BRANDING THE “WAR ON TERRORISM”: IS THERE A “NEW PARADIGM” OF INTERNATIONAL LAW?

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INTRODUCTION

On September 11, 2001, agents of an Islamic terrorist organization known as Al-Qaida, attacked the United States by hijacking four U.S. commercial flights (American 11 and 77 and United 77 and 93), and destroying the World Trade Center in New York and part of the Pentagon, resulting in the death of nearly 3,000 civilians and “a day of unprecedented shock and suffering in the history of the United States.”¹ On September 12, 2001, President Bush met with the principals from the White House, the Pentagon and the National Security Council for the purpose, he said, “to assign tasks for the first wave of the war against terrorism. It starts today.”² President Bush expanded on his declaration of war on terrorism in his speech of September 20, 2001: “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.”³

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2. Id. at 333.
While the term “war on terrorism” or “war on terror” carries tremendous moral force as the nation sought a response commensurate with the horror of the attack, there are clearly consequences in international law if it is taken literally. It is not a “war” in the legal sense of an armed conflict waged against a belligerent power, subject to *jus ad bellum* and *jus in bello*, but rather an expression of opposition against an idea, similar to the metaphorical use of the war against fascism in the context of the war against the Axis Powers. 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, and related documents calling for every Muslim who can to murder any American anywhere, to be a “declaration of war.” However, the metaphor of “war” is meant as a legal categorization by the Bush administration. Operation Enduring Freedom in Afghanistan was part of this war, although, for Operation Iraqi Freedom, the war on terrorism was a secondary justification for bringing down the regime of Saddam Hussein, after that of pre-emption of the threat of weapons of mass destruction.

The confusion that reigns regarding the relevance of international law on the use of force to these military campaigns and of human rights law to the treatment of persons detained by Coalition Forces is due in large part to the failure from the outset to distinguish the metaphor of the “war on terrorism”—which the Clinton Administration had used as a metaphor—from the legal category of war—which the Bush Administration applies to its global campaign to search and destroy those responsible for 9/11. It also results 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. This stance is perceived by some as a bold and courageous response to serious threats to the American way of life and its defense of freedom.

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4. See 9/11 Commission, *supra* note 1, at 47.
6. Jonathan Kay argues that respecting the structures 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 fullbore. Jonathan Kay, *Redefining The Terrorist, The National Interest*, Spring 2004, at 90, 93.
and by others as a catch-all justification used to trump the rule of law, and install "a messianic and Manichean ethic."  

The impact and magnitude of the phenomenon of terrorism should dictate the scope of the response and the adequacy of international law to regulate that response. Political decision-making relies more on perceptions and politics than a cold analysis of measurable impact of terrorism on human lives. It is unlikely that any policy-makers would allude to the fact that the nearly 3,000 victims of the terrorist attacks of September 11, 2001 represented about 0.17% of the total violence-related deaths that year. Of the 1.7 million violence-related deaths in 2000, 310,000 were war-related, 520,000 caused by homicide and 815,000 by suicide. There were fifty times as many victims of the tsunami in the Indian Ocean of December 2004 (162,000, one-third of whom were children), than of the attacks of 9/11. Thirty-five Americans died from terrorist attacks in 2003 and 29 were injured. Internationally, during the two years following September 11, 2001, approximate numbers of death from terrorist attacks were 1,500 in Iraq, 700 in Russia, 350 in Israel, 200 in Spain and 100 in the Philippines. Each of those deaths is intolerable. On the quantitative scale of human suffering, they are dwarfed by the 11 million annual deaths from infectious and parasitic diseases, including 3 million who died form AIDS, and over 1 million from malaria and yet it is the 3,000 deaths of 9/11 that motivate the alleged paradigmatic shift on which this article focuses.

The disproportion of these numbers is indicative of the nature of terrorism: it is successful to the extent that relatively small-scale harm

7. Upendra Baxi, The "War On Terror" and the "War Of Terror": Nomadic Multitudes, Aggressive Incumbents, and the "New" International Law Prefatory Remarks on Two "Wars", 43 OSGOOD HALL L. J. 1, 29 (2005). Baxi describes the use of the 9/11 as "a decisive matrix for the making of the "new" international law." Id. at 34.


can produce large scale fear and attract the attention greater than all other causes of death, which is precisely why it is used by groups that do not have the wherewithal of a state. The problem is obviously not one that can be measured by the burden on the lives of the affected population, nor even by the risks, although the fear that terrorists will acquire and use weapons of mass destruction considerably alters the nature of the risk. As Michael Ignatieff pointed out, "in order to think clearly about terror, we must distinguish moral condemnation from threat assessment, to try to separate the anger we feel from the risk they actually pose." 12 "The attacks of September 11," he adds, "did not endanger the social order of the United States or threaten its democracy with collapse." 13 In fact, terrorism alters the calculation of degree of harm and likelihood. There is a low probability of occurrence of acts of terrorism and the number of victims is likely to be limited, whereas there is a high probability (even certainty) of large-scale loss of life from preventable diseases. The political calculation is radically different: dramatic responses are called for in the former and resources and political will are always hard to find for the latter.

The U.S. reaction to 9/11 included invoking the concept of a "new paradigm," namely, the proposition that, in a time of perceived threat to national security of the magnitude of the September 11, 2001, attacks, it is legitimate and legal either to interpret certain core norms of the international legal order as not binding as a matter of international law or to consider that the powers of the President under the Constitution to wage a "war" on terrorism supercede international law. The traditional paradigm of international law is to limit recourse to force only in accordance with article 2(4) of the UN Charter and to treat the perpetrators of acts of terrorism as criminals under international law, subject to criminal prosecution by the country where the act is committed, the country of the victim or the perpetrator or by any country under universal jurisdiction and special measures of international cooperation to find, apprehend, prosecute and punish them. 14 With regard to the rules governing use of force, the Coalition

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13. Id.
14. Restatement (Third) of Foreign Relations §404: Universal Jurisdiction to Define and Punish Certain Offenses (2004); Restatement (Third) of Foreign Relations §423:
Forces engaged in at least two traditional international armed conflicts, although the U.S. placed them under a “new paradigm.” With regard to the response of international criminal law to terrorism, the traditional approach has not been abandoned, since police investigations and criminal prosecutions have taken place, but the new paradigm hypothesis holds that September 11th requires much more coercive measures and that the criminal law approach is inadequate to meet the challenge, which can only be met by waging a “war.”

One can sympathize with the impulse to declare “war,” but can “war” be waged against an enemy that is not identified except, in the words of President Bush, as “every terrorist group of global reach”? The massive deployment of force to go after the perpetrators is understandable, but can the laws of war be unilaterally supplanted when the existing laws would constrain the means? I will address these questions by examining the definition of terrorism (I), and then review the traditional paradigm of war and terrorism (II) and the so-called “new paradigm” of war (III) before examining the consequences of the new paradigm on the international legal system (IV).

I. DEFINING TERRORISM

The acts that provoked President Bush’s declaration of war involved hijacking of civilian aircraft and the use of those aircraft as explosive devices, both of which are characterized as crimes under international law. The phenomenon of “terrorism” has been variously defined in international and US law, although a comprehensive convention on the subject has encountered definitional obstacles.

A. Definitions of Terrorism in International and US Law

The UN’s traditional definition of terrorism is “...criminal acts intended or calculated to provoke a state of terror in the general public,

 Jurisdiction to Adjudicate in Enforcement of Universal and Other Non-Territorial Crimes (2004).

 15. Joint Address, supra note 3.

a group of persons or particular persons for political purposes ...”\textsuperscript{17} Terrorism is defined in the US by the Code of Federal Regulations as: “...the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.”\textsuperscript{18}

A deductive definition of terrorism can be found by considering as terrorism any of the acts that are defined as such in the twelve international conventions dealing with the problem, such as the Tokyo Convention on Offences and Certain Other Acts committed on Board Aircraft (1963), the Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970), the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971), the International Convention for the Suppression of Terrorist Bombings (1997)\textsuperscript{19}, the International Convention for the Suppression of the

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\textsuperscript{17} Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism Annex, Dec. 17, 1996, U. N. Doc. A/RES/51/210. This definition is used in numerous UN resolutions, such as the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, in which the General Assembly:

"1. Strongly condemns all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomsoever committed; 2. Reiterates that 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 are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them..."

\textit{Id.}

\textsuperscript{18} 28 C.F.R. §0.85. The FBI further describes terrorism as either domestic or international, depending on the origin, base, and objectives of the terrorists:

Domestic terrorism is the unlawful use, or threatened use, of force or violence by a group or individual based and operating entirely within the United States or its territories without foreign direction committed against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.

International terrorism involves violent acts dangerous to human life that are a violation of the criminal laws of the United States or any state, or that would be a criminal violation if committed within the jurisdiction of the United States or any state. These acts appear to be intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by assassination or kidnapping. International terrorist acts occur outside the United States or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which the perpetuations operate or seek asylum.

Definition of Terrorism http://www.terrorismfiles.org/encyclopaedia/terrorism.html.

\textsuperscript{19} G.A. Res. 52/164 (Dec. 15, 1997).

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Financing of Terrorism (1999)\textsuperscript{20} and the International Convention for the Suppression of Acts of Nuclear Terrorism.\textsuperscript{21} The Terrorist Bombing Convention establishes an obligation to extradite or punish anyone who “unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place of public use…with the intent to cause death or serious bodily injury; …or extensive destruction… likely to result in major economic loss,” or attempts, aids or organizes such acts.\textsuperscript{22} Under current US and international law, there can be little doubt that a legal basis is established for considering the acts of 9/11 as international crimes. However, efforts have increased since 9/11 to provide a comprehensive rather than piecemeal definition.

B. The Effort to Reach a Comprehensive Definition of Terrorism

The draft Comprehensive Convention on International Terrorism has been labored over since 1996, stymied by the inability to agree on a definition of terrorism.\textsuperscript{23} The process was accelerated by the recent effort to assess the challenges facing the UN with a view toward reforming it. Echoing the trend of the US administration to see the attacks of 9/11 as threatening a way of life, in 2004, the report of the High-level Panel on Threats, Challenges and Change said 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{24} It balanced this depiction of the evil of terrorism by alluding 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

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  \item[20.] G.A. Res. 54/109 (Dec. 9 1999).
  \item[21.] G.A. Res. 59/290 (Apr. 13, 2005).
  \item[22.] Bombing Convention, supra note 16, art. 2.
\end{itemize}
regional conflict and foreign occupation; and it profits from weak State capacity to maintain law and order.”

The implication that there may be justifiable motivations for such acts explains the difficulties the High-Level Panel and other UN bodies have encountered in defining terrorism. Specifically, it identified the two definitional stumbling blocks: 1) whether to include States’ use of armed forces against civilians within the definition and 2) whether the definition should make exception for a right to resistance of peoples under foreign occupation. In the end, the Panel believed there was “particular value in achieving a consensus definition within the General Assembly, given its unique legitimacy in normative terms, and that it should rapidly complete negotiations on a comprehensive convention on terrorism.”

[F]ully the High-level Panel’s call for a definition of terrorism, which would make it clear that, in addition to actions already proscribed by existing conventions, any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of

25. 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 G.A. Res. 36/109 (Dec. 10, 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.”

26. Id. at ¶160. The Panel considered that attacks by the state on civilians were already prohibited and that taking of civilians lives could not be justified under this right of resistance. Id.

27. Id. at ¶163. The Panel actually proposed that the following elements be included in the definition: “(a) Recognition, in the preamble, that State use of force against civilians is regulated by the Geneva Conventions and other instruments, and, if of sufficient scale, constitutes a war crime by the persons concerned or a crime against humanity; (b ) Restatement that acts under the 12 preceding anti-terrorism conventions are terrorism, and a declaration that they are a crime under international law; and restatement that terrorism in time of armed conflict is prohibited by the Geneva Conventions and Protocols; (c ) Reference to the definitions contained in the 1999 International Convention for the Suppression of the Financing of Terrorism and Security Council resolution 1566 (2004); (d ) Description of terrorism as “any action, in addition to actions already specified by the existing conventions on aspects of terrorism, the Geneva Conventions and Security Council resolution 1566 (2004), that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.” Id. at ¶164.
intimidating a population or compelling a Government or an international organization to do or abstain from doing any act.28

Although there seems to be consensus that terrorism amounts to the deliberate targeting of civilians, the Islamic Conference has insisted that terrorism must be defined by the intention of the act and not by the consequences or victims. In defense of “national liberation” movements and “self-determination,” even the most brutal of attacks on “innocent” victims might not be defined as terrorism. After the September 11th attacks, 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.”29 The draft outcome document of the summit of heads of state and government of September 14-16, 2005, contained a definition of terrorism,30 but the version of September which was finally adopted merely condemned “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.”31 It also stressed “the need to make all efforts to reach an agreement on and conclude a comprehensive convention on international terrorism during the sixtieth session of the General Assembly,” which the Assembly failed to do.32

30. That draft included the following definition: “any action intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a government or an international organisation to carry out or to abstain from any act, cannot be justified on any grounds, and constitutes an act of terrorism.” High-level Plenary Meeting of the General Assembly of Sept. 14-16, Draft Outcome Document (July 22, 2005) at ¶85, http://www.un.org/ga/president/59/draft_outcome.htm.
32. Id. at ¶83. 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. See Report of the Ad Hoc Committee established by General Assembly Resolution 51/210 of 17 December 1996, Tenth session (27 February -3 March 2006), UN doc. A/61/37 (Supp.).
The phenomenon of terrorism has thus been defined in international law to a large extent prior to 9/11 and by two treaties after 9/11 under the assumptions of the traditional paradigm of international law, as well as by a nearly completed comprehensive convention.

II. THE TRADITIONAL PARADIGM: NON-USE OF FORCE, APPLICATION OF INTERNATIONAL CRIMINAL, HUMANITARIAN AND HUMAN RIGHTS LAW

Under the prevailing paradigm, the rules of international law applicable to threats and acts of violence against the territory or nationals of a state are those of the use of force in self-defense or under international peace enforcement and international cooperation in the prevention and punishment of criminal behavior.

A. Use of Armed Force Against Presumed Terrorists and Their Supporters

The traditional paradigm of international law governing the use of force against presumed authors of terrorist acts and governments that support them is governed by article 2(4) of the Charter on the use of force, Chapter VII on peace enforcement, and article 51 on self-defense. Accordingly, in the absence of a clear situation of self-defense, the Security Council must determine that an act of aggression or threat to international peace and security has occurred and then authorize the use of force for the restoration of international peace and security before the territorial integrity of a state may be legally violated by armed force. The US attack on Afghanistan was much more in line with the traditional paradigm than the war on Iraq. Under international law, the legal basis for the attack on Afghanistan was a finding by the Security Council 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. In Resolution 1267, the Council,

Acting under Chapter VII of the Charter of the United Nations, 1. Insists that the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan, 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; Decides ... that... all States shall (a) Deny permission for any aircraft to take off from or
land in their territory if it is owned, leased or operated by or on behalf of the Taliban.\footnote{S.C. Res. 1267 (Oct. 15, 1999).}

(b) Freeze funds ... owned or controlled directly or indirectly by the Taliban.\footnote{S.C. Res. 1368 (Sept. 12, 2001).}

Under Security Council Resolution 1269 (1999), adopted on October 19, 1999, the Council “Unequivocally condemn[ed] all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security.”

Following the attacks on the United States of September 11, 2001, the Security Council, in its Resolution 1368 (2001) of 12 September 2001, recognized “the inherent right of individual or collective self-defense...”\footnote{U.N. Charter, art. 51. It is complemented by Article 5 of the Charter of the North Atlantic Treaty Organization, according to which member states shall assist the attacked state by taking “such action as it deems necessary, including the use of armed force.” North Atlantic Treaty, Apr. 4, 1949, art. 5, 34 U.N.T.S. 243, 250. The Council was not willing to provide a similar legal basis in 1985 when Israel claimed that bombing the PLO headquarters in Tunisia was justified because Tunisia harbored terrorists. The Security Council rejected this claim in Resolution 573 (14-0, with the United States abstaining) and condemned “vigorously the act of armed aggression perpetrated by Israel against Tunisian territory in flagrant violation of the Charter of the United Nations, international law and norms of conduct.” S.C. Res. 573 (Sept. 12, 2001).}

Two weeks later, the Council unanimously adopted anti-terrorism resolution 1373 (2001) on September 28, 2001, which obligates all Member States to take a series of specific actions to prevent and suppress acts of terrorism and created a committee to monitor implementation of the resolution. On October 7, 2001, the US government notified the Security Council that it had, together with other States, “initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.” It had “obtained clear and compelling information that the Al-Qaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks...Despite every effort by the United States and the international community, the Taliban regime has refused to change it policy. From the Territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack...
innocent people throughout the world and target United States nationals and interests in the United States and abroad. In response to these attacks, and in accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States.\[^{35}\] The Council's authorization of the International Security Assistance Force in resolution 1386 (2001) and its expansion in resolution 1510 (2003) confirm the legality of the operation.

In the case of the US and coalition forces invasion of Iraq, the claimed legal basis is Security Council resolution 1441 of November 7, 2001, which found Iraq to be in "material breach" of prior resolutions and warned of "serious consequences" if it did not disarm. Assuming that a self-defense justification was valid in the case of Afghanistan and that the Security Council accepted it as such, the self-defense in 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 made—at least not as a legal justification beyond some political posturing—that Iraq was responsible for terrorist attacks on the United States or for harboring, training or even funding the terrorists who committed them. 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 under the "old paradigm" or preventive attack under a "new paradigm" and, as will be discussed below, the United States used both.

The claim that the 2003 war in Iraq was not a preemptive or preventive attack but rather military action under Security Council Resolutions 679 and 687 of 1991 as a result of Iraq's failure to comply with Security Council Resolution 1441 is not persuasive.\[^{36}\] It is a


unilateral interpretation, notwithstanding Security Council resolution 1511, in which the Council authorized, after the fall of Baghdad, "a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq..." Official US statements have frequently referred to the threat Saddam Hussein's WMDs posed for the US, not that the US was enforcing Security Council resolutions. Although the legal office of the State Department asserts that Security Council Resolution 1441 was an application of the doctrine of preemption, only two Council members see it that way. With respect to "necessity," Schachter noted the US interpretation that it was necessary to act "to prevent future actions" thus giving necessity a kind of "operational meaning." With regard to "proportionality," he distinguished the question of whether "the bombing or other military action was necessary and proportional to the crime" from the question of whether it was "proportional to the threat in the future." Considering that "there's ample evidence that the people who are responsible for this, bin Laden and his group, do look to this as a continuing war," he concluded "the apparent weaponry at the command, on a world scale, of the alleged terrorist group, makes it reasonable to react with sufficient strength." It is also difficult to assess proportionality with respect to bombing civilian areas. The "awful dilemma" regarding the

1441 as the authority for the military action by the US and the UK but considers the action legal because the breach of the ceasefire by Iraq reactivated the authority of resolution 678 (1990). See Michael N. Schmitt, The Legality of Operation Iraqi Freedom Under International Law, 3 J. MIL. ETHICS, 82, 98 (2004).


fact that the terrorists hide within the civil population is one on which the Security Council has the authority to act. Schachter concludes, "So we end up, as it were, with a delegation of authority in the Security Council. And the Security Council has this extraordinary grant of authority, which can, on the whole, be maintained and respected, because it has the unanimity requirement, unanimity of the permanent members and, as these recent events have shown, the unanimity of all the members of the Security Council and, pretty generally, nearly all the members of the UN. So that is, in a way, the safeguard that one can look to for some assurance that these requirements of self-defense, necessity, and proportionality do have a significance in evaluating the actions of the United States and its allies."  

Antonio Cassese commented on the issue of self-defense under the traditional paradigm as follows: "The magnitude of the terrorist attack on New York and Washington may perhaps warrant this broadening of the notion of self-defense....Whether we are simply faced with an unsettling 'precedent' or with a conspicuous change in legal rules, the fact remains, however, that this new conception of self-defense posed very serious problems."  

He then discusses problems arise regarding the target, timing, duration, and the admissible means of self-defense under the new paradigm. Specifically, he is concerned about the expansion of the notion of self-defense to allow force to be used against the territory of any state harboring the terrorist organization, thus equating aiding and abetting terrorism with an armed attack.

In sum, under the *jus ad bellum* rules of the traditional paradigm, the war in Afghanistan was legally much more justified than that against Iraq. But what about *jus in bello*? Both the Afghanistan and Iraq conflicts are international armed conflicts in which the Geneva Conventions and Protocol I apply. On May 1, 2003, President Bush declared, "Major combat operations in Iraq have ended."  

Normally, the conflict would become an internal armed conflict and Common

40. *Id.*


42. Remarks by the President from the USS Abraham Lincoln At Sea Off the Coast of San Diego, California, Office of the Press Secretary, May 1, 2003, http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501-15.html (last visited Aug. 6, 2005) [hereinafter USS Abraham].
article 3 and Protocol II would apply.\textsuperscript{43} However, as long as the occupation continues, the Fourth Geneva Convention applies. Significantly, President Bush also stated in the same address, "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."\textsuperscript{44} The situation is ambiguous in law: the war against Iraq has ended in the sense that the armed forces of the state have been defeated and the country's leader is under arrest and nation-building is taking place under a presumed sovereign Iraqi state while occupation and fighting insurgent continues. At the same time, the war against terrorism, on which the "new paradigm" is based and which is continually associated with the battle against the insurgency in Iraq, continues.

B. Terrorism as Criminal Behavior

The second dimension of the traditional paradigm is to treat acts of terrorism as international criminal behavior rather than acts of war. According to treaties of international criminal law, states parties are obliged to treat terrorist acts as criminal and to develop appropriate means of cooperation with other countries to search out and capture of suspects, conduct extensive investigations and prosecute and punish under domestic and international criminal law. The standard duty regarding criminal prosecution of terrorism against civilian aircraft is to try or extradite (\textit{aut dedere aut prosequi}). This is the rule of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation\textsuperscript{45} and of US Law.\textsuperscript{46} This was the approach Attorney-General Ashcroft seemed to articulate when he said, "We will find the people responsible for these cowardly acts and justice will be done."\textsuperscript{47} And George W. Bush said, referring to bin Laden, "I want him brought to justice."\textsuperscript{48}

\textsuperscript{43} The rules would apply as customary international law, since neither Iraq nor the US are parties.
\textsuperscript{44} USS Abraham, supra note 44.
\textsuperscript{45} Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 7, Sept. 23, 1971, 24 UST 564.
\textsuperscript{46} See 18 U.S.C. §32.
\textsuperscript{47} Jack Kelley, Kevin Johnson & Toni Locy, Our intelligence was lousy: Blame game begins, USA TODAY, Sept. 12, 2001.
\textsuperscript{48} Transcript of Prime Time News Conference, Office of the Press Secretary, Oct. 11,
The EU response to 9/11 remains resolutely within the "traditional paradigm" in so far as the "fight" (not "war") against terrorism falls within the same area of concern as organized crime. The EU describes its efforts as follows:

Since the attacks of 11 September 2001, the European Union has been determined to step up the fight against terrorism. With this in mind, it has adopted a Framework Decision urging Member States to align their legislation and setting out minimum rules on terrorist offences. After defining such terrorist offences, the Framework Decision lays down the penalties that Member States must incorporate in their national legislation.

The Framework Decision deals with such matters as defining offenses and establishing jurisdiction and determining penalties. Even after the terrorist attacks in London of July 2005, the UK and other European countries revised their anti-terrorism legislation in ways that may have compromised civil liberties but with an effort to remain within the boundaries set by the European Convention on Human Rights.

It has also been argued, in particular by the UN High Commissioner for Human Rights immediately after the attacks of 9/11, that such terrorist acts should be criminally prosecuted as crimes against humanity. This interpretation would seem to fit the definition of these crimes in the Statute of the International Criminal Court, although there may be an issue with the scale of the attack falling short of the "widespread or systematic" criterion. International lawyers have proposed a specially constituted international criminal court, in light of

53. Rome Statute of the International Criminal Court, art. 7, Jul. 17, 1998, 2187 U.N.T.S. 90. Defines crimes against humanity as "murder … other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health … committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Id.
the lack of jurisdiction under the Statute of the International Criminal Court. 54 

Referring to numerous international treaties on terrorism Antonio Cassese concludes that "at least trans-national, state-sponsored or stated-condoned terrorism amounts to an international crime, and is already contemplated and prohibited by international customary law as a distinct category of such crimes."55 Applying the term quite literally, Cassese deems "war" to be an obvious misnomer. 56 Thus, there is no needed for a "new paradigm" to establish the legal basis for effective anti-terrorism law enforcement.

III. THE NEW PARADIGM: TERROR AS THE ENEMY IN THE POST 9/11 WORLD

Terminologically, "war" ceased with the UN Charter to be the legal category it was throughout the history of international law. It is not used in the UN Charter or in the Geneva Conventions, which use "breach of the peace," "act of aggression," "armed attack," and "armed conflict." Legally, "war" and its equivalents are conducted against a state, a belligerent, or an insurgent, but not non-state actors (such as Osama bin Laden, Al-Qaida, or other unidentified individuals). As Jordan Paust pointed out in an Insight distributed by the ASIL.

Under international law, we could not be at "war" with an entity that has a status less than that of an insurgent (which status pertains during an insurgency or armed conflict not of an international character within the meaning of common article 3 of the 1949 Geneva Conventions), unless that entity is directly involved with others engaged in a "war". If we are fighting insurgents, we would be at "war" in at least one sense—regarding application of certain laws of war. ...We could not be at "war" with Osama bin Laden, since he and his entourage are in no way representatives or leaders, et al., of an "insurgency" within the meaning of international law. He is also not a recognized leader of a "nation," "belligerent," or "state". We are in fact engaged in an armed conflict of an international character with Iraq, a

55. Antonio Cassese, supra note 41, at 999. Philippe Sands calls it a "phony 'war' ...used to eviscerate well-established and sensible rules of international law..." PHILIPPE SANDS, LAWLESS WORLD: MAKING AND BREAKING GLOBAL RULES, 206 (2006).
56. Anne-Marie Slaughter, supra note 55.
continual use of force during which all laws of war apply even though there is no formal US declaration or recognition of "war."  

Nevertheless, the President calls it "A war against all those who seek to export terror and a war against those governments that support or shelter them." Accordingly, he ordered the deployment of American troops to attack Afghanistan—for harboring terrorists—and Iraq—for alleged links to Al Qaida, at least indirectly. The legal arguments for such an interpretation are based on legitimate responses to violations of international law, self-defense, pre-emptive war and preventive war. Soon after September 11, 2001, the rhetoric of the Bush administration, followed by military action, abandoned a traditional legal approach to terrorism in which terrorists are prosecutable under international criminal law, claiming that the events of 9/11 set forth and justified a "new paradigm." The abstract nature of the term "terrorism" to designate the enemy, is reinforced by the rhetoric of values. Former Attorney General John Ashcroft proclaimed, "we're on the winning side of the values war." Presidential Directive 9 proposes the "elimination of terrorism as a threat to our way of life." The war is couched as a moral battle with biblical resonance reflecting the dual influence of the Christian right on the Bush administration and the tradition of "American exceptionalism" in international relations. This "new paradigm" is part of the Bush Doctrine that asserts the right of the US—presumed defender of these values—to act unilaterally to interpret

international law as allowing it to engage in preemptive and preventive war and marginalize treaties of human rights and humanitarian law. What legal arguments can be invoked to justify this so-called “paradigm shift”? In an address at the Council on Foreign Relations in 2003, Attorney General John Ashcroft acknowledged that, “in order to fight and to defeat terrorism the Department of Justice has added a new paradigm to that of prosecution, and that new priority is the priority of prevention.” In discussing the partnerships forged by the US to fight terror, Ashcroft proclaimed the mission to assure, “the opportunity of the rule of law to prevail over the reign of terror.” In fact, Ashcroft used the term “rule of law” eighteen times in the course of his address. The rule of law to which he is referring must be something other than the respect for the existing rules of international law since he announced a shift away from established rules. The same idea appears in the now-infamous January 25, 2002 memo from (now Attorney General) Alberto Gonzales to the President, referring to the President’s proclamation that “the war against terrorism is a new kind of war,” and going on to declare that “this new paradigm renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.” President Bush also referred to this “new paradigm” in a February 7, 2002 memo in which he states, “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.”

Others have argued that some updating and evolution of the international framework is necessary. In their 2002 article, “An International Constitutional Moment,” Anne-Marie Slaughter and William Burke-White explained that “in this new paradigm, we need new rules.” Among the new rules would be a change to Article 2(4), “to establish parallel prohibition on the use of force between states and

63. Memorandum from Attorney General Alberto Gonzales to President Bush (Jan. 25, 2002) reproduced in Mark Danner, supra note 5, at 84 [emphasis added]. The examples of quaint provisions are “commissary privileges, script (i.e., advances of monthly pay), athletic uniforms, and scientific equipment.” Id.
64. Id. at 105.
the use of force against civilians—parallel prohibitions that are the twin foundations of the international legal order.” The current rules of international humanitarian law and international criminal law certainly prohibit the use of force against civilians as such; the innovation would be in raising attacks on civilians to the level of acts of aggression against states or threats to international peace and security. Security Council Resolution 1269 (1999), among others, has already acknowledged that acts of terrorism could threaten international peace and security and the Council clearly stated in Resolution 1368 (2001) that it regarded the acts of 9/11, “like any act of international terrorism, as a threat to international peace and security.”

The Summit of heads of state and government of September 2005 endorsed the concept, originally articulated by an international commission, of the “responsibility to protect.”

However, due to an amendment by Ambassador Bolton of the U.S., the final text merely states that “Each individual State has the responsibility to protect its population” from various mass atrocities and the “The international community should, as appropriate, encourage and help States to exercise this responsibility and should support the United Nations to establish an early warning capability.” This is a far cry from the draft, which said:

[T]his responsibility to protect entails the prevention of such crimes, including their incitement. We accept this responsibility and agree to act in accordance with it. ... The international community, through the United Nations, also has the obligation to use diplomatic, humanitarian and other peaceful means, including under Chapters VI and VIII of the Charter to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we recognize our shared responsibility to take collective action, in a timely and decisive manner, through the Security Council under Chapter VII of the UN Charter and, in co-operation with relevant regional organizations, should peaceful means be inadequate and national authorities be unwilling or unable to protect their populations.

Charles Kupchan has written on whether a paradigm shift in foreign policy necessitates a shift in frameworks, arguing that 9/11 does not

warrant such a shift. However, he acknowledges that "Washington is right to put this issue at the top of the international agenda and to suggest that the preventive and preemptive use of force may be necessary to deal with related threats," and that "this new reality requires updating existing norms about the use of force." He goes on to note that in an era of failed states, there is a need to update doctrines regarding intervention and perhaps preventive war. Yet, he notes, a shift would have a greater impact if asserted at the policy level, to preempt the need for preemptive force with preemptive development and education in failed states. He concludes that, "change should come as part of a natural intellectual evolution, not as a precipitous overreaction to the events of September 11."  

Michael Glennon in his book *Limits of law, prerogatives of power: intervention after Kosovo* and in his May/June 2003 *Foreign Affairs* article argued that the rules of international law on the use of force and the rules of the Security Council do not reflect reality of the behavior of states or "American hyperpower." He writes, "Although the effort to subject the use of force to the rule of law was the monumental internationalist experiment of the twentieth century, the fact is that that experiment has failed." Many scholars, including Anne-Marie Slaughter, have questioned Glennon's contention that state practice (namely, the US invasion of Iraq) makes the UN obsolete and have asserted that improvements in international security need not require complete abandonment of the most critical norm restraining geopolitics.

The claim that 9/11 requires a paradigm shift in international law, is highly politicized and tends to be supported or rejected depending on the degree of support for the foreign policy of the Bush Administration. It should rather be assessed in light of the consequences it is likely to have on the norms and effectiveness of international law, to which I will now turn.

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71. *Id.* at 102.

72. *Id.* at 108.

73. See Michael J. Glennon, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTION AFTER KOSOVO (Palgrave 2001).

IV. CONSEQUENCES OF THE NEW PARADIGM ON INTERNATIONAL LAW

Among the consequences of the claim that the rules governing the use of force and responses to terrorism have shifted paradigmatically are the emergence of a theory of preventive war and a disastrous weakening of the already fragile international human rights regime.

The significance of a paradigm shift was not lost on other countries. For example, speaking for the non-aligned movement during the debate over intervention in Iraq, the representative in 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.75

These far-reaching implications relate to the doctrine of preventive war, the weakening of international humanitarian law, and the marginalization of international human rights law.

A. Pre-emptive and Preventive War

The arguments to justify the wars in Afghanistan and Iraq extend Article 51 self-defense to embrace the concepts of “pre-emptive” and “preventive” wars.

As Condoleezza Rice explained in the run up to war, “as a matter of common sense, the United States must be prepared to take action, when necessary, before threats have fully materialized.” She added:

Preemption is not a new concept. There has never been a moral or legal requirement that a country wait to be attacked before it can address existential threats. ... The United States has long affirmed the right to anticipatory self-defense -- from the Cuban Missile Crisis in 1962 to the crisis on the Korean Peninsula in 1994.76

Where is the definition of when pre-emption might actually be justified?” asks Ignatieff. The American people were told:

[T]hat intervention was necessary to meet a real and imminent threat. Now the line seems to be that war wasn’t much of an act of pre-emption at all, but rather a crusade to get rid of an odious regime. But this then makes it a war of choice - and the Bush administration came to power vowing not to fight those. At the moment, the Unites States is fighting wars in two countries with no clear policy of intervention, no clear end in sight and no clear understanding among Americans of what their nation has gotten itself into.

According to Secretary of Defense Donald Rumsfeld,

There is no question but that the United States of America has every right, as every country does, of self-defense, and the problem with terrorism is that there is no way to defend against the terrorists at every place and every time against every conceivable technique. Therefore, the only way to deal with the terrorist network is to take the battle to them. That is in fact what we’re doing. That is in effect self-defense of a preemptive nature.

The 2002 National Defense Strategy set out the doctrine officially:

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. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.

We must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries. Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.

The concept of pre-emptive attack as part of self-defense has some acceptance in international law in the context of anticipatory self-defense against a nuclear attack. However, those who support the idea acknowledge that the doctrine applies if steps have been taken prelimi-

77. Michael Ignatieff, supra note 12, at 43.
78. Id.
nary to an attack with such weapons and if it would be unreasonable to expect the threatened state to wait for an actual armed attack. The claim that Operation Iraqi Freedom was a preventive war applying this extension of the self-defense doctrine fails to meet both conditions of the already contested notion of anticipatory self-defense. First, one would need more than intelligence the US and the UK claim to have relied on and which subsequently proved flawed that Saddam had WMDs; the doctrine of anticipatory self-defense requires that there be evidence of preliminary steps to deploy the weapons. Schmitt considers anticipatory self-defense to require that “the potential aggressor has irrevocably committed itself to attack” and finds “little evidence...of an Iraqi intention to use WMD in the near future.” Second, the restrictions laid out in the Carolina case would have to be met, namely, that the imminence of the attack leave “no moment for deliberation” and “no choice of means,” neither of which we met. As Schachter concluded, the Carolina case established “a rule of restraint, not a license to wage preventive war.” The doctrine of preventive war is thus not acceptable under current international law and the U.S. has had to rely on a purported new paradigm to justify it.

B. Impact of the New Paradigm on International Humanitarian Law

Among the consequences of this doctrine is a weakening of the application of international humanitarian law (IHL), especially with regards to the protection of civilians and the determination of POW status. The issue of treatment of detainees concerns both humanitarian law and human rights and will be treated below under human rights.

1. Protection of Civilians

The basic norm, as restated in Protocol I, is as follows: “In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between

82. Schmitt, supra note 36, at 92-93.
83. Id. at 152.
the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”

Further, “It is prohibited to attack, destroy … or render useless objects indispensable to the survival of the civilian population…” The U.S. Department of Defense considers these norms to be “a codification of the customary practice of nations and therefore binding on all.” 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.”

As in all wars, the toll on civilians was terrible and, by some assessments, excessive in light of these norms of international humanitarian law. In a survey published in *The Lancet*, mortality prior to the invasion of coalition forces was compared with that after the invasion and the authors found a 58-fold increase in civilian death from violence. They estimated that 100,000 excess civilian deaths had occurred and that “more than half of the deaths reportedly caused by the occupying forces were women and children.” Human Rights Watch conducted a mission of inquiry to Iraq between late April and early June 2003 and found widespread use of ground-launched cluster munitions, unsound targeting methods, and air strikes on civilian power distribution


85. *Id.* at art. 54.


facilities. Although the mission did not attempt to count civilian deaths, it found significant issues in the conduct of the ground and air war that call for precautions to be taken to respect IHL with respect to indiscriminate attacks on civilians and civilian objects.\(^89\) In another study, Human Rights Watch looked at civilian deaths caused by U.S. military forces in Baghdad since May 1, 2003.\(^90\) While the report does not claim that the Coalition Forces were deliberately targeting civilians, it did conclude that they were not “doing enough to minimize harm to civilians as required by international law” and documents 18 of the 20 cases of legally questionable civilian deaths between May 1 and September 30, 2003.\(^91\) The team also found:

[A] pattern by U.S. forces of over-aggressive tactics, indiscriminate shooting in residential areas and a quick reliance on lethal force. In some cases, U.S. forces faced a real threat, which gave them the right to respond with force. But that response was sometimes disproportionate to the threat or inadequately targeted, thereby harming civilians or putting them at risk.\(^92\)

Significantly, the protection of civilians remains an obligation of the occupying force. According to Human Rights Watch, legal officials of the U.S. and coalition forces “agreed that U.S.-led coalition forces were governed by the Fourth Geneva Convention.” They also agreed that in the absence of a cessation of hostilities in Iraq, the coalition was in “a state of armed conflict and a state of occupation.”\(^93\)

2. Determination of POW Status

The new paradigm has been invoked to justify treating suspected terrorists as falling within a new category that is neither a member of the enemy’s armed forces nor a criminal element of society, but rather as a person who should be placed in legal limbo, while the detaining force determines whether and to what extent they constitute a danger and are of intelligence value. The Presidential Memo of February 7,

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91. Id. at 4.
92. Id. at 5.
93. Id. at 42.
2002, reads, "I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war."94 However, the Third Geneva Convention provides

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.95

The International Committee of the Red Cross considers that the POW convention should apply to the detainees. First of all, it questions the US government determination that the detainees are "unlawful combatants" and interprets Geneva Third and Fourth Conventions as allowing only two categories of detainees: either the individual apprehended is an enemy combatant and must be treated as POWs under the Third Geneva Convention and released after the cessation of hostilities or a civilian detainee, who must be charged and tried or released.

Rather than applying the Third Geneva Convention, the U.S. is applying Executive Order on the Detention, Treatment and Trial of Certain non-Citizens in the War Against Terrorism of November 13, 2001.96 The order authorized the Secretary of the Defense to detain and try before a military court (called a "commission") any non-US citizen whom the President determines to be a member of Al Qaida, participated in terrorism or harbored individuals who have done so. 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.

Amnesty International argued that the military commissions "violate the principle of non-discrimination (as the order applies only to non-US

citizens) and lack fundamental safeguards for fair trial provided for in international law."97 It called for the U.S. to revoke the presidential order.98 Human Rights Watch (HRW) voiced its criticism and called for the rescission the Executive Order, in a letter to President Bush on November 15, 2001, in which HRW said, "the broad reach of the executive order sacrifices fundamental rights to personal liberty and to a fair trial that go far beyond what is permitted even in times of crisis."99 The ICRC expressed its concern

[A]bout 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.100

A related practice is deportation of a suspect to a country which may practice torture. The case of Maher Arar, a Syrian-born Canadian, is illustrative. Arar worked for a high-tech firm in Boston and had federal authorization to travel to and from the US. In September 2002, on his return to Montreal from vacation, he made a transfer stop at JFK airport, where he was detained and interrogated by the FBI and an immigration


99. Letter from Kenneth Roth, Executive Director, Human Rights Watch, to President Bush (Nov. 15, 200) (on file with the author). The letter further stated the Executive Order: [I]s contrary to fundamental principles of human rights. While the rights in question may be derogated from in times of emergency, the US must show that this is being done only to the extent strictly required by the exigencies of the situation. The far-reaching and ambiguous reach of the Executive Order strongly indicates that this is not the case. It is hard to imagine such a military commission escaping criticism by the US government if created by another government. It is wrong and unlawful for the US government to arrogate to itself the power to transgress these well established protections of international human rights law.

officer for two days and his requests to see a lawyer were denied. Accused of having links to terrorist organizations, he was kept for two weeks and then deported to Syria, where he was detained and tortured for ten months. 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 Canadian government announced in January 2004 that it was conducting an inquiry and the Center for Constitutional Rights filed suit in the U.S. District Court against the Attorney General, the FBI Director, the Homeland Security Director and others, claiming violations of Arar's but the case was dismissed on February 16, 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.\footnote{101}

The Supreme Court decided by 6 to 3 on June 28, 2004 that 14 foreign nationals captured abroad in connection with hostilities and incarcerated at Guantánamo were entitled to file habeas corpus writs to have their claim of wrongful imprisonment heard by a federal judge.\footnote{102}

Regarding the military commissions that are finally trying some of the Guantánamo detainees, the ICRC remarked:

> International Humanitarian Law provides for the prosecution of people suspected of having committed war crimes or any other criminal offence. It requires that the individuals concerned be afforded essential judicial guarantees. These include the presumption of innocence, the right to be tried


by an impartial and independent tribunal, the right to qualified legal counsel, and the exclusion of any evidence obtained as a result of torture or other cruel, inhuman or degrading treatment.\textsuperscript{103}

The insistence by the U.S. Government that persons detained in relation to the conflicts in Afghanistan and Iraq are not protected by the Geneva Conventions because they are “unlawful combatants,” is a departure from a longstanding tradition. 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{104} 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{105} 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 held, but only 10 have been charged.

In 1977, Richard Baxter, a Harvard Law Professor and member of the U.S. Delegation to the diplomatic conference that adopted the Additional Protocols, observed, “It is true that political considerations become caught up in the law…but at the core of the law of war has always been a concern with the human rights of those enemy military and civilian personnel who become the victims of war.”\textsuperscript{106}

\textsuperscript{103} Id.

\textsuperscript{104} Ex parte Quirin, 317 U.S. 1 (1942), a United States Supreme Court case. Argued 29 and 30 July 1942. Decided July 31, 1942. Extended opinion filed October 29, 1942. (confirming the jurisdiction of a U.S. military tribunal to try German saboteurs in the US.).


The definition of prisoners of war that emerged most recently gave that status to all combatants except those who do not carry arms openly during combat or during deployment prior to combat. Those who do not carry arms openly during these phases are entitled to prisoner of war treatment but may be tried and punished for failing to declare themselves as the combatants they are.

\textit{Id.} at 12. And prophetically, he said in 1977:

From the perspective of the United States, the law often does no more than specify the way in which this country would wish to treat enemy personnel. There would be very few people in the United States prepared to argue that civilians should be punished without trial...that prisoners of war should be tortured for information.

\textit{Id.} at 12-13.
C. Human Rights Consequences of the New Paradigm of the War on Terror

Human rights standards have been downplayed as legal constraints under the “new paradigm.” Certainly the legitimate concern for the human rights of the victims of terrorism justifies special measures of protection consistent with the rules governing limitations and derogations built into the human rights regime. However, disregarding traditional rules governing treatment of detainees constitutes a greater threat to human rights and lowers standards in ways that do more harm than alleged advantages of “extreme interrogation” in dealing with perceived perpetrators of terrorism wherever they may be. Writing in the Department of State Bulletin, the chair of a Cabinet Committee to Combat Terrorism stated, “[t]he US approach to counterterrorism is based on the principle derived from our liberal heritage, as well as from the U.N. Declaration on Human Rights which affirms that every human being has a right to life, liberty and “security of person.” Yet the violence of international terrorism violates that principle. The issue is not war...The issue is [quoting a former Secretary of State] whether the vulnerable lines of international communication can continue without disruption to bring nations and people together.”107 He concludes by referring to the responsibility of government to protect the right to life: “There is no reason why protection of this right and of our citizens need necessary conflict with other human rights such as self-determination and individual liberty.”108 That was in 1974 under the Nixon administration. Thirty years later, the nature of the challenge of balancing security and liberty has not changed in any fundamental way that could properly be characterized as a paradigm shift.

In defining his strategy for responding the terrorism in 2005, the Secretary-General of the UN declared,

I regret to say that international human rights experts, including those of the UN system, are unanimous in finding that many measures which States are currently adopting to counter terrorism infringe on human rights and

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108. Id. at 545.
fundamental freedoms. Human rights law makes ample provision for strong counter-terrorist action, even in the most exceptional circumstances. But 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. Upholding human rights is not merely compatible with a successful counter-terrorism strategy. It is an essential element in it. 109

The UN has expressed a consistent position on the balancing of human rights with the causes of and responses to terrorism. According to that position, on the one hand, “terrorism, in all its forms and manifestations, wherever and by whomever committed, can never be justified in any instance, including as a means to promote and protect human rights,” while, on the other hand, “all measures to counter terrorism must be in strict conformity with international law, including international human rights and humanitarian law standards.” 110

The human rights system allows for limitations and derogations, particularly those provided for in the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party. With respect to six of the rights protected by the ICCPR, 111 states parties may limit the enjoyment of certain rights on condition that the limitation is prescribed by law, required in a democratic society, and necessary to protect public order, public health, public morals, national security, public safety, rights and freedoms (reputation) of others. 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 provided they meet the formal requirement of being officially proclaimed and notified to the Secretary-General of the UN; that they do not discriminate on the basis of race, colour, sex, language or social origin; that they apply to a "public


111. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171. These rights are: freedom of movement, right to a public trial, freedom of religion, freedom of opinion, right to peaceful assembly and freedom of association. Id. at arts. 12, 14, 18, 19, 21, 22.
emergency which threatens the life of the nation” (the condition of necessity); that they be “strictly required by the exigencies of the situation” (the condition of proportionality); and that they do not relate to any of the seven non-derogable rights. 112

Much of the attention on the restrictions of civil liberties at home has focused on the USA PATRIOT Act, (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism and Uniting to Secure America), which was adopted with broad, bipartisan support by Congress a month and a half after the attacks of Sept. 11, 2001, and renewed with the elimination of some troublesome provisions in March 2006. The stronger powers given to government agencies to protect Americans’ safety have come under criticism, especially those relating to domestic intelligence gathering, even of domestic organizations, and apprehension of any international terrorists still in the United States. 113 The United States is in a time of proclaimed national emergency 114 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 bothered to do so. 115

By far the most significant challenge for the traditional paradigm of international human rights law, posed by the U.S. 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

112. 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.

113. For example, the ACLU filed requests under the Freedom of Information Act regarding individuals and organizations that have been interviewed, investigated and subjected to searches by the terrorism tasks forces created in 100 cities, more that half of which were created after 9/11. The ACLU cites the American Friends Service Committee in Denver and various animal rights, peace and environmental groups. The FBI explains that any investigation by the FBI is carried out under Justice Department Guidelines required existence of criminal activity and that the person may know something about a crime. Curt Anderson, ACLU Challenges FBI on Anti-terror Probes, THE BOSTON GLOBE, Dec. 2004, at A23.


115. Office of the High Commissioner for Human Rights, List of States which have proclaimed or continued a state of emergency, UN doc. E/CN.4/Sub.2/2005/6, (July 7, 2005).
Afghanistan and Guantánamo Bay, deportation of suspects to countries suspected of practicing torture, and “ghost detainees.”

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 the Third Geneva Convention, both of which the United States has ratified. The Torture Convention defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, 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.

It does not provide for an exception in war time. Torture is prohibited, period. The Geneva Convention makes torture a grave breach, punishable as a war crime. The Commission on Human Rights in 2004 condemned

all forms of torture and other cruel, inhuman or degrading treatment or punishment, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified, and calls upon all Governments to implement fully the prohibition of torture and other cruel, inhuman or degrading treatment or punishment” and condemned “in particular any action or attempt by States or public officials to legalize or authorize torture under any circumstances, including through judicial decisions, and calls upon Governments to eliminate practices of torture.

The Commission also reminded “Governments that intimidation and coercion, as described in article 1 of the Torture Convention, including serious and credible threats, as well as death threats, to the physical
The integrity of the victim or of a third person, can amount to cruel, inhuman or degrading treatment.”

The new paradigm is reflected in a Justice Department memo of August 2002: “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.”\textsuperscript{119} 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.”\textsuperscript{120} The uproar over this language led President Bush to announce on June 26, 2003, “The United States is committed to the world-wide elimination of torture and we are leading this fight by example.”\textsuperscript{121} The position of the United States government, as reflected in the March 6, 2003, Department of Defense Working Group on Detainee Interrogation in the Global War on Terrorism, and the August 1, 2002, Memorandum signed by Jay Bybee, then head of the Office of Legal Counsel for Robert M. Gonzales Counsel to the President on Standard of Conduct for Interrogation does not accept the interpretation of the Commission on Human Rights.\textsuperscript{122} These documents allow torture if the President sets aside the Torture Convention obligations under his war-making powers, and allows acts that fall short of torture, even if they amount to cruel, inhuman or degrading punishment.\textsuperscript{123} Subsequently, the White House and Justice Department have minimized the relevance of that memo and taken the official position reflected in this statement by Gonzales of June 2004:

But if there still remains any question, let me say that the U.S. will treat people in our custody in accordance with all U.S. obligations including federal statutes, the U.S. Constitution and our treaty obligations. The President has said we do not condone or commit torture. Anyone engaged in conduct that constitutes torture will be held accountable. The President has

\begin{itemize}
  \item \textsuperscript{119} Memorandum from the Justice Department (Aug. 2002) quoted in \textsc{Seymour Hersh, Chain of Command. The Road from 9/11 to Abu Ghraib} 4 (HarperCollins, 2004) [hereinafter Hersh].
  \item \textsuperscript{120} \textit{Id.} at 5.
  \item \textsuperscript{122} U.S. Dept. of Justice Memo from Deputy Assistant Attorney General John Yoo to Alberto R. Gonzales, \textsc{White House Counsel}, http://news.findlaw.com/hdocs/docs/doj/bybee80102ltr.html.
  \item \textsuperscript{123} \textit{See id.}
\end{itemize}
not directed the use of specific interrogation techniques. There has been no presidential determination necessity or self-defense that would allow conduct that constitutes torture. There has been no presidential determination that circumstances warrant the use of torture to protect the mass security of the United States.¹²⁴

Nevertheless, the perceived willingness of the administration to resort to torture has reopened the debate. In Why Terrorism Works,¹²⁵ Alan Dershowitz cites an Israeli scholar’s new category of “megalomaniac hyperterrorism.”¹²⁶ He concludes that “we will never again be able to lower our guard against the kind of massive terrorism we experienced on September 11, 2001. This is an endless war with ever changing enemies, always moving from place to place.”¹²⁷ Dershowitz explains his position using the well-known hypothesis of the bomb that is hidden in some crowded place and will go off unless a captured suspect is forced to reveal where it is in time for it to be disarmed. Building on his experience in Israel, where the “ticking bomb” case is not perceived as a hypothetical for classroom discussion but as a tragic fact of life, he writes:

[I]t is certainly better to inflict nonlethal pain on one guilty terrorist who is illegally withholding information needed to prevent an act of terrorism than to permit a large number of innocent victims to die. Pain is a lesser and more remediable harm than death; and the lives of a thousand innocent people should be valued more than the bodily integrity of one guilty person.¹²⁸

The characteristics of this “new paradigm” of terrorism are: Targeting aim at harming maximum numbers of victims rather than a few symbolically chosen the gain sympathy for a political cause; Desire for access to weapons of mass destruction; The perpetrators are non-state actors, unconstrained by potential negative consequences for international relations, as Libya encountered. ¹²⁸. Id. at 144.
To his credit, Dershowitz addresses squarely the negative arguments based on the simple-mindedness of utilitarian quantification, the slippery slope argument, the torture-doesn’t-work argument, and he examines Dostoyevsky, Bentham (in favor), Kant (against) and Voltaire (confused). His preference, in the end, is for a democratic discussion followed by allowing nonlethal torture with a warrant under rare circumstances of the ticking bomb.

Michael Ignatieff has argued that, in time of terrorist emergency, the ethical dilemma in a democracy confronted by terrorism is not limited to the choice between abandoning human rights to strengthen our hand against the enemy or preserving human rights as essential to our existence as a democracy, even at the expense of facilitating the work of terrorists. His third position—which he calls “the lesser evil”—“holds that in a terrorist emergency, neither rights nor necessity should trump.”129 In summary, his argument is that “rights may have to bow to security in some instances, …[and] rights cannot so limit the exercise of authority as to make decisive action impossible.”130 He acknowledges this is a “balancing act,” an ethical position designed for skeptics in which “nothing trumps.”131 As long as a democratic process—especially “adversarial review, checks and balances, openness—determine when and what measures restrict civil liberties, such restriction is a “lesser evil” than the harm the putative terrorist attack would cause. He draws this red line: “Openness in any process where human liberty is at stake is simply definitional of what a democracy is.”132 “The problem,” he adds, “is not in defining where the red line lies but in enforcing it.”133

A less tolerant view of limiting rights to combat terrorism is expressed by David Cole, a law professor at Georgetown University and attorney for the Center for Constitutional Rights. In Enemy Aliens, he identifies the trend in the history of restrictions on civil liberties in time of war and other crises in the United States: “in the midst of security crises, government officials often see rights protections as little more than obstacles to getting the job done. Their message, he continues,

129. Michael Ignatieff, supra note 12, at 8.
130. Id. at 9.
131. Id.
132. Id. at 12.
133. Id.
"give us broad powers, and trust us not to abuse them." However, he explains, "at some point after—and often long after—the emergency has passed, the government’s conduct is widely acknowledged to have been an overreaction."

In Cole’s assessment, "the judgment of history is not that tragically difficulty sacrifices were necessary and appropriate given the threat presented, but that the government overreacted, sacrificing far more than the emergency warranted. But that judgment has generally come too late to help the thousands of human beings injured in the name of national security." He traces the evolution of the human rights groups objections to the treatment of prisoners at Guantánamo and in Afghanistan (at Bagram Air Base), and to the official position that the Geneva Conventions did not apply. Human Rights Watch was particularly vehement about applying the Geneva conventions to the Taliban and in Guantánamo. During the military trial of US soldiers accused of causing the death in 2002 of two Afghan prisoners at the Bagram detention center, an observer noted that the cases “illustrate how unprepared many soldiers were for their duties at Bagram, how loosely some were supervised and how vaguely the rules under which they operated were defined.” The administration regularly reaffirmed that torture was not practiced and the President issued a statement on the UN International Day in Support of Victims of Torture in June 2003 that the US would abide by the Torture Convention and not use cruel, inhuman or degrading treatment.

135. Id. at 229.
136. Hersh, supra note 119, at 2.
137. Id. at 18.
139. Hersh, supra note 119, at 19.
However, stripping prisoners, putting them in stress positions and depriving them of sleep were not considered by the Administration to meet the definition.

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. In the 53 page report by Major General Antonio M. Taguba of February 2004 citing instances of “sadistic, blatant, and wanton criminal abuse” at Abu Ghraib.140 The abuses he noted include: “breaking chemical lights and pouring the phosphoric liquid on detainees; pouring cold water on naked detainees, beating detainees with a broom handle and a chair; threatening male detainees with rape; ...sodomizing a detainee with a chemical light; ...using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.”141 Seymour Hersh comments on these practices and those illustrated in the photographs, “Such dehumanization is unacceptable in any culture, but it is especially so in the Arab world.”142

According to Hersh, the M.P. who released the photos “did what the world’s most influential human rights groups could not.”143 From that point on, investigations began, eventually leading to prosecution. Hersh also documented the link between the military intelligence needs for forceful interrogation methods in Guantánamo and those in Abu Ghraib. He explained that Gen. Miller, Commander at Guantánamo, briefed military commanders in Iraq on the methods used in Guantánamo and produced a classified report which proposed turning Abu Ghraib into a center of intelligence for the global war on terrorism.144

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.”145 One alternative to President Bush’s explanation is that the methods of “extreme interrogation” were deliberately drawn from the CIA’s manual of 1963 called “KUBARK

140. Id. at 22.
141. Id.
142. Id. at 23.
143. Id. at 25.
144. Id. at 31.
Counterintelligence Interrogation, which describes methods of "homeostatic derangement" designed to induce "the debility-dependence-dread state" resulting in "emotional and motivational reaction of intense fear and anxiety." The manual explains that the interrogator "is able to manipulate the subject's environment, to create unpleasant or intolerable situations, to disrupt patterns of time, space and sensory perception." Mark Danner concludes that, in light of the CIA manual, "the garish scenes of humiliation pouring out in the photographs and depositions form Abu Ghraib...begin to be comprehensible." He concludes:

[T]he 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 effect of the post-9/11 decision about methods of warfare and interrogation was, in Danner's words, "officially to transform the United States from a nation that did not torture into one that did."

Another explanation is that 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. Jane Mayer has demonstrated how the interrogations methods, stress, sensory deprivation, desecration of holy books, sexual embarrassment and humiliation, use of dogs, near drowning ("waterboarding"), and other methods developed in the SERE program have been applied at Guantánamo.

Professor Steven Miles, MD, of the Center for Bioethics at the University of Minnesota wrote in the Lancet "Although US military personnel receive at least 36 minutes of basic training on human rights,

146. Id. at 71.
147. Id.
148. Id. at 71-72.
149. Id. at 72.
150. Id. at 73.
Abu Ghraib military personnel did not receive additional human rights training and did not train civilian interrogators working there.\textsuperscript{152} He cites sworn statements and interviews documenting “beatings burns, shocks, bodily suspensions, asphyxia, threats against detainees and their relatives, sexual humiliation, isolation, prolonged hooding and shackling, and exposure to heat, cold, and loud noise.”\textsuperscript{153} His article has had considerable impact because it covers both the general human rights concerns with the application of the Geneva and human rights conventions and the failure of the medical system to live up to its ethical obligations. In particular the medical system failed to provide proper treatment of prisoners with disabilities, collaborated in “designing and implementing psychological and physically coercive interrogations,” medically monitored interrogations (in accordance with a 2003 memo from the Secretary of Defense), and even “isolated reports that medical personnel directly abused detainees.”\textsuperscript{154} He refers to other evidence of failure to accurately report illnesses and injuries, to notify families of death, illness or transfer to medical facilities; to investigate unexpected deaths; falsification of death certificates, failure to report on known cases of torture and degrading treatment before the Army report of January 2004.\textsuperscript{155} After review the various explanation for these lax policies, Miles concludes, “the stage for these offences was set by policies that were lax or permission with regard to human rights abuse, and a military command that was inattentive to human rights.”\textsuperscript{156}

From the human rights perspective, we return to the slippery slope argument: human rights are moral and legal imperatives that must be respected for the most odious so that they will be respected for the most ordinary. Seven enlisted soldiers faced courts martial for assault, mistreatment and sexual abuse of prisoners.\textsuperscript{157} On November 30, 2004, the Center for Constitutional Rights (CCR) and four Iraqi citizens filed a criminal complaint with the German Federal Prosecutor’s Office at the Karlsruhe Court, Karlsruhe, Germany against high-ranking US officials to hold them accountable for torture, including at Abu Ghraib. The case

\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.} at 726.
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} \textit{Id.} at 727.
\textsuperscript{157} Abu Ghraib, \textit{supra} note 94, at viii.
was brought under the doctrine of universal jurisdiction, which allows suspected war criminals may be prosecuted irrespective of where they are located. Among the officials charged age Secretary of Defense Donald Rumsfeld, Former CIA Director George Tenet, Undersecretary of Defense for Intelligence Dr. Stephen Cambone, and Lieutenant General Ricardo Sanchez. In September 2005, the case was dismissed due to the near complete prosecutorial discretion of the Prosecutor in Germany.

It is certainly to the credit of the United States that it has organized eight major inquiries into the allegations of prisoner abuse at Abu Ghraib and that criminal investigations and prosecutions have taken place. According to one of these investigations,

Clearly abuses occurred at the prison at Abu Ghraib. There is no single, simple explanation for why this abuse at Abu Ghraib happened. The primary causes are misconduct (ranging from inhumane to sadistic) by a small group of morally corrupt soldiers and civilians, a lack of discipline on the part of the leaders and Soldiers of the 205th MI BDE and a failure or lack of leadership by multiple echelons within CJTF-7. Contributing factors can be traced to issues affecting Command and Control, Doctrine, Training, and the experience of the Soldiers we asked to perform this vital mission.


159. Josh White, Reported Abuse Cases Fell After Abu Ghraib, THE WASHINGTON POST, March 17, 2005. ("Maj. Gen. Donald J. Ryder, the Army's provost marshal general and head of its criminal investigation command, reported last month that 308 detainee abuse cases have come under investigation, with 201 of them closed. Through Feb. 11, [2005] the Army had investigated 68 detainee deaths, 24 of them for possible criminal homicide charges. Thirteen of the 24 cases have been closed, with the results not yet released, and 11 are still being investigated.")

160. Investigation of Intelligence Activities at Abu Ghraib pages. AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade LTG Anthony R. Jones. AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade MG George R. Fay. August 23, 2004, 2. In September 2005, Human Rights Watch released a report of interviews with two sergeants and a captain from the Army's 82 Airborne Division alleging that the abuse was not the work of a few misguided low-ranking soldiers but a policy condoned at the senior level. The officer, who is a West Point graduate, notably stated, "The fact that it was systematic, and that the chain of command knew about it was so obvious to me that [until that point] I didn’t even consider the fact that other factors might be at play..." Human Rights Watch, Leadership Failure Firsthand Accounts of Torture of Iraqi Detainees by the U.S. Army's 82nd Airborne Division, September 2005, Volume 17, No. 3(G), 22, http://www.hrw.org/reports/2005/us0905/us0905.pdf.
However, evidence is emerging that refutes the finding that abuse was the result of "misconduct... by a small group" and points the finger to an official policy emanating from the highest echelon. On March 1, 2005, Human Rights First and the ACLU filed Ali et. al. v. Rumsfeld, asking a federal district court in Illinois to rule that Secretary of Defense Donald Rumsfeld violated the U.S. Constitution and international laws prohibiting torture and cruel, inhuman or degrading treatment or punishment, on behalf of eight men who were tortured and abused in U.S. detention facilities in 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, where defendants 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. This litigation was pending in the Spring of 2006.

CONCLUSION

The decision to brand the U.S. response to 9/11 a "war on terrorism" is a firm policy decision of the President. When Secretary of Defense Donald Rumsfeld floated alternate—and more accurate—expressions "Global Struggle Against Violent Extremism" or the "global struggle against the enemies of freedom, the enemies of civilization" in July of 2005, the President rejected it, although others on the right welcomed it. According to a senior administration official, "The president is not

161. Id.; See also JAMES RISEN, STATE OF WAR: THE SECRET HISTORY OF THE CIA AND THE BUSH ADMINISTRATION 23 (2006).
going to abandon that language... The armed conflict against terrorism
is not being abandoned." The co-called new paradigm, on which the
"war on terrorism" is based, has consequences in international law,
primarily with respect to rules governing the use of force 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.

A. International Security

Neither the end of the cold war, the emergence of the United States
as the only superpower nor the terrorist attacks on the United States of
2001 provides a solid foundation for questioning the rules of
international law governing the use of force or the powers of the
Security Council. This symposium issue is based on the concept that
there is something to be learned by exploring the evolution of
international criminal law "from Nuremberg to Abu Ghraib." Indeed,
Nuremberg established the basis for international criminal legal
responsibility for the crime of aggression and for atrocities committed
against combatants and civilians. The post-Cold War has made possible
a permanent international penal court, which was blocked from
happening for 60 years. The promise of the early nineties was not only
a permanent criminal court, which culminated in the adoption of the
ICC Statute in 1998 and its entry into force in 2002, but also the hope
that the Security Council could function as envisaged in 1945, that is,
to take coercive and timely action in response to acts of aggression and
threats to international peace and security. Notwithstanding the serious
criticism of its weaknesses and the UN’s own recognition of the need
for reform to meet current threats, the Charter system 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 unilaterally that an event, like a serious
terrorist attack, authorizes it to determine when, how and against whom

165. Alec Russell, Don't mention war on terror, say Bush aides, THE DAILY TELEGRAPH,
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.

As Philippe Sands correctly noted, “It is one thing to re-evaluate the adequacy of international laws in the light of changing circumstances, like new terrorist threats and the proliferation of weapons of mass destruction. It is quite another to impose them on the rest of the world without proper consultation or consideration of the likely consequences.”166 Sands notes the costs of this loss of “legitimacy and moral authority;”167 Upendra Baxi refers to the “arrogance of the power of the solitary global hegemon;”168 and even Francis Fukuyama sees in the behavior of the Bush administration “the fatal flaw lying at the heart of a world order based on American benevolent hegemony.”169 “The hegemon,” Fukuyama continues, “has to be not just well-intentioned but also prudent and smart in its exercise of power.”170 Clearly the claim of a new paradigm is neither prudent nor smart and the consequences for international security are devastating.

B. Human rights

Internationally recognized human rights protect 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 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 derogations are not in competition with human rights but rather an integral part of an accommodation with the realities of a world where no state—regardless of military, economic or moral strength—is

166. Sands, supra note 55, at 229.
167. Id.
168. Baxi, supra note 7, at 34.
170. Id.
immune from terrorism. Rather than a "lesser evil" it is perhaps more accurate to argue that the security needs can be met in the post 9/11 world by the full application of these derogation and limitation provisions. The Bush administration acknowledges this principle by determining, in an Executive Order, the following policy of the U.S.:

"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 information privacy guaranteed by Federal law, in the effective performance of national security and homeland security functions."  

A similar pledge is needed for the human rights of all people in accordance with the solemn obligations of the United States under international law.

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 price of transgressing this bright line is either prosecution and punishment of those who order or commit torture, where mechanisms of accountability work, or lowered expectation of compliance with non-derogable norms by others—which may be the most dangerous outcome. There is scant evidence that the U.S. has gained in security from its interrogation practices and ample evidence that U.S. flouting of international human rights law reduces the credibility of U.S. promotion of human rights internationally and weakens the preventive potential of the international human rights regime.

The accountability deficit for human rights violations is a major negative result of the new paradigm. It is true that the US is doing a lot that is supportive of the existing paradigm. It is supportive of this paradigm to enhance cooperation among law enforcement agencies worldwide, to proclaim publicly that the US does not torture, to have an official policy of humane treatment for all detainees, to conduct


172. Further evidence of loss in credibility was provided by the joint report, released in February 2006 by five holders of mandates of special procedures of the Commission on Human Rights, on the human rights violations of the Guantánamo detainees. See Situation of detainees at Guantánamo Bay, UN Doc. E/CN.4/2006/120, 15 February 2006. The rapporteurs' mandates covered arbitrary detention, the independence of judges and lawyers, torture and other cruel, inhuman or degrading treatment or punishment, freedom of religion or belief, the right to health.
thorough investigations of abuse and to make the results part of the public record, and to prosecute individuals who participated in abuses. However, international law requires more. In the name of a presumed new paradigm, the norms as defined in the Geneva Conventions and the Torture Convention have been interpreted too narrowly or excluded from application; inadequate precautions were taken to avoid civilian casualties; detention centers were inadequately monitored and may have applied an official policy condoning abuse;\textsuperscript{173} training was woefully inadequate on the application of human rights in wartime; clear instructions were not issued regarding rights of detainees, who were not informed of their rights; prosecutions so far have been limited to low-level individuals and command responsibility has been inadequately applied; and so far adequate remedies are denied those who claim arbitrary detention.

Few would claim that the motivation behind 9/11 had any acceptable moral or religious justification. It was a distortion of Islamic beliefs to claim it was part of a duty to protect the community of the faithful against infidels. From the policy perspective, Al Qaeda seems to have been motivated by opposition to the presence of US troops in Saudi Arabia and other specific policies rather than a clash of civilizations, although there is rhetoric about the "corrupt West" and the "crusaders."\textsuperscript{174} Dramatic acts against the United States under claim of protecting the dignity of Islam against the godless West certainly appeal to many Muslims who feel a legitimate frustration due to the repression of the society in which they live and the absence of economic opportunity, in short, whose human rights are denied. A social and international order in which human rights are respected is an alternative to the nihilism of those who kill indiscriminately in a desperate search for a solution to perceived injustice. It is the absence of other options,

\textsuperscript{173} It has been claimed that President Bush communicated to CIA chief Tenant the message that "it was time for the gloves to come off". See RISEN, supra note 162, at 23.

\textsuperscript{174} In 1998, Osama Bin Laden's issued a fatwa in which he proclaimed: The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque [Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim.

mainly options that will ensure human rights, that contributes to the decision of many to become supporters of groups like Al Qaeda.

As part of foreign policy, a balanced approach to human rights alters the way powerful countries are perceived and partially responds to President Bush’s rhetorical questions: “Why do they hate us?” His answer was “They hate our freedoms—our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other.”175 That may be true for the fanatics who engage in terrorism but their claim to an ideology of social justice appeals to many who are suffering in poverty and who lack the capability to lead the lives they value. The failure of the US and British forces to prevent their troops and agents from participating in torture and other mistreatment has done incalculable harm to the perception of liberal democratic governments as capable defenders of human rights. 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.”176 Thus, similar the impact of the new paradigm on international security, it has a devastating impact on international human rights.

C. Jus Cogens and the Principle of Desuetude

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.177 The claim that they have fallen into desuetude given the circumstances of the war on terrorism cannot be sustained. International law gives considerable flexibility in the interpretation and application of the doctrine of self-defense 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,

175. Joint Address, supra note 3.
177. Restatement (Third) of Foreign Relations, § 102 comment k. Id. at §702 comment n (human rights as peremptory norms).
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 voluntary nature. The so-called “new paradigm” is more a matter of branding for political purposes than a concept on which new norms of international law can be based.