International Human Rights Law and the War on Terroism

Derek Jinks

Follow this and additional works at: https://digitalcommons.du.edu/djilp

Recommended Citation

This Article is brought to you for free and open access by Digital Commons @ DU. It has been accepted for inclusion in Denver Journal of International Law & Policy by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu,dig-commons@du.edu.
INTERNATIONAL HUMAN RIGHTS LAW AND THE WAR ON TERRORISM

DEREK JINKS*  

The September 11th terrorist attacks prompted a rethinking of the relationship between liberty and security. The attacks exemplify a new mode of organizing sustained violence that poses a fundamental challenge to United States (U.S.) and international law. Indeed, Anne-Marie Slaughter and William Burke-White recently described this critical juncture in global politics as an “international constitutional moment.”¹ In the wake of the attacks, the U.S. confronted this challenge by initiating several important changes in its law and policy—the architecture of the “war on terrorism.”² To be sure, the U.S. response generated substantial controversy concerning three related issues: (1) the most appropriate forum for prosecuting individuals responsible for the September 11th attacks;³ (2) the international legal status of combatants captured in Afghanistan;⁴ and, more

---

* Assistant Professor of Law, Saint Louis University School of Law. This essay is based on my remarks at the Sutton Colloquium, International Terrorism, Ethnic Conflicts, and Self-Determination, held at the University of Denver college of Law on March 23, 2002. Special thanks to Ved Nanda, Michael Scharf, and Paul Williams for inspiring and organizing a remarkable conference.


generally, (3) the most appropriate role for law in any comprehensive strategy against international terrorism.\textsuperscript{5} It is striking that these debates turn on which law, if any, applies in the "war on terrorism." The questions structuring these debates are by now familiar: Does the Constitution protect "enemy aliens"? Do the Geneva Conventions protect "unlawful combatants"? Although these are critical questions, the focus on U.S. constitutional law and international humanitarian law has unfortunately obscured the importance of another potentially relevant body of law: international human rights law. If applicable, international human rights law would establish conclusively—irrespective of the applicability of the Geneva Conventions or U.S. Constitution—that all persons subject to the jurisdiction of the United States, as a matter of law, are entitled to certain basic rights including: the right not to be detained arbitrarily; the right to humane conditions and treatment if detained; and, the right to a fair trial on any criminal charges.

**INTERNATIONAL DUE PROCESS STANDARDS**

For example, international human rights law informs the legal analysis of the most controversial aspects of U.S. antiterrorism policy including: trial of suspected terrorists by military commission;\textsuperscript{6} indefinite detention of citizens designated as "enemy combatants;"\textsuperscript{7} and, prolonged detention of aliens suspected of terrorist activity.\textsuperscript{8} It is important to note that several international human rights treaties,\textsuperscript{9}

---

5. See generally Sofaer & Williams, supra note 3; Note, Responding to Terrorism: Crime, Punishment, and War, 115 HARV. L. REV. 1217 (2002); see also Ruth Wedgwood, The Rules of War Can't Protect Al Qaeda, N.Y. TIMES, Dec. 31, 2001, at A11 (suggesting that the law has no role in war on terror).


declarations, and resolutions establish minimum procedural protections for all individuals deprived of their personal liberty. Under Article 9 of the International Covenant on Civil and Political Rights (ICCPR), no one shall be "subjected to arbitrary arrest or detention" or "deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." This provision also specifies that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him." Article 9(3) provides that all persons arrested or detained on a criminal charge "shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." As interpreted by the United Nations (U.N.) Human Rights Committee, the provision requires at a minimum that an


12. ICCPR, supra note 9, art. 9(1).

13. Id.

14. ICCPR, supra note 9, art. 9(2).

15. ICCPR, supra note 9, art. 9(3). Note that Article 9(3) of the ICCPR applies only to individuals arrested or detained on a criminal charge, while the other rights recognized in the Article apply to all persons deprived of their liberty. People awaiting trial on criminal charges should not, as a general rule, be held in custody. In accordance with the right to liberty and the presumption of innocence, persons charged with a criminal offence, in general, should not be detained before trial. See id.; id., art. 14(3). International standards explicitly recognize that there are, however, circumstances in which authorities may detain an accused pending trial. See id., art. 9(3); see also Body of Principles, supra note 11, Principle 39; United Nations Standard Minimum Rules for Non-custodial Measures, 14 Dec. 1990, Res. 45/110 Principle 6; ACHR, supra note 9, art. 7(5). For example, pre-trial detention is permissible if authorities determine that detention is necessary to prevent flight, interference with witnesses, or when the accused poses a clear and serious risk to others which cannot be contained by less restrictive means. See Van Alphen v. the Netherlands, (305/1988), 23 July 1990, Report of the HRC Vol. II, (A/45/40), 1990, at 115. Therefore, pre-trial detention must not only be lawful, but must also be necessary and reasonable in the circumstances.

16. The ICCPR established the United Nations Human Rights Committee to monitor state parties'
individual must be brought before a judge or other officer within "a few days." Finally, The ICCPR provides for the right to habeas corpus, or amparo. Under this provision, anyone deprived of liberty by arrest or detention has the right to "take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not

compliance with the treaty. See ICCPR, supra note 9, art. 40. This monitoring function involves three complementary procedures. First, the ICCPR establishes a periodic reporting process. See id. art. 40(1). Under the reporting process, the Committee receives periodic written reports from state parties which explain the measures they have taken to protect the rights recognized in the treaties. See id. Government representatives present the reports to the U.N. Human Rights Committee in public sessions; Committee members question the representatives about issues raised in the reports; and the Committee publishes comments and recommendations on how to improve the protection of human rights in the state in question. Second, the Committee drafts "general comments" typically concerning the interpretation of the substantive rights and freedoms contained in the treaty each committee oversees. See United Nations High Commission for Human Rights/United Nations Human Rights Centre, Treaty Database Homepage at http://www.unhchr.ch/tbs/doc.nsf (last visited Oct. 21, 2002) [hereinafter UNHCHR Database]. See, e.g., DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE 95 (Oxford University Press, 1991) ("The general comments serve rapidly to develop the jurisprudence of the HRC under the Covenant."). Third, and most important, the Committee receives written "communications" or "petitions" from individuals alleging that a State party has violated one or more rights protected by the ICCPR. See Optional Protocol to the International Covenant on Civil and Political Rights, done Dec. 16, 1966, 999 U.N.T.S. 302 [hereinafter Optional Protocol]; Torkel Opsahl, THE HUMAN RIGHTS COMMITTEE, in THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (Philip Alston, ed., Oxford University Press, 1992). This procedure is optional, however, and many states party to the ICCPR do not recognize the competence of the Committee to receive individual petitions. See Human Rights Committee, Optional Protocol available at http://www1.umn.edu/humanrts/hcommittee/hrc-page.html (last visited Aug. 31, 2000) (stating that 95 of the 144 parties to the ICCPR have ratified the Optional Protocol). Under the First Optional Protocol to the ICCPR, the Committee performs a quasi-judicial function when reviewing individual petitions. See TOM ZWART, THE ADMISSIBILITY OF HUMAN RIGHTS PETITIONS (Martinus Nijhoff Pub. 1994). Although the Committee's decisions are not legally binding, they are widely viewed as persuasive authority and several States have implemented the Committee's interpretation of the treaty. See Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 YALE L.J. 273, 344-45 (1997).

17. See Office of the United Nations High Commissioner for Human Rights, Right to Liberty and Security of Persons (art. 9), 16th Sess., CCPR General Comment 8, para. 2 (1982). Note that this provision does not explicitly recognize a right to counsel for all accused at this stage of the proceedings. The Human Rights Committee has stated, however, that "all persons arrested must have immediate access to counsel." See Concluding Observations on State Part Report: Georgia, Human Rights Committee, UN Doc. CCPR/C/79/Add.74, 9 April 1997, at para. 28. See also Body of Principles, supra note 11, principle 18(1); Basic Principles on the Role of Lawyers, supra note 11, principle 1 (stating that "[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings."); id., principle 7 (requiring governments to ensure that all persons arrested or detained have access to a lawyer within 48 hours from arrest or detention); see also id., Principle 5 (providing that all persons arrested, charged or detained must be promptly informed of their right to legal assistance); id., principle 8 (requiring authorities to ensure that all arrested, detained or imprisoned persons have adequate opportunities to be visited by and to communicate with their lawyer without delay, interception or censorship, in full confidentiality). It also has been widely recognized that prompt and regular access to a lawyer for all detainees is an important safeguard against torture, ill-treatment, coerced confessions and other abuses. See, e.g. Report of the UN Special Rapporteur on Torture, U.N. Doc. E/ CN.4/1992/17, 17 December 1991, at para. 284.

18. ICCPR, supra note 9, art. 9(4).
International human rights law has also established an extensive inventory of procedural rights for individuals facing criminal charges. The Universal Declaration of Human Rights (UDHR), ICCPR, African Charter on Human and Peoples' Rights, (Banjul Charter) Inter-American Convention on Human Rights (ACHR) and the European Convention on Human Rights (ECHR) all include detailed fair trial provisions. Specifically, Article 14 of the ICCPR recognizes the right to "a fair trial and public hearing by a competent, independent and impartial tribunal established by law." This provision enumerates the minimum procedural requirements of a "fair trial," including the right to be presumed innocent, the right to be tried without undue delay, the right to prepare a defense, the right to defend oneself in person or through counsel, the right to call and examine witnesses, and the right to protection from retroactive criminal laws.

INTERNATIONAL HUMAN RIGHTS AND U.S. LAW

The central claim of this essay is that international human rights law conditions the exercise of U.S. power in the "war on terrorism." In one sense,
international human rights law clearly applies in that the United States has ratified several human rights treaties, including the ICCPR, and all treaties lawfully made under the U.S. Constitution are part of the "supreme law of the land." In addition, agencies of the U.S. government, including the Department of Defense, are required by Executive Order to comply with the ICCPR. Although the U.S. made clear its understanding that the substantive provisions of the ICCPR are "non-self executing," the treaty nevertheless establish international legal obligations binding on the executive and legislative branches of government. Moreover, the nature of international human rights law suggests that it applies in all circumstances. That is, international human rights law defines the minimum rights protections necessary to prevent the arbitrary exercise of power. This body of law reflects the collective normative aspirations of the international community; and, as such, provides an indispensable framework for evaluating specific policy options in the "war on terrorism."

**WARTIME AND OTHER "STATES OF EXCEPTION"**

The robust regime of procedural rights embodied in the ICCPR would, if applicable, call into question several aspects of U.S. antiterrorism policy. Indeed, the U.N. Human Rights Committee repeatedly declared special military courts and "national security" detention laws inconsistent with the ICCPR. The application beyond the scope of this essay. I will therefore analyze the substantive requirements of the treaty only insofar as these provisions inform analysis of the conditions under which the ICCPR is applicable. See ICCPR, supra note 9.

33. See U.S. CONST. art. VI, § 2.

34. Executive Order 13,107 directs all members of the executive branch to comply with the ICCPR. See Exec. Order No. 13,107, 63 Fed. Reg. 68,991 (1998), reprinted in 38 I.L.M. 493 (1999). The preamble of the Executive Order names three human rights treaties in particular: the ICCPR, supra note 9; the Convention Against Torture, supra note 9; and the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, reprinted in 5 I.L.M. 352 (1966). However, it also recognizes that the Executive Order shall apply to "other relevant treaties concerned with protection and promotion of human rights to which the United States is now or may become a party in the future." Executive Order 13,107, supra, at 68,991.


of the ICCPR to U.S. action in the "war on terrorism" is, however, complicated by the fact that these actions are undertaken in the context of an ongoing, formally proclaimed national emergency and an international armed conflict. Defining the scope of application of the ICCPR therefore requires an assessment of the degree to which international human rights law applies in times of war and other states of emergency.

International human rights treaties allow the suspension of some rights in public emergencies (such as times of war). Article 4 of the ICCPR provides that in situations threatening the life of the nation, a government may issue a formal declaration suspending certain human rights guarantees provided that: (1) a state of emergency that threatens the life of the nation exists; (2) the exigencies of the situation "strictly require" such a suspension; (3) the suspension does not conflict


39. See, e.g., ECHR, supra note 9, at art. 15(1); ICCPR, supra note 9, at art. 4(1); ACHR, supra note 9, at art. 27(1). For useful surveys of this area of law, see ANNA-LENA SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION (M. Nijhoff Publishers, 1998); JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY (University of Pennsylvania Press, 1994); JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (Oxford University Press, 1992).

40. See Fionnuala Ni Aolain, The Emergence of Diversity:Differences in Human Rights Jurisprudence, 19 FORDHAM INT’L L. J. 101, 103 (1995) (arguing that the concept of a "state of emergency refers to those exceptional circumstances resulting from temporary factors of a political nature, which, to varying degrees, involve extreme and imminent danger that threaten the organized existence of the state"); Lawless Case (Ireland), 1961 Y.B. Eur. Conv. On H.R. (Eur. Ct. H.R. 438, 472, 474) (holding that the ECHR’s derogation clauses may be invoked only in “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed”). The concept of emergency does include circumstances other than armed conflict. For example, national disasters and extreme economic crises may constitute "public emergencies." See R. St. J. MacDonald, Derogations under Article 15 of the European Convention on Human Rights, 36 COLUM. J. TRANSNAT’L L. 225, 225 (1997). Furthermore, the emergency must be temporary, imminent, and of such a character that it threatens the nation as a whole. See SVENSSON-MCCARTHY, supra; ORAA, supra note 39, at 11-33.

41. This requirement incorporates the principle of proportionality into derogation regimes. This principle requires that the restrictive measures must be proportional in duration, severity, and scope.
with the nation's other international obligations; the emergency measures are applied in a non-discriminatory fashion; and, the government notifies the United Nations Secretary-General immediately. Some rights, however, are not subject to derogation even in times of public emergency. The ICCPR specifically identifies several non-derogable obligations including the rights to be free from arbitrary killing; torture or other cruel, inhuman or degrading treatment or punishment; and slavery. Although the rights to fair trial and personal liberty are, as a formal matter, derogable provisions, the U.N. Human Rights Committee has made clear that many restrictions of these rights are inappropriate even in times of emergency. Indeed, the Committee, in its General Comment 29, stated

Implicit in this requirement is that ordinary measures must be inadequate; and the emergency measures must assist in the management of the crisis. See, e.g., ORAA, supra note 39, at 143; MacDonald, supra note 40, at 233-35.

42. See SVENSSON-MCCARTHY, supra note 39, at 624-639.
43. Id. at 640-682.
44. Id. at 683-718; ICCPR, supra note 9, at art. 4(3); ECHR, supra note 9, at art. 15(3); ACHR, supra note 9, at art. 27(3). The Human Rights Committee has emphasized the importance of notification for effective international supervision of derogations in states of emergency. See Report of the Human Rights Committee, U.N. GAOR, 36th Sess., Supp. No. 40, Annex VII, at 110, U.N. Doc A/36/40 (1981).

45. Each convention containing a derogation clause provides an explicit list of non-derogable provisions. See ICCPR, supra note 9, at art. 4(2) (prohibiting derogation from Articles 6 (right to life), 7 (prohibition on torture), 8 (prohibition of slavery and servitude), 11 (imprisonment for failure to fulfill contractual obligation), 15 (prohibition on retrospective criminal offence), 16 (protection and guarantee of legal personality), and 18 (freedom of thought, conscience and religion); ECHR, supra note 9, at art. 15(2) (prohibiting derogation from Articles 2 (right to life), 3 (freedom from torture), 4 (freedom from slavery), and 7 (retroactive effect of penal legislation)); ACHR, supra note 9, at art. 27 (prohibiting suspension of Articles 3 (right to juridical personality), 4 (right to life), 5 (right to humane treatment), 6 (freedom from slavery), 9 (freedom from ex-post facto laws), 12 (freedom of conscience and religion), 17 (right of the family), 18 (right to name), 19 (right of child), 20 (right to nationality), and 23 (right to participate in government)).

46. See ICCPR, supra note 9, art. 6.
47. See ICCPR, supra note 9, art. 7.
48. See ICCPR, supra note 9, art. 8.

50. Although the Human Rights Committee recommended against adopting an Optional Protocol to the ICCPR re-categorizing Articles 9 and 14 as non-derogable, the Committee noted that states should not derogate from several of the protections included in these articles. The Committee reasoned that:

The Committee notes that the purpose of the possible draft optional protocol is to add article 9, paragraphs 3 and 4, and article 14 to the list of non-derogable provisions in article 4, paragraph 2, of the Covenant. . . .The Committee is satisfied that States parties generally understand that the right to habeas corpus and amparo should not be limited in
that:

Safeguards related to derogation . . . are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence.  

The U.N. Human Rights Committee has also emphasized that procedural rights, such as fair trial rights, must be respected even in times of emergency in order to protect other non-derogable rights. Finally, the Committee, following the lead of the Inter-American Court of Human Rights, strongly suggested that, at a minimum, the right to habeas corpus (or amparo) is non-derogable.

The United States has not, and arguably could not, invoke Article 4 to preclude application of the ICCPR in the “war on terrorism.” First, the United States has not filed a derogation notice with the other state parties, through the

situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole. Having this in mind, the Committee believes that there is a considerable risk that the proposed draft third optional protocol might implicitly invite States parties to feel free to derogate from the provisions of article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol. Thus, the protocol might have the undesirable effect of diminishing the protection of detained persons during states of emergency.


52. The Committee concluded that:

It is inherent in the protection of [non-derogable] rights . . . that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights . . . . Thus, for example, as article 6 [the right to life] is non-derogable in its entirety, any trial leading to the imposition of the death penalty during a state of emergency must conform to the provisions of the Covenant, including all the requirements of articles 14 [fair trial] and 15 [prohibition on retroactive penalties].

Id. at para. 15.

53. See Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), 8 Inter-Am. Ct. H.R. (ser. A) at 33, OEA/ser.L/N/111.17, doc. 13 (1987); See also Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), 9 Inter-Am. Ct. H.R. (ser. A) at 40, OEA/ser.L/N/111.9, doc. 13 (1987). The Court unanimously held that “essential’ judicial guarantees which are not subject to derogation, according to Article 27(2) of the Convention, include habeas corpus (Art. 7(6)), amparo, and any other effective remedy before judges or competent tribunals (Art. 25(1)).” Id.

Secretary-General of the United Nations, as required under Article 4(3). Indeed, the United States has not proclaimed, as matter of domestic law, that emergency conditions necessitating the suspension of fundamental rights exist. Second, substantial evidence suggests that several of the "derogation measures" are not strictly required by the exigencies of the circumstances. Of course, the United States has offered no evidence that specific derogation measures are strictly necessary to meet the immediate threat of catastrophic terrorism. Additionally, the fact that investigation, trial, and conviction of Al Qaeda operatives has been successfully conducted by utilizing ordinary criminal procedure and without compromising national security, strongly suggests that many of the most controversial measures are not necessary to confront the emergency conditions. Third, the nature of the emergency itself may fail to satisfy the threshold requirements of Article 4. Although the September 11th attacks almost certainly constituted an emergency "threatening the life of the nation," the continuing, non-specific and ill-defined threat of terrorist activity does not satisfy this requirement. Moreover, because "states of exception" are, by their nature, of limited duration, the U.S. may not manufacture an ongoing state of emergency by waging a protracted—perhaps indefinite—"war on terrorism." Finally, the derogation measures arguably suspend non-derogable rights (and rights necessary to protect non-derogable rights) by violating the personal liberty and fair trial provisions of the ICCPR.

CONCLUSION

International human rights law recognizes the bare minimum of standards necessary to protect the safety and integrity of individuals from abuses of power. As such, it governs how states treat all people in all circumstances—even in time of war. Nevertheless, this body of law provides for "improved human rights to be matched by accommodations in favor of the reasonable needs of the State to perform its public duties for the common good." In furtherance of this objective, human rights treaties explicitly authorize states to restrict or suspend some rights, subject to several requirements, for an identified set of important public policy objectives. These codified "states of exception" strike a balance between universal human rights norms and national interests by specifying the circumstances in which states may lawfully abrogate treaty obligations. Most important for the

55. The derogation measures do not, however, necessarily violate the prohibition on discrimination in Article 4(1). Of course, many of the derogation measures are applied in a discriminatory fashion. For example, the Military Order providing for trial by military commission facially discriminates on the basis of citizenship. Military Order, supra note 6 (applying only to noncitizens). Article 4(1) prohibits discrimination "solely on the ground of race, colour, sex, language, religion, or social origin." ICCPR, supra note 9, art. 4(1). Unlike Articles 2(1) and 26—the substantive provisions on discrimination—Article 4(1) does not prohibit discrimination on the grounds of "national origin." Compare ICCPR, supra note 9, arts. 2(1) and 26 with id. art. 4(1). The travaux préparatoires of the treaty makes clear that states acknowledged that discrimination based on "national origin" might be essential in times of war. See, e.g., SVENSSON-MCCARTHY, supra note 39, at 643-646.

purposes of this essay, "derogation clauses" permit the suspension of certain rights in times of war or public emergency. This derogation regime does not, however, preclude application of the ICCPR to the "war on terrorism."