

# Rethinking Security and Human Rights in the Struggle against Terrorism

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Paper Presented at the ESIL Forum in the Workshop on 'Human Rights under Threat' on 27 May 2005

## Introduction<sup>1</sup>

Human rights and security are commonly known as contending values. Their conflictual relationship are borne out in the fight against terrorism. Since 9/11, states—including democratic states—have adopted counter-terrorist measures that seriously curtail fundamental and inviolable human rights. The insult on human rights that the fight amounts to has become particularly acute in the context of 'bringing perpetrators of acts of terrorism to justice', one out of several counter-terrorism measures that the U.N. Security Council obliges states to adopt.<sup>2</sup>

A looming fear of future terrorist attacks ('catastrophic terrorism')<sup>3</sup>, possibly with even more detrimental results than those that took place in New York, Washington D.C., and Pennsylvania on 11 September 2001, Madrid on 11 March 2004, and in Russia's North Ossetian town of Beslan on 1 September 2004, have been the upshot of a broad range of counter-terrorism measures in relation to terrorist suspects, including the following:

- \* arbitrary detention;<sup>4</sup>
- \* indefinite detention;<sup>5</sup>

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<sup>1</sup> This section consists of a selection of previous research on the way in which counter-terrorism measures adopted in the wake of 9/11 have put significant pressure on human rights. See Jessica Almquist, 'Which Justice for Perpetrators of Terrorism: The Need for Guidelines' FRIDE Working Paper no. 5 (March 2005) and Jessica Almquist, 'Any Light in the Tunnel? The Future of U.S. Counter-terrorism Measures' FRIDE Comment (October 2004). Both documents are available at: [www.fride.org](http://www.fride.org).

<sup>2</sup> According to U.N.S.C. Res. 1373 (2001), para. 2(e): 'States shall ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.'

<sup>3</sup> For the use of this term, see 'In Larger Freedom: Towards Security, Development and Human Rights for All.' Report of the Secretary-General, 21 Mar. 2005 (A/59/2005) [hereafter 'In Larger Freedom'].

<sup>4</sup> See e.g. International Commission of Jurists concludes mission in Colombia, 28 Jan. 2005 [[http://www.icj.org/IMG/pdf/Final\\_PR\\_Colombia.pdf](http://www.icj.org/IMG/pdf/Final_PR_Colombia.pdf)].

<sup>5</sup> See e.g. U.S. Military Order issued by President Bush on November 13, 2001. Detention, Treatment and Trial of Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57, 833 (Nov.

- \* the establishment of military commissions;<sup>6</sup>
- \* secret legal proceedings;<sup>7</sup>
- \* detention of non-violent dissenters as terrorist suspects;<sup>8</sup> and
- \* arbitrary executions.<sup>9</sup>

The continued protection of freedom from torture, the right to fair trial, freedom of expression, freedom of assembly, and so on, are believed to aid terrorist organizations to achieve their objectives to destruct free and democratic societies, and to destroy human rights and the rule of law. More disturbingly, rights like these are felt to debilitate states from fighting terrorism effectively.

The U.S. response to the 9/11 terrorist attacks might be seen as the most drastic one in this respect. Following these attacks the Bush administration took the lead in the fight against

13, 2001), that allows for the indefinite detention of ‘enemy combatants’; and U.K. Anti-Terrorism, Crime and Security Act, part 4. which allows for the indefinite administrative detention without trial. See also Report of the Working Group on Arbitrary Detention: Civil and Political Rights, Including Arbitrary Detention, 1 Dec. 2004 (E.CN.4/2005/6); and Committee against Torture, Conclusions and Recommendations to the United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, 25 Nov. 2004 (CAT/C/CR/33/3).

<sup>6</sup> U.S. Military Order issued by President Bush on November 13, 2001. Detention, Treatment and Trial of Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 13, 2001). According to the Military Commission Order No. 1, military commissions have the power to exclude the accused from hearings and deny him access to evidence against him. See also *Hamdan v. Rumsfeld*, U.S. District Court for the District of Columbia, 8 Nov. 2004 (Civil Action no. 04-1519 (JR)).

<sup>7</sup> See e.g. Spanish Code of Criminal Procedure art. 506(2) as modified by Organic Law 13/2003 of 24 October 2003. For a comment of the impact of this provision on the right to an effective defense, see: Human Rights Watch, ‘Setting an Example? Counter-terrorism Measures in Spain,’ vol. 17, no. 1(D), Jan. 2005, 47 ff [<http://hrw.org/reports/2005/spain0105/spain0105.pdf>].

<sup>8</sup> For example, the government of Uzbekistan considers peaceful religious fundamentalist beliefs and practices to be a threat of terrorism and criminalize such beliefs that fall outside state control. According to Human Rights Watch, the government has subjected thousands of religious Muslims accused of religious extremism—as well as terrorist suspects—to unfair trials and systematic torture and ill-treatment. See: Human Rights Watch, *Uzbekistan, Crackdown on Religious Dissenters Follows Attacks*, 2 Apr. 2004 [<http://hrw.org/english/docs/2004/04/01/uzbeki8386.htm>] and Human Rights Watch, *Open Letter to the United Nations Counter-Terrorism Committee*, 25 Jan. 2005 [<http://hrw.org/english/docs/2005/01/25/uzbeki10074.htm>].

<sup>9</sup> See e.g. the Indian Armed Forces Special Powers Act, which was passed to redress insurgency in North India. The Act empowers the armed forces to arrest individuals without warrant, to destroy any structure that may be hiding absconders without verification, to search and seizure without warrant and to shoot even to the causing of death. For a comment on the Indian review of this Act [[http://www.achrweb.org/reports/india/AFSPA\\_report.pdf](http://www.achrweb.org/reports/india/AFSPA_report.pdf)]. See also Human Rights Committee: *Concluding Observations on Israel*, 21 Aug. 2003 (CCPR/C/078/ISR), para. 15.

terrorism with its own understanding of what measures are required and legitimized to protect the security of the American people. The very same day of the terrorist attacks against the World Trade Centre and the Pentagon, Bush declared that the United States was 'in war'. The most drastic public measures adopted since then are the military interventions in Afghanistan and Iraq. By now, there is clear evidence, including shocking photographs, that U.S. counter-terrorist measures amount to serious human rights violations. Several NGO reports attest to this fact.<sup>10</sup> Additionally, in its 'Human Rights Annual Report 2004', the Foreign and Commonwealth Office of the U.K., an ally in the war against Iraq, condemned the shameful abuses perpetrated by some U.S. soldiers in the Abu Ghraib prison, Iraq, as well as the detention of hundreds of individuals in the U.S. naval facilities at Guantánamo Bay, Cuba.<sup>11</sup> Also U.N. special rapporteurs have raised concerns about the conduct of the U.S. in the 'war on terror.'<sup>12</sup> Notably, in January 2005, six U.N. experts published a joint statement on the detention centre at the U.S. Naval Base in Guantánamo Bay.<sup>13</sup>

However, the U.S. is certainly not alone in its belief that the threat that terrorism poses necessitates radical human rights trade-offs. About a year after the adoption of Security Council resolution 1373(2001), the Secretary General reported that several human rights had come under significant pressure in many parts of the world as a result of national counter-terrorism measures, in particular, the rights of terrorist suspects. Among them are respect for the principle of legality, conditions of treatment in pre-trial detention, freedom from torture, fair trial rights and due process guarantees.<sup>14</sup> Several statements of the U.N. Human Rights Committee support this conclusion. In particular, the committee has expressed concerns about domestic legal definitions

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<sup>10</sup> Recent relevant NGO reports include: Human Rights First, *Getting to Ground Truth: Investigating U.S. Abuses in the War on Terror*, Sept. 2004; Amnesty International, *Human Dignity Denied: Torture and Accountability in the War on Terror*, 27 Oct. 2004; Human Rights Watch, *The United States' Disappeared': The CIA Long-Term "Ghost Detainees"*, Oct. 2004; and the Center for Human Rights and Global Justice at NYU Law School and the Committee of International Human Rights of the Association of the Bar of the City of New York, *Torture by Proxy: International and Domestic Law Applicable to Extraordinary Renditions* (New York, ABCNY & NYU Law School, 2004).

<sup>11</sup> United Kingdom, Foreign & Commonwealth Office, *Human Rights Annual Report 2004*, p. 16

<sup>12</sup> Report of the Special Rapporteur on Torture, Cruel and Inhuman or Degrading Treatment or Punishment, 1 Sep. 2004 (A/59/7324); and Report of the High Commissioner for Human Rights: The Present Situation of Human Rights in Iraq, 4 Jun. 2004.

<sup>13</sup> United Nations Human Rights Experts Express Continued Concern About Situation of Guantánamo Bay Detainees, 4 Feb. 2005 [<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/F3AF690DC18BFFD6C1256F9E0034AC95?opendocument>]. The Special Procedures have published three other joint statements on the impact of counter-terrorism on human rights on 25 July 2004, 20 June 2003, and 10 December 2004 respectively [<http://www.ohchr.org/english/bodies/chr/special/counter-terrorism.htm>].

<sup>14</sup> Report of the Secretary-General: Protection of human rights and fundamental freedoms while countering terrorism., 8 Aug. 2003 (A/58/266), pp. 12-13. The report was drafted in response to U.N.G.A. Res. 57/219 of 18 Dec. 2002 in which the General Assembly requested the Secretary-General to 'submit a report on the implementation of the present resolution to the Commission on Human Rights at its fifty-ninth session and to the General Assembly at its fifty-eighth session'.

of terrorism that are framed so broadly so as to violate the principle of legality.<sup>15</sup> Furthermore, several pre-trial detentions of terrorist suspects violate their right to freedom from torture and ill-treatment, the right to be informed promptly of the reasons for arrest and the existence of any charges against them, and the prohibition against prolonged pre-trial detention.<sup>16</sup> The use of military and other special courts to prosecute terrorism-related offences have led to violations of fair trial rights, including the presumption of innocence as well as other fundamental requirements inherent in the principle of legality and the rule of law.<sup>17</sup> Additionally, the committee has expressed concerns about ‘targeted killings’ of those suspected of acts of terrorism.<sup>18</sup> Also the special procedures of the U.N. Human Rights Commission have addressed human rights abuses of terrorist suspects.<sup>19</sup> Both the Special Rapporteur on the question of torture and the Working Group on Arbitrary Detention are deeply troubled by the practice in some states of holding terrorist suspects in incommunicado detention, prohibiting contacts with family members, counsel and other outside assistance for certain periods of time.<sup>20</sup> It is particularly startled by the ‘arbitrary character of detention in several countries where inquiries into terrorist acts are being conducted’.<sup>21</sup>

The conflict between security and human rights as borne out in the struggle against terrorism is real and significant. As Nicholas Howen, Secretary-General of the International Commission of Jurists, put it in a speech in August 2004:

Counter-terrorism measures worldwide are challenging our most basic assumptions about the rule of law and human rights. We thought that no government would again brazenly argue that it can justifiably torture detainees to extract information. We thought we would not have to answer again whether someone who is suspected of committing horrific criminal acts can be treated

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<sup>15</sup> See e.g. Human Rights Committee: Concluding Observations on Morocco, 5 Nov. 2004 (CCPR/CO/82/MAR/Rev.1), para.20; and Human Rights Committee, Concluding Observations on Belgium, 12 Aug. 2004 (CCPR/CO/81/BEL), para. 24. However, similar concerns have been raised prior to 9/11. See, for example, Human Rights Committee: Comment on Egypt, 9 Aug. 1993 (CCPR/C/79/Add.23), para. 8.

<sup>16</sup> See Report of the Secretary-General, *supra* note 14, para. 40.

<sup>17</sup> See e.g. Human Rights Committee: Concluding Observations on Benin, 1 Dec. 2004 (CCPR/CO/82/BEN), para. 12. However, similar concerns have been raised prior to 9/11. See, e.g. Human Rights Committee, Concluding Observations on Peru, 25 Jul. 1996 (CCPR/C/79/Add. 67), para. 351.

<sup>18</sup> Human Rights Committee: Concluding Observations on Israel, 21 Aug. 2003 (CCPR/CO/78/ISR), para. 15

<sup>19</sup> For an overview of reports published by the special procedures addressing the impact of counter-terrorism measures on the protection of human rights, see <http://www.ohchr.org/english/bodies/chr/special/counter-terrorism.htm>.

<sup>20</sup> Study of the United Nations High Commissioner for Human Rights: Protection of human rights and fundamental freedoms while countering terrorism, 8 Oct. 2004 (A/59/428), para. 23.

<sup>21</sup> Report of Working Group on Arbitrary Detention: Civil and Political Rights, Including the Questions of Torture and Arbitrary Detention, 15 Dec. 2003 (E/CN.4/2004/3), paras. 50-71, esp. para. 53.

inhumanely. Can they be denied the rights of other human beings? We are forced again to defend fundamental rules of state behaviour that have been negotiated and agreed by governments themselves.<sup>22</sup>

In the light of post 9/11 developments, the need to rethink the relationship between security and human rights in the sense of offering new and substantive insights on this issue takes on renewed significance. While it is important to recognize that security and human rights concerns can and do come into conflict with one another, a security consensus in which human rights protection has a secure place and purpose would be an important and welcome advancement. Such a consensus would have the potential of facilitating the development of a common discussion between currently sectionalized security and human rights communities on how to move forward, and how to resolve potential conflicts between security and human rights concerns in a way that is both efficient and acceptable to everybody. But on what basis could such a consensus be formed? What would be the more precise role and purpose of human rights in such a consensus? How can human rights communities contribute to the development of such a consensus? What are the limits to the current human rights framework for resolving salient areas of disagreement? What could be done in more practical terms to secure mutual engagement of institutionally ‘compartmentalized’ security and human rights bodies in the U.N. context?

### **Towards a New Collective Security Consensus**

Recent developments reveal that more nuanced and complex approaches to security and its relationship to human rights—approaches that recognize that the two values are not merely one another’s opposites, but are intertwined and interrelated with one another—have come in the background at the level of state practice.

The U.N. and especially its Secretary-General has sought to counter this trend. In a speech following the terrorist attacks in New York, Washington D.C., and Pennsylvania, the Secretary-General announced that:

We need a new vision of global security for this new period in international relations – a vision that can help bring about a new equilibrium. This new vision must simultaneously respect human rights, confront the asymmetric threat of terrorism, and draw, as never before, upon the resources and legitimacy of multilateral cooperation.<sup>23</sup>

A serious U.N. effort to give further substance to the idea of a new security consensus was made by the High-level Panel on Threats, Challenges and Change (hereafter ‘High-level Panel’). In its report ‘A More Secure World: Our Shared Responsibility’,<sup>24</sup> issued on 2 December

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<sup>22</sup> ‘Counter-Terrorism and Human Rights: Challenges and Responses.’ Speech by Nicholas Howen, Secretary-General, International Commission of Jurists, ICJ Biennial Conference 2004.

<sup>23</sup> UN Press Release SG/SM/8518. See also Secretary-General’s message to the International Counter-Terrorism Conference in Riyadh, 5-8 Feb. 2005 (UN Press Release SG/SM/9708).

<sup>24</sup> ‘A More Secure World: Our Shared Responsibility.’ Report of the High-level Panel on Threats, Challenges and Change, 2 Dec. 2004 (A/59/565) [hereafter ‘A More Secure World’].

2004, the High-level Panel advances a set of specific recommendations on how to fight terrorism, and the future role of the U.N. in this respect. The recommendations acknowledge the importance of continued human rights protection. In particular, the Panel urges the U.N. to develop a global comprehensive strategy to fight terrorism that strengthens ‘responsible States and the rule of law and fundamental human rights’.<sup>25</sup> It advises the Secretary-General to take a leading role in building up such a strategy which would include:

the development of better instruments for global counter-terrorism cooperation, all within a *legal framework that is respectful of civil liberties and human rights*, including in the area of law enforcement; intelligence-sharing, where possible; denial and interdiction, when required; and financial controls.<sup>26</sup>

The High-level Panel identifies the need for a global comprehensive strategy that does not merely view human rights protection as constituting a set of (unfortunate) ‘side-constraints’<sup>27</sup> on the ultimate goals pursued of states and international organizations in this fight, but also understands human rights protection as rendering the fight more effective. As it notes, ‘terrorism flourishes in environments of despair, humiliation, poverty, political oppression, extremism and human rights abuse’.<sup>28</sup> The Panel recognizes that ‘the current “war on terrorism” has in some instances corroded the very values that terrorists target: human rights and the rule of law’, and that ‘approaches to terrorism that focus exclusively on military, police and intelligence measures risk undermining efforts to promote good governance and human rights, alienate large parts of the world’s population and thereby weaken the potential for collective action against terrorism’.<sup>29</sup>

Notwithstanding its acknowledgement of the significance of human rights protection in the fight against terrorism, the High-level Panel does not dwell on the more precise place of human rights in the new security consensus on which it bases its specific recommendations. The security framework it develops centers on the responsibility to protect, i.e. the idea that ‘sovereign states have a responsibility to protect their own citizens from avoidable catastrophe—from mass murder and rape, from starvation—but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states’.<sup>30</sup> The responsibility to protect brings to the forefront the claim that the international community has a duty to protect vulnerable populations at risk from civil wars, insurgencies, state repression and state collapse. The Panel envisages a new broad collective security framework that gives further substance to this idea.

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<sup>25</sup> *Ibid.* para. 148.

<sup>26</sup> *Ibid.* para. 148 (c) [emphasis added].

<sup>27</sup> For the idea of rights as ‘side-constraints’, see Robert Nozick, *Anarchy, Stat, and Utopia* (New York, NY, Basic Books, 1974).

<sup>28</sup> *Ibid.* para. 145.

<sup>29</sup> *Ibid.* para. 147.

<sup>30</sup> Report of the Independent Commission on Intervention and State Sovereignty: The Responsibility to Protect (2003) [available at: <http://www.iciss.ca/pdf/Commission-Report.pdf>].

The responsibility to protect principle is closely connected with the emerging concept of human security.<sup>31</sup> The notion of human security overlaps with that of human rights, but it is not the same.<sup>32</sup> Unlike the notion of human rights it seeks to complement national security concerns, and is directly concerned with violent conflict. In an important sense, it purports to be a direct appeal to security communities. Unlike the notion of human rights, however, it is less substantiated. According to the Independent Commission on Human Security:

Human security means protecting fundamental freedoms—freedoms that are at the essence of life. It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people’s strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.<sup>33</sup>

At the moment, it is unclear whether the concept of human security is entirely comfortable with human rights-based approaches and so whether it endorses the complete body of international human rights law as giving substance to its claims. Moreover, it is unclear what specific recommendations in the context of counter-terrorism measures could be derived from the notion of human security. Once in the business of advancing more detailed recommendations, the commission only devotes some attention to the threat of terrorism and none to the threat of counter-terrorism measures.<sup>34</sup>

More generally, both the responsibility to protect and human security are primarily meant to broaden and, to some extent, reshape prevailing understandings among the members of the international community on what constitutes threats against international security. Both plead for the embracement of the fate of victims of mass atrocities, failed states, violent conflict, but also of poverty, hunger, and so on. Furthermore, the responsibility to protect emphasizes the need for

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<sup>31</sup> Report of the Independent Commission on Human Security: Human Security Now (2003) [available at: <http://www.humansecurity-chs.org/finalreport/FinalReport>].

<sup>32</sup> *Ibid.* p. 9. Human security remains a new and controversial concept. There is considerable argument over its proper meaning and potential usefulness. The concept is most developed in *Human Security Now*. Report of the Commission on Human Security (2003) [available at: <http://www.humansecurity-chs.org/finalreport/outline.pdf>]. This definition is used by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) [available at: <http://ochaonline.un.org/webpage.asp?MenuID=9431&Page=1494>]. For a recasting of this term, see UNESCO SecuriPax Forum [available at: <http://www.unesco.org/securipax/secpax.htm>]. However, see also the Vision of the Human Security Network according to which ‘human security’ in essence means ‘freedom from pervasive threats to people’s rights, their safety and even their lives’ [available at: <http://www.humansecuritynetwork.org/menu-e.php>]. Finally, for a more elaborated discussion on the theme, see e.g. Michael Brzoska and Peter J. Coll (eds.), ‘Promoting Security: But How and for Whom?’. Contributions to BICC’s Ten-year Anniversary Conference. Bonn International Center for Conversion, Brief 30 (October 2004), esp pp. 40-55 [available at: <http://www.bicc.de/publications/briefs/brief30/brief30.pdf>].

<sup>33</sup> *Ibid.* p. 4.

<sup>34</sup> For a discussion on the threat of terrorism, see *ibid.* pp. 22-24.

multilateral action to respond effectively to threats to human security. In the light of these considerations, the new collective security framework that the High-level Panel elaborates does not seem to be sufficiently refined to establish a secure place for and clear purpose of human rights protection that would aid the development of a more constructive discussion between security and human rights communities on how to resolve areas of disagreement about the way in which the fight of terrorism is to be carried out. At the same time, a widespread acceptance of responsibility to protect and human security as essential components of a new security consensus would be a significant advancement.

The claim about the need for a new security consensus was put forward in forceful terms by the U.N. Secretary-General in his recent report 'In Larger Freedom: Towards Development, Security and Human Rights for All' publicized on 21 March 2005. As he laments, 'on the security side, despite a heightened sense of threat among many, we lack even a basic consensus'.<sup>35</sup> The Secretary General then puts forward his substantive ideas on what a new security consensus should entail. Unlike the High-level Panel, he advances a framework that clearly places human rights at the centre. Indeed, in his view, the very basis for such a framework should be the claim that all human beings are entitled to freedom from fear.<sup>36</sup> Later on in his report, he takes a step further in claiming that 'while freedom from fear is essential it is not enough. All human beings have the right to be treated with dignity and respect.' Indeed, 'no security agenda will be successful unless they are based on the sure foundation of respect for human rights'.<sup>37</sup> In fighting terrorism, the strategy that the U.N. and its member states adopt must be comprehensive and entail an uncompromisable defense of human rights.<sup>38</sup>

It must be noted that one central obstacle to reaching a new collective security consensus on the fight against terrorism is the lack of an internationally agreed definition of terrorism. While some recent advances have been made,<sup>39</sup> the persistent disagreement surrounding a definition, in particular, whether 'state terrorism' should be included, and whether there are exceptions (notably, the right to resistance for occupied populations), may be far from resolved. The Secretary-General endorses the recommendation put forward by the High-level Panel on the need for a definition, including what this definition should be.<sup>40</sup> Without this consensus, not even the question of what the threat of terrorism consists of in more concrete terms is settled. The

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<sup>35</sup> 'In Larger Freedom' *supra* note 3, para. 74.

<sup>36</sup> *Ibid.* para. 81.

<sup>37</sup> *Ibid.* paras. 127 and 128.

<sup>38</sup> *Ibid.* para. 94. See also A Global Strategy for Fighting Terrorism, the Secretary-General, United Nations, Keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, Madrid, 10 March 2005 [available at: <http://summit.clubmadrid.org/keynotes/a-global-strategy-for-fighting-terrorism.html>].

<sup>39</sup> U.N.S.C. Res. 1566 (2004).

<sup>40</sup> 'A More Secure World', *supra* note 24, para. 164(d) and 'In Larger Freedom', *supra* note 3, para. 91. The High-level Panel describes terrorism as 'any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act'.

absence of a clear definition clearly complicates a discussion between security and human rights communities on how to fight terrorism.<sup>41</sup>

While the two frameworks for collective security in focus differ in some respects, both manifest the urgent need for a new security consensus to fight the threat of terrorism. Additionally, both manifest a new consensus or framework that recognizes the direct relevance of human rights protection for conducting this fight. Still, there are relevant differences between the two frameworks. In an important sense, a security consensus founded on freedom from fear as a minimum condition, and human dignity as an ideal or aspiration, is more substantiated than the one based on the responsibility to protect and human security. The former places the fate of individuals and their rights at the forefront of the security agenda. It is inextricably tied to the full stock of international law that has been developed to ensure respect for human rights, including international human rights, humanitarian and criminal law. In this sense, it significantly empowers human rights communities to contribute, not only to a common discussion, but also to decision-making on how the fight against terrorism should be carried out.

That being said, both frameworks that have been discussed so far are too general too offer sufficiently substantiated common ground to discuss more specific issues of concern for both security and human rights communities. For example, none of them devotes attention to the fact that human rights and security concerns can and do come into conflict with one another, neither do they address how these conflicts should be resolved. This is not meant as a claim that there is no room to discuss these and other similar issues within any of the two frameworks; rather, it is meant to indicate that the resources, tools and know-how that will be employed in this discussion must be developed further.

## **A Human Rights Contribution to the Security Debate**

General international statements about the need to fully safeguard international human rights in the adoption of counter-terrorism measures seem simplistic and insufficient in the light of the oft-made human rights trade-offs that are being made in the name of security. Ideas about new security frameworks that are insensitive to the more specific bases for actual decisions about law and policy on the ground, so to speak, risk not having any impact on those who decide on how to fight terrorism. At the same time, it is a mistake to assume that international human rights law, the main legal framework for human rights communities, is insensitive to security considerations. On the contrary, it has accommodated, at least some of them.

The Universal Declaration of Human Rights (1948)—understood as customary international law—obliges all states, and entails provisions of direct relevance for the fight against terrorism. For example, with respect to the Security Council obligation of bringing perpetrators of terrorist acts to justice, the UDHR obliges all states to protect everyone from

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<sup>41</sup> However, the need for an agreement on a definition has emerged as one of the key items on the agenda for the World Summit (14-16 Sept. 2005). See General Assembly President's Draft Outcome Document, 5 Aug. 2005, para. 66 according to which UN member states ' resolve to conclude a comprehensive convention on international terrorism, including a legal definition of terrorist acts, during the 60<sup>th</sup> session of the General Assembly [available at. [http://www.un.org/ga/59/hlpm\\_rev.2.pdf](http://www.un.org/ga/59/hlpm_rev.2.pdf)].

torture, or cruel, inhuman or degrading treatment or punishment<sup>42</sup> as well as from arbitrary arrest, detention or exile.<sup>43</sup> It also obliges all states to respect the principle of legality and to ensure that everyone is presumed innocent until proved guilty according to law in a public trial at which he has had the guarantees necessary for his defence.<sup>44</sup> In contrast with the UDHR, the International Covenant on Civil and Political Rights (1966) (ICCPR) entails more detailed provisions. One illustration is the provision concerning the conditions for arrest and detention.<sup>45</sup> Another example is the inclusion of detailed due process and fair trial guarantees.<sup>46</sup> Furthermore, unlike the UDHR, the ICCPR also includes explicit provisions about emergency situations. According to Article 4(1) of the ICCPR:

In time of public emergency which threaten the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

The state obligation to respect the right to be free from torture, cruel, inhuman or degrading treatment or punishment is absolute,<sup>47</sup> and so is the obligation to respect the principle of legality.<sup>48</sup> Also the right to life is a non-derogable right although it does not prohibit the death penalty.<sup>49</sup> The ICCPR embodies no explicit prohibition against derogations from obligations concerning the conditions for arrest and detention, due process rights and fair-trial guarantees. On a textual reading, the absence of such a provision seems to permit states to derogate from these rights if terrorism creates a 'public emergency which threatens the life of the nation'.<sup>50</sup> However, the U.N. Human Rights Committee notes that in these situations, rules of international humanitarian law becomes applicable.<sup>51</sup> Moreover, whether rights are derogable must consider peremptory norms of international law. The category of peremptory norms extends beyond the list of non-derogable provisions in the ICCPR.<sup>52</sup> Furthermore, it is necessary to take account of

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<sup>42</sup> UDHR, art. 5.

<sup>43</sup> UDHR, art. 9.

<sup>44</sup> UDHR, art. 11.

<sup>45</sup> ICCPR, art. 9.

<sup>46</sup> ICCPR, art. 14.

<sup>47</sup> ICCPR, art. 7 read in conjunction with art. 4(2).

<sup>48</sup> ICCPR, art. 15 read in conjunction with art. 4(2).

<sup>49</sup> ICCPR, art. 6 read in conjunction with art. 4(2).

<sup>50</sup> General Comment No. 29 on States of Emergency (article 4), 31 Aug. 1001 [CCPR/C/21/Rev.1/Add.1], para. 2. This comment should be contrasted with General Comment No. 5 on Derogation of Rights (article 4) [31 July 1981]. The latter does not seek to clarify the non-derogability of certain rights, even under states of emergency, which are not explicitly mentioned in article 4 of the ICCPR as non-derogable.

<sup>51</sup> *Ibid.* paras. 3 and 9.

<sup>52</sup> *Ibid.* para. 11.

the prohibition against ‘crimes against humanity as laid down in the Rome Statute of the International Criminal Court’.<sup>53</sup> In the light of these considerations, the committee pronounces that ‘all persons deprived of their liberty should be treated with humanity and with respect for the inherent dignity of the human person.’<sup>54</sup> Unacknowledged (or secret) detentions are not allowed under any circumstances.<sup>55</sup> The obligation to provide remedies for any violation of the ICCPR is absolute.<sup>56</sup> Additionally, the committee holds that:

As certain elements of the right to fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. ... the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence. The presumption of innocence must be respected ... the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party’s decision to derogate from the Covenant.<sup>57</sup>

The statement points to the relevance of other fields of international law besides that of human rights in order to clarify what a minimum provision of respect for persons and their freedoms consists of in more precise terms, including humanitarian and criminal law. The committee took a contentious but much needed step when it alluded to the sum-total of international norms that protect the dignity and humanity of human beings at all times and in all places; its interpretation of what rights under the ICCPR are non-derogable does not flow from a textual reading of the ICCPR.<sup>58</sup>

Besides national security concerns, international human rights law accommodates concerns with personal security. Indeed, personal security is itself a human right. Thus, according to UDHR, ‘everyone has the right to life, liberty and security of person’ (art. 3). ICCPR develops this provision, but makes a distinction between the right to life (on the one hand) and the right to

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<sup>53</sup> *Ibid.* para. 12.

<sup>54</sup> *Ibid.* para. 13(a). But see General Comment No. 21 replacing general comment 9 concerning humane treatment of persons deprived of liberty (art. 10) [10 April 1992] which does not elaborate the non-derogability of this provision even if it is not explicitly mentioned under article 4(2).

<sup>55</sup> *Ibid.* para. 13(b).

<sup>56</sup> *Ibid.* para. 14.

<sup>57</sup> *Ibid.* para. 16.

<sup>58</sup> For example, the Rome Statute of International Criminal Court has been accepted by 97 states. However, see also the Vienna Convention on the Law of Treaties, art. 31 concerning general rules of interpretation. According to its art. 31(3), in the interpretation of a treaty, ‘there shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.’

liberty and security (on the other). Article 6(1) of the ICCPR states that: ‘every human being has the inherent right to life’ and that ‘this right shall be protected by law’ and entails that ‘no one shall be arbitrarily deprived of his life’. Article 9 (1), moreover, affirms the right to liberty and security of person. However, it is primarily meant to protect persons from arbitrary arrest and detention.<sup>59</sup> It does not flow from a textual reading of this provision that it entails an obligation of states to protect persons from other types of threats to their personal security, such as the threat of terrorism. Nonetheless, the U.N. Human Rights Committee notes that:

Although in the [ICCPR] the only reference to the right of security of persons is to be found in article, there is no evidence that [this] was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty... It cannot be that case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the [ICCPR].<sup>60</sup>

Thus, from a human rights standpoint, the state may have a duty to protect persons under its jurisdiction from known threats to their security, including that of terrorism.

Indeed, the ‘state duty to protect’ has been affirmed and recognized in a number of human rights resolutions of the U.N. Human Rights Commission and of the Sub-Commission on the Protection and Promotion of Human Rights as obliging the state to adopt measures in response to the threat of terrorism broadly understood as ‘activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity, security of States and destabilizing legitimately constituted Governments’.<sup>61</sup> Terrorism has also been understood as ‘acts of aggression aimed at the annihilation of human rights’<sup>62</sup> and as undermining ‘civil plural society and [as having] adverse consequences on the economic and social developments of States’.<sup>63</sup> Furthermore, terrorism creates an environment that ‘destroys the freedom from fear of

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<sup>59</sup> ICCPR, art. 9(1) reads: ‘Everyone has the right to liberty and security of persons. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’

<sup>60</sup> Delgado Paez v. Colombia, U.N. Human Rights Committee, communication no. 195/1985, 12 July 1990, para. 5.5.

<sup>61</sup> See Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 12 July 1993 (A/CONF.157/23), para. 17. See also e.g. resolution 2004/87 of the U.N. Commission of Human Rights (E/CN.4/RES/2004/87).

<sup>62</sup> See e.g. resolution 1997/39 of the U.N. Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/Sub.2/RES/1997/39).

<sup>63</sup> See e.g. resolutions 1996/20, 1997/39 and 1994/18 of the U.N. Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/Sub.2/RES/1996/20; E/CN.4/Sub.2/RES/1997/39; and E/CN.4/Sub.2/RES/1994/18). See also e.g. resolution 1995/43 of the U.N. Commission of Human Rights (E/CN.4/RES/1995/43. 1994/18).

the people'<sup>64</sup> and 'the ideal of free human beings enjoying freedom from fear and want, and makes it difficult for States to promote and protect human rights and fundamental freedoms'.<sup>65</sup> More recently, terrorism has been emphasized and as amounting to 'gross violations of human rights perpetrated by terrorist groups'.<sup>66</sup> Terrorism has even been understood as an unjustifiable means to promote and protect human rights.<sup>67</sup>

Both national security or personal security concerns may restrict the exercise of human rights, including the right to liberty of movement, freedom to choose one's own residence, the right to leave any country, including one's own,<sup>68</sup> freedom to manifest one's religion or beliefs,<sup>69</sup> the right to hold opinions,<sup>70</sup> the right to peaceful assembly,<sup>71</sup> and freedom of association<sup>72</sup>. What is generally required is that such restrictions are provided by law, are necessary to protect national security, or the rights and freedoms of others, and are consistent with other rights recognized in the covenant.

In the light of its noteworthy sensitivity to security issues, international human rights law may offer a framework for discussion between security and human rights communities on how the fight against terrorism is to be carried out. For one thing, it is a framework that endorses and explains the basis for the fight against terrorism (state duty to protect) as well as indicates the way in which this fight is to be carried out in order to be acceptable to everybody, including those who stand to suffer most from the counter-terrorism measures adopted in the course of this fight. In this sense, a human rights-based approach to security is sensitive to the interest of states (indeed, regards it as an obligation) to adopt preventive measures to protect the life, liberty and security of innocent civilians within its jurisdiction; it is also sensitive to the interest of states to restrict human rights for the sake of national security and, under certain conditions, even derogate from their obligations to respect such rights. It is also a framework which settle far from all areas of disagreement between security and human rights communities and, therefore, leaves room for discussion and negotiation.

However, the inherent impetus of human rights communities towards the full endorsement of human dignity in their interpretation of the precise obligations of states in the fight against terrorism may complicate the use of this framework for a common discussion. If the consensus is based on human dignity, it might fuel a negative reaction from sensitive religions

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<sup>64</sup> See e.g. resolutions 1999/26 and 2002/24 of the U.N. Sub-Commission on the Promotion and Protection of Human Rights (E/CN.4/Sub.2/RES/1999/26 and E/CN.4/Sub.2/RES/2002/24).

<sup>65</sup> See e.g. resolution 2004/44 of the U.N. Commission on Human Rights (E/CN.4/RES/2004/44).

<sup>66</sup> 2004/44. Human Rights and terrorism; see also 2003/37. Human rights and terrorism and 2002/35. Human rights and terrorism; 2001/37 Human rights and terrorism; 2000/30 Human rights and terrorism.

<sup>67</sup> 2001/18. Terrorism and human rights.E/CN/Sub.2/RES/2001/18; See also Human rights and terrorism. E/CN.4/Sub.2/RES/1997/39. 'Terrorism in all its forms and manifestations, wherever and by whomever committed, can never be justified in any instance including as a means to promote and protect human rights.'

<sup>68</sup> ICCPR, art. 12(3).

<sup>69</sup> ICCPR, art. 18(3).

<sup>70</sup> ICCPR, art. 19(3)(b).

<sup>71</sup> ICCPR, art. 21.

<sup>72</sup> ICCPR, art. 22(2).

since the notion of human dignity is, at least historically, closely tied to Christianity. Both security and human rights communities entail non-Christian religions, and attitudes towards religion are certainly not without significance in the fight against terrorism. However, not only sensitive religions, but also secular members of the security communities may disagree about what may be in their view lead to all too far-reaching restrictions on their methods of work. For these reasons, a more realistic and considerate alternative would be to focus on ‘freedom from fear’ as a minimum condition leaving it an open question what the ultimate aspirations of individuals (and societies) are.<sup>73</sup>

### **Limitations to a Human Rights-Based Approach to Security**

Quite regardless of whether we endorse ‘freedom from fear’ or ‘human dignity’ as the basis for a security consensus, some counter-terrorism measures can never find support from within a human rights framework. Indeed, some measures are categorically wrong no matter which reasons a state may have had for adopting them. One prominent example is the right to freedom from torture, a right that has come under significant pressure as a result of the fight against terrorism (or the ‘war on terror’).

In one of its first major reports, Amnesty International stated that:

Those who consciously justify torture ... rely essentially on the philosophical argument of a lesser evil for a greater good. They reinforce this with an appeal to the doctrine of necessity – the existential situation forces them to make a choice between two evils ... The usual justification posits a situation where the ‘good’ people and the ‘good’ values are being threatened by persons who do not respect ‘the rules of the game’, but use ruthless, barbaric, and illegal means to achieve their ‘evil’ ends.<sup>74</sup>

Several philosophers have considered the possibility that a political leader may be forced to make decisions of these kinds—between two evils. One case in point is whether or not to authorize the torture of a captured leader of a terrorist group who knows (or probably knows) the location of a bomb set to go off within the next twenty-four hours (the ‘ticking bomb’ case). Michael Walzer analyzes the moral dilemma—whether a man can face a situation where he must choose between two courses of action both of which would be wrong to undertake—in somewhat more general terms.<sup>75</sup> In his words:

In modern times the dilemma appears most often as the problem of ‘dirty hands’ and it is typically stated by the Communist leader Hoerderer in Sartre’s play of that name: ‘I have dirty hands right up to the elbows. I’ve plunged them in filth and blood. Do you think you can govern innocently?’ My own answer is no. I

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<sup>73</sup> For a distinction between a ‘morality of duty’ or a ‘morality of aspiration’, see Lon Fuller, *The Morality of Law* (New Haven, NJ, Yale University Press, rev. ed, 1969), pp. 5-9.

<sup>74</sup> Amnesty International, *Report on Torture* (Amnesty International, 1973) (2nd ed. 1975), p. 23.

<sup>75</sup> Michael Walzer, ‘Political Action: The Problem of Dirty Hands’, *Philosophy & Public Affairs*, vol. 2:2 (Winter 1973).

don't think I could govern innocently; nor do most of us believe that those who govern are innocent ... But this does not mean that it isn't possible to do the right thing while governing. It means that a particular act of government (in a political party or in the state) may be exactly the right thing to do in utilitarian terms and yet leave the man who does it guilty of a moral wrong.<sup>76</sup>

Extreme cases of these kinds find no room for serious consideration in a human rights framework and rightly so. Still, such cases may be worth reflecting on in order to understand some of the real difficulties that officials, in rare cases, may be confronted with and to understand some of the rhetorics behind attempts to legitimise torture.

Secondly, a human rights framework does not add much to a discussion about whether or not respect for human rights is the most *efficient* way to fight terrorism; from the standpoint of human rights, the basis for ensuring respect for freedom is a matter of principle and not expediency. Efficiency considerations is not without relevance, however. On the contrary, besides arguments of necessity, arguments of efficiency surface prominently among members of the security communities. This is not to say that efficiency considerations contradict the claim about the need for human rights protection. For example, the Secretary-General affirms that a strong defense of human rights will render the fight against terrorism more effective. Indeed, in adopting counter-terrorism measures:

we must never compromise human rights. When we do so we facilitate achievement of one of the terrorist's objectives. By ceding the high moral ground we provoke tension hatred and mistrust of Governments among precisely those parts of the population where terrorists find recruits.<sup>77</sup>

A possibility of paying closer attention to efficiency considerations might strengthen the human rights framework;<sup>78</sup> still, it is not (and could not be) a decisive principle for decisions about law and policy from the standpoint of human rights communities.

Thirdly, international human rights law does not pay specific attention to 'international security concerns' designed, as it is, to regulate the relation between the state and individuals under its jurisdiction. While it would in principle be possible to accommodate international security concerns and, thus, a consideration of the powers and responsibilities of international institutions, such as the U.N. and its Security Council, to act in response to terrorism, and to do so in a way consistent with international human rights law, there is, at the moment, no specific international human rights instrument that provides a firm legal basis for holding international

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<sup>76</sup> *Ibid.* p. 161.

<sup>77</sup> 'In Larger Freedom', *supra* note 3, para. 94. For a similar view, see also 'A More Secure World', *supra* note 24, para. 145.

<sup>78</sup> The development of a strategy in which human rights have a secure place may not be a matter of principle alone, but also one of expediency. Out of the 20 attacks of Al-Qaeda since 1998, 14 of them has taken place after 9/11. See MIPT Terrorism Knowledge Base [<http://www.tkb.org/IncidentGroupModule.jsp?groupid=6&pagemode=incident&startDate=01/01/1968&endDate=11/23/2004>].

institutions accountable in relation to these human rights obligations in the same way as states.<sup>79</sup> The absence of such a basis is unfortunate not least because it undermines the basis for creating opportunities for a more equal participation of security and human rights communities in U.N. decision-making in the area of counter-terrorism. It also undermines the prospects of an effective implementation of the U.N. policy of mainstreaming human rights into all its organs, offices and departments, including the Security Council.

Another limitation to the human rights framework is that it views the state in holistic terms. In other words, it does not break down the state in its many sectors (intelligence, police, immigration controls, military, courts, and so on) all of which may have far-reaching and differing responsibilities in the fight against terrorism. In other words, it does not offer any comprehensive understanding of the various actors involved in countering terrorism, their specific tasks and functions, including their specific human rights obligations. This is regrettable since engaging with security communities require more substantive insights on the different roles of these actors and the specific difficulties that they encounter.

Taken together, these limitations indicate that a human rights-based approach to security may be insufficient as a basis for a common discussion between human rights and security communities: the human rights framework as it is designed at the moment lacks some of the resources, tools, knowledge and vocabulary deemed essential for human rights and security communities to engage in a comprehensive discussion on matters of common concern. It will be necessary, then, for human rights communities to transcend their own framework and search for common ground in broader frameworks, frameworks that do not merely take human rights, but also security concerns seriously. Examples of such frameworks are the ones that have been elaborated in the context of the ongoing U.N. reform and discussed in the previous section. Human rights communities must situate themselves in some such framework and find their place and purpose in a much broader and complicated arena of political life.

### **The Case of the U.N. Counter-Terrorism Committee<sup>80</sup>**

A new collective security consensus that seeks to give human rights protection a place and purpose in the U.N. context, even if it merely incorporates a minimum set of human rights claims, would, if sufficiently supported, require security organs to revise their attitudes and policies towards human rights. The U.N. Counter-terrorism Committee (hereafter the 'CTC'), since 2001 a subsidiary organ of the U.N. Security Council and the main organ in charge of leading the multilateral fight against terrorism, does not consider human rights protection as part

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<sup>79</sup> The U.N. Secretary General has nevertheless taken the initiative to 'mainstream human rights', i.e. to enhance the human rights programme and integrating it into the broad range of U.N. activities. See *Renewing the United Nations: A Programme for Reform*. Report of the Secretary-General to the General Assembly (A/51/950, 14 July 1997). For a comment on the modest impact of mainstreaming see e.g. 'Mainstreaming Human Rights: Interview with Danilo Turk,' Carnegie Council on Ethics and International Affairs, 6 Sep. 2004 [available at: [www.cceia.org/viewMedia.php/prmTemplateID/8/prmID/248](http://www.cceia.org/viewMedia.php/prmTemplateID/8/prmID/248)].

<sup>80</sup> Parts of this section have been borrowed from Jessica Almqvist, 'Which Justice for Perpetrators of Acts of Terrorism? The Need for Guidelines' FRIDE Working Paper #5 (March 2005).

of its mandate. The recognition of the direct relevance of international human rights law in Security Council resolution 1456 (2003) has not led the CTC to make any substantive changes in its human rights policy as announced by its Chairman in 2002:

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 the interaction with human rights concerns, and we will keep ourselves briefed as appropriate.<sup>81</sup>

At present, it is the Office of the High Commissioner for Human Rights (OHCHR) which has the task to inform states about the way in which international human rights law bear on their counter-terrorism efforts. In 2003, the General Assembly asked the OHCHR to: 'make general recommendations concerning the obligation of states to promote and protect human rights while taking actions to counter terrorism.'<sup>82</sup> Until now, however, the OHCHR has not presented any such recommendations.

The CTC and the OHCHR have exchanged briefings on their working methods and areas of concern since 2002. As a result of Security Council resolution 1456 (2003), their relationship is now in the process of being formalised. In its 'Proposal for the Revitalization of the Counter-Terrorism Committee' (2004), endorsed by the Security Council,<sup>83</sup> the CTC recommends that one function of its Technical Assistance Office should be to 'liaise with the Office of the UN High Commissioner for Human Rights and other human rights organizations in matters related to counter-terrorism.'<sup>84</sup> Furthermore, in September 2004, the Director of the recently established Executive Directorate of the CTC (CTED), Javier Rupérez, informed the OHCHR that he intends to include among his staff an expert on human rights, humanitarian law and refugee law, including for the purposes of 'liaising' with the OHCHR and other human rights organizations.<sup>85</sup>

Whether these measures will lead to more serious mutual engagement of human rights and security bodies in U.N. decision-making on how to fight terrorism in a way that is both efficient and acceptable remains unclear. In this context, it should be noted that the human rights bodies of the U.N. regard themselves as unsatisfactorily equipped to offer guidance to states in

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<sup>81</sup> Security Council, 4453<sup>rd</sup> Meeting, Friday, 18 January 2002, 10 a.m., New York.

<sup>82</sup> U.N.G.A. Res. 58/174 (2003). In the same resolution, the General Assembly also requested the OHCHR to: 'examine the question of the protection of human rights while countering terrorism,' and 'provide assistance and advice to States, on their request, on the protection of human rights while countering terrorism, as well as to relevant UN bodies.'

<sup>83</sup> U.N.S.C. Res. 1535 of 26 March 2004, para. 1.

<sup>84</sup> Proposal for the Revitalisation of the Counter-Terrorism Committee. Annex to Letter dated 19 February 2004 from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council (S/2004/124), para 16(c).

<sup>85</sup> Report of the Secretary-General: Protecting human rights and fundamental freedoms while countering terrorism, 1 Oct. 2004 (A/59/404). See also Report of the High Commissioner for Human Rights: Protection of human rights and fundamental freedoms while countering terrorism, 16 Dec. 2004 (E/CN.4/2005/100). The expert has now been appointed and began his work in July 2005.

their interpretation and application of the obligations under resolution 1373. Questions relating to the interpretation and application of the principle of legality, extraterritorial or ‘secret’ detention practices, fair trial rights, and inter-state transfer of persons suspected of terrorism, including extradition and ‘rendition’ prompt answers.<sup>86</sup> However, because of their ‘unusual complexities’ and/or because of the narrow mandates of the different bodies, the human rights mechanisms have not been able to address any of these questions in depth.<sup>87</sup>

Notwithstanding the institutionalized segmentation of security and human rights bodies in the U.N. context, the CTC itself as well as other subsidiary counter-terrorism bodies to the Security Council have come to experience more immediate human rights problems in their efforts to countering terrorism. Indeed, these problems have come to impede the CTC’s implementation efforts as some states are reluctant to adopt the measures it recommends because of their adverse impact on human rights. In fact, it has noted that such obstacles have arisen in the implementation of the obligation to prevent and suppress the financing of terrorism.<sup>88</sup> According to the CTC, terrorists have used certain non-profit associations, either to disseminate terrorist propaganda or by collecting funds that are channelled to terrorist groups. However, as it notes, ‘it is particularly difficult to monitor such associations, both for technical reasons (the sector is by nature informal) and for political reasons (increased oversight of the associations is considered to be a *restriction of public freedoms*)’.<sup>89</sup>

Moreover, the High-level Panel criticizes the way entities and individuals are added to the terrorist list maintained by the Security Council.<sup>90</sup> As it notes, ‘the absence of review or appeal

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<sup>86</sup> Study of the United Nations High Commissioner for Human Rights: Protection of human rights and fundamental freedoms while countering terrorism, *supra* note 20. The study was requested by the General Assembly in its resolution 58/187 of 27 Feb. 2003 (A/RES/57/219). See also the interim report in the Report of the Secretary General to the Commission of Human Rights, 12 Mar. 2004 (E/CN.4/2004/91); and Report of the Secretary General: Protecting human rights and fundamental freedoms while countering terrorism, 1 Oct. 2004 (A/59/404).

<sup>87</sup> Study of the United Nations High Commissioner for Human Rights, *ibid.*, para. 43. The UN independent expert on the protection of human rights and fundamental freedoms while countering terrorism, Mr. Robert Goldman, suggests that the problems faced by the human rights bodies of the UN can only be effectively overcome by the creation of a ‘special procedure with a multidimensional mandate to monitor States’ counter-terrorism measures and their compatibility with international human rights law. See *Report of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism*, 7 Feb. 2005 (E/CN.4/2005/103), para. 91. For support of this recommendation by the Secretary-General see ‘In Larger Freedom’, *supra* note 2, para. 94. At the time of writing, it is unclear whether the recommendation will be adopted by the Human Rights Commission in its 2005 session.

<sup>88</sup> U.N.S.C. Res. 1373 (2001), para. 1(a).

<sup>89</sup> See Report by the Chair of the Counter-Terrorism Committee on the Problems Encountered in the Implementation of Security Council Resolution 1373 (2001). Annexed to Note by the President of the Security Council, 26 January 2004 (S/2004/70), p. 6 [emphasis added].

<sup>90</sup> The terrorist list is available at <http://www.un.org/Docs/sc/committees/1267/pdflist.pdf>. The list, last updated on 17 Feb. 2005, includes: (a) 143 individuals belonging to or associated with the Taliban; (b) 1 entity belonging to or associated with the Taliban; (c) 179 individuals belonging to or associated with the Al-Qaida organisation; (d) 114 entities belonging to or

for those listed raise serious accountability issues and possibly violate fundamental human rights norms and conventions'. For this reason, it urges the Al-Qaida-Talibans Sanctions Committee to institute a process for reviewing the cases of individuals and institutions claiming to have been wrongly placed or retained on its watch list.<sup>91</sup>

So far, however, none of these human rights concerns have given rise to any serious discussion by the Security Council. From the standpoint of the CTC, besides freedom of association, human rights have not been considered as posing any 'problems in the implementation of resolution 1373'.

That being said, the Security Council does not reject the claim about the need for human rights protection altogether. For example, it has considered and accommodated the rights of suspects, accused and those found guilty of serious crimes under international law before. The current criminal justice policy of the Security Council to fight terrorism should be contrasted with its criminal justice initiatives only a decade earlier in response to the war crimes, genocide and crimes against humanity that took place in the former Yugoslavia and Rwanda.<sup>92</sup> The two *ad hoc* international criminal tribunals that the Council established accord extensive human rights protection to those suspected, accused and found guilty of these crimes.<sup>93</sup> At the time of their establishment, the tribunals seemed to mark the beginning of a new international security agenda that regards the protection of the human rights of perpetrators of serious crimes under international law as an inescapable component of any attempt to counter threats to, or restore breaches of, international security with the help of criminal justice institutions. The completion strategies of the two tribunals with the objective to give the domestic justice systems more power to prosecute 'intermediary-level accused' in former Yugoslavia and Rwanda have made the granting of such powers conditional upon the ability and willingness of the domestic justice systems to protect the human rights of the accused.<sup>94</sup> Other recent Security Council supported initiatives to prosecute offenders of serious crimes also exhibit a concern with the human rights

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associated with the Al-Qaida organisation; and (e) 5 individuals and 11 entities that have been removed from the list.

<sup>91</sup> 'A More Secure World', *supra* note 24, para. 154.

<sup>92</sup> Statute of the International Tribunal for former Yugoslavia, adopted by U.N.S.C. Res. 808 (1993) (hereafter "ICTY Statute"); Rules of Procedure and Evidence of the International Tribunal for Rwanda (hereafter "ICTY Rules of Procedure"); Statute of the International Tribunal for Rwanda, adopted by U.N.S.C. Res. 955 (1994) and last amended on 8 Dec. 2004 (hereafter "ICTR Statute"); and Rules of Procedure and Evidence of the International Tribunal for Rwanda, adopted on 29 June 1995 and last amended on 15 May 2004 (hereafter "ICTR Rules of Procedure").

<sup>93</sup> See e.g. ICTY Statute, art. 20 (rights of accused); art. 24 (penalties are limited to imprisonment) ICTY Rules of Procedure, rule 42 (rights of suspects during investigations); ICTR Statute, art. 20 (rights of accused); art. 24 (penalties are limited to imprisonment); and ICTR Rules of Procedure, rule 42 (rights of suspects during investigations).

<sup>94</sup> Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts, 10 June 2004 (S/2002/678), paras. 4 and 32; and Completion Strategy of the International Criminal Tribunal for Rwanda, 15 April 2004 (S/2004/341), paras. 38 and 39.

of such offenders, for example, in Sierra Leone.<sup>95</sup> Moreover, one of the reasons for the U.N. reluctance to aid the Iraqi Special Tribunal to train its judges is its use of the death penalty.<sup>96</sup>

Nevertheless, some security communities operating in the U.N. context seem to accept human rights protection only when it appears to be of no cost to them. If the issue is sensitive, as it evidently is in the ‘war on terror’, human rights concerns are excluded. The new security consensus as envisioned by those who urge the U.N. to play a more prominent role on security issues nevertheless warrants a change of stance in this respect. Much more need to be done to give human rights a more clear place and purpose in the security agenda of the Security Council and its subsidiary bodies.<sup>97</sup>

## Conclusion

The fight against terrorism is not near an end. A pessimist might contend that it has just began; the recent bombings in London on 7 July 2005 remind us of the enormous difficulties involved in preventing terrorist attacks. In spite of clear evidence of serious human rights violations being committed in the course of this fight, human rights communities are near excluded from decision-making processes on how the fight is to be carried out. The ongoing effort to convince members of the international community about the importance of a new collective security consensus in which human rights protection has a clear place and purpose is a promise about the possibility of inclusion in such decisions. These new frameworks bring human rights and security communities into relation with one another, and offer them some common ground for discussion on how to resolve their areas of disagreement. At the moment, however, and as revealed in the current U.N. institutional organization and in the distribution of powers among the different bodies, there is a deep-rooted segmentation of, and inequality between, human rights and security communities that are not easily overcome. The ‘narrow mandate’ of the CTC and its relationship with the OHCHR is especially significant in this respect.

The primary concern is not whether human rights communities must compromise their agenda—i.e. to abandon aspirations of human dignity and accept a more minimalistic understanding of what respect for human rights means and requires (freedom from fear)—so as to persuade security communities about their modest role and purpose in the fight against terrorism. The primary concern is the absence of even a broad agreement in practice on a framework that allows the participation of both sides in a common discussion, and the urgent need to find one.

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<sup>95</sup> Statute of the Special Court for Sierra Leone, annexed to agreement between the UN and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, 16 Jan. 2002, pursuant to U.N.S.C. Res. 1315 (2002), art. 17 (rights of the accused); art. 19 (penalties, other than for juvenile offenders, are imprisonment for a specified number of years); and Rules of Procedure and Evidence of the Special Court for Sierra Leone, adopted on 16 Jan. 2002 and last amended on 14 March 2004, rule 42 (rights of suspects during investigations).

<sup>96</sup> Daily Press Briefing by the Office of the Spokesman for the Secretary-General and the Spokesman for the General Assembly President, 22 Oct. 2004 [<http://www.un.org/News/briefings/docs/2004/db041022.doc.htm>].

<sup>97</sup> One example of what could be done by the CTC to develop a broader security agenda has been discussed in Jessica Almqvist, ‘Which Justice for Perpetrators of Acts of Terrorism? The Need for Guidelines’ FRIDE Working Paper #5 (March 2005).

For this reason, it might be important, from a strategic point of view, if nothing else, for human rights communities to rethink their understanding of the relationship between security and human rights, limited as it now is, for the most part, to national security and personal security concerns, and develop a broader repertoire of arguments in defense of human rights. More particularly, human rights communities should refine their understanding of the relationship between security and human rights so as to be able to offer counter-arguments in extreme situations, as well as consider the relevance of efficiency considerations, international (in addition to national and personal) security issues, and the specific difficulties encountered by the many different sectors dealing with terrorism on the ground. The broadening and refinement of our understanding does not mean acceptance; but it could mean a way forward. And, it is time for the security communities to engage in a similar enterprise.