention to all territories or persons under the *de iure* or *de facto* control of the state party).

was concern that there were secret detention centres in certain countries in which detainees were being held by the US for the purposes of interrogation in a deliberate effort to remove them from the legal protections of the country in which they were located, the US legal system, and international scrutiny, whether by the ICRC under IHL or by other bodies. Third, there was concern that persons were being 'rendered' or returned by the US or other states outside any formal legal process to third countries, where there was a substantial risk that they might be subject to torture and/or in the expectation that the intelligence agencies of that country would use whatever methods were necessary to extract intelligence that would be of assistance to the anti-terrorist struggle. The disappearance of many individuals, their incommunicado detention, and the categorical denials that there were any such places, made it extremely difficult to ascertain the extent to which rights were being respected. It must have been clear to the officials involved, whether American or other, that what was involved in this type of behaviour was clearly inconsistent with international human rights standards and other international and national norms.

The attempt to assert human rights values in the face of determined action by governments to avoid public knowledge of what was going on has been an important aspect of the work of a number of human rights actors since 2001. Non-governmental organisations played an important role, going to considerable lengths to attempt to identify persons who had disappeared and who, it was suspected, were being held in secret detention locations, and seeking to hold governments accountable by publicising that information and engaging with human rights institutions to assist them in taking these matters up with governments.

Where governments devote themselves to hiding their activities and refusing to confirm or deny claimed facts (or simply lying) in order to avoid public scrutiny, particular challenges are presented to civil society institutions. A critical component of a human rights response to such behaviour has to be the grinding work of fact-finding, piecing together individual items of information to form a larger mosaic, and then using this material to challenge both government secrecy and unlawful behaviour. NGOs, the media, public bodies at the national level (such as parliamentary committees, human rights commissions or courts) and international human rights bodies all potentially have a role to play in putting together the pieces of the puzzle. It is a difficult task, and one in which government holds most of the cards. While it seems likely that much of the information will eventually emerge, this may take years, by which stage most of the damage will have been done.

The most prominent example of this in the context of the 'war against terror' has been the human rights community's response to secret detentions and so-called 'extraordinary renditions'. Despite denials of secret detentions outside

the US (until President Bush's open admission of such a program in September 2006),⁹⁰ the US had held 'high-value detainees' ('HVD') in detention facilities in undisclosed locations in a number of countries in Europe and elsewhere. It is also now clear that in a significant number of cases, persons were transferred from US custody to countries where it was clear that there was a substantial risk of torture — and in some cases those returnees were indeed tortured after their return.⁹¹

The uncovering of this story involved many actors at the international and national level, but various organs of the Council of Europe played an important role. Spurred on and assisted by NGOs and the media, they determinedly employed the public power of an international organisation and the political weapon of publicity to draw attention to what was going on, in an attempt to hold accountable at least some of the governments involved.

The primary arena of activity was the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (the Committee), whose Chair and Rapporteur on this issue, Swiss Senator Dick Marty,⁹² played a critical role, describing his efforts to uncover what had gone on with very limited resources as pitting 'Mountainbike against Ferrari'.⁹³

The work spearheaded by Marty through the Committee was one of a number of responses by different parts of the Council of Europe to the media and NGO claims of secret detention centres, illegal transfers, and torture and other ill treatment. These suggested that these activities may have taken place on the territory of some member states of the Council of Europe (as well as elsewhere), with the complicity of those states. In particular, there were claims that secret detention centres had been run by the US on the territory of at least two member states, and that other member states may have permitted their territory and airspace to be used by Central Intelligence Agency (CIA) flights to carry out its program of 'extraordinary renditions'.

The Committee took up the issue in late 2005,⁹⁴ and appointed Marty as its Rapporteur on the issue.⁹⁵ Around the same time, on 21 November 2005, the

⁹⁰ G Bush, 'Remarks by the President on the Global War on Terror' (War against terrorism is a struggle for freedom and liberty, Bush says), (Speech delivered in the East Room of the White House, 6 September 2006).

⁹¹ See generally M Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law' (2006) *NYU Public Law and Legal Theory Working Papers* 43.

⁹² On the lead-up to the commencement of the Marty investigation, see Committee on Legal Affairs and Human Rights, 'Alleged Secret Detentions in Council of Europe Member States, Information Memorandum II' (2006) AS/Jur 03 rev, 22 January 2006, [1]-[16] [Marty January 2006 Report].

⁹³ 'Alle gegen Marty' <<http://www.dickmarty.ch/>>.

⁹⁴ See Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 'Alleged Secret Detention Centres in Council of Europe Member States, Information Memorandum (Revised)' (2005) AS/Jur (2005) 52 rev 2, 22 November 2005, [Marty November 2005 Report].

⁹⁵ Marty January 2006 Report, above n 92, [15]-[16].

Secretary-General of the Council of Europe made use of his power under Article 52 of the European Convention on Human Rights⁹⁶ to request an explanation from member states as to how their laws and practices provided protection against unacknowledged detention (including at the instigation of a foreign state) and details of any instances which had occurred since early 2002.⁹⁷ This was by no means the Committee's or the Council's first post-9/11 engagement with the general human rights issues arising from the 'war on terror', nor with the specific actions of the US in relation to transfer and detention of persons claimed to be involved in terrorist activities (or suspected of this).⁹⁸

The Committee approached its work on a number of fronts. First, Marty sought a legal opinion from the European Commission for Democracy through Law (the Venice Commission) on the legality of secret detentions in the light of Council of Europe member states' international obligations.⁹⁹ The Commission is a body of the Council of Europe with considerable legal expertise and standing and the purpose of the request was to obtain an authoritative general statement of the relevant international legal issues; the Commission provided its opinion in March 2006.¹⁰⁰ Second, Marty sought information from a number of European agencies (including the EU Satellite Centre and Eurocontrol) that held information about flights and certain sites. He also sought information from various governmental delegations to the Council and certain parliamentary delegations, and subsequently held interviews with NGOs, journalists, persons who claimed they had been detained in secret centres or clandestinely transported, and also with persons currently or previously employed in relevant governmental agencies (including intelligence agencies), among others.

⁹⁶ *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) 213 UNTS 222 (entered into force 3 September 1953).

⁹⁷ *Ibid*, Appendix IV.

⁹⁸ On 11 July 2002 the Committee of Ministers of the Council of Europe had already issued Guidelines on human rights and the fight against terrorism, <http://www.coe.int/t/f/droits_de_l'homme/Guidelines.asp>. The Committee on Legal Affairs and Human Rights had already prepared a report on the legality of the Guantánamo Bay detentions: Committee on Legal Affairs and Human Rights, *Lawfulness of detentions by the United States in Guantánamo Bay*, Doc 10497, 8 April 2005, <<http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/Doc05/EDOC10497.htm>>, which led to the adoption by the Parliamentary Assembly of the Council of Europe of Resolution 1433 (2005) on the Lawfulness of detentions by the United States in Guantánamo Bay, <<http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta05/ERES1433.htm>>.

⁹⁹ Marty January 2006 Report, above n 92, Appendix III.

¹⁰⁰ European Commission for Democracy through Law, 'Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners Adopted by the Venice Commission at its 66th Plenary Session' (17-18 March 2006), Opinion No 363/EDOC, CDL-AD(2006)009. See M Hakimi, 'The Council of Europe Addresses CIA Rendition and Detention Program' (2007) 101 *American Journal of International Law* 442.

Over the next 18 months, by piecing together the information from these sources, Marty presented three reports¹⁰¹ providing an account of the activities of governments, which showed in his view that there had been widespread violations of human rights in which member states of the Council of Europe had been complicit. In his June 2006 report, focusing on the alleged CIA rendition program relating to the transport and detention of high-value detainees and others and based on information from air traffic control authorities, and other sources, Marty concluded that:¹⁰²

5. ... [A]cross the world, the United States has progressively woven a clandestine 'spider's web' of disappearances, secret detentions and unlawful inter-state transfers, often encompassing countries notorious for their use of torture. Hundreds of persons have become entrapped in this web, in some cases merely suspected of sympathising with a presumed terrorist organisation.

6. The 'spider's web' has been spun out with the collaboration or tolerance of many countries, including several Council of Europe member States. This co-operation, which took place in secret and without any democratic legitimacy, has spawned a system that is utterly incompatible with the fundamental principles of the Council of Europe.

7. The facts and information gathered to date, along with new factual patterns in the process of being uncovered, indicate that the key elements of this 'spider's web' have notably included: a world-wide network of secret detentions on CIA 'black sites' and in military or naval installations; the CIA's programme of 'renditions', under which terrorist suspects are flown between States on civilian aircraft, outside of the scope of any legal protections, often to be handed over to States who customarily resort to degrading treatment and torture; and the use of military airbases and aircraft to transport detainees as human cargo to Guantánamo Bay in Cuba or to other detention centres.

...

9. Some Council of Europe member States have knowingly colluded with the United States to carry out these unlawful operations; some others have tolerated

¹⁰¹ Marty January 2006 Report, above n 92; Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 'Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States', Draft report – Part II (explanatory memorandum), Doc 10957, 12 June 2006 [Marty June 2006 Report]; and Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, 'Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States', Second report, Doc 11302 rev, 11 June 2007 [Marty 2007 Report].

¹⁰² Draft Resolution, [5]-[7], [9], Marty June 2006 Report, above n 101, 2 (summarising the findings of the report). See also Amnesty International, 'Off the Record: U.S. Responsibility for Enforced Disappearances in the "War on Terror"', June 2007, AI Index: AMR 51/093/2007, 5-6; J Margulies, *Guantánamo and the Abuse of Presidential Power* (New York: Simon & Schuster, 2006) 18-200; T Paglen and A C Thompson, *Torture Taxi: On the Trail of the CIA's Rendition Flights* (Hoboken, NJ: Melville House, 2006); S Grey, *Ghost Plane: the True Story of the CIA Torture Program* (New York: St Martin's Press, 2006).

them or simply turned a blind eye. They have also gone to great lengths to ensure that such operations remain secret and protected from effective national or international scrutiny.

By the time that Marty presented his next substantial report to the Committee and the Parliamentary Assembly in mid-2007, he considered that his earlier conclusions had received further support and that there was extensive and reliable evidence of systematic violations in which Council of Europe states had been actively or passively involved. He concluded that two secret detention centres (in Poland and Romania) had been part of the CIA operations as part of the HVD program, and that the program had been set up with the cooperation of European officials and kept secret under North Atlantic Treaty Organization (NATO) confidentiality rules. Marty also concluded that detainees were subjected to 'inhuman and degrading treatment, sometimes protracted' and that 'certain "enhanced" interrogation methods used' violated the prohibitions against torture and other ill treatment under European and UN human rights treaties.¹⁰³

The Marty reports provide a compelling account of the manner in which the arrangements between the US and various countries (including ones outside Europe) were reached, and the procedures for transferring detainees between various countries and the purposes for which this was undertaken. A number of the countries involved have denied the accuracy of the findings,¹⁰⁴ while other critics have argued that the evidence supporting the conclusions is based on media reports or is unreliable. Marty has defended his findings, noting that all his findings were based on a variety of different sources, and all findings were corroborated from different sources.

While it is certainly true that for some of his information, Marty relied on (or at least started with) media and NGO reports, the use of air traffic control data supplied by various national and international authorities, the interviews with victims and present and former government officers, and the various statements by government officials on which he also relied, belie the criticism that the report has no solid evidential basis. Marty noted that the Committee was 'not an investigating authority: we have neither the powers nor the resources ... our task is ... to assess, as far as possible, allegations of serious violations of human rights committed on the territory of Council of Europe member states'.¹⁰⁵ While he plainly considered that the evidence was strong enough to reach firm factual conclusions, the primary responsibility lay with states to carry out proper investigations into the violations alleged to have taken place on their territory, and they had failed to fulfil that responsibility.

¹⁰³ Draft Resolution, [2]-[7], Marty 2007 Report, above n 101, 2 (summarising the findings of the report).

¹⁰⁴ See in particular the strong denials by Poland and Romania in Marty 2007 Report, above n 101, Appendix, Doc 11302 Addendum (19 June 2007).

¹⁰⁵ Marty 2007 Report, above n 101, [9].

Marty also documented the unwillingness or refusal of many states to provide relevant information.¹⁰⁶ He also notes that in some cases, states had issued flat denials of particular practices, yet subsequently incontrovertible evidence of them had emerged. Perhaps the most striking is the admission by President Bush on 6 September 2006 that indeed the CIA had been running an HVD program, which had involved detention of suspects in undisclosed locations. Marty also notes the ready resort by states to the invocation of national security grounds to justify the refusal to provide relevant information, not just to his inquiry, but also in proceedings brought before national courts by persons who alleged that they had been the victims of serious human rights violations at the hands of the governments concerned.

Although the story that emerges from Marty's reports is the deliberate and systematic disregard of fundamental international human rights norms by the governments involved, there is also another dimension of these events, which reveals a different use of law and legal structures. Marty finds that some of the arrangements for the secret detention centres and illegal renditions were entered into under the framework of NATO cooperation arrangements, as well as by a series of bilateral agreements between various governments (generally at the agency level).¹⁰⁷ Furthermore, he draws attention to what appears to have been an attempt by President Bush to confer the mantle of domestic legality on the CIA's program by the signature on 17 September 2001 of a classified Presidential Finding, which granted the CIA significant new powers in relation to its covert activities directed against terrorism.¹⁰⁸ These patterns of behaviour suggest that the intelligence agencies involved were not totally oblivious to the utility of law, but that theirs was a partial view, which saw a practical and political importance in using established or ad hoc international arrangements to pursue their goals and relying on domestic authorisations to protect themselves against liability under US law,¹⁰⁹ while showing complete disregard for fundamental human rights standards. The only law that really appears to have mattered was domestic law — whether or not it was in flagrant violation of international law¹¹⁰ — and also the rules of the intelligence and military communities in the context of NATO and bilateral cooperative arrangements between intelligence agencies.

¹⁰⁶ Ibid, Summary.

¹⁰⁷ Ibid [9].

¹⁰⁸ Ibid [58]-[60].

¹⁰⁹ This approach was also seen in relation to the notorious 'torture memos' that emerged from the US Department of Justice, which argued for legal positions the effect of which was to minimise the exposure of US military and intelligence officials to any criminal liability under US laws in relation to the use of 'enhanced interrogation techniques' (aka 'torture or cruel, inhuman or degrading treatment or punishment').

¹¹⁰ The primacy of domestic law emerges from the account given of the Bush administration's response to the events of 9/11 by two of the principal legal players in the first Bush administration, John Yoo, and one of his successors, Jack Goldsmith: see Yoo, above n 51; Goldsmith, above n 51, 129-34.

The work carried out by the Council of Europe and many other parties in uncovering the conduct of the government agencies involved in the secret detentions and illegal renditions demonstrates the significant challenges that face civil society and public institutions in holding governments accountable for human rights violations of this sort. The governments involved were determined to undertake secret operations in clear violation of international standards, and went to great efforts to conceal these from the public and our political institutions, to deceive the public when questions were raised, and to resist disclosure of information on national security grounds when persons affected sought to hold them to account through judicial or other proceedings. The resources available to uncover such conduct are often limited when compared with the resources governments devote to their concealment. It is only through concerted efforts by and collaboration among various public institutions at the international and national level, the media, NGOs and others — as seen in the Council of Europe inquiries — that the story can emerge, and trigger or reinforce further exercises in accountability in different forms at the national level.

Conclusion

In this chapter I have sought to explore a number of ways in which states have drawn on law or operated outside the international human rights legal framework, in their attempts to address what they perceive as the serious threat of terrorism. The discussion above shows that law has been a central part of that response at the international level and that there have been different forms of regulatory response drawing on law, described as regulation through law, despite the law, and outside the law. The proponents of strong counter-terrorism measures have enlisted the power and legitimacy of international law and legal institutions to legitimate the many new measures adopted, while in other cases they have chosen to disregard the applicability of the law or to deny its relevance or inhibiting effect.

All these types of regulatory activity have drawn ameliorative responses from a range of institutions and organisations whose mandates or missions involve the promotion and protection of human rights at international and national levels. The institutions with a primary responsibility within the international system for the protection of human rights have sought both to arrest the excesses and to reassert the importance of human rights norms and the values they represent. In a very real sense the rule of law and human rights has been fighting back on various fronts, more slowly than the breathless pace of the development of new counter-terrorism laws, policies and programs, but painstakingly reaffirming the importance of human rights standards as goals and means. In this task, NGOs, the media, and parliamentary institutions at the international and national level have been indispensable collaborators in the process.

The strategies adopted by international human rights institutions in responding to the direct and serious encroachments on established human rights norms in the struggle against terrorism have been diverse. Three of them have been the focus of this chapter: mainstreaming, critical engagement and disputation over authoritative interpretation of norms, and fact-finding as a form of ensuring public accountability. The strategies have involved arguing for normative inclusion and the availability of human rights expertise in the specialised counter-terrorism bodies, the reaffirmation of accepted principles of human rights law to the familiar and new situations presented by the phenomenon of terrorism in the modern world, and the use of fact-finding methods to reveal the nature and extent of infringements states have engaged in and to institute forms of accountability for those actions.

The specific measures adopted have included efforts to ensure the insertion or incorporation of human rights standards and perspectives in the mandates and procedures of the specialised counter-terrorism bodies; the establishment of new mechanisms to engage directly with the counter-terrorism bodies, states and other actors, and to provide political and normative scrutiny of the work of those bodies; and the use of existing bodies and procedures to focus on the human rights implications of states' legislative and other actions.

In terms of substantive argumentation, one can see at least two fundamental features of the manner in which counter-terrorism measures and the modes for their implementation have been justified and implemented. The first is the construction of the emergency, the crisis, the world that changed forever on 9/11, and the corresponding need to take exceptional measures that would neither be needed nor justified in 'normal' times. The second is a mode of implementation that is based on lack of transparency, secrecy, invisibility and very limited opportunity for an external and independent review.

To each of these features, the riposte has come from human rights institutions that the need to confront crises and emergencies is in fact not so unusual and does not require major departures from established principles and approaches. Second, the importance of transparency and accountability have been rearticulated, and the need for them in identifying and remedying violations of international and national law has been vividly underlined by the vigorous efforts of human rights bodies to tear away the veil of secrecy behind which states have sought to conceal them.