

**HUMAN RIGHTS AND COUNTERTERRORISM FROM A
TRANSATLANTIC PERSPECTIVE:
THE CASES OF THE UNITED STATES AND THE NETHERLANDS**

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Peter R. Baehr^{*}

“Terrorism flourishes in environments of despair, humiliation, poverty, political oppression, extremism and human rights abuse.”¹

INTRODUCTION

Has the emphasis on human rights in foreign policy and international relations shifted after the attacks on the World Trade Center in New York on 11 September 2001? The answer would at first sight seem to be negative, if one looks at the statements delivered on behalf of governments such as those of the United States and the Netherlands.

At a press briefing on the 2007 edition of the State Department’s Country Report on Human Rights Practices Secretary of State Condoleezza Rice had the following to say:

“(…)[D]espite every challenge the courageous champions of human rights persevere. They are an inspiration to their fellow citizens and to all of us. The high standard that they set continues to give hope to people everywhere who work peacefully for their liberty, their dignity and their rights. (...) This document is collected and written with the optimism that no corner of the earth is permanently condemned to tyranny. As President Bush has said: ‘Freedom can be resisted, and freedom can be delayed, but

^{*} I thank David Forsythe, Wolfgang Heinz, Tiemo Oostenbrink and Gijs de Vries who commented on an earlier version of this paper.

¹ United Nations High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, New York: United Nations, 2004, 45.

freedom cannot be denied.’ (...) Change may, indeed change will, take time, but change will come. As long as citizens around the world champion the universal values of human rights, there is hope, And we, in the United States, continue to believe that it is our duty to support these courageous men and women. And it is in that spirit that I am pleased to present these Country Reports on Human Rights Practices for 2007.’²

And the introduction to the 2007 Report on Country reports on Human Rights Practices states the following:

“As we publish these reports, the Department of State remains mindful of both international and domestic criticism of the United States’ human rights record. The U.S. government will continue to hear and reply forthrightly to concerns about our own practices, including the actions we have taken to defend our nation from the global threat of terrorism. Our laws, policies and practices have evolved considerably in recent years, and we continue to strive to protect innocent civilians from attack while honoring our longstanding commitment to respect human rights and fundamental freedoms. (...) We do not consider views about our performance voiced by others in the international community to be interference in our internal affairs, nor should other governments regard expressions about their performance as such.”³

The Dutch Minister of Foreign Affairs, Maxime Verhagen, was no less outspoken in his commitment to human rights, when he addressed the United Nations Human Rights Council on 3 March 2008:

“Tradition, culture or religion must never be used to justify the violation of human rights. Equally, there can be no special circumstances in which human rights violations may be condoned. A simple example is our duty to protect people from torture. The fight against terrorism has sparked a debate on where there are circumstances in which

² Briefing on the State Department’s 2007 Country Reports on Human Rights Practices, 11 March, 2008.

³ US DEPARTMENT OF STATE, *Country Reports on Human Rights Practices 2007*. The Introduction to the 2006 Report included the following sentence: “We recognize that we are writing this report at a time when our record, our actions, we have taken to respond to terrorist attacks against us, have been questioned.”

torture may be acceptable. I have a very simple answer to that: no. Torture is not acceptable in any circumstances.”⁴

In her “Speech from the Throne”, setting out the government’s plans for the coming year, Queen Beatrix, on 18 September 2007, had the following to say: “In many places in the world human rights are not respected. The Netherlands will use its membership of the United Nations Human Rights Council to promote the protection of these rights.”⁵ In his paper on a strategy for human rights, the Foreign Minister stated: “The rules that have been set down in international treaties on the respect for human rights, are valid under all circumstances and therefore also in the fight against terrorism.”⁶

These are of course mere “words, words, words,”⁷ But President Jimmy Carter, whose commitment to human rights is beyond any doubt, showed himself well aware of the fact that his policy pronouncements were to a large degree verbal pronouncements: “But I also believe that it is a mistake to undervalue the power of words and of the ideas that words embody. In the life of the human spirit, words *are* actions.”⁸

On the other hand, the record of the two states in the field of human rights would not seem to be as positive as the official pronouncements cited suggest. For example, Amnesty International has repeatedly urged the government of the United States to close the detention centre at Guantánamo Bay which it has called “an international icon of lawlessness”.⁹ It stated: “Justice cannot be achieved in a rule-of-law vacuum. To hold people in secret custody or indefinite, virtually incommunicado, detention without charge or trial, while labelling them as ‘terrorists’, ‘killers’, and ‘bad people’, is to

⁴ Statement by Maxime Verhagen, Minister of Foreign Affairs of the Netherlands at the 7th session of the Human Rights Council, Geneva, 3 March 2008.

⁵ Translated from the original Dutch.

⁶ MINISTRY OF FOREIGN AFFAIRS, *Naar een Menswaardig Bestaan: Een Mensenrechtenstrategie voor het Buitenlands Beleid* [“Towards a Dignified Existence: A Human Rights Strategy for Foreign Policy”], The Hague, 2007, 50 [translated from the original Dutch].

⁷ “Words, words, mere words, no matter from the heart.” (William Shakespeare, *Troilus and Cressida* V.iii (109)).

⁸ Speech at the University of Notre Dame, 22 May 1977. See also: THOMAS RISSE and STEPHEN C. RAPP, “International Human Rights Norms and Domestic Change: Conclusions,” in: THOMAS RISSE, STEPHEN C. ROPP, KATHRYN SIKKINK (eds.), *The Power of Human Rights: International Norms and Domestic Change*, Cambridge et al.: Cambridge University Press, 1999, 276: “Words matter! They can even hurt (...). Words matter, even if they are only rhetoric.”

⁹ AMNESTY INTERNATIONAL, “United States of America: Abandon Military Commissions, Close Guantanamo,” www.amnesty.org/library/print/ENGAMR511182007.

jeopardize the possibility that they can be brought to a fair trial.”¹⁰ Amnesty International even called the prison camp in Guantánamo, in its 2005 Annual Report “the gulag of our times”, which would seem to be somewhat of an exaggeration. Its sister organization, Human Rights Watch, in a letter to President Bush, said that the continued detention of approximately 375 men at Guantánamo Bay, without charge and without any meaningful review of the legal basis of their detention, “has directly undermined US efforts to end terrorism.” “The loss of moral high ground caused by the ongoing detentions at Guantánamo has been a boon to terrorist recruitment. It weakens public cooperation with law-enforcement efforts, which is far more important for cracking terrorist conspiracies than squeezing bits of information from suspects in the interrogation room years after they were captured.”¹¹ Both organizations quoted former Secretary of State Colin Power, who had said that Guantánamo is “doing far more damage than any good.”¹²

In the following, we will discuss whether and to what extent the promotion and protection of human rights in foreign policy and international relations has undergone changes since the events of 11 September 2001, commonly known as “9/11”. The focus will be mainly on the United States of America, as the government of that country has in recent years taken the lead in what it calls the “war on terror”. For purposes of comparison, the situation of the Netherlands will be taken into consideration.

TERRORISM

The threat of terrorism and the means taken to combat terrorist attacks (“the war on terrorism”) are nowadays often cited as threats to the maintenance of international human rights standards, “implying that the usual legal restraints and checks and balances [do] not apply.”¹³

Terrorism is an assault on human rights. It constitutes “...any action (...) if it is intended to cause death or serious bodily harm to civilians or non-combatants with the

¹⁰ Ibid.

¹¹ HUMAN RIGHTS WATCH, Letter to President George W. Bush, 22 June 2007.

¹² NBC, Meet the Press, 10 June 2007, transcript available at www.msnbc.msn.com/id/19092206/.

¹³ DAVID P. FORSYTHE, “United States Policy toward Enemy Detainees in the ‘War On Terrorism’” (2006) *Human Rights Quarterly*, 28 at 471. For the US relationship with international humanitarian law, see: DAVID P. FORSYTHE, “The United States and International Humanitarian Law,” *Journal of Human Rights* 7 (2008.), 25-33.

purpose of intimidating a population or compelling a Government or an international organization to do or abstain from any act.”¹⁴ Such acts violate the *right to life* – a basic human right that is guaranteed in all human rights standards -- of civilians.¹⁵

The terminology used in the current debates such as “the fight against international terrorism” suggests that we are dealing with a recognisable uniform and new phenomenon – with its own ideology, organisational structure, etc. – that regards the West as its enemy and wishes to cause it harm (“jihadist terrorism”, Al Qaeda). However, historical examples of the 19th and early 20th century and the separatist terrorism of the IRA and ETA and various groups in Kashmir show that it is not an entirely new phenomenon. There will always be people who wish to attack their enemies and who accept – or even aim for – innocent casualties.¹⁶

What is relatively new, however, is that today’s transnational terrorism focuses on “the West”, thereby trying to change power relations in Middle Eastern countries such as Saudi Arabia and Egypt. Also new is the effectiveness of the attacks and the scale on which they occur plus the degree to which perpetrators are willing to risk their own lives for the cause (“suicide bombers”). It would seem that on this scale it was only known as a fighting tactic by the Japanese air force during World War II (“kamikaze fighters”) and more recently Sri Lanka’s Tamil Tigers. As the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while

¹⁴ *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report by the UN Secretary-General in the Follow-up to the Millennium Summit (UN Doc. A/59/2005), 21 March 2005, par. 91. Although this is what then UN Secretary-General Kofi Annan has proposed, there does not yet exist a universally accepted definition of terrorism. Another proposal is the draft comprehensive convention on international terrorism, which is stalled because of differences between the West and the members of the Organization of Islamic Conference. See: <http://cns.miis.edu/pubs/inven/pdfs/intlterr.pdf>. See also: RICHARD ASHBY WILSON, *Human Rights in the “War on Terror”*, (Cambridge: Cambridge University Press, 2005), 2, note 2; Nico Schrijver and Larissa van den Herik, “Counter-Terrorism Strategies, Human Rights and International Law: Meeting the Challenges, Final Report Poelgeest Seminar,” *Netherlands International Law Review*, vol. LIV (2007), 572-587 at 573-575.

¹⁵ Recent examples of such action are the attack on the Twin Towers in New York of 11 September 2001, causing almost 3000 deaths; Bali, Indonesia October 2002, 200 deaths; Casablanca, Morocco May 2003, 45 deaths; Istanbul November 2003; 11 March 2004 in Madrid, 191 deaths; London July 2005, 52 deaths; Amman November 2005; Dahab, Egypt November 2005, 23 deaths; and Mumbai, India, July 2006, 183 deaths; Algiers, December 2007, 37 deaths.

¹⁶ ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS, *Counterterrorism from an International and European Perspective*, Advisory Report nr. 49, The Hague: Ministry of Foreign Affairs, 2006 (English version), 7.

encountering terrorism, Martin Scheinin, has noted: “[W]hat turns a suicide attack into terrorism, even during an armed conflict, is the targeting of civilians as victims.”¹⁷

In the aftermath of the 9/11 attacks, the United States Government issued a Presidential Military Order (PMO) that aimed to “...identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support [terrorist] attacks [and for suspects] to be detained and, when tried (...) by military tribunals.”¹⁸

The PMO applied to non-U.S.-citizens, who are or have been, or have knowingly harboured a member of Al-Qaeda or have engaged in, aided, abetted to conspire to commit acts of international terrorism prejudicial to the interests of the United States. It authorized the detention of suspects at any designated location worldwide with no guarantee of trial. It prescribed that a military commission, with lower standards of evidence than applicable in U.S. civilian courts, would try suspects.

Since then, debates have taken place – both nationally in the United States and internationally -- concerning the range of these measures and the limitations they put on the rule of law and international human rights standards.¹⁹ An important aspect concerned the question whether and to what extent they could lead to the application of torture (or what US officials prefer to call “coercive interrogation practices”²⁰) against suspected terrorists.

In 2005, the then UN Commission on Human Rights decided to appoint a Special Rapporteur on the promotion and protection of human rights while countering terrorism. His mandate includes making concrete recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

¹⁷ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms, while countering terrorism, Martin Scheinin, UN Doc. A/HRC/4/26 (29 January 2007), par. 69.

¹⁸ United States Presidential Military Order entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism” White House Press Release, 13 November 2001.

¹⁹ See FORSYTHE (2006), note 13 supra. One of the best documents on the matter is the note by the UN High Commissioner on Human Rights, prepared by ROBERT K. GOLDMAN, “Protection of Human Rights and Fundamental Freedoms while Considering Terrorism,” (E/CN.4/2005/103, 7 February 2005). The International Commission on Human Rights maintains a website on counter-terrorism and human rights: <http://www.ici.org/IMG>.

²⁰ See FORSYTHE (2006), note 13 supra, 474-476 and 477.

In his report to the Human Rights Council over 2006 he warned against the increasing practice by states of terrorist “profiling”, based on certain physical, behavioural or psychological characteristics, including “race”, ethnicity, national origin and/or religion. This practice he considered both ineffective and a disproportional interference with human rights such as the right to privacy, freedom of movement, personal liberty and non-discrimination.²¹ He also warned against disproportionate measures against suicide attacks: “Combined with shoot-to-kill policies or other forms of relaxing the standards related to the use of firearms, ‘profiling’ can have lethal consequences for totally innocent individuals.”²²

In his most recent report to the General Assembly²³ he expressed grave concern about the situation of detainees held at Guantánamo Bay and in other locations, and the lack of judicial guarantees and fair trial procedures afforded to individuals suspected of terrorist activity, as well as the transfer of terrorist suspects.²⁴

The two committees established by the United Nations to oversee anti-terrorist measures pay increasingly attention to the need for maintaining human rights standards.²⁵ However, in a recent article Rosemary Foot has made the point that the major powers, China, Russia “and especially the United States” have decided either to keep quiet on the matter of supporting a human rights framework in their fight against terrorism or “to use ambiguous phrasing”.²⁶ They still seem to grant priority to their fight against terrorism over the maintenance of human rights standards. The policy of the current United States government in its “war against terror” has received strong criticism both internationally and domestically. One of its domestic critics is the American human rights expert David Forsythe who has recently published an essay in which he criticized the Bush administration for (1) having engaged in international

²¹ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, UN Doc. A/HRC/4/26 (29 January 2007), 6-7.

²² *Ibid.*, 25.

²³ UN Doc. A/62/263, 15 August 2007.

²⁴ *Ibid.* par. 28. Even the Dutch Foreign Minister Maxime Verhagen – notoriously pro-US and pro-NATO – recently expressed his misgivings about the holding of prisoners on Guantánamo: “I fundamentally object to holding somebody in prison without legal charge, without legal judgement. And that is precisely the reason why I am opposed to Guantánamo.” *Wordt Vervolgd* (Amsterdam, monthly issued by the Dutch section of Amnesty International, vol. 40, nr. 12 (December 2007/January 2008), 26, translated from the original Dutch.

²⁵ ROSEMARY FOOT, “The United Nations, Counter-Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas,” (2007) *Human Rights Quarterly*, 29, 489-514.

²⁶ *Ibid.*, 513.

abuse of prisoners in connection to its ‘war’ on terrorism; (2) having failed to limit this abuse to the minimal and genuine requirements of defending the life of the democratic United States; (3) having unwisely sought to minimize any review of its sweeping policies, whether by international or national actors, and (4) having failed in a major way to minimize the negatives inherent in its policy of coercive interrogation, with detrimental effects overall on U.S. national security.²⁷

In a policy paper that was sent to Parliament in early March 2008, the Dutch Minister of Foreign Affairs stated that the promotion and protection of human rights should be an integral part of an effective antiterrorism strategy. “The protection of human rights is essential in preventing extremism and violent political opposition.”²⁸ In conversations with United States government representatives, the Minister had repeatedly criticized the juridical foundations of the detention of terrorism suspects in Guantánamo Bay. The paper also stated that the dialogue with the United States about the antiterrorism activities would be continued, both bilaterally and through the European Union. The Foreign Minister added, not without a touch of realism: “This will be a long-winded process.”²⁹

TORTURE

Acts of torture are prohibited under all circumstances. 144 states are party to the International Convention against Torture and Cruel, Inhuman or Degrading Behaviour or Punishment. A few years ago, it looked as if the prohibition of torture was on its way to become a human rights standard that was universally accepted. That seems no longer to be the case. More and more voices are being heard in many parts of the world that “methods of intensive interrogation” that are akin to torture, may be necessary to obtain vital information, for example from alleged terrorists.³⁰

²⁷ DAVID P. FORSYTHE, “The United States and Torture in International Perspective,” in: Alison Brysk and Gershon Shafir (eds.), *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, (Berkeley, Calif.: University of California Press, 2007).

²⁸ NETHERLANDS MINISTRY OF FOREIGN AFFAIRS, *Actieplan voor Implementatie van de Notitie “Naar een Menswaardig Bestaan – een Mensenrechtenstrategie voor het Buitenlands Beleid”* [“Plan of Action for the Implementation of the Paper ‘Towards a Decent Existence – a Human Rights Strategy for Foreign Policy’”], paragraph 62 [translated from the original Dutch].

²⁹ *Ibid.*, paragraph 68.

³⁰ See: ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS, *Advisory Letter Counterterrorism in a European and International Perspective: Interim Report on the Prohibition of Torture*, No. 11, December 2005, (English version), p. 6, note 10. WILSON, *supra* note 14, p. 17 recalls a memo prepared by then President Bush’s legal counsel Alberto R. Gonzales, in which torture was redefined as referring

Well-known is of course the revelation that American military engaged in torture practices against Iraqi detainees in 2003 held in the Abu Ghraib prison. A criminal investigation by the US Army had already been underway since May 2003 where four soldiers had been formally charged under the Uniform Code of Military Justice (UCMJ) with detainee abuse. In April 2004 reports of the abuse, as well as graphic pictures showing American military personnel in the act of abusing prisoners, came to public attention.³¹

The U.S. Department of Defense removed seventeen soldiers and officers from duty, and seven soldiers were charged with dereliction of duty, maltreatment, aggravated assault, and battery. Between May 2004 and September 2005, seven soldiers were convicted in courts martial, sentenced to federal prison time, and dishonorably discharged from service. Two soldiers were sentenced to ten years and three years in prison, respectively. The commanding officer at the prison was demoted to the rank of colonel. She has denied knowledge of the abuses claiming that the interrogations were authorized by her superiors and performed by subcontractors, and that she was not even allowed entry into the interrogation rooms.³² However, no high ranking officer was held responsible for the conscious hiding of prisoners or keeping them in inhumane conditions.³³

In 2005, the US Senate passed a proposal by Senator John McCain that stated explicitly that military personnel may use only the interrogation techniques permitted by the US Field Manual³⁴ and that the prohibition of torture also applies to foreign nationals

only to that physical pain which is equivalent to the pain ‘accompanying serious physical injury such as organ failure, impairment of bodily function, or even death’. For a recent discussion of the justification of torture see: SUMNER B. TWISS, “Torture, Justification, and Human Rights: Toward an Absolute Proscription,” (2007) *Human Rights Quarterly*, 29, 346-367.

³¹ There were at least ten investigations. See: WOLFGANG HEINZ, “Abu Ghraib ein Jahr später-eine Zwischenbilanz,”[Abu Ghraib Ten Years Later: An In-between Account,], in: Deutsches Institut für Menschenrechte u.a. (ed.), *Jahrbuch Menschenrechte 2006*, Frankfurt a/M, 2005, 138-150.

³² STEVEN STRASSER (ed.) *The Abu Ghraib Investigations: The Official Reports of the Independent Panel and the Pentagon on the Shocking Prisoner Abuse in Iraq* (New York: Public Affairs, 2004); See also: MARK DANNER. *Torture and Truth: America, Abu Ghraib and the War on Terror* (New York: New York Review Books, 2004). After the acquittal of the only officer that was charged, the *International Herald Tribune*, in an editorial, sharply criticized the Bush administration’s handling of the issue: “[President] Bush, Vice-President Dick Cheney, former Defense Secretary Donald Rumsfeld and other top officials have claimed that the abuses at Abu Ghraib were the disconnected acts of a small number of sociopaths. It’s clear that is not true.”(*International Herald Tribune* (Paris), 1 and 2 September 2007).

³³ FORSYTHE (2006), note 13 supra, 479.

³⁴ These restrictions have recently come under discussion. See: “Horrorifying and Unnecessary Mistreatment of Prisoners,” *International Herald Tribune* (Paris), 3 March 2008.

detained by the US outside US territory, such as Guantánamo. CIA activities were, however, not addressed. In the summer of 2006, the U.S. Supreme Court ruled in the Hamdi case that all Guantánamo prisoners were to benefit from Common Article 3 of the 1949 Geneva Conventions.³⁵ The nomination of Michael Mukasey to become U.S. attorney general was strongly criticized by human rights organizations in the fall of 2007, when he refused to denounce the practice of “waterboarding” in which interrogators immerse or pour water over a detainee’s face until he believes he will suffocate or drown. Such practice is generally seen as akin to torture or at least to cruel, inhuman or degrading practice or punishment.³⁶ In January 2008, the newly appointed Attorney-General refused to answer the question whether he considered such waterboarding to constitute torture: “Given that waterboarding is not part of the current program and may never be added to the current program, I don’t think it would be appropriate for me to pass definite judgment on the technique’s legality.”³⁷ In March 2008, President Bush vetoed a bill that would have outlawed interrogation techniques such as waterboarding. In a radio address he said: that “it would take away one of the most valuable tools in the war on terror – the CIA program to detain and question key terrorist leaders and operators.”³⁸

³⁵ Common Article 3 of the Geneva Conventions: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity;
- (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

³⁶ HUMAN RIGHTS WATCH, “US: Senate Should Reject Mukasey Nomination. Refusal to Denounce Waterboarding Show Him Unfit for Attorney General,”

http://hrw.org/english/docs/2007/10/31/usdom17210_txt.htm.

³⁷ “Senators Confront Attorney General over Legality of Waterboarding,” *International Herald Tribune* (Paris), 31 January 2008.

³⁸ “Bush Vetoes Bill that Would have Outlawed Waterboarding by CIA,” *International Herald Tribune* (Paris), 10 March 2008 and “Scaring Americans into Justifying Torture,” *International Herald Tribune* (Paris), 12 March 2008.

The practice of dealing with “illegal enemy combatants” has come under severe criticism. In an editorial, the *International Herald Tribune*³⁹ recalled the times that the United States urged all nations to obey the letter and spirit of international treaties and protect human rights and liberties: “American leaders denounced secret prisons where people were held without charges, tortured and killed.” Following this introduction, the paper strongly attacked the Bush administration that has “not only condoned torture and abuse at secret prisons, but they have conducted a systematic campaign to mislead Congress, the American people and the world about those policies”. It concluded: “Truly banning the use of torture would not jeopardize American lives; experts in these matters generally agree that torture produces false confessions.” Needless to say that the Bush administration has steadfastly rejected these and similar criticisms.⁴⁰

In November 2006, the Amsterdam daily newspaper *de Volkskrant*, under the heading “Dutch Military Tortured in Iraq”⁴¹ reported that three years earlier, Dutch military serving in Iraq had committed acts of torture against Iraqi detainees. This news caused a great deal of commotion in Dutch political circles and forced the minister of Defence to order an investigation by an independent commission (in actual fact, two such commissions conducted inquiries independently of each other). On 17 June 2007, the two commissions reported that no acts of actual torture had been committed, but questioned some of the interrogation methods.⁴² The findings of the two commissions caused a great deal of relief in official Dutch circles.

³⁹ 8 October, 2007.

⁴⁰ In December 2007, it was revealed that the CIA, in 2005, had destroyed at least two videotapes documenting the interrogation of two operatives of Al Qaeda in the agency’s custody. This news caused considerable uproar in the US Congress. According to newspaper reports, the tapes were destroyed in part because officers were concerned that video showing harsh interrogation methods could expose agency officials to legal risks. “Lawmakers Angered by Fate of CIA Tapes,” *International Herald Tribune* (Paris), 8 December 2007.

⁴¹ “Nederlandse Militairen Martelden in Irak,” [“Dutch Military Tortured in Iraq,”] *de Volkskrant* (Amsterdam), 17 November 2006.

⁴² “Onderzoek Ondervragingen in Irak: Rapport van de Commissie van Onderzoek naar de Betrokkenheid van Nederlandse Militairen bij Mogelijke Misstanden bij Gesprekken met Gedetineerden in Irak,” [“Inquiry Interrogations in Iraq. Report of the Commission of Inquiry into the Involvement of Dutch Military in Possible Abuses in Talks with Detainees in Iraq”], The Hague, 18 June 2007. Commissie van Toezicht Betreffende de Inlichtingen- en Veiligheidsdiensten, *Samenvatting inzake het Onderzoek naar het Optreden van MIVD-medewerkers in Irak bij het Ondervragen van Gedetineerden* [“Summary of the Inquiry into the Actions of Stafmembers of the Military Information and Security Service in Iraq during the Interrogation of Detainees”] CTIVD nr. 15, 18 June 2007.

However, since then, Herman Burgers, a former official at the Ministry of Foreign Affairs who was closely involved in the drafting of the 1984 International Convention on the Prohibition of Torture, having examined the two reports and having attended the subsequent debate in the Standing Committee on Defence of the Second Chamber of the Dutch parliament, has made the following points:⁴³

- The two commissions did not question the victims of the alleged acts of torture.
- The commissions accepted too easily the motivations for their questionable practices mentioned by the Dutch military involved. A striking example was the electrical sticks that had been taken to Iraq allegedly to keep vagrant dogs at a distance.
- No witnesses were allowed to attend the questionings, including the legal advisor of the Dutch military battalion.
- The detainees were blindfolded to prevent them from recognizing their interrogators, who also wore blackened ski-glasses.
- The detainees were exposed to “white noise”, a loud sound when a radio is tuned to a high volume, not on but close to a broadcasting station, allegedly to prevent the detainees from communicating with each other and from listening to the conversations of their interrogators.
- The reports do not mention the UN Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) to which the Netherlands is a party.

Burgers did not question the conclusion of the two commissions that no torture was committed by the Dutch military, but concluded that the combination of exposing the detainees to “white noise”, the deprivation of sleep, the fact that they were kept handcuffed and blindfolded during the interrogations and that they were sprinkled with cold water, meant cruel treatment prohibited by CAT, which could lead to torture. Torture as well as cruel, inhuman or degrading treatment or punishment is under international law under no circumstances allowed.⁴⁴

⁴³J.H. BURGERS, “Dissenting Opinion: Geen Deuren Open Laten Staan naar Marteling,” [“Not to Leave Doors Open Towards Torture”], 2007 *NJCM Bulletin* 32, 958-966.

⁴⁴ See also ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS, *Reactie op de Mensenrechtenstrategie 2007* [“Reaction on the Human Rights Strategy 2007”], The Hague: Ministry of Foreign Affairs, 2007, 10.

If one accepts Burgers' findings (as I do), one must conclude that the prohibition of torture was maintained both qua standard and in practice. However, the reactions by the Dutch public and political opinion tended to stress their relief over the fact that there were no findings of torture, but showed relatively little concern over the practice by Dutch military of cruel, inhuman or degrading treatment or punishment – which is equally prohibited in international human rights law.⁴⁵ This can clearly be called a shift in emphasis by the authorities.

In the chapter on terrorism in his recent paper on a human rights strategy, the Dutch Foreign Minister points out that “under extraordinary circumstances”, within a clearly delineated juridical framework, derogation from certain human rights standards is possible: “Therewith the principles of proportionality, non-discrimination and limited duration are valid. The fight against terrorism cannot offer a license to suspend certain human rights *ad infinitum*.”⁴⁶ It would have been useful, if he had also mentioned that certain rights such as the prohibition of torture and cruel, inhuman or degrading treatment or punishment may not be suspended under any circumstances.⁴⁷

RENDITIONS

Rendition refers to the extra-judicial transfer of individuals (including suspected terrorists) to countries where the person is wanted for trial, to countries where the individual can be adequately interrogated or prolonged detained. In a recent report⁴⁸ a British Parliamentary Committee distinguished five different forms of such rendition:

⁴⁵ Forsythe has made the point that there is no clear scientific or legal distinction between torture and lesser forms of mistreatment. Given that the international legal definition of torture hinges on the intentional infliction of *intense* pain, physical or mental, the dividing line is subjective. (DAVID P. FORSYTHE, “The United States and Torture in International Perspective,” in: ALISON BRYSK and GERSHON SHAFIR (eds.), *National Insecurity and Human Rights: Democracies Debate Counterterrorism*, (Berkeley, Calif.: University of California Press, 2007), note 45.

⁴⁶ MINISTRY OF FOREIGN AFFAIRS, *Naar een Menswaardig Bestaan: Een Mensenrechtenstrategie voor het Buitenlands Beleid* [“Towards a Dignified Existence: A Human Rights Strategy for Foreign Policy”], The Hague, 2007, 53 [translated from the original Dutch].

⁴⁷ ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS, *Counterterrorism in a European and International Perspective: Interim Report on the Prohibition of Torture*, advisory letter no. 11, The Hague, 2005, English version, 11: “The ban on torture is absolute and may not be compromised in any situation whatsoever.”

⁴⁸ Intelligence and Security Committee, *Rendition*, Presented to Parliament by the Prime Minister by Command of Her Majesty, July 2007, www.cabinetoffice.gov.uk/intelligence [hereafter “Intelligence and Security Committee”]

- “Rendition”: Encompasses any extra-judicial transfer of persons from one jurisdiction or State to another.
- “Rendition to Justice”: The extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of standing trial within an established and recognized legal and judicial system.
- “Military Rendition”: The extra-judicial transfer of persons (detained in, or related to, a theatre of military operations) from one State to another, for the purposes of military detention in a military facility.
- “Rendition to Detention”: The extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system.
- “Extraordinary Rendition”: The extra-judicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there is a real risk of torture or cruel, inhuman or degrading treatment (CIDT).⁴⁹

Obviously, it is especially the latter two types of rendition that cause the greatest concern if looked at from a human rights point of view.⁵⁰ Since 2001, hundreds of terror suspects are alleged to have been transferred by the United States to states, such as Pakistan and Egypt, where physical and psychological brutality and coercion feature prominently in interrogations. Many detainees are alleged to have been subjected to enforced disappearance, a crime under international law. European states such as Germany, Italy, the Netherlands, Spain⁵¹. Sweden, Turkey, and the United Kingdom, are reported to have, if not participated, at least condoned this practice of rendition by

⁴⁹ Ibid., p. 6, par.7. See also: Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/62/263, 15 August 2007, par. 28 and DAVID WEISSBRODT and AMY BERQUIST, “Extraordinary Rendition: A Human Rights Analysis,” (2006) *Harvard Human Rights Journal*, 19, 123-160. The movie “Rendition” shows vividly what may happen in the case of (an Egyptian’s) mistaken identity.

⁵⁰ In his recent paper on a human rights strategy, the Dutch Foreign Minister strongly rejected the practice of extraordinary renditions: “Such matters as ‘extraordinary renditions’ and secret detention facilities, that are in violation of international law, will be explicitly condemned.” MINISTRY OF FOREIGN AFFAIRS, *Naar een Menswaardig Bestaan: Een Mensenrechtenstrategie voor het Buitenlands Beleid* [“Towards a Dignified Existence: A Human Rights Strategy for Foreign Policy”], The Hague, 2007, 51 [translated from the original Dutch].

⁵¹ According to the Spanish civil aviation authority, AENA, 47 flights from Guantánamo passed through Spanish airspace or landed in the country from 2002 until as recently as February 2007 *International Herald Tribune* (Paris), 13 November 2007.

not sufficiently controlling flight movements and being less than interested in clarifying reports of such flights. Between 2003 and 2005 the CIA ran secret detention sites in Poland and Romania.⁵²

The British report criticized certain American practices, which raised some “ethical dilemmas”. At first, the British did not believe that the Americans were using so-called “black facilities”⁵³ A British intelligence officer told the Committee that “...it never crossed my mind that [the intelligence] was coming from torture [or CITD]. We are talking about the Americans, our closest ally. This now with hindsight, may look naïve, but all I can say is what we thought at the time.” An official at the American embassy in London, when asked about the report, said: “We have in all cases with respect to those issues operated with full respect of the sovereignty of our partners and allies.”⁵⁴

Diplomatic guarantees concerning the treatment of such persons by the country of destination should be tested for compatibility with the peremptory non-refoulement principle in order to assess the practicability and moral acceptability. In light of the numerous promises that have been broken, there is a body of authoritative opinion that categorically rejects the diplomatic guarantee system, because it is no more than a means of undermining or circumventing the non-refoulement principle The United Nations Special Rapporteur on Torture, in his report over 2006, reiterated⁵⁵ that such diplomatic assurances are not legally binding and undermine state obligations to prohibit torture, are ineffective and unreliable in ensuring the protection of returned

⁵² Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Members: Second Report, Explanatory Memorandum, Rapporteur Mr. Dick Marty*, Switzerland, ALDE, 7 June 2007, 4. In February 2008, the European Commission accused Poland and Romania of dodging its requests for clarifying their possible role in the United States extraordinary rendition program. (“EU Accuses 2 Members of Delay on Renditions,” *International Herald Tribune* (Paris), 23/24 February 2008.)

⁵³ The Committee defined “black facilities” or “black sites” as an “extra-judicial detention and interrogation facility secretly operated by the U.S. Central Intelligence Agency outside the normal legal system”. “This therefore does not include detention facilities at Guantánamo Bay or Bagram Air Base”. (Intelligence and Security Committee, *supra* note 43, p. 24, note 58.)

⁵⁴ “U.K. Report Reproaches U.S. over Abductions,” *International Herald Tribune* (Paris), 28-29 July 2007. See also: WOLFGANG S. HEINZ, *Terrorismusbekämpfung und Menschenrechtsschutz in Europa* [“The Fight against Terrorism and the Protection of Human Rights in Europe,”] Berlin: Deutsches Institut für Menschenrechte, 2007, 28 f. and 42-44.

⁵⁵ *Supra* note 49, p. 24, par. 72.

persons and therefore should not be resorted to by states.⁵⁶ An ad hoc working group of the Council of Europe has also dealt with this subject.⁵⁷

In November 2007, Amnesty International came out with a report on a very special kind of extraordinary rendition, saying that ISAF forces⁵⁸, particularly those from Belgium, Britain, Canada, the Netherlands and Norway, had transferred detainees to Afghanistan's intelligence service, the National Directorate of Security (NDS), despite consistent reports of torture and other ill-treatment by the NDS. Amnesty put forward a number of recommendations including:

- ISAF must temporarily suspend all transfer of detainees to Afghan authorities and hold them in their custody until effective safeguards are in place;
- ISAF contributing countries should promote the reform of the Afghan detention system and explore the feasibility of placing international staff within Afghan detention facilities in order to train new Afghan detention officials;
- The Afghan government must publish the secret Presidential decree governing the operation of the NDS and take steps to separate the current functions of detention, investigation and prosecution;
- The Afghan government should ratify the Optional Protocol to the Convention against Torture and invite the UN Special Rapporteur on Torture to visit Afghanistan, including detention facilities under the control
- Independent monitors should be given unrestricted and unhindered access to all detention centres and unsupervised access to all detainees.⁵⁹

THE DOMESTIC LEVEL

One of the persons who clearly thinks that a great deal has changed in recent years in the field of human rights, is the Vice-President of the Council of State of the

⁵⁶ Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. E/CN.4/2006/6.(2006). The Special Rapporteur on the promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, urged, in his recent report to the General Assembly, "restraint" in respect of so-called diplomatic assurances by the receiving state not to subject a person to torture and other inhuman treatment, "as this can never replace the receiving State's obligation to carry out an individual assessment of whether a real risk of torture or cruel, inhuman or degrading treatment or punishment exists in respect of the person."(UN Doc. A/62/263, 15 August 2007, par. 82 (c).

⁵⁷ See: HEINZ, note 54 supra, 14 ff.

⁵⁸ ISAF stands for International Security Assistance Force (in Afghanistan).

⁵⁹ Amnesty International, *Afghanistan: Detainees Transferred to Torture: ISAF Complicity?* www.amnesty.org/library/print/ENGASA110112007.

Netherlands, Herman Tjeenk Willink, who on 7 June 2007 gave a memorable speech in which he raised the question whether the anti-terrorist measures taken in many countries in the aftermath of the events of 9/11 were still necessary: “Isn’t it time we paused to think about what we are doing and at least attempt to obtain a clear view of the internal momentum of our security policy?”⁶⁰ In his speech he mentioned the following six points:

- How effective are the measures taken and are blanket measures not by definition disproportional?
- How can national parliaments control measures taken at the international level? “Who is controlling the Security Council?”
- To what extent are the measures taken at the national, European and international level periodically reviewed?
- Specific measures originally taken to combat terrorism tend to become part and parcel of ordinary criminal law.
- To the extent that courts have taken measures to correct the situation, does this not undermine the role of the proper political institutions, such as the government and parliament?
- If not only individuals but also entire groups are seen as security risks, this jeopardizes their political and social integration. The traditional liberties and rights are not opposed to security, but they lie in fact at its heart.

He concluded his speech as follows: “The democratic state, with its rule of law, its fundamental rights, its diversity and its tolerance, is *not* among the root causes of terrorism. On the contrary, democracy and the rule of law are the most effective weapons against it. So democracy and the rule of law must not be restricted to protect them against terrorism. Far from it, they must be deployed to the full in the fight against terrorism, both nationally and internationally.”⁶¹

⁶⁰ HERMAN TJEENK WILLINK, “To What Extent May in a Constitutional Democracy the Rule of Law be Limited in Order to Protect Her against Terrorism?” in Review Committee on the Intelligence and Security Services (CTIVD) & Faculty of Law Radboud University, Nijmegen, *Accountability of Intelligence and Security Agencies and Human Rights*, The Hague, 2007, 19-26.

⁶¹ Ibid.

CONCLUSIONS

This paper has focused on the role of the United States and the Netherlands in their maintenance of human rights standards, while countering terrorist activities. It is clear that both governments keep insisting on their commitment to human rights standards. Yet, it is also clear that their fight against terrorism has put that commitment into danger. Especially the United States, through its detention of “illegal enemy combatants” at Guantánamo Bay, without the benefit of a fair trial⁶², has been strongly questioned both by non-governmental human rights organizations and by United Nations Special Rapporteurs. The use of torture, while out of the question in these two countries until a few years ago, has come under serious consideration, if not actual practice. In the case of the Netherlands, at least the use of cruel, inhuman and degrading treatment or punishment by some of its military has been admitted. The least one can say is that there is a considerable amount of tension between the maintenance of international human rights standards on the one hand and the struggle against terrorist activities by the security forces on the other hand. In the case of the Netherlands, the views and criticisms expressed by the experts Burgers and Tjeenk Willink expounded in this paper should be carefully considered. They are of relevance to other states as well.

Under the rules of human rights law humanitarianism prevails over sovereignty. This maxim has come under discussion since the terrorist assaults of 11 September 2001 and later similar events. Governments – that of the United States in particular – tend to assume that counterterrorist measures (“the war on terror”) belong to the national sovereignty of the state and may prevail over its international human rights obligations.

The promotion and protection of human rights is of special importance in difficult times, when the survival of the state is under attack. It is understandable that governments in general, and their security services in particular, want to do everything in their power to prevent and to counter terrorist attacks. Such attacks, as we said before, are themselves an onslaught on the human rights of innocent civilians. Yet, at the same time, human rights are intended to protect these very civilians. The authorities should always remember that the maintenance of the rule of law and human rights is

⁶² The present military commissions cannot be said to follow elementary standards of fair trial.

one the things that distinguishes them from their terrorist adversaries. That is one of the main reasons why such practices as torture and cruel, inhuman or degrading treatment or punishment or –another topic – extraordinary renditions, should never be resorted to – not even when combating terrorists.