Human Rights Watch

World Report

2004

Human Rights and Armed Conflict

Human Rights Watch

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We investigate and expose

human rights violations and hold abusers accountable.

We challenge governments and those who hold power to end abusive practices and respect international human rights law.

We enlist the public and the international

community to support the cause of human rights for all.

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Human Rights Watch conducts regular, systematic investigations of human rights abuses in some seventy countries around the world. Our reputation for timely, reliable disclosures has made us an essential source of information for those concerned with human rights. We address the human rights practices of governments of all political stripes, of all geopolitical alignments, and of all ethnic and religious persuasions. Human Rights Watch defends freedom of thought and expression, due process and equal protection of the law, and a vigorous civil society; we document and denounce murders, disappearances, torture, arbitrary imprisonment, discrimination, and other abuses of internationally recognized human rights. Our goal is to hold governments accountable if they transgress the rights of their people.

Human Rights Watch began in 1978 with the founding of its Europe and Central Asia division (then known as Helsinki Watch). Today, it also includes divisions covering Africa, the Americas, Asia, and the Middle East. In addition, it includes three thematic divisions on arms, children's rights, and women's rights. It maintains offices in Brussels, Geneva, London, Los Angeles, Moscow, New York, San Francisco, Tashkent and Washington. Human Rights Watch is an independent, nongovernmental organization, supported by contributions from private individuals and foundations worldwide. It accepts no government funds, directly or indirectly.

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Human Rights Watch mourned the sudden passing this year of two much-loved colleagues, Mike Jendrzejczyk and Alison Hughes. Mike J., known for his extraordinary energy and passion for social justice, was Washington D.C. director of our Asia Division and had been a staff member for thirteen years at his death on May 1. He was a pioneer who helped shape human rights advocacy as we know it today, developing tools and innovative new approaches that have become standard practice. Alison Hughes, Washington, D.C.-based advocacy associate, was only 26 when she died on October 26. A bright light in our office, she was committed, talented, and brought to her work an infectious sense of humor and a deep sense of justice. We remember Mike and Alison with great warmth and sadness.

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Preface

This year's Human Rights Watch World Report offers something new. Past volumes have featured summaries of human-rights-related developments in each of the seventy or so countries and themes we cover in-depth each year. This year, to mark the twenty-fifth anniversary of Human Rights Watch, we have chosen a single theme—human rights and armed conflict—and have produced a series of more analytical, reflective essays. Each essay takes stock of developments in a specific area and offers suggestions on the way forward.

The focus this year on armed conflict was influenced by events, most obviously the war in Iraq and continuing armed conflict in Africa, particularly in the Great Lakes region and in West Africa. 2003 also saw renewed bloodshed in Russia (Chechnya) and Indonesia (Aceh), to name only two of the many conflicts that continued to destroy civilian lives and the institutions and infrastructure on which they depend: justice, education, health, water. Almost without exception, the world's worst human rights and humanitarian crises take place in combat zones.

The United States-led war in Iraq was the major international political event of the year, and will continue to raise important challenges for human rights and international humanitarian law. As Kenneth Roth argues in the keynote essay of this volume, while the Bush administration has repeatedly cited the human rights crimes of the Saddam Hussein government to justify the war retrospectively, this never was a war that could be justified on strictly humanitarian grounds.

In their essay on conditions in post-Saddam Iraq, Joe Stork and Fred Abrahams note that the United States and its coalition partners have treated rights issues as matters of secondary importance. Themes that they identify in Iraq—from failure to provide troops with essential training in securing law and order to insufficient attention to justice for past serious crimes—echo themes identified by Sam Zia-Zarifi in his essay on post-conflict Afghanistan. Zia-Zarifi notes that, in Afghanistan, the focus of coalition forces on defeating remnant Taliban and al-Qaeda forces as quickly as possible led to reliance on warlords, many with long records of rights abuses. The result has been a deteriorating human rights situation, deepening fear among Afghans and growing insecurity in much of the country.

The human rights implications of the global campaign against terrorism, often portrayed by those who wage it as a new kind of war, loom large in a number of the essays. Entries on the United States and Russia (Chechnya) in particular demonstrate a clear and troubling trend: an assault on human rights in the name of counter-terrorism. Jamie Fellner and Alison Parker describe various ways in which the Bush administration is citing threats to national security as a justification for putting executive action above the law in the United States. The Bush Administration's indifference to norms of accountability that are at the core of the U.S. governmental structure as well as the international human rights framework is deeply troubling internationally and for the American public as well. Rachel Denber's essay on Chechnya shows how the international community, despite well-intended words on the importance of human rights and humanitarian law, has failed dismally to

engage with the Russian government over its appalling human rights record in Chechnya, a conflict now justified by Russian authorities as their contribution to the global war on terror.

In his essay on the conduct of counter-terrorism operations, Kenneth Roth notes the unclear boundaries of what the Bush administration calls its war on terror. As Roth notes, if "war" were meant metaphorically, like the war on drugs, it would be an uncontroversial hortatory device, a way of rallying support to an important cause. But the administration seems to mean it literally, invoking the extraordinary power of a government at war to detain suspects without trial and even to kill them, despite distance from any traditional battlefield such as Afghanistan or Iraq. Roth also examines Israel's practice of targeted killings of alleged armed militants. He concludes that, even in war, law enforcement rules should presumptively apply away from a traditional battlefield, and war rules should be a tool of last resort, certainly not applicable when a functioning criminal justice system is available.

War in the Democratic Republic of the Congo (DRC), addressed by many of the essays here, is a profound, multi-faceted human rights crisis. Though neglected by virtually all of the world powers and major international media, an estimated 3.3 million civilians have lost their lives in the war since 1998—more than in any conflict since World War Two. These deaths are a combination of often brutal killings and the loss of access to food, health care, and other essentials of life as populations have been forced to flee and aid agencies have been overwhelmed by the needs of inaccessible populations in often insecure areas. The international system has coped with difficulty with a war which has

involved six other African states, over a dozen rebel groups, and dozens of companies and individuals seeking to exploit the country's natural resources.

One hopeful development, analyzed by Binaifer Nowrojee in her essay on recent armed conflicts in Africa, is the emergence of new regional bodies such as the African Union that could play a more active role in insisting on rights protections in conflict prevention initiatives. Although the African regional framework is still nascent and rights have remained marginal in regional peacekeeping interventions to date, African leaders have now committed on record to take a more active role in curbing regional armed conflict and associated rights abuses. As Nowrojee notes, international engagement and assistance will continue to be critically important even as such regional initiatives get underway.

An important theme that emerges in many of the essays here is the extraordinary and awful gap between existing international legal standards and practice. In the last few years, new standards have included the Mine Ban Treaty, the Guiding Principles on Internal Displacement, the Optional Protocol to the Convention on the Rights of the Child banning the use of child soldiers, and the establishment of the International Criminal Court. Yet we seem no closer to preventing the brutality of DRC and so many other conflicts.

A number of essays highlight the critical importance of the U.N. Security Council, the key international body tasked with the maintenance of international peace and security. The council has passed resolutions

and established mechanisms that often put commitments to protect rights at the center of the U.N. system's response to international crises. Yet time and time again these commitments to protect children, to hold perpetrators accountable, to address arms flows, and to scrutinize the behavior of international companies are forgotten, ignored, or neglected in the face of political pressures.

As Jo Becker demonstrates in her survey of current developments in the global effort to stop the use of child soldiers, even innovative efforts such as Secretary-General Kofi Annan's public naming of armed groups and governments that recruit or use children will not succeed in changing the practices of the named parties without more systematic follow-through. Strict application of Security Council resolutions and concrete action against violators is required to ensure that the council's commitments are more than empty promises to those caught up in brutal and chronic conflicts.

In parts of the former Yugoslavia—notably Croatia, Bosnia and Herzegovina, and Kosovo—the failure of international and domestic efforts to promote the return of refugees and displaced persons has left substantially in place the wartime displacement of ethnic minorities. As Bogdan Ivanisevic's essay on ethnic minority returns in the region concludes, the Balkan experience offers an important lesson for other post-conflict situations: unless displacement and "ethnic cleansing" are to be accepted as permanent and acceptable outcomes of war, comprehensive and multi-faceted return strategies—with firm implementation and enforcement mechanisms—must be an early

priority for peace-building efforts. When such elements are present, minority returns progress; when they are absent, returns stall.

LaShawn Jefferson's essay on sexual violence highlights an important point: the violations of human rights that we witness in conflict are often rooted in forms of prejudice, discrimination, marginalization, and impunity that were present long before the conflict began. Jefferson argues that women and girls are continuously at risk for wartime sexual violence because of women's subordinate status and abuses in peacetime, using as examples the brutal and insidious sexual violence that has characterized conflicts in Sierra Leone, Liberia, and DRC in recent years, and in Bosnia and Rwanda in the 1990s. Survivors of sexual violence often face daunting obstacles in post-conflict periods. Civil society groups have tried to step into the breach, but governments often fail to provide necessary services, and, in reconstruction and development plans, women's voices are all too often conspicuous by their absence.

The availability of natural resource wealth, particularly when paired with corrupt, unaccountable government, forms an important part of the backdrop of many armed conflicts. Though economists and political scientists continue to argue over the genesis of many of today's civil conflicts—greed or grievance?—the role of corruption, lack of transparency, and private and public sector profiteering merits renewed attention. Arvind Ganesan and Alex Vines's essay on conflict and resources addresses just such issues. Lisa Misol's discussion of the role of arms-supplying governments and private traffickers who supply weapons to known rights abusers highlights, among other things, the

dangers of governments abrogating their responsibilities to regulate the actions of private actors.

Misol's essay also reminds us that although we have many of the necessary laws in place to protect non-combatants, there is still room for improvement. A proposed international arms trade treaty, spearheaded by civil society groups, would prohibit arms transfers where the authorizing government knows or ought to know that the weapons will be used to commit genocide, crimes against humanity, serious human rights abuses, or serious violations of international humanitarian law.

Steve Goose, in his essay on the damage to innocent civilians wrought by cluster munitions both during and after armed conflict, similarly notes the importance of developing new legal tools. Cluster munitions are particularly dangerous to civilians because they are inaccurate, scattering explosive submunitions across wide areas, and because of the long-term lethal threat posed by landmine-like submunition duds. Cluster munitions have already been used in sixteen countries and existing stockpiles likely include well over two billion submunitions. As Goose explains, in the past decade the international community has banned two weapons—antipersonnel landmines and blinding lasers—on humanitarian grounds; cluster munitions now stand out as the weapon category most in need of stronger regulation to protect civilians during and after armed conflict.

Armed conflict continues to pose some of the most urgent questions for the international community and for the human rights movement in

particular. The range of abuses associated with warfare— killings and maiming of civilians, sexual violence, poor conditions for refugees and internally displaced people, illicit arms flows to abusers, use of child soldiers, and so on—reflects the complexity of most conflicts. Add to the mix the difficulties of dealing with rebel movements (ranging from de facto civil administrations to Hobbesian thugs such as the Lord's Resistance Army), neighboring governments, diaspora communities, and the corporate sector—and the complexity increases.

It is easy for activists and people of goodwill to lose hope or question the continued relevance of human rights arguments. Reed Brody, reflecting on 25 years of the human rights movement, quotes Michael Ignatieff as asking "whether the era of human rights has come and gone." Yet much has been achieved and, as Brody's essay reminds us, human rights discourse and institutions are now fixtures of the international relations landscape.

U.N. Secretary General Kofi Annan has said "we must do more to move from words to deeds, from the elaboration of norms to an era of application." Many of the norms and commitments to which he refers are in place. Most of the laws required to protect in conflict are on the statute books. Even the mechanisms for holding perpetrators accountable are being put in place through the International Criminal Court and some of the ad hoc international tribunals that have been set up to try crimes committed in Rwanda, the former Yugoslavia, and Sierra Leone.

As Richard Dicker and Elise Keppler note in their overview of international justice mechanisms, the developing system of international justice that grew up in the 1990s faces a more difficult environment today. They offer an assessment of successes and failures to date and identify obstacles ahead. Still, the importance of justice to a society's health and long-term stability, coupled with the fact that national court systems, particularly in post-conflict settings, will likely continue to fall far short of minimally acceptable standards, strongly argues the need for consolidating gains to make international mechanisms more effective.

This volume provides but a snapshot of Human Rights Watch's work in seeking to protect the victims of conflict. It does not cover some key issues we regularly work on such as refugees and the displaced, or the special problems of dealing with armed groups; it does not address some of the conflicts we watched closely in 2003, including Colombia, Aceh, and Israel and the Occupied Territories. We offer it as a contribution to the current thinking on protecting human rights in conflict.

The essays here make clear that what is needed is the political will to implement existing commitments and the creativity to draw on past successes and failures to devise new institutional responses to the human rights challenges posed by pervasive armed conflict. Such change will require renewed activism to name and shame those who, by sins of omission or commission, are responsible for or complicit in the kinds of acts described in this volume. Activists must work to remind the world of the promises that have been made to women, to children, to the displaced, to the sick and the hungry, to ethnic and racial minorities and other vulnerable groups—the laws, the norms, the

standards, the resolutions, and the policies that are meant to ensure their protection and the preservation of their lives, their well being, and their dignity.

At a mass gravesite in al-Hilla, Iraq, a U.S. marine holds a video camera while desperate families dig up graves in an attempt to identify the remains of loved ones. Families waited in vain for direction from U.S. and U.K. authorities as to how the Coalition intended to exhume gravesites and preserve evidence for possible criminal proceedings. © 2003 Geert van Kesteren

War in Iraq: Not a Humanitarian Intervention

By Ken Roth

Humanitarian intervention was supposed to have gone the way of the 1990s. The use of military force across borders to stop mass killing was seen as a luxury of an era in which national security concerns among the major powers were less pressing and problems of human security could come to the fore. Somalia, Haiti, Bosnia, Kosovo, East Timor, Sierra Leone—these interventions, to varying degrees justified in humanitarian terms, were dismissed as products of an unusual interlude between the tensions of the Cold War and the growing threat of terrorism. September 11, 2001 was said to have changed all that, signaling a return to more immediate security challenges. Yet surprisingly, with the campaign against terrorism in full swing, the past year or so has seen four military interventions that are described by their instigators, in whole or in part, as humanitarian.

In principle, one can only welcome this renewed concern with the fate of faraway victims. What could be more virtuous than to risk life and limb to save distant people from slaughter? But the common use of the humanitarian label masks significant differences among these interventions. The French intervention in the Democratic Republic of Congo, later backed by a reinforced U.N. peacekeeping presence, was most clearly motivated by a desire to stop ongoing slaughter. In Liberia and Côte d'Ivoire, West African and French forces intervened to enforce a peace plan but also played important humanitarian roles. (The United States briefly participated in the Liberian intervention, but the

handful of troops it deployed had little effect.) All of these African interventions were initially or ultimately approved by the U.N. Security Council. Indeed, in each case the recognized local government consented to the intervention, though under varying degrees of pressure.

By contrast, the United States-led coalition forces justified the invasion of Iraq on a variety of grounds, only one of which—a comparatively minor one—was humanitarian. The Security Council did not approve the invasion, and the Iraqi government, its existence on the line, violently opposed it. Moreover, while the African interventions were modest affairs, the Iraq war was massive, involving an extensive bombing campaign and some 150,000 ground troops.

The sheer size of the invasion of Iraq, the central involvement of the world's superpower, and the enormous controversy surrounding the war meant that the Iraqi conflict overshadowed the other military actions. For better or for worse, that prominence gave it greater power to shape public perceptions of armed interventions said by their proponents to be justified on humanitarian grounds. The result is that at a time of renewed interest in humanitarian intervention, the Iraq war and the effort to justify it even in part in humanitarian terms risk giving humanitarian intervention a bad name. If that breeds cynicism about the use of military force for humanitarian purposes, it could be devastating for people in need of future rescue.

Human Rights Watch ordinarily takes no position on whether a state should go to war. The issues involved usually extend beyond our

mandate, and a position of neutrality maximizes our ability to press all parties to a conflict to avoid harming noncombatants. The sole exception we make is in extreme situations requiring humanitarian intervention.

Because the Iraq war was not mainly about saving the Iraqi people from mass slaughter, and because no such slaughter was then ongoing or imminent, Human Rights Watch at the time took no position for or against the war. A humanitarian rationale was occasionally offered for the war, but it was so plainly subsidiary to other reasons that we felt no need to address it. Indeed, if Saddam Hussein had been overthrown and the issue of weapons of mass destruction reliably dealt with, there clearly would have been no war, even if the successor government were just as repressive. Some argued that Human Rights Watch should support a war launched on other grounds if it would arguably lead to significant human rights improvements. But the substantial risk that wars guided by non-humanitarian goals will endanger human rights keeps us from adopting that position.

Over time, the principal justifications originally given for the Iraq war lost much of their force. More than seven months after the declared end of major hostilities, weapons of mass destruction have not been found. No significant prewar link between Saddam Hussein and international terrorism has been discovered. The difficulty of establishing stable institutions in Iraq is making the country an increasingly unlikely staging ground for promoting democracy in the Middle East. As time elapses, the Bush administration's dominant remaining justification for the war is that Saddam Hussein was a tyrant

who deserved to be overthrown—an argument of humanitarian intervention. The administration is now citing this rationale not simply as a side benefit of the war but also as a prime justification for it. Other reasons are still regularly mentioned, but the humanitarian one has gained prominence.

Does that claim hold up to scrutiny? The question is not simply whether Saddam Hussein was a ruthless leader; he most certainly was. Rather, the question is whether the conditions were present that would justify humanitarian intervention—conditions that look at more than the level of repression. If so, honesty would require conceding as much, despite the war's global unpopularity. If not, it is important to say so as well, since allowing the arguments of humanitarian intervention to serve as a pretext for war fought mainly on other grounds risks tainting a principle whose viability might be essential to save countless lives.

In examining whether the invasion of Iraq could properly be understood as a humanitarian intervention, our purpose is not to say whether the U.S.-led coalition should have gone to war for other reasons. That, as noted, involves judgments beyond our mandate. Rather, now that the war's proponents are relying so significantly on a humanitarian rationale for the war, the need to assess this claim has grown in importance. We conclude that, despite the horrors of Saddam Hussein's rule, the invasion of Iraq cannot be justified as a humanitarian intervention.

The Standards for Humanitarian Intervention

Unusual among human rights groups, Human Rights Watch has a longstanding policy on humanitarian intervention. War often carries enormous human costs, but we recognize that the imperative of stopping or preventing genocide or other systematic slaughter can sometimes justify the use of military force. For that reason, Human Rights Watch has on rare occasion advocated humanitarian intervention—for example, to stop ongoing genocide in Rwanda and Bosnia.

Yet military action should not be taken lightly, even for humanitarian purposes. One might use military force more readily when a government facing serious abuses on its territory invites military assistance from others—as in the cases of the three recent African interventions. But military intervention on asserted humanitarian grounds without the government's consent should be used with extreme caution. In arriving at the standards that we believe should govern such nonconsensual military action, we draw on the principles underlying our own policy on humanitarian intervention and on our experiences in applying them. We also take into account other relevant literature, including the report of the Canadian government-sponsored International Commission on Intervention and State Sovereignty.

In our view, as a threshold matter, humanitarian intervention that occurs without the consent of the relevant government can be justified only in the face of ongoing or imminent genocide, or comparable mass slaughter or loss of life. To state the obvious, war is dangerous. In theory it can be surgical, but the reality is often highly destructive, with a

risk of enormous bloodshed. Only large-scale murder, we believe, can justify the death, destruction, and disorder that so often are inherent in war and its aftermath. Other forms of tyranny are deplorable and worth working intensively to end, but they do not in our view rise to the level that would justify the extraordinary response of military force. Only mass slaughter might permit the deliberate taking of life involved in using military force for humanitarian purposes.

In addition, the capacity to use military force is finite. Encouraging military action to meet lesser abuses may mean a lack of capacity to intervene when atrocities are most severe. The invasion of a country, especially without the approval of the U.N. Security Council, also damages the international legal order which itself is important to protect rights. For these reasons, we believe that humanitarian intervention should be reserved for situations involving mass killing.

We understand that "mass" killing is a subjective term, allowing for varying interpretations, and we do not propose a single quantitative measure. We also recognize that the level of killing that we as a human rights organization would see as justifying humanitarian intervention might well be different from the level that a government might set. However, in either circumstance, because of the substantial risks inherent in the use of military force, humanitarian intervention should be exceptional—reserved for the most dire circumstances.

If this high threshold is met, we then look to five other factors to determine whether the use of military force can be characterized as

humanitarian. First, military action must be the last reasonable option to halt or prevent slaughter; military force should not be used for humanitarian purposes if effective alternatives are available. Second, the intervention must be guided primarily by a humanitarian purpose; we do not expect purity of motive, but humanitarianism should be the dominant reason for military action. Third, every effort should be made to ensure that the means used to intervene themselves respect international human rights and humanitarian law; we do not subscribe to the view that some abuses can be countenanced in the name of stopping others. Fourth, it must be reasonably likely that military action will do more good than harm; humanitarian intervention should not be tried if it seems likely to produce a wider conflagration or significantly more suffering. Finally, we prefer endorsement of humanitarian intervention by the U.N. Security Council or other bodies with significant multilateral authority. However, in light of the imperfect nature of international governance today, we would not require multilateral approval in an emergency context.

Two Irrelevant Considerations

Before applying these criteria to Iraq, it is worth noting two factors that we do not consider relevant in assessing whether an intervention can be justified as humanitarian. First, we are aware of, but reject, the argument that humanitarian intervention cannot be justified if other equally or more needy places are ignored. Iraqi repression was severe, but the case might be made that repression elsewhere was worse. For example, an estimated three million or more have lost their lives to violence, disease, and exposure in recent years during the conflict in the eastern Democratic Republic of Congo (DRC), yet intervention in the DRC was

late and, compared to Iraq, modest. However, if the killing in Iraq warranted military intervention, it would be callous to disregard the plight of these victims simply because other victims were being neglected. In that case, intervention should be encouraged in both places, not rejected in one because it was weak or nonexistent in the other.

Second, we are aware of, but reject, the argument that past U.S. complicity in Iraqi repression should preclude U.S. intervention in Iraq on humanitarian grounds. This argument is built on the U.S. government's sordid record in Iraq in the 1980s and early 1990s. When the Iraqi government was using chemical weapons against Iranian troops in the 1980s, the Reagan administration was giving it intelligence information. After the *Anfal* genocide against Iraqi Kurds in 1988, the Reagan and first Bush administrations gave Baghdad billions of dollars in commodity credits and import loan guarantees. The Iraqi government's ruthless suppression of the 1991 uprising was facilitated by the first Bush administration's agreement to Iraq's use of helicopters – permission made all the more callous because then-President Bush had encouraged the uprising in the first place. In each of these cases, Washington deemed it more important to defeat Iran or avoid Iranian influence in a potentially destabilized Iraq than to discourage or prevent large-scale slaughter. We condemn such calculations. However, we would not deny relief to, say, the potential victims of genocide simply because the proposed intervener had dirty hands in the past.

The Level of Killing

In considering the criteria that would justify humanitarian intervention, the most important, as noted, is the level of killing: was genocide or comparable mass slaughter underway or imminent? Brutal as Saddam Hussein's reign had been, the scope of the Iraqi government's killing in March 2003 was not of the exceptional and dire magnitude that would justify humanitarian intervention. We have no illusions about Saddam Hussein's vicious inhumanity. Having devoted extensive time and effort to documenting his atrocities, we estimate that in the last twenty-five years of Ba`th Party rule the Iraqi government murdered or "disappeared" some quarter of a million Iraqis, if not more. In addition, one must consider such abuses as Iraq's use of chemical weapons against Iranian soldiers. However, by the time of the March 2003 invasion, Saddam Hussein's killing had ebbed.

There were times in the past when the killing was so intense that humanitarian intervention would have been justified—for example, during the 1988 *Anfal* genocide, in which the Iraqi government slaughtered some 100,000 Kurds. Indeed, Human Rights Watch, though still in its infancy and not yet working in the Middle East in 1988, did advocate a form of military intervention in 1991 after we had begun addressing Iraq. As Iraqi Kurds fleeing Saddam Hussein's brutal repression of the post-Gulf War uprising were stranded and dying in harsh winter weather on Turkey's mountainous border, we advocated the creation of a no-fly zone in northern Iraq so they could return home without facing renewed genocide. There were other moments of intense killing as well, such as the suppression of the uprisings in 1991. But on the eve of the latest Iraq war, no one contends that the Iraqi

government was engaged in killing of anywhere near this magnitude, or had been for some time. "Better late than never" is not a justification for humanitarian intervention, which should be countenanced only to stop mass murder, not to punish its perpetrators, desirable as punishment is in such circumstances.

But if Saddam Hussein committed mass atrocities in the past, wasn't his overthrow justified to prevent his resumption of such atrocities in the future? No. Human Rights Watch accepts that military intervention may be necessary not only to stop ongoing slaughter but also to prevent future slaughter, but the future slaughter must be imminent. To justify the extraordinary remedy of military force for preventive humanitarian purposes, there must be evidence that large-scale slaughter is in preparation and about to begin unless militarily stopped. But no one seriously claimed before the war that the Saddam Hussein government was planning imminent mass killing, and no evidence has emerged that it was. There were claims that Saddam Hussein, with a history of gassing Iranian soldiers and Iraqi Kurds, was planning to deliver weapons of mass destruction through terrorist networks, but these allegations were entirely speculative; no substantial evidence has yet emerged. There were also fears that the Iraqi government might respond to an invasion with the use of chemical or biological weapons, perhaps even against its own people, but no one seriously suggested such use as an imminent possibility in the absence of an invasion.

That does not mean that past atrocities should be ignored. Rather, their perpetrators should be prosecuted. Human Rights Watch has devoted enormous efforts to investigating and documenting the Iraqi

government's atrocities, particularly the *Anfal* genocide against Iraqi Kurds. We have interviewed witnesses and survivors, exhumed mass graves, taken soil samples to demonstrate the use of chemical weapons, and combed through literally tons of Iraqi secret police documents. We have circled the globe trying to convince some government—any government—to institute legal proceedings against Iraq for genocide. No one would. In the mid-1990s, when our efforts were most intense, governments feared that charging Iraq with genocide would be too provocative—that it would undermine future commercial deals with Iraq, squander influence in the Middle East, invite terrorist retaliation, or simply cost too much money.

But to urge justice or even criminal prosecution is not to justify humanitarian intervention. Indictments should be issued, and suspects should be arrested if they dare to venture abroad, but the extraordinary remedy of humanitarian intervention should not be used simply to secure justice for past crimes. This extreme step, as noted, should be taken only to stop current or imminent slaughter, not to punish past abuse.

In stating that the killing in Iraq did not rise to a level that justified humanitarian intervention, we are not insensitive to the awful plight of the Iraqi people. We are aware that summary executions occurred with disturbing frequency in Iraq up to the end of Saddam Hussein's rule, as did torture and other brutality. Such atrocities should be met with public, diplomatic, and economic pressure, as well as prosecution. But before taking the substantial risk to life that is inherent in any war, mass

slaughter should be taking place or imminent. That was not the case in Saddam Hussein's Iraq in March 2003.

The Last Reasonable Option

The lack of ongoing or imminent mass slaughter was itself sufficient to disqualify the invasion of Iraq as a humanitarian intervention. Nonetheless, particularly in light of the ruthlessness of Saddam Hussein's rule, it is useful to examine the other criteria for humanitarian intervention. For the most part, these too were not met.

As noted, because of the substantial risks involved, an invasion should qualify as a humanitarian intervention only if it is the last reasonable option to stop mass killings. Since there were no ongoing mass killings in Iraq in early 2003, this issue technically did not arise. But it is useful to explore whether military intervention was the last reasonable option to stop what Iraqi abuses were ongoing.

It was not. If the purpose of the intervention was primarily humanitarian, then at least one other option should have been tried long before resorting to the extreme step of military invasion—criminal prosecution. There is no guarantee that prosecution would have worked, and one might have justified skipping it had large-scale slaughter been underway. But in the face of the Iraqi government's more routine abuses, this alternative to military action should have been tried.

An indictment, of course, is not the same as arrest, trial, and punishment. A mere piece of paper will not stop mass slaughter. But as a long-term approach to Iraq, justice held some promise. The experiences of former Yugoslav President Slobodan Milosevic and former Liberian President Charles Taylor suggest that an international indictment profoundly discredits even a ruthless, dictatorial leader. That enormous stigma tends to undermine support for the leader, both at home and abroad, often in unexpected ways. By allowing Saddam Hussein to rule without the stigma of an indictment for genocide and crimes against humanity, the international community never tried a step that might have contributed to his removal and a parallel reduction in government abuses.

In noting that prosecution was not tried before war, we recognize that the U.N. Security Council had never availed itself of this option in more than a decade of attention to Iraq. The council's April 1991 resolution on Iraq (resolution 688), in condemning "the repression of the Iraqi civilian population in many parts of Iraq," broke new ground at the time as the first council resolution to treat such repression as a threat to international peace and security. But the council never followed up by deploying the obvious tool of prosecution to curtail that repression. Yet if the U.S. government had devoted anywhere near the attention to justice as it did to pressing for war, the chances are at least reasonable that the council would have been responsive.

Humanitarian Purpose

Any humanitarian intervention should be conducted with the aim of maximizing humanitarian results. We recognize that an intervention motivated by purely humanitarian concerns probably cannot be found. Governments that intervene to stop mass slaughter inevitably have other reasons as well, so we do not insist on purity of motive. But a dominant humanitarian motive is important because it affects numerous decisions made in the course of an intervention and its aftermath that can determine its success in saving people from harm.

Humanitarianism, even understood broadly as concern for the welfare of the Iraqi people, was at best a subsidiary motive for the invasion of Iraq. The principal justifications offered in the prelude to the invasion were the Iraqi government's alleged possession of weapons of mass destruction, its alleged failure to account for them as prescribed by numerous U.N. Security Council resolutions, and its alleged connection with terrorist networks. U.S. officials also spoke of a democratic Iraq transforming the Middle East. In this tangle of motives, Saddam Hussein's cruelty toward his own people was mentioned—sometimes prominently—but, in the prewar period, it was never the dominant factor. This is not simply an academic point; it affected the way the invasion was carried out, to the detriment of the Iraqi people.

To begin with, if invading forces had been determined to maximize the humanitarian impact of an intervention, they would have been better prepared to fill the security vacuum that predictably was created by the toppling of the Iraqi government. It was entirely foreseeable that

Saddam Hussein's downfall would lead to civil disorder. The 1991 uprisings in Iraq were marked by large-scale summary executions. The government's Arabization policy raised the prospect of clashes between displaced Kurds seeking to reclaim their old homes and Arabs who had moved into them. Other sudden changes of regime, such as the Bosnian Serb withdrawal from the Sarajevo suburbs in 1996, have been marked by widespread violence, looting, and arson.

In part to prevent violence and disorder, the U.S. army chief of staff before the war, General Eric K. Shinseki, predicted that "several" hundreds of thousands of troops would be required. But the civilian leaders of the Pentagon dismissed this assessment and launched the war with considerably fewer combat troops—some 150,000. The reasons for this decision are unclear, but they seem due to some combination of the U.S. government's faith in high-tech weaponry, its distaste for nation-building, its disinclination to take the time to deploy additional troops as summer's heat rose in Iraq and the political heat of opposition to the war mounted around the world, and its excessive reliance on wishful thinking and best-case scenarios. The result is that coalition troops were quickly overwhelmed by the enormity of the task of maintaining public order in Iraq. Looting was pervasive. Arms caches were raided and emptied. Violence was rampant.

The problem of understaffing was only compounded by the failure to deploy an adequate number of troops trained in policing. Regular troops are trained to fight—to meet threats with lethal force. But that presumptive resort to lethal force is inappropriate and unlawful when it comes to policing an occupied nation. The consequence was a steady

stream of civilians killed when coalition troops—on edge in the face of regular resistance attacks, many perfidious—mistakenly fired on civilians. That only increased resentment among Iraqis and fueled further attacks. Troops trained in policing—that is, trained to use lethal force as a last resort—would have been better suited to conduct occupation duties humanely. But the Pentagon has not made a priority of developing policing skills among its troops, leaving relatively few to be deployed in Iraq.

To top it all off, L. Paul Bremer III, the U.S. administrator in Iraq, disbanded the entire Iraqi army and police force. That left the occupying authorities without a large pool of indigenous forces that could have helped to establish the rule of law. We recognize that security forces or intelligence agencies that had played a lead role in atrocities, such as the Special Republican Guard or the Mukhabarat, should have been disbanded and their members prosecuted. Some members of the Iraqi army and police were also complicit in atrocities, but the average member had significantly less culpability; there was no penal justification for disbanding these forces en masse rather than pursuing the guilty on an individual basis. The blanket dismissal took a toll on Iraqi security.

The lack of an overriding humanitarian purpose also affected Washington's attitude toward the system of justice to be used to try Iraqi officials' human rights crimes. The Bush administration, like many other people, clearly would like to see those responsible for atrocities in Iraq brought to justice, but its greater distaste for the International Criminal Court (ICC) has prevented it from recommending the justice

mechanism that is most likely to succeed. The administration has insisted that accused Iraqi officials be tried before an "Iraqi-led process." In theory, it is certainly preferable for Iraq to try its own offenders. But after three-and-a-half decades of Ba`th Party rule, the Iraqi judicial system has neither a tradition of respect for due process nor the capacity to organize and try a complex case of genocide or crimes against humanity. Were such prosecutions to proceed in Iraqi courts, there is much reason to believe that they would be show trials.

The obvious solution to this problem is to establish an international criminal tribunal for Iraq—either a fully international one such as those established for Rwanda and former Yugoslavia, or an internationally led tribunal with local participation such as the special court created for Sierra Leone. Although the Bush administration has supported these pre-existing tribunals, it adamantly opposes an international tribunal for Iraq. The reason appears to lie in the ICC. The ICC itself would be largely irrelevant for this task since its jurisdiction would begin at the earliest in July 2002, when the treaty establishing it took effect. Most crimes of the Saddam Hussein government were committed before that. But the administration so detests the ICC that it opposes the creation of any international tribunal for Iraq, apparently out of fear that such a new tribunal would lend credibility to the entire project of international justice and thus indirectly bolster the ICC. An overriding concern with the best interests of the Iraqi people would have made it less likely that this ideological position prevailed.

Compliance with Humanitarian Law

Every effort should be made to ensure that a humanitarian intervention is carried out in strict compliance with international human rights and humanitarian law. Compliance is required in all conflicts—no less for an intervention that is justified on humanitarian grounds. The invasion of Iraq largely met this requirement, but not entirely. Coalition forces took extraordinary care to avoid harming civilians when attacking fixed, pre-selected targets. But their record in attacking mobile targets of opportunity was mixed.

As Human Rights Watch reported in detail in its December 2003 report on the war, U.S. efforts to bomb leadership targets were an abysmal failure. The 0-for-50 record reflected a targeting method that bordered on indiscriminate, allowing bombs to be dropped on the basis of evidence suggesting little more than that the leader was somewhere in a community. Substantial civilian casualties were the predictable result.

U.S. ground forces, particularly the Army, also used cluster munitions near populated areas, with predictable loss of civilian life. After roughly a quarter of the civilian deaths in the 1999 NATO bombing of Yugoslavia were caused by the use of cluster bombs in populated areas, the U.S. Air Force substantially curtailed the practice. But the U.S. Army apparently never absorbed this lesson. In responding to Iraqi attacks as they advanced through Iraq, Army troops regularly used cluster munitions in populated areas, causing substantial loss of life. Such disregard for civilian life is incompatible with a genuinely humanitarian intervention.

Better Rather Than Worse

Another factor for assessing the humanitarian nature of an intervention is whether it is reasonably calculated to make things better rather than worse in the country invaded. One is tempted to say that anything is better than living under the tyranny of Saddam Hussein, but unfortunately, it is possible to imagine scenarios that are even worse. Vicious as his rule was, chaos or abusive civil war might well become even deadlier, and it is too early to say whether such violence might still emerge in Iraq.

Still, in March 2003, when the war was launched, the U.S. and U.K. governments clearly hoped that the Iraqi government would topple quickly and that the Iraqi nation would soon be on the path to democracy. Their failure to equip themselves with the troops needed to stabilize post-war Iraq diminished the likelihood of this rosy scenario coming to pass. However, the balance of considerations just before the war probably supported the assessment that Iraq would be better off if Saddam Hussein's ruthless reign were ended. But that one factor, in light of the failure to meet the other criteria, does not make the intervention humanitarian.

U.N. Approval

There is considerable value in receiving the endorsement of the U.N. Security Council or another major multilateral body before launching a humanitarian intervention. The need to convince others of the

appropriateness of a proposed intervention is a good way to guard against pretextual or unjustified action. An international commitment to an intervention also increases the likelihood that adequate personnel and resources will be devoted to the intervention and its aftermath. And approval by the Security Council, in particular, ends the debate about the legality of an intervention.

However, in extreme situations, Human Rights Watch does not insist on Security Council approval. The council in its current state is simply too imperfect to make it the sole mechanism for legitimizing humanitarian intervention. Its permanent membership is a relic of the post-World War II era, and its veto system allows those members to block the rescue of people facing slaughter for the most parochial of reasons. In light of these faults, one's patience with the council's approval process would understandably diminish if large-scale slaughter were underway. However, because there was no such urgency in early 2003 for Iraq, the failure to win council approval, let alone the endorsement of any other multilateral body, weighs heavily in assessing the intervenors' claim to humanitarianism.

We recognize, of course, that the Security Council was never asked to consider a purely humanitarian intervention in Iraq. The principal case presented to it was built on the Iraqi government's alleged possession of and failure to account for weapons of mass destruction. Even so, approval might have ameliorated at least some of the factors that stood in the way of the invasion being genuinely humanitarian. Most significantly, a council-approved invasion is likely to have yielded more

troops to join the predominantly American and British forces, meaning that preparation for the post-war chaos might have been better.

Conclusion

In sum, the invasion of Iraq failed to meet the test for a humanitarian intervention. Most important, the killing in Iraq at the time was not of the exceptional nature that would justify such intervention. In addition, intervention was not the last reasonable option to stop Iraqi atrocities. Intervention was not motivated primarily by humanitarian concerns. It was not conducted in a way that maximized compliance with international humanitarian law. It was not approved by the Security Council. And while at the time it was launched it was reasonable to believe that the Iraqi people would be better off, it was not designed or carried out with the needs of Iraqis foremost in mind.

In opening this essay, we noted that the controversial invasion of Iraq stood in contrast to the three African interventions. In making that point, we do not suggest that the African interventions were without problems. All suffered to one degree or another from a mixture of motives, inadequate staffing, insufficient efforts to disarm and demobilize abusive forces, and little attention to securing justice and the rule of law. All of the African interventions, however, ultimately confronted ongoing slaughter, were motivated in significant part by humanitarian concerns, were conducted with apparent respect for international humanitarian law, arguably left the country somewhat better off, and received the approval of the U.N. Security Council. Significantly, all were welcomed by the relevant government, meaning

that the standards for assessing them are more permissive than for a nonconsensual intervention.

However, even in light of the problems of the African interventions, the extraordinarily high profile of the Iraq war gives it far more potential to affect the public view of future interventions. If its defenders continue to try to justify it as humanitarian when it was not, they risk undermining an institution that, despite all odds, has managed to maintain its viability in this new century as a tool for rescuing people from slaughter.

The Iraq war highlights the need for a better understanding of when military intervention can be justified in humanitarian terms. The above-noted International Commission on Intervention and State Sovereignty was one important effort to define these parameters. Human Rights Watch has periodically contributed to this debate as well, including with this essay, and various academic writers have offered their own views. But no intergovernmental body has put forth criteria for humanitarian intervention.

This official reticence is not surprising, since governments do not like to contemplate uninvited intrusions in their country. But humanitarian intervention appears to be here to stay—an important and appropriate response to people facing mass slaughter. In the absence of international consensus on the conditions for such intervention, governments inevitably are going to abuse the concept, as the United States has done in its after-the-fact efforts to justify the Iraq war.

Human Rights Watch calls on intergovernmental organizations, particularly the political bodies of the United Nations, to end the taboo on discussing the conditions for humanitarian intervention. Some consensus on these conditions, in addition to promoting appropriate use of humanitarian intervention, would help deter abuse of the concept and thus assist in preserving a tool that some of the world's most vulnerable victims need.

In 2002, villagers fled their homes in Ituri province, northeastern Congo, where fighting among local militias serving as proxies for the Rwandan, Ugandan, and Congolese governments has resulted in the death of some 50,000 people. It is estimated that, in the past five years, war-related violence, disease, and displacement have killed 3.3 million people in the Democratic Republic of Congo. © 2002 Marcus Perkins/Tearfund

Africa on its Own: Regional Intervention and Human Rights

By Binaifer Nowrojee[1]

Despite the continued gloomy reality of much reporting from Africa, the current moment is in fact one of hope for the continent. Though a quarter of Africa's countries were affected by conflict in 2003, several long-running wars have recently ended, including the twenty-five year war in Angola. In the Democratic Republic of Congo (DRC) all the major actors signed agreements and began a period of political transition, although scattered military activity continued in the east. In Burundi the government and the leading rebel force reached agreement in October and November 2003, but the government continued to fight against a smaller rebel movement in areas near the capital. Talks to end the brutal wars in Sudan and Liberia appeared likely to bear fruit.

Perhaps more importantly, new continental institutions and policy frameworks are creating the political space needed to discuss openly the roots of conflict—the source of Africa's worst abuses—in threats to democracy, human rights, and the rule of law. The transformation of the Organization of African Unity (OAU) into the African Union (A.U.) in 2002 offers unprecedented opportunities to begin to address the

[1] The writing of this essay was coordinated by Binaifer Nowrojee, but relies heavily on contributions from all members of the Human Rights Watch Africa Division, particularly Bronwen Manby, Alison DesForges, Anneke Van Woudenberg, Corinne Dufka, Leslie Lefkow, Sara Rakita, Nobuntu Mbelle, and Kate Fletcher.

reasons why Africa has been such a troubled continent since most of its states achieved independence forty or so years ago.

At the level of peacekeeping or "peace enforcement," military intervention in conflict-affected countries sponsored by African continental or sub-regional institutions is increasingly becoming a reality. The major world powers have not given the United Nations (U.N.) the capacity to respond effectively to Africa's wars. And, though Africa's former colonizers have sent troops in recent years to areas ravaged by conflict—including the 2000 British intervention in Sierra Leone and the ongoing French engagement in Côte d'Ivoire since late 2002—the major powers have repeatedly made it clear that they will not make the necessary commitment to prevent the massive human rights violations in Africa that result from conflict (Rwanda, the DRC, Burundi, and the Central African Republic being some examples of such neglect). The European Union intervention in the northeastern region of Ituri was an exception, prompted by fear of genocide and strictly limited in time to the period necessary for the U.N. to increase its forces in that troubled region. In this context, African states have no choice but to take up the challenge.

At both international and continental levels, the historical response to war in Africa has been hand-wringing when hostilities break out, but little if anything in the way of serious preventive action. Yet there are often obvious signs that war may be coming—in particular official policies that violate human rights through systematic discrimination and disregard for the rule of law, stolen elections (if any are held at all), and impunity for gross abuses. At least on paper, the A.U. and initiatives it

has adopted—including the New Partnership for Africa's Development (NEPAD) and the Conference on Security, Stability, Development and Cooperation in Africa (CSSDCA)—provide a means for African states that are committed to furthering respect for human rights and acting to preempt conflict to apply pressure to governments that abuse their power.

This essay outlines the new institutions of the A.U. and the commitments to human rights that they make. It then considers four recent military peacekeeping interventions—in Burundi, Liberia, Côte d'Ivoire, and the DRC—that have been endorsed by African regional institutions. Although these interventions were undertaken with explicitly humanitarian motives, the human rights component has continued to be inadequate. Finally, the essay considers how, despite their commitments on paper, African states have yet to act on the commitments made in the Constitutive Act of the A.U. to ensure respect for democracy, human rights, and the rule of law in all states of the continent—the most important conflict prevention measure available.

Building Institutional Capacity to Intervene: the A.U. and Conflict Prevention

African leaders have recently reformed, fairly radically, the continent's institutions and policies. In 2002, the forty-year-old OAU was dissolved and reconstituted as the A.U. In contrast to the OAU, the A.U. is provided with the Constitutive Act that envisages a more integrated level of continental governance, possibly eventually paralleling that of the

European Union. Under the OAU, state sovereignty was paramount: non-interference in the internal affairs of member states was its trademark. Regional or sub-regional interventions like those by the Economic Community of West African States (ECOWAS) in conflicts in Liberia and Sierra Leone were the exception, not the rule.

Under the A.U.'s Constitutive Act, there is a commitment to "promote and protect human and peoples' rights," and it specifies that "governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union." It also provides for a fifteen-member Peace and Security Council to replace the OAU's Mechanism for Conflict Prevention, Management, and Resolution. Once established, the council will facilitate the A.U.'s response to crises and will "promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts." As of October 2003, seventeen African countries, of the twenty-seven needed, had ratified the A.U. Protocol on Peace and Security, which would set up the Peace and Security Council. The A.U. Protocol explicitly authorizes the organization to "intervene in a Member State … in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity."

At the same time as the process establishing the A.U. was ongoing, African governments—led by South Africa, Nigeria, Senegal and Algeria—created another new mechanism to promote good governance and economic development: the New Partnership for Africa's

Development (NEPAD), and the related African Peer Review Mechanism. NEPAD is focused on economic development, but unusually, explicitly recognizes that: "Peace, security, democracy, good governance, human rights, and sound economic management are conditions for sustainable development." It proposes systems for monitoring adherence to the rule of law that can promote respect for human rights, in addition to perhaps serving as a check to prevent conditions in a given country from deteriorating to the point of insurgency or conflict. NEPAD has now been adopted as a formal program of the A.U.

One of the proposed systems for monitoring adherence to the rule of law is NEPAD's African Peer Review Mechanism (APRM). Under the APRM, a group of African "eminent persons" is to conduct periodic reviews of members' "policies and practices" "to ascertain progress being made towards achieving mutually agreed goals." Membership in the APRM is not mandatory. Rather, states choose peer review by signing an additional memorandum of understanding, adopted in March 2003. At this writing, a dozen countries have joined.

The Conference on Security, Stability, Development and Cooperation in Africa—on which the A.U. also adopted a Memorandum of Understanding in 2002—includes a set of undertakings on a wide range of issues related to human rights, democracy, and the rule of law. The CSSDCA, loosely modeled on the Organization for Security and Cooperation in Europe (OSCE), has a peer review implementation mechanism that resembles but in some respects is stronger than NEPAD's. There are obvious areas of overlap between the CSSDCA

and NEPAD, and there is now an attempt to coordinate the two processes, with ongoing discussions about harmonizing the standards used and division of responsibilities under the different review systems.

NEPAD has been endorsed by virtually all international agencies and bilateral donors, from the U.N. General Assembly to the European Union (E.U.), Japan, and the United States (U.S.), as the general framework around which the international community should structure its development efforts in Africa. Perhaps most important among these endorsements is that of the Group of Eight (G8) industrialized countries, which adopted an Africa Action Plan at its 2002 summit. The G8 plan sets out a detailed list of engagements in support of the A.U.'s priorities, focusing on human rights and political governance as well as on economic issues. The G8 plan included some good—though carefully limited—language on the promotion of peace and security in Africa; the only G8 promise with a hard deadline was "to deliver a joint plan, by 2003, for the development of African capability to undertake peace support operations, including at the regional level." A report on progress in implementing the Africa Action Plan was duly presented to the 2003 G8 summit. But though the report reads as if much has been achieved, in practice there have been more words than action or financial support. The promised plan for the development of African capacity in peace support operations itself acknowledged freely that "it will take time and considerable resources to create, and establish the conditions to sustain, the complete range of capabilities needed to fully undertake complex peace support operations and their related activities."

Regional Interventions

We are likely to see more African interventions to stem conflict in the coming years. Though they can make a useful contribution, as the examples below demonstrate, there are also many possible pitfalls; as these and other cases have already shown. A regional intervention may ignore critical post-conflict components such as justice, demobilization, and restructuring the armed forces. Regional politics may interfere with and undermine the humanitarian nature of the intervention. Funding limitations may hinder a timely and effective intervention. Peacekeepers may be recruited from national armies that regularly commit abuses against their own citizens; and in some cases from neighboring countries that have an interest in the conflict they are supposed to be policing. The intervention may fail to establish mechanisms of accountability to punish peacekeepers that commit human rights violations and thus itself further contribute to an environment of impunity.

Lastly, African regional interventions may encourage the wider international community in its tendency to abdicate its responsibility to respond to African crises. The reality is that Africa's peacekeeping capabilities cannot in the short run equal those of wealthier countries. Even if wealthier countries make a more serious financial commitment to peacekeeping in Africa than has historically been the case—that is, even if the G8's promises are fulfilled—Africa should not be expected to take sole charge of the burden of attempting to prevent or respond to war on the continent.

In 2003, regional and continental African bodies demonstrated an increased willingness to respond both militarily and politically to regional

crises. Of all the sub-regional bodies, the West African group ECOWAS continued to play the most prominent role in addressing conflicts in Côte d'Ivoire and Liberia. In May, the ECOWAS security committee resolved to create a rapid response military force to tackle sub-regional crises, and also agreed to strengthen the regional arms moratorium. ECOWAS is also in the process of establishing early warning centers in the troubled West African region.

The trend towards greater regional intervention was most evident in four countries:

- Burundi, where the A.U. mounted its first peacekeeping operation in 2003.
- Côte d'Ivoire, where some 1,300 ECOWAS troops coordinated with 3,800 French forces in monitoring the fragile cease-fire that ended the civil war sparked in September 2002.
- Liberia, where, after President Charles Taylor stepped down, 3,500 ECOWAS peacekeepers deployed in and around the capital, Monrovia, pending the arrival of U.N. forces. ECOWAS also brokered an August 2003 ceasefire and an agreement to establish an interim government.
- Democratic Republic of Congo, where the Southern African Development Community (SADC) justified intervention on the grounds that a SADC member state was fighting an extra-territorial threat. The intervention included attempts to mediate peace in DRC and the deployment of troops.

All of these interventions were prompted by conflict that has caused massive suffering to civilian populations. Yet their human rights component remained marginal.

Burundi

The decade-long civil war in Burundi was sparked when an elected Hutu president was assassinated in 1993 by soldiers from the Tutsi-dominated government army. The war has claimed more than 200,000 lives and has been marked by daily violations of international humanitarian law by all sides: killings, rape, and torture of civilians, the use of child soldiers, and the forced displacement of populations.

After a series of ceasefire agreements between the government and three of four rebel movements, a transitional government took power. Legislators passed several laws important for delivering justice, including a long-promised law against genocide, war crimes, and crimes against humanity; and the country received a new infusion of foreign aid. But the government and the leading rebel movement, the Forces for the Defense of Democracy (FDD), continued combat sporadically until October and November 2003 when they signed protocols renewing their commitment to a cease-fire and began incorporating FDD members into the government and the army. The final ceasefire protocol included guarantees of unlimited and undefined "provisional immunity" from prosecution for both forces, calling into question all previous efforts to ensure accountability for violations of international humanitarian law. Meanwhile the war continued between government

troops and a smaller rebel movement, the Forces for National Liberation, that held territory around the capital.

The A.U.'s initial intervention in Burundi was a traditional peacekeeping mission, deployed to enforce the 2000 Arusha Peace Accords rather than to curtail an immediate crisis. It was based on and expanded a smaller force of South African troops present to protect opposition political leaders under the terms of the Arusha Accords. In January 2003, the A.U. authorized the dispatch of a small military observer mission to monitor the ceasefire. A month later, at an extraordinary summit, the A.U. approved a larger peacekeeping mission, the African Mission in Burundi (AMIB). The A.U. mandated AMIB to disarm, demobilize, and reintegrate into society all rebel troops and to monitor the country's post-war transition to democracy. By October, a 3,500-strong force had been deployed to Burundi, largely from South Africa, Ethiopia, and Mozambique. However, delays in donor funding, bureaucratic inertia, and the absence of a political agreement initially frustrated the A.U. peace effort. In addition, there was growing concern that inadequate facilities and arrangements for the cantonment of Hutu rebels would undermine the implementation of the ceasefire.

The Burundi peacekeeping mission charged peacekeepers with protecting government buildings, facilitating rebel demobilization, and paving the way for elections in 2004. The mandate says nothing about protecting civilians, but its rules of engagement do provide for intervention in the event of massive violence against civilians. Still largely confined to the capital at this writing in December 2003, AMIB soldiers had not played a role in limiting abuses against non-combatants.

Although the mission did not have a human rights mandate, it did include election-related issues, a first for A.U.-initiated interventions.

As with any such endeavor, difficulties and challenges abounded. Because the parties to the peace process failed to resolve issues such as the restructuring of the national army, the peacekeepers could not move forward with programs to demobilize and reintegrate combatants.

Regional leaders, led initially by Tanzania and Uganda, had long attempted to end the war, but without success. South Africa assumed a greater role after the Arusha Accords were signed. When the United Nations, designated by the Accords to provide troops to protect opposition leaders, refused to do so until there was an effective ceasefire, South Africa provided the necessary soldiers for implementation to go forward. South Africa paid the cost of these soldiers, who later became the core of the AMIB force while other contributors to AMIB, Ethiopia and Mozambique, received support from the United States and the United Kingdom to help cover their expenses. South Africa pushed vigorously for the October and November 2003 protocols ending combat between the government and the FDD rebels, in part because it could then ask the United Nations to send peacekeepers to replace its own troops and end its expensive commitment to peacekeeping in Burundi. In welcoming the protocols, South African leaders said nothing about the guarantee of provisional immunity. Other international leaders—including U.N. Secretary-General Kofi Annan—equally anxious to end combat in Burundi, also remained silent about the indefinite delay in demanding justice for crimes against civilians.

Liberia

Liberia has seen ECOWAS-led peacekeeping operations since 1990. The flow of arms and combatants, including mercenaries, across its porous borders has destabilized the country for over a decade and its conflict has spilled over into neighboring Sierra Leone and Côte d'Ivoire, as well as into Guinea. Liberia is likely to remain a source of regional instability for some time, despite ECOWAS's efforts and its successful brokering of a peace agreement.

The ECOWAS military intervention at the start of civil war in 1990 was a Nigerian-led operation that remained in Liberia for nine years. It successfully set up a haven of relative peace around the capital city and protected civilians within the perimeter of its control—though the peacekeepers also committed abuses against civilians or suspected rebels on occasion. The peacekeepers also provided economic and arms support to factions opposed to Charles Taylor (leader of one of the most successful and most abusive armed groups), thereby contributing to the proliferation of rebel groups. In 1997, with support from the United Nations, ECOWAS promoted a peace plan and oversaw the highly flawed elections that brought Charles Taylor to office as head of state. In 1999, the ECOWAS troops left Liberia.

Prompted by the 1990 intervention, ECOWAS began to strengthen its institutional conflict-response mechanisms. In 1993, ECOWAS expanded its founding treaty to include peace and security in its mandate. ECOWAS subsequently created a Mediation and Security Council with the authority to deploy military forces by a two-thirds vote.

It was not long before ECOWAS dispatched a peacekeeping force to Sierra Leone. Following a 1997 insurgency by the Revolutionary United Front (RUF), a rebel group supported by Charles Taylor, by then Liberian president, ECOWAS sent forces to Sierra Leone to quell its decade-long civil war. In 1998, ECOWAS troops helped to restore to power the elected government of President Ahmad Tejan Kabbah. The ECOWAS mandate in Sierra Leone ended in 1999, when the United Nations deployed peacekeepers. Most of the ECOWAS contingents were absorbed into the U.N. mission. In 2000, Sierra Leone collapsed back into war for another two years, as the RUF returned to the bush, but a bilateral intervention by the United Kingdom and a beefed up U.N. presence eventually contributed to the ending of the war and the holding of elections in 2002. U.N. troops, as well as a small British contingent, remained in a post-war Sierra Leone as of late 2003.

Liberia once again descended into civil war in 2000. The two rebel groups, Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL), and government forces each committed widespread atrocities. But not until 2003 did ECOWAS finally redeploy peacekeepers to Liberia. The situation in Liberia deteriorated in the latter half of 2003 as LURD and MODEL fought their way to the capital Monrovia, indiscriminately shelling civilian areas. Under the auspices of ECOWAS, President John A. Kufour of Ghana began hosting peace talks in June 2003. A ceasefire was signed in mid-June but fighting continued. In early August, Taylor resigned his presidency and fled to Nigeria, where he was offered shelter, despite an indictment for war crimes by the Special Court for Sierra Leone. After two-and-a-half months, the Ghana talks culminated in the signing of a peace agreement on August 18, 2003.

The first of the new contingent of ECOWAS peacekeepers arrived in Liberia on August 4, 2003. ECOWAS shifted troops from Sierra Leone in order to deploy some 3,000 West African ECOMIL (ECOWAS Military Mission in Liberia) peacekeepers. The ECOMIL troops brought much needed calm to the capital, and led the way for the deployment of a 15,000-strong U.N. peacekeeping force approved by the U.N. Security Council in early September. The mission deployed in October, and the ECOMIL troops became the first contingent of U.N. troops in Liberia.

Given its historic ties to Liberia, the United States seemed the obvious candidate to lead an international peacekeeping mission, as the United Kingdom and France had done in Sierra Leone and Côte d'Ivoire, respectively. Yet the U.S. refused to assume any risk or responsibility for curtailing the crisis in Liberia. After much debate, the U.S. made only a weak, largely symbolic intervention: some 2,000 U.S. Marines were stationed on vessels off-shore, but a mere 200 landed in Monrovia. These 200 troops landed only after ECOMIL had taken control of Monrovia and the rebels had withdrawn from the immediate area. They stayed on shore only a few days and the entire U.S. force withdrew from the area roughly ten days later. The U.S.'s paltry intervention came as a huge disappointment; many believed that the presence of U.S. troops would have calmed significantly the volatile situation and enabled West African peacekeepers to deploy outside the capital where serious abuses were continuing. It also would have made recruiting forces for the U.N. peacekeeping force much easier.

The A.U.'s role in Liberia has been disappointing on the question of justice. The A.U. remained silent regarding the Special Court for Sierra

Leone's indictment of Taylor for war crimes in connection with his support for the RUF. The A.U. took no position when the indictment was unsealed and Ghana's President Kufour chose not to arrest Taylor during the peace talks in Accra. Neither the A.U. nor ECOWAS has called on Nigeria's President Obasanjo, who offered Taylor refuge in Nigeria, to arrest Taylor and transfer him to Sierra Leone for trial. The ECOWAS-brokered Liberian peace agreement made no clear recommendations for or commitments to justice; it is uncertain what kind of justice mechanisms, if any, will be established to address crimes committed during the war. Given the dangerous regional nature of the Liberian crisis, with Guinea and Côte d'Ivoire providing ongoing support to Liberian rebel groups, the AU should also take steps to denounce Liberia's neighbors and others providing support to abusive armed insurgency groups. The A.U. appointed a special envoy for Liberia, who could and should urge respect for human rights.

Côte d'Ivoire

Since September 19, 2002, Côte d'Ivoire has been gripped by an internal conflict that has paralyzed the economy, split the political leadership, and illuminated the stark polarization of Ivorian society along ethnic, political, and religious lines. It is a conflict that has been characterized by relatively little in the way of active hostilities between combatants, but by widespread and egregious abuses against civilians. It is a conflict that, while primarily internal, developed regional dimensions when both the Ivorian rebel groups and the government of Côte d'Ivoire recruited Liberian mercenary fighters to support their forces in the west.

ECOWAS quickly recognized the gravity of the Ivorian situation, touching as it did the economic heart of the region, and began mediation efforts within days of the initial uprising. ECOWAS concerns largely centered on the economic and humanitarian impact of the crisis and the risks to regional stability posed by the conflict. In October 2002, ECOWAS mediators brokered a ceasefire, and both the Ivorian government and the main rebel group, the Patriotic Movement of Côte d'Ivoire (Mouvement Patriotique de la Côte d'Ivoire, MPCI) authorized an ECOWAS monitoring mission. However, the ECOWAS commitment to send troops was hampered by funding constraints and stalled for more than two months after it was made. In the interim, France agreed to fill the gap, expanding its longstanding military presence and extending its mandate from protection of French nationals to ceasefire monitoring.

Despite these efforts, the Ivorian conflict intensified with the opening of the western front, the involvement of Liberian forces on both sides, and the proliferation of rebel groups in December 2002. ECOWAS military engagement remained minimal until early 2003, despite consistent efforts to broker cease-fires, set up peace negotiations, and bring the parties to conflict together. As ECOWAS efforts stalled, French concern deepened and France's contributions increased on both the military and political fronts. By early 2003, there were over 2,500 French troops in Côte d'Ivoire working in conjunction with over 500 ECOWAS forces, and a French-brokered peace agreement, the Linas-Marcoussis accords, had been signed by the government and all three rebel groups. ECOWAS and A.U. officials continued to apply pressure to both the Ivorian government and rebel forces, with Ghana's president, John Kufuor, playing a particularly prominent role as head of ECOWAS.

Additional ceasefire agreements and negotiations led to an officially-proclaimed end to the conflict in July 2003, but implementation of the Linas-Marcoussis accords was slow. Working in conjunction with a small U.N. political and military liaison mission, MINUCI, and some 4,000 French troops, the ECOWAS operation helped monitor compliance with the peace agreement between the Ivorian government and rebel forces. As of late-May 2003, approximately 1,300 ECOWAS troops were in place in the country. However, insufficient resources remained a serious constraint.

In spite of intense regional and French efforts, Côte d'Ivoire's hopes for peace remained deadlocked as of November 2003. At this writing, disarmament has still not taken place, and the government of reconciliation formed by the peace accord has been handicapped by continuing splits between the warring parties. The growth of a vocal, violent, pro-government militia movement with links to the state armed forces, has done little to ease tensions. Abuses against civilians, both in Abidjan and rural areas, have continued, albeit on a lesser scale than during the "official" war.

Continuing impunity remains a fundamental problem. Despite domestic, regional, and international recognition of the serious abuses that took place during the conflict and in election-related violence in 2000, to date there have been no significant steps taken to bring perpetrators of abuses to justice. Key human rights provisions in the peace accords included the establishment of a national human rights commission and an international commission of inquiry, yet neither has materialized. In February 2003, the A.U. called for an investigation by

the African Commission on Human Rights, but has since remained silent on the subject. Yet impunity remains one of the key underlying causes of the conflict in Côte d'Ivoire. Long-term resolution of the conflict will require not only political and military engagement by ECOWAS and the A.U., but resolute action to condemn human rights abuses and use financial and political leverage to restore the rule of law.

From the start of the conflict, the U.N. deferred to France on political and military matters concerning Côte d'Ivoire. A Security Council resolution in February 2003 condemned human rights abuses in the conflict and conferred authority on French and ECOWAS forces to intervene. The U.N. Mission in Côte d'Ivoire (MINUCI) was proposed in late April and approved in early May 2003. Initially, the mission included military observers and liaison officers and a vital human rights monitoring component. But the Security Council cut human and financial resources for the mission's civilian components, based mainly on U.S. concerns over the budget and staffing. In advocating such cuts, the U.S. displayed serious short-sightedness: the multitude of abuses in Côte d'Ivoire amply underscored the urgent need for a human rights monitoring component to be included in the peacekeeping effort. The international and donor communities must press aggressively for accountability and respect for human rights, including the use of sanctions and the conditioning of aid. Even where African leaders are taking the initiative, there is still an important continuing role for the international community.

Democratic Republic of Congo (DRC)

From August 1998 until 2003, the DRC was enmeshed in Africa's most devastating and large-scale war, at one point pitting the armies of Rwanda, Uganda, and Burundi together with Congolese rebel groups against the government of DRC supported by Zimbabwe, Angola, and Namibia. Despite three peace agreements aimed at ending the war as well as the creation of a new transitional government that started work in July 2003, sporadic fighting in eastern DRC continued until the end of 2003. It has been estimated that the war led directly or indirectly to the deaths of more than three million civilians, making it more deadly to civilians than any other conflict since World War II.

The conflict in the DRC has presented critical challenges to African leaders. For the A.U., it was a fundamental test of its commitment to conflict prevention, management, and resolution in Africa. For the Southern African Development Community (SADC), the war created significant regional political problems, as member states Zimbabwe, Namibia, and Angola joined, under the SADC umbrella, the former government in Kinshasa to fight the invasion of Uganda and Rwanda. Questions were also raised regarding the legality of the SADC intervention and whether proper authorization procedures were followed by SADC's Organ on Politics, Defense and Security, led at the time by Zimbabwean President Robert Mugabe.

Under the leadership of President Thabo Mbeki, the inaugural chair of the A.U., South Africa brokered talks aimed at a peace agreement between the former Kinshasa government and Rwanda. The talks culminated in the Pretoria Peace Accords of 2002. South Africa also

hosted the lengthy inter-Congolese dialogue that paved the way for an eventual government of national unity. South Africa further provided a substantial military contribution to the U.N. peace operation in DRC, agreeing to place some 1,500 South African troops in a forward base in the volatile east.

While crediting the willingness of South Africa to take a leading role in trying to resolve the conflict, critics remarked that its leaders failed to denounce numerous human rights violations by all parties to the war. Some questioned South Africa's neutrality, accusing it of having economic ambitions in DRC and a close partnership with Rwanda. South Africa was also ineffective in its role as a neutral observer for the Third Party Verification Mission (TPVM), a mechanism for implementing the accords that was finally dissolved in late 2003.

Despite the appearance that peace is closer now than ever, immense challenges still confront the new government of national unity in Kinshasa, among them the need for justice for massive human rights violations committed in Congo by all warring parties—domestic and international. Congolese civil society groups have been vocal in demanding an end to impunity. The international community, including the U.N. Security Council, has repeatedly stated that perpetrators will be held responsible for crimes committed during the war. Yet, as of this writing, no mechanism is in place to prosecute crimes committed before July 2002. July 2002 marks the official inauguration of the International Criminal Court (ICC) which Congo has ratified, and crimes committed thereafter fall under its jurisdiction. The A.U.'s ability to respond effectively to the many remaining post-conflict problems in the DRC

may be the most challenging test of its commitment to taking a more proactive, continent-wide role.

Conclusion

The A.U.'s growing, if tentative, involvement in some of Africa's worst conflicts is a welcome development. However, its interventions must include a stronger human rights component fully integrated into all aspects of peacekeeping operations. As the cases highlighted in this essay show, African peacekeeping forces need both better training and stronger mandates to protect civilians. There is also an obvious need to integrate African peacekeeping initiatives with U.N. efforts, including by ensuring that the A.U.'s Peace and Security Council is closely linked to the U.N. Security Council, and to increase international—including U.N. and G8—support for peacekeeping initiatives on the continent. It is ironic that it is on the poorest continent that peacekeeping is increasingly being devolved to regional rather than international institutions.

Peacekeeping, moreover, is a limited remedy. Peacekeeping interventions usually engage conflict late and focus primarily on providing short-term, often geographically limited military solutions. While such interventions can save lives and bring about significant improvements in short-term security, they do not in themselves necessarily address the underlying structural causes of conflict, including ensuring respect for human rights, accountable government, and the rule of law.

Among the most difficult of these issues is that of ending impunity for past and ongoing human rights crimes, an area where the A.U. has not been as strong as it should be. Although the OAU Council of Ministers endorsed in 1996 a "Plan of Action Against Impunity in Africa" adopted by the African Commission on Human and Peoples' Rights earlier that year, there has been no real political will to implement this largely NGO-drafted document. African leaders have made a commitment (in a declaration on the CSSDCA adopted in 2000) to "condemn genocide, crimes against humanity and war crimes in the continent and undertake to cooperate with relevant institutions set up to prosecute the perpetrators"—yet a member state of the A.U.—Nigeria—is currently refusing to hand over to justice former President Charles Taylor to the Special Court for Sierra Leone. No A.U. voice has been raised to protest this refusal.

NEPAD proposes four key areas for building Africa's capacity to manage all aspects of conflict, including the need to strengthen regional institutions for conflict prevention, management, and resolution; for peacekeeping; for post conflict reconstruction; and for "combating the illicit proliferation of small arms, light weapons and landmines." Nobody could argue that these are not urgent matters, but in the absence of a strategy to deal with deeper causes they are unlikely to be successful. These deeper causes include widespread impunity not only for the worst atrocities but also for the more mundane large-scale theft of public funds; the illegal extraction and sale of Africa's primary resources; and systematic discrimination on ethnic or regional grounds.

Ultimately the A.U. must strengthen its institutional commitment and capacity to monitor and address human rights violations on a regular basis—and it must act before things deteriorate to a crisis point and require military intervention. Although the documents setting up the new African institutions, including the A.U. Constitutive Act, NEPAD, and the CSSDCA, include many bold statements about the importance of good governance and the rule of law, African leaders have yet to show the will to condemn publicly abuses by their peers and insist that measures are taken to end the abuses. The NEPAD and CSSDCA peer review processes should in theory help correct this problem. The international community has a responsibility to ensure that they have the resources to do so and that African civil society groups are able to monitor them as they begin their work.

The opportunities presented by these new African regional initiatives—this moment of hope—should not be thrown away.

A U.S. soldier checks Afghan women villagers for weapons. Kandahar, Afghanistan, May 2003. (c) 2003 Agence France Presse

Losing the Peace in Afghanistan

By Sam Zia-Zarifi

"Failure is not an option." From President George W. Bush on down, this is how American officials describe their policy toward Afghanistan. This statement crops up so often that it sounds like a mantra, as if simply repeating it enough times will guarantee success. Recently, leaders of the North Atlantic Treaty Organization (NATO) have also taken to this statement, reflecting the extent to which NATO officials believe that the organization's future depends on its success in bringing security to Afghanistan.

Yet repetition of the statement alone does not remove the suspicion, oft-heard in Afghanistan, that it reflects more a political calculation of the cost of failure to U.S. and western interests than it does a commitment to the well-being of the Afghan people. Unless the United States, the de facto leader of the international community in Afghanistan, develops and implements policies that take into account and protect the rights and well-being of Afghans, failure is a very real possibility.

U.S. officials have increasingly referred to Afghanistan as a success story that can serve as a model for Iraq. There are successes to point to in Afghanistan. When the United States and its Coalition partners helped oust the Taliban, they opened a window of opportunity for ordinary Afghans to resume their lives. In the first year after the fall of the

Taliban, some two million Afghans who had fled their country returned (although millions more remain refugees); girls and children regained the possibility of attending school or holding jobs; and the voices of civil society, silenced by over two decades of repression and fighting, again emerged around the country.

Long-term success in Afghanistan (as in other post-conflict situations) will mean protecting and expanding these developments until they become stable and sustainable. This is what Afghans hoped and believed the international community, led by the world's lone superpower, would help them do. But key elements of the U.S. approach in Afghanistan—relying on regional power brokers (warlords) and their troops to maintain order, and downplaying human rights concerns—have in fact slowed the pace of progress and, in many instances, stopped or even reversed it. It is this failure to grasp the opportunities provided in Afghanistan that makes U.S. policies there more of a model of what to avoid than what to replicate.

Failure is never far from the minds of Afghans. For the past two years, wherever Human Rights Watch has been in Afghanistan, Afghans have ranked insecurity as their greatest worry. When they talk about insecurity, Afghans often speak of their fear that the current international project will fail. They fear a return to the mayhem of the warlords or the harsh rule of the Taliban, and they fear new troubles sure to arise from a criminal economy fueled by booming heroin production. Afghans are keenly aware that they are only accidental recipients of international support.

Losing the Peace in Afghanistan

Despite the self-congratulatory liberation rhetoric emanating from Washington, London, and other western capitals, Afghans know that it wasn't humanitarian concern, but the September 11 attacks and Osama bin Laden's unwanted residence in Afghanistan that prompted the international community to take notice of Afghanistan again. Afghans fear that the world outside will fail them and banish them again to insecurity, conflict, and chaos, as happened after the Afghan mujahideen's success in driving out the Soviet Union. Failure following quickly upon proclaimed liberation is an option that Afghans have experienced before, and have no wish to repeat.

Afghans are right to worry. The signs are troubling. Despite the initial enthusiasm for rebuilding the country, the world seems to have forgotten them. International support has been scarce. Comparisons with recent peacekeeping and nation-building exercises are troubling. As pointed out by the humanitarian organization CARE International, in Rwanda, East Timor, Kosovo, and Bosnia, donors spent an average of $250 per person annually in aid. If that average were applied in Afghanistan, the country would receive $5.5 billion in aid every year for the next four years. Instead, it has received pledges amounting to less than one-fourth of that sum. The Henry L. Stimson Center, a Washington, D.C.-based think-tank, has pointed out that in Kosovo the international community spent twenty-five times more money, on a per capita basis, than it has pledged in Afghanistan. Similarly, in Kosovo the international community committed fifty times more troops per capita than it has in Afghanistan. Comparisons with Iraq, of course, are even worse: while Iraq received U.S.$26 billion in reconstruction aid in 2003, Afghanistan received less than $1 billion.

This inattention has had a tremendously negative impact. Taliban forces are resurgent and emboldened in their attacks on U.S. troops as well as on the government of President Hamid Karzai and the foreign community supporting him. Warlords, militias, and brigands dominate the entire country, including the city of Kabul. Many women and girls, freed from the Taliban's rule, have again been forced out of schools and jobs due to insecurity. Poppy cultivation has soared to new highs, providing billions of dollars to the Taliban, warlords, and petty criminals who resist the central government. Foreign states with long, mostly destructive histories of interference in Afghanistan's affairs—Pakistan, Iran, Saudi Arabia, India, Uzbekistan, and Russia—are again picking local proxies to push their agendas.

What explains the lack of commitment to Afghanistan? A major reason is that the United States, like previous foreign powers in Afghanistan, sees the country as endemically violent and thus excessively relies on a military response to the country's problems. Viewing the country through a prism of violence has contributed to a number of erroneous policies in Afghanistan, to wit: focusing on the short-term defeat of Taliban and al-Qaeda forces with little regard for long-term security concerns; the resultant reliance on warlords on the national and local levels without regard for their legitimacy with the local population; and the shortchanging of nonmilitary measures. This skewed understanding of Afghanistan's problems and their solutions has persisted despite recent indications that Washington policy-makers now recognize the continuing threats posed in Afghanistan and understand some of the mistakes of their past policies.

Losing the Peace in Afghanistan

What would failure mean in Afghanistan? For the community of nations dedicated to the machinery of global order created after the Second World War, abandoning Afghanistan again would constitute a defeat with repercussions well beyond Afghanistan's borders. The country might once again become a training ground for terror.

President Bush declared in April 2002 that he envisioned nothing short of a Marshall Plan for Afghanistan. The whole world is gauging how the United States and other international actors perform in Afghanistan. For NATO, which has just taken over the responsibility of providing security in parts of Afghanistan, failure would mean losing a raison d'être in a world without a Soviet threat. Failure in Afghanistan would be a sign of the global community's impotence and insincerity in transforming failed states. For most Afghans, failure would mean a return to warfare, chaos, and misery.

The goal of creating a stable, civilian government in Afghanistan faces four different but interlinked challenges: increasingly powerful regional warlords, resurgent Taliban forces, growth of the poppy trade and other criminal activity, and a continuing threat of meddling regional powers, in particular Pakistan, Iran, Saudi Arabia, and Russia. All of these challenges have grown more pressing due to international inattention, and all are likely to become even more threatening as Afghanistan enters a politically charged election year, with a constitutional process recently completed and a presidential election set for June of 2004. Failure to meet any of these challenges will greatly increase the chances of failure in Afghanistan and a return to a conflict that savages the Afghans and

destabilizes Central Asia, the Middle East, South Asia, and, by providing a haven for criminals and terrorists, the world.

Such an outcome is not inevitable in Afghanistan. Nearly all observers, Afghan and international, agree that progress can be made in Afghanistan. It requires an increased, consistent commitment by the international community. It requires integration of military and economic reconstruction efforts. Most basically, and most crucially, it requires listening to ordinary Afghans who seek international assistance so they can work toward peace and prosperity. A serious commitment to Afghanistan has to be made, and made clearly. There are signs that in some quarters of the U.N. and, most importantly, of the U.S. leadership, this need is now understood. However, this commitment is still not being felt in Afghanistan. Without it, failure is likely.

Shortchanging the Peace

There is widespread agreement among Afghans and international observers that there can be no reconstruction without security, and there can be no security without reconstruction. In Afghanistan, as in other post-conflict situations, construction crews cannot build roads, clinics, or schools if they face threatening forces; armed groups will not give up the way of the gun unless they can make a living and protect their families and livelihood without it.

This is by no means an intractable problem; rather, it points out how international support should be used to help a country emerging from

conflict regain a stable peace. International financial aid supports the task of reconstruction, while international security assistance allows hostile groups to stop fighting long enough for reconstruction to help them. The financial aid has to be sufficient in scope to spark reconstruction and generate a self-sustaining cycle of economic growth. The security assistance must be robust enough to discourage forces opportunistically, or intractably, opposed to peace from spoiling the reconstruction. This model has gained widespread acceptance in the past two decades over the course of major reconstruction efforts throughout the world. This was broadly the model promised to Afghans as the U.S. was ousting the Taliban. The international community signaled its commitment to this model in the Bonn Agreement and at the Tokyo donors' conference.

Despite grandiose promises, the international community has been stingy with Afghans. In a shocking display of political short-sightedness, countries that have declared war on terror and on drugs—Afghanistan's two biggest exports in the recent past—have failed or refused to marshal the resources necessary to combat the resurgence of armed groups and drug lords in Afghanistan. Afghans will be the first to pay the price for this failure, but they will not be the last.

President Bush repeatedly invoked the Marshall Plan as a model for U.S. support for Afghanistan. Certainly such a sweeping reconstruction effort, modeled on the United States' largesse and support for Europe after the Second World War, is what is needed in Afghanistan. The country is one of the poorest in the world, with little infrastructure surviving three decades of conflict, no major developed natural

resources, and staggeringly poor health care. According to UNICEF, an average of 1,600 women die in Afghanistan for every 100,000 live births. This figure is 12 times worse than in neighboring Iran, and 130 times higher than in the United States. In the northeastern province of Badakhshan, in particular, the area where the country's strongest warlords come from, the mortality rate is 6,500 per 100,000 live births—the highest maternal-mortality ratio ever documented in the world. The mind can barely comprehend the level of human misery now, much less if the current international reconstruction effort fails.

Far easier to grasp is the level of financial assistance necessary and adequate for the job of reconstructing Afghanistan: most estimates suggest that at least $15-20 billion U.S. dollars will be needed over the next five years. The Afghan government believes it needs even more: some $30 billion. These are relatively small sums, as recent peacekeeping and reconstruction efforts go. By comparison, recent reconstruction budgets in Kosovo, Bosnia, and East Timor were up to fifty times greater when measured on a per capita basis. The amount pledged by donors for Afghanistan is also significantly smaller than the $26 billion sum pledged for the reconstruction of Iraq by the United States this year alone. (And, as *The Economist* magazine has pointed out, Afghanistan is larger than Iraq in terms of population, area, and need.)

Not many of those who control the purse strings in the international community seem to have listened to the call for assistance. Despite the call for $20 billion over five years, the international community has pledged only $7 billion ($1.6 billion from the United States).

Of this $7 billion sum, the international community has to date actually provided only $4 billion. Only a third of this amount has made its way to Afghanistan over the last two years. And of that amount, only some $200 million has resulted in completed projects.

So: two years after the fall of the Taliban, during a period when international and local experts have suggested that five to eight billion dollars worth of international aid was necessary for reconstructing Afghanistan, only some two to five percent of the amount has been delivered to Afghanistan. This hardly seems like the formula for success.

Wanted: Peacekeepers

Two years after the fall of the Taliban, security remains poor in much of the country, with most indicators pointing downward and upcoming elections likely only to aggravate the insecurity. The U.S. has simultaneously pursued two policies in Afghanistan. These could be complementary, but instead they conflict with each other: fighting the war against remnants of the Taliban and al-Qaeda, and creating a stable civilian government in Kabul that could eventually bring peace to the whole country. For much of the first year, the first issue dominated, making a mess for the second.

As part of "Operation Enduring Freedom," the United States currently has some 10,000 troops in Afghanistan, with another 2,000 from the United Kingdom, Australia, and other Coalition members. The mandate of these troops is to combat the Taliban, not to provide security for

Afghans. In fact, as of this writing, these troops freely engage and support local warlords and military commanders who ostensibly will fight the Taliban, with little or no regard for how the warlords treat the local citizenry. These troops have no mandate to protect civilians in case of fighting between rival militias; they will not act to enforce the writ of the central government against recalcitrant warlords.

The mandate to help support the central government (but not Afghan civilians directly) falls to the five thousand strong International Security Assistance Force (ISAF), which has had a completely distinct command and control structure from the U.S. forces. Of the five thousand, some one thousand are devoted to protecting embassies and other important foreign institutions.

A comparison with recent post-conflict situations, put forward by CARE International, illuminates the limited scope of the international community's commitment to Afghanistan: while in Kosovo, Bosnia, and East Timor the international peacekeeping force amounted to one peacekeeper per seventy or so people, in Afghanistan that ratio was one peacekeeper per five thousand people.

There is no question that ISAF has been modestly successful in increasing security in Kabul, hence helping support the remarkable economic development that the city has witnessed over the last two years, and demonstrating how quickly Afghans can and will work toward creating a civil society if given the space to do so. But even in Kabul and its immediate environs ISAF did not (or could not) carry out one of its

central missions, which was to rid Kabul of factional militias. Armed men, particularly those associated with the forces of Defense Minister Marshall Fahim and fundamentalist warlord Abdul Rasul Sayyaf, still roam the streets by day and engage in robbery and banditry by night.

Afghans outside Kabul have been clamoring for two years to share in the benefits of international security assistance. From the first moments that Human Rights Watch researchers traveled around Afghanistan after the U.S. rout of the Taliban, Afghans told us that they wanted foreign peacekeepers. The chief U.N. representative to Afghanistan, Lakhdar Brahimi, eventually took up this call for expanded security. President Hamid Karzai joined in the clamor too, after his initial bursts of misplaced optimism were taken advantage of by U.S. officials, who claimed that Afghanistan was secure and needed no more aid in that regard.

Many senior European officials also generally accepted the argument for greater security forces. But they said their countries did not have adequate forces to offer; or if they did, they didn't have the ships or airplanes to get them to Afghanistan; or if they did, they lacked the trucks and helicopters necessary to transport them around the country. Meanwhile, the United States—which possessed the only readily available logistical force capable of providing security throughout Afghanistan—kept asking why Europe could not contribute more to the Afghan cause.

This state of affairs lasted until mid-2003. By then, it had become apparent that the security situation in Afghanistan was seriously deteriorating. The Taliban had resurfaced as a military threat in the south and the southeast, while serious clashes were taking place between different factional forces on a regular basis in the northwest and the west. Given this reality, those European allies of the United States that had refused to cooperate with the attack on Iraq felt compelled to contribute to the operations in Afghanistan.

After squandering the first year after the fall of the Taliban, the international community signaled its growing seriousness about dealing with the security problems of Afghanistan. These signals have yet to be translated into concrete results.

The first tentative step was the creation of so-called Provincial Reconstruction Teams. These teams combine some 300 to 400 military and intelligence personnel with reconstruction specialists. The U.S. initially fielded four such teams to Gardez (in the southeast), Kunduz (the north), Mazar-i Sharif (northwest), and Bamiyan (center). As of this writing, the U.K., Germany, and New Zealand have agreed to take over one PRT each, and four other PRTs are scheduled to join them by early 2004 in Herat (the west), Parwan (center), Jalalabad (southeast), and Kandahar (south).

By most accounts, the PRTs have somewhat improved security conditions, although this should not be exaggerated: the city of Mazar-i Sharif, for instance, is still a flashpoint of local conflict despite the

presence of a well-regarded British PRT. But the real problem with the PRT program is that it is a bandage being touted as a cure. After months of claiming that no expansion of ISAF was possible because it would require thousands of (unavailable) armed troops, it seems dishonest of the U.S. and the European powers to now claim that a few hundred lightly armed reconstruction teams will suffice to secure Afghanistan. The security mandate of the U.S. PRTs is more focused on force protection than the protection of Afghans. And, at least some military experts have warned that sending the relatively small PRTs out across Afghanistan without adequate military support raises the possibility of leaving them vulnerable to hostile action—threatening repetition of problems encountered in Bosnia, where U.N. peacekeepers effectively became hostages to Serb forces and were unable to protect the civilians under their purview.

Humanitarian aid organizations, which still provide for many of the basic needs of the Afghan people, vociferously oppose the PRTs' confusion of military and aid missions. Such blurring of distinctions poses a real threat to civilian aid workers, who become viewed as agents of the military forces instead of as independent actors, and thus become targets for attack.

It remains to be seen how the PRTs will interact with the newly reconstituted ISAF under NATO command. Clearly, the Afghanistan operation is a major undertaking for NATO. It constitutes NATO's first combat operation outside of Europe, and it signals a possible new direction for an international alliance whose original mission—countering the Soviet threat to Europe—no longer exists. Lord

Robertson, NATO's chairman, powerfully expressed his vision of a new, leaner and meaner NATO that can serve as a global force. He criticized the alliance's current force configuration, where the 1.4 million men in arms of NATO's non-U.S. members can field only 55,000 troops. Whether NATO can overcome its institutional weaknesses remains to be seen. Several military and civilian NATO officials have voiced concerns about the coalition's lack of sufficient logistical and communication equipment in Afghanistan. Such shortcomings could render NATO forces, as well as the PRTs, vulnerable to attack.

Fear, Drugs, and the Taliban

Criminality, particularly poppy cultivation and the heroin trade, has blossomed again in Afghanistan, generating billions of dollars for forces outside the control of any legitimate authority. Much of this trade and the money it generates is under the control, or at least the influence, of various major and minor military commanders, who use this money to increase their military capability and gain independence from the central government and any international troops working with them. The Taliban, too, has used this trade to finance its increasingly sophisticated and brazen attacks. These problems could have been avoided, had the U.S. and the international community acted more responsibly in Afghanistan. All these problems are still resolvable, if the world acts quickly and seriously.

In the absence of the Taliban, which in some years managed to stop nearly all poppy production, or any other limiting authority, opium cultivation has again exploded in Afghanistan. Farmers who have waited

futilely for agricultural assistance from the central government or the international community have turned to poppy cultivation. As a result, Afghanistan has regained its position as the world's leading producer of heroin. According to the U.N. Office on Drugs and Crimes, the country's 3,000 metric tons of opium production in 2003 constituted two-thirds of the world's supply and generated revenues of $2.3 billion for Afghan warlords, corrupt provincial authorities, and even the Taliban. Both the absolute and the proportionate impact of drug trafficking is expected to be still higher in 2004 because the laboratories used to transform poppies into opium and heroin are now increasingly located in Afghanistan. This sum—equivalent to nearly half of the legitimate gross domestic product—finances forces opposed to central authority.

Criminality in general—including smuggling of timber and other goods to and from the Middle East, Central Asia, and South Asia—generates large sums of unregulated income. The lure of illicit income is especially strong in the absence of legitimate economic outlets due to failures of reconstruction. Not surprisingly, there are strong indications that the regional armed leaders—the warlords—are extensively involved in the drug and smuggling trade. The more powerful warlords, those with a major political base, do not even need to rely on drug trafficking, confident that they can avoid such potentially problematic sources of income.

The Rule of the Warlords

Who are these warlords? Warlord is not a technical word. In Afghanistan, it is a literal translation of the local phrase "jang salar," and it has simply come to refer to any leader of men under arms. The country has thousands of such men, some deriving their power from a single roadblock, others controlling a town or small area, and still others reigning over large districts. At the apex of this chaotic system are some six or seven major warlords, each with a significant geographic, ethnic, and political base of support. Over the last two years, Human Rights Watch has documented criminality and abuses by commanders small and large, and by nearly all of the major warlords: General Atta and General Dostum in the north, Ismail Khan in the west, Gul Agha Shirzai in the south, Abdul Rasul Sayyaf in the center, and, the most powerful, Marshall Fahim, the senior vice president and minister of defense.

Fahim's background and current behavior illustrates why these men inspire such fear among Afghans. Fahim was one of the mujahideen who fought the Soviets for years under the predominantly Tajik Northern Alliance and the group's fabled leader, Ahmad Shah Massoud. When the mujahideen forced out the Soviets, he became the chief of security for the government of Burhanuddin Rabbani. He inherited the command of the Northern Alliance on September 9, 2001, when suicide bombers assassinated Massoud.

As the fortuitous leader of the last remaining credible force fighting the Taliban, Fahim found himself in a strong position to negotiate with

grateful American military forces and to gain an important position in the transitional Afghan authority. Thus his innovative approach to the post of minister of defense: he brought his own army with him. The Northern Alliance forces, estimated to include about 70,000 troops, possess heavy artillery, land and air transport vehicles, and armored vehicles; and they have no loyalty to President Karzai or any other civilian government in Afghanistan. With this force behind him, Fahim bullied Karzai, the United Nations, and the United States into giving him the vice presidency.

Marshall Fahim put this advantage to good use. He immediately began placing fellow Tajiks from the small Panjshir valley north of Kabul in important positions. As he reconstituted the Afghan army, with American and European assistance, he amassed a large cache of weapons and supplies intended for the national army. It is clear that he did not envision the army as facing a foreign threat or even a significant local threat from the Taliban. At the end of 2002, Kabul and the area directly controlled by Fahim (northeast of the capital) housed fourteen divisions. In the north, there were at least ten divisions. By contrast, the west received only four divisions, while the south got another four, and the southeast and the east each received five. The center received two. Of the thirty-eight generals chosen for the new army by Fahim, thirty-seven were Tajiks (the other was Uzbek). Of the thirty-seven Tajiks, thirty-five were linked to Fahim's political group; of a total of one hundred generals appointed by Fahim in early 2002, ninety were from his group.

Fahim's reach extended beyond political and military power. Like many other senior political and military officials, Fahim has reportedly enriched himself through an extensive patronage network that perpetuates and extends his power. Not surprisingly, this network displays nepotism familiar from the Tajik-controlled military.

And yet none of this power translates into improved conditions even for Fahim's fellow Tajiks in Badakhshan, which remains one of the poorest, most oppressed areas in Afghanistan. In Badakhshan, women suffer from the lowest standards of health care in the world, poppy cultivation is rising exponentially, and criticism of the state of affairs is not tolerated.

Despite this sorry record, U.S. military officials defend Fahim as a stalwart ally against the Taliban and a heroic fighter against the Soviets. This is how the warlords cast themselves, and how the U.S. has treated them: mujahideen, defenders of the faith and homeland, who fought against the Soviets and the Taliban until, with American support, they liberated Afghanistan.

In its unwavering support for Marshall Fahim and the other warlords, the United States pretends to forget that they ruled the country for four ruinous, devastating years—years so bad that many Afghans were relieved when the Taliban routed the warlords. The warlords, in their public pronouncements, never refer to what they did from 1992 to 1995, but no Afghan fails to recall these years without a shudder. Marshall Fahim himself has been personally implicated in various purges and

atrocities committed by Northern Alliance forces during the civil war that killed some 10,000 civilians in Kabul in 1992 and 1993. Other warlords, like Abdul Rasul Sayyaf, Ismail Khan, General Dostum, and Gul Agha have essentially similar bloody backgrounds.

Furthermore, these warlords and U.S. officials neglect to mention that on October 6, 2001, when the United States began attacking the Taliban, there were almost no warlords left in Afghanistan. By that time, the Taliban had either co-opted the major warlords, or destroyed them. Arbitrary and criminal rule by local warlords had for the most part been replaced by the brutal authoritarian rule of the Taliban, until the September 11 attacks on the United States once again drew the attention of the United States to Afghanistan.

The American attack assumed a military strategy that avoided ground combat and the resulting threat to U.S. forces. The strategy of aerial bombardment, while capable of punishing the Taliban, lacked the ground troops necessary to secure territory. To carry out this task, the United States needed local troops, and for this the United States physically brought back the warlords, rearmed them, financed them, supported them militarily, and reinstalled them in power. The CIA simply handed suitcases of cash to warlords around the country. This investment allowed local commanders to resume their former positions and rearm themselves, ostensibly to take on the Taliban. It also gave them the seed money to become self-sufficient by engaging in smuggling, drug trafficking, and general criminal activity. Predictably, their rule has been nasty and brutal, as grimly documented in numerous

accounts gathered by Human Rights Watch researchers and others from throughout Afghanistan over the past two years.

Just as predictably, the warlords have performed as poor proxies in the fight against the Taliban. Most famously, local troops subcontracted by American forces are believed to have allowed Osama bin Laden to escape capture in the mountains of southeastern Afghanistan in the immediate aftermath of the Taliban's retreat. In the time since, these ostensible allies have attacked their personal rivals by providing false information to goad or trick U.S. forces into attack. The depredations and lawlessness perpetrated by these armed thugs have fueled the drug trade, fostered resentment that has renewed the appeal of the Taliban's harsh brand of justice, and squandered the good will of the Afghan people toward the international community.

Take the case of Hazrat Ali, the warlord of Nangarhar province, based in the southeastern city of Jalalabad, astride the main road between Kabul and Pakistan. Hazrat Ali is an ally of Marshall Fahim; in fact, Fahim imposed Hazrat Ali on the province, favoring him over a local candidate in 2002. Wanton looting, sexual assault on women, girls, and boys, intimidation of critics, and brigandage have been the hallmarks of Hazrat Ali's rule—though such abuses are by no means unique to the area under his command.

Press reports consistently link Hazrat Ali to the burgeoning opium trade and smuggling networks now choking Jalalabad. When Human Rights Watch publicly criticized Hazrat Ali, he responded by publicly

threatening Human Rights Watch's researchers. But U.S. and U.K. officials have confirmed that Hazrat Ali has received (and likely continues to receive) direct payments for his role in fighting the Taliban and maintaining order in his sector. Meanwhile, the British government, which has taken the lead in the anti-narcotic effort, has failed to provide adequate resources for the job in the area under Hazrat Ali. Afghan anti-narcotic officers have complained about the lack of financial and military support from American and British forces on the crucial trunk road between Kabul and Pakistan.

The Return of the Taliban

The warlords' reemergence and blatant misrule, and the international community's seeming acquiescence, has created fear and despair around Afghanistan, but nowhere more so than among the rural Pashtun of the south. The Pashtun are Afghanistan's largest ethnic group, comprising about 40 percent of the population. They formed the backbone of the Taliban movement, in part reflecting the greater prevalence of conservative religious beliefs among Pashtuns, and in part reflecting their fear of non-Pashtun groups, such as the Northern Alliance, gaining control over Afghanistan. The dominance of Tajik forces in Kabul, personified by Marshall Fahim, has further stoked the Pashtuns' sense of marginalization from political developments in Afghanistan. Thus the Pashtun areas of southern and southeastern Afghanistan have witnessed an upsurge in activity by the Taliban and forces under the command of Gulbuddin Hekmatyar, a long-active extremist warlord with links to Pakistani security forces and Saudi Arabian Wahhabist groups.

The result of this upsurge has been an absolute breakdown in security in the Pashtun areas and increasing human rights violations. The United Nations and international non-governmental organizations now consider nearly two-thirds of the Pashtun-belt as no-go areas. The assassination on November 16, 2003, of Bettina Goislard, a young French staffer for the U.N. High Commissioner for Refugees, underscored this terrible threat. Goislard was the first U.N. worker killed in Afghanistan, but by September 2003, an average of some three- dozen Afghan and international staff members of various aid agencies and reconstruction teams were coming under armed attack. The targeting of foreign and local humanitarian groups suggests a troubling change in tactics by the Taliban and other groups opposed to the central government in Afghanistan.

The resurgent Taliban has exhibited even more violence and less tolerance than during its previous incarnation. Attacks on aid groups in the period between May and August 2003 occurred nearly three times as often as during any period in the previous year. Flush with income from the drug trade (which previously the Taliban seems to have avoided and actively combated), the Taliban can now outspend and outman not just the weak central government in Kabul, but even the U.S. forces: In areas around the southern city of Kandahar, the Taliban is reportedly paying their fighters as much as $70 a week, going up to $120 a week for fighters who attack American forces. The United States is reportedly paying its local warlord allies $60 a week. Not surprisingly, the Taliban now claims to hold large portions of several southern and southeastern provinces.

One thing that unites the Taliban and local warlords who are ostensibly allied with Karzai's government or U.S. forces is their opposition to any legitimate political process in Afghanistan that could return peace and civility to the country. Human Rights Watch documented numerous instances of warlords intimidating local representatives during the constitutional drafting process, which ended in December. These warlords are intent on imposing their own representatives on the upcoming Afghan government and thus completing their entrenchment as sources of power, a process that they began during the emergency *loya jirga* (grand council) in June 2002. As presidential elections slated for June of 2004 approach, it is likely that the warlords will also step up their efforts to grab power.

The Taliban has exhibited less interest in influencing the electoral process than in simply stopping it. It has declared the constitutional process invalid, instead offering its own limited version of religious law. Through "night letters" (surreptitiously distributed pamphlets) and, increasingly through public pronouncements, the Taliban has threatened to harm candidates as well as those who vote in the elections. The Taliban has reserved special venom for those Afghan women daring enough to stand as candidates, threatening not only them, but also their families.

The impact of Taliban intimidation has been dramatic. Compared with elections preceding the emergency loya jirga—which itself faced serious intimidation and intrusion by warlords, participation in elections has dropped across Afghanistan, with the lowest levels seen in the south. The United Nations has reported that popular participation in elections

to pick representatives for the constitutional process was so low in some precincts as to challenge the legitimacy of the elections.

The Failure Option

The degenerating security situation has already seriously hampered Afghanistan's political and economic reconstruction. Nevertheless, the electoral process, dictated by the Bonn Agreement, marches on. International experience suggests caution before embarking on a national election where national security has not been established. In Bosnia and Liberia, for instance, the election process aggravated political power rivalries and fostered violence.

The Afghan government is responsible for providing security for elections, but currently lacks the requisite capability. The Afghan National Army, with at most 7,000 effective troops, is still under the command of Marshall Fahim, and lacks the military capacity or the political legitimacy to protect voting booths. The Afghan police force, even more necessary than the army for providing security in cities and towns and along the main roads in Afghanistan, is even worse off than the army. The United Nations Development Fund has established a Law and Order Trust Fund (LOTFA) to gather the estimated $350 million necessary to reform and fund the Afghan police force over the next five years. As of this writing, only $10 million had been delivered to LOTFA by the international community. (The European Union, shocked by the lack of security and the burgeoning drug trade, has reportedly agreed on another $50 million, but this sum had not been delivered at this writing). Police officers, many of whom complain that their salaries have not

been paid, cannot reasonably be expected to protect Afghan voters and candidates.

In short, at present there appears to be no alternative to the international community assuming the burden of providing security in the run-up to elections—a responsibility familiar from efforts in the Balkans and in East Timor. Yet inexplicably, the United States and the international community as a whole seem to be ignoring this lesson. The shortage of international security forces, discussed above, is particularly acute when considered in the context of the 2004 elections: Not a single international trooper is mandated to protect the election process. The American forces lack this mandate, the PRTs lack this mandate, and even ISAF (even if expanded under NATO command) lacks this mandate. Although NATO performed an important role in securing elections in Kosovo, apparently the organization's planners have not yet considered such a responsibility in Afghanistan.

Afghans and international observers agree that international assistance is essential to safeguard Afghanistan during this political season, yet international assistance has still not been offered. Without such assistance, a weak Karzai government will likely find itself hostage to the competing demands of ethnically based warlords and the external threat of the Taliban. Afghanistan may return to conditions similar to those that prevailed a decade ago, with several ethnically based militias vying with the Tajiks for control of Kabul while the Taliban, thriving on Pashtun resentment, threatens from the south. Such an outcome would, of course, constitute a failure of the worst kind for Afghans and Afghanistan.

Even if the election takes place without serious incident, there are dangers for Afghanistan—the most obvious is international apathy. With its attention diverted to developments in Iraq, for example, the international community could declare the election a success, usher in a new Afghan government, applaud, and then leave. Under these conditions, the inevitable face-off between the entrenched warlords would begin in earnest as soon as the last foreign soldier left the country.

The Road Forward

A better future for Afghanistan is possible, but it requires international commitment and resources sufficient to begin to set the country on a better course and give Afghans time to prepare to shoulder the burden themselves.

First, the international community must provide economic assistance commensurate to the task of rebuilding Afghanistan. Every step of the reconstruction of Afghanistan has been hampered by a lack of financial assistance. The international community should begin by at least honoring existing pledges to Afghanistan, and then considering new and greater pledges at the upcoming donor conference in Tokyo.

Second, the international community must take responsibility for providing security beyond Kabul. The expanded PRTs are a move in the right direction in terms of improving security, but they hardly suffice. Their mandate needs to be expanded geographically (to cover more

areas of Afghanistan) and focused to concentrate on security and leave reconstruction to other organizations. NATO, whose own credibility is on the line, must reassess its mission in Afghanistan, greatly bolster its military capability, and assume rules of engagement that focus on protecting the rights of the Afghan people. Afghan warlords, while they may have thousands of armed men at their command, can hardly stand up to a serious western military force, as amply demonstrated by the much-vaunted Taliban's rapid dissolution in the face of sustained force. The warlords know this, as do many mystified Afghans, who cannot understand why the United States and international institutions seem so cowed by the warlords.

Military experts have repeated that Afghanistan's reconstruction needs a "robust spine"—a military force, relying on air power and quick deployment, that can support the legitimate central government and the reconstruction project. Its existence, and the commitment it signifies, would suffice in many areas to bring into line the majority of regional commanders, whose chief impetus right now is opportunistic profit at the cost of the central government.

Meanwhile, groups intractably opposed to a civilian government in Afghanistan—so-called total spoilers, such as the Taliban, Gulbuddin Hekmatyar, and even some warlords temporarily allied with the central government, like Sayyaf—must be dealt with as a real military threat for some time to come. No Afghan army can or should be expected to assume this burden alone in the near future. Nor should a poorly thought out Afghan army be created as an ostensible cure-all or excuse for international disengagement, as such an army would almost certainly

become just another tool in the power struggle between competing factions. For the time being, the responsibility for security rests with the United States and its coalition partners.

Finally, the international community should give greater priority to deploying human rights monitors to gauge conditions on the ground and listen to what the Afghan people are saying. The United States seems to have very little official capacity for engaging the Afghan people directly. The PRTs, for instance, do not have a human rights protection mandate and, as far as is known, do not include any monitors dedicated to human rights protection. The U.N. too lacks this capacity. The United Nations has adopted an admirable policy of operating with a light footprint, but there is a time when the print can be too light. Afghanistan is in such a period now. Only eight human rights monitors are envisioned for covering all of Afghanistan, as opposed to the hundreds that monitored the post-conflict period in Guatemala, East Timor, or the Balkans. Even worse, of these eight, only five positions are filled. U.N. officials claim they simply cannot find qualified candidates for these posts. At a policy level, this seems to violate one of the tenets of Lakhdar Brahimi's own blueprint for U.N. operations, namely that bureaucratic obstacles should not be allowed to hobble operational needs. On a more practical level, however, this obvious failure of management bolsters the suspicion that the United Nations may be reluctant to listen to what Afghans have to say, lest it upset the carefully balanced (though ultimately unstable) political structure maintained in Afghanistan by the United States and the United Nations.

The international community should also support emergent voices for accountability and the rule of law in Afghanistan, such as the brave but beleaguered Afghan Independent Human Rights Commission (AIHRC). Created by the Bonn Agreement, the Commission has performed admirably to date, listening to ordinary Afghans and voicing their concerns, even as each report it issues on abuses by members of the current government is followed by threats to AIHRC members.

One thing AIHRC members have asked for, repeating the demands of ordinary Afghans, is justice for past and current abuses. As mentioned above, many of the senior members of the current cabinet have bloody hands. They should be investigated, arrested, prosecuted. They should be kept out of politics, as was envisioned by the Bonn Agreement. The international community shamefully failed to follow the will of the Afghan people when they allowed warlords into the emergency loya jirga process. They are making the same mistake during the constitutional process. It is essential to begin a process of securing justice for the worst crimes, demonstrating that a repeat of the past will not be tolerated. Ignoring this issue, which consistently tops the list of demands by ordinary Afghans, will aggravate insecurity, decrease legitimacy, and perpetuate longstanding conflicts. The international community should help by providing funding, expertise and, most importantly, political support to create a justice mechanism capable of helping Afghans grapple with their bloody past.

More specifically, the United States must promote respect for the rule of law in Afghanistan. The U.S. military must cease cooperation with regional warlords outside the purview of the central government. U.S.

forces must assume a mandate that respects and protects the rights of Afghan civilians against abusive local warlords.

Perhaps more importantly, U.S. military forces must abide by international human rights and humanitarian law while conducting operations in Afghanistan. The use of excessive force during military operations in residential areas has generated tremendous resentment against the international community. The U.S. practice of detaining Afghans without charge or other due process rights at ad hoc prisons in Bagram and other locations around Afghanistan has made a mockery of respect for justice. Such rights violations are a festering sore for many Afghans and a terrible example for a country where every two-bit warlord runs a private prison.

Success or failure in Afghanistan is ultimately not a military issue, or at least not only a military issue. Current international policies toward Afghanistan demonstrate very little integration of the military and reconstruction efforts. Continuing in this manner is to court failure.

Mustafa Subhi Hassan al-Qubaisi, 12, holds a photo of his twin brother Muhammad, shot by U.S. troops from the 82nd Airborne on June 26 in the Hay al-Jihad neighborhood of Baghdad. September 23, 2003. © 2003 Fred Abrahams/Human Rights Watch

Sidelined: Human Rights in Postwar Iraq

By Joe Stork and Fred Abrahams[2]

Human rights have had an inconsistent place in the Iraq crisis of 2003. The Bush administration's campaign to build domestic and international political support in the lead-up to war sometimes invoked the appalling human rights record of Saddam Hussein's government, though few believed this was a significant motivating factor behind the decision to go to war. After the battlefield successes of March and April, as its claims of Iraqi weapons of mass destruction lost credibility, the administration more insistently cited human right crimes to justify the war retrospectively.

In the military occupation of Iraq and counterinsurgency operations, however, the United States and its partners have treated human rights issues as matters of secondary importance, demonstrating ambivalence toward human rights and humanitarian law concerns. They have too often set aside lessons from past international interventions that demonstrate the importance of rights monitoring and protection.

This essay examines three aspects of this problem: the failure to deploy sufficiently trained and equipped forces for law enforcement responsibilities; the failure initially to protect mass grave sites or to

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[2] Fred Abrahams, a former staff member, is currently a consultant and conducted research for Human Rights Watch in Iraq in 2003.

ensure that professional forensic exhumations were conducted to preserve evidence of past atrocities; and the dogged resistance of the U.S. to any international role in efforts to address responsibility for serious past crimes in Iraq.

The despotic and abusive rule of Saddam Hussein is gone, and Iraqis today can express themselves without fear of arbitrary detention, torture, or execution. Political parties and civic associations have emerged quickly, and many of the new associations are dedicated to one or another aspect of a larger human rights agenda, such as documenting cases of the "disappeared" or safeguarding and cataloguing documents of the myriad security agencies that were the infrastructure of Ba`thist repression. But the rule of law has not arrived, and as of this writing, seven months into the occupation, the country is still beset by the legacy of human rights abuses of the former government, as well as new ones that have emerged under the occupation.

Meeting Law Enforcement Responsibilities

The problematic human rights dimension of U.S. policy in Iraq stood out clearly in April and May, with the failure of war planners to address post-war obligations of the U.S.-led coalition to respect civilian lives and property, including public property, and provide basic security for Iraqi residents. Initially, such security extended to little beyond the Ministry of Oil, which was well-guarded while other government buildings were looted. The occupying power neglected to provide sufficient and suitable forces for this task and failed to order troops to take steps to halt the widespread and protracted looting, therefore not meeting its

international humanitarian law obligations.[3] U.S. Defense Secretary Donald Rumsfeld appeared to dismiss such concerns with his "freedom's untidy" comment,[4] perhaps reflecting his own share of the responsibility for this failure. Subsequent accounts of the Pentagon's dismissal of postwar plans developed by other government agencies, such as the State Department-sponsored Future of Iraq Project, reinforced such perceptions.[5] Lt. Gen. (Ret.) Jay Garner, who headed the U.S. stabilization and reconstruction effort for the first month after major combat ceased, said that the Future of Iraq Project's report "was good work" but that it "wasn't well received" by the Pentagon's civilian leadership.[6]

One irony was the failure to stop the looting of Iraqi military arsenals. Human Rights Watch researchers in Iraq came across caches of antitank and antipersonnel mines, and even missiles. It is not clear why the occupying forces did not more actively collect the weapons that

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[3] The Hague Regulation of 1907, to which the U.S. is party, provides that the occupying power "shall take all steps in his power to re-establish and insure, as far as possible, public order and safety…." Art. 43.

[4] "DoD News Briefing – Secretary Rumsfeld and Gen. Myers," transcript, p. 7, www.defenselink.mil/transcripts/2003/tr20030411-secdef0090 (retrieved December 2, 2003).

[5] The project brought together several hundred Iraqi expatriates under State Department auspices beginning in April 2002 to assess Iraqi societal and infrastructure needs and propose reconstruction plans in various sectors.

[6] Garner also said he tried to recruit the project's director, Tom Warrick, to his team, but that Warrick apparently "just wasn't acceptable" to the Pentagon. See Frontline documentary "Truth, War and Consequences," www.pbs.org/wgbh/pages/frontline/shows/truth/interviews/garner (retrieved December 2, 2003).

insurgents might be using against them now. "There were a couple of areas that we were concerned about—nuclear plants and that type of thing, for obvious reasons," Lt. Gen. James Conway, Commander of the First Marine Expeditionary Force, told the U.S. public television news program Frontline. "But the things that came down for us to protect were very few in number in the early going. Not a very extensive list at all."[7]

Eventually the looting slowed, when all that remained was dust and debris. But security remained a problem in many cities, with thefts, car-jackings, kidnappings, and sexual assaults on women and girls an ongoing concern. As with the looting, this problem had been foreseen. Recent experience from Kosovo, East Timor, and Afghanistan made clear that professional police forces are required after an armed conflict to patrol streets and maintain civic order. Also needed are jails and judges—the basics of a criminal justice system. Many experts warned well before the war that, in the words of the Future of Iraq Project report, "the period immediately after regime change might offer these criminals the opportunity to engage in acts of killing, plunder and looting."[8]

Security was not merely desirable, but reflected the legal obligation of the occupying power under international humanitarian law to restore

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[7] Ibid., see http://www.pbs.org/wgbh/pages/frontline/shows/truth/interviews/conway.html

[8] "U.S. study foresaw pitfalls in Iraq" by Eric Schmitt and Joel Brinkley, *New York Times*, October 20, 2003.

and maintain public order. It was a chaotic post-conflict scene, as U.S. commanders say, but the conditions did not absolve the U.S. and its coalition partners of their responsibilities under international humanitarian law.

Problematic adherence to human rights norms in Iraq since major combat operations ended has been especially evident in the deployment of combat forces for policing tasks. Human Rights Watch investigations of civilian deaths have raised serious concerns regarding the failure to deploy sufficient numbers of appropriately trained and equipped forces in this regard. These serious shortcomings have been exacerbated by a systematic failure to undertake sufficiently high-level investigations in cases of civilian deaths that may have resulted from excessive or indiscriminate use of lethal force by U.S. troops.[9]

The death of `Adil `Abd al-Karim al-Kawwaz is a case in point. On August 7, al-Kawwaz was driving home from his in-law's house in Baghdad with his wife and four children just prior to the evening curfew. It was dark and he did not see the U.S. soldiers from the 1st Armored Division operating a checkpoint with armored vehicles and heavy-caliber guns. No signs or lights indicating their presence were visible, and al-Kawwaz did not understand he was supposed to stop. He drove too close and the soldiers opened fire, killing him and three of his children, the youngest of whom was eight years old.

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[9] *Violent Response: The U.S. Army in al-Falluja*, Human Rights Watch, June 2003; *Hearts and Minds: Post-war Civilian Casualties in Baghdad by U.S. Forces*, Human Right Watch, October 2003.

This shooting was not an isolated event. At checkpoints, during raids, or after roadside attacks, edgy U.S. soldiers have resorted to lethal force with distressing speed. Troops also have not been adequately equipped with non-lethal or less lethal equipment, such as tear gas and rubber bullets, for use in establishing control of a situation without recourse to live fire. When they have reason to use lethal force, soldiers sometimes respond in an excessive and indiscriminate way that put civilians at risk.

Compounding the problem is a lack of accountability for unlawful deaths. Coalition soldiers and civil authorities, and even independent non-Iraqi contractors engaged by them, are immune from Iraqi law, under the terms of Coalition Provisional Authority (CPA) Decree 17. This leaves it up to the member states of the U.S.-led coalition and their respective militaries to investigate such incidents and hold accountable anyone found to have used, or condoned the use of, excessive or indiscriminate force.

The U.S. military has asserted that all incidents involving suspicious or wrongful death are being properly investigated. In response to a Human Rights Watch report, a CPA statement said, "We have fully investigated all credible reports and have taken appropriate action considering the constitutional protections for all the soldiers involved, applicable military law, and the law of war."[10]

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[10] Vivienne Walt, "Iraqi families want retribution for deaths; some charge U.S. soldiers unjustly shoot, kill civilians," *San Francisco Chronicle*, November 24, 2003.

But adequate investigations did not take place, contributing to an atmosphere of impunity in which soldiers feel they can pull the trigger without consequences if their actions resulted in wrongful death or injury. As of October 1, the U.S. military had announced completing only five investigations into allegedly unlawful civilian deaths. In all five investigations, the soldiers who fired were found to have operated within the military rules of engagement. In one case, the findings recommended that checkpoints be better marked--unfortunately that came in September, after another family had been killed in a car at a checkpoint.

Human Rights Watch investigated two of these five incidents and found evidence to suggest that soldiers had in fact used excessive force. In one case, from August 9, soldiers from the 1st Armored Division's 3rd Brigade mistakenly shot at an unmarked Iraqi police car as it chased suspected criminals in a van, killing two Iraqi policemen. A witness said one of the policemen was killed after he had stepped out of his car with his hands raised and shouting "No! Police!" U.S. soldiers beat a third policeman who was in the car.

The second case was the shooting of the al-Kawwaz family, recounted above. The U.S. military called that "a regrettable incident," but determined that soldiers from the 1st Armored Division's Alpha 2-3 Field Artillery had acted within the rules of engagement. The U.S. military gave the family $11,000 "as an expression of sympathy."

Human Rights Watch investigated civilian deaths in Baghdad as a result of U.S. fire after May 1, 2003, and estimated that as of September 30 there had been ninety-four cases in the capital alone that warranted an official investigation. The U.S. military does not even attempt to track how many civilians its soldiers have killed, saying it is "impossible for us to maintain an accurate account."[11] The failure to attempt even a rough tally suggests that Iraqi civilian loss of life or serious injury are not primary concerns.

U.S. military personnel acknowledge that one underlying problem is the reliance on combat troops to perform post-conflict policing tasks. Soldiers from the 82nd Airborne or the 1st Armored Division fought their way into Iraq and are now being asked to show patience and restraint in an increasingly risky environment. As one U.S. officer told Human Rights Watch, "it takes a while to get the Rambo stuff out." Military police, by contrast, are better suited to deal with these tasks, but the Bush administration is apparently reluctant to call up more reservists or National Guard forces that could perform these tasks.

The rules of engagement of U.S. troops in Iraq are not made public, due to security concerns. But Iraqis have a right to know how they can avoid walking into their own deaths. Through proper signs in Arabic and public service campaigns, they should know how they are expected to behave at checkpoints or during raids on their homes.

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[11] *Hearts and Minds: Post-war Civilian Casualties in Baghdad by U.S. Forces*, Human Right Watch, October 2003.

U.S. soldiers have for the most part not had training to compensate for their understandably weak comprehension of Iraqi culture, not to mention an inability to speak or understand Arabic. For at least the first months of the occupation, most checkpoints and patrols did not have Arabic translators available. At checkpoints, soldiers used hand signals or verbal orders that Iraqis did not understand, sometimes with fatal results. Other misunderstandings were also damaging. Male U.S. soldiers sometimes searched Iraqi women, although this practice abated over time. Other soldiers put their feet on the heads of detainees, a serious affront to personal dignity.

As attacks on U.S. soldiers have grown more frequent and more intense, the danger of harm to civilians grows. After unknown attackers shot down a U.S. Blackhawk helicopter near Tikrit on November 7, killing six soldiers, the U.S. military responded with a "show of force" that included the use of tanks, howitzers and planes dropping 500-pound bombs. "We've lost six of our comrades today," a U.S. officer was quoted as saying. "We're going to make it unequivocally clear what power we have at our disposal."[12]

In Tikrit in mid-November U.S. forces reportedly used tank and artillery fire to destroy homes belonging to families of Iraqis who allegedly mounted attacks against U.S. forces. A spokesman for the U.S. Army's 4th Infantry Division said the demolitions were intended to "send a

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[12] Anthony Shadid and Vernon Loeb ,"Another Copter Down in Iraq; 6 GIs Killed," *Washington Post*, November 8, 2003.

message" to the insurgents and their supporters.[13] While U.S. troops are entitled to suppress armed attacks against them, destroying civilian property as a reprisal or as a deterrent amounts to collective punishment, a violation of the 1949 Geneva Conventions.[14]

The escalating use of force reveals how the occupying powers have been unable to secure law and order, even when attacks on coalition troops were not a daily event. From the beginning of the occupation, U.S. troops have failed to communicate effectively with the local population on security issues, and to deploy sufficient numbers of international police or constabulary (*gendarme*) forces, and have relied on combat troops for policing duties without appropriate training.

Some military officers have acknowledged that soldiers were inadequately trained and equipped for what they call SASO—Stability and Support Operations. "The soldiers have been asked to go from killing the enemy to protecting and interacting, and back to killing again," one U.S. military commander wrote in an After Action Report. "The soldiers are blurred and confused about the rules of engagement,

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[13] Rajiv Chandrasekaran and Daniel Williams, "U.S. Military Returns to War Tactics," *Washington Post*, November 22, 2003.

[14] Fourth Geneva Convention of 1949, art. 33.

which continues to raise questions, and issues about force protection while at checkpoints and conducting patrols."[15]

In some cases, soldiers did not have the right equipment, like construction and barrier materials, to establish checkpoints. Even interpreters were lacking, leaving the soldiers unable to communicate with the local population they were supposed to serve. "These interpreters are critical to the team's ability to interact with civilians, discern their problems, and broadcast friendly unit intentions," the After Action Report said. "Often times the unit had crowds and upset civilians to deal with and absolutely no way to verbally communicate with them."[16]

The failure to provide a secure environment seriously affects Iraq's vulnerable populations: women, children and minority groups. The widespread fear of rape and abduction among women and their families has kept women and girls at home, preventing them from taking part in public life. Iraqi police give a low priority to allegations of sexual violence and abduction. The victims of sexual violence confront indifference and sexism from Iraqi law enforcement personnel, and the U.S military police are not filling the gap.[17] Almost half of Iraq's

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[15] "Subject: Operation Iraqi Freedom After Action Review Comments," April 24, 2003, conducted by TCM C/3-15 Infantry, Task Force 1-64 [declassified], http://www.strategypage.com/dls/articles/20030912.asp (retrieved October 17, 2003).

[16] Ibid.

[17] *Climate of Fear: Sexual Violence and abduction of women and girls in Baghdad*, Human Rights Watch, July 2003.

population is under the age of eighteen, and the war and its aftermath are exposing them to continued risk. Drugs are becoming more prevalent and the number of street kids has grown.

"You don't want troops to do policing but you have no choice," an Australian coalition official told Human Rights Watch. The coalition wants to hand law enforcement tasks over to the Iraqi police and army, he said, but these institutions are still weak and, despite improvements, they are not yet capable of performing the necessary tasks alone.

The training and reequipping of the Iraqi police and army must continue so that they can assume greater responsibility for law and order. But there are risks in the push to get Iraqi security forces on the street. Independent monitoring and redress systems must be in place from the beginning. And training must include thorough instruction in human rights law enforcement standards for crowd control, treatment of detainees, conduct of interrogations, and other areas where the Iraqi police have displayed shortcomings in the past. The occupying forces must also screen and vet local officials, police, and other security personnel to ensure that human rights abusers do not rejoin their ranks.

This extends to the judicial system. Major resources and efforts are needed to reestablish an independent judiciary and to retrain jurists, prosecutors, defense attorneys, police officers, and court personnel. Iraq's prisons, sites of grave human rights abuses in the past, must be brought up to international standards. While some steps have been taken to start this process, Iraqi laws that do not meet international due

process and fair trial standards must be repealed or brought into compliance with international human rights and fair trial standards.

Mass Graves

On March 4, 1991, thirteen-year-old Khalid Khudayyir and his thirty-three-year-old cousin Fu'ad Kadhim left their village in southern Iraq on foot, headed for the city of al-Hilla to buy food. They never returned.

More than twelve years later, on May 16, 2003, the family learned of their fate when their identification documents were found among decomposed human remains in a mass grave near al-Mahawil military base, some twenty kilometers north of al-Hilla. Like thousands of Iraqis in the predominantly Shi`a southern part of the country, they had been arrested and "disappeared" during the Iraqi government's brutal suppression of the popular uprising that followed the Iraqi army's defeat in Kuwait in 1991.

For the Khudayyir family, the gruesome discovery brought some closure to a sad and horrific chapter in their lives. For Iraq's Shi`a population, and other Iraqis as well, it helped mark a beginning of collective reckoning with decades of state persecution and mass murder. Almost immediately after the fall of the government in April, Iraqis began to identify mass gravesites around the country.

The acting mayor of al-Hilla notified U.S. military authorities on May 3 of one of the smaller al-Hilla mass gravesites. The gravesite at al-Mahawil contained the remains of more than two thousand Iraqi victims. Another mass gravesite about five kilometers distant contained several hundred bodies. A third site just south of al-Hilla contained an additional forty bodies. In all three sites the bodies were buried en masse, in contact with one another, rather than in individual plots.

A U.S. assessment team from the Office of Reconstruction and Humanitarian Assistance (ORHA, the predecessor of today's Coalition Provisional Authority, or CPA), visited several days later and recommended that military troops secure the sites and arrange for exhumations by forensics experts. Instead, in the absence of a comprehensive strategy for assisting with mass grave exhumations, desperate families used shovels and mechanical backhoes to search fields, tumbling bodies into heaps of clothes and bones. U.S. Marines at the site, whose orders were simply to "assist local authorities," videotaped the exhumation and collected some testimonies. The family of Khalid and Fu'ad found what they sought, but hundreds, perhaps thousands, of others may be denied that closure due to the disorganized and unprofessional exhumations. After frantic digging at the largest site in the area, more than one thousand remains—approximately half of those originally interred—were reburied without identification in conditions that almost surely preclude subsequent identification.[18]

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[18] *The Mass Graves of al-Mahawil: The Truth Uncovered*, Human Rights Watch, May 2003.

The experience at al-Mahawil was not unique. In the southern city of Basra and its environs, eyewitnesses to the killings of scores of young Shi`a men in 1999, in reprisal for street disturbances following the assassination of Ayatollah Muhammad Sadiq al-Sadr by government agents in February 1999, came forth to identify three of the numerous unmarked gravesites in the area. There, too, families waited in vain for direction from U.S. and U.K. authorities as to how the coalition intended to exhume the gravesites and preserve evidence for possible criminal proceedings. Relatives grew impatient as they combed through lists of executed prisoners recovered from looted government archives, and began to excavate some of the sites without professional direction or support. At the gravesite of al-Birigisia, thirty miles south of Basra near an oil refinery, the chaotic conditions at the exhumation precluded even rudimentary precautions against misidentification of remains.

Mass graves of this sort almost always indicate that the deaths were the result of natural disasters or mass atrocities. The random manner in which Khalid Khudayyir and Fu'ad Kadhim and thousands like them across Iraq were exhumed in those weeks after the fall of Saddam Hussein's government exposed a disturbing lack of planning by the U.S.-led coalition. Saddam Hussein's government "disappeared" at least 290,000 Iraqis over the years of its rule. Despite awareness of Saddam Hussein's crimes—indeed often using them to justify war—the occupying power did not secure the gravesites, provide forensic teams, or tell desperate Iraqis searching for their loved ones what procedures and mechanisms were being planned to address the crisis.

This failure to protect the mass gravesites had direct consequences, first of all for the families of victims, and the effects likely will be felt for years. The flawed exhumation at al-Mahawil rendered perhaps half the bodies unidentifiable. Bodies were mixed up and many corpses were dismembered. Identity documents were lost. There were also consequences for holding accountable those most responsible for these atrocities. These mass gravesites were crime scenes, and evidence that could have been crucial to future criminal prosecutions for crimes against humanity may have been tainted if not lost or destroyed.

Many mass gravesites remain undisturbed. Not all of the relevant evidence has been lost, by any means, and practices appeared to improve with time. According to U.S. officials with the Coalition Provisional Authority, the intervention of local rights activists, political parties, and community and religious leaders convinced many families and relatives of the need to conduct exhumations in a professional manner, with the help of trained forensic experts, in order to provide more reliable identifications and to preserve evidence for future criminal proceedings.

U.S. officials also told Human Rights Watch that they are working with Iraqi leaders to select some twenty key gravesites connected to the major incidents of atrocities, such as the 1988 Anfal campaign against Iraq's Kurds in the north and the 1991 and 1999 massacres of Shi`a in the south, based on assessments of international forensic teams that have visited the country. These sites would be the focus for forensic investigations in connection with trials of top leaders of the former government before a special tribunal.

Nevertheless, by failing to secure sites like those at al-Mahawil and al-Birigisia, the U.S. risked compromising the ability of Iraqis and the international community to hold accountable those responsible for serious past crimes such as genocide, crimes against humanity, and war crimes, at least with regard to the evidence of specific atrocities uncovered and now lost or ruined at those sites.

What Kind of Tribunal

The question of accountability for past atrocities and need to ensure some measure of justice for the victims and their survivors ranks as an issue of great concern to many Iraqis. How these matters are addressed by the CPA, and by the Iraqi Governing Council it appointed, has consequences not just for perpetrators and victims of serious abuses under the rule of Saddam Hussein. The decisions made—or avoided—today will affect as well the quality of Iraq's criminal justice system in the immediate and longer-term future. Those decisions will also potentially influence the future of international justice mechanisms as they emerged in the 1990s, namely the special criminal tribunals of former that Yugoslavia and that of Sierra Leone, and most recently the International Criminal Court.

So far, the steps taken by the CPA and the Iraq Governing Council, and the directions they have signaled, leave much to be desired.

Six months after the overthrow of the Saddam Hussein government, events have demonstrated the need to move swiftly on the justice front.

One indication is the steady pace of revenge killings of former government and Ba`th Party officials, killings that reportedly numbered in the "several hundred" in early November 2003.[19]

Other indicators are the murders of local Iraqi judges who were collecting evidence for criminal prosecutions. Muhan Jabr al-Shuwaili, the top al-Najaf governorate judge and one of a four-member investigative commission set up by al-Najaf's municipal council, had reportedly recorded 400 complaints and issued twelve arrest warrants in only a few months of work. On November 3, several men kidnapped him from his home, drove him to a deserted cemetery, and executed him with two shots to the head, saying "Saddam has ordered your prosecution."[20] The next morning Isma`il Yusif Sadiq, a judge from Mosul, was gunned down in front of his house.[21]

Despite this intimidation, other local investigative efforts are continuing, illustrating the strength of the search for accountability. The Iraqi Bar Association has reportedly registered some 50,000 claims for loss of lives and property at the hands of the former government. In the words

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[19] Susan Sachs, "Iraqis Seek Justice, or Vengeance, for Victims of the Killing Fields," *New York Times*, November 4, 2003.

[20] The account is from one of the judge's associates, a prosecutor who was also kidnapped but released unharmed. See Nayla Razzouk, "Iraq judges probing Saddam-era cases angry at lack of US protection," Agence France-Presse, November 6, 2003 (retrieved December 2, 2003).

[21] Dan Murphy, "In the new Iraq, local officials put lives on the line," *Christian Science Monitor*, November 7, 2003 (retrieved December 2, 2003).

of district court judge Qais `Abbas Rida, "We have to let every single Iraqi file his case. We should broadcast these trials to the whole world." [22] Rida says he took testimony and forensic evidence from a man who had been tortured on orders of former Revolutionary Command Council deputy chairman `Izzat Ibrahim al-Duri and sent a warrant for al-Duri's arrest to all police stations in the country.

Iraqi human rights groups, like the Association of Victims in Basra, have emerged around the country—preserving documents, cataloguing names, identifying those names with various waves of repression. The groups have by and large refused to divulge the names of informers and intelligence agents, and thereby probably avoided a bloodbath. But for how long?

In Baghdad's Republican Palace, now the headquarters of the CPA, there are Americans and others who are serious about justice and accountability issues, but it is not clear how much resonance their views have in Washington policy-making circles. To date the Bush administration has firmly resisted calls to establish an independent repository to collect and safeguard evidence and set minimum standards for gathering documents, forensic evidence, and testimonies.

What should have happened, as it did in the case of former Yugoslavia and Rwanda (and in slightly different form in Cambodia and East

[22] Susan Sachs, "Iraqis Seek Justice, or Vengeance, for Victims of the Killing Fields," *New York Times*, November 4, 2003.

Timor), was a U.N. Security Council resolution authorizing the secretary-general to establish an international commission of some half-dozen experts, Iraqi and international in composition, with at least a four-month mandate, to

- establish an independent national central repository to receive documentary, forensic, and other forms of evidence (at least two international forensic teams reportedly declined to conduct exhumations in absence of an independent repository for evidence);
- coordinate international forensic efforts to train Iraqis to conduct exhumations and identification of remains ;
- establish a minimum-standards process for establishing the fate of the "disappeared;"
- develop minimum standards for gathering testimonies, documents, and forensic evidence (e.g., chain of custody standards);
- recommend mechanisms of accountability: the right mix of a special tribunal for those most responsible for the most serious offenses; necessary legal reforms to allow regular Iraqi criminal courts to handle the majority of alleged perpetrators of serious human rights crimes; a truth and justice mechanism to deal with lower-grade perpetrators and to establish a historical record; and vetting mechanisms to remove past abusers from government posts on the basis of individual accountability, in a way that doesn't add new rights violations;
- Recommend best practices for witness and victim protection.

Six months on, this is still missing. Security Council Resolution 1483 marks a key moment lost: that resolution's preamble "affirm[s] the need for accountability for crimes and atrocities committed by the previous Iraqi regime," but there is nothing in the operative paragraphs on how this is to happen, or who is responsible for developing policy. The main responsibility for this failure rests with the U.S. and U.K., but other Council member states failed to challenge them.

Human Rights Watch and colleague organizations have urged the secretary-general to initiate such a commission, based on the implicit authorization in 1483 which empowered the secretary-general's Special Representative for Iraq to "encourage[e] efforts to promote legal and judicial reform." Special Representative Sergio Vieira de Mello, in his meetings with the Security Council in late July, before he returned to Baghdad and his death, reportedly encountered opposition to this idea from the U.S. and found no appetite on the part of the secretary-general to take up the fight in the face of that opposition.

The "Iraqi-led" process as publicly endorsed by U.S. officials has effectively been translated by the Iraqi Governing Council as an "Iraqi-only" process, recognizing but then marginalizing the essential international dimension. With some assistance from a British legal advisor, the Judicial Commission set up by the Governing Council has drafted a statute that, once-approved by the Governing Council and ratified by CPA head Paul Bremer, will have the force of law. As of early December the draft was reportedly very close to completion but there were no indications that either the Governing Council or the CPA

would make it public and invite comment, reflecting a distinct lack of transparency.

The draft statute incorporated many positive features, including international legal definitions of genocide, war crimes, and crimes against humanity as justiciable matters, largely reflecting the language of the Rome Statute of the International Criminal Court. But it also included violations of Iraqi criminal law, for the most part serious crimes like murder but also vaguely worded prohibitions against "abuse of position [of authority]," for example, and "use of the armed forces of Iraq against an Arab country." This seemed to reflect a determination to be able to punish former government officials even if the evidence did not support conviction on the most egregious offenses in the "crimes against humanity" categories. It also suggested an inclination to have the tribunal cast a wide net, to be able to bring within its purview whomever the present authorities wish to punish. Many of these people should be tried instead before ordinary (reformed) Iraqi criminal courts. This language left the proposed tribunal open to inefficiency if not outright abuse.

The draft statute recognized the need for an international component by mandating the president of the tribunal to appoint non-Iraqis as advisors to the separate chambers. The non-Iraqis, in addition to prior judicial or prosecutorial experience, must also have experience in international war crimes trials. For the Iraqi judges themselves there is not—there could not realistically be—any such requirement of international experience.

The draft statute also stipulated that the prosecutors and investigative judges—in the French-derived Egyptian model on which Iraq's judicial system is based, investigative judges conduct interrogations and inquiries to make the first determination of a prima facie criminal violation—must be Iraqi nationals, though again each of these departments was required to appoint non-Iraqi advisors.

The main impetus for this insistence that only Iraqis serve as judges and other key positions in the tribunal was the Iraqi Governing Council. This reflected in part an abiding distrust of the United Nations, blaming the world body for not taking stronger measures against Saddam Hussein's government despite its tyranny and awful crimes. There was also an Iraqi concern to preserve use of the death penalty, something that would not be possible in a U.N.-mandated tribunal.[23]

While Iraqi concerns must be taken seriously, it is also critical that the justice effort has integrity and credibility, which is not likely in an Iraqi-only process given the state of the Iraqi judiciary after decades of autocratic rule and the concerns detailed above. Even so, there has been little evident objection to the Governing Council plan from the Bush administration, which from the outset has manifested a largely instrumentalist approach to issues of accountability and justice in Iraq. The crimes of the former government have been duly recited and deplored, and justice promised, but the mechanism under consideration

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[23] Coalition Provisional Authority Order Number 7, section 3, suspended use of the death penalty.

displays serious deficiencies. Several factors probably account for this, including the administration's aversion to anything hinting of "international justice," a concern that the jurisdiction of any justice mechanism be confined to crimes of Iraqi officials, and a desire to preserve some ability to trade prosecution deals for intelligence on weapons of mass destruction and other subjects of interest.

The most appropriate mechanism, drawing on the positive as well as negative experience of the existing international tribunals, would be a mechanism incorporating Iraqi and international expertise and experience, located if security conditions permit in Iraq, and using Arabic and Kurdish as the official languages of the tribunal. The presence of Iraqi jurists and prosecutors will help ensure that the composition of the tribunal and associated mechanisms reflects Iraqi society, whose interests are most directly at stake. At the same time, the presence of international jurists and prosecutors on the staff, not just as advisors but as integral members of the team of judges and lawyers at the core of the tribunal, would help ensure the necessary degree of credible impartiality and independence, competence in prosecuting and adjudicating extremely complex criminal proceedings, and familiarity with developments in international justice standards.

Ensuring Human Rights Accountability

An essential element of any reform and reconstruction process is transparency and accountability. In the short term, independent monitoring and reporting can curb abuses of power, provide a modicum of credibility and legitimacy, and offer a forum for grievances to be

aired. In the long term, independent institutions are needed to ensure a government that is committed to the protection of basic human rights essential to a democratic society.

The Coalition Provisional Authority has a Human Rights and Transitional Justice division. Its mandate, however, does not include monitoring or reporting on current abuses, but only on abuses of the past. It does important work in the area of civil society development and human rights education, but the primary task is documenting Saddam Hussein's crimes, dealing with mass graves (which it has done better since the extremely problematic beginning) and assisting the establishment of a tribunal for past abuses. Its web page, like the entire website of the CPA, is primarily in English. It leaves an impression that its purpose is to show the outside world what the CPA is doing, rather than to inform Iraqis on how their country is being run and how their rights today can be protected.

The Governing Council—the interim body appointed by the CPA—included a Ministry of Human Rights in the cabinet it announced in early September 2003, but it remains untested. What is needed is a statutorily independent monitoring system, like an ombudsman's office or national human rights institution. International donors, who have committed $33 billion to Iraq since the war, should support the creation of such an institution with a mandate to cover the full range of human rights issues and the power to conduct investigations and make recommendations to both the occupying powers and any transitional Iraqi authority. It should have the necessary independence, diversity, resources, and geographic presence to do the job well.

Ultimately it is Iraqis who will best be able to ensure that the authorities in their country abide by international human rights standards, and the occupying powers and donor countries must do more to assist local nongovernmental organizations. The nascent human rights community in Iraq needs and desires training, management skills, and financial assistance from abroad. As the development of a local human rights community in Cambodia and East Timor has made clear, the United Nations and foreign donors can play an important role in fostering development of such groups.

In the meantime, the United Nations should better address the need for human rights protection, as security allows, by expanding the monitoring operations of the United Nations High Commissioner for Human Rights. The member states of the Commission for Human Rights, moreover, should make it a priority at its next annual meeting, in March-April 2004, to renew the mandate of the special rapporteur on Iraq and specify that the mandate includes on-going developments as well as past abuses. The work of the monitors and the special rapporteur alike could provide donors with authoritative information and analysis on the human rights situation within the country and make recommendations for remedial action, including long-term institutional reform.

Such monitoring missions have played a constructive role in other post-conflict transitions, like in Cambodia, East Timor, Bosnia-Herzegovina, and Kosovo. Security conditions may constrain United Nations efforts in Iraq, but this should not prevent donors from earmarking funding for this purpose, or the United Nations identifying suitable experts and

preparing to extend its presence on the ground. Without such mechanisms to keep a check on abuses—to promote government transparency in general—Iraq's transitional period may proceed without the human rights grounding that is essential.

Toward that end, the United States and its allies should move quickly to address the serious human rights shortcomings of the occupation to date. The first is to carry out investigations of all cases where there are credible allegations or other reasons to suspect that use of lethal force by occupation troops may have led to wrongful death or injury to Iraqi civilians. The second is to establish an independent central depository to receive forensic evidence from mass graves as well as documentary evidence and eyewitness testimonies related to serious past human rights abuses. The third is to endorse publicly and support diplomatically the establishment of a special criminal tribunal for past crimes that incorporates experienced international as well as Iraqi judges and prosecutors in all key departments.

An elderly woman now lives in her basement after her house was destroyed in Grozny. Russia has used the “war on terrorism” to justify its brutal campaign in Chechnya. © 2002 Thomas Dworzak/Magnum Photos

“Glad to be Deceived”: the International Community and Chechnya

By Rachel Denber

“It is so easy to deceive me, for I am glad to be deceived.”

- Alexander Pushkin, “Confession” (1826)

The armed conflict in Chechnya, now in its fourth year, is the most serious human rights crisis of the new decade in Europe. It has taken a disastrous toll on the civilian population and is now one of the greatest threats to stability and rule of law in Russia. Yet the international community’s response to it has been shameful and shortsighted.

The international community has a moral and political obligation to protect fundamental rights of people in and around Chechnya. It should with a unified voice be prevailing on the Russian government to halt forced disappearances, torture, and arbitrary detention, which Russian forces perpetrate on a daily basis. It should be compiling documentation about abuses into an authoritative, official record. It should be vigorously pressing for a credible accountability process for perpetrators of serious violations of international humanitarian law, and should think strategically about how to achieve this when the Russian court system fails to deliver justice. And it should stop Russia from forcing the return of displaced people to areas where their safety and well-being cannot be ensured.

But none of this has happened. The international community has instead chosen the path of self-deception, choosing to believe Russia's claims that the situation in Chechnya is stabilizing, and so be spared of making tough decisions about what actions are necessary to stop flagrant abuses and secure the well-being of the people of the region.

The year 2003 saw no improvement in the international community's disappointing response to the Chechen situation. All the international community could muster were well-intended statements of concern that were never reinforced with political, diplomatic, financial or other consequences.

Chechnya was placed on the agenda of the U.N. Commission on Human Rights, the highest human rights body within the U.N. system, but even there a resolution on Chechnya failed to pass. No government leader was willing to press for specific improvements during summits with Russian President Vladimir V. Putin. In late 2002 the Russian government closed the field office in Chechnya of the Organization for Security and Cooperation in Europe (OSCE). And to date the Russian government had still not invited U.N. special rapporteurs on torture and extrajudicial executions to visit the region. And unlike in other armed conflicts in Europe, few foreign missions in Russia sought to gather first-hand information about continuing human rights abuses.

It did not have to be this way. Events of the past decade have shown that however flawed their policies might be in many respects, concerned states and intergovernmental bodies can play a significant role in

addressing human rights violations. Even in the Balkans, where the international community failed to stop horrific abuses as they were occurring, concerned states eventually supported the creation of the International Criminal Tribunal on the former Yugoslavia, a significant and likely long-lasting contribution to security and human rights in the region. Hundreds of OSCE monitors deployed to Kosovo in November 1998 were able to create official documentation of massacres and other human rights abuses.

To be sure, there are important political obstacles to affecting Russia's behavior in Chechnya. Because it is a permanent member of the United Nations Security Council, Russia was able to shield Chechnya from serious U.N. scrutiny, save for the U.N. Commission on Human Rights in 2000 and 2001. The U.S. and European governments have broad political and economic agendas with Russia, ranging from strategic missile defense to energy security to Russian policy in the Middle East. But none of these factors can justify or fully explain the international community's reluctance to promote human rights protections in and around Chechnya, or why Russia never has had to face significant consequences for abuses by its troops.

International disengagement on Chechnya became more marked after the September 11, 2001 attacks in the United States. Russia, which had since 1999 called the conflict in Chechnya a "counter-terror operation," soon began to argue that the war in Chechnya was its contribution to the U.S.-led global campaign against terrorism. Russia succeeded in further shielding the conflict from scrutiny in international forums and in Russia itself.

Western governments have emphasized the need for Russia to find a political solution to the conflict. But they fail to see the role that continuing abuses play in prolonging it. For this reason, the policy of disengagement is shortsighted. As abuses continue, and as there continues to be no credible accountability process, Chechens appear to be losing what faith or hope they may have had in the Russian government. Disengagement, particularly now, is untimely. Russia has spared little effort to present the situation as stabilizing. But it has proven incapable of ending the conflict; instead, in 2003 it began to spill into neighboring Ingushetia, with Russian forces perpetrating the same abuses there as they have in Chechnya.

In the long term, disengagement on Chechnya is a disservice to human rights in Russia. Having faced no diplomatic or other consequences for its crimes in Chechnya, the Russian government has certainly learned an important lesson about the limits of the international community's political will in pursuing human rights.

Unchecked patterns of abuse by Russia's forces in Chechnya will eventually affect the rest of Russian society. Tens of thousands of police and security forces have done tours of duty in Chechnya, after which they return to their home regions, bringing with them learned patterns of brutality and impunity. Several Russian human rights groups have begun to note a "Chechen syndrome" among police who served in Chechnya—a particular pattern of physical abuse and other dehumanizing treatment of people in custody. Russians already face serious risk of torture in police custody. The Chechnya experience is

thus undermining efforts to promote the rule of law in Russia’s criminal justice system.

Human Rights Abuses in the Chechnya Conflict

Russia’s second armed conflict in Chechnya in the 1990s began in September 1999. Russia claimed it was a counter-terror operation, aimed at eliminating the chaos that had reigned in Chechnya since the end of the 1994-1996 Chechen war and at liquidating terrorist groups that had found haven there. Five months of indiscriminate bombing and shelling in 1999 and early 2000 resulted in thousands of civilian deaths. Three massacres, which followed combat operations, took the lives of at least 130 people. By March 2000, Russia’s federal forces gained at least nominal control over most of Chechnya. They began a pattern of classic “dirty war” tactics and human rights abuses that continue to mark the conflict to this day. Russian forces arbitrarily detain those allegedly suspected of being, or collaborating with, rebel fighters and torture them in custody to secure confessions or testimony. In some cases, the corpses of those last seen in Russian custody were subsequently found, bearing marks of torture and summary execution, in dumping grounds or unmarked graves. More often, those last seen in custody are simply never seen again—they have been forcibly disappeared. Make no mistake, Chechen rebel forces too have committed grave crimes, including numerous brutal attacks targeting civilians in and outside of Chechnya, killing and injuring many. Rebel fighters were also responsible for assassinations of civil servants cooperating with the pro-Moscow Chechen administration of Chechnya. Anti-personnel land mines laid by fighters and Russian forces claimed the lives of federal soldiers and civilians alike.

At the height of the Chechen war in 2000, as many as 300,000 people had been displaced from their homes, with most living in the neighboring republic of Ingushetia. Of these, 40,000 resided in tent camps.

By 2003, the cycle of arbitrary detention, torture, and forced disappearance was well entrenched, and the crisis of forced disappearances appeared to have become a permanent one. According to unpublished governmental statistics, 126 people were abducted and presumed "disappeared" in January and February 2003 alone. In mid-August, the Chechen Ministry of Internal Affairs said that nearly 400 people had "disappeared" in Chechnya since the beginning of the year. Local officials in 2003 have also admitted the existence of forty-nine mass graves containing the remains of nearly 3,000 civilians.

As noted above, the conflict increasingly has spilled over the Chechen border into Ingushetia, still a haven for tens of thousands of displaced Chechens, and Russian operations there have been as abusive as they are in Chechnya. In June 2003, Russian and pro-Moscow Chechen forces conducted at least seven security operations in Ingushetia, five of them in settlements for Chechen displaced persons. The operations involved numerous cases of arbitrary arrest and detention, ill-treatment, and looting. As with abuses committed in Chechnya, authorities failed to diligently investigate the violations and hold perpetrators accountable.

Russian authorities in Ingushetia also have kept up steady pressure on displaced people living in tent camps to return to Chechnya.

Throughout 2003, as in 2002, federal and local migration authorities intermittently cut off gas, electricity, water, and other infrastructure services to several of the camps and removed hundreds of people from camp registration lists, causing them to be evicted. In addition, officials threatened the displaced people with arrests on false charges such as drugs and weapons possession, and impending security sweeps. Migration authorities closed one camp in the middle of winter in 2002, another in October 2003, and as of this writing seemed set to close yet a third; meanwhile, authorities blocked the construction of alternative shelters in Ingushetia.

Closing the tent camps, which at this writing housed more than 12,000 displaced Chechens, and pressuring people to return to Chechnya is part of a larger government strategy to put the Chechnya “problem” back inside Chechnya so that authorities can claim that the situation there is “normalizing.” Such claims, in turn, are used to support Russia’s position that international scrutiny of the republic is no longer justifiable.

The International Response

The international community was poorly positioned to respond effectively to these developments because it had acquiesced in Russia’s efforts to keep outside observers from being deployed to Chechnya. In late 2002 the Russian government refused to renew the mandate of the OSCE Assistance Group, effectively closing the organization’s important field presence in Chechnya. Since mid-2001, the Assistance Group had reported on human rights conditions, facilitated

humanitarian relief, and promoted a peaceful resolution of the crisis in Chechnya. Negotiations over renewing the OSCE mandate collapsed after Russia insisted that the mission relinquish its human rights and political dimensions. To its credit, the OSCE refused. After the closure, the Dutch chairmanship pressed for a new OSCE presence with a human rights component, but did not receive support from other OSCE participating states necessary to make the effort successful.

As already noted, a resolution sponsored by the European Union on Chechnya failed to pass at the 2003 session of the U.N. Commission on Human Rights for the second year in a row. It was rejected in part because the European Union seemed to will it to fail: as in 2002, it used the threat of a resolution only as a bargaining chip to coax the Russian government into agreeing to a much weaker chairman's statement. This strategy was misguided in its optimism, given that the Russian government had ever since the beginning of the conflict vehemently rejected international criticism of its conduct of the war and mobilized diplomatic resources to keep the Chechnya issue out of the U.N. When Russia predictably walked away from the chairman's statement negotiations, the E.U. introduced the resolution but then purposively failed to advocate for its adoption, and refused to share information about its strategy with third party states.

In January 2003, the Chechnya rapporteur for the Parliamentary Assembly of the Council of Europe (PACE) Lord Judd put forward a resolution calling on Russia to postpone a constitutional referendum for Chechnya planned for March, citing the escalating conflict and persistence of human rights abuses and a poor security environment.

After a hot debate, PACE rejected this proposal, and instead called on Russia to ensure appropriate conditions for the referendum. Lord Judd resigned in protest. In April, PACE adopted a highly critical resolution on the human rights situation and the lack of accountability in Chechnya.

UNHCR worked hard to ensure protection for displaced persons in Ingushetia in 2002-03, and protested Russian government efforts to force them back. As authorities moved to close camps, UNHCR was able to prevent eighty families from being left homeless in Ingushetia. UNHCR's efforts are admirable. But Russia's intent to close tent camps could not be clearer, and UNHCR's efforts will not be sufficient unless U.N. member states also seek and obtain political commitments from Russia that ensure protection for displaced persons.

At the bilateral level, little apparent effort was made at the highest levels to press Russia to improve human rights protections in the region. President Putin received a ringing endorsement from governments around the world who helped him celebrate the 300th anniversary of the founding of St. Petersburg. Chechnya was at the bottom of the agendas in summits with British Prime Minister Tony Blair and U.S. President George W. Bush. Speaking on behalf of the Italian presidency of the European Union, Silvio Berlusconi even went so far as to praise the Chechen presidential elections, which nearly every independent observer said were rigged.

Antecedents to Inaction

Many analysts attribute international diffidence with respect to abuses in Chechnya to changing international priorities after September 11, 2001, particularly the increasing focus on global security. But in fact the antecedents to inaction go much farther back, even to the early months of the war. The international community deserves credit for the strong and forthright criticism it mounted at that time, and for efforts to bring diplomatic pressure to bear to convince the government to rein in abusive troops and allow access to the region. But the effort for the most part was half-hearted and short-lived, ending soon after Vladimir Putin, who became acting president upon Boris Yeltsin's resignation on December 31, 1999, was elected president in March 2000.

In the early months of the war, Russian forces razed Grozny in indiscriminate bombing, killing thousands, arrested thousands more, and summarily executed more than 130 detained persons in post-battle sweep operations. International criticism was sharp. The OSCE in 1999 insisted on a reaffirmation of its mandate in Chechnya, and in April 2000, the Parliamentary Assembly of the Council of Europe suspended Russia's voting rights, restoring them only in January 2001. In late 1999, the EU adopted a decision to freeze certain technical assistance programs because of Chechnya and recommended that embassy personnel travel to the region and gather information on events there. But after Yeltsin's resignation the EU toned down its rhetoric; the recommendation to send in diplomats was never implemented.

The limits the international community set for itself in this early period would set the parameters for years to come. Only the PACE recognized massacres of noncombatants as war crimes. International actors apparently were not prepared to follow through on the consequences that recognizing the massacres as war crimes would entail.

No government or multilateral institution was willing to consider linking financial benefits to improvements on the ground in Chechnya or the creation of a credible accountability process. The World Bank, which arguably had the most leverage and a mandate to withhold aid on human rights grounds, released U.S. $450 million in structural adjustment loan payments to Russia during the first year of the war, which went directly to the Russian government for unrestricted general budgetary spending.

Multilateral institutions and their member states also resisted pressing for an accountability process that had any international involvement, putting their faith in the Russian government to establish a credible domestic monitoring and accountability process. Council of Europe member states did not act on PACE's recommendation that they file an interstate complaint against Russia with the European Court of Human Rights.

In 2000 and 2001 the U.N. Human Rights Commission adopted strong resolutions condemning human rights abuses in Chechnya and calling on Russia to invite U.N. thematic mechanisms to the region. But it stopped short of calling for an international commission of inquiry, requiring instead that Russia establish a national commission of inquiry.

The Russian government bitterly opposed the resolution, and vowed not to cooperate with its recommendations. At the time, Human Rights Watch and others urged the Commission to call for an international commission of inquiry, which could operate, albeit in a limited capacity, in the face of Russian objections. We had serious doubts that the Russian government would establish a thorough and impartial monitoring or accountability process.

The Russian government established a human rights office in Chechnya, headed by President Putin's special envoy on human rights in Chechnya. A national commission of inquiry was formed, in name only. Neither institution had the authority to investigate or prosecute violations of humanitarian law or human rights law, and neither produced an official record of the abuses committed by both sides of the conflict.

In April 2001, at the request of PACE, the Russian government made available a list of criminal investigations related to the Chechnya conflict. This list revealed the extent of the impunity for crimes committed in the conflict: the vast majority of criminal cases were not under active investigation; no cases had made it to the courts; and there was no investigation into widespread torture, one of the key abuses of the conflict.

The international community had an important role to play in documenting abuses, both to inform policy toward Russia and, ultimately, to produce an official record of the abuses committed in the conflict. In 1999, the EU instructed heads of embassies of its member

states to visit the region to gather information on humanitarian assistance. In sharp contrast to its efforts in Kosovo prior to March 1999, the instruction was not implemented, and working-level visits by diplomats to the region were few and far between.

The OSCE's Assistance Group to Grozny was the best equipped institution to lead a documentation effort on Chechnya. It had documented abuses in the 1994-1996 Chechnya conflict, played a crucial role in negotiating an end to it, and was still on the ground as late as 1998. The OSCE subsequently had gained institutional expertise in documenting humanitarian law violations in Kosovo. Its book, *As Seen as Told,* remains to this day one of the most authoritative accounts of the abuses that occurred in Kosovo prior to March 1999. It could not apply this experience to Chechnya, as Russia's prodigious efforts at presenting obstacles caused the Assistance Group to postpone its redeployment until May 2001. And even after its redeployment, the Assistance Group was constrained in its reporting.

In 2000, the Council of Europe seconded experts for Putin's special representative for human rights in Chechnya, but they spent most of the year in Strasbourg. After a bomb exploded near the experts' passing car in Chechnya in April 2003, they deemed the security situation too volatile to return. Even prior to that date, the work of the experts in Chechnya had been severely inhibited by their limited mandate, which prevented them from freely moving around Chechnya and conducting investigations of key incidents on their own initiative. The reporting of the experts generally contained little information that could not be found in other sources and information on human rights abuses was

often of a general nature. The quality of reporting had improved in late 2002, but since April 2003 the experts have been forced to do their work in Strasbourg, which has made it impossible for them to directly monitor the situation on the ground.

As prime minister, Putin had staked his political career on the "counterterror" operation in Chechnya. Under his presidency the government, and he personally, greeted international criticism of the campaign, no matter how mild, with outbursts, threats, and indignation. If the strategy aimed to dampen Russia's interlocutors' enthusiasm for constructive intervention, it was successful. By mid-2000, Western leaders understood that Putin, until then a political unknown, had consolidated power and would lead Russia for at least four more years. They generally ceased to press Russia for concessions on Chechnya. This meant that the international community's most important multilateral achievements on Chechnya—resolutions at the United Nations Human Rights Commission, resolutions by the PACE, and the like—received no reinforcement at the bilateral level, and so went unheeded.

Russia, Chechnya, and the Global Campaign against Terror

By September 11, 2001, the war in Chechnya, its toll on civilians and its broader implications for the rule of law in Russia had fallen off the agenda of many of Russia's interlocutors. After the attacks in the United States, as noted above, Russia cast the conflict in Chechnya as its

contribution to the global campaign against terrorism, pointing to links certain Chechen field commanders allegedly had to al-Qaeda.

Russia's cooperation was needed in the war in Afghanistan, and would later be sought in the U.S. war in Iraq. Several heads of state indicated outright that Russia's conduct in Chechnya would be seen in a new light. The horrific hostage-taking by Chechen rebels on a Moscow theater in October 2002 caused revulsion in Russia and throughout the world, and lent credence to Putin's assertions and, in the minds of some, seemed to confirm the existence of links between certain rebel groups and al-Qaeda. A series of suicide bombings in Chechnya and other parts of Russia in 2002 and 2003 killed and maimed hundreds more.

Already made a lower priority, Chechnya practically disappeared from governments' public agendas with Russia. Neither the European Union, its member states, nor the United States has had the political courage to mount strong criticism at key moments, or call publicly for accountability or for U.N. rapporteurs to be allowed to visit the region. Most governments have called publicly and in a coordinated fashion for Russia to desist from compelling displaced persons to return to Chechnya. But after so many years of criticism unmatched by a credible threat of sanction, such words yielded little effect.

In dealing with Chechnya today, governments and multilateral institutions for the most part stress the need for a political solution to the conflict, rather than pressing for an immediate end to human rights abuses, let alone holding Russia and Chechen rebels to account for

them. Many argue that the abuses will end only when the conflict ends. The international community should not be reproached for seeking an end the conflict in Chechnya, but emphasizing this goal over all others overlooks the fact that it is the continuing cycle of abuses that fuel the conflict. To end the conflict, the Russian government has to build in the population of Chechnya an atmosphere of trust in Russia's institutions. But the daily grind of torture, arbitrary detention, and forced disappearances instead sows further mistrust. As people see their loved ones killed or disappeared they have less incentive not to join the rebel effort.

Russia's efforts at finding a political solution—at "normalizing" the situation—are not ending the conflict in Chechnya, but rather making the conflict less visible to the outside world. The constitutional referendum held in Chechnya in March 2003, and the subsequent presidential elections in October, were widely advertised by the Russian government as a final stage of stabilization of conditions in the republic. In reality, the referendum and elections took place against a background of continuing and escalating violence, and independent observers unanimously believed that the elections were rigged. Yet the Russian government has continued to use both elections to convince the outside world that the situation is normalizing through a political process, and to argue that international scrutiny or other involvement is no longer justified.

Ironically, as the Russian government is emphasizing the international implications of the Chechnya operation for the global campaign against terrorism, it is shutting the region to international scrutiny and

cooperation. This discredits Russia's partners in the global campaign against terrorism among those inside Chechnya who suffer form lawlessness and abuse at the hands of Russia's forces and Chechen rebels.

As Russian forces enjoy impunity for crimes in Chechnya, and as Russia has escaped any significant diplomatic consequences for such crimes, the Russian government may come to expect nothing less than international disengagement on human rights more generally in Russia. The Russian public may conclude that it is acceptable for the government to be unaccountable for its actions. This will stunt progress on human rights in Russia for years to come, as the government learns to simply dismiss criticism of its broader human rights record, confident that words, no matter how tough, will never translate into action.

The Way Forward

Russia's sway within the international arena should not hinder a robust response from the international community on human rights abuses in Chechnya. The international community should consider that Russia's involvement in the war against terrorism raises rather than diminishes the stakes of its conduct in Chechnya. Russia's status as a permanent member of the U.N. Security Council, and its ability to remove Chechnya from the U.N.'s agenda, heightens the importance of regional mechanisms—the Council of Europe and the OSCE. To be effective, these institutions require first and foremost the support of their member governments in their bilateral relations with Russia. At the same time, U.N. officials, including the secretary-general, should press Russian

authorities to allow U.N. institutions and mechanisms to play a role in monitoring and promoting human rights in Chechnya. This too is a message that must be reinforced in bilateral relations.

Russia's interlocutors should coordinate to deliver a unified message on the need for accountability for crimes against civilians, access to the region by human rights monitors, continued international assistance to displaced persons, and an end to involuntary returns to Chechnya. They should use summits and multilateral meetings as opportunities to press for specific benchmarks—including an updated, detailed list of investigations and prosecutions; invitations to the U.N. special rapporteurs on torture, extrajudicial executions, and violence against women; and binding commitments not to compel displaced persons to return to Chechnya until it is safe to do so, to provide decent and humane shelter to those who continue to be displaced, and to allow for international agencies to continue to provide relief for them. They should press for these benchmarks publicly and forcefully, and make clear that political, diplomatic, and financial consequences will follow should improvements not be forthcoming.

The international community can also help the cause of justice by supporting local organizations that help victims of abuse in Chechnya press their claims with the European Court of Human Rights. Once there is momentum on justice, international financial institutions should make clear that they will make the Russian government's compliance with court judgments a condition for future loan and credit disbursements.

Wishing away the human rights crisis in Chechnya will in the long run will not serve the goal of a peaceful resolution to the armed conflict. It is also a disservice to the thousands of people who have suffered human rights abuses and who are left with nowhere to turn for justice. A robust international response to Russia, one that backs words with action, is a critical part of the solution.

Above the Law: Executive Power after September 11 in the United States

By Alison Parker and Jamie Fellner

Justice today, injustice tomorrow. That is not good government.

- Asante proverb, Ghana

Good Government Under Law

In fourteenth century Italy, Ambrogio Lorenzetti painted frescoes in Siena's city hall depicting good and bad government through allegorical figures. Rendered in shades of gold, cobalt blue, red, and ochre, the fresco of good government depicts Justitia twice, reflecting her cardinal importance. In one classic image, she sits balancing the scales held by wisdom. The fresco of bad government presents the enthroned figure of Tyrannia, who sits above a vanquished Justitia, pieces of broken scales at her side. Lorenzetti's message, drawing on a revolution in political thought, was clear: justice is central to good government. In bad government, the ruling power places himself above a defeated and supine Justitia. Justice no longer protects the individual—the executive acts above the law and without restraint.

In Renaissance Siena, as elsewhere in Western Europe, officials who were part and parcel of the ruling power meted out justice. Modern governments have tried to ensure justice by creating an independent and

impartial judiciary, capable of holding the government as well as the governed accountable for breaking the law. Certainly, the separation of the courts from the executive branch and the ability of the courts to scrutinize the constitutionality of executive actions has been a crucial feature of the legal framework in the United States. Indeed, it has been the lynchpin for the rule of law and the protection of human rights in that country.

Nevertheless, since taking office, U.S. President George W. Bush has governed as though he had received an overwhelming mandate for policies that emphasize strong executive powers and a distrust—if not outright depreciation—of the role of the judiciary. The Bush administration has frequently taken the position that federal judges too often endorse individual rights at the expense of policies chosen by the executive or legislative branches of government, and it has looked to nominate judges who closely share its political philosophy. But the concern is more fundamental than specific judges or decisions. Rather, the administration seems intent on shielding executive actions deemed to promote national security from any serious judicial scrutiny, demanding instead deference from the courts on even the most cherished of rights, the right to liberty.

Much of the U.S. public's concern about post-September 11 policies has focused on the government's new surveillance powers, including the ability to peruse business records, library files, and other data of individuals against whom there may not even be any specific suspicion of complicity with terrorism. These policies potentially affect far more U.S. citizens than, for example, the designation of "enemy combatants,"

or the decision to hold individuals for months in prison on routine visa charges. But the latter efforts to diminish the right to liberty and to curtail or circumvent the courts' protection of that right may be far more dangerous to the U.S. polity as a whole. Critics of the administration's anti-terrorism efforts have raised concerns that civil liberties are being sacrificed for little benefit in national security. But those critiques have generally failed to grapple with more fundamental questions: who should decide how much protection should be afforded individual rights and who should determine what justice requires—the executive or the judiciary? And who should determine how much the public is entitled to know about domestic anti-terrorist policies that infringe on individual rights?

Many of the Bush administration's post-September 11 domestic strategies directly challenge the role of federal and administrative courts in restraining executive action, particularly action that affects basic human rights. Following September 11, the Bush administration detained over one thousand people presumed guilty of links to or to have knowledge of terrorist activities and it impeded meaningful judicial scrutiny of most of those detentions. It has insisted on its right to withhold from the public most of the names of those arrested in connection with its anti-terrorism efforts. It has designated persons arrested in the United States as "enemy combatants" and claims authority to hold them incommunicado in military prisons, without charges or access to counsel. It insists on its sole authority to keep imprisoned indefinitely and virtually incommunicado hundreds of men at its military base at Guantánamo Bay, Cuba, most of whom were taken into custody during the U.S. war in Afghanistan. It has authorized

military trials of foreign detainees under rules that eschew a meaningful right of defense and civilian appellate review.

In all of these actions, the Bush administration has put the ancient right to habeas corpus under threat, perhaps unsurprisingly since habeas "has through the ages been jealously maintained by courts of law as a check upon the illegal usurpation of power by the executive."[24] Habeas corpus, foreshadowed in 1215 in the *Magna Carta* and enshrined in the U.S. Constitution after centuries of use in England, guarantees every person deprived of his or her liberty a quick and efficacious check by the courts against "all manner of illegal confinement."[25]

The Bush administration argues that national security—the need to wage an all out "war against terrorism"—justifies its conduct. Of course, there is hardly a government that has not invoked national security as a justification for arbitrary or unlawful arrests and detentions. And there is hardly a government that has not resisted judicial or public scrutiny of such actions. But the administration's actions are particularly troubling and the damage to the rule of law in the United States may be more lasting because it is hard to foresee an endpoint to the terrorist danger that the administration insists warrants its actions. It is unlikely that global terrorism will be defeated in the foreseeable future. Does the U.S. government intend to hold untried detainees for the rest of their

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[24] *Sec'y of State for Home Affairs v. O'Brien*, 1923 A.C. 603, 609.

[25] Sir William Blackstone, *Commentaries on the Laws of England*, 1765-1769, Book III, Ch. 8, p. 131.

lives? Does it intend to keep the public from knowing who has been arrested until the last terrorist is behind bars?

U.S. anti-terrorism policies not only contradict principles woven into the country's political and legal structure, they also contradict international human rights principles. The diverse governmental obligations provided for in human rights treaties can be understood as obligations to treat people justly. The imperative of justice is most explicitly delineated with regard to rights that are particularly vulnerable to the coercive or penal powers of government, such as the right to liberty of person. Human rights law recognizes that individual freedom should not be left to the unfettered whim of rulers. To ensure restraints on the arbitrary or wrongful use of a state's power to detain, the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, requires that the courts—not the executive branch—decide the legality of detention.[26] The ICCPR also establishes specific requirements for court proceedings where a person's liberty is at stake, including that the proceedings be public. Even if there were to be a formally declared state of emergency, restrictions on the right to liberty must be "limited to the extent strictly required by the exigencies of the situation."[27]

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[26] International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, articles 9 and 14.

[27] The U.N. Human Rights Committee, the body that monitors compliance with the International Covenant on Civil and Political Rights, states in its commentary to article 4 on states of emergency, that limitations to derogation "relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.… [T]he obligation to limit any derogations to those

Justice cannot exist without respect for human rights. As stated in the preamble of the Universal Declaration of Human Rights, "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The Bush administration's rhetoric acknowledges human rights and insists that the fight against terrorism is a fight to preserve "the non-negotiable demands of human dignity, the rule of law, limits on the power of the state…and equal justice," as President Bush told the graduating class of the West Point military academy in June 2002. But the Bush administration's actions contradict such fine words. Taken together, the Bush administration's anti-terrorism practices represent a stunning assault on basic principles of justice, government accountability, and the role of the courts.

It is as yet unclear whether the courts will permit the executive branch to succeed. Faced with the government's incantation of dangers to national security if it is not allowed to do as it chooses, a number of courts have been all too ready to abdicate their obligation to scrutinize the government's actions and to uphold the right to liberty. During previous times of national crisis the U.S. courts have also shamefully failed to protect individual rights—the internment of Japanese Americans during World War II, which received the Supreme Court's seal of approval, being one notorious example. As new cases arising from the government's actions make their way through the judicial

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strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers." Human Rights Committee, General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 4.

process, one must hope the courts will recognize the unprecedented dangers for human rights and justice posed by the Bush administration's assertion of unilateral power over the lives and liberty of citizens and non-citizens alike.

Arbitrary Detentions of Visa Violators

In a speech shortly after the September 11 attacks, U.S. Attorney General John Ashcroft said, "Let the terrorists among us be warned. If you overstay your visa, even by one day, we will arrest you. If you violate a local law, you will be put in jail and kept in custody for as long as possible."[28] The Attorney General carried out his threat, using a variety of strategies to secure the detention of more than 1,200 non-citizens in a few months. We do not know how many, if any, terrorists were in fact included among these detainees. Only a handful was charged with terrorism-related crimes. But we do know that the haphazard and indiscriminate process by which the government swept Arabs and Muslims into custody resulted in hundreds of detentions that could not be effectively reviewed or challenged because the executive weakened or ignored the usual checks in the immigration system that guard against arbitrary detention.

The right to liberty circumscribes the ability of a government to detain individuals for purposes of law enforcement—including protection of

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[28] Attorney General John Ashcroft, *Prepared Remarks to the U.S. Mayors Conference*, Washington, D.C., October 25, 2001.

national security. While the right is not absolute, it is violated by arbitrary detentions, i.e., detentions that are either not in accordance with the procedures established by law or which are manifestly disproportional, unjust, unpredictable, or unreasonable. International and U.S. constitutional law mandate various safeguards to protect individuals from arbitrary detention, including the obligations of authorities to inform detainees promptly of the charges against them; the obligation to permit detainees to be released on bail pending conclusion of legal proceedings absent strong countervailing reasons such as the individual's danger to the community or flight risk; and the obligation to provide a detainee with effective access to a court to review the legality of the detention. In the case of hundreds of post-September 11 detainees in the United States, the government chose as a matter of policy and practice to ignore or weaken these safeguards.

It did so because one of its key post-September 11 strategies domestically was to detain anyone who it guessed might have some connection to past or future terrorist activities, and to keep them incarcerated as long as necessary to complete its investigations into those possible connections. U.S. criminal law prohibits detention solely for the purpose of investigation, i.e., to determine whether the detained individual knows anything about or is involved in criminal activities. The law also prohibits "preventive" detentions, incarceration designed to prevent the possibility of future crimes. Detention must be predicated on probable cause to believe the suspect committed, attempted, or conspired to commit a crime. Judges—not the executive branch—have the ultimate say, based on evidence presented to them, as to whether such probable cause exists. The Bush administration avoided these legal strictures against investigative or preventive

detentions through the use of arrests for immigration law violations and "material witness" warrants. At the same time it avoided or limited the ability of detainees to avail themselves of protections against arbitrary detention, including through meaningful judicial review.

Immediately after the September 11 attacks, the Department of Justice began a hit or miss process of questioning thousands of non-citizens, primarily foreign-born Muslim men, who it thought or guessed might have information about or connections to terrorist activity. At least 1,200 non-citizens were subsequently arrested and incarcerated, 752 of whom were charged with immigration violations.[29] These so-called "special interest" immigration detainees were presumed guilty of links to terrorism and incarcerated for months until the government "cleared" them of such connections. By February 2002 the Department of Justice acknowledged that most of the original "special interest" detainees were no longer of interest to its anti-terrorist efforts, and none were indicted for crimes related to the September 11 attacks. Most were deported for visa violations.

In effect, the Department of Justice used administrative proceedings under the immigration law as a proxy to detain and interrogate terrorism suspects without affording them the rights and protections that the U.S. criminal system provides. The safeguards for immigration detainees are

[29] Because the government announced the number of persons arrested as "special interest" detainees only in November 2001, the total number eventually held as such has never been made public.

considerably fewer than for criminal suspects, and the Bush administration worked to weaken the safeguards that do exist. Human Rights Watch and other groups have documented the various ways the administration ran roughshod over the rights of these special interest detainees.[30] In June 2003, the Department of Justice's Office of the Inspector General released a comprehensive report on the treatment of the September 11 detainees that confirmed a pattern of abuses and delays for the "detainees, who were denied bond and the opportunity to leave the country…. For many detainees, this resulted in their continued detention in harsh conditions of confinement."[31]

For example, unlike criminal suspects, immigration detainees have no right to court-appointed counsel although they do have a right to seek private counsel at their own expense. But in the case of the September 11 detainees, public officials placed numerous obstacles in the way of obtaining legal representation.[32] Detainees were not informed of their right to counsel or were discouraged from exercising that right. The

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[30] ***See*** U.S. Department of Justice, Office of the Inspector General (OIG), ***The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks***, April 2003 (hereinafter OIG 9/11 Report). ***See also*** Human Rights Watch, ***Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees***, Vol. 14, No. 4 (G), August 2002; Migration Policy Institute, ***America's Challenge, Domestic Security, Civil Liberties, and National Unity After September 11***, June 26, 2003.

[31] OIG 9/11 Report, p. 71.

[32] OIG 9/11 Report, p. 130 (stating that "[w]e found that the BOP's [Bureau of Prisons] decision to house September 11 detainees in the most restrictive confinement conditions possible severely limited the detainees' ability to obtain, and communicate with, legal counsel.")

Immigration and Naturalization Service (INS), a division of the U.S. Department of Justice,[33] failed to inform attorneys where their clients were confined or when hearings were scheduled. Detainees in some facilities were permitted one weekly phone call, even to find or speak to an attorney; a call that did not go through nonetheless counted as the one permissible call. Not having prompt access to lawyers, these "special interest" detainees were unable to protest violations of immigration rules to which they were subjected, including being held for weeks without charges (some detainees were held for months before charges were filed). The government never revealed the alleged links to terrorism that prompted their arrest, leaving them unable to prove their innocence. The government also took advantage of the lack of counsel to conduct interrogations that typically addressed criminal as well as immigration matters (under criminal law, suspects have the right to have an attorney present during custodial interrogations, including free legal counsel if necessary).

In most immigration proceedings where non-citizens have violated the provisions of their visa, their detention is short. They will have a bond

[33] Until November 2002, the Immigration and Naturalization Service (INS) was a part of the United States Department of Justice. However, most of the former INS functions since have been divided into the Bureau of Citizenship and Immigration Services (BCIS), handling immigration processing and citizenship services; and the Bureau of Immigration and Customs Enforcement (BICE) of the Directorate of Border and Transportation, handling border control and immigration enforcement. Both Bureaus are under the direction of the Department of Homeland Security (DHS), which is a department of the federal government of the United States, and was created partially in response to the September 11 attacks. The new department was established on November 25, 2002 and officially began operations on January 24, 2003.

hearing relatively quickly after charges have been filed, and unless there is reason to believe the detainee is a danger to the community or will abscond, immigration judges will permit the detainee to be released on bond. With regard to the special interest detainees, however, the Department of Justice adopted several policies and practices to ensure they were denied release until it cleared them of terrorism links. For example, under immigration procedure, immigration judges do not automatically review whether there is probable cause for detention; hearings are not scheduled until after charges have been filed. The government's delay of weeks, and in some cases months, in filing charges had the practical effect of creating long delays in judicial review of the detentions. Additionally, the government urged immigration judges to either set absurdly high bonds that the detainee could never pay or simply to deny bond, arguing that the detainee should remain in custody until the government was able to rule out the possibility of links to or knowledge of the September 11 attacks.

The INS also issued a new rule that permitted it to keep a detainee in custody if the initial bond was more than $10,000, even if an immigration judge ordered him released; since the INS sets the initial bond amount, this rule gave the Department of Justice the means to ensure detainees would be kept in custody. In addition, there were cases in which the Department of Justice refused to release a special interest detainee even if a judge ordered the release because the detainee had not yet been "cleared" of connections to terrorism. Indeed, the INS continued to hold some detainees even after they had been ordered deported because of lack of "clearance" even though the INS is required to remove non-citizens expeditiously, and in any event within 90 days of a deportation order as required by statute. In short, through these and

other mechanisms, the immigration process to which the special interest detainees were subjected effectively reversed the presumption of innocence—non-citizens detained for immigration law violations were kept jailed until the government concluded they had no ties to criminal terrorist activities. As a result, special interest detainees remained in detention for an average of eighty days, and in some cases up to eight months, while they waited for the Federal Bureau of Investigation (FBI) to clear them of links to terrorism.

The long delays were endured by non-citizens who were picked up accidentally by the FBI or INS as well as those the government actually had reason to believe might have a link to terrorism. Once a person was labeled of "special interest," there were no procedures by which those who in fact were of no interest could be processed more quickly. As the Office of the Inspector General noted, the lengthy investigations "had enormous ramifications," since detainees "languished" in prison while waiting for their names to be cleared.[34]

Despite the Inspector General's scathing criticism of the government's treatment of the detainees, the Department of Justice was unrepentant, issuing a public statement that it makes "no apologies for finding every legal way possible to protect the American public from further terrorist attacks.… The consequences of not doing so could mean life or

[34] OIG 9/11 Report, p.71.

death."[35] As of October 2003, the executive branch had adopted only two of the Inspector General's twenty-one recommendations designed to prevent a repetition of the problems documented.

Secret Arrests and Hearings of Special Interest Detainees

History leaves little doubt that when government deprives persons of their liberty in secret, human rights and justice are threatened. In the United States, detentions for violations of immigration laws are traditionally public. Nevertheless, of the 1,200 people reported arrested in connection with the post-September 11 investigations in the United States, approximately one thousand were detained in secret.[36] The government released the names of some one hundred detained on criminal charges, but it has refused to release the names, location of detention, lawyers' names, and other important information about those held on immigration charges. Even now, it refuses to release the names of men who have long since been deported.

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[35] Department of Justice, ***Statement of Barbara Comstock, Director of Public Affairs, Regarding the Inspector General's Report on 9/11 Detainees***, June 2, 2003.

[36] In November 2001, the U.S. government announced that 1,200 individuals were detained in connection with September 11. Of this number, some one hundred plus had their names revealed when they were criminally charged. Most were charged with relatively minor crimes, such as lying to FBI investigators. Only a handful of the one hundred plus were charged with terrorism-related crimes and none have been charged with involvement in the September 11 attacks. The government provided no further information regarding the number of additional persons detained. Given the public information disclosed on the persons criminally charged, Human Rights Watch estimates that at least one thousand were detained in secret.

The public secrecy surrounding the detentions had a very real and negative impact on detainees' ability to defend themselves. It made it difficult for family members and lawyers to track the location of the detainees—who were frequently moved; it prevented legal services organizations from contacting detainees who might need representation; and it prevented organizations such as Human Rights Watch from getting in touch with detainees directly and talking to them about how they were treated during their arrests and detentions.

On October 29, 2001, Human Rights Watch and other groups sought the names of the detainees, their lawyers' names, and their places of detention under the U.S. Freedom of Information Act (FOIA)—legislation that mandates government disclosure of information subject to certain narrowly defined exceptions. The Department of Justice denied the request. When Human Rights Watch and the other groups went to court to challenge the government's denial, the government insisted that release of the names would threaten national security, speculating about possible scenarios of harm that could flow if the names were public. For example, it asserted that revealing the names would provide terrorists a road map to the government's anti-terrorism efforts. This argument appeared particularly specious since it was unlikely that a sophisticated terrorist organization would fail to know that its members were in the custody of the United States government, especially since detainees were free to contact whomever they wished.

A federal district court rejected the government's arguments for secrecy in August 2002 and ordered the release of the identities of all those detained in connection with the September 11 investigation. The judge

called the secret arrests "odious to a democratic society…and profoundly antithetical to the bedrock values that characterize a free and open one such as ours."[37] However, in June 2003 the court of appeals reversed that decision. In a passionate dissent, one appellate judge noted:

> Congress…chose…to require meaningful judicial review of all government [FOIA] exemption claims…. For all its concern about the separation-of-powers principles at issue in this case, the court violates those principles by essentially abdicating its responsibility to apply the law as Congress wrote it.[38]

In October 2003, Human Rights Watch and twenty-one other organizations asked the U.S. Supreme Court to overturn the appellate decision and to compel the Department of Justice to release the names.

Meanwhile, the Department of Justice imposed blanket secrecy over every minute of 600 immigration hearings involving special interest detainees so that even immediate family members were denied access to the hearings. The policy of secrecy extended even to notice of the

[37] *Center for National Security Studies v. U.S. Department of Justice*, 215 F. Supp. 2d 94, 96 (D.C. Dist. 2002) (quoting *Morrow v. District of Columbia*, 417 F.2d 728, 741-742 (D.C. Cir. 1969)).

[38] *Center for National Security Studies, et al v. U.S. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003) (Tatel, J., dissenting).

hearing itself: courts were ordered not to give out any information about whether a case was on the docket or scheduled for a hearing.[39] The Justice Department has never presented a cogent rationale for this closure policy, particularly since deportation proceedings are typically limited to the simple inquiry of whether the individual is lawfully present or has any legal reason to remain in the United States, an inquiry that should not require disclosure of any classified information. Moreover, if the Justice Department sought to present classified information during a hearing, simply closing those portions of the proceedings where such material was presented could have protected national security.

Newspapers brought two lawsuits challenging the secret hearings, alleging the blanket closure policy violated the public's constitutional right to know "what their government is up to." In one case in August 2002, an appellate court struck down the policy. The court minced no words in explaining just what was threatened by the government's insistence on secrecy, stating that:

> The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully,

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[39] *See Memorandum from Chief Immigration Judge Michael Creppy to all Immigration Judges and Court Administrators*, September 21, 2001 (outlining "additional security procedures" to be immediately applied in certain deportation cases designated by the Attorney General as special interest cases).

> and accurately in deportation proceedings. When government begins closing doors, it selectively controls information rightfully belonging to the people.[40]

The government declined to appeal this decision to the Supreme Court.

In the second case, a federal appeals court upheld the closures, finding that the need for national security was greater than the right of access to deportation hearings. The Supreme Court declined to review that decision in May 2003. Significantly, in its brief filed in opposition to the Supreme Court hearing the case, the U.S. government distanced itself from the blanket closure policy, stating that it was not conducting any more secret hearings and that its policies relating to secret hearings were under review and would "likely" be changed.

Material Witness Warrants

In addition to immigration charges, the Bush administration has used so-called material witness warrants to subject individuals of interest to its terrorism investigation to "preventive detention" and to minimize judicial scrutiny of these detentions. U.S. law permits detention of a witness when his or her testimony is material to a criminal proceeding, and when the witness presents a risk of absconding before testifying. According to the Department of Justice, the government has used the

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[40] *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

material witness law to secure the detention of less than fifty people (it has refused to release the exact number) in connection with the September 11 investigations.[41]

The U.S. government has obtained judicial arrest warrants for material witnesses by arguing that they have information to present to the grand juries investigating the crimes of September 11. The available information on these cases suggests that the government was misusing the material witness warrants to secure the detention of people it believed might have knowledge about September 11—but who could not be held on immigration charges and against whom there was insufficient evidence to bring criminal charges. In many of the cases, the witnesses were in fact never presented to a grand jury but were detained for weeks or months—under punitive prison conditions—while the government interrogated them and continued its investigations.[42] For example, Eyad Mustafa Alrabah was detained as a material witness for more than two months after he voluntarily went to an FBI office to report that he had briefly met four of the alleged hijackers at his mosque in March 2001. During his detention, he was routinely strip and cavity searched and held in isolation with the light constantly on in his cell. Alrabah, however, never testified in front of a grand jury.

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[41] *See* Letter from Jamie E. Brown, *Acting Assistant Attorney General, Office of Legislative Affairs, to Rep. F. James Sensenbrenner, Jr., chairman, House Judiciary Committee,* May 13, 2003.

[42] *See* Human Rights Watch, *Presumption of Guilt: Human Rights Abuses of Post-September 11 Detainees*, Vol. 14, No. 4 (G), August 2002

The *Washington Post* reported in November 2002 that of the forty-four men it identified as being detained as material witnesses since September 11, 2001, nearly half had never been called to testify in front of a grand jury. In at least several cases, men originally held as material witnesses were ultimately charged with crimes—strengthening the suspicion that the government was using the material witness designation as a pretext until it had time to accumulate the evidence necessary to bring criminal charges. A number of the witnesses languished in jail for months or were eventually deported based on criminal and immigration charges unrelated to September 11 that were supported by evidence the government gathered while detaining them as material witnesses.

Material witness warrants are supposed to ensure the presentation of testimony in a criminal proceeding where the witness cannot otherwise be subpoenaed to testify and where there is a serious risk that the witness will abscond rather than testify. In September 11 cases, at least some courts have accepted with little scrutiny the government's allegations that these requirements are satisfied. At the insistence of the government, the courts have also agreed to restrict access by the detainees' lawyers to the government's evidence, making it difficult if not impossible for the lawyers to object to the necessity of detention. For example, in some cases lawyers were only able to review the evidence supporting the request for the warrant quickly in court and they were unable to go over the information carefully with their clients before the hearing started. In addition, the government has argued in at least some cases that the mostly male Arab and Muslim witnesses were flight risks simply because they are non-citizens (even though some are lawful permanent residents), and have family abroad. The government's argument amounted to no more than an astonishing assumption that

millions of non-citizens living in the United States with family living abroad cannot be counted on to comply with U.S. law and to testify under a subpoena.

The Bush administration has held the material witnesses in jail for extended periods of time, in some cases for months, and subjected them to the same conditions of confinement as given to accused or convicted criminals. Indeed, some have been held in solitary confinement and subjected to security measures typically reserved for extremely dangerous persons.

The Department of Justice has argued that it must keep all information pertaining to material witnesses confidential because "disclosing such specific information would be detrimental to the war on terror and the investigation of the September 11 attacks," and that U.S. law requires that all information related to grand jury proceedings to be kept under seal.[43] It has refused to identify which information must specifically be kept secret because of its relevance to grand jury proceedings and national security interests; instead it has not only kept witnesses' identities secret, but has also refused to reveal the actual number of them, the grounds on which they were detained, and the length and location of their detention. To shroud the circumstances of detention of innocent witnesses in secrecy raises serious concerns. As one court recently stated: "To withhold that information could create public

[43] Ibid.

perception that an unindicted member of the community has been arrested and secretly imprisoned by the government."[44]

Presidential Exercise of Wartime Powers

Since September 11 the Bush administration has maintained that the president's wartime power as commander-in-chief enables him to detain indefinitely and without charges anyone he designates as an "enemy combatant" in the "war against terrorism." On this basis the government is currently holding three men incommunicado in military brigs in the United States and some 660 non-citizens at Guantánamo Bay in Cuba. With regard to the three in the United States, the administration has argued strenuously that U.S. courts must defer to its decision to hold them as "enemy combatants." With regard to the Guantánamo detainees, the administration contends that no regular U.S. court has jurisdiction to review their detention. It has also authorized the creation of military tribunals to try non-U.S. citizens alleged to be responsible for acts of terrorism; as proposed, the tribunals evade important fair trial requirements, including a full opportunity to present a defense and the right to independent judicial review. The administration's actions display a perilous belief that, in the fight against terrorism, the executive is above the law.

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[44] See In Re Grand Jury Material Witness Detention, (U.S. Dist. Ore. Apr. 7, 2003).

Enemy Combatants Held in the United States

President Bush has seized upon his military powers as commander-in-chief during war as a justification for circumventing the requirements of U.S. criminal law. Alleged terrorism suspects need not be treated as criminals, the government argues, because they are enemies in the war against terror. In the months and years since the detention of these suspects in the United States, the executive branch has not sought to bring them to trial. Instead, it claims the authority to subject these suspects to indefinite and potentially lifelong confinement in military brigs based on the president's decision that they are enemy combatants. Although there is no ongoing war in any traditional sense in the United States and the judicial system is fully functioning, the Bush administration claims that the attacks of September 11 render all of the United States a battlefield in which it may exercise its military prerogative to detain enemy combatants.

To date, the U.S. government has designated as enemy combatants in the United States two U.S. citizens and one non-citizen residing in the United States on a student visa. One of the U.S. citizens, Yaser Esam Hamdi, was allegedly captured during the fighting in Afghanistan and was transferred to the United States after the military learned he was a U.S. citizen. The other two, Jose Padilla, who is a U.S. citizen, and Ali Saleh Kahlah al-Marri, a student from Qatar, were arrested in the United States; Padilla was getting off a plane in Chicago after traveling abroad, and al-Marri was sleeping in his home.

The Bush administration initially claimed these enemy combatants had no right to challenge their detention in court, even though they are U.S. citizens and/or reside in the United States. The Department of Justice eventually conceded they had a constitutional right to habeas review, but it has fought strenuously to deny them the ability to confer with counsel to defend themselves in the court proceedings—much less to be present at the hearings—and has insisted that the courts should essentially rubber stamp its declaration that they are enemy combatants not entitled to the protections of the criminal justice system.

In the case of U.S. citizen Jose Padilla,[45] on December 4, 2002, a federal district court upheld the government's authority to order citizens held without trial as enemy combatants. The court also accepted the government's "some evidence" standard for reviewing the president's conclusion that Padilla was "engaged in a mission against the United States on behalf of an enemy with whom the United States is at war." But Padilla's lawyers succeeded in convincing the court that Padilla's right to habeas corpus includes the right to be able to confer with counsel. The government has appealed that decision and the case is pending before the Second Circuit Court of Appeals.

[45] Padilla was taken into custody by federal law enforcement agents on May 8, 2002 at an airport in Chicago and held pursuant to a material witness warrant. On June 9, two days before he was to be brought to court for his first scheduled hearing, President Bush designated Padilla as an enemy combatant. He was transferred from the criminal justice system to a naval brig in South Carolina. The government claims he was an al-Qaeda operative involved in a plot to explode a radioactive ("dirty bomb") in the United States.

Ali Saleh Kahlah al-Marri, a Qatari national who entered the United States on a student visa, was arrested and charged by a federal grand jury for allegedly lying to investigators, credit card fraud, and other fraudulent acts.[46] However, after the indictment, the executive branch decided to re-designate him an enemy combatant and transferred him to a Navy facility in South Carolina on June 23, 2003. The government explained that it determined al-Marri was an enemy combatant because of information gleaned from interrogations of an accused al-Qaeda official.[47] Legal challenges to his detention have so far been held up by a threshold jurisdictional dispute between al-Marri's lawyers and the government over which court can hear his habeas petition.[48]

Two years since the fall of the Taliban government, Yaser Esam Hamdi, a U.S. citizen, remains in military custody without charges. According to

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[46] Al-Marri was originally arrested on a material witness warrant in December 2001 because of several phone calls that he allegedly made to an individual in the United Arab Emirates who is suspected of sending funds to some of the September 11 hijackers for flight training.

[47] One newspaper account at the time of al-Marri's designation as an enemy combatant alleged that the government's actual reason for the change in status was to pressure him to cooperate. The story quoted an unnamed Department of Justice official as saying, "If the guy says 'Even if you give me 30 years in jail, I'll never help you,'" the official said. "Then you can always threaten him with indefinite custody incommunicado from his family or attorneys." *See* P. Mitchell Prothero, "New DOJ Tactics in al-Marri Case," *United Press International*, June 24, 2003.

[48] See, *Al-Marri v. Bush*, 274 F. Supp. 2d 1003 (C.D. Ill. 2003) (holding that al-Marri could not have his habeas petition heard in Illinois, and implying that he should file in South Carolina since "[h]is immediate custodian is there, and the Court has been assured by the Assistant Solicitor General of the United States and the U.S. Attorney for this district that Commander Marr [in charge of the Navy brig] would obey any court order directed to her for execution.")

the U.S. government, Hamdi was "affiliated" with a Taliban unit in the Afghan war. The unit surrendered to Afghan Northern Alliance forces in November 2001 and Hamdi was then turned over to the U.S. military.[49] In habeas proceedings, a federal district court noted "this case appears to be the first in American jurisprudence where an American citizen has been held incommunicado and subjected to an indefinite detention in the continental United States, without charges, without any findings by a military tribunal, and without access to a lawyer."[50] However, the district court and an appellate court agreed that the president had the constitutional authority to designate persons as enemy combatants. In addition, a district court ruled that Hamdi had a right to confer with his counsel, but an appellate court reversed that decision.[51]

To support its contention that Hamdi was properly designated an enemy combatant, the government submitted a vague nine-paragraph declaration by a U.S. Department of Defense official named Michael Mobbs. The government argued that the "Mobbs declaration" constituted "some evidence" that Hamdi was an enemy combatant, and "some evidence" was enough. After several hearings,[52] an appeals court

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[49] Hamdi was first sent to Guantánamo Bay, Cuba, until it emerged in April 2002 that he was a U.S. citizen, at which point the government moved him to a Naval Station Brig in Virginia.

[50] *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 528 (E.D. Va. 2002).

[51] See, *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

[52] The declaration was provided by a special adviser to the undersecretary of defense for policy, but the district court judge felt that the declaration was insufficient basis for a ruling and sought more evidence. The government argued that "some evidence" was enough to support the designation. On appeal, the fourth circuit court of appeals accepted the government's view that courts should not closely examine military decisions. It ruled that

accepted the enemy combatant designation since the court lacked a "clear conviction" that Hamdi's detention as an enemy combatant was "in conflict with the Constitution or laws of Congress."[53]

Although the appellate court said that the facts of Hamdi's involvement in the fighting in Afghanistan were uncontested, it did not address how Hamdi could contest those facts if he was never given access to the declaration, nor permitted to confer with his attorney, nor able to speak directly to the court. On October 1, 2003 his lawyers filed briefs seeking Supreme Court review of his case. Before the Supreme Court decided whether they would take the case, on December 3, 2003, Defense Department officials reversed their position again, stating that Hamdi would be allowed to see a lawyer for the first time in two years. But the government took the position that Hamdi would be allowed access to counsel "as a matter of discretion and military policy; such access is not required by domestic or international law and should not be treated as a precedent."[54] While allowing Hamdi access to an attorney resolved one question before the U.S. Supreme Court, several other issues remain.

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while some scrutiny of the detention of a so-called enemy combatant designation was required because of the right to habeas corpus possessed by all citizens and all non-citizens detained in the United States, such scrutiny was satisfied by the nine paragraphs submitted by government.

[53] *Hamdi v. Rumsfeld*, 316 F.3d 450, 474 (4th Cir. 2003).

[54] U.S. Department of Defense News Release No. 908-03, "DoD Announces Detainee Allowed Access to Lawyer," December 2, 2003.

If the U.S. Supreme Court upholds the "some evidence" standard, the right to habeas review will be seriously weakened. In the Padilla case, for example, the government's Mobbs declaration refers to intelligence reports from confidential sources whose corroboration goes unspecified. Moreover, the declaration even acknowledges grounds for concern about the informants' reliability.

The U.S. government asserts that its treatment of Padilla, Hamdi, and al-Marri is sanctioned by the laws of war (also known as international humanitarian law). During an international armed conflict, the laws of war permit the detention of captured enemy soldiers until the end of the war; it is not necessary to bring charges or hold trials. But the U.S. government is seeking to make the entire world a battlefield in the amorphous, ill-defined and most likely never-ending "war against terrorism." By its logic, any individual believed to be affiliated in any way with terrorists can be imprisoned indefinitely without any showing of evidence, and providing no opportunity to the detainee to argue his or her innocence. The laws of war were never intended to undermine the basic rights of persons, whether combatants or civilians, but the administration's re-reading of the law does just that.

Detainees at Guantánamo

For two years, the U.S. government has imprisoned a total of more than seven hundred individuals, most of whom were captured during or immediately after the war in Afghanistan, at a U.S. naval base at Guantánamo Bay, Cuba. The United States has asserted its authority to

exercise absolute power over the fate of individuals confined in what the Bush administration has tried to make a legal no man's land.

The detainees were held first in makeshift cages, later in cells in prefabricated buildings. They have been held virtually incommunicado. Apart from U.S. government officials as well as embassy and security officials from detainees' home countries, only the International Committee of the Red Cross (ICRC) has been allowed to visit the detainees, but the ICRC's confidential operating methods prevent it from reporting publicly on conditions of detention. Even so, in October the ICRC said that it has noted "a worrying deterioration in the psychological health of a large number" of the detainees attributed to the uncertainty of their fate. Thirty-two detainees have attempted suicide.[55] The Bush administration has not allowed family members, attorneys, or human rights groups, including Human Rights Watch, to visit the base, much less with the detainees. While allowed to visit the base and talk to officials, the media have not been allowed to speak with the detainees and have been kept so far away that they can only see detainees' dark silhouettes cast by the sun against their cell walls. The detainees have been able to communicate sporadically with their families through censored letters.

The Bush administration has claimed all those sent to Guantánamo are hardened fighters and terrorists, the "worst of the worst." Yet, U.S. officials have told journalists that at least some of those sent to

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[55] John Mintz, "Clashes Led to Probe of Cleric," *Washington Post*, October 24, 2003.

Guantánamo had little or no connection to the U.S. war in Afghanistan or against terror. The Guantánamo detainees have included very old men and minors, including three children between thirteen and fifteen who are being held in separate facilities. The U.S. government acknowledges that there are also some sixteen and seventeen-year-olds at the base being detained with adults, but—without explanation—it refuses to say exactly how many of them there are. Some sixty detainees have been released because the United States decided it had no further interest in them.

According to the Bush administration, the detainees at Guantánamo have no right to any judicial review of their detention, including by a military tribunal. The administration insists that the laws of war give it unfettered authority to hold combatants as long as the war continues—and the administration argues that the relevant "war" is that against terrorism, not the long since concluded international armed conflict in Afghanistan during which most of the Guantánamo detainees were picked up.[56]

The Bush administration has ignored the Geneva Conventions and longstanding U.S. military practice which provides that captured combatants be treated as prisoners of war unless and until a "competent tribunal" determines otherwise. Instead of making individual determinations through such tribunals as the Geneva Conventions

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[56] Under the Geneva Conventions, the ongoing fighting in Afghanistan is considered a non-international armed conflict.

require, the Bush administration made a blanket determination that no person apprehended in Afghanistan was entitled to prisoner-of-war status. The United States is thus improperly holding without charges or trial Taliban soldiers and hapless civilians mistakenly detained, as well as terrorist suspects arrested outside of Afghanistan who should be prosecuted by civilian courts.

The Bush administration, in its determination to carve out a place in the world that is beyond the reach of law, has repeatedly ignored protests from the detainee's governments and intergovernmental institutions such as the Inter-American Commission on Human Rights, the U.N. Special Rapporteur on the independence of judges and lawyers, the U.N. Working Group on Arbitrary Detention, and the U.N. High Commissioner for Human Rights. Without ever laying out a detailed argument as to why its actions are lawful under either the laws of war or international human rights law, the U.S. government has simply insisted that national security permits the indefinite imprisonment of the Guantánamo detainees without charges or judicial review.

Thus far the U.S. government has been able to block judicial oversight of the detentions in Guantánamo. In two cases, federal district and appellate courts have agreed with the Department of Justice that they lack jurisdiction to hear habeas corpus petitions because the detainees are being held outside of U.S. sovereign territory.[57] The ruling that the

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[57] *See Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003); *Coalition of Clergy v. Bush*, 310 F.3d 1153 (9th Cir. 2002); *Gherebi v. Bush*, 262 F. Supp. 2d 1064 (C.D. Ca. 2003); *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.C. Dist. 2002).

courts lack jurisdiction is based on a legal fiction that Guantánamo remains under the legal authority of Cuba. The United States has a perpetual lease to the land it occupies in Cuba, which grants it full power and control over the base unless both countries agree to its revocation.

Under international law, a state is legally responsible for the human rights of persons in all areas where it exercises "effective control." Protection of rights requires that persons whose rights are violated have an effective remedy, including adjudication before an appropriate and competent state authority.[58] This makes the Bush administration's efforts to block review by U.S. courts and frustrate press and public scrutiny all the more troubling. No government should be able to create a prison where it can exercise unchecked absolute power over those within the prison's walls.

On November 11, 2003, the Supreme Court decided to review the lower court decisions rejecting jurisdiction over the detainees' habeas petitions. Amicus briefs had been filed by groups of former American prisoners of war, diplomats, federal judges, and military officers, non-governmental organizations, and even Fred Korematsu, a Japanese-American interned by the United States during World War II. Until the court renders its decision in June or July 2004, the detainees will remain in legal limbo, without a court to go to challenge their detention.

[58] ICCPR, article 3.

Military Tribunals

Fair trials before impartial and independent courts are indispensable to justice and required by international human rights and humanitarian law. Nevertheless, the U.S. government plans to try at least some persons accused of involvement with terrorism before special military commissions that risk parodying the norms of justice.

Authorized by President Bush in November 2001 for the trial of terrorist suspects who are not U.S. citizens, the military commissions will include certain procedural protections—including the presumption of innocence, ostensibly public proceedings, and the rights to defense counsel and to cross-examine witnesses. However, due process protections have little meaning unless the procedures in their entirety protect a defendant's basic rights. The Pentagon’s rules for the military commissions fail miserably in this regard.

Perhaps most disturbing is the absence of any independent judicial review of decisions made by the commissions, including the final verdicts. Any review will be by the executive branch, effectively making the Bush administration the prosecutor, judge, jury and, because of the death penalty, possible executioner. There is no right to appeal to an independent and impartial civilian court, in contrast to the right by the U.S. military justice system to appeal a court-martial verdict to a civilian appellate court and, ultimately, to the Supreme Court. The fairness of the proceedings is also made suspect by Pentagon gag orders that prohibit defense lawyers from speaking publicly about the court proceedings without prior military approval—even to raise due process

issues unrelated to security concerns—and that prohibit them from ever commenting on anything to do with any closed portions of the trials.

The right to counsel is compromised because defendants before the commissions will be required to retain a military defense attorney, although they may also hire civilian lawyers at their own expense. The commission rules permit the monitoring of attorney-client conversations by U.S. officials for security or intelligence purposes, destroying the attorney-client privilege of confidentiality that encourages clients to communicate fully and openly with their attorneys in the preparation of their defense.

The commission rules call for the proceedings to be presumptively open, but the commissions will have wide leeway to close the proceedings as they see fit. The commission's presiding officer can close portions or even all of the proceedings when classified information is involved and bar civilian counsel even with the necessary security clearance from access to the protected information, no matter how crucial it is to the accused's case. This would place the defendant and his civilian attorney in the untenable position of having to defend against unexamined and secret evidence.

In July 2003, President Bush designated six Guantánamo detainees as eligible for trial by military commission. The U.S. government has put the prosecutions on hold in three of these cases involving two U.K. nationals and one Australian citizen in response to concerns raised by the British and Australian governments about due process and fair trial

in the military commissions. Decisions have been reached that the United States would not subject these three men to the death penalty or listen in on their conversations with their defense lawyers, but the governments continue to negotiate over other issues. There is no indication thus far that the bilateral negotiations address such shortcomings as the lack of independent appellate review. Moreover, the Bush administration has not suggested that any modifications to the procedures for British or Australian detainees would be applied to all detainees at Guantánamo, regardless of nationality. The negotiations thus raise the prospect of some detainees receiving slightly fairer trials, while the rest remain consigned to proceedings in which justice takes a backseat to expediency.

Shock and Awe Tactics

Protecting the nation's security is a primary function of any government. However, the United States has long understood "that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability . . . . our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused."[59]

Despite this admonition, since September 11 the Bush administration has used the words "national security" as a shock and awe tactic,

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[59] *Korematsu v. United States*, 584 F. Supp. 1406, 1442 (N.D. Ca 1984).

blunting the public's willingness to question governmental actions. But even those who have asked questions have rarely found an answer. The government has by and large been successful in ensuring little is known publicly about who it has detained and why. It has kept the public in the dark about deportation proceedings against September 11 detainees and the military commission rules certainly leave open the possibility of proceedings that are closed to the public in great part. So long as the secrecy is maintained, doubts about the justice of these policies will remain and any wrongs will be more difficult to right.

The Bush administration's disregard for judicial review, its reliance on executive fiat, and its penchant for secrecy limit its accountability. That loss of accountability harms democratic governance and the legal traditions upon which human rights depend. Scrutiny by the judiciary—as well as Congress and the public at large—are crucial to prevent the executive branch from warping fundamental rights beyond recognition. A few courts have asserted their independence and have closely examined government actions against constitutional requirements. But other courts have abdicated their responsibility to perform as guarantors of justice. Some courts have failed to apply a simple teaching at the heart of the Magna Carta: "in brief. . .that the king is and shall be *below* the law."[60] For its part, Congress is only now beginning to question seriously the legality and necessity of the Bush administration's post-September 11 detentions.

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[60] *Regina v. Sec'y of State for Foreign and Commonwealth Affairs,* Q.B. 1067, 1095 (2001) (citing Pollock & Maitland, *The History of English Law* (1923) (emphasis added).

Confronted with a difficult and complex battle against international terrorism, the United States must not relinquish its traditions of justice and public accountability. The United States has long held itself up as the embodiment of good government. But it is precisely good governance—and its protection of human rights—that the Bush administration is currently jeopardizing with its post-September 11 anti-terrorist policies.

Drawing the Line: War Rules and Law Enforcement Rules in the Fight against Terrorism

By Kenneth Roth

Where are the proper boundaries of what the Bush administration calls its war on terrorism? The recent wars against the Afghan and Iraqi governments were classic armed conflicts, with organized military forces facing each other. But the administration says its war on terrorism is global, extending far beyond these typical battlefields. On September 29, 2001, U.S. President George W. Bush said, "Our war on terror will be much broader than the battlefields and beachheads of the past. The war will be fought wherever terrorists hide, or run, or plan."

This language stretches the meaning of the word "war." If Washington means "war" metaphorically, as when it speaks of the war on drugs, the rhetoric would be uncontroversial—a mere hortatory device designed to rally support to an important cause. But the administration seems to think of the war on terrorism quite literally—as a real war—and that has worrying implications.

The rules that bind governments are much looser during wartime than in times of peace. The Bush administration has used war rhetoric to give itself the extraordinary powers enjoyed by a wartime government to detain or even kill suspects without trial. Enticing as such enhanced power might be in the face of the unpredictable and often lethal threat

posed by terrorism, it threatens basic due process rights and the essential liberty such rights protect.

War and Peace Rules

By literalizing its "war" on terror, the Bush administration has broken down the distinction between what is permissible in times of peace and what can be condoned during a war. In peacetime, governments are bound by strict rules of law enforcement. Police can use lethal force only if necessary to meet an imminent threat of death or serious bodily injury. Once a suspect is detained, he or she must be charged and tried. These requirements—what one can call "law enforcement rules"—are codified in international human rights law.

In times of war, law enforcement rules are supplemented by the more permissive rules of armed conflict, or international humanitarian law. Under these "war rules," an enemy combatant can be shot without warning (unless he is incapacitated, in custody, or trying to surrender), regardless of any imminent threat. If a combatant is captured, he or she can be held in custody until the end of the conflict, without being charged or tried.

These two sets of rules have been well developed over the years, by both tradition and detailed international conventions. There is little law, however, to explain when one set of rules should apply instead of the other. Usually the existence of an armed conflict is obvious, especially when two governments are involved. But in other circumstances, such

as the Bush administration's announced war on terrorism as it extends beyond Afghanistan and Iraq, it is less clear.

For example, the Geneva Conventions—the principal codification of war rules—apply to "armed conflict" but do not define the term. However, the International Committee of the Red Cross (ICRC), the official custodian of the conventions, does provide some guidance in its commentary, in distinguishing between civil war and mere riots or disturbances.

One test suggested by the ICRC for determining whether wartime or peacetime rules apply is to examine the intensity of hostilities. The Bush administration, for example, claims that al-Qaeda is at war with the United States because of the magnitude of the September 11, 2001 attacks as well as the pattern of al-Qaeda's alleged bombings including of the U.S. embassies in Kenya and Tanzania, the *U.S.S. Cole* in Yemen, and residential compounds in Saudi Arabia. Each of these attacks was certainly a serious crime warranting prosecution. But technically speaking, was the administration right to say that they add up to war? Is al-Qaeda a ruthless criminal enterprise or a military operation? The ICRC's commentary does not provide a clear answer.

In addition to the intensity of hostilities, the ICRC suggests considering such factors as the regularity of armed clashes and the degree to which opposing forces are organized. Whether a conflict is politically motivated also seems to play an unacknowledged role in deciding whether it is "war" or not. Thus, organized crime or drug trafficking,

though methodical and bloody, are generally understood to present problems of law enforcement, whereas armed rebellions, once sufficiently organized and violent, are usually seen as "wars."

The problem with these guidelines, however, is that they were written to address domestic conflicts rather than global terrorism. Thus, they do not make clear whether al-Qaeda should be considered an organized criminal operation (which would trigger law-enforcement rules) or a rebellion (which would trigger war rules). The case is close enough that the debate of competing metaphors does not yield a conclusive answer. Clarification of the law would be useful.

Even in the case of war, another factor in deciding whether law-enforcement rules should apply is the nature of a given suspect's involvement. War rules treat as combatants only those who are taking an active part in hostilities. Typically, that includes members of an armed force who have not laid down their arms as well as others who are directing an attack, fighting or approaching a battle, or defending a position. Under these rules, even civilians who pick up arms and start fighting can be considered combatants and treated accordingly. But this definition is difficult to apply to terrorism, where roles and activities are clandestine, and a person's relationship to specific violent acts is often unclear.

Given this confusion, a more productive approach is to consider the policy consequences of applying wartime or law enforcement rules.

Unfortunately, the Bush administration seems to have ignored such concerns.

Padilla and al-Marri

Consider, for example, the cases of Jose Padilla and Ali Saleh Kahlah al-Marri. Federal officials arrested Padilla, a U.S. citizen, in May 2002 when he arrived from Pakistan at Chicago's O'Hare Airport, allegedly to scout out targets for a radiological or "dirty" bomb. As for al-Marri, a student from Qatar, he was arrested in December 2001 at his home in Peoria, Illinois, for allegedly being a "sleeper," an inactive accomplice who could be activated to help others launch terrorist attacks. If these allegations are true, Padilla and al-Marri should certainly be prosecuted. Instead, after initially holding each man on other grounds, President Bush declared them both to be "enemy combatants" and claimed the right to hold them without charge or trial until the end of the war against terrorism—which, of course, may never come.

But should Padilla and al-Marri, even if they have actually done what the U.S. government claims, really be considered warriors? Aren't they more like ordinary criminals? A simple thought experiment shows how dangerous are the implications of treating them as combatants. The Bush administration has asserted that the two men planned to wage war against the United States and therefore can be considered de facto soldiers. But if that is the case, then under war rules, the two men could have been shot on sight, regardless of any immediate danger they posed. Padilla could have been gunned down as he stepped off his plane at

O'Hare, al-Marri as he left his home in Peoria. That, after all, is what it means to be a combatant in time of war.

Most people, I suspect, would be deeply troubled by that result. The Bush administration has not alleged that either suspect was anywhere near to carrying out his alleged terrorist plan. Neither man, therefore, posed an imminent threat of the sort that might justify the preventive use of lethal force under law enforcement rules. With a sophisticated legal system available to hear their cases, killing these men would have seemed gratuitous and wrong. Of course, the Bush administration has not proposed summarily killing them; it plans to detain them indefinitely. But if Padilla and al-Marri are not enemy combatants for the purpose of being shot, they should not be enemy combatants for the purpose of being detained, either. The one conclusion necessarily implies the other.

Even if they were appropriately treated as combatants, Padilla's and al-Marri's lives might still have been spared under the doctrine of military necessity, which precludes using lethal force when an enemy combatant can be neutralized through lesser means. But from the bombing of urban bridges in northern Serbia during the Kosovo war to the slaughter on the "Highway of Death" during the 1991 Gulf War, the U.S. government has been at best inconsistent in respecting the doctrine of military necessity. Other governments' records are even worse. That terrorist suspects who pose no immediate danger might only sometimes be shot without warning should still trouble us and lead us to question the appropriateness of their classification as combatants in the first place.

Yemen

A similar classification problem, though with an arguably different result, arose in the case of Qaed Salim Sinan al-Harethi. Al-Harethi, who Washington alleges was a senior al-Qaeda official, was killed by a drone-fired missile in November 2002 while driving in a remote tribal area of Yemen. Five of his companions also died in the attack, which was carried out by the CIA. The Bush administration apparently considered al-Harethi an enemy combatant for his alleged involvement in the October 2000 *U.S.S. Cole* bombing, in which seventeen sailors died.

In this instance, the case for applying war rules was stronger than with Padilla or al-Marri, although the Bush administration never bothered to spell it out. Al-Harethi's mere participation in the 2000 attack on the *Cole* would not have made him a combatant in 2002, since in the interim he could have withdrawn from al-Qaeda; war rules permit attacking only current combatants, not past ones. And if al-Harethi were a civilian, not a member of an enemy armed force, he could not be attacked unless he were actively engaged in hostilities at the time. But the administration alleged that al-Harethi was a "top bin Laden operative in Yemen," implying that he was in the process of preparing further attacks. If true, this would have made the use of war rules against him more appropriate. And unlike Padilla and al-Marri, arresting al-Harethi may not have been an option. The Yemeni government has little control over the tribal area where al-Harethi was killed; eighteen Yemeni soldiers had reportedly died in an earlier attempt to arrest him. However, even in this arguably appropriate use of war rules, the Bush administration offered no public justification, apparently unwilling to acknowledge even

implicitly any legal constraints on its use of lethal force against alleged terrorists.

Bosnia and Malawi

In other cases outside the United States, the Bush administration's use of war rules has had far less justification. For example, in October 2001, Washington sought the surrender of six Algerian men in Bosnia. At first, the U.S. government followed law enforcement rules and secured the men's arrest. But then, after a three-month investigation, Bosnia's Supreme Court ordered the suspects released for lack of evidence. Instead of providing additional evidence, however, Washington switched to war rules. It pressured the Bosnian government to hand the men over anyway and whisked them out of the country—not to trial, but to indefinite detention at the U.S. naval base at Guantánamo Bay. If the men had indeed been enemy combatants, a trial would have been unnecessary, but there is something troubling about the administration's resort to war rules simply because it did not like the result of following law enforcement rules.

The administration followed a similar pattern in June 2003, when five al-Qaeda suspects were detained in Malawi. Malawi's high court ordered local authorities to follow criminal justice laws and either charge or release the five men, all of whom were foreigners. Ignoring local law, the Bush administration insisted that the men be handed over to U.S. security forces instead. The five men were spirited out of the country to an undisclosed location—not for trial, but for interrogation. The move

sparked riots in Malawi. The men were released a month later in Sudan, after questioning by Americans failed to turn up incriminating evidence.

These cases are not anomalies. In the last two-and-a-half years, the U.S. government has taken custody of a series of al-Qaeda suspects in countries such as Pakistan, Thailand, and Indonesia. In many of these cases, the suspects were not captured on a traditional battlefield, and a local criminal justice system was available. Yet instead of allowing the men to be charged with a crime under local law-enforcement rules, Washington had them treated as combatants and delivered to a U.S. detention facility in an undisclosed location.

A Misuse of War Rules?

Is this method of fighting terrorism away from a traditional battlefield an appropriate use of war rules? At least insofar as the target can be shown to be actively involved in ongoing terrorist activity amounting to armed conflict, war rules might be acceptable when there is no reasonable criminal justice option, as in tribal areas of Yemen. But there is something troubling, even dangerous, about using war rules when law enforcement rules reasonably could have been followed.

Errors, common enough in ordinary criminal investigations, are all the more likely when the government relies on the murky intelligence that drives many terrorist investigations. The secrecy of terrorist investigations, with little opportunity for public scrutiny, only compounds the problem. If law enforcement rules are used, a mistaken

arrest can be rectified at a public trial. But if war rules apply, the government is never obliged to prove a suspect's guilt. Instead, a supposed terrorist can be held for however long it takes to win the "war" against terrorism—potentially for life—with relatively little public oversight. And the consequences of error are even graver if the supposed combatant is killed, as was al-Harethi. Such mistakes are an inevitable hazard of the traditional battlefield, where quick life-and-death decisions must be made. But when there is no such urgency, prudence and humanity dictate applying law enforcement rules.

Washington must also remember that its conduct sets an example, for better or worse, for many governments around the world. After all, many other states would be all too eager to find an excuse to eliminate their enemies through war rules. Israel, to name one, has used this rationale to justify its assassination of terrorist suspects in Gaza and the West Bank. It is not hard to imagine Russia doing the same to Chechen leaders in Europe, Turkey using a similar pretext against Kurds in Iraq, China against Uighurs in Central Asia, or Egypt against Islamists at home.

There is some indication that the Bush administration may be willing to abide by a preference for law enforcement rules when it comes to using lethal force. President Bush has reportedly signed a secret executive order authorizing the CIA to kill al-Qaeda suspects anywhere in the world but limiting that authority to situations in which other options are unavailable. But when it comes to detention, the administration has been quicker to invoke war rules.

Both the administration's reluctance to kill terrorist suspects and its preference for detention over trial presumably stem in part from its desire to interrogate suspects to learn about potential attacks. Just as a dead suspect cannot talk, a suspect with an attorney may be less willing to cooperate. Moreover, trials risk disclosure of sensitive information, as the administration has discovered in prosecuting Zacarias Moussaoui. These are the costs of using a criminal justice system.

But international human rights law is not indifferent to the needs of a government facing a security crisis. Under a concept known as "derogation," governments are permitted to suspend certain rights temporarily if they can show that it is necessary to meet a "public emergency threatening the life of the nation." The International Covenant on Civil and Political Rights, which the United States has ratified, requires governments invoking derogation to file a declaration justifying the move with the U.N. secretary-general. Among the many governments to have done so are Algeria, Argentina, Chile, Colombia, Peru, Poland, Russia, Sri Lanka, and the United Kingdom. Yet instead of derogating from law enforcement rules, the Bush administration has opted to use war rules.

The difference is more than a technicality. Derogation is a tightly circumscribed exception to ordinary criminal justice guarantees, permitted only to the extent necessary to meet a public emergency and scrutinized by the U.N. Human Rights Committee. Moreover, certain rights—such as the prohibition of torture or arbitrary killing—can never be suspended. The Bush administration, however, has resisted justifying its suspension of law enforcement rules and opposed scrutiny of that

decision, whether by international bodies or even by U.S. courts. Instead, it has unilaterally given itself the greater latitude of war rules.

The U.S. Justice Department has defended the Bush administration's use of war rules for suspects apprehended in the United States by citing a U.S. Supreme Court decision from World War II, *Ex Parte Quirin*. In that case, the court ruled that German army saboteurs who landed in the United States could be tried as enemy combatants before military commissions. The court distinguished its ruling in an earlier, Civil War-era case, *Ex Parte Milligan*, which had held that a civilian resident of Indiana could not be tried in military court because local civil courts remained open and operational. Noting that the German saboteurs had entered the United States wearing at least parts of their uniforms, the court in *Quirin* held that the *Milligan* protections applied only to people who are not members of an enemy's armed forces.

But there are several reasons why, even under U.S. law, *Quirin* does not justify the Bush administration's broad use of war rules. First, the saboteurs in *Quirin* were agents of a government with which the United States was obviously at war. The case does not help determine whether, away from traditional battlefields, the United States should be understood as fighting a "war" with al-Qaeda or pursuing a criminal enterprise. Second, although the court in *Quirin* defined a combatant as anyone operating with hostile intent behind military lines, the case has arguably been superseded by the 1949 Geneva Conventions (ratified by the United States), which, as noted, treat as combatants only people who are either members of an enemy's armed force or are taking active part in hostilities. *Quirin* thus does not help determine whether, under

current law, people such as Padilla and al-Marri should be considered civilians (who, under *Milligan,* must be brought before civil courts) or combatants (who can face military treatment).

Moreover, *Quirin* establishes only who can be tried before a military tribunal. The Bush administration, however, has asserted that it has the right to hold Padilla, al-Marri, and other detained "combatants" without charge or trial of any kind—in effect, precluding serious independent assessment of the grounds for potentially lifetime detention. The difference is especially significant because in the case of terrorist suspects allegedly working for a shadowy group, error is more likely than it was for the uniformed German saboteurs in *Quirin*.

Finally, whereas the government in *Quirin* was operating under a specific grant of authority from Congress, the Bush administration, in treating suspects as enemy combatants, is operating largely on its own. This lack of congressional guidance means that the difficult judgment calls in drawing the line between war and law enforcement rules are being made behind closed doors, without the popular input that a legislative debate would provide.

A Policy Approach

So, when the "war" on terrorism is being fought away from a traditional battlefield, how should the line be drawn between war and law enforcement rules? No one should lightly give up due process rights, as the Bush administration has done with its "enemy combatants"—

particularly when a mistake could result in death or lengthy detention without charge or trial. Rather, law enforcement rules should presumptively apply to all suspects, and the burden should fall on those who want to invoke war rules to demonstrate that they are necessary and appropriate.

The following three-part test would help assess whether a government has met its burden when it asserts that law enforcement rules do not apply. To invoke war rules, a government should have to prove, first, that an organized group is directing repeated acts of violence against it, its citizens or interests with sufficient intensity that it constitutes an armed conflict; second, that the suspect is an active member of the opposing armed force or an active participant in the violence; and, third, that law enforcement means are unavailable.

Within the United States, the third requirement would be nearly impossible to satisfy—as it should be. Given the ambiguities of investigating terrorism, it is better to be guided more by *Milligan*'s affirmation of the rule of law than by *Quirin*'s exception to it. Outside the United States, Washington should never resort to war rules away from a traditional battlefield if local authorities can and are willing to arrest and deliver a suspect to an independent tribunal—regardless of how the tribunal then rules. War rules should only be used in cases when no law enforcement system exists (and the other conditions of war are present), not when the rule of law happens to produce inconvenient results. Even if military forces are used to make an arrest in such cases, law enforcement rules might still apply; only when attempting an arrest is too dangerous should war rules be countenanced.

This approach would recognize that war rules may have their place in fighting terrorism, but given the way they inherently compromise fundamental rights, they should be used sparingly. Away from a traditional battlefield, they should be used, even against a warlike enemy, as a tool of last resort—when there is no reasonable alternative, not when a functioning criminal justice system is available. Until there are better guidelines on when to apply war and law enforcement rules, this three-part test, drawn from the policy consequences of the decision, offers the best way to balance security and rights. In the meantime, the Bush administration should abandon its excessive use of war rules. In attempting to make Americans safer, it has made all Americans, and everyone else, less free.

Israeli Assassinations

The Israeli-Palestinian conflict provides a useful context to apply this test. Since late 2000, the Israeli government has been deliberately assassinating Palestinians in the West Bank and Gaza Strip whom it claims are involved in attacks against Israelis, particularly Israeli civilians. In many cases, Palestinian civilians died in the course of these assassinations, sometimes because suspects were targeted while in residential buildings or on busy thoroughfares. Even if these attacks might otherwise have been justified, some would violate the international prohibition on attacks that are indiscriminate or cause disproportionate harm to civilians. In other cases, however, the assassinations have hit their mark with little or no harm to others. Can these well-targeted assassinations be justified?

Although the level of violence between Israeli and Palestinian forces has varied considerably over time, the violence in certain cases has been intense and sustained enough for the Israeli government reasonably to make the case that in those instances an armed conflict exists.

As for the second prong, the Israeli government would have to show, as noted, that the targeted individual was an active participant in these hostilities, such as by directing an attack, fighting or approaching a battle, or defending a position. The Israeli government used to claim that the Palestinians targeted for assassination were involved in plotting attacks against Israelis, although increasingly the government has not bothered to make that claim. Even when it does so, the summary nature of the claim means that there is nothing to stop Israel from declaring virtually any Palestinian an accomplice in the violent attacks and thus subject to assassination. Given that these assassinations are planned well in advance, Israel should provide evidence of direct involvement in plotting or directing violence before overcoming the legal presumption that all residents of occupied territories are protected civilians. Moreover, because unilateral allegations are so easy to make falsely or mistakenly, and in light of their lethal consequences, these claims should be tested before an independent review mechanism.

As for the third prong, Israel has made no effort to explain why these suspected participants in violent attacks on Israelis could not be arrested and prosecuted rather than summarily killed. Significantly, assassinations are taking place not on a traditional battlefield but in a situation of occupation in which the Fourth Geneva Convention imposes essentially law enforcement responsibilities on the occupier.

These responsibilities do not preclude using war methods in the heat of battle, but the assassinations typically take place when there is no battle raging. In these circumstances, Israel has the burden of explaining why law enforcement means could not be used to arrest a suspect rather than war-like tools to kill him. Theoretically Israel might claim that its forces are unable to enter an area under occupation without triggering armed conflict, but in fact the Israeli military has shown itself capable of operating throughout the West Bank and Gaza with few impediments. In these circumstances, Israel would be hard-pressed to show that a law-enforcement enforcement option is unavailable. It would thus not be justified to resort to the war rules of assassination.