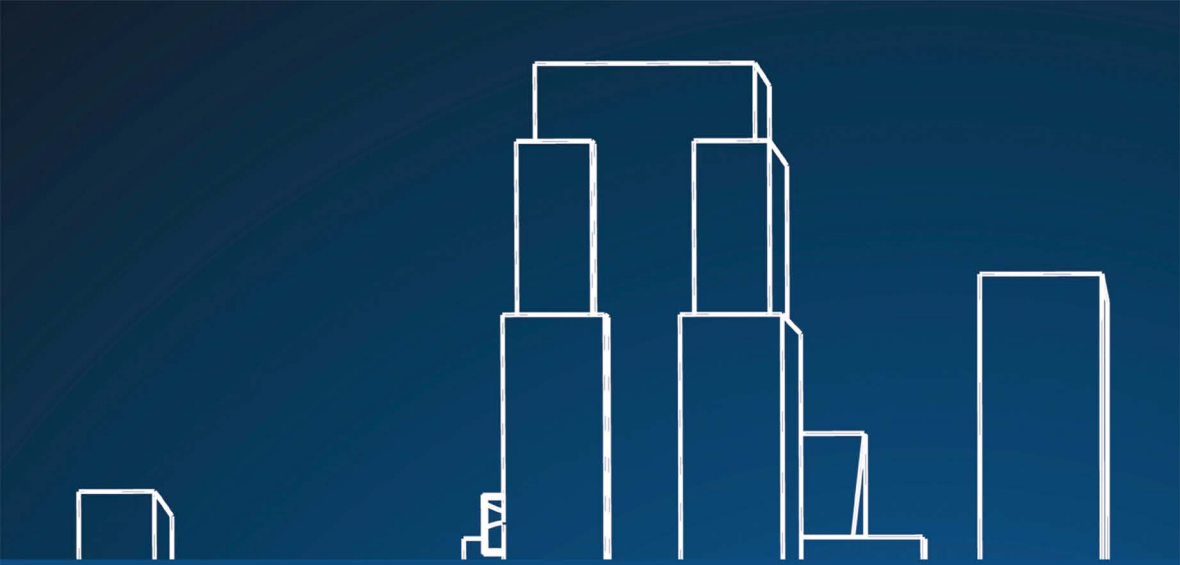

Routledge Research in Human Rights Law

HUMAN RIGHTS AND AMERICA'S WAR ON TERROR

Edited by
Satvinder S. Juss

With a foreword by
Richard Falk

Human Rights and America's War on Terror

This volume examines the success of the 9/11 attacks in undermining the cherished principles of Western democracy, free speech and tolerance, which were central to US values. It is argued that this has led to the USA fighting disastrous wars in Afghanistan and Iraq, and to sanctioning the use of torture and imprisonment without trial in Guantánamo Bay, extraordinary rendition, surveillance and drone attacks. At home, it has resulted in restrictions of civil liberties and the growth of an ill-affordable military and security apparatus. In this collection the authors note the irony that the shocking destruction of the World Trade Center on 9/11 should become the justification for the relentless expansion of security agencies. Yet, this is a salutary illustration of how the security agencies in the USA have adopted faulty preconceptions, which have become too embedded within the institution to be abandoned without loss of credibility and prestige.

The book presents a timely assessment of both the human rights costs of the 'war on terror' and the methods used to wage and relentlessly continue that war. It will be of interest to researchers, academics, practitioners and students in the fields of human rights law, criminal justice, criminology, politics and international studies.

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Human Rights and America's War on Terror

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Foreword

There is no doubt that the substantive and symbolic damage done by the 9/11 attacks was traumatic in its impact well beyond what was initially imagined. To have so exposed American vulnerability to low-technology attacks made the huge American military machine seem almost obsolete overnight. To have struck hard at the World Trade Center and the Pentagon, the economic and military symbols of American global leadership, was to pose an unprecedented challenge for which the political leadership of the country was clearly unprepared, as well as unequipped. The US government was adept over the course of the country's history at winning major wars, and its policymakers were proud in recent years of what they identify as "full spectrum dominance," boasting of this claimed capacity to prevail on any battlefield at any scale anywhere on the planet. At the same time, 9/11 made a huge hole in the hubristic fabric of American grand strategy. Its leaders and their advisors had no experience, doctrine, or weaponry with which to fight this new formidable ideological enemy that possessed seemingly unstoppable tactics that could be directed at soft targets everywhere in the world by a suicidal band of trained followers seemingly impatient for martyrdom.

The disturbing elements of the situation surrounding 9/11 became evident to many close observers of the incident even before the smoke cleared at Ground Zero. The mood of concern was epitomized by the pithy abstraction "this changes everything," loosely attached to the momentous occurrences on that day. The contributors to this volume focus on a series of chosen counterterrorist responses that began to be formulated on the day after, that is, on 9/12. What sets this book apart is its comprehensive critical interrogation of these responses, illuminating the disturbing dialectic that has been evident in subsequent years between terrorism and counterterrorism. It raises the stressful question as to whether the real danger of terrorism is the entrapment of the targeted society in a behavioral logic that ends up establishing an unwanted moral symmetry between terrorism and counterterrorism. It seems crucial to distinguish the traumatic context of the attacks, labeled 9/11, from the less frenzied, if more consequential, selection of counterterrorist responses, here identified by the shorthand of 9/12.

Until this brilliant book of essays, few even discussed this provocative hypothesis that the American counterterrorist tactics and measures from 9/12 until today have caused more damage to the United States, its way of life, and essential

political identity as a constitutional and humane democracy than did the horrific attacks themselves. This is a startling assertion difficult, at first, even to comprehend, and made even more frightening by the realization that the forces let loose by the 9/12 logic of "securitizing everything" (to borrow a phrase from Martin Ewi's excellent chapter) are virtually impossible to constrain even after their failure and depravity became manifest.

What compounds the seeming perversity of this situation is that even the counterterrorist mission that was supposed to vindicate what Dick Cheney described as "going to the dark side" has also actually gone awry, giving rise to as at least as much violent extremism as it eliminated. Donald Rumsfeld, of all unlikely people, confirmed this point years ago when he famously acknowledged that no "metrics" existed to help the government decide whether America was winning or losing the "War on Terror." He describes the puzzle as follows: "Are we capturing, killing or deterring and dissuading more terrorists every day than the *madrassas* and the radical clerics are recruiting, training and deploying against us?" Despite this candid acknowledgment, it seemed never to occur to Rumsfeld, then Secretary of Defense, whether in light of such radical uncertainty it was not time to reconsider existing counterterrorist policies since the current ones seemed not to be working, and were responsible for widespread death, destruction, massive suffering, and, yes, a worldwide chorus of allegations directed at the United States, essentially charging war crimes, violations of human rights, and, to top it all, "state terrorism." The names of Abu Ghraib and Guantanamo entered the political vocabulary of wrongdoing as places designating degenerate political behavior. As the 9/11 victim morphed into the 9/12 victimizer, the words of Kurt Vonnegut's celebrated refrain in *Slaughterhouse Five* have a new resonance: "and so it goes."

What this volume achieves better than any competitor is a comprehensive interpretative overview of the costly deficiencies of what has been known ever since 9/11 as the War on Terror, which Satvinder Juss, the editor of this undertaking, aptly describes as "the ill-crafted War on Terror." In a series of scholarly chapters such policies and practices as torture, extraordinary rendition, black sites, drone warfare, and indefinite detention are authoritatively and critically depicted as departures from centuries of humanitarian efforts to impose some limits on the behavior of states in wartime situations. Other chapters depict the homeland encroachments on civil liberties that have entailed totalizing surveillance in ways that badly erode the privacy of ordinary American citizens, arouse acute suspicions of immigrants, minorities, and foreigners, nurture a taste for autocratic and demagogic leadership, and adopt a good and evil simplistic calculus with which to castigate non-state adversaries. This black and white thinking by policymakers and leaders makes diplomacy irrelevant and virtually ensures the permanence of what has previously been acknowledged by the US Department of Defense as "the long war," or more popularly known as "the forever war."

Of course, the haunting question we are left with is whether the 9/12 pattern of response could and should have been handled differently to achieve better results in relation to national security with particular reference to the effectiveness of counterterrorist tactics. A reevaluation of the 9/12 approach would also

consider whether it was necessary to encroach so flagrantly upon civil liberties and human rights, international humanitarian law, and the sovereign rights of foreign countries, in meeting a range of threats never previously encountered. It is always a temptation to be a retrospective wise man or woman, knowingly re-running history on the basis of armchair hindsight while being freed from the urgencies and anxieties of meeting challenging existential threats credibly associated with feared terrorist sequels to 9/11. Without ignoring this cautionary *caveat*, there still seems to be an immense learning opportunity present that could have been useful when confronting future crises or even now to correct some of the worst 9/12 missteps.

At the same time, while critical evaluation is clearly overdue, especially in the nerve centers of government, it is also the case that for reasons earlier mentioned, 9/11 produced a challenging menu of threats that could not be handled by either the available toolbox of weaponry and doctrine nor could be addressed effectively within the framework of existing international law. For one thing, that framework had evolved to regulate behavior among states, without taking account of non-state actors that were assumed to be manageable through the exercise of sovereign rights. For another, the non-territorial nature of the terrorist adversary meant that deterrence and defense had become almost irrelevant, and in their place an almost irresistible temptation created to strike preemptively whenever and wherever potential terrorists were found in the world. And as a corollary to such an assessment, the acquisition of information was deemed critical, and could only be reliably acquired from captured suspects or trusted informers. It is this logic that probably accounted for the kind of 9/12 response structure that was put together in a hurry, and arguably in far too great a hurry.

My view is that the challenging innovative dimensions of 9/11 could have been taken into account while also making a much more serious effort to minimize damage to the normative frameworks embodied in international law and constitutionally protected liberties. Precisely because of the pressures exerted on the rules previously governing international recourse to force, there should have been an extra effort made to avoid gratuitous displays of depraved behavior of the kind that occurred in Iraqi and Afghan prison complexes, verified by the shocking Abu Ghraib pictures of humiliating torture with no plausible rationale, which discredited the already unacceptable reliance on torture of detained suspects, which had violated one of the most respected prohibitions in international law. In my view, the core mistake was to declare this undifferentiated *war* on terrorism, without seeking a more nuanced counterterrorist security template, perhaps combining criminal law enforcement with a new kind of very limited war claim.

Was it, in other words, really necessary to opt for the war paradigm, without even offering supportive arguments, capriciously departing thereby from the crime paradigm that had been long relied upon by governments in the past to cope with even the most formidable non-state violent political movements? Until 9/11, it never occurred to counterterrorist specialists to declare war in response to a terrorist incident even if severe. Prior to 9/11, the main effort of governments at the UN and in other lawmaking contexts was to achieve the criminalization of

terrorism, domestically and internationally. The biggest obstacle on this path was definitional, whether to confine terrorism to the violent initiatives of non-states, or to broaden the conception to refer to acts of political violence deliberately targeting civilian society, whether the actor was state or non-state. This issue was never authoritatively resolved, thus making "terrorism" a language of opprobrium that is used by states to demonize their non-state opponents, and hence functions as part of statist ideology.

Why, then, the immediate conceptual leap by the Bush presidency, framing the attack as an act of war, which made it reasonable to respond by adopting war modalities while at the same time denying enemy combatants the benefits of international humanitarian law as encapsulated in the Geneva Conventions? Was it the magnitude or trauma generated by the event? It could be argued, and seemed widely believed, that 9/11 was worse in terms of trauma and impact than the Pearl Harbor attack 60 years earlier, which was unquestionably an act of war, and this helps explain the disastrously inflated response. Or was it possibly a too literal reading of the fiery language of Osama bin Laden, leader of al-Qaeda, who insisted that the encounter between the West and Islam was one of warfare without mercy? A significant indicator of the post-9/11 frenzied mood was the almost total absence of any meaningful dissent from this rush to war even from the Democratic Party opposition and hardly a murmur of doubt voiced in the mainstream media.

Undoubtedly, these factors were influential, but were they the whole, or even the true, story? The political leadership at the time, including its entourage of neocon advisors definitely saw 9/11 as more than what it appeared to the public to be. They saw it as an opportunity to mobilize the citizenry to support a much expanded reliance on force in carrying out American foreign policy. Undoubtedly analytical clarity was thus diminished by strategic ambition, which saw a window of opportunity wide open on 9/12. In this interpretation, 9/12 was at least as much about Western grand strategy in the Middle East as it was about counter-terrorism. This still doesn't explain the silence of the lambs, that is, the Democrats. This passivity was partly a patriotic reflex to the widespread collective trauma caused by 9/11, a national unity mood magnified by media frenzy, and partly a golden occasion for Democrats to support long-held Israeli goals of regime change in several key Arab countries.

With the election of Donald Trump many observers expected policy discontinuity, especially given his strong criticisms of the Democratic Party's costly failures in its Middle Eastern interventions before he entered the White House. In fact, there has been far more continuity than discontinuity during the Trump presidency, who even more than Obama follows faithfully the precepts of neocon thinking in the region, being especially deferential to Israel's ill-advised confrontational approaches in Iran and Syria, and his affirmation of the worst side of the 9/12 counterterror tactics, including torture, CIA black sites, and Guatanamo.

From an international law point of view the issue has been dramatically joined by a pair of recent landmark decisions by the European Court of Human Rights, *Nashiri v. Roma*nia and *Abu Aubaydah v. Lithua*nia, which condemned the whole

gamut of 9/12 tactics from an authoritative legal perspective. These decisions also pose challenges to European governments as to whether or not to continue its cooperation with US-style counter-insurgency operations. As such, there is exhibited an almost 360-degree reversal of attitudes. Following 9/11 there was no normative gap between the United States and Europe, while currently the width of the gap confirms the view of this volume that it is increasingly difficult on moral or legal grounds to distinguish al-Qaeda or ISIS terrorism from US counterterrorism. At the very least the present policy atmosphere should provide the occasion for a profound and comprehensive review of the War on Terror, whether it is working and still necessary, and whether such distasteful departures from law and ethics can any longer be rationalized under the rubric of security given the persistence of terrorist threats.

Despite these considerations retaining the crime approach to counterterrorism had strong arguments on its side, especially in the 9/11 context. The rest of the world, almost without exception, condemned the attacks, and expressed solidarity with America's need to react effectively to these attacks. These governments seemed genuinely ready to lend unprecedented cooperation in facilitating effective law enforcement against al-Qaeda leaders and operatives for their apparent engagement in these gross crimes against humanity. It is instructive to recall that even the Taliban in Afghanistan offered to cooperate if Washington provided convincing evidence that al-Qaeda was responsible for 9/11. In addition to offering a show of sympathy and a readiness to cooperate in a robust law-enforcement campaign, there were important world order issues at stake. All sovereign states had a double interest in a prudent 9/12 approach: first of all, to achieve the effective suppression of transnational mega-terrorist attacks of this sort that potentially threatened the primacy of all states; and secondly, in the avoidance of war in all instances except self-defense in response to attacks by states on other states.

The US government seemed uninterested in pursuing this option of criminal law enforcement plus diplomacy, apparently more determined from the beginning to have a pretext for toppling the Taliban, which was accorded precedence over the stated objective of weakening the al- Qaeda threat. Similarly, in 2003 when it launched a regime-changing war of aggression against Iraq, the rather lame excuse was 9/11, and an accompanying belief that pre-emptive warfare was a necessary element of national security in an Age of Terrorism, but the principal motivation for the war policy was different. The rationale for such a military operation against the regime of Saddam Hussein was already present in the pre-9/11 outlook of the neoconservative foreign-policy advisors who were so influential during the presidency of George W. Bush. Leading neocons had actually expressed in a widely read report distributed by their ideological vehicle, Project for the New American Century, the need for "a new Pearl Harbor" a year before Bush was elected president, and two years prior to 9/11, so that they could initiate a series of regime-changing interventions in the Middle East. These neocon heavyweights acknowledged the prior need to create a political climate in the United States that would support military interventions in the region that was convincing enough to the American people to overcome their lingering opposition to overseas ventures that

might produce American casualties. 9/11 created that desired atmosphere. It allowed previously dubious military undertakings to receive a green light from the political process, including the mainstream media, thereby overcoming the previously skeptical public opinion.

Both of these wars proved expensive and counterproductive in almost every respect, with little net positive results from the perspective of global security or even the national security of the United States. Indeed, the Iraq War unquestionably gave rise to ISIS, which has spread terror on a far broader scale than al-Qaeda, relying on barbaric tactics. The Iraq War was also notable for achieving a political outcome that was the direct opposite of what was sought. It actually expanded Iran's regional reach and influence rather than frustrating its ambitions by constructing an iron wall of containment with a Baghdad government beholden to Washington rather than informally aligned with Tehran. There are several relevant observations. Counterterrorism was at most a secondary goal of these wars. Furthermore, these wars were strategic failures on their own terms, failing either to become democracies or allies. And finally, as with the Vietnam War, the wrong lessons were learned. It was not realised that military intervention rarely succeeds, and only then at great costs, especially in post-colonial settings. In these settings native populations mount a national resistance that compensates for its battlefield weakness, displaying a strategic patience that dissipates the political will of its overseas intervener. It is hard to explain this America refusal to learn from past mistakes. The best explanations seem connected with the enormous investments made over many years in constructing the American military machine creating an ingrained bureaucratic reluctance to think outside the militarist box. And so instead of recognizing the limits of hard power, the prevailing approach has made it much harder to correct past mistakes and adapt to a new global security environment.

Another 9/12 issue that might have made a difference if handled more deftly is that of the nature of the enemy. George W. Bush repeatedly denounced al-Qaeda as inherently evil, as distinct from denouncing its tactics on 9/11 as evil, which the editor here does so effectively. Such a posture amounts to a refusal to examine the root causes of such political extremism and criminalized violence. When the root causes are examined it becomes evident that there are "legitimate grievances" that give rise to acute frustration and rage throughout the Arab world, eventuating in recourse to terror directed at the West. Two wrongs certainly don't make a right, especially here, but better grasping why the wrongs occurred may reduce the prospects of their repetition in the future. I recall that John Major, after being prime minister, let it be known that he only made progress in resolving the struggle in Northern Ireland when he stopped thinking of the IRA as a terrorist organization and starting conceiving of the IRA as a political actor with genuine grievances, limited goals, and a potential receptivity to political compromise. There are numerous other recent examples of converting terrorist organizations into diplomatic partners when the moment seemed right, but the lethal fusion of terrorist denunciation and Islamophobia have prevented to date any consideration in the post-9/11 world of whether political solutions might better achieve

security and political normalcy than this War on Terror that threatens to be a war without end.

What makes this book so stimulating and significant is that it builds an intellectual foundation for exploring new paths to achieving genuine security in the face of terrorist threats without either devastating foreign countries or undermining liberty at home. The contributors to this volume show that counterterrorist policies and practices have not only collided with the most basic civilizational verities, but have violated several key international humanitarian law provisions, and contributed to putting once proud democracies on a rocky road leading straight to autocracy. In this regard, the secondary effects of intervention overseas in the form of massive refugee flows, pressures to close the borders and the hearts of sovereign states, and, in the process, create an open sesame for opportunistic leaders to scapegoat minorities and immigrants that inflict potentially fatal wounds on the body politic of democratic societies. It is late, but not too late, to have overdue dialogues on alternative approaches to counterterrorism and security in an age of terror. This book helps establish the kind of reflective atmosphere that should encourage citizens of good will to seek through dialogue an improved balance between security imperatives and ethical standards.

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May 2018

Preface

Did the 9/11 atrocity ultimately prevail as an act of terror on the West? And is it perverse to suggest that it did? Some two decades after this monstrosity it is now clear that its enormity and insidiousness succeeded in dismantling some of the most highly venerated values of Western democracy. It needs hardly reminding how these coveted values arose from the 'Enlightenment' during what came to be known as the 'long eighteenth century' (a period from around 1685 to 1815). European politics, philosophy and science were radically transformed, in a movement that has come to be known as the 'Age of Reason' because it questioned traditional authority. There was then an indelible conviction that humanity could be refined and reformed through the agency of rational change. From free speech to religious tolerance, and from fair trials to freedom from torture, the cherished edifices of all have today been consciously and studiously disassembled following the Twin Tower attacks in New York on 11 September 2001. On reflection, what has surely been perverse is that this has been done by none other than our own democratically elected governments, and with the United States ahead of all others. This has consequences that are on the way to making us quite decidedly indistinguishable from those to whom we are opposed in this ill-fated 'War on Terror'.

As with all banalities of evil, it started off fairly innocuously. Following the outrage of 9/11 the US coalition forces, together with Britain, embarked on a conflict in Afghanistan and Iraq, causing it to become embroiled in fighting one disastrous war after another. In the determination to win these wars, there arose the official endorsement of torture and of imprisonment without trial. The result has been a ghastly mutation of our democracies into illiberal authoritarian states. Civil liberties have been disavowed and abandoned, individual rights disclaimed. Instead, a grotesquely colossal, extravagantly expensive, avoidably unnecessary, and recklessly extravagant armed forces and security organization has emerged from the ashes of the Twin Towers. In short, the abominable annihilation of the World Trade Center on 9/11 became the pretext for the remorseless enlargement of the security apparatus in the West. What followed thereafter was the NATO operation in 2011, which overthrew Colonel Gaddafi in Libya, only to leave the country deeply divided and unstable. This is not unsurprising given that in no less than three times in the decade after 9/11, the West toppled regimes in

Afghanistan, Iraq and Libya, without remotely planning for a new government, leading to the allied coalition of the dead and the injured which numbered in their tens of thousands, with countless thousands of civilian casualties, and three highly unstable Muslim countries now riven by Islamic terror. This, in turn, has invited even more of a War on Terror on those hapless lands and its peoples. Moreover, following the election of Donald Trump, it is now clear that the historical and political developments of the last two decades are now explicitly challenging the very basis of human rights; and that the war is now constructed consciously and calculatedly as a 'civilizational conflict' between a radical Islamist foe and a Judeo-Christian 'West'. A war that is now being waged exactly as Bernard Lewis and Samuel Huntington 'predicted'.

This is to say nothing of Syria, where after ISIS broke off from al-Qaeda in 2013, this Islamic State militant group spread itself into not just Iraq but also Syria, occupying half of those countries. A local insurgency that followed the so-called 'Arab Spring' (wishful thinking if ever there was one) has, as the *Washington Post* reminded us, metastasized into a 'mini world war', with now not just the USA but also Russia, together with regional actors, as well as radicalized fighters moving in, adding to the plight of a country that no longer exists as it once did, with its people disfigured, deprived and dislodged. Indeed, all three countries bear the scars of Western interventions undertaken without any proper intelligence analysis, unannounced regime change goals and a dodged moral responsibility, for a calamity left behind for someone else to clean up.

The countries bearing the brunt of the ill-crafted War on Terror are today mired in political and economic chaos, competing factions continue to fight for control and tens of thousands of refugees have been created who make perilous journeys to Europe, creating the biggest refugee crisis since the Second World War. If it were not for the fact that there has been, not a one-off failure here of a war going disastrously wrong, but no less than three wars in a ten years with Syria teetering on the brink, one could say that West does not know how 'to do war' (leave alone a 'just war'). That, however, is the present reality. The failure to plan, to wage and then to manage the aftermath suggests that our 'ways of the war' are seriously and pathologically flawed in what they reveal in the deep pattern that underlies its conduct. What emerges is that we are here today quite simply because of the way in which the vastly expanded network of security agencies have triumphed in embracing defective predispositions and biases, which have now become so deeply ingrained in our institutional structures that they dare not be discarded without the utter depletion and breakdown of institutional integrity, reliability and reputation.

Against this background, is it only a heretic who would question 'Western foreign policy' today? Taking our governments to task for drone attacks, for detentions at Guantanamo Bay, and for 'extraordinary renditions' where suspects are tortured in far-off lands out of sight and behind the scenes may be something that the common man or woman in our streets is blissfully unaware of. However, can a failure to make our governments accountable by asking them questions that make them feel awkward and uncomfortable be justified when we know that even an

ordinary citizen in a Western democracy is now all too acutely aware of the myriad irreproachable lives lost, as a direct result of the West's War on Terror in the Islamic world? Yet, to raise such questions, and to seek governmental accountability from our elected leaders, is not to excuse the outrage of 9/11, any more than it is to excuse the London attacks of 2005 or the Boston Marathon terror attack of 2013, but only to explain the effect of what we do, both on ourselves and on others, as a result of ill-judged policies and their execution. Invoking the injustice and humiliation inflicted by the West on the Muslim world will not do as grounds for murder. But neither will invoking the necessities of the so-called War on Terror do as a justification for massacring the innocents.

With these questions in mind, the purpose of the essays in this compilation is to elucidate and unravel the persistent influence of the War on Terror in domestic and international laws and in explicating how the erosions into our civil liberties are now the 'new normal'. It is only when policy makers can see how much the liberties that we took for granted have been eroded that the roots of liberal democracy and universal human values can be salvaged and re-asserted. It is to be hoped that this approach will appeal to the increasing numbers rallying against the sweep to power of the 'alt-right'.

In the first essay, Victor Kattan explains how the concept of the much-touted 'pre-emptive action' gained favour in policy discussions in the West. This robust, proactive counter-terrorism strategy which centred on preventing the United States' enemies from striking first came soon after 9/11 in September 2002, when the Bush administration published *The National Security Strategy of the United States of America* (NSS-2002). This argued that the threat and consequences of inaction could not be tolerated, given the availability of WMD which meant that the traditional concepts of deterrence did not work against terrorists. What was required was 'taking anticipatory action' to defend the United States. Remarkably, this was 'even if uncertainty remains as to the time and place of the enemy's attack'. What is especially valuable of this exegesis by Kattan is that he traces the origins of what became known as the 'war on terrorism' to the US intervention in the Lebanon following Israel's 1982 invasion, when this 'Shultz doctrine' was taken from Israeli doctrine at the time.

In the second essay, Mileno Sterio explains how we have reached a stage where, some two decades after 9/11 in 2001, it is possible to say that, in its scope, expenditure and impact on international relations, the war on terrorism is comparable to the Cold War. This is because it represents the beginning of a new phase in global political relations. This, in turn, has important consequences for security, human rights, international law, cooperation and governance. Paradoxically, as she explains, the War on Terror began as an anti-terrorism response to the 9/11 attacks, but it has transmuted itself into an enormous campaign spanning military, intelligence, diplomatic and domestic dimensions, which when fathomed leave us in no doubt that the United States has overstepped its boundaries and has engaged in harmful behaviour – by infringing the sovereignty of other states and by curtailing the civil liberties of American citizens. The United States has been involved in major wars in Afghanistan and Iraq, covert operations

in Yemen and elsewhere through the use of drones as well as other military tactics, large-scale military-assistance programmes for various friendly regimes and major increases in military spending. Thus, Sterio shows that in the examples of the use of drones, of mass surveillance and of detention at Guantanamo Bay, we see that the War on Terror's tangible anti-terrorism benefits have been outweighed by some of the War's most aggressive policies, violating both international law as well as civil liberties of Americans domestically. The result is that the War on Terror has shaped US law and policy in a manner that very few other world events have.

Against this background, Joseph Margulies undertakes a detailed and specific analysis in the third essay, of what 'Guantanamo Bay' represents to us, some two decades after 9/11, in a hard-hitting and yet difficult to challenge perspective. What scholars must do, he argues, is to 'detect the difference between symbol and substance', so that they can 'account for the chasm that separates the two' because the reality is that law at Guantanamo 'is an extravagant irrelevance', (and this is especially true of the law of military commissions) because what the law does is simply of almost no substantive purpose except to distract 'from the reality of unfettered global American power in the war on terror and the plight of the remaining prisoners at the base'. The result is that we overlook 'the scope of American hegemony'. The courts only provide the hollow hope of progressive social change. But the symbolism of Guantanamo matters. This is seen in the leading legal cases because although, as declarations of legal rights, *Rasul* and *Boumediene* had essentially no effect, nevertheless, as a salvo against official lawlessness, they were important contributors, because they became part of a much larger campaign against a particular form of presidential abuse. Although, the Bush administration conceived, designed and built the prison at Guantanamo to be the ideal interrogation chamber, inaccessible to the public and unsupervised by the judiciary, since the Supreme Court decision in *Rasul* the prison hasn't served that function. The result is that today Guantanamo is both historical artefact and exorbitant irrelevance, so that, paradoxically, as it became *less* important as a prison, it became *more* important as a symbol. What scholars need to do, he argues is not 'to obsess over every bolt and screw in the elaborate legal architecture that exists only to create the appearance of rule-of-law-regularity' because to do so is to overlook 'the reality of unfettered power'.

Taking these arguments further, the fourth essay by Martin Ewi acknowledges how the world changed after 9/11, and how the ensuing years have been a struggle by the international community to stem what has been regarded as 'terrorism', conceived of as what is a common threat to humanity. Martin shows how this new counter-terrorism world order has affected almost every aspect of life – communication, transportation, trade, social interaction, education, health, economic activities including banking, human rights and civil liberties, and democratic processes (just to name a few). New security regimes and norms have been adopted and populations are gradually (with difficulties) accepting as the new normal this new world order of securitization of everything. However, he argues that whether the world has become safer from terrorism and violent extremism since 9/11 remains heavily contested. What is known for sure is that in terms of

number of attacks globally, terrorism has shown no signs of waning. Instead, the phenomenon has burgeoned.

On particularly insidious aspect of the War on Terror that the West has been most loath to own up to has been the use of torture, which sometimes has been euphemistically described as 'advanced techniques of interrogation'. This is why in the fifth essay Stephen Ellmann provides the most extensive chapter of this volume, critically analysing the role that lawyers should have played in preventing such actions, by asking what is torture, and how is it defined by the law. The question is important because it is not only 'torture' as so defined, but also other transgressions which violate other rules of international and domestic law that prohibit lesser, but still repellent, forms of mistreatment, given that Common Article 3 of the Geneva Conventions of 1949 prohibits not only torture but also 'violence to life and person, in particular murder of all kinds, mutilation, [and] cruel treatment' and 'outrages upon personal dignity, in particular humiliating and degrading treatment'. Moreover, the Convention Against Torture, to which the United States is a party, forbids torture and also 'other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture'. However, given that torture has a special horror, such that only those who wish to declare themselves ungoverned by law and mercy would want the label of 'torturer', what is to be done in cases where lawyers decide to instead embrace the concept of 'enhanced interrogation techniques', and to argue that one man's cruelty is another's justified severity? Given that if the focus were to shift from torture to 'cruel, inhuman or degrading', and given that the arguments marshalled for and against applying the latter label would much resemble those that have been brought to bear on the issue of torture, is it not time, he asks, that the question of how the prohibition of torture should be interpreted is pursued by lawyers?

No less serious violation than torture is the practice of 'extraordinary rendition' to another country, and into the hands of the security services of other nations, solely in order to be subjected to a form or interrogation, which would otherwise be considered beyond the pale in one's own country and by one's own government officials. This is the subject of discussion in the sixth essay by Margaret Satterthwaite and Alexandra Zetes, who remind us that the practice of rendition – the involuntary transfer of an individual across borders without recourse to extradition or deportation proceedings – is actually not new at all. For more than a hundred years, governments have been engaged in snatching a defendant for trial and thereby presenting him/her as 'rendition to justice'. In this respect, it has actually been celebrated as a crucial tool in the fight against impunity for grave crimes. However, what is worrisome today is that with nationalist governments growing in popularity and human rights guarantees weakening, leading to state practices such as moving to close borders, deport non-nationals, denaturalize their own citizens and use informal means to transfer suspects the mechanisms through which a state may transfer custody of an individual increasingly escape careful scrutiny. Satterthwaite and Alexandra Zetes accordingly argue that in this era of global realignment the human rights principles guiding inter-state cooperation in such matters must be reasserted, and set out to examine the legal norms governing informal transfers

and detentions in this new era and aim to set out a minimum standard that must be upheld whenever a state renders an individual, no matter how extraordinary the times. In this they draw upon comparative jurisprudence, such as that of European human rights law, as seen in the *Abu Qatada* case, to support their argument that wherever individuals are subject to informal transfer, governments must ensure specific procedural and substantive protections against refoulement. They further suggest that the continuing lack of transparency related to the US use of informal transfer is extremely concerning.

Satvinder S. Juss takes up the theme in the seventh essay, of how the United States can learn from developments in other jurisdictions, this time in the United Kingdom, following the detention and torture of Abdul Hakim Belhaj in Diego Garcia, at the US 'black' site in the Chagos Islands. In 2013, he and his Libyan wife, Mrs Boudchar, decided to sue the United Kingdom's Security Intelligence Service (SIS) because, following his abduction in Malaysia, rendition flight assistance with transit facilities was provided by the British-owned, but American-operated base at Diego Garcia in the Indian Ocean. The full story would never have been known were it not for 'several extraordinary caches of secret British, American and Libyan intelligence documents that were discovered amid the chaos of the Libyan revolution in 2011, scattered around abandoned government offices, prisons and officials' private residences'. These not only confirmed covert CIA operations, but British complicity in them. By January 2015, as the pressure began to mount, a senior Bush administration official appears to have confirmed that 'Interrogations of US prisoners took place at a CIA black site on the British overseas territory of Diego Garcia'. It was said that, '[t]he island was used as a "transit location" for the US government's 'nefarious activities' post-9/11 when other places were too full, dangerous, insecure, or unavailable, according to Lawrence Wilkerson, Colin Powell's former chief of staff. This was significant as it 'was the first time a senior Bush administration official has stated on the record that the remote British territory was a part of the CIA's global network of black sites'. Yet, the long-established legal position was that the courts will not adjudicate upon acts done abroad by virtue of sovereign authority – what was to become known as the 'Foreign Act of State' doctrine – as is clear from the US Supreme Court's decisions in *Underhill v Hernandeez* (1897) and *Oetjen v Central Leather Co.* (1918). Belhaj, however, sued the UK government for its complicity in his human rights deprivations. Whilst the UK courts had themselves long decided to inherit the doctrine of the 'Foreign Act of State' from these earlier developments in American law, the UK Supreme Court in 2017 held that in deciding whether an issue is non-justiciable, English law will have regard to 'the extent to which the fundamental rights of liberty, access to justice and freedom from torture are engaged by the issues raised …'. Although the Court recognized traditional limitations, where judicial intervention will be inappropriate, such as the making of war and peace, making treaties with foreign sovereigns, and annexations and cessions of territory, the UK Supreme Court's decision is revolutionary and suggests for the USA a way forward, where fundamental human rights are violated by the actions of our governments abroad, such that the rule of law is preserved in all cases wherever possible.

In the eighth essay, Jonathan Hafetz returns to the question of how the continued impunity for torture and related human rights violations arising out of the extrajudicial detention of terrorism suspects after 9/11 has created an accountability gap. The absence of criminal or civil liability not only contradicts international human rights law's requirement of effective investigation and redress, but also has broader ramifications. It reinforces the perception that international human rights law and international criminal law are enforced in an uneven manner that protects the interests of the most powerful states. Hafetz argues that whereas other nations also participated in the US torture program and engaged in abuses on their own, it was the United States that remained exceptional in the chasm between the evidence of systematic torture and near complete absence of accountability. In fact, as he points out, several countries, including the United Kingdom, Sweden, Canada and Australia, have gone on to provide compensation to former detainees held by the CIA or US military in cases where their own public officials engaged in wrongdoing. However, Hafetz suggests that the greatest success in closing the accountability gap has actually been achieved through litigation in supranational human tribunals against other states for their complicity in US torture. He describes how in 2012 the European Court of Human Rights (ECtHR) issued a judgment against Macedonia, finding it in violation of the European Convention on Human Rights for its role in the torture and enforced disappearance of Khalid El-Masri. In 2014, the ECtHR issued judgments against Poland for similar abuses against two other detainees, Abd al-Rahim al-Nashiri and Abu Zubaydah, at secret CIA prisons (also known as 'black sites'). More recently, in 2016, the ECtHR issued a judgment against Italy for its role in the abduction and rendition of a terrorism suspect from Milan, and its subsequent failure to conduct an effective investigation. All three cases resulted in awards of monetary compensation to the victims. The cases have helped spur litigation against other countries for their participation in US torture and against states for participation in other US-led counter-terrorism operations. Consequently, these cases illustrate both the opportunities and challenges associated with holding states responsible for human rights violations in a pluralistic system with multiple centres of enforcement.

The final essay, by Steven R. Morrison and Annique M. Lockard, ends on a more sombre note. They explain that one reason why individuals' rights have been so completely violated is that once they are associated with groups that are deemed dangerous no reprieve for them is possible. The reason for this, they argue, is that the criminal law lacks a principled theory of group action. At its inception, the War on Terror was to be either a criminal issue or a war issue, so that when 9/11 happened the first choice was to decide whether to treat it as a crime or an act of war. The Bush administration chose the latter, which has shaped the United States' response to further acts of terrorism, and increasingly of other countries' responses too. What they argue is that, in part because of this choice, designating certain acts as 'terrorism' has become a political move, and that is despite the fact that the criminal law is intimately involved in addressing these acts. The result is a system in which the national security apparatus, the

military apparatus and the domestic criminal justice system all play roles in addressing the War on Terror. Some people are tried in US federal courts as criminals, some are tried in Guantanamo Bay as combatants subject to military law and some are subject to targeted killing on the 'battlefield'. While the systems of criminal justice, national security and military operate very differently and are subject to different rules, they all have been marshalled to address what we call 'terrorism' and what really can mean different things in different contexts. Morrison and Lockard argue that this multi-pronged approach is not necessarily bad. However, it does lead to muddled political responses that do not necessarily give rise to just and measured outcomes. In addition, so many interest groups (domestic law-enforcement agencies, national security agencies, military sections) now rely on the War on Terror for their raison d'être that it appears the War on Terror will continue in perpetuity, not because terrorism will continue to be a problem (because it will), but because so many jobs everywhere rely on it continuing. As a result, American criminal law and, by extension, much of worldwide human rights, is on the cusp of a revolution away from individualistic norms of accountability and towards a more nuanced understanding of collectives. This revolution will produce systems of criminal law and of human rights that are more responsive to collective realities. They argue that law enforcement increasingly focuses on the groups and communities from which prior suspects have come. Because the 9/11 attackers were defined along religious-political lines, subsequent suspects overwhelmingly are Muslims who express discontent with American policies (but probably at a rate no higher than the American population at large). Therefore, when in the post-9/11 war on terror a complex of First Amendment-inspired and criminal due process human rights are threatened, they all share a basic assumption: that groups are particularly dangerous and, when faced with large-scale threats, the public safety imperative overrides individual rights norms and permits governments to pursue individuals for their connections with certain groups, whether those connections are real or perceived, and whether or not those connections reliably suggest criminal intent. What is necessary, according to Morrison and Lockard, is to stake out the border between criminal conduct and protected activity in the group context so as to generate an evidentiary regime capable of locating individuals on either side of that border.

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Satvinder S. Juss
10 May 2018

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1 The "Netanyahu doctrine"

The National Security Strategy of the United States of America, and the invasion of Iraq

Victor Kattan

> Did Israel launch that preemptive strike because Saddam had committed a specific act of terror against us? Did we coordinate our actions with the international community? Did we condition this operation on the approval of the United Nations? No, of course not. Israel acted because, it understood, we understood, that a nuclear-armed Saddam would place our very survival at risk. And today the United States must destroy the same regime because a nuclear-armed Saddam will place the security of our entire world at risk.
>
> (Benjamin Netanyahu testifying before the US Congress at a hearing titled "Conflict with Iraq: an Israeli Perspective", 12 September 2002)

Introduction

The adoption of Article 51 of the Charter of the United Nations on 26 June 1945 marked a watershed as the first collective effort to provide a universal definition of self-defence in international law:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack *occurs* against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security….[1]

Coming after the German surrender but before the Trinity explosion and the bombings of Hiroshima and Nagasaki, the Charter's definition of self-defence soon provoked a wide-ranging debate as to whether force could be used by states in self-defence against an imminent attack with atomic weapons.[2] A similar debate took place in the USA following the 23 October 1983 bombing that killed 241 US Marines at their barracks in the Beirut International Airport, the largest loss of

1 Article 51 UN Charter (emphasis added).

2 For early debates, see C.H.M. Waldock, "The Regulation of the Use of Force by Individual States in International Law", *Recueil des Cours* 1952-II, p. 498. Derek Bowett, *Self-defence in International Law* (Manchester University Press, 1958), pp. 187–193. Ian Brownlie, "Some Legal Aspects of the Use of Nuclear Weapons" (14) *International and Comparative Law Quarterly* (1965), pp. 437–451.

Marines in a single incident since the battle of Iwo Jima.[3] Then the debate was whether force could be used by states in self-defence against attacks by non-state actors using sanctuaries in other states to launch their attacks.[4] After the attacks on the Twin Towers in New York City and the Pentagon in Washington, DC on 11 September 2001, these debates came together when scholars asked whether the UN Charter could cope with threats from weapons of mass destruction (WMD) in the event that a terrorist organisation was able to acquire WMD and had the means, and the intention, to deploy them.[5]

In September 2002, the Bush administration published *The National Security Strategy of the United States of America* (NSS-2002), which generated much commentary.[6] Coming after 9/11, NSS-2002 articulated a robust, proactive counter-terrorism strategy centred on preventing the USA's enemies from striking first.[7] Due to the availability of WMD and the claim that traditional concepts of deterrence did not work against terrorists, it was argued that the threat and the consequences of inaction made more compelling the case for "taking anticipatory action" to defend the USA, "even if uncertainty remains as to the time and place of the enemy's attack".[8] Accordingly, NSS-2002 announced that "[t]o forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively".[9]

As explained in this chapter, George P. Shultz articulated a broad pre-emptive counter-terrorism doctrine when he was Secretary of State in the Reagan administration when a "war against terrorism" was declared following the 1983 bombings of the US Embassy and Marine Corp barracks in Beirut.[10] The "Shultz doctrine" subsequently found expression in National Security Decision Directive 138 (NSDD-138), which was closely modelled on Israeli doctrine, and which was

3 Donald Rumsfeld, *Known and Unknown: A Memoir* (Penguin 2011), p. 9.
4 See the Symposium on Terrorism and International Law in volume 8, issue 3 of *The Whittier Law Review* (1986–1987). See also, Richard Falk, "The Decline of Normative Restraint in International Relations", 10 *Yale Journal of International Law* (1984–1985), p. 263.
5 See the Symposium on Rogue Regimes in volume 36(4) of the *New England Law Review* (2001–2002) and the Agora on the Future Implications of the Iraq Conflict in volume 97(3) of *The American Journal of International Law* (2003).
6 *The National Security Strategy of the United States of America* (17 September 2002). For contemporary commentary, see: "The Bush Doctrine", *The New York Post*, 21 September 2002; "The Bush Doctrine", *The New York Times*, 22 September 2002; Peter Beaumont, "Saddam's Secret Procurement Network: Now for the Bush Doctrine", *Observer*, 22 September 2002; Norman Podhoretz, "In Praise of the Bush Doctrine", *Commentary* (September 2002), pp. 19–28; John Lewis Gaddis, "A Grand Strategy of Transformation", 133 *Foreign Affairs* (Nov.–Dec. 2002), pp. 50–57.
7 NSS-2002, p. 15.
8 Ibid.
9 Ibid.
10 See David C. Wills, *The First War on Terrorism: Counter-Terrorism Policy during the Reagan Administration* (Rowman & Littlefield 2003), pp. 79–87; Mattia Toaldo, *The Origins of the US War on Terror: Lebanon, Libya and American Intervention in the Middle East* (Routledge 2014), pp. 96–97.