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David P. Stewart

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## HUMAN RIGHTS, TERRORISM AND INTERNATIONAL LAW

DAVID P. STEWART\*

## I. TERRORISM AND HUMAN RIGHTS

WHAT is the relationship between serious international crimes, especially the escalating phenomenon of international terrorism and human rights? What contribution can international lawyers make to the debate over this relationship?

No one can seriously question that international crime is rising, in quantity as well as severity. Generally, it is logical to attribute a statistical increase in the overall incidence of trans-border and transnational crime to greater commercial and economic interaction between countries. In that sense, it can be described as a function or byproduct of the phenomenon of globalization. But what is more significant, and what ought to be more worrying to all students of international law and relations, is the significant shift in the predominant types of crime, some would say the increasing seriousness of offenses. This is reflected in notorious "mega-crimes" such as international terrorism, genocide and crimes against humanity, in such vile practices as human smuggling and sex trafficking, and in less visible but equally corrosive white-collar criminal activity such as transnational corruption, fraud, narcotics trafficking and racketeering.

It cannot be genuinely debated that this increase in crime worldwide constitutes a serious threat to the social and legal order, to the international protection and promotion of human rights and to our efforts to work towards democratic governance across the globe. Serious threats demand serious and effective responses, to be sure. We expect no less from our government, and as citizens we are entitled to no less.

But it is also beyond serious contention that in the reaction to these new and more threatening dimensions of international crime lies a potential threat to human rights. In responding to the realities of international terrorism in the post-9/11 period, government officials (law enforcement authorities in particular) must be cognizant of the risk of overreaction. In adapting traditional legal authorities to confront and combat new threats, in creating new types of security apparatus to deal with the "war on terror," governments must of course be cautious to respect the rule of law and to preserve the legal and constitutional protections which define a free society.

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\* Assistant Legal Advisor for Diplomatic Law and Litigation, United States Department of State, Washington D.C. This article is based on remarks made at a Villanova Law Review Symposium held on October 23, 2004. The views expressed are those of the author and do not necessarily represent the position of the Department of State or the United States government.

Drawing the line correctly is enormously difficult. One mark of the health of our domestic system in the United States is that this fundamental question is being debated openly, thoughtfully and credibly.<sup>1</sup> A second mark, no less important, is that under our system of separation of powers, a strong judiciary can generally be counted on to defend the constitutional limits of authority. A third aspect, not widely appreciated in our domestic discussions, is the contribution which international law and experience can make to the effort to draw the line properly.

My purpose here is not to sketch the contours of this debate generally, but to comment only from the perspective of international law, especially human rights. The general observations which follow are intended to stimulate critical thinking by student participants in this Symposium, not to present a comprehensive analysis of all the relevant legal issues. Some of the following comments will be more obvious than others. For example, any of you who have studied, or are now studying, international law or human rights may already have noted that in the growing (and increasingly heated) domestic debate, the international law and human rights dimension of the subject has not, thus far, received the level or detail of attention it clearly deserves.<sup>2</sup>

The absence of a human rights element in our domestic debate is striking, unfortunate and limiting. Viewing the problems of responding to terrorism from the perspective of human rights helps to frame our thinking as international lawyers. It does not provide a complete roadmap or all the answers. As the late Professor Joan Fitzpatrick observed:

The human rights movement employs the language and the institutions of law to limit the harm that the powerful inflict on the vulnerable [sic]

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Acts of terrorism such as the attacks of September 11 are obviously antithetical to human rights values, not least the right to life and the inherent dignity of the human person not to be used as the instrument of another's ideology.

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1. For only two examples, see THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORISM ATTACKS UPON THE UNITED STATES (2004); Norman Podhoretz, *World War IV: How It Started, What It Means, and Why We Have to Win*, COMMENT., Sept. 2004, at 17-24.

2. For a discussion of the issues from different perspectives, see Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241 (2003); Josh Kastenberg, *The Customary International Law of War and Combatant Status: Does the Current Executive Branch Policy Determination on Unlawful Combatant Status for Terrorists Run Afoul of International Law, or Is It Just Poor Public Relations?*, 39 GONZ. L. REV. 495 (2003); and Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335 (2004). See also STEPHEN FLYNN, *AMERICA THE VULNERABLE: HOW OUR GOVERNMENT IS FAILING TO PROTECT US FROM TERRORISM* (2004).

. . . However, with the exception of the definition of “crimes against humanity” and concepts of universal jurisdiction, human rights law offers relatively few rules for the conduct of transnational criminal networks. Human rights norms constrain state responses to terrorism more clearly and directly than they govern the conduct of terrorists.<sup>3</sup>

We can surely all agree that international terrorism threatens human rights. So do excessively repressive responses to terrorism and other forms of serious international crime. International human rights principles and processes may prove more relevant to addressing the latter than the former. They are nonetheless important, if often overlooked, elements in the debate about how to conduct the war on terrorism.<sup>4</sup>

## II. THREAT OF EXCESSIVE RESPONSE

Tough responses to the increased incidence of international crime, and in particular to threats or acts of international terrorism, while entirely expected and justified, are likely to put pressure on human rights and civil liberties.<sup>5</sup> Historically, the first to feel the burden have often been foreigners (non-citizens) in the United States. Professor David Cole has made a persuasive case that the “phenomenon of overreaction,” to use his term, frequently has its “genesis in measures directed at foreign nationals.”<sup>6</sup> He argues that, even where repressive measures are taken against non-citizens for the legitimate protection of citizens, it is important to resist “trading foreign nationals’ liberty for citizens’ security.”<sup>7</sup> We can all think of such examples in our own history during times of war or civil unrest, beginning with the infamous (if mostly short-lived) Alien and Sedi-

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3. Fitzpatrick, *supra* note 2, at 242-43.

4. The relationship between terrorism and human rights has been studied extensively in various international fora. *See, e.g.*, Kalliopi K. Koufa, Special Rapporteur on Terrorism and Human Rights of the UN Sub-Comm’n on the Promotion and Protection of Human Rights, *Specific Human Rights Issues: New Priorities, in Particular Terrorism and Counter-Terrorism*, (final report) U.N. Doc. E/CN.4/Sub.2/2004/40 (2004), available at <http://www.un.org/Depts/dhl/resguide/spechr.htm#subcom> (last visited Apr. 26, 2005). *See also* Inter-American Comm’n on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr. (Oct. 22, 2002), available at <http://www.iachr.org/Terrorism/Eng/toc.htm> (last visited Apr. 20, 2005); HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM: THE COUNCIL OF EUROPE GUIDELINES (2005).

5. I will not deal here with issues regarding the legitimacy of actions taken against terrorists on which there is a growing literature. *See, e.g.*, Michael H. Hoffman, *Quelling Unlawful Belligerency: The Juridical Status and Treatment of Terrorists under the Laws of War*, 31 *ISR. Y.B. HUM. RTS.* 161 (2002); Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 *CORNELL INT’L L.J.* 533 (2002).

6. DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 232 (2003).

7. *Id.* at 7.

tion Acts of 1798,<sup>8</sup> and including the Espionage Act of 1917<sup>9</sup> and the establishment of Japanese internment camps in World War I—when our society faced the same conundrum: balancing the imperatives of individual liberties against the need to protect society, particularly against real (or sometimes merely perceived) threats from foreigners within.<sup>10</sup>

In the United States, recent debate has focused on a number of repressive domestic measures taken in the aftermath of the tragic events of September 11, 2001. Some of this discussion has centered on aspects of the USA Patriot Act<sup>11</sup> and, more recently, on proposed legislation to reform the structure and operating rules of our intelligence community.<sup>12</sup> The details of these measures deserve careful scrutiny, especially from the constitutional perspective. We can readily identify, in recent domestic policies and practices, a number of specific steps, which critics characterize as excessively repressive. Whether or not those criticisms are justified is an issue for a different forum. Here, my point is two-fold: first, to a considerable extent, the measures in question are directed against foreign nationals, and second, an independent judiciary remains the most important bulwark against excess and overreaction.

Perhaps the most hotly debated and (thus far) most aggressively litigated post-9/11 practice involves the prolonged or arbitrary detention of accused terrorists or enemy combatants—some without charges or access to counsel or court, essentially incommunicado, mostly foreigners but including some American citizens.<sup>13</sup> This debate has many aspects. Most directly, it implicates the President's clear constitutional power to detain enemy combatants during times of armed conflict under Article II of the Constitution and pursuant to the specific authorization of Congress.<sup>14</sup> It

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8. Act of June 18, 1798 (Naturalization Act), ch. 54, 1 Stat. 566; Act of June 25, 1798 (Alien Friends Act), ch. 58, 1 Stat. 570; Act of July 6, 1798 (Alien Enemies Act), ch. 66, 1 Stat. 577; Act of July 14, 1798 (Sedition Act), ch. 74, 1 Stat. 596 (1798); *see also* Alien Enemy Act of 1798, 50 U.S.C. §§ 21-24 (2000). This Act was enacted largely because of fear of a war with France.

9. Act of June 15, 1917 (Espionage Act of 1917), ch. 30, 40 Stat. 217.

10. *See* *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943); *cf.* *Civil Liberties Act of 1988*, Pub. L. No. 100-383, 102 Stat. 903.

11. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272.

12. *See* *Intelligence Reform and Terrorism Prevention Act of 2004*, Pub. L. No. 108-458, 118 Stat. 3638, 3638-44 (codified at 50 U.S.C. § 401 (2004)).

13. *See, e.g., In re Guantanamo Detainee Cases*, 344 F. Supp. 2d 174 (D.D.C. 2004); *cf. A v. Sec'y of State for the Home Dep't*, [2004] UKHL 56 (Dec. 16, 2004) (indefinite detention of non-nationals suspected of being terrorists unsupported by declaration of national emergency and incompatible with Articles 5 and 14 of European Convention on Human Rights and Fundamental Freedoms). *See generally* Jordan J. Paust, *Judicial Power To Determine the Status and Rights of Persons Detained Without Trial*, 44 HARV. INT'L L.J. 503 (2003).

14. *Authorization for Use of Military Force*, Pub. L. No. 107-40, §§ 1-2, 115 Stat. 224 (2001).

involves the proper application of the law of war, the meaning of the Geneva Conventions, and whether enemy combatants held outside United States territory (e.g., at the naval station at Guantanamo Bay in Cuba) have any basis, constitutional or otherwise, on which to challenge the legality of their detention in the domestic courts of the United States. It concerns the use of law of war authorities to detain United States citizens. Sharp lines are drawn in this debate. Some describe the detentions in question as arbitrary and unjustified, others argue they are necessary and reasonable under exigent and unprecedented circumstances.

The legality of these practices is being challenged in the court system. The initial round of legal skirmishing has focused largely on issues of access to counsel and the availability of judicial review, *inter alia*, through the writ of habeas corpus. As you are all well aware, the United States Supreme Court recently issued a trio of landmark decisions in *Hamdi v. Rumsfeld*,<sup>15</sup> *Rumsfeld v. Padilla*<sup>16</sup> and *Rasul v. Bush*,<sup>17</sup> each involving factually and legally different circumstances.<sup>18</sup>

### III. INITIAL JUDICIAL RESPONSES

In *Rasul*, the Supreme Court upheld, by a 6-3 vote, the right of foreign nationals captured abroad (most in Afghanistan) and subsequently detained as enemy combatants outside the United States, to challenge the legality of their detention through the habeas mechanism.<sup>19</sup> In so doing, the Court distinguished (some would say overruled) its prior decision in *Johnson v. Eisentrager*,<sup>20</sup> which held that a federal district court lacked authority to grant habeas relief to German citizens captured by United States forces in China and tried and convicted of war crimes by an American military commission in Nanking. In *Rasul*, the Court said the detainees in question were not nationals of countries at war with the United States.<sup>21</sup>

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15. 124 S.Ct. 2633, 2648-50 (2004) (holding that United States citizen is entitled to protection from involuntary, indefinite detention without due process).

16. 124 S.Ct. 2711, 2727 (2004) (holding that due to lack of jurisdiction, Court does not reach question of presidential authority to detain Padilla militarily).

17. 124 S.Ct. 2686, 2698 (2004) (holding that aliens apprehended abroad and held at Guantanamo as enemy combatants can invoke habeas jurisdiction of United States district courts under 28 U.S.C. 2241).

18. See *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va 2002); see also Ronald Dworkin, *What the Court Really Said*, N.Y. REV. OF BOOKS, Aug. 12, 2004, at 26; James Thuo Gathii, *Torture, Extraterritoriality, Terrorism, and International Law*, 67 ALB. L. REV. 335 (2003).

19. See *Rasul*, 124 S.Ct. at 2698.

20. 339 U.S. 763 (1950).

21. See *Rasul*, 124 S.Ct. at 2692 (“Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled, save by the judgment of his peers or by the law of the land.” (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218-19 (1953) (Jackson, J., dissenting))).

By contrast, *Hamdi* involved a claim on behalf of a United States citizen captured in Afghanistan by Afghan forces.<sup>22</sup> Hamdi, you will recall, was turned over to the United States, detained at Guantanamo and eventually confined in a Navy brig in Charleston. Not charged with any crime, he sought to argue that his detention without trial or access to counsel violated his due process rights. The United States Court of Appeals for the Fourth Circuit had ruled that he was entitled only to a limited inquiry into the legality of his detention under the war powers authorities adopted and exercised by the political branches. The Supreme Court vacated and remanded, holding that he could be detained as an enemy combatant but is entitled to notice of the factual grounds for his detention and a meaningful opportunity to present evidence that he was, in fact, not an enemy combatant.

Like Hamdi, José Padilla is also a United States citizen, but he was arrested in the United States and accused of planning to detonate a radioactive "dirty" bomb as an act of terrorism. He too has been held in federal detention as an enemy combatant, first in New York and then in South Carolina. In *Padilla*, the Chief Justice, writing for a 5-4 majority, dismissed his petition for habeas corpus on procedural grounds, ruling that it had been submitted to the wrong court (i.e., that under the federal habeas statute, the proper respondent to a petition is the person currently having custody of the detainee).<sup>23</sup>

You may also have seen recent press reports that the United States District Court for the District of Columbia held on October 20, 2004 in *Al Odah v. United States*<sup>24</sup> that the military must give detainees at Guantanamo speedy access to their attorneys and cannot monitor their conversations with their lawyers.<sup>25</sup> This suit focused specifically on the situation of three Kuwaitis, but certainly the decision will be read to articulate a rationale applicable to most, if not all detainees, based on the three Supreme Court decisions mentioned above.<sup>26</sup>

Another dimension of this evolving legal situation is represented by last week's decision of the Eleventh Circuit Court of Appeals, in *Bourgeois*

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22. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2635 (2004).

23. *Rumsfeld v. Padilla*, 124 S.Ct. 2711, 2727 (2004).

24. 346 F. Supp. 2d 1 (D.D.C. 2004).

25. *See id.* at 5. The district court stated:

The Court finds that Petitioners are entitled to be represented by counsel pursuant to the federal habeas statute, 28 U.S.C. § 2241, the Criminal Justice Act, 18 U.S.C. § 3006A, and the All Writs Act, 28 U.S.C. § 1651. In light of this finding, the Court determines that the Government is not entitled to unilaterally impose procedures that abrogate the attorney-client relationship and its concomitant attorney-client privilege covering communications between them.

*Id.*

26. *See United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004) (addressing due process rights of foreign national accused of conspiracy to commit terrorism).

*v. Peters*,<sup>27</sup> concerning protests at Fort Benning, Georgia, home of the School of the Americas. The appellate court struck down, on the basis of the First and Fourth Amendments, a policy of requiring all protestors to undergo metal detector searches based on Homeland Security threat assessments.<sup>28</sup>

These decisions variously provide powerful evidence that the judicial system of the United States is willing and able to deal effectively with claims of governmental overreaction to acts as well as threats of terrorism, even in wartime situations.<sup>29</sup> Most, of course, are on preliminary or procedural issues, and none of the Supreme Court decisions resulted in widespread release of the individuals concerned. Other important rulings are certain to follow.<sup>30</sup> In none, however, have international human rights principles, and specifically the human rights obligations of the United States, figured prominently.

#### IV. OTHER DIMENSIONS AND RESPONSES

Other important aspects of the global war on terrorism have also proven controversial and are likely to generate significant judicial decisions in the future. No one interested in international law and human rights will have overlooked the allegations that United States authorities have employed excessively harsh interrogation techniques amounting to inhumane treatment, physical and mental abuse and even torture at the facility at Abu Ghraib in Iraq and at Guantanamo. Excessive practices such as those described are clearly aberrant, illegal and without any justification. They must be repudiated. One can debate the causes, origins and proper legal consequences, but certainly one substantial factor must lie in

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27. 387 F.3d 1303, 1325 (11th Cir. 2004) (holding city's warrantless, suspicionless magnetometer search policy violated anti-war protesters' First and Fourth Amendment rights). "We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Terror is unlikely ever to be truly over." *Id.* at 1312.

28. *See id.* at 1325 (stating holding).

29. *Cf. Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2650 (2004) ("[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.").

30. *See, e.g., Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004) (holding, on petition for habeas corpus, that unless competent tribunal determined that detainee was not entitled to prisoner of war status under Geneva Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949 (Third Geneva Convention), 6 U.S.T. 3316, 74 U.N.T.S. 135, he could only be tried by court-martial under Uniform Code of Military Justice and not before military commission convened under special order of President). The court also held that procedures of military commission were contrary to with those of the Uniform Code of Military Justice, art. 39(b), 10 U.S.C.S. § 839(b). *Id.* The creation of Combatant Status Review Tribunals and eventual trials of enemy combatants before military commissions will likely generate some interesting litigation in federal courts. *Cf. Daryl A. Mundis, The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, in *Agora: Military Commissions*, 96 AMER. J. INT'L L. 320 (2002).

a failure of command responsibility and legal oversight.<sup>31</sup> Eventually, cases involving these claims are likely to come before civil and/or military courts.

The list of domestic anti-terrorism policies, practices and procedures which have given rise to human rights concerns is substantial. It would also include new and more stringent border security measures; expedited removal procedures for non-citizens; use of United States immigration law authorities for the detention of foreign nationals who are on watch lists or thought to pose a threat; use of profiling techniques for detention decisions; deportation of detainees to countries where torture in interrogation is practiced; expansion of domestic data gathering and information sharing across department and agency lines, in particular breaching the traditional divide between domestic law enforcement and foreign intelligence; the proposed "Total Information Awareness" program—the list of problematic proposals and initiatives is extensive.

Without debating the specifics or the legalities, or whether these measures are, in fact, necessary for our national security, one thing seems very clear from a human rights perspective: the importance of an independent judiciary and the right of habeas corpus as protective and corrective mechanisms. As those of you know who have studied international human rights, habeas corpus is not, in fact, a rule of customary international law, nor is it widely reflected in human rights instruments or in international humanitarian law, and it is certainly not broadly accepted in civil law systems. Yet, few lawyers would argue, I think, that the writ of habeas corpus or analogous legal devices (such as *amparo*) are not among the most important tools for preventing abuse of governmental authority.

At the same time, most lawyers would likely agree that it is neither wise nor sufficient to rely solely on the judicial branch to prevent or correct overreaching. The executive branch must also police itself. One overlooked development in the debate over restructuring the national intelligence community involves the establishment of a new civil liberties board on an interagency basis within the executive branch. This new entity was created by an executive order issued by the President on August 27, 2004.<sup>32</sup> Importantly, the purpose and rationale was stated by the executive order as follows:

The United States Government has a solemn obligation, and shall continue fully, to protect the legal rights of all Americans, including freedoms, civil liberties and informational privacy guaranteed by Federal law, in the effective performance of national security and homeland security functions.<sup>33</sup>

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31. See generally Gathii, *supra* note 18.

32. Exec. Order No. 13,353, 60 Fed. Reg. 53,585 (Sept. 1, 2004).

33. *Id.* § 1.

To advance this policy, the order established a Presidential Board on Safeguarding Americans Civil Liberties, consisting, *inter alia*, of representatives of the Department of Justice, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of the Treasury, the Office of Management and Budget, the Central Intelligence Agency (CIA) and National Security Agency (NSA), Department of Defense and the Legal Adviser of the Department of State, among others.

The legislature also has a vital role (by legislation and through oversight) in ensuring that responses to the threats of international terrorism and other forms of trans-border criminal activity are measured, appropriate and consonant with fundamental concepts of individual rights, liberties and protections.

#### V. IMPORTANCE OF HUMAN RIGHTS PERSPECTIVE

It is evident, of course, that we as a nation are not alone in wrestling with this dilemma in the international community. Many other countries have undergone the same kind of struggle in recent years in response to their own challenges from internal conflict, terrorism, civil war and external threats. In doing so, they have measured their options and their responses increasingly by reference to internationally accepted human rights principles. We can do so as well.

Many would say—and I would certainly be among them—that overall our domestic record here in the United States in defending individual rights and liberties, even though far from perfect, is considerably better than most societies. This is largely because of the prescience of our forefathers in constructing a Constitution and a Bill of Rights which have, over more than two centuries, provided unparalleled protection to individual freedoms and liberties. Many may believe, as I do, that our existing legal and constitutional protections are adequate to the task of defending those freedoms and liberties.

At the same time, one of the fundamental purposes of the contemporary international human rights regime is to serve as a bulwark against excesses—not just to protect the minority from the majority and the vulnerable from the powerful—but to serve as powerful limitations on the power of government in times of stress and confrontation, when the risks of excess and overreaction are sharpest. As an open, democratic society, we should be able to learn from the experiences of others and, in confronting our own challenges, to benefit from referring to those same human rights principles.

This is not to diminish, in any way, the critical importance of self-defense or the vital necessity of providing for our security. These tasks must of course be paramount. It is simply to suggest the important contribution that a human rights perspective can in fact bring to the discussion. As one commentator has noted:

True defenders of human rights should as a general rule be very suspicious of the potentially suffocating embrace of the counter-terrorist perspective, but this is particularly the case when it presents itself as a friend, in the form of a morality of the lesser evil.<sup>34</sup>

## VI. DOCTRINAL SHIFT

Let me turn briefly to what might be, for some, a few less obvious aspects of the assigned topic for our panel. Some might suggest that, at least to a certain extent, the current difficulties stem from the government's decision to treat terrorism (and some other particularly serious criminal activity such as narco-trafficking) as threats to national security, indeed as acts of war, rather than "merely" as crimes. In one perspective, this shift is said to have deprived the perpetrators of various procedural and other safeguards which are available in the criminal context but not when the response involves military force (such as the right to counsel, the presumption of innocence and the availability of a judicial forum).

Not very long ago, of course, it was a major change in our national policy to proclaim that terrorism, narco-trafficking, aircraft hijacking and similar transnational activities were, in fact, international crimes against which we would deploy the full force of our law enforcement machinery.<sup>35</sup> At the time, bringing Fawaz Yunis and Osama bin Laden and other alleged terrorists to justice in a United States courtroom was intended, and perceived, as a real and potent threat.<sup>36</sup>

Now, when folks talk about "bringing the perpetrators to justice," they may actually be thinking more of a predator drone than a federal prosecutor. Is that wrong? Was not 9/11 an act of war? How you answer that question may turn, in part, on whether you believe that "ordinary" criminal law is sufficient to meet that threat of terrorism, or whether "extraordinary" measures are needed to meet "extraordinary" threats.<sup>37</sup> Moreover, your answer may affect how you view the implications of the response for

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34. C.A. Gearty, *Terrorism and Human Rights*, EUR. HUM. RTS. L. REV. 2005, 1, 3 (citing Michael Ignatieff, *THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR* (Edinburgh Univ. Press 2004)).

35. The absence of an internationally agreed definition of terrorism has not proved to be an obstacle to the adoption or implementation of specific treaties requiring state parties to criminalize and prosecute acts typically committed by terrorists. For a recent discussion of the definitional issue, see Alexandra V. Orlova & James W. Moore, "Umbrellas" or "Building Blocks"? *Defining International Terrorism and Transnational Organized Crime in International Law*, 27 HOUS. J. INT'L L. 267 (2005).

36. See, e.g., *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003), cert. denied, 540 U.S. 933 (2003); *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999); *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991); *United States v. Bin Laden*, 92 F. Supp. 2d 189 (S.D.N.Y. 2000).

37. See, e.g., Brice Dickson, *Law Versus Terrorism: Can Law Win?*, EUR. HUM. RTS. L. REV. 2005, 11.

human rights. In any event, it is clear that this shift complicates the discussion, and perhaps even creates doctrinal confusion.<sup>38</sup>

## VII. RELATIONSHIP BETWEEN HUMAN RIGHTS AND TERRORISM

Within the United Nations (U.N.), the relationship between human rights and terrorism has long been debated, more loudly and urgently since 9/11 to be sure, but frankly the international community is not getting it much clearer than we have done domestically.

On the one hand, the international community has been forceful in condemning acts of terrorism (even while remaining unable to agree on a definition of terrorism or a single legal instrument to address the phenomenon). Within the U.N. Commission on Human Rights, for example, Resolution 2004/44 (adopted on April 19, 2004) stated (in its 12th preambular paragraph) that "terrorism in all its forms and manifestations creates an environment that destroys the ideal of free human beings enjoying freedom from fear and want, and makes it difficult for States to promote and protect human rights and fundamental freedoms."<sup>39</sup> In operative paragraph 1, the Commission:

*Reiterates its unequivocal condemnation* of all acts, methods and practices of terrorism, regardless of their motivation, in all their forms and manifestations, wherever, whenever and by whomever committed, as acts aimed at the destruction of human rights, fundamental freedoms and democracy, threatening the territorial integrity and security of States, destabilizing legitimately constituted Governments, undermining pluralistic civil society and the rule of law and having adverse consequences for the economic and social development of the State.<sup>40</sup>

At the same time, in operative paragraph 7, the Commission called upon States to combat terrorism "in strict conformity with international law, including human rights standards and obligations and international humanitarian law."<sup>41</sup> To the same effect, Commission Resolution 2004/87, adopted on April 21, 2004, reaffirmed in operative paragraph 1 that "States must ensure that any measure taken to combat terrorism complies

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38. An interesting series of discussions is now being undertaken by the Stanley Foundation on whether, post-9/11, we are more or less secure. For a description of the "Secure America Project," see <http://www.stanleyfoundation.org/programs/sns/index.html> (last visited Apr. 20, 2005).

39. U.N. ESCOR RES. 2004/44, Comm'n on Hum. Rts., 60th Sess., 55th mtg., Agenda Item 11, at para. 12, U.N. Doc. E/CN.4/2004/L.80 (2004), available at [www.unchr.info/resolution/E-CN4-2004-L80-0419.pdf](http://www.unchr.info/resolution/E-CN4-2004-L80-0419.pdf).

40. *Id.* ¶ 1.

41. *Id.* ¶ 7.

with their obligations under international law, in particular international human rights, refugee and humanitarian law."<sup>42</sup>

Clearly, the international human rights community has not had much more success than we have domestically in resolving the doctrinal tension between the exigencies of war, self-defense and counter-terrorism efforts on the one hand and the need to protect civil and political liberties on the other.

### VIII. CONFUSION BETWEEN HUMAN RIGHTS AND HUMANITARIAN LAW

As the foregoing resolutions suggest, there also remains substantial confusion about the precise relationship or delineation between human rights law and humanitarian law in respect of measures to combat terrorism and international crime. Traditionally, many of us assumed—or were taught—that humanitarian law was in its origin a derivative of the law of war, addressed to the protection of civilians, the wounded, the *hors de combat*, and was therefore limited in its application to conflictive situations—first to international conflicts, then later to internal (or non-individual) conflicts as well. In this regard, it was considered *lex specialis* which displaced otherwise applicable law because of the unique circumstances of armed conflict. Increasingly, however, the two concepts (law of war and humanitarian law) are being conflated, so that the traditional distinction between ‘the law of The Hague’ and ‘the law of Geneva’ is disappearing.

By contrast, international human rights principles (and later binding provisions of human rights law) were presumed to govern the relations between a government and its own citizens (and others subject to its jurisdiction) during the majority of time when society was *not* in armed conflict. It thus addressed basic civil and political rights (for example, freedom of belief, thought, speech, association, travel and the right to vote and participate in the public life of the nation) and economic, social and cultural rights (for example, the rights to work, health, education and social security) which generally have little real-world relevance to situations of armed conflict, whether internal or international. Many of the due process rights articulated by the human rights treaties pertain to individuals accused of crimes and are inapposite to battlefield conditions. Admittedly, the dividing line can be fuzzy on occasion, for example in situations involving large-scale police operations in hostage situations.

Without question, humanitarian law shares a number of common purposes and objectives with human rights law, such as protection of life and prohibition of torture and other forms of inhumane treatment, but it addresses them in the very different context of the relationship between a belligerent’s armed forces and enemy combatants, rather than the rela-

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42. See U.N. ESCOR RES. 2004/87, Comm’n on Hum. Rts., 60th Sess., 58th mtg., at 330, U.N. Doc. E/CN.4/2004/127 (2004), available at: <http://www.un.org/esa/coordination/ecosoc/humanrightprt.pdf>; see also U.N. SCOR RES. 1456, U.N. SCOR, 58th Sess., 4688th mtg. at 1, U.N. Doc. S/Res/1456 (2003).

tionship of a government and the individuals it governs. That the two fields were separate seemed to be confirmed by the fact that the governing principles were articulated in separate instruments, for example in the 1948 Universal Declaration of Human Rights<sup>43</sup> and the four Geneva Conventions of 1949.<sup>44</sup> For operational lawyers in the military, whose task it is to advise military commanders on the relevant legal rules governing use of military force, the clarity of the distinction has its own importance.

Regrettably, this distinction too—between human rights and humanitarian law—appears to have lost its clarity. Even the International Court of Justice, to judge by its advisory opinions in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,<sup>45</sup> and earlier in *Legality of Nuclear Weapons*,<sup>46</sup> appears to be solidly on a different track, namely that the International Covenant on Civil and Political Rights does not cease its application in time of armed conflict or war (except to the extent that a valid derogation has been taken under the provisions of Article 4). The Human Rights Committee, in its recently issued General Comment 31, has opined that the Covenant applies to anyone “within the power or effective control of the forces of a State Party acting outside its territory,” which presumably includes forces participating in peace-keeping and peace-enforcement operations.<sup>47</sup>

These developments pose a number of troubling, and as yet unresolved, questions for international lawyers working in the fields of human rights and counter-terrorism. Do a state’s obligations under human rights treaties apply extraterritorially? Outside the government-to-governed relationship? In situations involving the use of armed force as

43. 1948 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., 183d mtg., Supp. No. 16, at 136-37, U.N. Doc. A/810 (1948).

44. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

45. International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (July 9, 2004), available at [www.icj-cij.org/icjwww/imwp/immwpframe.htm](http://www.icj-cij.org/icjwww/imwp/immwpframe.htm). In the *Wall* decision, the Court clearly held that Israel had obligations in the West Bank and Gaza under the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Committee on the Rights of the Child (CROC).

46. *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8).

47. See U.N. GAOR, Hum. Rts. Comm., 80th Sess., 2187th mtg., General Comment No. 31, U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (2004), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/58f5d4646e861359c1256ff600533f5f?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/58f5d4646e861359c1256ff600533f5f?Opendocument). For a recent discussion of these issues, see Michael J. Dennis,

*Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, in *The Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory*, 99 AM. J. INT’L. L. 1, 119 (2005).

well as times of extended military occupation? To include enemy nationals, prisoners of war, illegal combatants, terrorists and international criminals? Can the various human rights bodies, including those established under the UN Charter (such as the Commission on Human Rights), those which are treaty-based (such as the Human Rights Committee) and those which function within the various regional organizations, determine violations of international humanitarian law or the laws of war? Do non-state actors (such as terrorists, criminal organizations and insurgents) have obligations under human rights or humanitarian law? Can they violate human rights? These are among the issues that you, as students of international human rights law, will have to address in the future.