

Terror/Torture Redux

Karima Bennoune*

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I. INTRODUCTION

My Lecture today will be based on my recent article *Terror/Torture*, which was published in the *Berkeley Journal of International Law* in 2008.¹ I keep hoping that the article's interwoven topics of terrorism and torture will become obsolete, but current events have not allowed that to happen. On the terror side, we have recently witnessed the Christmas Day attack in 2009 that would have killed at least 300 people or so if successful, depriving them of their most basic human right, the right to life.² Terrorist attacks in Kandahar, Afghanistan on March 14, 2010, killed thirty and wounded forty-six, including many guests at a wedding.³

Meanwhile, on the torture side, we have seen renewed justifications of the use of torture and ill-treatment in the debate about how to treat the

* © 2010 Karima Bennoune. Karima Bennoune is Professor of Law and Arthur L. Dickson Scholar at the Rutgers School of Law—Newark.

1. Karima Bennoune, *Terror/Torture*, 26 BERKELEY J. INT'L L. 1 (2008). Some material in this Article, especially in Part II, is drawn from the published version of that article.

2. *Al-Qaeda Wing Claims Christmas Day US Flight Bomb Plot*, BBC NEWS, Dec. 28, 2009, <http://news.bbc.co.uk/2/hi/8433151.stm>. Since the delivery of these remarks, terrorism by nonstate actors has continued to fill the headlines, whether in the form of the attempted attack on Times Square, which could have made many children waiting to see *The Lion King* its victims, or the heinous assault on Ahmadi mosques in Pakistan on May 28, 2010, which killed ninety-three. See Tom Hays & Colleen Long, *Pakistani Arrested in Times Square Car Bomb Attack*, SALON.COM, May 4, 2010, http://www.salon.com/news/2010/05/04/us_times_square_car_bomb_3; *Pakistan Ahmadi Bury Lahore Mosque Attacks Victims*, BBC NEWS, May 29, 2010, <http://www.bbc.co.uk/news/10190389>.

3. *Afghanistan's Kandahar Hit by Suicide Bombers, 30 Dead*, BBC NEWS, Mar. 14, 2010, http://news.bbc.co.uk/2/hi/south_asia/8566109.stm.

suspect in the Christmas Day attack. For example, on December 29, 2009, Pat Buchanan called for Umar Farouk Abdulmutallab, the attempted airline bomber, to be denied pain medicine and access to a lawyer.⁴ Additionally, Michigan Congresswoman Candice Miller called for the suspect to be “aggressively” interrogated (read: tortured or ill-treated) and turned over to the military.⁵ And we are told by politicians that such issues should not even be debated. Senate Minority Leader Mitch McConnell told the Heritage Foundation in February 2010, “The Global War on Terror is not a theory to be discussed. It is a war to be won. . . .”⁶

Personally, I think many of the major policy issues related to the “War on Terror,” including both the human rights impact of terrorism and the prevention of torture, are in need of continuing debate. So, given that the topic of the paper is unfortunately still relevant, I have revived it as *Terror/Torture Redux*. I will try to encapsulate its main ideas for you (the Terror/Torture Part) and then say a bit about more recent developments (the Redux Part). In particular, I will look at the recent shift in public and political debate, and how this reflects what this Symposium’s title calls *The United States’ Evolving Approach to International Law*.

II. TERROR/TORTURE: THE MAIN POINTS

The article *Terror/Torture* is sixty-one pages long. Legal academic writing style seems to necessitate that amount of words to make three main points. Here are the headlines of *Terror/Torture*:

1. Neither contemporary human rights discourses nor security discourses are adequate to describe the totality of threats to human dignity and human rights from terrorism and counterterrorism, and both must be broadened.

4. Mark W. Smith, *Pat Buchanan: Terror Suspect Doesn't Deserve Rights*, FREEP.COM (Dec. 29, 2009, 1:12 PM), <http://www.freep.com/article/20091229/BLOG36/91229025/Pat-Buchanan—Terror-suspect-doesnt-deserve-rights>.

5. Ben Schmitt et al., *Lawmaker: Military Should Try Suspect*, FREEP.COM, Dec. 29, 2009, <http://www.freep.com/article/20091229/NEWS05/912290357/Lawmaker-Military-should-try-suspect>. Republican Senator Jim Demint of South Carolina also argued that the “Christmas Day bomber” should have “immediately been interrogated military-style[,]” and that by not doing so, and by treating him as a person with rights, the United States had “probably lost valuable information.” *The Situation Room: Abdulmutallab: Enemy Combatant or Criminal Defendant?* (CNN television broadcast Jan. 4, 2010), transcript available at <http://archives.cnn.com/TRANSCRIPTS/1001/04/sitroom.02.html>.

6. Sen. Mitch McConnell, Address to the Heritage Foundation (Feb. 3, 2010), <http://blog.heritage.org/2010/02/03/watch-live-sen-mitch-mcconnell-r-ky-addresses-the-war-on-terror/>.

2. We need a radical universalist rethink of these discourses based on the understanding that international human rights law protects the individual from both terror and torture.
3. The philosophical overlap between terrorism and torture (and their normative prohibitions) reminds us that to take the approach that best champions human dignity, one must look attentively at the human rights impact of both what is labeled “terrorism” and what is labeled “counterterrorism.” Given the similarities and symbiosis between terrorism and torture used as counterterrorism, maintaining absolute legal prohibition of one requires maintaining our commitment to the absolute prohibition of the other. This third point builds on and—I hope—reinforces points one and two.

I will now say a few words about each of these points:

A. *The Limitations of Current Human Rights and Security Debates*

My starting point is the notion that neither contemporary human rights nor security discourses are multifaceted enough to comprehend the extant situation, which includes threats to human rights emanating both from terrorism and from counterterrorism. On the human rights side, we still need to understand, engage with, and combat terrorism as a human rights violation, in and of itself. This may not sound like a radical notion, but in parts of the human rights world it is.

Concomitantly, security proponents need to expand their notion of safety to include fundamental aspects of human rights. Those who, for example, justify torture in the name of fighting terror undermine the very respect for human dignity and the universality needed to sustain comprehensive global norms against terrorism. Such justifications were a hallmark of the previous Administration.⁷ They still echo in the debate over the Obama Administration’s approach to these questions and may be part of the political debate in our upcoming presidential elections. Supporting torture seems to equal being tough on terrorism. Conversely, being tough on torture seems to be equated with being soft on terrorism. This is a terribly mistaken binary opposition.

Note that while I critique both the human rights language and the security language used in these discussions, my critiques are quite different. On the security side, I am taking aim at those who actually justify torture, a violation of a *jus cogens* international law norm. On the

7. See, e.g., JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 7-9 (2008).

human rights side, we are not talking about justification of terrorism, but a minimizing or deprioritizing of its role in the human rights debate.⁸

As an aside, I should say at this point that circularity is a recurring theme in *Terror/Torture*. In these realms, we see circles of death and destruction, circles of threats arrayed like Scylla and Charybdis, and even circles of causality. The latter circle is best captured by a wonderful quote in the paper from the Dutch sociologist W.H. Nagel who wrote long ago in 1980: "The profile of terrorism is circular. Terrorism creates counterterrorism and counterterrorism is pregnant with future terrorists."⁹ Flat or linear thinking cannot adequately respond to conundra in this shape. Moreover, we need to contemplate Nagel's prophecy and its implications for U.S. approaches to international law in the context of what should now probably be called the phenomenon formerly known as the "War on Terror."¹⁰

8. This is a criticism which has been made before in human rights circles. As the outgoing Rapporteur on terrorism and human rights of the then U.N. Sub-Commission on the Promotion and Protection of Human Rights related in her final report, "the overall human rights movement may have been concentrating, possibly for too long, on the repressive measures adopted by Governments only, without paying much attention to the means used by those opposing them." Here she is, inter alia, quoting as important a human rights figure as Asbjørn Eide. Special Rapporteur, *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism*, ¶ 55, Comm'n on Human Rights, U.N. Doc. E/CN.4/Sub.2/2004/40 (June 25, 2004) (by Kalliopi K. Koufa). This problem has been described by some leading human rights activists as a pattern in which two sentences are spent criticizing terrorism, whilst pages are dedicated to cataloguing government counterterrorist violations. For an abbreviated example of this, see Press Release, Human Rights First, Human Rights First Statement on the Fifth Anniversary of September 11 (Sept. 8, 2006), <http://humanrightsfirst.org/media/usls/2006/statement/105/index.htm>. There has been some movement toward the development of a full-fledged human rights approach to terrorism. Note, for example, the 2007 conference organized by Amnesty International USA at New York University School of Law which, for the first time, brought together leading human rights groups, including Amnesty International, Human Rights Watch, and Human Rights First, to develop a human rights approach to terrorism. See Roundtable Discussion, *Navigating Between Scylla and Charybdis: Confronting Terrorism as a Human Rights Issue*, AMNESTY INT'L USA, <http://www.amnestyusa.org/events/roundtable-discussion/page.do?id=1102220> (last visited Sept. 20, 2010). However, this remains a mostly outstanding task.

9. W.H. Nagel, *A Socio-Legal View on the Suppression of Terrorists*, 8 INT'L J. SOC. L. 213, 221 (1980).

10. Note that the terminology here is in flux. In spring 2009, Secretary of State Hillary Clinton announced a suspension of the use of the term "War on Terror." Jay Solomon, *U.S. Drops 'War on Terror' Phrase, Clinton Says*, WALL ST. J., Mar. 31, 2009, at A16. The ubiquitous phrase was seen as inflammatory and has been criticized by legal scholars. However, prior attempts to switch to "global struggle against the enemies of freedom" failed to catch on. See Matthew Davis, *New Name for "War on Terror,"* BBC NEWS, July 27, 2005, <http://news.bbc.co.uk/2/hi/americas/4719169.stm> (internal quotation marks omitted). For now, this Article will continue to employ the term "War on Terror" in quotes.

B. New Ways To Grapple with Terror/Torture: Beyond Flat Thinking

This brings me to point two. To reiterate, we need an approach that goes beyond these narrow human rights and security discourses and that reflects that international human rights law protects the individual from both terror and torture, i.e., from both terrorism and the excesses of counterterrorism. This is reflected in the very difficult double burden human rights law puts on states and how that burden is affected by the phenomenon called terrorism.

For example, the International Covenant on Civil and Political Rights (ICCPR) in its second article calls on states to both “respect and ensure” the rights in the Covenant.¹¹ In the face of terrorism, the double burden of respecting and ensuring rights requires states to take active steps to protect their populations from violent attack by nonstate armed groups (the ensure piece). However, in so doing, the state cannot itself violate the rights guaranteed in the ICCPR (the respect piece).

In U.S. discussion of international law, consideration of these interconnected responsibilities under international law is often bifurcated. In the face of terrorism, security experts emphasize the aspect of *ensuring* rights to protection from terrorist violence (though not often using such language).¹² Meanwhile, human rights advocates largely focus on *respecting* rights in the context of government counterterrorism responses (though they usually at least acknowledge, *en passant*, that governments must protect their populations).¹³

The trick, which neither side in the debate has adequately referenced, is that states have to do both—respect rights and ensure rights—at the same time. President Obama underscored this point in his inaugural address when he rejected “as false the choice between our safety” and what he called “our ideals.”¹⁴ Too often we focus only on one side of the coin *or* the other. However, it will be interesting to see if this Administration can maintain the idealism of that inaugural speech, which already seems like it happened some years ago in a more optimistic time.

11. The relevant language from article 2(1) states: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . .” International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

12. *See, e.g.*, DAVID OMAND, *SECURING THE STATE* (2010).

13. *See, e.g.*, INT’L COMM’N OF JURISTS, *ASSESSING DAMAGE, URGING ACTION: REPORT OF THE EMINENT JURISTS PANEL ON TERRORISM, COUNTER-TERRORISM AND HUMAN RIGHTS* (2009).

14. Barack Obama, President of the United States, Inaugural Address (Jan. 21, 2009), <http://www.whitehouse.gov/blog/inaugural-address/>.

As noted, human rights discourse often minimizes discussion of ensuring rights to protection from terrorist violence by the enforcement of international law, and is instead largely or even solely a critique of state policies in response. It is firmly entrenched on the “respect” side of the coin. This critique has been essential in recent years as extraordinary renditions, prolonged arbitrary detention, torture and ill-treatment, and other violations of international law had all become part of counterterrorism policy in the United States and around the world.¹⁵

However, this critique alone offers an insufficient response to the current moment, given the very real threat in many places from terrorism. The human rights community will be utterly unable to engage in the policy debates we need to have now if it is only (or is only seen to be) engaged with one side of this double responsibility. We need to do more work on the human rights of victims of terrorism, for example, including their rights to compensation and rehabilitation.

On the other hand, governmental disregard for human rights standards and broader principles of international law in the battle against terrorism (in the United States during the Bush Administration and around the world) has terribly undermined the delicate balancing process required to both respect and ensure rights. Security discourses that have justified these policies (or inspired them) have done the same damage.

Ultimately, this may have doomed what has been called the “War on Terror” to fulfilling Nagel’s prophesy, that “counterterrorism is pregnant with future terrorists.”¹⁶ I note that Sidney Jones, an expert on Salafi jihadism, has argued that “atrocities in . . . U.S.-controlled detention centers . . . unquestionably helped the jihadist cause.”¹⁷ I was very pleased that President Obama committed to stamping out torture, ill-treatment, and arbitrary detention in the name of combating terrorism in his three executive orders on the topic at the beginning of his presidency.¹⁸ This approach could contribute to saving us from Nagel’s prophecy. However, as Professor Paust notes in his contribution, the road to actualizing those commitments is likely to be difficult and long,

15. See, e.g., INT’L COMM’N OF JURISTS, *supra* note 13, at 33, 61-62, 80.

16. Nagel, *supra* note 9, at 221.

17. Sidney Jones, *Asking the Right Questions to Fight Terror*, JAKARTA POST, Jan. 9, 2006, <http://www.crisisgroup.org/en/regions/asia/south-east-asia/indonesia/asking-the-right-questions-to-fight-terror.aspx>.

18. See Exec. Order No. 13,491, 74 Fed. Reg. 4893 (Jan. 27, 2009); Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009); Exec. Order No. 13,493, 74 Fed. Reg. 4901 (Jan. 27, 2009).

especially if there are further terrorist attacks in the United States.¹⁹ Clearly, more action is needed, especially to restore the procedural guarantees and accountability that can make these promises real.²⁰ Despite much discussion, we have had no “War on Terror” truth commission, and no significant prosecutions related to “War on Terror” abuses.

Given the ongoing challenges on the human rights and security sides, how can we move to a thicker analysis that embodies both sides of the responsibility of human rights law? How can we respond to all of these challenges to human dignity from terrorism and from abuses of counterterrorism?

One strategy that I suggested in *Terror/Torture* is to think about the similarities between abuses often assigned to opposite sides of the state/nonstate divide. The best candidates for such a comparison are terrorism (as defined by the U.N. High-Level Panel—committed by nonstate actors against civilians²¹) and torture (as defined by the U.N. Convention Against Torture—carried out by the state or with its consent or acquiescence²²), especially torture justified by some as a counter-terrorist technique.

19. Jordan Paust, *Ending the U.S. Program of Torture and Impunity: President Obama's First Steps and the Path Forward*, 19 TUL. J. INT'L & COMP. L. 151 (2010).

20. Note the recent Supreme Court denial of certiorari in the case of Maher Arar, a Canadian citizen illegally rendered to Syria for torture and detention by the United States. See David S. Morgan, *High Court Rejects Torture Rendition Case*, CBS NEWS, June 14, 2010, <http://www.cbsnews.com/stories/2010/06/14/national/main6581644.shtml>.

21. The U.N. High-Level Panel on Threats, Challenges and Change proposed the following definition:

[A]ny action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.

Rep. of the High-Level Panel on Threats, Challenges & Change, *A More Secure World: Our Shared Responsibility*, ¶ 164(d), U.N. Doc. No. A/59/565 (Dec. 2, 2004) (internal quotation marks omitted).

22. The U.N. Convention Against Torture defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter *Convention Against Torture*].

C. *The Philosophical Similarities Between Terror and Torture*

This brings me forward to point three. Torture, the kind of abuse on which the human rights movement classically focuses, clearly rests on the same philosophical assumption as terrorism on which security proponents concentrate. That assumption is of the permissibility of instrumentalizing severe and deliberate human suffering. Hence, conversely, their legal prohibitions, too, rest on similar bases, on the idea that there is something repugnant, something apart, about intentionally inflicting such suffering.

“Terror/torture,” a phrase I coin in the article, represents a spectrum of brutalizing practices often justified in the name of a greater good or higher purpose.²³ The similarities between these practices are significant and defining. Torture terrorizes, and terrorism often involves a kind of torturing. Both notions are the subject of definitional controversies described in the article, but both basically refer to intentional infliction of various kinds of severe harms on others for a purpose.²⁴ They are both characterized by the infliction of severe pain and suffering on victims, the intentionality of doing so, and the fact that the action in question is done for a justificatory purpose. Moreover, both sets of practices deliberately provoke tremendous fear in victims, survivors, and those around them.

Ultimately, the concrete results of terrorism and torture are often much the same: the devastation of the bodies and minds of those targeted by these practices, grave physical and psychological injury to many with profound and lasting sequelae for survivors, and the spreading of fear among others of falling victim to the same fate. These common results and common characteristics are a key part of why terrorism and torture matter and are absolutely beyond the pale in international law.

To get around these similarities between the practices, the distinction sometimes made in the United States and elsewhere is that the victims of terror are “innocent,” whereas the victims of torture—we are assured by the proponents of its use in counterterrorism cases—are “guilty,” or at least possess guilty knowledge.²⁵

Of course, keeping with the theme of circularity, terrorists and *their* apologists often suggest that their civilian victims are somehow culpable,

23. Bennoune, *supra* note 1, at 16.

24. Webster's Dictionary defines terror, in relevant part, as “violence (as bomb-throwing) committed by groups in order to intimidate a population or government into granting their demands.” WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1218 (9th ed. 1983). Terrorism is “the systematic use of terror esp. as a means of coercion.” *Id.* The relevant definition of torture is “the infliction of intense pain . . . to punish [or] coerce.” *Id.* at 1246.

25. See, e.g., ALAN M. DERSHOWITZ, WHY TERRORISM WORKS 142-63 (2002).

whether because they voted for governments or failed to overthrow them or benefited from the policies that the terrorists claim to oppose, or perhaps they are guilty merely by identity.²⁶ The latter, of course, is an unspoken assumption of the justifiers of torture in the U.S. debate over the last nine years about using torture as a tool of counterterrorism as well. We have assumed that we are largely talking about treatment to be meted out to brown-skinned foreign Muslim men after all, not to your average author of a torture memo. Discrimination has then shaped notions of “guilt” and of acceptable conduct toward terror suspects, just as discrimination often is used to justify terrorist attacks.

What is then essential about both international law norms against torture and terrorism is that they reject these extralegal categorizations of innocent versus guilty and discriminatory assumptions, and deem instead that certain treatment cannot be meted out to any person or at least—in the case of some terrorism rules—to any civilian. They embrace the absolute and universal nature of human dignity.

The intellectual proponents of loosening bans on torture to confront terror fail to grasp that deconstructing the prohibition of torture in international law inherently destabilizes the notion of terror and why it is wrong. In a transnational debate, we cannot convince the needed broad constituency to oppose a practice selectively merely on the basis of shared ideas about innocence or guilt of the victims, but rather only on the basis that, as profoundly simple as it sounds, human beings must not do certain things to any other human beings, no matter what.²⁷

III. REDUX

Today, as the tenth anniversary of September 11 approaches, we are still living with both sides of the terror/torture coin. On the terror side, the recent upswing in deliberate attacks on civilians by nonstate terrorist groups is deeply worrying and must be effectively stopped, prevented,

26. See, e.g., Statement, World Islamic Front, Jihad Against Jews and Crusaders (Feb. 23, 1998), <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>.

27. While these are important points of principle, they are also matters of strategic importance. As Homeland Security Secretary Janet Napolitano noted in March 2010 with regard to the Christmas Day attempted attack, “[T]he international dimensions of this incident—and the international threat posed by violent extremism—require an international response.” Janet Napolitano, *Air Safety Demands a Global Response*, USA TODAY, Mar. 18, 2010, at 11A. Secretary Napolitano also describes new efforts by the Obama Administration to strengthen international cooperation on aviation security, airport screening, and information sharing. *Id.* When the international consensus on countering terrorism is weakened by abuses associated with counterterrorism, such efforts are undoubtedly impeded.

and punished using international law.²⁸ These attacks have a grave impact on the human rights of victims that must be addressed and redressed. The worldwide networks of Muslim fundamentalist armed groups responsible for some of these crimes must also be challenged using international law.²⁹ At the same time, it cannot be stressed enough that Muslims are the most frequent targets of terrorist attacks by these groups, and these victims deserve equal attention to that received by other victims.³⁰

On the torture side, I am gravely concerned about how our national attitude toward the international law norms on torture and ill-treatment has shifted drastically in recent years, and again in recent months. I want to spend the remainder of my time focusing on this issue.

Our immediate former Vice President Mr. Cheney is on the record—seemingly everywhere in recent times—openly saying that terror suspects should be tortured and criticizing the Obama Administration for not doing so with Umar Abdulmutallab.³¹ Amnesty International says that it receives reports of torture from more than one hundred countries every year in all regions of the world.³² The United States is by no means alone in the practice or the most egregious violator. However, the open embrace of torture by high U.S. officials (who are now former officials) is distinctive.³³ I am glad to say that the current Vice President Mr. Biden has offered a strong rejoinder to his

28. See, e.g., *Twin Suicide Car Bombings in Central Baghdad Kill 26*, BBC NEWS, June 20, 2010, <http://www.bbc.co.uk/news/10360154>.

29. For further discussion of this topic, see Karima Bennouna, *Remembering the Other's Others: Theorizing the Approach of International Law to Muslim Fundamentalism*, 41 COLUM. HUM. RTS. L. REV. 635 (2010).

30. Even the U.S. National Strategy for Combating Terrorism acknowledged this reality. NATIONAL STRATEGY FOR COMBATING TERRORISM 5 (Sept. 2006), available at <http://www.cbsnews.com/htdocs/pdf/NSCT0906.pdf>.

31. See, e.g., *'This Week': Former Vice President Dick Cheney* (ABC News television broadcast Feb. 14, 2010), transcript available at <http://abcnews.go.com/print?id=9818034>. Mr. Cheney has made these assertions, notwithstanding that Mr. Abdulmutallab is reportedly cooperating thoroughly with authorities, especially thanks to the intervention of his parents, an intervention made possible by the law-abiding treatment of their son. See, e.g., Ed Henry, *White House Reveals Secret Cooperation with Abdulmutallab Family*, CNN, Feb. 2, 2010, http://articles.cnn.com/2010-02-02/justice/plane.bomb.suspect_1_umar-farouk-abdulmutallab-senior-obama-obama-administration?_s=PM:CRIME.

32. See, e.g., *Report 2010: Global Justice Gap Condemns Millions to Abuse*, AMNESTY INT'L, May 27, 2010, <http://www.amnesty.org/en/news-and-updates/reports-2010-global-justice-gap-condemns-millions-abuse-2010-05-27> (detailing receipt of reports of torture or ill-treatment from more than 111 countries during 2009).

33. Perhaps the most stark example of this is the open defense of waterboarding as a means of averting terrorist attacks by former President George W. Bush on *Decision Points*, an interview broadcast by MSNBC. See *Decision Points* (NBC television broadcast Nov. 8, 2010), transcript available at http://www.msnbc.msn.com/id/40076644/ns/politics-decision_points/.

predecessor and said he could never envision any circumstance when waterboarding should be used.³⁴

But it remains shocking to see that the former Vice President can openly say, as he did on ABC's *This Week*, that "I was a big supporter of waterboarding. I was a big supporter of the enhanced interrogation techniques."³⁵ And we know that these practices were carried out, but he does not face investigation and potential arrest or trial as required by the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which the United States is a state party.³⁶

This is not simply a partisan issue, though one tends to find more Democrats than Republicans speaking out about torture. Nevertheless, Senator McCain, a Republican, was a vocal critic of torture and ill-treatment in light of his own experience, especially prior to his run for president.³⁷ And the liberal columnist Jonathan Alter wrote a condemnable editorial after 9/11 entitled *Time to Think About Torture*, in which he, among other things, openly suggested the use of extraordinary rendition from the pages of *Newsweek*.³⁸ We need to construct a political discourse across the board, in which violations of *jus cogens* norms of international law, like torture, are simply recognized as beyond the pale.

To do that, however, we may need to fix our moral compass, which seems to have been gravely damaged in this regard, both by the atrocity of 9/11 itself and by the political misuse of that atrocity that followed.³⁹

34. See *Face the Nation* (CBS News television broadcast Feb. 14, 2010), transcript available at http://www.cbsnews.com/htdocs/pdf/FTN_021410.pdf. Bob Schieffer asks the current Vice President, "Can you . . . ever envision a time when waterboarding should be used on anyone?" Mr. Biden replies, "No." *Id.*

35. *'This Week': Former Vice President Dick Cheney*, *supra* note 31. Mr. Cheney also says: "I was and remain a strong proponent of our enhanced interrogation program." *Id.* It is also interesting how his view of terrorism itself differs from Secretary Napolitano's. Napolitano stressed the global threat of terrorism, and the fact that there were nationals of seventeen other nations besides the United States on board the Christmas Day flight that Abdulmutallab attempted to blow up with his underwear bomb. See Napolitano, *supra* note 27. Cheney, on the other hand, describes 9/11 as having "kill[ed] 3,000 Americans." *'This Week': Former Vice President Dick Cheney*, *supra* note 31. In fact, it has been estimated that the nationals of more than a hundred nations were murdered on September 11, 2001. See, e.g., *9/11 by the Numbers*, N.Y. MAG., <http://nymag.com/news/articles/wtc/1year/numbers.htm> (last visited Sept. 17, 2010).

36. Convention Against Torture, *supra* note 22, art. 4.

37. See Karima Bennoune, *Terror/Torture on the Campaign Trail*, DORF ON LAW BLOG (Sept. 8, 2008, 3:21 PM), http://michaeldorf.org/2008_09_01_archive.html.

38. Jonathan Alter, *Time To Think About Torture*, NEWSWEEK, Nov. 5, 2001, <http://www.newsweek.com/2001/11/04/time-to-think-about-torture.html>.

39. The popular media has played a role also. Jane Mayer suggests that while movies used to depict villains torturing, in recent years, on television programs like "24," it is now the heroes who do so. Jane Mayer, *Whatever It Takes*, NEW YORKER, Feb. 19, 2007, http://www.newyorker.com/reporting/2007/02/19/070219fa_fact_mayer?currentPage=all.

A recent *Rasmussen Reports* national telephone survey, conducted on December 31, 2009, found that fifty-eight percent of U.S. voters say waterboarding and other aggressive interrogation techniques should be used to gain information from Umar Farouk Abdulmutallab.⁴⁰ Only thirty percent of respondents say they oppose such techniques, and twelve percent are not sure.⁴¹

What is particularly disturbing to me, as an educator, is that according to *Rasmussen*, younger voters are more strongly supportive of aggressive interrogation techniques.⁴² How have we weakened the commitment to international law in young people? How have we allowed terrorists to change us in this way? I was shocked recently to find, when teaching a class on torture, that almost all of the students in my class—a self-selected bunch of human rights students—were willing to accept exceptions to the ban on torture and ill-treatment in the context of counterterrorism. Almost no one was willing to speak openly in Kantian defense of the absolute ban on torture, that is to say, in defense of the position of international law itself.⁴³ This is a dangerous disconnect, a ticking time bomb of its own.

Even the case book I use to teach human rights, the prominent Alston/Steiner/Goodman book published by Oxford University Press, now includes more justifications of torture and “torture lite” from the ethicist Jean Elshtain, and law professors Alan Dershowitz and Oren Gross, than it does denunciations of torture or testimonies of torture victims.⁴⁴ This, too, is a sign of the times. We must find a way to rebuild⁴⁵ an absolute cultural, intellectual, moral, and political consensus against torture. This is a profound challenge for the current

40. *58% Favor Waterboarding of Plane Terrorist To Get Information*, RASMUSSEN REPORTS, Dec. 31, 2009, http://www.rasmussenreports.com/public_content/politics/general_politics/december_2009/58_favor_waterboarding_of_plane_terrorist_to_get_information.

41. *Id.*

42. *Id.*

43. *See, e.g.*, Convention Against Torture, *supra* note 22, art. 2(2) (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

44. HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 224-62 (3d. ed. 2008).

45. Note that prior to September 11, practices amounting to torture or other cruel, inhuman, or degrading treatment were often practiced on ordinary criminal suspects and prisoners in the United States, as in many countries. Therefore, we must be careful of seeing post-9/11 detention practices as a complete break with the past. *See* AMNESTY INT’L, UNITED STATES OF AMERICA: RIGHTS FOR ALL (1998), <http://www.amnesty.org/en/library/asset/AMR51/035/1998/en/0440cd04-da99-11dd-80bc-797022e510351998en.pdf>. However, the systematized and official nature of torture and ill-treatment in the context of the “War on Terror,” and its open defense by some in official capacity represented indeed a radical policy shift for the United States.

Administration and future administrations, for current and future generations of international lawyers, and others, in the United States.

To meet this challenge, it is also vital that we build an underlying consensus that supports the notion that international law standards govern the conduct of counterterrorism. *Ensuring* the crucial right to security must be done in a way that also *respects* international law. I suspect that the conduct of the “War on Terror” will be an issue in the 2012 presidential election, especially if we continue to see the Americanization of the Jihad as some have dubbed the trend in attacks inside the United States.⁴⁶ A great deal of work needs to be done before then. We must restore support for what is perhaps the key lesson of international law, both on terror and on torture: you must not give up your basic humanity, even in the face of profound inhumanity.

Though most often considered the discrete starting points of separate discussions, the two halves of terror/torture are woven together in a fabric of callousness and othering that continues to shape our current moment. To eradicate one half of the terror/torture problem, we must remain committed to eradicating the other, no matter how our approach to international law evolves. Reexamined holistically, this is the clear message of human rights law. This re-examination should lead intrinsically to a new and fuller discourse on terrorism and human rights.

My hope then is that my Article topic will become obsolete, and I can speak about something else during your next symposium. Thank you.

46. See, e.g., Evan Perez, *Arrests Raise Fears of American Jihad*, WALL ST. J., Dec. 12, 2009, <http://online.wsj.com/article/SB126058036714988243.html>.