International Law and the ‘War on Terrorism’: Post 9/11 Responses by the United States and Asia Pacific Countries

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Introduction

Terrorism is not a new challenge to international order,¹ although the influence of the United States has resulted in significant rethinking of the international law and politics of terrorism since the attacks on the US of 11 September 2001, which has had ramifications in all regions, including the Asia Pacific. An unresolved issue of international law is whether and to what extent those attacks have justified the claim that there is a ‘new paradigm’ in international law. The following pages will examine responses to terrorism under the traditional paradigm with particular reference to the Asia Pacific region, and under the so-called new paradigm proposed by the government of the United States in the context of its ‘war on terrorism.’

I. The International Law and Politics of Responses to Terrorism under the Traditional Paradigm

Under international law, the phenomenon of terrorism has been defined in various treaties; the rules governing the use of force have been applied to regimes and

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¹ Acts currently characterized as terrorism date back to ancient times. The term itself derives from the régime de la terreur following the French Revolution, which resulted in ten of thousands of people being put to death in France between 1793-1794. From the perspective of international law, efforts to deal with the phenomenon go back at least to 1937, when the League of Nations drafted the Convention for the Prevention and Punishment of Terrorism.
organizations that commit or support terrorism; and states have developed mechanisms of international cooperation in law enforcement to apprehend and prosecute criminal activity related to terrorism. The United States has actively enlisted these elements of the traditional paradigm in its post 9/11 responses to terrorism.

A. Terrorism Defined
Terrorism is normally understood to refer to ‘...criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes ...’\textsuperscript{2} It is the object of 13 multilateral and 7 regional treaties, which define and provide for criminalization of specific acts relating to such behaviour as hijacking,\textsuperscript{3} bombing,\textsuperscript{4} financing of terrorism\textsuperscript{5} and nuclear terrorism.\textsuperscript{6} The report of the UN High-level Panel on Threats, Challenges and Change\textsuperscript{7} said in 2004 that terrorism ‘attacks the values that lie at the heart of the Charter of the United Nations: respect for human rights; the rule of law; rules of war that protect civilians; tolerance among peoples and nations; and the peaceful resolution of conflict.’\textsuperscript{8} It also alluded to the fact that ‘terrorism flourishes in environments of despair, humiliation, poverty, political oppression, extremism and human rights abuse; it also flourishes in contexts of regional conflict and foreign occupation; and it profits from weak State capacity to maintain law and

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\textsuperscript{2} This definition is used in numerous UN resolutions, such as the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, UN Doc A/Res/51/210, 17 December 1996, Annex.
\textsuperscript{8} \textit{Id}, para 145.
order.’ The divergent geopolitical perspectives reflected in this language have hampered efforts to achieve consensus on a definition in the context of the draft Comprehensive Convention on International Terrorism, with which the UN has been grappling since 1996. Although there seems to be consensus that terrorism amounts to the deliberate targeting of civilians, the failure to agree on a definition relates in large part to the insistence by Islamic countries that terrorism must be defined by the intention of the act and not exclusively by the consequences or victims, so that attacks in defense of ‘national liberation’ movements and ‘self-determination’ might not be defined as terrorism. UN Secretary-General Kofi Annan’s response to this view was: ‘I understand and accept the need for legal precision. But let me say frankly that there is also a need for moral clarity. There can be no acceptance of those who would seek to justify the deliberate taking of innocent civilian life, regardless of cause or grievance.’ The ad hoc committee working on the draft ended its February-March 2006 session without consensus but expressing its ‘strong resolve’ to finalize the draft comprehensive convention on international terrorism.

B. Use of Force Against Regimes and Organizations That Support Terrorism

The traditional paradigm of international law governing the use of armed force across borders against presumed authors of terrorist acts and governments that support them is found in article 2(4) of the Charter of the United Nations on the use of force, Chapter VII on peace enforcement, and article 51 on self-defense. Accordingly, the Security Council must determine that an act of aggression or threat to international peace and security has occurred and then authorize the use

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9 *Id.* The language is reminiscent of numerous earlier resolutions and reports, which referred to ‘the underlying causes...which lie in misery, frustration, grievances and despair.’ See, for example, A/Res/36/109 of 10 December 1981, entitled ‘Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of the forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.’


11 The 2005 *World Summit Outcome* simply stated ‘We strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes, as it constitutes one of the most serious threats to international peace and security.’ 2005 Summit Outcome, UN doc. A/Res/60/1, 24 October 2005, para 81.

of force for the restoration of international peace and security. The US response to 9/11 was indeed to use such force by going to war in Afghanistan for the purpose, as it explained to the UN, ‘to prevent and deter further attacks on the United States.’

This action was for the most part in line with the traditional paradigm of international law, since the Security Council found that the failure by the regime in power to deliver up terrorists was in violation of international law and that its behavior was a threat to international peace and security. The US took the precaution of ensuring that the Security Council, in Resolution 1368 (2001) of 12 September 2001, recognized ‘the inherent right of individual or collective self-defense...’ which provided the principal legal basis for the use of force.

As will be explained below, the US has claimed that the war in Iraq was legal as a preemptive or preventive attack under the ‘new paradigm’. It also advanced another legal justification under the traditional paradigm, namely, that military action was authorized under earlier Security Council Resolutions (namely resolutions 679 and 687 of 1991) as a result of Iraq’s failure to comply with Security Council Resolution 1441. In Resolution 1441, the Council found Iraq in ‘material breach’ of its resolutions and gave it ‘a final opportunity to comply with its disarmament obligations,’ adding that Iraq ‘will face serious consequences as a result of its continued violations of its obligations.’ The US and the UK deemed it within their powers to determine when the failure to comply would be operative and what the ‘serious consequences’ would be.

Many have argued that this link with earlier resolutions was an ex post facto justification of a predetermined decision to invade Iraq. The evidence that the use of UN resolutions was secondary to the decision to go to war regardless of the legality was buttressed by the so-called ‘Downing Street Memo’ – the minutes transcribed during the British Prime Minister’s meeting on 23 July 2002, which famously included this statement: ‘There was a perceptible shift in attitude. Military

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14 In Resolution 1267 (1999) of 15 October 1999, the Council, acting under Chapter VII of the Charter insisted ‘that the ... Taliban, ...comply promptly ... cease the provision of sanctuary and training for international terrorists and their organizations, ... and cooperate with efforts to bring indicted terrorists to justice’ and voted sanctions against that regime.
15 This right, according to Article 51 of the Charter, means that ‘Nothing ... shall impair the inherent right of individual or collective self-defense if an armed attack occurs...until the Security Council has taken measures...’
18 Published by The Sunday Times on 1 May 2005
action was now seen as inevitable. Bush wanted to remove Saddam, through military action, justified by the conjunction of terrorism and WMD. But the intelligence and facts were being fixed around the policy.\(^{19}\) In the meantime, the other members of the Security Council, the UK included, favored the principle—basic to the current law on the use of force— that a second Security Council resolution authorizing the use of force was required before the invasion of Iraq could be legal. During a two-hour meeting between Tony Blair and George Bush at the White House on 31 January 2003 – nearly two months before the invasion – Bush made it clear that the US intended to invade whether or not there was a second UN resolution and even if UN inspectors found no evidence of a banned Iraqi weapons program.\(^{20}\) The historical record is becoming ever clearer that the advice of international lawyers in the US and the UK on the need for a second resolution was disregarded and arguments based on revival of the use of force authorization, on threat of WMD, and on humanitarian intervention were advanced after the fact and the true rationale was forced regime change, which has no basis under international law.\(^{21}\)

Only the US and the UK maintain that Iraq’s material breach of Resolution 1441 revived previous authority to use force. According to a recently revealed secret legal advice given on 7 March 2003 by Britain’s Attorney General, ‘the safest legal course would be to secure the adoption of a further resolution to authorize the use of force’ because Resolution 1441 was probably not adequate, although the alternative view could ‘be reasonably maintained’.\(^{22}\) Ten days later, in a response to a parliamentary question of 17 March 2003, the Attorney General provided a public interpretation removing any hesitation as to the legality of the use of force without any further decision by the Council. This unequivocal public advice led the Foreign Office’s Deputy Legal Advisor to resign the following day because she felt that there was no legal basis for military action without a second resolution and that ‘an unlawful use of force on such a scale amounts to a crime of aggression,’

\(^{19}\) http://www.downingstreetmemo.com/memos.html


\(^{22}\) Sands (note 20 above), p 264.
finding the circumstances ‘so detrimental to the international order and the rule of law.’

Kofi Annan, when pressed by the BBC on the question of the legality of the war, said: ‘Yes, if you wish. ... it was not in conformity with the UN charter from our point of view, from the charter point of view, it was illegal.’ A former official of the Defense Department found Annan’s remark ‘outrageous.’

C. Law Enforcement Responses to Terrorism

Under the traditional paradigm, acts of terrorism are treated as international criminal behavior rather than acts of war. According to treaties of international criminal law, states parties are obliged to criminalize terrorist acts and to develop appropriate means of cooperation with other countries to apprehend, prosecute and punish those responsible. Post-9/11 the US has been very active in expanding and reinforcing the law enforcement approach to combating terrorism. Attorney-General Ashcroft said in 2001, ‘We will find the people responsible for these cowardly acts and justice will be done.’ And George W. Bush said, referring to bin Laden, ‘I want him brought to justice.’

Two weeks after the attacks of 9/11, the Security Council unanimously adopted anti-terrorism resolution 1373 (2001) on 28 September 2001, which reaffirmed the Council’s unequivocal condemnation of the terrorist acts of 11 September and obligated all Member States to criminalize the willful provision or collection of funds for terrorist acts and to freeze any financial assets and economic resources of those who commit or attempt to commit terrorist acts or participate in or facilitate the commission of terrorist acts and of persons and entities acting on behalf of terrorists. Moreover, all States must refrain from providing any form of support to entities or persons involved in terrorist acts and prevent terrorism by denying safe haven to those who finance, plan, support, commit terrorist acts and provide safe havens as well. They must prosecute anyone who has participated in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts and should also ensure that terrorist acts are established as serious criminal offences in domestic law and seriously punished.

They also must intensify and accelerate the exchange of information regarding terrorist actions or movements, forged or falsified documents, traffic in arms and

23 Sands (note 20 above), pp 189-190.
25 Randy Scheunemann, a former advisor to US Defense Secretary Donald Rumsfeld told the BBC ‘I think it is outrageous for the Secretary-General, who ultimately works for the member states, to try and supplant his judgment for the judgment of the member states’.
26 Jack Kelley, Kevin Johnson and Toni Locy, ‘Our intelligence was lousy: Blame game begins.’ USA Today, 12 September 2001.
sensitive material, use of communications and technologies by terrorist groups, and the threat posed by the possession of weapons of mass destruction. Before granting refugee status, all States should take appropriate measures to ensure that the asylum seekers have not planned, facilitated or participated in terrorist acts.

The Security Council also established a 15-member Counter-Terrorism Committee (CTC) to monitor the resolution’s implementation, revitalized in 2004 to provide expert advice on all areas covered by resolution 1373, to facilitate technical assistance, and to promote closer cooperation and coordination with regional and intergovernmental bodies.28

D. Asia-Pacific Responses to Terrorism

The countries of the Asia Pacific region expressed support for the United States after 9/11 and took steps to implement Resolution 1373 (2001).29

The Association of Southeast Asian Nations (ASEAN), consisting of ten regional states,30 adopted at its seventh Summit on 5 November 2001, a Declaration on Joint Action to Counter Terrorism and unanimously condemned the 9/11 attacks as an ‘attack against humanity and an assault on all of us.’31 ASEAN members have agreed to cooperate to block funds to terrorist groups and to share intelligence and increase police cooperation. The Asia-Pacific Economic Cooperation (APEC) forum, consisting of 21 members,32 adopted Leaders’ Statements in 2002 and 2003 on terrorism and established the APEC Counter Terrorism Task Force (CTTF) to coordinate efforts in counterterrorism, nonproliferation, and trade security. Each APEC member has prepared a Counter-Terrorism Action Plan.33

However, as the ‘war on terrorism’ progressed the actions by Asian governments shifted to meet their longer-term approaches to terrorism and to respond to domestic pressures. It is instructive to compare the reactions of a few of the countries of the region, taking the examples of China (the Beijing government and the Hong Kong SAR), Singapore, the Philippines, Indonesia, Malaysia, Thailand, and India.

30 Brunei Darussalam, Burma, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, and Vietnam.
32 Australia; Brunei Darussalam; Canada; Chile; People’s Republic of China; Hong Kong, China; Indonesia; Japan; Republic of Korea; Malaysia; Mexico; New Zealand; Papua New Guinea; Peru; Philippines; Russian Federation; Singapore; Chinese Taipei; Thailand; United States; and Vietnam.
China and Hong Kong

After 9/11, both China and Hong Kong strengthened their anti-terrorism and related laws. Hong Kong enacted its United Nations (Anti-Terrorism Measures) Ordinance in direct response to Security Council Resolution 1373. However, the ordinance had to be revised to bring it into full conformity with Resolution 1373 and the Financial Action Task Force special anti-terrorism recommendations and to respond to criticism that it did not provide adequate safeguards for the protection of human rights and property rights.

The People’s Republic of China amended its criminal law to punish more explicitly ‘terrorist’ crimes, and its People’s Bank of China Law in order to strengthen anti-money laundering capabilities. In February 2004, China applied to join the Financial Action Task Force (FATF) and was unanimously accepted as an observer in January 2005.


Specifically, two amendments were made to the Criminal Law to increase the punishments for people who ‘organize or lead a terrorist organization’ and criminalize those who ‘fund terrorist organizations or individuals engaging in terrorist activities’. Other amendments punish the ‘dissemination’, or ‘illegal manufacturing, trading, transporting or storing’, or ‘the stealing or seizing or plundering’, of ‘poisonous or radioactive substances or contagious-disease pathogens’. Two amendments punish illegal financial operations or gains related to a range of crimes, including narcotics and smuggling crimes adding ‘terrorist crimes’ and a new clause provides that ‘whoever seriously disturbs social order by disseminating false explosive, poisonous or radioactive substances or contagious-disease pathogens, or by fabricating threats or information about an explosion or biological or radioactive threat, or by knowingly disseminating fabricated threats or messages.’

Both Hong Kong and China have joined the American Container Security Initiative (CSI). Their participation in the CSI is of critical importance given the volume of US container traffic originating from these two locations. Both jurisdictions are signatories to major anti-terrorism conventions; of the 12 international anti-terrorism conventions in force, eight apply in Hong Kong and 11 in China. China has signed the Financing of Terrorism Convention and the Nuclear Terrorism Convention.

However, China also undertook a number of measures to improve its counterterrorism posture and domestic security and was criticized for using the global terrorism effort as, inter alia, a justification for deepening its crackdown against Uighur separatists in Xinjiang.

China’s increased attention to counter-terrorism has furthered its international geopolitical objectives post 9/11, including the stabilization of US-PRC relations up to the highest level, after the tensions created early in the Bush Administration.

39 Hong Kong joined the CSI in September 2002, and the program became operational in May 2003. China agreed to join the CSI in 2003.


45 For instance, its Ministry of Public Security formed special units in all provinces to deal with ‘terrorist crimes.’ In December 2002 a Chinese court sentenced Tibetan religious leader Tenzin Delek Rinpoche to death (with a two-year reprieve). On 10 February 2003, a court in Guangzhou sentenced US permanent resident Wang Bingzhang to life imprisonment in part for ‘organizing and leading a terrorist group.’

following the April 2001 EP-3 aircraft collision and US approvals of arms sales to Taiwan.47

Within the framework of the Shanghai Cooperation Organization, China and the other members agreed to establish a Regional Anti-Terrorism Agency in 2002. China also signed bilateral counterterrorism agreements with US, Russia, the UK, France, India and Pakistan.48

**Philippines and Singapore**

The Philippines reacted quickly to 9/11. President Macapagal-Arroyo offered the US broad overflight clearances, use of military bases, logistics support, and Philippine troops for an international operation49 and introduced significant anti-money laundering initiatives.50 Yet it was placed on the Organization of Economic Cooperation and Development’s Financial Action Task Force on Money Laundering (FATF) list of Non-Cooperating Countries and Territories (NCCT). On 11 February 2005, following amendment of the Philippine Anti-Money Laundering Act of 2001 to address the main legal deficiencies identified by FATF, it was removed from the NCCT list, along with Indonesia.51

Singapore, a staunch supporter of the United States, which already hosted a naval logistics base and American logistics personnel,52 responded swiftly to 9/11

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50 The Philippines passed Anti-Money Laundering Act, in September 2001, adopted related regulations in March 2002 that criminalized money laundering, called for the establishment of a system of covered-transaction reporting, and created the Anti-Money-Laundering Council. In 2003, the legislation was amended to give Central Bank personnel unfettered access to deposit accounts. Nevertheless, the country remained on the FATF’s list of NCCTs as of 2004 due to the lack of information technology platforms to collect and process covered transaction reports, the adoption of an anti-money laundering implementation plan and corresponding actions. See ‘Patterns of Global Terrorism-2003. Released by the Office of the Coordinator for Counterterrorism 29 April 2004’, available at http://www.state.gov/s/ct/rls/pgtrpt/2003/31611.htm (accessed 22 February 2006).


52 In contrast, Indonesia and Malaysia do not welcome US troops out of concern for the domestic backlash.
and to Security Council Resolution 1373 by ratifying the Financing of Terrorism Convention, and participating in the US-led Proliferation Security Initiative.\(^{53}\) Singapore became the first port in Asia to begin operations under the CSI.\(^{54}\) Singapore also began a campaign promoting its Internal Security Act\(^{55}\) in a new role as an anti-terrorism legislation.\(^{56}\)

Further, Singapore hardened its infrastructure security and intelligence apparatus; implemented an upgraded export-control law, largely aimed at preventing proliferation of components of weapons-of-mass-destruction (WMD) to governments; ratified the Financing of Terrorism Convention and the Plastic Explosives Convention; and passed legislation to enable it to implement the Maritime Navigation Convention.

**Malaysia**

After 9/11, Malaysia responded quickly to Security Council requirements regarding terrorist financing by amending its penal and criminal procedure codes\(^ {57}\) and quickly granting the United States overflight authorization and access to intelligence information. Malaysia passed legislation to allow the negotiation of mutual legal-assistance treaties with other countries,\(^ {58}\) signed a joint counterterrorism declaration of cooperation with the United States,\(^ {59}\) and approved the establishment of a Malaysian-based regional counterterrorism training center in Kuala Lumpur (The South East Asia Centre for Counter Terrorism)\(^ {60}\).

In 2003, its Anti-Money Laundering Act 2001 was amended to enable authorities to freeze the assets of known terrorists based on information received from, among others, the lists issued by the Security Council Sanctions Committee.


\(^ {54}\) Patterns of Global Terrorism-2002 (note 51 above).

\(^ {55}\) The ISA was originally enacted in 1963 to empower the Executive with enhanced capabilities to deal with current or emergent threats to national security.


\(^ {57}\) To increase penalties for terrorist acts, allow for the prosecution of individuals who provide material support for terrorists, expand the use of wiretaps and other surveillance of terrorist suspects, and permit video testimony in terrorist cases. See ‘Patterns of Global Terrorism-2003. Released by the Office of the Coordinator for Counterterrorism 29 April 2004’. Available at http://www.state.gov/s/ct/rls/pgtrpt/2003/31611.htm (accessed 22 February 2006).

\(^ {58}\) The Mutual Assistance in Criminal Matters Act 2002.

\(^ {59}\) Patterns of Global Terrorism-2002 (note 51 above).

\(^ {60}\) ‘ASEAN Efforts to Counter Terrorism’ avail at http://www.aseansec.org/14396.htm (accessed 22 February 2003).
established under Security Council Resolution 1267 (1999). As a result, Malaysian Prime Minister Mohamad Mahathir was upheld as an example of a moderate Muslim leader and, in light of Malaysia’s proactive stance in counterterrorism, the US softened its criticism of Malaysia’s human rights performance and the treatment of former Deputy Prime Minister Anwar Ibrahim. However, matters changed with the Iraq war. Mahathir vocally condemned the US action at the 58th session of the UN General Assembly in September 2003, and again at the Organization of Islamic Countries (OIC) meeting in October 2003.

Malaysia is a party to three of the 12 international antiterrorism conventions and protocols in force. It has not acceded to the Financing of Terrorism Convention, the Hostages Convention or the Plastic Explosives Convention, but, according to the US government, it had commenced internal procedures to enable it to deposit its instruments of accession to these instruments. On September 16, 2005, it signed the Nuclear Terrorism Convention.

**Indonesia**

Indonesia’s initial reaction to 9/11 was ambivalent. Although then President Megawati Sukarnoputri was one of the first to visit the United States in the immediate aftermath of the attacks, Indonesia’s Council of Ulamas called on Muslims in the world to *jihad fii sabillah* should the United States and its allies commit aggression against Afghanistan and the Islamic world. The Indonesian government also opposed most US anti-terrorism operations and took only lax anti-terrorist action due to domestic pressures. When the US went to war against Afghanistan, public protests Indonesian were widespread and domestic disapproval of Americans was high. Vice President Hamzah Haz held highly publicized meetings with the leaders of alleged terrorist groups.

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63 *Id.*
65 Devamany (note 61 above).
66 Status of the convention (note 44 above).
67 Translated to English, it means ‘fight in the path of Allah’.
68 See Tay (note 31 above), p 119.
70 Gomez (note 29 above), p 708.
However, the government’s engagement in counter-terrorism became more intense after the 2002 terrorist bombings in Bali and the 2003 bombing of the Jakarta JW Marriott Hotel.\textsuperscript{71} Indonesia quickly adopted various antiterrorism decrees (PERPU), introduced a counterterrorism bill, amended its anti-money laundering law,\textsuperscript{72} detained Jemaah Islamiyah (JI) spiritual leader Abu Bakar Bashir and arrested members of the JI cell believed responsible for the Bali bombings, including JI leaders Imam Samudra and Mukhlas.\textsuperscript{73} Indonesia was a party to four of the 12 international conventions and protocols in force relating to terrorism and is a signatory to two additional conventions but has not yet ratified them.\textsuperscript{74} It has not signed the Nuclear Terrorism Convention.

**Thailand**

Thailand’s position lies between the compliant pro-US position of the Philippines and Singapore, on one hand, and the more domestically oriented positions Indonesia and Malaysia, on the other. Its post-9/11 counterterrorism policy focuses primarily on protection of its domestic interests, especially in tourism.\textsuperscript{75} Nevertheless, Thailand condemned the 9/11 attacks and pledged cooperation on counterterrorism with US agencies, committed to signing all the UN counterterrorism conventions, and offered to participate in the reconstruction of Afghanistan.\textsuperscript{76}

Thailand ratified the Financing of Terrorism Convention in September 2004, is a party to four other international conventions and protocols relating to terrorism,\textsuperscript{77} and has signed the Container Security Initiative and the International Convention for the Suppression of Acts of Nuclear Terrorism.

Thailand also began discussions with the United States on the possible introduction of a border-security system called the Terrorist Interdiction Program in 2002, established an interagency financial crimes group to coordinate counterterrorism finance policy,\textsuperscript{78} made plans to expand its Anti-Money Laundering Act to include terrorism, and in 2003, the King signed an emergency antiterrorist decree establishing the criminal offense of terrorism in the penal.\textsuperscript{79}

Thailand has come under criticism for the counterterrorism decrees of August 2003. These measures broaden the scope of protracted detention without charge.

\textsuperscript{71} HK Policy Act Report 2004 (note 41 above).

\textsuperscript{72} That, \textit{inter alia}, defined various acts of terror and provided police and prosecutors with broader powers to combat terrorism such as extended pretrial detention periods and the use of electronic evidence in court.

\textsuperscript{73} Patterns of Global Terrorism-2002 (note 51 above).

\textsuperscript{74} The Financing of Terrorism Convention and the Violence at Airports Protocol.

\textsuperscript{75} Tay (note 31 above), p 120.

\textsuperscript{76} Patterns of Global Terrorism-2001 (note 49 above).

\textsuperscript{77} The Montreal Safety of Civil Aviation Convention, the Hague Seizure of Aircraft Convention, the Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, and the Violence at Airports Protocol.

\textsuperscript{78} Patterns of Global Terrorism-2002 (note 51 above).

\textsuperscript{79} HK Policy Act Report 2004 (note 41 above).
or trial, which may be in violation of Thailand’s obligations under the International Covenant on Civil and Political Rights. Thailand’s counterterrorism efforts are aimed primarily at the Muslim insurrection in southern Thailand and have been seen as an excuse to target minorities and their defenders.80

**India**

India endorsed the American military response to the 9/11 attacks, offered logistical support and staging areas to the US, joined with ASEAN nations in adopting a joint declaration to combat international terrorism in 2003,81 and quickly granted sweeping powers to security forces to suppress terrorism, placing numerous groups on the list of ‘terrorist organizations’ declared ‘unlawful’.82

India also passed an anti-money-laundering bill in 2002, that eventually resulted in the Prevention of Money Laundering Act, which became effective on July 1, 2005 and provides the statutory basis for the Financial Intelligence Unit (FIU), criminalizes money laundering and requires banks, financial institutions and intermediaries to report individual transactions valued over $23,000 to the FIU. India has indicated that it wants to join the Financial Action Task Force on Money Laundering.83

In May 2002, India and the United States launched the Indo-US Cyber Security Forum to safeguard critical infrastructures from cyber attack, became a party to the 1979 Convention on the Physical Protection of Nuclear Material84 (though India is yet to take any initiative with regard to the CSI85) and is party to all 12 international conventions and protocols in force relating to terrorism in force but has not signed the Nuclear Terrorism Convention.

In reaction to 9/11 and internal terrorist incidents, including militant attacks in India of October and December 2001,86 India enacted the Prevention of

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82 See Patterns of Global Terrorism-2001 (note 49 above).
84 Patterns of Global Terrorism-2002 (note 51 above).
86 On 1 October, 31 persons were killed and at least 60 others were injured when militants detonated a bomb at the main entrance of the Jammu and Kashmir legislative assembly building in Srinagar. The Kashmiri terrorist group Jaish e-Mohammed claimed responsibility for the attack. On 13 December an armed group attacked India’s Parliament in New Delhi. The incident resulted in the death of 13 terrorists and security personnel. See Patterns of Global Terrorism–2001 (note 49 above).
Terrorism Act (POTA). The POTA was India’s response to Resolution 1373 to provide the central and state governments with additional law-enforcement tools in the war on terrorism. Incorporating a broad definition of terrorism,\textsuperscript{87} it criminalized the failure to provide authorities with ‘information relating to any terrorist activity’\textsuperscript{88} but was criticized as draconian, specifically because a suspect could be detained for up to 180 days without the filing of charges in court, and the law allowed for secret interception and recording of conversations and the use of police confessions as evidence in court. NGOs and the National Human Rights Commission have reported the abusive use of POTA against political opponents, religious minorities, Dalits, tribals and children.\textsuperscript{89}

The misuse of the POTA became an important election plank of the Congress party and its allies and, after its victory in the election, the Congress-led United Progressive Alliance repealed the POTA\textsuperscript{90} in December 2004 and amended the 1967 Unlawful Activities Prevention Act (UAPA) by reintroducing POTA’s main features. Additionally, the list of 32 organizations banned under the POTA was included in the amended UAPA;\textsuperscript{91} the legal definition of terrorism was expanded to include extraterritorial acts; and Government wiretapping authority was strengthened in terrorism cases.\textsuperscript{92}

In the view of the US Government, ‘India remains an important ally in the global war on terror.’\textsuperscript{93} This partnership was reiterated during president Bush’s visit to India and Pakistan in March 2006.

\textbf{II. The Law and Politics of Responses to Terrorism Under the So-called ‘New Paradigm’}

In response to the attacks of 9/11, the US has claimed that there is a ‘new paradigm’

\begin{itemize}
\item \textsuperscript{87} That included acts of violence or disruption of essential services carried out with ‘intent to threaten the unity and integrity of India or to strike terror in any part of the people’.
\item \textsuperscript{88} The Jurist, ‘World Anti-Terrorism Laws’. Available at http://jurist.law.pitt.edu/terrorism/terrorism3a.htm (accessed 5 March 2006).
\item \textsuperscript{90} Sudha Ramachandran, ‘Filling India’s anti-terrorism void’ \textit{Asia Times Online}, 23 September 2004 available at http://www.atimes.com/atimes/South_Asia/FI23Df03.html (accessed 5 March 2006).
\item \textsuperscript{91} \textit{Ibid}.
\item \textsuperscript{93} \textit{Id}.
\end{itemize}
requiring a fundamental change in the international law of the response to terrorism. Let us first consider the declaration of war on terrorism and then the impact of the claim of a new paradigm on the law governing the use of force and on human rights and humanitarian law.

A. The War on Terrorism

The official report of the 9/11 Commission describes the attacks of 11 September 2001, resulting in the death of nearly 3,000 civilians as ‘a day of unprecedented shock and suffering in the history of the United States.’94 On 12 September 2001, President Bush met with senior officials, as he said, ‘to assign tasks for the first wave of the war against terrorism. It starts today.’95 A week later he explained, ‘Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.’96 The 9/11 Commission considered the fatwa issued by the so-called ‘World Islamic Front’ at the request of Osama Bin Ladin and Ayman al Zawahiri, calling for every Muslim who can to murder any American anywhere, to be a ‘declaration of war.’97 The concept of a ‘war on terrorism’ or ‘war on terror’ has thus been taken literally rather than metaphorically in the sense of opposition to an idea, such as the war against fascism or the war on drugs. The literal use of ‘war’ is accompanied by frequent references to a ‘paradigm shift’. Although President Bush famously declared on 1 May 2003, ‘Major combat operations in Iraq have ended,’ he added, ‘The war on terror is not over; yet it is not endless. We do not know the day of final victory, but we have seen the turning of the tide.’98

Speaking for the non-aligned movement during the debate over intervention in Iraq, the representative of Malaysia argued, ‘The decision that the Security Council is about to take will undoubtedly transcend the immediate issue of Iraq. It appears to us that we are no longer debating the situation in Iraq and that country’s full compliance with resolution 1441 (2002), but that we are currently defining a new international order that will determine how the international community addresses conflict situations in the future. This is an extremely serious issue that needs careful considerations and that will have far-reaching implications as we progress into a new millennium.’99

95 Id, p 333.
97 9/11 Commission (note 94 above), p 47.
The confusion that reigns regarding the legal implications of the war on terrorism results in part from a series of legal memoranda of early 2002 acknowledging the President’s authority to disregard international law in the exercise of his war powers. Some see a bold and courageous response to serious threats to the American way of life and its defense of freedom. Jonathan Kay, for example, argued in The National Interest that respecting the strictures of humanitarian law ‘is not a realistic option for the United States as it wages the War on Terror’ and that, in the aftermath of 9/11, ‘the government of the United States did the right thing by putting legal niceties to one side and pursuing the war against terrorism full bore.’ Others, such as Philippe Sands, a QC and professor of international law at University College, London, in his book Lawless World: Making and Breaking Global Rules, called the ‘war on terrorism’ a ‘phony war’ ...used to eviscerate well-established and sensible rules of international law, which the US has in the past supported, relied upon and often created.

The US government’s reaction to 9/11 included the concept of a ‘new paradigm,’ namely, the proposition that, in a time of perceived threat to national security of the magnitude of the 11 September 2001 attacks, it is legitimate and legal either to interpret certain core norms of international law as not binding or to consider that the powers of the President under the Constitution to wage a ‘war’ on terrorism supercede international law. The new paradigm has had a dramatic impact through the doctrine of preventive war and the non-application of certain norms of international humanitarian law and international human rights law.

### B. The Doctrine of Preventive War

Assuming that a self-defense justification was valid in the case of Afghanistan and that the Security Council accepted it as such, self-defense as a response to terrorism in the case of the war in Iraq requires a much greater stretch of the imagination. First of all, the claim was not seriously made that Iraq was responsible for terrorist attacks on the United States or for harboring, training or even funding the terrorists who committed them, although public statements have clearly sought to give that impression. For example, in a nationwide radio address of 21 February 2004, President Bush said: ‘All of us knew Saddam Hussein’s history... He cultivated ties to terrorists.’

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102 Sands (note 20 above), p 206.

Second, the self-defense claim based on the potential danger of weapons of mass destruction and the failure of Iraq to disarm as required by the Security Council did not involve an armed attack or the failure of the Security Council to take measures. The only basis on which a self-defense claim can be convincing is one of preemptive attack, which is the language government officials used, although the actual doctrine is more one of preventive attack.

The doctrine of preemptive war was explained by Secretary of Defense Donald Rumsfeld and incorporated into the 2002 National Defense Strategy. The concept of pre-emptive attack as part of self-defense in international law requires (1) that the enemy has taken steps preliminary to an attack and (2) that it would be unreasonable to expect the threatened state to wait for an actual armed attack, the so-called ‘sitting duck’ hypothesis. The claim that Operation Iraqi Freedom was an extension of the self-defense doctrine fails to meet both conditions of the already contested notion of anticipatory self-defense. It shifts rather into the category of a preventive war. The doctrine of preventive war refers to military action to prevent a potential but not imminent armed attack and is not accepted under current international law. Indeed, the WMD justification for the invasion of Iraq was based on the expectation that Saddam might have developed WMDs and might have deployed them at some future time and that eventuality need to be prevented.

C. Impact of the New Paradigm on International Humanitarian Law

Under international humanitarian law (IHL), certain conventions apply to international armed conflict, others to internal ones. Both the Afghanistan and Iraq conflicts are international armed conflicts in which the Geneva Conventions and Protocol I apply (the latter as customary law, since neither Iraq nor the US is a party). Under the new paradigm, the US has considered that it can draw from the spirit of these norms of international law without being bound by the letter.

Among the consequences of this doctrine is a weakening of the application of international humanitarian law, especially as regards the protection of civilians and the determination of POW status. The issue of treatment of detainees concerns

105 ‘The National Security Strategy of the United States of America’. Available at http://www.whitehouse.gov/nsc/nss.html. Specifically, that strategy states: ‘For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. ...We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.’
107 Id, p 152.
both humanitarian law and human rights and will be treated below under human rights.

Many of the official references to the new paradigm have been in the context of IHL. On 25 January 2002, a memo from White House Counsel (now Attorney General) Alberto Gonzales to the President referred to the President’s proclamation that ‘the war against terrorism is a new kind of war.’ He continued: ‘this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.’\textsuperscript{108} President Bush also referred to this ‘new paradigm’ in a 7 February 2002 memo in which he stated, ‘Our Nation recognizes that this new paradigm – ushered in not by us but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the law of Geneva.’\textsuperscript{109} Note ‘consistent with’ rather than ‘in conformity with’, suggesting a margin of appreciation as to what specific provisions will be applied.

Protection of civilian populations is governed by the prohibition ‘to attack, destroy ... or render useless objects indispensable to the survival of the civilian population...’\textsuperscript{110} and the duty to ‘at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly [Parties to the conflict] shall direct their operations only against military objectives.’\textsuperscript{111} The US Department of Defense considers this article ‘as a codification of the customary practice of nations and therefore binding on all.’\textsuperscript{112} In the conduct of Operation Iraqi Freedom, the official policy was to spare civilians. President Bush said on March 27, 2003, ‘Protecting innocent civilians is a central commitment of our war plan.’\textsuperscript{113}

Nevertheless, as a survey published in \textit{The Lancet} notes, civilian death from violence increased 58-fold after the invasion and estimated that 100,000 excess

\textsuperscript{108} ‘Memorandum for the President Bush of January 25, 2002’, reproduced in Danner (note 102 above), pp 83-84 [emphasis added]. The examples of quaint provisions are ‘commissary privileges, script (ie, advances of monthly pay), athletic uniforms, and scientific equipment.’

\textsuperscript{109} Id, p 105. [Emphasis added.]

\textsuperscript{110} Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), adopted on 8 June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (signed by the US on 12 December 1977, but not yet ratified), (‘Protocol I’), art 54.

\textsuperscript{111} Protocol I, art 48.


civilian deaths had occurred and that ‘more than half of the deaths reportedly caused by the occupying forces were women and children.’\textsuperscript{114} Human Rights Watch conducted a mission of inquiry to Iraq between late April and early June 2003 and found that the Coalition Forces were not ‘doing enough to minimize harm to civilians as required by international law’.\textsuperscript{115}

The new paradigm has been invoked to justify denying IHL projection to suspected Al Qaeda and Taliban terrorists simply by recourse to the category of ‘unprivileged’, ‘illegal’ or ‘unlawful’ combatants according to in the Presidential Memo of 7 February 2002\textsuperscript{116} and in an Executive Order authorizing the Secretary of the Defense to detain outside or within the US and try before a military court (called a ‘commission’) any non-US citizen whom the President determines to be a member of Al Qaida, to have participated in terrorism or to have harbored individuals who have done so.\textsuperscript{117} The order requires that detainees be treated humanely, be afforded adequate food, water, housing, clothes and medical treatment, as well as free exercise of religion.

This category draws from a pre-Geneva Conventions use of the term by the US Supreme Court for spies and saboteurs who pass behind enemy lines.\textsuperscript{118} It has also been used for a person who participates in hostilities without official sanction or as an ‘irregular’ (guerilla, partisan, member of resistance movement).\textsuperscript{119} In the aftermath of the war in Afghanistan in 2001, about 750 people were sent to Guantánamo Bay for interrogation and detention. Over 500 men are still being


\textsuperscript{115} Id, p 5.

\textsuperscript{116} Text reproduced in Steven Strasser, (ed) \textit{The Abu Ghraib Investigation. The Official Reports of the Independent Panel and the Pentagon on the Shocking Prisoner Abuse in Iraq} (New York: Public Affairs, 2004), Appendix B.


\textsuperscript{118} \textit{Ex parte Quirin}, 317 US 1 (1942), a United States Supreme Court case. Argued 29 and 30 July 1942. Decided 31 July 1942. Extended opinion filed 29 October 1942. (confirming the jurisdiction of a US military tribunal to try German saboteurs in the US.)

held, but only 10 have been charged. This dimension of the new paradigm in fact harkens back to an old paradigm, which has been superseded by the Third Geneva Convention (the POW Convention). The latter is quite clear:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.  

The International Committee of the Red Cross (ICRC) considers that the POW Convention should apply to the detainees and questions the US government determination that the detainees are ‘unlawful combatants’. It interprets the Third and Fourth Geneva Conventions as allowing only two categories of detainees: either *enemy combatant* protected as a prisoner of war under the Third Geneva Convention and entitled to release after the cessation of hostilities or *civilian detainee*, who must be charged and tried with due process guarantees or released.  

The UK Court of Appeal (in a case involving Guantánamo detainee Feroz Ali Abbasi), called this ‘a legal black hole’ and the US Supreme Court decided in 2004 that the Guantánamo detainees were entitled file habeas corpus writs to have their claim that they were wrongfully imprisoned heard by a federal judge. The ICRC expressed its concern ‘about the fact that the US detains an unknown number of people outside any legal framework...Many of those captured in the context of the so-called War on Terror are being held at US detention facilities in Bagram and Kandahar in Afghanistan and in Guantanamo Bay, Cuba. A small number of persons are furthermore detained in Charleston, USA. According to public statements by official US sources, a number of detainees are also being held incommunicado at undisclosed locations.’

According to a transcript released in early March 2006, the closed-door hearing of British citizen Feroz Ali Abbasi, a Guantánamo detainee, who complained of abuse, indicates that the Air Force colonel to whom he tried to argue for better

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120 Geneva Convention relative to the Treatment of Prisoners of War, adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August 1949; entry into force 21 October 1950.  
121 Sands (note 20 above), p 166.  
123 ICRC, Operational update, ‘US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC. 5 November 2004’. Available online at http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/593709C3D0B1296DC1256F430044235D.
treatment replied: ‘I do not care about international law. I do not want to hear the words international law again. We are not concerned about international law,’ and had him removed from the hearing. This attitude is unfortunately symptomatic of the disparagement of international law one finds even in the words of President Bush, who reportedly told Secretary of Defense Donald Rumsfeld on 12 September 2001, ‘I don’t care what the international lawyer says, we are going to kick some ass.’ Tragically, this attitude also seems to prevail with respect to international human rights law.

D. Impact of the New Paradigm on International Human Rights Law
There is little disagreement that human rights standards have been disregarded as legal constraints under the ‘new paradigm.’ The UN has expressed a consistent position that ‘all measures to counter terrorism must be in strict conformity with international law, including international human rights and humanitarian law standards.’ The UN, meeting at the level of Heads of States or Government on the occasion of the 2005 Summit, recognized ‘that international cooperation to fight terrorism must be conducted in conformity with international law, including the Charter and relevant international conventions and protocols. States must ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law.’

It should also be noted that the UN Commission on Human Rights has mandated both an independent expert on the protection of human rights and fundamental freedoms while countering terrorism, and a Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.

The human rights system allows for limitations and derogations, particularly those provided for in the International Covenant on Civil and Political Rights.

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126 Sub-Commission on the Promotion and Protection of Human Rights Resolution 2001/18 on ‘Terrorism and Human Rights’ (16 August 2001). Post 9/11 resolutions have been even stronger on this point.


128 See the Report by the independent expert, (note 119 above).

(ICCPR), to which the United States is a party. If these powers of limitation are not adequate to meet the needs on the scale of the response to terrorism, the article 4 allows parties to derogate from most human rights.\(^\text{130}\) The United States is in a time of proclaimed national emergency\(^\text{131}\) and could invoke article 4 of the ICCPR to notify the Secretary-General of its decision to derogate from the Covenant and yet it has not done so, thus further weakening the international human rights regime.

Much of the focus of attention on the restrictions on civil liberties in the US has been on the USA PATRIOT Act, passed a month and a half after the attacks of 9/11, and renewed with a few problematic provisions removed in March 2006. Civil liberties groups have criticized especially the provisions relating to domestic intelligence gathering, including of domestic organizations.\(^\text{132}\) Further, it was recently revealed that President authorized in 2002 the National Security Agency (NSA) to wiretap phone and email communications involving United States persons within the US, without obtaining a warrant or court order as required by the Foreign Intelligence Surveillance Act of 1978 (FISA).\(^\text{133}\)

By far to most significant challenge for the traditional paradigm of international human rights law posed by the US post-9/11 behavior is with respect to the definition and absolute prohibition of torture. The current debate over torture is not limited to the treatment of the prisoners at Abu Ghraib but includes interrogation of detainees in Afghanistan, other locations in Iraq and Guantánamo Bay, as well as deportation of suspects to countries suspected of practicing torture (‘extraordinary rendition’), and persons whose detention was not revealed to the ICRC (‘ghost detainees’).\(^\text{134}\)

From the human rights perspective, the treatment of prisoners captured during an armed conflict is governed by the International Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Punishment or Treatment and

\(^\text{130}\) The rights from which no derogation is allowed are the right to life, freedom of thought, conscience and religion, and recognition as a person before the law; freedoms from torture, freedom from slavery or servitude, non-imprisonment for debt, and non-application of ex post facto laws.


the Third Geneva Convention, both of which the United States has ratified. The Torture Convention defines torture in clear language that does not create the option for state parties to have their own definition based on lower standards. Nor does it provide for an exception in wartime; torture is prohibited at all times, everywhere. Nevertheless, a Justice Department memo of August 2002 states: ‘Certain acts may be cruel, inhuman, or degrading, but still not produce pain and suffering of the requisite intensity to all within [a legal] proscription against torture.’ The memo continues: ‘Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.’ The memo was replaced by one of 30 December 2004, setting different standards, but did not disagree with the conclusions of the previous memos. The uproar over this language led President Bush to announce on 26 June 2003, ‘The United States is committed to the world-wide elimination of torture and we are leading this fight by example.’ On 30 December 2005, President Bush signed the Detainee Treatment Act of 2005, containing the McCain amendment prohibiting ‘cruel, inhuman, or degrading treatment or punishment’ of detainees and providing for ‘uniform standards’ for interrogation. However, the memorandum of 1 August 2002, supported by a Pentagon working group report of 6 March 2003, concluded that the President is not bound by the Torture Convention obligations when acting under his commander-in-chief powers.

‘Extraordinary renditions’ are another practice of the war on terror contrary to international human rights law. It has been reported that about a hundred and fifty people have been rendered since 2001, thus being subjected to ‘torture by

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135 The definition refers to ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, which such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’ The Geneva Convention makes torture a grave breach, punishable as a war crime.


137 *Id*, p 5.


proxy’ or ‘outsourcing of torture’.142 Both the Torture Convention (article 3) and US law prohibit the return of any person to a place where there is a substantial likelihood that they will be subjected to torture. The Center for Constitutional Rights filed suit in the US District Court against the Attorney General, the FBI Director, the Homeland Security Director and others, claiming violations of the rights of a Canadian citizen who had been send to Syria but the case was dismissed on 16 February 2006 by Judge David Trager who held that the federal judiciary could not hold US government officials liable for damages ‘in the absence of explicit direction by Congress ... even if such conduct violates our treaty obligations or customary international law.’ Nevertheless, he left open the possibility to replead if more detailed information could be provided as to ‘which defendants directed, ordered and/or supervised the alleged violations of Arar’s due process rights.’ He also said that the use of torture in rendition cases is a foreign policy question not subject to judicial review.143

A few ‘bad apples’ or government policy

The treatment by the United States of detainees in Afghanistan, Iraq and Guantánamo raises obvious questions about the use of torture in the war against terrorism. Media attention was greatest with respect to the prison outside Baghdad known as Abu Ghraib. The administration regularly reaffirmed that torture was not practiced and the President issued a statement in 2003 that the US would abide by the Torture Convention and not use cruel, inhuman or degrading treatment.144 However, the images broadcast on ‘60 minutes II’ and in all the newspapers of a hooded detainee standing barefoot on a box with wires attached to his fingers and underneath his garment radically altered the political context. Investigations, such as that by Major General Taguba of February 2004, documented ‘sadistic, blatant, and wanton criminal abuse’ at Abu Ghraib.145 The military police who released the photos ‘did what the world’s most influential human rights groups

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could not,’ according to Seymour Hersh. President Bush describes what happened in Abu Ghraib as the ‘disgraceful conduct by a few American troops, who dishonored our country and disregarded our values.’ Several alternative explanations have emerged to that of a few misguided and poorly trained soldiers:

1) The methods of ‘extreme interrogation’ were deliberately drawn from the CIA’s manual of 1963 called ‘KUBARK Counterintelligence Interrogation.’ One author concludes ‘the awful details of the abuse itself and the clear logical narrative they take on when set against what we know of the interrogation methods of the American military and intelligence agencies...is quite enough to show that what happened at Abu Ghraib,...did not depend on the sadistic ingenuity of a few bad apples.’ The Commander at Guantánamo briefed military commanders in Iraq on the methods used in Guantánamo and produced a classified report proposed to turn Abu Ghraib into a center of intelligence for the global war on terrorism. A senior military intelligence officer at Abu Ghraib, when asked about the use of dogs for intimidation, ‘testified that he was taking his cue on the use of dogs from [the Commander at Guantánamo ], who took over detainee operations in Iraq.’

2) Knowledge gained from a Pentagon-funded program called Survival, Evasion, Resistance, and Escape (SERE), developed in the 1950s and expanded after the Vietnam War to train US troops to endure extreme physical and psychological hardship, was applied to develop the interrogation methods used in Guantánamo and Abu Ghraib. An extensive report on this claim was published in July 2005.

3) There was systematic failure to train interrogators. As Steven Miles points out in a Lancet article documenting abuse, ‘Although US military personnel receive at least 36 minutes of basic training on human rights, Abu Ghraib military personnel did not receive additional human rights training and did not train civilian interrogators working there.’ Miles concludes, ‘Military command ... was inattentive to human rights.’

4) Finally – and most damaging – is the claim that torture was in fact official policy emanating from the highest echelon. According to James Risen, ‘several

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146 Hersh (note 136 above), p 25.
148 Id, p 72.
149 Id, p 31.
153 Id, p 727.
current and former CIA officials say that after the September 11 attacks the
president made it clear to agency officials in many ways that it was time for the
gloves to come off, although ‘Tenet never demanded written presidential
authorization for the interrogations techniques, and he agreed not go to into
the Oval Office and describe in detail in a formal presidential briefing what the
CIA was doing with captured al Qaeda operatives or other prisoners.’

In addition to the credible evidence that they were not the acts of a few ‘bad
apples,’ the methods spawned by the new paradigm appear to be counterproductive.
As a former interrogator described the impact of the coercive measures used in
Guantánamo, ‘If you don’t have a terrorist now, you will by the time he leaves.’

Accountability for human rights violations

A reported 600 accusations of detainee abuse have been filed and 251 officers and
soldiers have faced punishment for assault, mistreatment and sexual abuse of
prisoners. So far, the trials have remained at a low level, although the commanding
officer at the prison, Brig. General Janis Karpinski, was demoted to the rank of
colonel on 5 May 2005. The highest-ranking officer punished was Captain Shawn
Martin, who was sentenced to 45 days in jail and a fine of $12,000 for kicking
detainees and staging mock prisoner execution.

On 30 November 2004, the Center for Constitutional Rights (CCR) and four
Iraqi citizens filed a criminal complaint in Germany against high-ranking US
officials to hold them accountable for torture, including at Abu Ghraib. The case
was brought under the doctrine of universal jurisdiction, which allows suspected
war criminals to be prosecuted irrespective of where they or the criminal acts are
located. In September 2005, the case was dismissed due to the near complete
prosecutorial discretion of the Prosecutor in Germany.

v Rumsfeld, asking a federal district court in Illinois to rule that Secretary of Defense
Donald Rumsfeld violated the US Constitution and international law on behalf of
eight men who were allegedly tortured and abused in US detention facilities in

154 James Risen, State of War: The Secret History of the CIA and the Bush Administration (New
155 Id, p 25.
156 Meyer (note 142 above).
March 2006. See also Steven Strasser, (ed) The Abu Ghrain Investigation. The Official Reports
of the Independent Panel and the Pentagon on the Shocking Prisoner Abuse in Iraq (New York:
158 Schmitt (note 157 above).
159 ‘CCR Seeks Criminal Investigation in Germany of US Officials for War Crimes in Abu
9, accessed 27 March 2006).
Iraq and Afghanistan. An amended complaint consolidated the lawsuit against Secretary Rumsfeld with three similar complaints, which were transferred to a judge in the District of Columbia. Secretary Rumsfeld filed a motion to dismiss questioning whether there is authority for ‘such extensive judicial intrusion into war-making functions, let alone a decision creating a non-statutory damages remedy for alien detainees dissatisfied with the military’s wartime detention practices’ and claiming qualified immunity on some counts and absolute immunity on others. The lawyer in the case from Human Rights First said, ‘Particularly in light of reports documenting how senior command and civilian leadership have escaped accountability for the gross abuse of detainees in US custody, the Secretary’s position that ordering torture was ‘within the scope of his employment’ is a stunning abdication of the responsibility of command.’ Further proceedings were expected the spring of 2006.

In February 2006, the UN released a joint report, submitted by five holders of mandates of special procedures of the Commission on Human Rights, on the situation of detainees held at the United States Naval Base at Guantánamo Bay since June 2004. In their report, they found the United States guilty of arbitrary detention; serious violations of various guarantees of the right to a fair trial; allowing, through redefining of ‘torture’ in the framework of the struggle against terrorism, ‘certain interrogation techniques that would not be permitted under the internationally accepted definition of torture;’ inhuman treatment in violation of the right to health and the right to be treated with humanity as a result of uncertainty about the length of detention and prolonged solitary confinement; excessive violence during transportation and force-feeding of detainees on hunger strike amounting to torture; rendition of persons to countries where there is a substantial risk of torture amounting to a violation of the principle of non-refoulement; lack of any impartial investigation into abuses as required by the Torture Convention; and

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161 Id, pp 16-26.
162 Id, pp 26-31.
164 ‘Situation of detainees at Guantánamo Bay’, UN Doc. E/CN.4/2006/120, 15 February 2006. The rapporteurs are Report of the Chairperson of the Working Group on Arbitrary Detention, Ms Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr Paul Hunt.
reliable indications of violations of the right to freedom of religion or belief.\textsuperscript{165} They also found a right-to-health violation resulting from ‘deterioration of the mental health of many detainees’\textsuperscript{166} and expressed concerns about ‘the alleged violations of ethical standards by health professionals’,\textsuperscript{167} and ‘the force-feeding of competent detainees’\textsuperscript{168}

White House spokesman Scott McClellan called the report ‘a discredit to the UN’ claiming that the rapporteurs ‘haven’t even looked into the facts, all they’ve done is look at the allegations.’\textsuperscript{169} Indeed, the rapporteurs turned down the invitation to visit Camp Delta because they would not be allowed to interview prisons directly. The US position is that only the ICRC has such access. Kofi Annan and even Tony Blair and other senior British officials agree with the rapporteurs that the base should be closed down.\textsuperscript{170}

Some have proposed that the President’s policies and decisions be considered high crimes and misdemeanors, and consequently impeachable offenses under the US Constitution. While no Representative has introduced Articles of Impeachment yet, Rep Conyers has submitted a bill (H Res636 and H Res637) co-sponsored by 30 other Representatives for a Watergate-style investigation and has issued an investigative status report by the House Judiciary Committee Democratic Staff called ‘The Constitution in Crisis’, detailing most of these issues. Several NGOs are lobbying for actual articles of impeachment, including one proposed article stating that the President acted ‘in violation of his constitutional duty to take care that the laws be faithfully executed,’ inter alia, by ‘Weakening the effects of International Law by defying the United Nations thus encouraging other nations to violate International law by example.’\textsuperscript{171} The Center for Constitutional Rights published a book in early 2006 called \textit{Articles of Impeachment against George W Bush}, setting out the legal arguments for impeachment in four separate articles of impeachment, namely, warrantless surveillance, misleading Congress on the reasons for the Iraq war, violating laws against torture, and subverting the Constitution’s separation of powers.\textsuperscript{172}

Thus a movement for higher-level accountability is gaining momentum. For

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\textsuperscript{165} \textit{Id}, paras 72-92.
\textsuperscript{166} \textit{Id}, para 92.
\textsuperscript{167} \textit{Id}, para 93.
\textsuperscript{168} \textit{Id}, para 94.
\textsuperscript{171} http://www.impeachbush.tv/impeach/articles.html.
\textsuperscript{172} Center for Constitutional Rights, \textit{Articles of Impeachment against George W Bush} (Melville House Publishing, 2006).
the moment, however, the new paradigm seems to have become established policy with grave consequences for international law.

Conclusions: ‘A shadow has been cast’

The so-called new paradigm is an invention by the US government in the context of its ‘war on terrorism’ through which it seeks to avoid the constraints of international law with respect to rules governing the use of force, humanitarian law, and human rights. If this paradigmatic shift were accepted, it would represent an unacceptable retreat for the rule of law in international relations and for respect for peremptory norms of international law. It is part of what many see as a broader challenge to international law by the current government. As Philippe Sands asserts, ‘we now know that the Administration took a conscious decision to use the ‘war on terrorism’ as a further means to propel its assault on global rules.’173

International security

The rules of international law governing the use of force and the powers of the Security Council cannot legally be upended by the unilateral acts and interpretation of law by one of the Security Council’s permanent members. If sovereign equality has any meaning, it includes the proposition that the rules of general international law apply equally to all subjects of international law. Thus, if one state can determine that an event, like a serious terrorist attack, authorizes it to determine unilaterally when, how and against whom it will engage in armed conflict, then that same prerogative belongs to other states. If the American precedent were followed, international security would be severely jeopardized. Except where a state has willingly supported terrorists and the Security Council has found its behaviour a threat to international peace and security, the means – which can be effective – of combating the scourge or terrorism are those of law enforcement. The robust use of these means may be regarded as warfare in a metaphorical, but not legal sense. As Mary Robinson warned while she was UN High Commissioner for Human Rights: ‘Despite efforts to frame the response to terrorism within the framework of crimes under national and international law, an alternative language has emerged post-September 11. That language [of]... a war on terrorism ... has brought a subtle change in emphasis in many parts of the world... As a result a shadow has been cast.’174

Human rights

The international law of human rights protects freedom of movement, association, and expression and the right to privacy – all of which facilitate the recruitment of terrorists, money laundering to support terrorism, and launching of terrorist

173 Sands (note 20 above), p 153.
operations. Human rights also guarantee the rights to life and security, which terrorists by definition shamelessly flout. Moreover, the human rights regime includes a system of limitations of rights in the interest of national security and public order, and of derogations of rights in time of public emergency threatening the life of the nation. These limitations and derogation are not in competition with human rights but rather and integral part of an accommodation with the realities of a world where no state – regardless of military or economic or moral strength – is immune from terrorism.

Most countries, including those of the Asia Pacific region, have enacted and implemented counter-terrorism measures and some have taken advantage of the call for such measures to institute repressive laws and practices to respond to domestic threats. In some countries, through democratic processes, remedial steps were taken. While the countries concerned need to be more attentive to their domestic and international human rights obligations, they do not challenge the application of international law. The US, on the other hand, has rejected significant features of the international legal system itself – through the claim of a new paradigm – and democratic processes have resulted in little more than a decision of the Supreme Court that detainees have a right to have a habeas claim heard before a federal court, with very little compliance, and a few low-level prosecutions, due to media outcry following the release of the Abu Ghraib photos. This behaviour encourages others to disregard international norms. As Kofi Annan summarized it, ‘compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist’s objective – by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits.’

A few principles – as a result of a historical heritage shared across civilizations – have emerged as sacrosanct, beyond limitation or derogation. These non-derogable rights include freedom from torture. The accountability deficit is a major negative result of the new paradigm with regard to this prohibition. It is true that the US has proclaimed publicly that the US does not torture; it has investigated abuse and made the results public; and it has prosecuted some individuals who participated in abuses. However, from the human rights perspective, it is unacceptable that it has failed to accept the full applicability of the Geneva Conventions and the Torture Convention; it has denied access of qualified UN investigators to prisoners; it has held detainees indeterminately and denied access to proper courts for the determination of their status; it has inadequately monitored detention centers and not provided clear instructions and training; it has limited the prosecutions of abuse to a handful of low-level individuals; and it has denied a private remedy to

persons harmed by acts of US agents in violation of international law. As Sands put it: ‘There is clear evidence ... that the violations of human rights and humanitarian law engendered by the ‘war on terrorism’ have undermined respect for human rights in other parts of the world.’  

**Jus cogens, the principle of desuetude and the future of international law**

The argument for a new paradigm relies on the need to adjust principles of international law to changing realities. The two most significant principles at stake – the non-use of force and prohibition of torture and other mistreatment of persons – have the character of *jus cogens*, that is, they are peremptory norms of international law. It is unsustainable to claim that they have fallen into desuetude given the circumstances of the war on terrorism. International law gives considerable flexibility in the interpretation and application of the doctrine of self-defense and in actions against terrorists and the states and organizations that support them; however, it does not abide the unilateral abandonment of its peremptory norms.

The paradigm shift implied by the doctrine of the ‘war on terrorism’ is grounded in an understandable and politically successful effort to be seen to be taking resolute action against the terrorist enemy; in practice, it is proving to be weakening the most basic ramparts of the international security and human rights systems. International law is indeed inseparable from politics and it has to be responsive to geopolitical shifts. However, that does not mean that its very foundations may be subject to radical revision without a consensual process, which is the essence of its voluntarist nature. The so-called ‘new paradigm’ is more a matter of branding for political purposes than a legal concept on which new norms of international law can be based. ‘It is one thing to re-evaluate the adequacy of international law in the light of changing circumstances, like new terrorist threats and the proliferation of weapons of mass destruction,’ writes Sands. ‘It is quite another to impose them on the rest of the world without proper consultation or consideration of the likely consequences.’

Terrorism is a highly dangerous phenomenon that destroys lives and disrupts peaceful relations among nations; international law, laboriously elaborated over four centuries, is the normative foundation of an international order based of peace and justice, one in which terrorism has no place. By challenging significant elements of that normative rampart I fear that the so-called new paradigm will do – and has done – more harm than good. The future of international law hangs in the balance.

176 Sands (note 20 above), p 234.
177 *Restatement of the Law (Third). The Foreign Relations Law of the United States*, §102, Comment k (principles prohibiting the use force) and §702, Comment n (human rights as peremptory norms) and Reporters’ Note 11 (torture and prolonged arbitrary detention have character of jus cogens).
178 Sands (note 20 above), p 229.