
CHAPTER FIVE

THE UNITED STATES AND INTERNATIONAL HUMAN RIGHTS

INTRODUCTION

The erosion of human rights protections in the United States in the aftermath of September 11 has had a profound impact on human rights standards around the world. In the past two years, the United States has become identified with its selective observation of international human rights treaties to which it is bound – a pattern that has emboldened other governments to do the same. A growing number of countries have adopted sweeping counterterrorism measures into their domestic legal systems, at times significantly expanding on the substance of U.S. measures while explicitly invoking U.S. precedent. Opportunistic governments have been co-opting the U.S. “war on terrorism,” citing support for U.S. counterterrorism policies as a basis for internal repression of domestic opponents. In some instances, U.S. actions have encouraged other countries to disregard domestic and international law when such protections stand in the way of U.S. counterterrorism efforts. And political refugees are bearing the brunt of the new international climate. Countries from Australia to France are treating all immigrants, including refugees seeking asylum, primarily as security risks, turning a blind eye to personal circumstances and individual claims of hardship.

The administration deserves credit for recently reaffirming the United States’ commitment to the elimination of torture by all nations – and for stating determination to lead this effort by example. But in compromising its standards in the name of “national security,” the United States is losing the moral authority necessary to achieve this and other fundamental human rights goals. And by ignoring international rules by which it remains bound, the U.S. government risks undermining the international legal framework that has sustained the United States’ position in the world since World War II.

LEGAL BACKGROUND

The modern framework of international human rights law emerged as a response to the atrocities of World War II. Until 1945, human rights protections were considered a matter exclusively within the domestic sovereignty of individual states. Traditional deference to state sovereignty began to break down, however, as the world came to grips with the horrors of the Holocaust. With the landmark Nuremberg trials and the creation of the United Nations, the protection of human rights came to be regarded as an important area of international attention and concern.

Indeed, the development of international human rights law through the past fifty years has been premised on the notion that all nations have the obligation to respect the rights of individuals within their borders, and that the international community can and should play a role if a state does not meet this obligation. The Universal Declaration of Human Rights, adopted by the United Nations in 1948, called on member states to recognize “the inherent dignity... and equal and inalienable rights of all members of the human family.”⁵⁸³ Subsequent human rights treaties protect individual citizens from abuses such as torture, arbitrary arrest, and summary conviction, while guaranteeing rights such as freedom of speech, freedom of religion, and the right to seek asylum from persecution.⁵⁸⁴ More than three quarters of the world’s countries (including the United States) are parties to humanitarian law treaties such as the 1949 Geneva Conventions and human rights treaties such as the International Covenant on Civil and Political Rights (ICCPR); and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵⁸⁵ The International Committee of the Red Cross is the recognized “guardian” of the Geneva Conventions and as such, monitors for their application during periods of armed conflict.⁵⁸⁶ State compliance with the ICCPR and the Convention Against Torture is monitored by the UN Human Rights Committee and the UN Committee Against Torture, respectively.

FOLLOWING A NEW U.S. MODEL

Since the days of Eleanor Roosevelt – a principal drafter of the Universal Declaration of Human Rights – the United States has been justifiably proud of its leading role in promoting the development of international human rights law. Through the past half century, the United States has taken an active, and often leading role in enforcing human rights standards – a role it publicly embraces as central to American values. As Paula Dobriansky, the current Under Secretary of State for Global Affairs, emphasized to the Senate Foreign Relations Committee several months before the September 11 attacks: “Since the end of the Second World War, the United States has been without equal in articulating a vision of international human rights and having the grit to carry it out.... We shall continue to be the world’s leading advocate for democracy and human rights.”⁵⁸⁷

In the aftermath of September 11, a new model has begun to take hold. This model is perhaps best illustrated by an instruction issued in the U.S. Department of State’s guidelines for the 2002 “Country Reports on Human Rights Practices.” Since 1976, Congress has required the State Department to produce an annual report on human rights conditions in other countries to assist with congressional oversight of U.S. foreign relations. In preparation for its 2002 reports (issued in March 2003), the State Department distributed a new instruction for U.S. embassy officials around the world, providing: “Actions by governments taken at the request of the United States or with the expressed support of the United States should not be included in the report.”⁵⁸⁸ This instruction appears to discourage embassy officials who might otherwise have reported upon violations committed by allied governments as a part of a “war on terrorism.” The State Department has given assurances that this instruction will not appear in future guidelines, but its inclusion in the 2002 guidelines reinforced concerns that the United States is relaxing human rights standards for those who support U.S. actions.⁵⁸⁹

Trend Toward Harsh Emergency Laws

Seizing upon the dangers of September 11, a growing number of governments have passed aggressive new counterterrorism laws that undermine established norms of due process, including access to counsel and judicial review. On June 30, 2003, UN experts associated with the UN Commission on Human Rights issued a joint statement emphasizing their “profound concern at the multiplication of policies, legislations and practices increasingly being adopted by many countries in the name of the fight against terrorism, which affect negatively the enjoyment of virtually all human rights – civil, cultural, economic, political and social.”⁵⁹⁰ They also drew attention to “the dangers inherent in the indiscriminate use of the term ‘terrorism,’ and the resulting new categories of discrimination.”⁵⁹¹

The United Kingdom, a close ally of the United States, passed the Anti-Terrorism Crime and Security Act of 2001 in direct response to the September 11 attacks.⁵⁹² This Act grants the government extended powers to arrest and detain foreign nationals when the Home Secretary certifies that they are a risk to national security or are suspected “international terrorists.”⁵⁹³ In passing the legislation, the United Kingdom was forced to derogate from its obligations under Article 5 of the European Convention on Human Rights, the article protecting fair trial rights.⁵⁹⁴ U.K. Attorney General Lord Goldsmith justified the derogation on the basis of the “exceptional situation of emergency constituted by the threat posed by Islamist international terrorism.”⁵⁹⁵ No other European country has derogated from the Convention under similar terms.⁵⁹⁶

The Pakistani government promulgated a new Anti-Terrorism Ordinance in November 2002. The ordinance allows the police to arrest terrorism suspects and detain them for up to a year without charge.⁵⁹⁷ Under previous law, authorities could detain suspects for three months.⁵⁹⁸ The new ordinance was approved by President Pervez Musharraf’s military-led cabinet, rather than by Pakistan’s newly elected legislature.⁵⁹⁹ Zia Ahmed Awan, president of the Karachi-based Lawyers for Human Rights and Legal Aid (LHRLA), said that the order “will only increase the victimization of ordinary people at the hands of the police and other law enforcement agencies.”⁶⁰⁰

In February 2003, the Egyptian government introduced a bill in the People’s Assembly to extend a controversial emergency law for another three years. The law, which has been in force since 1981, authorizes the government to detain people it considers a threat to national security for 45-day renewable periods without charge.⁶⁰¹ It also bans all public demonstrations and allows citizens to be tried before military tribunals.⁶⁰² The law had been set to expire on May 31, 2003.

The bill extending the law was introduced without prior notice and was rushed for passage the same day.⁶⁰³ Prime Minister Atif Ubyayd asked the Assembly to support the extension, calling it an “urgent necessity” in light of the “war on terrorism.”⁶⁰⁴ He emphasized that other countries, including the United States and Britain, had passed new security laws that “adopted the principles to which we have adhered in the Egyptian

emergency law.”⁶⁰⁵ But a February 24, 2003 statement by Phillip Reeker, a spokesperson for the U.S. State Department, revealed U.S. concern about being used as justification for the law:

We certainly understand and appreciate the Egyptian government’s commitment to combat terrorism and maintain stability. We have had serious concerns that we have often raised with the government of Egypt concerning the manner in which that law has been applied. For example, we have often expressed our concern regarding the practices of referral to the emergency courts of cases that do not appear to be linked to national security, and referral of civilians to military tribunals for non-violent offenses, and the indefinite renewal of administrative detentions.⁶⁰⁶

In Kenya, meanwhile, the government introduced the Suppression of Terrorism Bill in May 2003.⁶⁰⁷ The bill would allow the government to hold terrorism suspects in incommunicado detention for up to 36 hours. Police officers also would be authorized to search private property and carry out arrests without warrants. The bill also provides that no criminal or civil prosecution can be brought against a law enforcement officer who injures or kills a terrorism suspect.⁶⁰⁸ Njeru Githae, Assistant Minister for Justice and Constitutional Affairs, acknowledged that, “[t]he Bill may be taking away a few fundamental rights of Kenyans,” but claimed “this may be justified by the very nature of terrorism.”⁶⁰⁹

Many Kenyans think the bill is being imposed upon them by American and British interests.⁶¹⁰ Willy Mutunga, Director of the Kenyan Human Rights Commission, characterized the bill as a modified version of the PATRIOT Act and said it would “disrespect basic human rights” in Kenya.⁶¹¹ Reverend Timothy Njoya, a Presbyterian minister, declared: “The bill is borrowed from the same source as the American and British one.... If this bill is enacted the way it is, it will make Kenya a police state.”⁶¹² Although the bill was rejected by the parliamentary legal committee in July 2003, a vote still looms in the full Parliament, where the bill has many supporters.⁶¹³

In Israel, the Knesset passed the Incarceration of Unlawful Combatants Law in March 2002.⁶¹⁴ The law defines an unlawful combatant as “a person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel.”⁶¹⁵ Similar to its current use by the United States, the term “unlawful combatant” is used to detain terrorism suspects indefinitely without judicial review, while simultaneously stripping them of the protections afforded by international human rights and humanitarian law. B’Tselem, a prominent Israeli human rights group, criticized the government for “making a mockery of the very existence of international law, whose main aim is to establish standards shared by all the countries of the world and prevent a situation where every country fights according to the rules it has made up for itself.”⁶¹⁶

Co-Opting the “War on Terrorism”

*Internationally, we are seeing an increasing use of what I call the “T-word” – terrorism – to demonize political opponents, to throttle freedom of speech and the press, and to delegitimize legitimate political grievances.*⁶¹⁷

UN Secretary General Kofi Annan

In the two years since September 11, counterterrorism has become the new rubric under which many governments seek to justify their actions, however offensive to human rights. The rhetoric of U.S. counterterrorism policy has exacted a heavy toll on longstanding American values, such as open political dissent, democratic advocacy, and freedom of the press. As the International Federation of Journalists emphasized on the first anniversary of the attacks: “From Australia to Zimbabwe... politicians have rushed to raise the standard of ‘anti-terrorism’ against their political opponents, and have tried to stifle free journalism along the way.”⁶¹⁸

Opportunistic governments have spoken publicly to applaud U.S. policies, which they now see as an endorsement of their own longstanding practices. As Egypt’s President Hosni Mubarak declared, the new U.S. policies proved “that we were right from the beginning in using all means, including military tribunals, to combat terrorism.... There is no doubt that the events of September 11 created a new concept of democracy that differs from the concept that Western states defended before these events, especially in regard to the freedom of the individual.”⁶¹⁹

For the United States, these declarations of common cause often come from unwelcome quarters. In Liberia, for example, then-President Charles Taylor told the Liberian legislature shortly after September 11 that the challenge to his own grip on power was merely an extension of the global terrorist threat.⁶²⁰ Indeed, Taylor went so far as to apply the term “unlawful combatant” to Hassan Bility, an internationally respected journalist who had been critical of his policies.⁶²¹ Bility, the editor of the *Analyst*, was arrested in June 2002 and detained without access to a lawyer. He was tortured under interrogation.⁶²² Taylor claimed that as an “unlawful combatant,” Bility was being treated “in the same manner in which the U.S. treats terrorists.”⁶²³ Reginald Goodridge, the Liberian Information Minister, told an American journalist, “It was you guys [the U.S. government] who coined the phrase. We are using the phrase you coined.”⁶²⁴ After his release in December 2002, Bility concluded that the government had been grasping at straws: “The government did not really have anything to say, so it had to piece together some ill-chosen phrase to satisfy its desire to the international community.”⁶²⁵

In November 2001, Zimbabwean President Robert Mugabe claimed that foreign correspondents were “terrorist sympathizers” for reporting on political attacks against white Zimbabweans. Mugabe’s spokesperson insisted that it was an “open secret” that such reporters were “assisting terrorists” and “distorting the facts.”⁶²⁶ He then warned:

As for correspondents, we would like them to know that we agree with U.S. President Bush that anyone who in any way finances, harbors or defends terrorists is himself a terrorist. We, too, will not make any difference between terrorists and their friends and supporters.... This kind of media terrorism will not be tolerated.⁶²⁷

In Eritrea, the government has also drawn explicitly on the U.S. example. On September 18, 2001, Eritrean officials arrested 11 former high-ranking officials and has held them in incommunicado detention ever since.⁶²⁸ Those arrested were part of a dissident group of ruling party members that had publicly criticized President Issayas Afewerki and pushed for peaceful democratic reform.⁶²⁹ Spokesmen for the Eritrean government later suggested that the officials were agents of Osama Bin Laden.⁶³⁰

On the day of the arrests, the government suspended all independent and privately owned newspapers in Eritrea for “threatening state security” and “jeopardizing national unity.”⁶³¹ It later arrested ten prominent journalists who had formally protested the government’s actions. The journalists continue to be held in incommunicado detention without charge, almost two years after their arrests.⁶³² Girma Asmerom, Eritrea’s Ambassador to the United States, has insisted that locking up journalists is “perfectly consistent” with democratic practice.⁶³³ As proof of this, he cited “America’s roundup of material witnesses and suspected aliens” in the months after the September 11 attacks.⁶³⁴

The Chinese government has also exploited the rhetoric of counterterrorism to crack down on political dissent. On February 10, 2003, the Shenzhen People’s Court sentenced Wang Bingzhang, a prominent democracy activist, to life in prison for espionage and “violent terrorist activities,” which included “organizing and leading a terrorist group” in China.⁶³⁵ It was the first time that the Chinese government had brought terrorism charges against a democracy activist.⁶³⁶

Wang, a longtime U.S. permanent resident, is the founder of the Chinese Alliance for Democracy in New York and the dissident magazine *China Spring*.⁶³⁷ He and two others, known as the “Democracy 3,”⁶³⁸ disappeared without a trace in June 2002 after meeting with Chinese labor activists in Vietnam, near the northern border with China.⁶³⁹ They were missing for six months before the Chinese government acknowledged that they were being held in Chinese custody.⁶⁴⁰ Although his two companions were eventually released, Wang was convicted and sentenced after a one-day trial.⁶⁴¹ The sentence was affirmed on February 28, 2003.

That same day, the U.S. State Department expressed its “deep concern” over China’s treatment of Wang, stressing that “the war on terrorism must not be misused to repress legitimate political grievances or dissent.”⁶⁴² Richard Boucher, a spokesperson for the State Department, emphasized:

[M]any questions about Mr. Wang’s case remain unanswered, such as those involving the apparent detention by China of Mr. Wang for a six-month period, during which Chinese authorities denied knowing his whereabouts.... We also

note with deep concern that Mr. Wang's trial was conducted in secret, raising questions about the nature of the evidence against him and the lack of due process. We'd also note with particular concern the charge of terrorism in this case, given the apparent lack of evidence, and again, due process.⁶⁴³

The UN Working Group on Arbitrary Detention also questioned the lack of evidence against Wang; in July 2003, it concluded that his detention contravenes the Universal Declaration of Human Rights.⁶⁴⁴ Copies of the Working Group's decision were sent to Beijing, but Wang remains in Chinese custody.

The Russian government also has attempted to package a longstanding campaign against Chechen separatists inside the box of global counterterrorism efforts. On September 12, 2001, Russian President Vladimir Putin declared that America and Russia had a "common foe" because "Bin Laden's people are connected with the events currently taking place in our Chechnya."⁶⁴⁵ While the U.S. government has acknowledged Al Qaeda's connections in Chechnya (it added three Chechen groups to the U.S. list of foreign "terrorist organizations" in February 2003), it has also tried to challenge the extent of Russia's claims.⁶⁴⁶ In March 2002, the U.S. Senate passed a resolution declaring: "[T]he war on terrorism does not excuse, and is ultimately undermined by, abuses by Russian security forces against the civilian population in Chechnya."⁶⁴⁷ The State Department's 2002 Human Rights Report criticized the Russian government's "poor" human rights record in Chechnya and found that state abuses included "disappearances," extrajudicial killings, torture, and arbitrary detention.⁶⁴⁸

The European Parliament has also condemned the "appalling human rights situation in Chechnya." On July 3, 2002, it passed a resolution calling for the investigation of "persistent and recurring mass violations of humanitarian law and human rights committed against the civilian population by Russian forces, which constitute war crimes and crimes against humanity."⁶⁴⁹ In response, the Russian Duma declared that the resolution had "run counter to the spirit of partnership between the Russian Federation and the European Union in the fight against international terrorism."⁶⁵⁰ The Duma also criticized the European Parliament for "continuing to ignore human rights violations in the so-called traditional democracies," including the United States.⁶⁵¹ Russia characterized the situation as a "policy of double standards in the field of human rights."⁶⁵²

Russian officials have attacked human rights groups for criticizing its policies in Chechnya. It has even suggested that such human rights groups be investigated for links to international terrorism. On July 22, 2003, Abdul-Khakim Sultygov, Russia's Commissioner for Human Rights in Chechnya, declared:

Chechnya clearly demonstrates that terrorist activities go hand-in-hand with the psychological war, propaganda and moral terror conducted by human rights NGOs. There is a need to investigate the sources financing these organizations, including those with international status, for their potential ties to the international terrorist network.⁶⁵³

Russian media laws have already been amended to make it a crime to report statements made by “terrorists,” because such stories are said to “justify terrorism.”⁶⁵⁴

And in Indonesia, the government has been considering plans to build a Guantánamo-like island detention camp to house prisoners in its longstanding struggle against armed separatists in northern Sumatra. On May 19, 2003, Indonesian President Megawati Sukarnoputri signed a presidential decree authorizing a new military offensive against the separatists, known as the *Gerakan Aceh Merdeka* (GAM) or Free Aceh Movement. As part of this offensive, the Indonesian military announced that it would build an internment camp for prisoners on an island off Aceh. Although the United States has been pressuring Indonesia to end the Aceh offensive, the plan was immediately likened to the U.S. government’s own detention camp at Guantánamo Bay, Cuba.⁶⁵⁵

Lt. Gen. Djamari Chaniago, Chief of General Affairs for the Indonesian military, told journalists in June 2003 that he expected the detention center to be operational within two months and to eventually house 1,000 detainees.⁶⁵⁶ The detainees reportedly were to be provided with food for the first six months and were then expected to produce their own.⁶⁵⁷ Due to budget problems, however, the Indonesian military put construction plans on hold in July 2003.⁶⁵⁸

OUTSIDE THE LAW

*If you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.*⁶⁵⁹

Unnamed U.S. intelligence official to *The Washington Post*

Extraordinary Rendition

In the past two years, the United States has shown itself increasingly ready to sacrifice human rights considerations when these considerations complicate counterterrorism efforts. There have been reports that U.S. intelligence agencies have used abusive interrogation techniques in interrogating terrorism suspects. The U.S. executive has also reportedly tolerated and even tacitly endorsed the interrogation methods of some of its less scrupulous allies when those methods may yield useful intelligence information.

According to a series of press reports, the Central Intelligence Agency (CIA) has been covertly transferring terrorism suspects to other countries for interrogation, a process known as “extraordinary rendition.”⁶⁶⁰ The practice consists of handing suspects to foreign intelligence services, notably those of Jordan, Egypt and Morocco, which are known for employing coercive interrogation methods.⁶⁶¹ Some detainees are said to have been transferred with lists of specific questions that their American interrogators want answered.⁶⁶² In other cases, CIA reportedly plays no role in directing the interrogations, but subsequently receives any information that emerges.⁶⁶³ It is not clear if U.S. officials are ever physically present at these sessions.⁶⁶⁴

Although the total number of “extraordinary renditions” by the United States remains unknown, U.S. diplomats and intelligence officials have repeatedly (but anonymously) confirmed that such transfers do take place.⁶⁶⁵ As one diplomat told *The Washington Post*: “After September 11, these movements have been occurring all the time. It allows us to get information from terrorists in a way we can’t do on U.S. soil.”⁶⁶⁶ In a separate interview, an intelligence official who had been personally involved in rendering captives explained: “We don’t kick the [expletive] out of them. We send them to other countries so they can kick the [expletive] out of them.”⁶⁶⁷

Such renditions violate Article 3 of the UN Convention Against Torture, which prohibits signatory countries from sending anyone to another state when there are “substantial grounds for believing that he would be in danger of being subjected to torture.”⁶⁶⁸ They also send an unmistakable message of approval to the governments that actually conduct the proxy interrogations, and to all regimes that have been criticized for using torture. In reacting to reports that the United States had sent Al Qaeda suspects to Egypt for interrogation by Egyptian officials, Muhammad Zarei, an Egyptian lawyer, remarked: “In the past, the United States harshly criticized Egypt when there was human rights violations, but now, for America, it is security first – security, before human rights.”⁶⁶⁹

In response to questions about U.S. rendition policy, William Haynes, the General Counsel of the U.S. Defense Department, reaffirmed in June 2003 that “should an individual be transferred to another country to be held on behalf of the United States... United States policy is to obtain specific assurances from the receiving country that it will not torture” that individual.⁶⁷⁰ Haynes also stressed that the government would investigate credible allegations of torture and take “appropriate action” if there were reason to believe that such assurances were not being honored.⁶⁷¹ In addition, on the UN International Day in Support of Victims of Torture, June 26, 2003, President Bush pledged:

The United States is committed to the world-wide elimination of torture and we are leading this fight by example.... I call on all nations to speak out against torture in all its forms and to make ending torture an essential part of their diplomacy.⁶⁷²

President Bush’s statement is an important reaffirmation of official U.S. policy. But the U.S. government must do much more if it wants to combat the perception that it has been quietly relaxing the prohibition against torture and other cruel, inhuman, and degrading treatment. Specifically, it needs to counter the concern, as expressed by the World Organization Against Torture, that “while the U.S. publicly denies any knowledge of the use of torture upon detainees that have been handed over to these countries, it is gathering and making use of the information that these interrogations produce.”⁶⁷³ Despite Haynes’ promise, there has been no indication that the U.S. government is taking adequate action to root out the problem – even in cases reported in detail in the press.

In one such case, for example, the CIA was allegedly involved in the extra-legal rendition of a suspected Al Qaeda recruiter, Mohammed Haydar Zammar, in June 2002.⁶⁷⁴ Zammar, a German citizen of Syrian origin, was arrested in Morocco and sent for

interrogation to Syria – a country fiercely criticized by the U.S. government for using torture methods such as pulling out fingernails, electric shocks, forcing objects up detainees' rectums, and hyper-extending their spines.⁶⁷⁵ In January 2003, Driss bin Lakoul, a Moroccan man who was held in the same military detention center as Zammar for several months, claimed that Zammar was being tortured by Syrian officials.⁶⁷⁶

Although Syria will not comment on Zammar's case, U.S. and German officials have confirmed that he is there.⁶⁷⁷ Both sets of officials have also indicated that Zammar is providing information about Al Qaeda activities.⁶⁷⁸ Indeed, Germany has admitted receiving intelligence information from U.S. investigators who had been permitted to question Zammar.⁶⁷⁹ According to an unnamed U.S. official interviewed in *The Washington Post*, U.S. interrogators have not personally questioned Zammar, but have instead submitted lists of questions, receiving answers back in return.⁶⁸⁰

In another case, the CIA secretly transferred Maher Arar, a dual citizen of Canada and Syria, first to Jordan and then to Syria. U.S. officials had arrested Arar on September 26, 2002 as he was changing planes at JFK airport in New York, en route home to Canada.⁶⁸¹ Although Arar was traveling on his Canadian passport, U.S. officials deported him to Syria without first informing the Canadian authorities, a move that evoked strong protest from Canada.⁶⁸² Arar arrived in Syria on October 10, 2002, reportedly after spending 11 days at a CIA interrogation center in Jordan.⁶⁸³ Syrian officials have indicated that he is being interrogated to determine whether he has ties to Al Qaeda.⁶⁸⁴ In August 2003, Amnesty International reported allegations that he has been subject to torture in Syria, including the use of electric shocks and beatings on the soles of his feet.⁶⁸⁵

Extralegal Transfers

The United States also has reportedly been pressuring other governments to hand Al Qaeda suspects over to U.S. interrogators, even when this violates the domestic law of those nations. In one such case, the government of Malawi secretly transferred five men to U.S. custody, in violation of a domestic court order.⁶⁸⁶ The five men, suspected of funneling money to Al Qaeda, were arrested in Blantyre on June 22, 2003 in a joint operation involving CIA and Malawi's National Intelligence Bureau.⁶⁸⁷ They were initially held at an undisclosed location inside Malawi without access to counsel.⁶⁸⁸ Their lawyers challenged their detention before the High Court of Blantyre, which issued an injunction blocking their transfer to U.S. custody.⁶⁸⁹ The court ordered Fahad Assani, Malawi's Director of Public Prosecution, to produce them within 48 hours, either to be released on bail or to be informed of the charges against them under Malawi or international law.⁶⁹⁰

On June 24, 2003, the day before the scheduled court hearing, the men were flown to Zimbabwe aboard a chartered flight in the company of U.S. officials.⁶⁹¹ The next day, a senior Malawian immigration official confirmed: "[The suspects] are not in the custody of Malawi, they are in American custody."⁶⁹² The Malawi Director of Public Prosecution, who had not been informed of the impending transfers, complained: "Who can I produce in court now? Their ghosts?"⁶⁹³ Bakili Muluzi, the president of Malawi, defended the renditions, saying they were in Malawi's best interests.⁶⁹⁴

TORTURE AND MISTREATMENT BY U.S. OFFICIALS?

In the past year, there have been numerous reports of U.S. military and CIA officials using “stress and duress” techniques in interrogating terrorism suspects. Detainees released from the U.S. facilities in Guantánamo Bay, Cuba and Bagram, Afghanistan have reported being stripped naked; made to stay in uncomfortable positions, or forced to stand or kneel, for long periods; subjected to prolonged hooding and shackling; and/or deprived of sleep through loud noises and constant light.⁶⁹⁵ Detainees in Iraq have complained of similar mistreatment.⁶⁹⁶

In December 2002, two Afghan detainees died in U.S. custody at Bagram Air Base. Both deaths were officially classified as homicides, resulting in part from “blunt force trauma.”⁶⁹⁷ The U.S. military launched a criminal investigation into the deaths in March 2003. The military is also investigating the June 2003 death of a third Afghan man, who reportedly died of a heart attack while in a U.S. holding facility in Asadabad, Afghanistan. The deaths have amplified existing concern about the U.S. treatment of detainees.

As described above, President Bush officially pledged in June 2003 that the United States is committed to the world-wide elimination of torture. And U.S. officials have denied the charges of abuse, insisting that interrogation practices are “humane and... follow all international laws and accords dealing with this type of subject.”⁶⁹⁸ But in March 2003, Colonel Roger King, the chief U.S. military spokesman in Bagram, confirmed that “[w]e do force people to stand for an extended period of time,” and that a “common technique” for interrogation was “either keeping light on constantly or waking inmates every 15 minutes to disorient them,” because “[d]isruption of sleep has been reported as an effective way of reducing people’s inhibition about talking.”⁶⁹⁹

Internationally, courts have condemned “stress and duress” techniques similar to those reported as torture or other cruel, inhuman or degrading treatment. In 1999, for example, the Supreme Court of Israel ruled that even in the face of the “harsh reality” of continual terror unleashed against Israeli civilians, interrogation methods such as cuffing, hooding, loud music, deprivation of sleep, and positional abuse are absolutely forbidden under international and Israeli law, particularly when used in combination.⁷⁰⁰ In 1978, the European Court of Human Rights similarly prohibited a set of techniques that had been used in Northern Ireland, involving protracted standing on tip-toes, hooding, loud noise, and deprivation of sleep, food and drink.⁷⁰¹

The men were held in unknown locations for five weeks before being released on July 30, 2003, reportedly cleared of any connection to Al Qaeda.⁷⁰² One of the suspects, Khalif Abdi Hussein, a teacher of Somali origin, said that their captors never told them why they were being held.⁷⁰³ The day before their release, two of the suspects’ wives revealed in a radio interview that President Muluzi had invited them to his private residence to apologize for the arrests.⁷⁰⁴ “The president was very apologetic,” said one of the women. “He said he was sorry; it was not the Malawi government, it was the Americans.”⁷⁰⁵ Lameck Masina, the chief reporter at the radio station, was fired the next day – reportedly for “shaming the president” and for violating the government’s order not to re-air the interview.⁷⁰⁶

A similar pattern emerged in Bosnia. At the request of the U.S. government, Bosnian authorities transferred six Algerian men into U.S. custody in January 2002, in clear violation of that nation's domestic law. The Bosnian police had arrested the men, five of whom had Bosnian citizenship, in October 2001 on suspicion that they had links with Al Qaeda.⁷¹⁵ In January 2002, the Bosnian Supreme Court ordered them released for lack of evidence.⁷¹⁶ Instead of releasing them, however, Bosnian authorities handed them over to U.S. troops serving with NATO-led peacekeepers.⁷¹⁷ U.S. Ambassador Clifford Bond remarked that the transfer had reflected U.S.-Bosnian cooperation and told local journalists: "We deeply appreciate their efforts both to protect our safety and to promote security in your country."⁷¹⁸

Shortly after arriving in U.S. custody, the men were transported to the U.S. Naval Base at Guantánamo Bay, Cuba (discussed in Chapter 4).⁷¹⁹ This was despite an injunction from the Human Rights Chamber of Bosnia and Herzegovina, which had explicitly ordered that four of the men remain in the country for further proceedings.⁷²⁰ The Human Rights Chamber, a creation of the U.S.-brokered Dayton Accords, was established to safeguard human rights.⁷²¹

The transfer ignited protests outside the U.S. Embassy and received angry coverage in the local press. One magazine, *Dani*, published a cover illustration of Uncle Sam urinating on the Bosnian Constitution, while Bosnian Prime Minister Zlatko Lagumdžija looked on.⁷²² "The Americans wanted the Algerians and got them," said Vlado Adamović, a judge on the Bosnian Supreme Court. "As a citizen, all I can say is it was an extra-legal procedure."⁷²³ An official at the Human Rights Chamber for

EXTRALEGAL TRANSFERS FROM PAKISTAN

In October 2001, Pakistani authorities secretly handed over Jamil Qasim Saeed Mohammed to U.S. officials, bypassing normal extradition and deportation proceedings.⁷⁰⁷ Mohammed, a Yemeni microbiology student enrolled at Karachi University, was suspected of involvement in Al Qaeda. According to multiple sources, Pakistani officials took Mohammed to the Karachi airport at 1 AM on October 23, 2001 and transferred him, shackled and blind-folded, into the custody of masked U.S. officers.⁷⁰⁸ These officers drove him to a remote tarmac and placed him on an unmarked U.S. plane.⁷⁰⁹ Mohammed's current location is unknown. In another case, Pakistani authorities covertly transferred Adil Al-Jazeeri, an Algerian national, to U.S. custody in July 2003. Al-Jazeeri, a suspected aide to Osama Bin Laden, had been captured in Peshawar approximately a month earlier, where Pakistani authorities allegedly held him in incommunicado detention and subjected him to "tough questioning."⁷¹⁰ Late in the night of July 13, 2003, he was placed on a U.S. plane in Peshawar – blind-folded and with his hands bound behind his back.⁷¹¹ Although his current location is unknown, he was reportedly flown from Peshawar to the U.S. Air Base in Bagram, Afghanistan.⁷¹² It is unclear how many people Pakistan has transferred to U.S. custody under similar circumstances. Remarking on Al-Jazeeri's case, one senior Pakistani intelligence official said: "We obtained all the information that was of interest to us before handing him to the Americans. That is the standard practice applied to all suspected Al-Qa'idah members who are caught."⁷¹³ Referring to Mohammed's case, another Pakistani official emphasized that "deportations of foreigners to the U.S. are not unusual."⁷¹⁴

Bosnia and Herzegovina emphasized: “Our decision was not merely a recommendation. It was binding. Irreparable harm has been done.”⁷²⁴

The 14-member Human Rights Chamber subsequently ruled that Bosnian authorities had violated the suspects’ rights by handing them over to the United States.⁷²⁵ The Chamber held that the government had violated the Bosnian Constitution and multiple articles of the European Human Rights Convention, including the prohibitions against expulsion and illegal detention. The tribunal also found that the authorities had violated the European Convention by failing to seek assurances from the United States that the suspects would not be executed. The Chamber ordered Bosnia to provide them with lawyers and to take all possible steps to prevent them from being sentenced to death.⁷²⁶

Concern about the transfers runs deep. “It’s dreadful,” said Madeleine Rees, who heads the Sarajevo office of the UN High Commissioner for Human Rights. “Protection of human rights is way down on the list of priorities. Credibility has been shot to pieces.”⁷²⁷ Sulejman Tihic, a prominent Muslim politician, commented: “9-11 gave wings to the forces who committed war crimes here. Now they’re acting as if they were forerunners in the war against terrorism.”⁷²⁸

Similar extra-legal transfers have occurred in the nation of Georgia. On February 6, 2003, Georgia’s ambassador to the United Nations confirmed reports that several Al Qaeda suspects had been transferred to U.S. custody. He stated: “During the search operation in Pankisi last fall, Georgian troops detained several suspected Al-Qaeda members and handed them over to the United States.”⁷²⁹ U.S. officials, refusing to comment, did not deny the reports.⁷³⁰ Georgia, meanwhile, has also turned over other terrorism suspects to Russia. On October 5, 2002, one day after Georgia transferred five Chechens to Russia without due process, Georgian President Shevardnadze remarked: “International human rights commitments might become pale in comparison with the importance of the counter-terrorist campaign.”⁷³¹

TREATING ASYLUM APPLICANTS AS SECURITY RISKS

Refugees have clear rights under international law, including the right to not be returned to a place where they have a well-founded fear of persecution.⁷³² During the past decade, however, there has been a steady erosion in states’ willingness to provide protection to refugees. The events of September 11 added new momentum to this trend. Refugees are increasingly characterized not only as challenges to identity, culture, and economic growth, but as critical threats to national security.

In the immediate aftermath of September 11, the UN Security Council linked refugees and asylum seekers with the “terrorist” threat in Resolution 1373, a resolution imposing binding obligations on UN member states to prevent and suppress terrorism.⁷³³ Within two weeks of the tragedy, the European Union pressed the European Commission to examine the relationship between “safeguarding internal security and complying with international protection obligations” with a view to revising asylum policy.⁷³⁴ As discussed in Chapter 3, the United States curtailed its refugee resettlement program immediately after September 11, leaving thousands of refugees, all of whom had already completed the rigorous selection

processes, stranded abroad.⁷³⁵ In the past two years, the United States has also at times detained whole categories of arriving asylum seekers, including Haitian refugees, on generalized national security grounds – without affording an individualized assessment of the need for detention in particular cases.

A new climate of restrictionism, fueled by heightened security concerns and resurgent xenophobia, now threads through policy debates on immigration and asylum world-wide. Not only are states reducing the rights of refugees who succeed in crossing their borders, particularly through increased use of detention,⁷³⁶ they are increasingly willing to send refugees back to their countries of origin to face persecution. They are also devising new ways of preventing refugees from arriving in their territory in the first place.

THE NAURU DETENTION FACILITIES

In July 2003, Australia's Democratic Senate Leader Andrew Bartlett visited one of the detention facilities in Nauru. Here is an excerpt from his account:

On arrival, I was immediately grabbed by the many young children – three, four and five-year-olds – gathered at the gate. They had all been confined to camps for nearly two years.... The showers and toilets were [] in demountables; they used brackish water that was available for six hours each day.... The medical staff find themselves dealing mostly with mental health issues, but there is nothing they can do to alleviate the causes. . . .

[T]he women and children in the camps... are deliberately being kept apart from husbands and fathers in Australia. Our Prime Minister... is telling these women they must return alone with their children to Iraq or Afghanistan, to circumstances where their husbands faced severe persecution. The husbands cannot leave Australia without losing their protection....

Despite the lives destroyed, the vast resources squandered and, above all, the inexcusable trauma forced on little children, the Government has the audacity to describe its Pacific solution as a success.⁷³⁷

In August 2001, a Norwegian cargo ship, the *Tampa* responded to a distress call and rescued over 400 Afghan migrants from a sinking Indonesian ship.⁷³⁸ The Australian government refused to let the *Tampa* dock in Australia, however, despite being informed of the serious medical problems on board.⁷³⁹ When conditions on the boat worsened, the *Tampa* entered Australian territorial waters and Australia's special forces commandeered the vessel. The Australian federal court ruled that the asylum seekers were being held "in detention without lawful authority," and ordered that they be allowed to enter Australia.⁷⁴⁰ Ignoring the ruling, the Australian government paid the South Pacific state of Nauru to allow the asylum seekers to be disembarked there.⁷⁴¹

In the fall of 2001, shortly after September 11, the Australian Parliament passed legislation mandating the forcible transfer of refugees attempting to enter Australia to detention in third states, such as Nauru, Papua New Guinea, and Indonesia. The legislation was specifically drafted to retrospectively validate "any action" taken with respect to the *Tampa*.⁷⁴² At the same time, another law "excised" offshore Australian territories from the zone where ordinary asylum processes applied.⁷⁴³ Australia also pursued bilateral

agreements, recruiting states such as Indonesia, Cambodia, and Thailand to help seek out and detain Australian-bound migrants.⁷⁴⁴

Australia justified this bundle of measures, known as the “Pacific Solution,” as consistent with the needs of the world-wide counterterrorism campaign. Australian Defense Minister Peter Reith declared: “It is irrefutable that part of your security posture is your ability to control your borders.... What it implies, as [U.S. Assistant Defense Secretary] Jim Kelly said, was if you’ve got people – I think the words he used were – ‘with strange identities’ – walking around, then that enhances your security concerns.”⁷⁴⁵ Without the plan, Reith suggested that a nation might “be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities.”⁷⁴⁶ Similar arguments were indeed being made in the United States with respect to the interdiction and detention of Haitian asylum seekers (as discussed in Chapter 3). In the two years since the “Pacific Solution” was implemented, thousands of unauthorized migrants who have attempted to reach Australia by boat have been detained, primarily outside Australian territory.⁷⁴⁷

Like Australia, Europe, led by the United Kingdom, has also considered creating extra-territorial processing and detention centers for refugees who seek asylum within the European Union (E.U.).⁷⁴⁸ Under the scheme, asylum seekers who arrive in the jurisdiction would be sent to transit centers located outside the E.U. Countries such as Albania and Croatia have been mentioned as possible locations, for example. In a leaked report, the United Kingdom invoked counterterrorism efforts to justify the proposal: “Returning asylum seekers to regional protection areas should have a deterrent effect on economic migrants and others, including potential terrorists, using the asylum system to enter the U.K.”⁷⁴⁹ In June 2003, the United Kingdom withdrew its proposal for European-wide adoption of the scheme,⁷⁵⁰ but there is still a possibility that it may pursue the policy unilaterally.⁷⁵¹ At the same time, other proposals aimed at keeping asylum seekers from European shores have remained on the E.U. agenda. Plans to create “zones of protection” for refugees outside Europe in the main regions from which refugees originate are still under examination.⁷⁵²

RECOMMENDATIONS

1. The United States should publicly renounce efforts by other governments to use global counterterrorism efforts as a cover for repressive policies toward journalists, human rights activists, political opponents, or other domestic critics.
2. As a signal of its commitment to take human rights obligations seriously, the United States should submit a report to the UN Human Rights Committee on the current state of U.S. compliance with the International Covenant on Civil and Political Rights (ICCPR). The United States ratified the ICCPR in 1992, but has not reported to the Human Rights Committee since 1994.
3. The United States should affirm its obligation to not extradite, expel, or otherwise return any individual to a place where he faces a substantial likelihood of torture. All reported violations of this obligation should be independently investigated. The United States should also independently investigate reports that U.S. officers have used “stress and

duress” techniques in interrogating terrorism suspects, and it should make public the findings of the military investigations into the deaths of three Afghan detainees in U.S. custody.

4. The United States should respect the domestic laws of other countries, particularly the judgments of other nations’ courts and human rights tribunals enforcing international law.
5. The United States should encourage all countries to ensure that national security measures are compatible with the protections afforded refugees under international law.