Human Rights and Counterterrorism in Global Governance: Reputation and Resistance

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Focusing on U.S. and Asian state behavior, and UN and Asia-Pacific organizations, I explore the argument that a reputation for effectiveness in the counterterrorist campaign has become more significant than a reputation for defending human rights. I conclude that only where human rights issues had established a reasonably firm domestic and international institutional foothold before September 11, 2001, does a reputation built on concern for the protection of human rights retain an ability to constrain certain of the illiberal trends associated with the counterterrorist agenda. Nevertheless, even in these instances, counterterrorist requirements are shaping institutional behavior and rhetoric and depleting the resources available for dealing with human rights abuse. Keywords: reputation in world politics, attack on personal security rights, institutional activism post–September 11.

The terrorist assault on U.S. territory in September 2001 has been instrumental in modifying or redefining certain of the social practices that have guided interactions in world politics among a range of state and nonstate bodies. This is particularly the case in the area of human rights, or more precisely with respect to the right to personal security. Prior to September 11, there had been a reasonably widespread understanding—as opposed to agreement—that governments were expected to protect individual human rights and that failures to protect were of legitimate concern to other state, nonstate, and international institutional actors in global society. A state’s reputation no longer rested solely on its ability to exercise authority over territory and the population that resided within it, but it now also embraced the idea of “sovereignty as responsibility,” where a state had a duty to provide for basic human rights in its own land mass and to be concerned about the abuse of rights overseas. Academic writers influenced either by power or by sociological explanations of world politics argued that states accepted this normative understanding because they were coerced or offered positive incentives, because they deemed the norms to be
valid, or because they recognized that this idea of legitimate sovereignty was part of the script of modern statehood.  

However, after September 11, this assumption that modern, legitimate statehood increasingly entailed the protection of human rights came under serious challenge in certain parts of the world. An apparent reemphasis on the security of the state and its citizens—as opposed to a concern about the abuse of individuals wherever they might reside—and the perception that antiterrorism requires the introduction of legislation that curtails civil liberties pose part of that challenge. Similarly, the compromises seen as necessary when framing foreign policies toward governments that have poor records in the area of human rights but are deemed important in counterterrorist operations have undercut the weight that has hitherto been accorded the human rights norm in the foreign relations of democratic states. International and regional organizations have passed legislation, instituted monitoring mechanisms, and started to engage in capacity building, all of which reinforces these trends in state behavior. Advocacy groups devoted to human rights promotion find themselves on the defensive, even in danger, and are divided in their assessment of how best to operate or stay relevant in the so-called age of terror.

Many of the political actors affected by these trends seemingly have picked up the signal that building a reputation for resolve and developing an ability to participate effectively in the antiterrorist struggle has become increasingly important, overshadowing human rights matters in the appreciation of their standing as modern states and institutions. As a result, the level of contribution these state and interstate bodies make to the counterterrorist campaign has shown signs of reshaping hierarchies in world politics.

In this article, I develop and explore the argument that a reputation for effectiveness in the counterterrorist campaign is being given more weight than that of human rights defender. To demonstrate this point, I draw on examples from U.S. and Asian state behavior and from UN and Asia Pacific organizations. The United States is key because, through its unilateral actions and its exercise of power in bilateral relationships and in multilateral international institutions, it has been important in the past in defending human rights both at home and abroad; but it also has set in motion the trends that are reshaping reputational goals. Asia is a focus because the United States has designated it a core location in the antiterrorist campaign, containing so-called frontline and second-front states in that struggle. Moreover, prior to September 11, various Asian states had found their human rights records to be under global scrutiny. The UN and Asia Pacific organizations are germane to the discussion,
too: as already noted, the United States can exert its influence on organizations, whether it participates in them or not. It has been influential in shaping the counterterrorist actions of both the UN and Asian regional organizations. Thus, Resolution 1373, largely drafted by the Bush administration, led the UN Security Council to set up the Counter-Terrorism Committee (CTC). This prompted Asian regional and subregional organizations to develop antiterrorist measures based on CTC expectations.

A focus on particular governments and international institutions allows for a nuanced conclusion to emerge. My argument attests to the independent capacity of both domestic and global institutions to resist certain well-embedded social practices being overridden. I find that a reputation built on concern for the protection of human rights retains an ability to constrain actions at least among those political bodies where, in the past, human rights issues had established a reasonably firm domestic and international institutional foothold. There is some robustness to the human rights norm as shown by certain governmental actions, in the work of transnational and domestic human rights non-governmental organizations (NGOs), and at the UN level itself. Perhaps in these instances, therefore, there might be a hybrid form of reputation being established, drawing together the two reputations of human rights defender and antiterrorist fighter. Optimistically, this could lead eventually to the adoption of strategies that realize an acceptable balance between the need to sustain a centralized authority’s capacity to protect its people and a commitment to maintain the protection of individual human rights, wherever they are under threat.

Elsewhere, however, in organizations and states where that institutional foothold for human rights was less secure prior to September 11, 2001, then unsurprisingly we are seeing attempts to demonstrate effective counterterrorist action to the neglect, and often the worsening, of human rights protections. Whether this regressive trend continues is open to future investigation.

Defining Reputation and Hierarchy

Following Jonathan Mercer, reputation in world politics is defined as a relational concept based on a belief that an actor has an enduring characteristic that creates certain expectations and understandings about behavior in the present and future. This helps to deter or compel in others some forms of behavior, or to induce uncoerced cooperation. Overall, its effects are to reduce costs. In the field of strategic studies, military alliances
can have or can build a reputation for treating their mandates seriously and for standing firmly in support of other alliance members, thereby enhancing deterrence. Economic actors are particularly interested in building a reputation for trustworthiness, because this induces cooperation and lowers future transaction costs. Newly democratizing countries view it as valuable to the establishment of their new reputations as law-abiding, democratic states to show that they are willing to take on additional human rights commitments. For example, in 1988, Hungary demonstrated a desire to anchor itself within the democratic community of states by choosing to ratify the optional protocol of the International Covenant on Civil and Political Rights (ICCPR), which allows for individual petition of the UN Human Rights Committee. Even well-established democratic states have been known to recognize the value of recapturing or retaining a reputation for moral authority. In 1976, before his appointment as President Carter’s national security adviser, Zbigniew Brzezinski had written that building a concern for human rights into U.S. external relations could help to relegitimate foreign policy both domestically and overseas. Brzezinski understood that a reputation for moral behavior links power with moral authority, which is particularly useful in the absence of enforcement mechanisms or where there is a reluctance to use coercive means.

Hierarchies in world politics—the ranking of state, nonstate, and institutional actors according to how successfully they acquire resources and achieve through material or nonmaterial means their desired outcomes in world politics—can be determined by patterns of political and economic support and the degree to which a state, regional, or global organization is seen as a site of early resort when it comes to problem solving. Thus, Amnesty International (AI), an organization with high standing as a transnational human rights organization, produces authoritative reports that are often drawn on by the various official bodies that work in the human rights field, including the UN Human Rights Committee, parliamentary committees, and international criminal tribunals. AI, critical in the 1970s and 1980s in launching a worldwide campaign against the use of torture, helped draft a declaration that defined and eventually established the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Among states, the United States is obviously central in this determination of hierarchy because of the attention that is paid to its use of material and symbolic support in its bilateral and multilateral relationships. Important too is its capacity to ignore certain actors or venues as it formulates its policies unilaterally, bilaterally, or through particular multilateral organizations. In America’s so-called war on terrorism, Washington has
sent a series of powerful signals indicating which political actors are deemed important to the achievement of its counterterrorist goals, in some cases trying patently to turn former virtually “rogue states” into valued partners and moribund organizations into potential problem-solving venues.

The Evolving Basis of Reputation

Human Rights as the Mark of Legitimate Governance

The period after 1945 put human rights on the global agenda. Several human rights treaties and declarations were created and were promoted either through the UN or through regional charters. Most significant among these were the ICCPR and the International Covenant on Economic, Social and Cultural Rights, both of which were opened for signature in 1966 and came into effect ten years later. In 1946, the UN created the Commission on Human Rights (UNCHR). Over time, and especially from the late 1970s, this commission and its subcommission became more active in fulfilling their mandates: stepping up the range of their fact-finding activities, appointing new thematic special rapporteurs in such areas as summary or arbitrary executions (1982) and torture (1985), and investigating evidence of abuse in particular countries. Related to this increased activism were developments in democratic states, especially the United States, whose Congress in the early 1970s passed legislation that called for the denial of military or economic aid to any government that grossly violated the human rights of its people. Many other democratic states followed the U.S. lead. Having made such commitments, domestic and transnational activist organizations, which grew substantially in number over this same period, tried to ensure that states and organizations lived up to their obligations.

Despite the obvious difficulties in implementing these policies, human rights standards were set from the mid-1970s, presenting a “summary statement of the minimum social and political guarantees recognized by the international community as necessary for a life of dignity in the contemporary world.” Some monitoring of state behavior also resulted from the reporting requirements of several human rights treaties, annual meetings of the UNCHR and its subcommission, record keeping by major human rights NGOs, and the details provided in the annual U.S. State Department Country Reports on Human Rights Practices. Much of this human rights activity had emerged as the result of a deeply political, rather than moral, process; yet it proved difficult to disband
The ending of the Cold War in the late 1980s deepened these trends. Priority could be given to human rights without fear of alienating those countries that could add valuable strategic weight to one side of the Cold War divide at the expense of the other. In 1993, the UN appointed its first High Commissioner for Human Rights (UNHCHR), an office that has grown in stature over time. From then on, UN peacebuilding operations, which grew substantially in number from the 1990s, always included a human rights component. States and inter-state bodies increasingly recognized gross violations of human rights as a threat to international peace and security: indeed, during the period 1991 to 1999, the UN Security Council considered on nine occasions whether some external body should, partly or wholly on humanitarian grounds, organize or authorize military action inside a state. In each instance there was, in fact, a humanitarian intervention, not always with UN authorization or host-state consent. Where the United States was concerned, the Clinton administration, although justly criticized for its inconsistency in promoting human rights, nevertheless did appoint credible people to the post of assistant secretary for human rights, afforded unprecedented access to NGOs, and took a decision to make it the responsibility of all executive departments and agencies to be aware of U.S. international human rights obligations.

This is not to suggest that there was widespread global support for all of these developments. The Asian values argument of the early 1990s, a vivid reminder that some governments—but not necessarily all their citizens—wanted to give priority to political and cultural diversity over universalist claims, projected these normative developments as impositions at a time of post–Cold War Western triumphalism. But even in this region, a number of countries saw the time as ripe to establish national human rights commissions, and some—such as China—started to engage actively in human rights discourse, leading to Beijing’s signature of the two major human rights covenants in 1997 and 1998.

Jack Donnelly was surely right, then, when he argued in 1998 that “human rights represent a progressive late twentieth century expression of the important idea that international legitimacy and full membership in international society must rest in part on standards of just, humane or civilized behaviour.” Disagreements remained over which rights deserved greatest attention, and on which occasions, as well as about how best to promote human rights. But the expectation that global actors would—indeed should—be concerned about human rights in any part of the world where they might be grossly violated was rarely overtly questioned.
Those states concerned about a reputation for legitimate governance or acceptance by peers as a “civilized” state could be persuaded or shamed into modifying their behavior—at least to the point of signing the major international covenants, submitting to these covenants’ reporting obligations, and voicing a rhetorical commitment to the protection of human rights.

Institutional Change and Activism After September 11

The terrorist attacks on the United States in September 2001 have prompted a reconsideration of the worth of a reputation for legitimate governance, or at least have stimulated states and organizations to consider whether there were new priorities to consider in the unprecedented circumstance of a fatal terrorist attack on the most powerful state in the global system. The response of some—encapsulated for a time in the *Le Monde* editorial entitled “We Are All Americans,” was to find venues where support for the United States in its hour of need and pain could be demonstrated.11 The UN Security Council responded uncharacteristically with “rapidity, unanimity, and decisiveness.” On September 12, it passed Resolution 1368 condemning the attacks and recognizing the inherent right of collective and self-defense. Resolution 1373, passed sixteen days later, legally obligated all member states to deny terrorists the means to carry on their work. A newly established CTC was set up to monitor compliance with 1373’s requirement for states to freeze assets, to prevent the collection or transfer of funds or provision of arms, and to deny safe haven and passage to suspected terrorist groups. Governments are obligated to report to the CTC on steps they are taking to implement the resolution, and the CTC, in turn, acts as a kind of repository of ideas to help states develop a capacity—such as providing model legislation and recommending various forms of training—to meet 1373 obligations.12 Although the United States drove forward this intergovernmental process, the UN’s reputation obviously benefited from being seen to act with decisiveness and competence in extremis. Even if the Security Council left it to the United States to use force against the Taliban and Al-Qaida, the UN could point to the superiority of its multilateral organizational structure when it came to dealing with terrorists by nonmilitary means.13

What, though, did the CTC have to say about the human rights implications of the antiterrorist actions and legislation that states were developing? Very little, even though some reports from states swiftly raised concerns in this area (for example, those from Egypt, Estonia, Moldova, New Zealand, Sweden, and the United Kingdom, according to
the Human Rights Committee). CTC’s first chair, Sir Jeremy Greenstock, noted that the CTC “is not a tribunal for judging states” and thus would not test if state responses were consistent with human rights standards, leaving that to other parts of the UN system to determine.14 I will say more about the criticisms made of this circumspection later on, but initially the CTC’s signals could be read as having given preference to measures that promoted counterterrorism over human rights obligations.

Other regional organizations quickly took a lead from the UN’s CTC. In October 2001, the Asia-Pacific Economic Cooperation (APEC) forum met in Shanghai. Prior to September 11, APEC had a rather lackluster record of achievements, including a failure to respond to the Asian financial crisis of 1997–1998 or to make much progress with its core commitment of trade liberalization. It had always eschewed direct involvement with security questions, although security discussions turned out to be indirectly an important part of APEC’s latent agenda—for example, the East Timor crisis in 1999. At the October 2001 annual leaders’ summit, APEC moved quickly into counterterrorism mode just as the UN Security Council had. Having issued a declaration committing the organization to the antiterrorist struggle, it subsequently created the Counter-Terrorism Task Force to coordinate the implementation of this commitment, established the Secure Trade in the APEC Region (STAR) initiative, and promoted the development of APEC Counter-Terrorism Action Plans. John Ravenhill, though he cautions us not to overestimate the degree of agreement among member states on terrorist issues, still argues: “Post Sept 11, APEC has been revitalized by the new tasks its Leaders have given it through the adoption of a counterterrorism agenda.” Compared with the past, APEC is pursuing this agenda in a more coherent fashion, with greater financial backing and with the support of a more effective secretariat. The various commitments made are still voluntary, but there is an urgency to APEC deliberations that is not characteristic of earlier periods in its history.15

There are signs, too, that the Association of Southeast Asian Nations (ASEAN) Regional Forum (ARF), which is the Asia Pacific security organization, has become more energetic as a result of its pursuit of a counterterrorist agenda; its July 2002 “Statement on Measures Against Terrorist Financing” reflects a significant change in language compared with past security communiqués. In this document, ARF participants, instead of adopting language that “encouraged” states to implement measures according to national timetables, as it would have in the past, stated that each ARF participant “will aim” to implement the various measures outlined “quickly and decisively.” These are not phrases usually associated with Asian regional organizations that have been
premised on voluntarism, noninterference, and consensus decisionmaking and consequently have moved at a gradual, if not glacial, pace in implementing all other aspects of their agendas. At an ARF ministerial meeting on counterterrorism in Bali in February 2004, the participants agreed to establish an “ad hoc working group of senior legal officials from around the region” that would “report back to Ministers on the adequacy of regional legal frameworks for counter-terrorism cooperation and identify new areas for improvement of cooperation and assistance.” For a grouping of states that has been extremely wary of ceding any element of state sovereignty, this represents a notable change in approach.

State Actions

If regional and global institutions have seen it necessary to begin developing reputations for robustness in dealing with terrorists, so have individual governments, even at the expense of civil liberties. The U.S. administration, within one week of the terrorist attacks, brought the U.S. Patriot Act before Congress. The act amended fifteen different federal statutes and awarded sweeping new powers to law enforcement and intelligence agencies, affecting laws relating to immigration, surveillance, and intelligence sharing. It took only six weeks for Congress to pass it. U.S. authorities also locked up roughly 1,200 noncitizens, mostly Muslim men, immediately after September 11. Some U.S. citizens, described as “enemy combatants,” have been held without trial. Several hundred prisoners, mostly detained as a result of the fighting in Afghanistan, have been held at the U.S. naval base at Guantánamo Bay, Cuba, but not given prisoner of war status, and few have had their cases reviewed. Well before the shocking revelations of the mistreatment and torture by U.S. military personnel of prisoners held in the Abu Ghraib prison in Iraq, national security officials were reported in the U.S. press as having “defended the use of violence against captives as just and necessary.” As one official supervising the capture and transfer of alleged terrorists told a Washington Post reporter in December 2002, “If you don’t violate someone’s human rights some of the time, you probably aren’t doing your job.”

Washington has also decided to give large-scale financial and symbolic support to states that it believes have key roles to play in the antiterrorist campaign. Nowhere was this shift in U.S. policy more evident than in the case of Pakistan. From being regarded as a virtual failing or “rogue” state—with fragile institutions, a weak economy, a nuclear weapons capacity, and a military dictatorship—the U.S. executive branch has tried to overlook the attributes it once associated with Islamabad and
replace these with that of vital partner. U.S. aid began to flow once the tough U.S. sanctions previously imposed as a result of Pakistan’s nuclear test and military coup were lifted in September and October 2001. February 2002 heralded the state visit of Pakistan’s president, Pervez Musharraf, to Washington, where Musharraf was described as a “leader of great courage and vision.” The accolade of a visit to Camp David came in June 2003, making him the first South Asian leader ever to be invited to the U.S. president’s mountain retreat. On that occasion, Musharraf received a further pledge of U.S.$3 billion in aid over five years, half of which is for military assistance. Subsequently, Pakistan was designated a major non-NATO ally of the United States (as was the Philippines—another state closely aligned with the United States in antiterrorist action in Southeast Asia).20

Examples of this shift in U.S. perceptions of states that it deems important in the antiterrorist campaign can be found throughout Asia. In the case of Malaysia, the United States now values it as both a source of intelligence on terrorist groupings and effective in arresting terrorist suspects in relatively large numbers. The Bush administration also seeks to project it as a model, moderate, predominantly Islamic country in Southeast Asia that is a “beacon of stability in the region.”21 Malaysia’s Internal Security Act (ISA), once regularly criticized in the United States for its arbitrary provisions and use against domestic political opponents, is now seen as essential in a counterterrorism context. Where China is concerned, the Bush administration in August 2002 agreed with the Chinese claim that the East Turkestan Islamic Movement is a terrorist grouping that operates in Xinjiang province and has links with Al-Qaida. This designation has damaged the reputation of the largely peaceful Muslim separatist movement in that area, linking the movement with terrorist activity in support of a clear Chinese attempt to delegitimize the Uighur struggle for religious and cultural autonomy. In Indonesia, the United States had been putting security sector reform relatively high on its policy agenda, in an attempt to help the new post-Suharto leadership reduce the military’s role in politics. It had also imposed sanctions to ensure that certain of Indonesia’s military leaders were made accountable for past human rights abuses (especially in East Timor). However, U.S. officials have made strong efforts since September 11 to circumvent these sanctions, to strengthen U.S.-Indonesian military-to-military relations, and to overlook the need for accountability. Helping Indonesia build a robust reputation for dealing with terrorism has taken precedence in significant parts of the U.S. executive branch over Indonesia’s status as a democratizing state that had needed to deal firmly with past human rights transgressions.22
What these actions and statements represent are a retreat from the cosmopolitan concern with “saving strangers.” They imply reduced attention to security defined as protecting individuals from instances of abuse originating inside states to a more absolutist notion associated with strong central authority in service of continuing statehood. Renewed priority has been given to the ability to police air, sea, and land borders; to arrest terrorist suspects; to focus on their interrogation rather than trial; and to investigate more fully those seeking asylum or relocation. Governments do, of course, have a duty to protect their citizens against terrorists who themselves reject the inviolability of innocent human life and who threaten the right to life. But that duty does not entail the abandonment of fundamental principles and peremptory norms associated with the protection of human rights that had previously gained some purchase at the global and domestic levels.

Security services worldwide have taken advantage of this reputational turn away from human rights protections. On Human Rights Day, 10 December 2001, seventeen special rapporteurs and independent experts of the UNCHR expressed serious concern over the infringements of human rights that were being reported to them on a daily basis due to measures adopted by states after September 11. Antiterrorist legislation, newly passed or amended in many countries, had defined terrorism in terms that were dangerously wide-ranging. A number of government officials also stated explicitly that a concern with human rights and democracy undermined the effective application of a counterterrorism policy. As the Uzbek foreign minister pithily put it, “Let’s first bring things in order, then we’ll talk about democracy and human rights.”

U.S. terminology and behavior have also been used as the benchmark for a number of other Asian governments. Some militaries in Asia have conducted their own “war on terrorism” against domestic opponents of several different kinds, emulating in some cases the “shock and awe” tactics of the United States and the idea of embedding friendly journalists during military campaigns—for example, the Indonesian military’s actions in Aceh. Where civilian agencies in the security sector have been given a lead, they have taken preventive action on the basis sometimes of flimsy evidence or at least on the basis of evidence that the public is never able to review. A recent Human Rights Watch report on Malaysia, for example, shows that its ISA—which allows for the holding of detainees for sixty days incommunicado, then for two years, with possible renewal of this period without judicial oversight—has led to the arrest of more than a hundred individuals on terror-related grounds. However, the government has not shown that any of those detained has engaged in illegal activity. While in custody, family members...
and others report that those arrested have suffered serious abuse. The detainees have also apparently been threatened with being sent to Guantánamo Bay’s Camp X-Ray if they fail to cooperate—illustrating the latter’s status as a symbol that expressed “a new acceptance of human rights violations in the name of fighting terrorism.”

There are many examples worldwide where governments appear to believe they have renewed license to abuse human rights in the name of fighting terrorism, on the grounds that this is deemed an acceptable form of behavior and, moreover, emulates the behavior of the most powerful state in the system. The concept of the strong state shows signs of undergoing some redefinition from one based not on the idea of sovereign responsibility but on effectiveness in the antiterrorist struggle, including the ability to act preventively and round up or eliminate suspects.

The Robustness of the Human Rights Norm?

What, then, of the power of the human rights norm with which I started this article? Paying attention once again to the same set of state and organizational actors as earlier, it is clear that institutions, domestic and international, can make a difference as to whether the human rights norm retains an ability to constrain.

The UN and Regional Organizations

Various parts of the UN have been responsible for resurrecting the human rights norm in this inhospitable era for three main reasons: the embeddedness of human rights in the UN’s organizational structure; the role of the UNHCHR, which has over time become more visible and active within the UN agencies; and the presence of an outspoken proponent of human rights in the UN secretary-general. To increase the resonance of their arguments, UN human rights advocates make the twin points that, although terrorist actions themselves are a threat to human rights, human rights violations do also increase the population of terrorists.

The CTC came under early pressure to be more assertive in assessing the human rights consequences of the reports that states make as part of obligations associated with Resolution 1373. When the chair of the CTC briefed the UN Security Council on 18 January 2002, he reiterated that monitoring the performance of states in the human rights area was outside the scope of the CTC’s mandate. However, on that same occasion, Kofi Annan reminded Council members that there was “no trade-off between effective action against terrorism and the protection of human rights,” an
argument that he has continued to advance on several subsequent occasions. Both the former UNHCHR, Mary Robinson, and her successor, the late Sergio Vieira de Mello, spoke before the CTC, the latter reminding it in October 2002 that the best and only way to defeat terrorism was by respecting human rights, promoting social justice and democracy, and upholding the rule of law. Sir Nigel Rodley of the UN Human Rights Committee (a body that monitors compliance with the ICCPR) directly stated to the CTC in June 2003: “However inconvenient it may appear, the Council should not leave it wholly to those parts of the UN system that have a specific human rights mandate.” This concerted pressure at least has had the effect of promoting regular dialogue between the CTC and the UN’s human rights bodies and has led the CTC to refer to expert opinion where there might be human rights consequences flowing from a state’s antiterrorist action.

UN General Assembly Resolution 219, passed 18 December 2002, on respect for human rights and fundamental freedoms while combating terrorism, together with Security Council Resolution 1456 of 20 January 2003 on the same theme, declare that states should adopt only those antiterrorist measures that are in accordance with human rights, refugee, and humanitarian law. Annual UNCHR meetings in Geneva have considered reports of the UN special rapporteur on terrorism and human rights, which included a call to the CTC in the 2004 report to “fully incorporate human rights and humanitarian law obligations into its directives.” The Office of the UNHCHR has produced the “Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism,” which, among other matters, clarifies the concept of nonderogable rights under UN and regional human rights conventions. It states categorically, “This publication will help policy makers, including government officials, parliamentarians, judges, lawyers and human rights defenders, in developing counter-terrorism strategies that are fully respectful of human rights.” No state can claim to be in ignorance. Similarly, the UN Committee Against Torture has been reminding state parties to the CAT of the nonderogable nature of the obligations they undertook in signing this convention. Nevertheless, the Office of the High Commissioner is under no illusions about the increased threats to virtually all human rights since September 2001, including threats to “human rights defenders . . . migrants, refugees and asylum-seekers, indigenous peoples and people fighting for their rights or against the negative effects of economic globalization policies.”

However, whereas a number of regional organizations have responded to these signals and have announced a commitment to consider the human
The United States and Asian Governments

Individual governments’ adherence to human rights norms depends, unsurprisingly, on the vibrancy of a country’s civil society and on whether there is rule of law and separation of powers, especially an independent judiciary. Governments can also be reminded of the human rights obligations that inhere as a result of their signature of regional and international human rights agreements.

U.S. mechanisms for challenging the behavior of the Bush administration—concerning, for example, the legal limbo of those in Guantánamo or the incarceration of several thousand Muslim men in the United States itself—have been reasonably far-reaching. It was the U.S. Supreme Court that criticized the Bush administration’s claim that those held in Guantánamo were beyond U.S. law. Justice Sandra Day O’Connor, in writing the majority opinion, stated: “It is during our most challenging and uncertain moments that our nation’s commitment to due process is most severely tested. It is in those times that we must preserve our commitment at home to the principles that we fight [for] abroad.” The U.S. Department of Justice’s own Office of the Inspector General wrote a highly critical report on the conditions under which U.S. authorities were holding post-September 11 detainees.
The strengthening of U.S. bilateral relationships with rights-abusing states is also sometimes disputed, especially where there is a congressional interest in a particular country (Indonesia for example) and where Congress is required to sign off certain funding decisions. Uzbekistan, a country with a very poor human rights record, has been designated a key U.S. antiterrorist ally in Central Asia and has provided a military base useful for the war against the Taliban. However, in July 2002, Congress passed an amendment to the Foreign Operations Appropriations Act that required the administration to report every six months on all security and military assistance to the Uzbek government. In addition, it made all supplementary aid conditional on “substantial and continuing progress” in meeting the democracy and human rights criteria outlined in the U.S.-Uzbek March 2002 “Declaration on the Strategic Partnership and Cooperation Framework.” Significantly, human rights conditions appeared in the first section of that declaration. Important too is that, in July 2004, the U.S. State Department for the first time decided not to certify that Tashkent had made sufficient progress to warrant supplemental funding, thus denying President Karimov’s government $18 million. Admittedly, this is a very small sum compared with what has been handed over since the start of the war against the Taliban, but it is a sign that human rights requirements can still impose some minor constraints on U.S. relations with a state that the U.S. secretary of defense, Donald Rumsfeld, described in February 2004 as a “key member of the coalition’s global war on terror” and thanked for providing “stalwart support” in the antiterrorist campaign.

Separation of powers is a welcome feature of the U.S. political system. In Asia, Japan has had lengthy parliamentary deliberation of antiterrorist legislation against the background of its constitution’s human rights provisions. Moreover, elsewhere in the region, domestic and pan-Asian human rights NGOs have been trying to rein in the authoritarian trends by collecting and publicizing information about new antiterrorist legislation or amendments to existing security laws and drawing attention to the way the legislation is being used, including attacks on political opponents, the silencing of human rights activists, and the heightened discrimination against particular ethnic and religious groups.

However, as the work of these Asian NGOs attests, a number of Asian governments have taken advantage of the illiberalism associated with the counterterrorist era, especially where judicial and legislative independence is weak or nonexistent and human rights groups—where they have been allowed to operate—can either be intimidated or ignored. Within the most authoritarian of the countries in the region, it
is the international human rights NGOs or the international press working clandestinely with local activists that tend to be the sources of information about what is going on. Even among the less authoritarian states of Asia, illiberal trends can garner the support of broad domestic opinion where the mass public has accepted a government’s contention that terrorists neither deserve due process nor deserve to be treated in accordance with international human rights law. The Indonesian military campaign against the Gerakan Aceh Merdeka (GAM), or Free Aceh Movement, has been officially projected as a war against separatist-terrorists. The label GAM sympathizer has been tied to human rights activists, students, and journalists with serious consequences for those so labeled. Yet the military’s campaign has not been strongly attacked domestically, in part because the armed forces have maintained control over information and have portrayed the operation as a success and as fundamental to maintaining a unified Indonesia.36

Conclusion

Post–September 11 developments have exposed the patchiness of the actual implementation of human rights norms in ways that mostly are not unfamiliar to us; but in other respects, they are shocking given the alacrity with which states, including the democratic among them, have adopted illiberal legislation and forms of behavior that are illegal and immoral. Nevertheless, evidence suggests that the human rights era is not over; neither does modern, legitimate governance imply the neglect of attention to human rights concerns. Rather, it seems that the twin reputations of defender against terrorism and human rights protector in some settings are in contention, but in others they show signs of being brought together.

Institutions do matter, as shown by the actions of those where the human rights idea has become reasonably well embedded. In some instances, they are providing a platform for normative debate and supplying information about the legal implications of human rights commitments already made. In time, they may well constrain more directly certain aspects of this plainly illiberal behavior. Thus, within the UN framework, a great deal of effort is being expended on the argument that the success of the antiterrorist struggle depends on a continuing concern with protecting human rights, and that a reputation for resoluteness in the face of a serious security threat should not come at the expense of the UN’s reputation for having built, painstakingly over sev-
eral decades, the international human rights regime. Unfortunately, however, this effort seems to be absorbing many of the limited resources of the UN’s human rights bodies. For Asian state-based regional organizations, there is far less concern about the human rights consequences of antiterrorist campaigns and instead some evidence that regional bodies that have been criticized in the past for considerable inertia have become reinvigorated in the face of counterterrorism.

Some of the Asian states are finding it possible once again to make the argument that order should trump a concern with individual human rights. Moreover, in terms of their relations with the United States, it can make sense for many of these governments to demonstrate a capacity to tackle the terrorist threat because of the largesse that can result. This largesse has the effect of strengthening the security services, thus enhancing authoritarian control and (perhaps in the short term only) regime security. And where terrorist action can be equated with nationalist causes, some governments have garnered local support for actions that deal ruthlessly with those the central authorities have labeled as terrorists. If we accept that the domestic rather than the external realm is primary when it comes to the promotion and protection of human rights, then this finding is sobering.

In consolidated democracies, such as the United States, we are seeing some evidence of the power of domestic structures to rein in various of the executive branch’s excesses, especially if there is a congressional interest or a legal question to adjudicate. That said, the continuing reports of abuse, including the use of torture at Guantánamo, at Abu Ghraib, and in detention facilities in Afghanistan, have undermined the U.S. official argument that harsh treatment of detainees has occurred only in a limited number of isolated cases. These reports suggest that strong domestic pressure needs to be maintained in order to root out such behavior.

Overall, therefore, if legitimate governance once had been seen to rest on a reputation for protecting human rights at home and abroad, the script of modern statehood now seems to comprise a wider set of notions. The requirement is for state institutions to build capacity to promote order and deal with transnational and domestic terrorist threats. In some instances, this is being done with considerable ruthlessness, even at the cost of the right to personal security. Sovereignty, defined more straightforwardly in an earlier era as the authority to control territory and peoples, has made something of a comeback. However, it does not have the field entirely to itself where institutions that concern themselves with rights reflect their mandates and retain their vigilance.
Notes

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1. The abuse of personal security rights encompasses the use of torture, detention without trial, extrajudicial killings, disappearances, and the like.


3. For a useful survey of these arguments, see Hans Peter Schmitz and Kathryn Sikkink, “International Human Rights,” in Walter Carsnaes, Thomas Risse, and Beth A. Simmons, eds., Handbook of International Relations (London: Sage, 2001).


20. Ibid., chap. 3.


24. IPA et al, Human Rights, the United Nations, especially pp.17–19. See too the July 2003 statement after the terrorist attack on the Marriott Hotel in Jakarta of the then Indonesian security minister (now president), Susilo Bambang Yudhoyono: “Those who criticize about human rights being breached must understand that all the bombing victims are more important than any human rights issue.” Ibid., p. 17.

26. For example, before the CTC on 6 March 2003, Kofi Annan stated: “Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism—not privileges to be sacrificed at a time of tension.” UN General Assembly, 58th session, Report of the Secretary-General, A/58/266, 8 August 2003, p. 7.

27. IPA et al., Human Rights, the United Nations, p. 20.


29. For example, the introductory statement of the ARF Bali Regional Ministerial Meeting on Counter-Terrorism reads: “Ministers agreed that the campaign against terrorism can only be won through comprehensive and balanced measures in full conformity with the purposes and principles of the Charter of the United Nations and human rights covenants” (5 February 2004), available online at www.aseansec.org/16000.htm (accessed 15 April 2004). I am grateful to Dr. Kuniko Ashizawa for research that verifies this section of my argument.


35. See, for example, “Asian Consultation on the Impact of Terrorism and Antiterrorism Measures in Asia,” Bangkok, 19–20 November 2004, organized by FORUM-ASIA (a pan-Asian organization based in Bangkok) and Suara Rakyat SUARAM, Malaysia.
