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Keywords

Human Rights Law, War, Government, Military Law, Separation, Separation of Powers

INTERNATIONAL HUMAN RIGHTS LAW AND THE WAR ON TERRORISM

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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.

1. Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. J. INT'L L. 1 (2002).

2. George W. Bush, Address to a Joint Session of Congress and the American People, Sept. 20, 2001, available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> (last visited Oct. 21, 2002).

3. See, e.g., Harold Hongju Koh, *We Have the Right Courts for Bin-Laden*, N.Y. TIMES, Nov. 23, 2001, at A39 (arguing that any such trials should be conducted in federal district court); Anne-Marie Slaughter, *Al Qaeda Should Be Tried Before the World*, N.Y. TIMES, Nov. 17, 2001, at A23 (arguing that the U.N. Security Council should establish another ad hoc tribunal); Paul R. Williams & Michael P. Scharf, *Prosecute Terrorists on a World Stage*, L.A. TIMES, Nov. 18, 2001, at M5 (suggesting that the statute of the International Criminal Tribunal for the Former Yugoslavia be amended to confer jurisdiction over the September 11th attacks); Ruth Wedgwood, *The Case for Military Tribunals*, WALL ST. J., Dec. 3, 2001, at A18 (supporting military commissions of the sort envisioned in President Bush's Military Order); Laura Dickinson, *Courts Can Avenge Sept. 11: International Justice—Not War—will Honor our Character while Ensuring our Safety*, LEGAL TIMES, Sept. 24, 2001, at 66 (supporting “internationalized” trials in other national jurisdictions). On the legality of military commissions specifically, see Neal K. Katyal & Laurence Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J. L. & PUB. POL'Y. 635 (2002); George P. Fletcher, *War and the Constitution; Bush's Military Tribunals Haven't Got a Legal Leg to Stand On*, THE AMERICAN PROSPECT, Jan. 1-14, 2002, at 26.; Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2d 249 (2002); Abraham D. Sofaer & Paul R. Williams, *Doing Justice During Wartime: Why Military Tribunals Make Sense*, 111 POL'Y REV. 3 (2002).

4. The controversy concerns whether detained al Qaeda and Taliban fighters qualify for “prisoner of war” (POW) status under the Geneva Conventions. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 287, entered into force Oct. 21, 1950. See

generally, (3) the most appropriate role for law in any comprehensive strategy against international terrorism.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;⁶ indefinite detention of citizens designated as “enemy combatants;”⁷ and, prolonged detention of aliens suspected of terrorist activity.⁸ It is important to note that several international human rights treaties,⁹

e.g., *Coalition of Clergy et al. v. Bush*, 189 F. Supp. 2d 1036 (C. D. Cal. 2002) (denying habeas petition brought on behalf of Camp X-Ray detainees); John Cerone, *Status of Detainees in International Armed Conflict, and their Protection in the Course of Criminal Proceedings*, ASIL INSIGHTS (Jan. 2002) available at <http://www.asil.org/insights/insigh81.htm> (last visited Oct. 21, 2002); Alfred P. Rubin, *Applying the Geneva Conventions: Military Commissions, Armed Conflict, and al Qaeda*, 26 FLETCHER F. WORLD. AFF. J. 79 (2002).

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).

6. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, (Nov. 16, 2001) [hereinafter Military Order]. The Department of Defense (DOD) has implemented the Order by issuing the rules of procedure and evidence for the commissions. See Department of Defense, Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, (Mar. 21, 2002) [hereinafter DOD Rules]. The use of military commissions in U.S. history is well documented. See generally David J. Bederman, *Article II Courts*, 44 MERCER L. REV. 825 (1993); WILLIAM E. BURKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* 351-69 (Franklin Hudson Pub. 1914) (1892); GEORGE B. DAVIS, *A TREATISE ON THE MILITARY LAW OF THE UNITED STATES* 307-13 (John Wiley & Sons, 1915) (1898); William WINTHROP, *MILITARY LAW AND PRECEDENTS* 832-34 (William S. Hein & Co., 1979) (1920).

7. See Amnesty International, *Memorandum to the U.S. Government on the Rights of People in U.S. Custody in Afghanistan and Guantanamo Bay* (April 2002), available at Amnesty International Online, <http://web.amnesty.org/ai.nsf/recent/AMR510532002> (last visited Oct. 21, 2002).

8. See, e.g., David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (May 2002); David Firestone & Christopher Drew, *Al Qaeda Link Seen in Only a Handful of 1,200 Detainees*, N.Y. TIMES, Nov. 29, 2001, at A1.

9. See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 9, 14, & 15, 999 U.N.T.S. 171 [hereinafter ICCPR]; The African Charter on Human and Peoples' Rights, June

declarations,¹⁰ and resolutions¹¹ 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"¹² or "deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."¹³ 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."¹⁴ 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."¹⁵ As interpreted by the United Nations (U.N.) Human Rights Committee,¹⁶ the provision requires at a minimum that an

27, 1981, arts. 3, 6, & 7, 21 I.L.M. 58 [hereinafter Banjul Charter]; American Convention on Human Rights, Nov. 22, 1969, arts. 7, 8 & 9, 1144 U.N.T.S. 123 [hereinafter ACHR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 5, 6 & 7, 213 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, and Protocol No. 8, E.T.S. 118 [hereinafter ECHR]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 (art. 7) [hereinafter Convention Against Torture].

10. See, e.g., Universal Declaration of Human Rights, arts. 9-11, G.A. Res. 217, U.N. GAOR, 3d Sess., at 72, U.N. Doc. A/810 (1948) [hereinafter UDHR].

11. See, e.g., Basic Principles on the Role of Lawyers, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 Aug. to 7 Sept. 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990); Guidelines on the Role of Prosecutors, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 Aug. to 7 Sept. 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990); Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, annex, 43 U.N. GAOR 43d Sess., Supp. No. 49, at 298, U.N. Doc. A/43/49 (1988) [hereinafter Body of Principles]; Basic Principles on the Independence of the Judiciary, Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 Aug. to 6 Sept. 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985); Standard Minimum Rules for the Treatment of Prisoners, U.N. Doc. A/CONF.611, annex I, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. No. 1, at 11, U.N. Doc. E/3048 (1957), amended by E.S.C. Res. 2076, 62 U.N. ESCOR Supp. No. 1 at 35, U.N. Doc. E/5988 (1977) (Part II. A. Prisoners Under Sentence and Part II. C. Prisoners Under Arrest or Awaiting Trial).

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."¹⁷ Finally, The ICCPR provides for the right to *habeas corpus*, or *amparo*.¹⁸ 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/hrcommittee/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).

lawful.”¹⁹ 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),²⁰ ICCPR,²¹ African Charter on Human and Peoples’ Rights, (Banjul Charter)²² Inter-American Convention on Human Rights (ACHR)²³ and the European Convention on Human Rights (ECHR)²⁴ 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.”²⁵ This provision enumerates the minimum procedural requirements of a “fair trial,” including the right to be presumed innocent,²⁶ the right to be tried without undue delay,²⁷ the right to prepare a defense,²⁸ the right to defend oneself in person or through counsel,²⁹ the right to call and examine witnesses,³⁰ and the right to protection from retroactive criminal laws.³¹

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.”³² In one sense,

19. ICCPR, *supra* note 9, art. 9(4).

20. See UDHR, *supra* note 10, art. 10.

21. See ICCPR, *supra* note 9, art. 14.

22. See Banjul Charter, *supra* note 9, arts. 7, 26. The African Commission on Human and Peoples’ Rights has adopted a resolution on the Right to Recourse Procedure and Fair Trial which elaborates on article 7 (1) of the Banjul Charter and guarantees several additional rights, including: notification of charges, appearance before a judicial officer, right to release pending trial, presumption of innocence, adequate preparation of the defense, speedy trial, examination of witnesses and the right to an interpreter. See Doc. No. ACHPR/COMM/FIN(XI)/Annex VII, 9 March 1992.

23. See ACHR, *supra* note 9, art. 8.

24. See ECHR, *supra* note 9, art. 6.

25. ICCPR, *supra* note 9, art. 14(1).

26. See ICCPR, *supra* note 9, art. 14(2); ECHR, *supra* note 9, art. 6(2).

27. See ICCPR, *supra* note 9, art. 14(3)(c); ECHR, *supra* note 9, art. 6(1).

28. See ICCPR, *supra* note 9, art. 14(3)(d); ECHR, *supra* note 9, art. 6(3)(b).

29. See, ICCPR, *supra* note 9, at art. 14(3)(d); ECHR, *supra* note 9, at art. 6(3)(d):

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

30. See, ICCPR, *supra* note 9, at art. 14(3)(e). See also ECHR, *supra* note 9, at art. 6(3)(d); ACHR, *supra* note 9, at art. 8(2)(f):

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

31. See ICCPR, *supra* note 9, art. 15(1) (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed”).

32. Whether any particular U.S. policy contravenes the substantive provisions of the ICCPR is

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."³³ In addition, agencies of the U.S. government, including the Department of Defense, are required by Executive Order to comply with the ICCPR.³⁴ 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.³⁵ 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.³⁶ 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). [hereinafter Executive Order]. 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.

35. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 198-204 (Foundation Press, 2nd ed. 1996). In addition, the "non-self executing" declarations arguably do not preclude defendants from invoking treaty rights defensively. See *United States v. Duarte-Acero*, 132 F. Supp.2d 1036, 1040 (S.D. Fla. 2001) (holding the prohibition against private causes of action does not apply when raising "ICCPR claims defensively"); See also John Quigley, *Human Rights Defenses in U.S. Courts*, 20 HUM. RTS. Q. 555, 580-82 (1998); David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 210-214 (1999).

36. See, e.g., *Acosta v. Uruguay*, Comm. No. 110/1981 (1983), U.N. Doc. Supp. No. 40 (A/39/40) at 169 (1984); *Scarrone v. Uruguay*, Comm. No. 103/1981 (1982), U.N. Doc. Supp. No. 40 (A/39/40) at 154 (1984); *Barbato & Barbato v. Uruguay*, Comm. No. 84/1981, (1981), U.N. Doc. Supp. No. 40 (A/38/40) at 124 (1983); *Schweizer v. Uruguay*, Comm. No. 66/1980 (1980), U.N. Doc. Supp. No. 40 (A/38/40) at 117 (1983); *Conteris v. Uruguay*, Comm. No. 139/1983 (1985), U.N. Doc. Supp. No. 40 (A/40/40) at 196 (1985); *Machado v. Uruguay*, Comm. No. 83/1981 (1982), U.N. Doc. Supp. No. 40 (A/39/40) at 148 (1984); *Lluber v. Uruguay*, Comm. No. 123/1982 (1983), U.N. Doc. Supp. No. 40 (A/39/40) at 175 (1984); *Nieto v. Uruguay*, Comm. No. 92/1981 (1981), U.N. Doc. Supp. No.

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 emergency³⁷ and an international armed conflict.³⁸ 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).³⁹ 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;⁴⁰ (2) the exigencies of the situation "strictly require" such a suspension;⁴¹ (3) the suspension does not conflict

40 (A/38/40) at 201 (1983); *Caldas v. Uruguay*, Comm. No. 43/1979 (1979), U.N. Doc. Supp. No. 40 (A/38/40) at 192 (1983); *Magana ex-Philibert v. Zaire*, Comm. No. 90/1981 (1981), U.N. Doc. Supp. No. 40 (A/38/40) at 197 (1983); *Altesor v. Uruguay*, Comm. No. R.2/10 (1977), U.N. Doc. Supp. No. 40 (A/37/40) at 122 (1982); *Pietraroia v. Uruguay*, Comm. No. R.10/44 (1979), U.N. Doc. Supp. No. 40 (A/36/40) at 153 (1981); *Bouton v. Uruguay*, Comm. No. R.9/37 (1978), U.N. Doc. Supp. No. 40 (A/36/40) at 143 (1981); *Touron v. Uruguay*, Comm. No. R.7/32 (1978), U.N. Doc. Supp. No. 40 (A/36/40) at 120 (1981); *Motta v. Uruguay*, Comm. No. R.2/11 (1977), U.N. Doc. Supp. No. 40 (A/35/40) at 132 (1980); *Muteba v. Zaire*, Comm. No. 124/1982 (1983), U.N. Doc. Supp. No. 40 (A/39/40) at 182 (1984); *Borda v. Columbia*, Comm. No. R.11/46 (1979), U.N. Doc. Supp. No. 40 (A/37/40) at 193 (1982).

37. President George W. Bush, Remarks by the President in Photo Opportunity with the National Security Team, (September 12, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html> (last visited DATE).

38. Mike Mount, *U.S. Mounts New al Qaeda Hunt in Afghanistan*, available at CNN.com, <http://www.cnn.com/2002/WORLD/asiapcf/central/09/09/afghanistan.sweep/index.html> (last visited on Oct. 21, 2002).

39. See, e.g., ECHR, *supra* note 9, at art. 15(1); ICCPR, *supra* note 9, at art. 4(1); ACHR, *supra* note 9, 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 SVENSSON-MCCARTHY, *supra* note 39, at 195-281; FITZPATRICK, *supra* note 39; 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;⁴² (4) the emergency measures are applied in a non-discriminatory fashion;⁴³ and, (5) the government notifies the United Nations Secretary-General immediately.⁴⁴ Some rights, however, are not subject to derogation even in times of public emergency.⁴⁵ The ICCPR specifically identifies several non-derogable obligations including the rights to be free from arbitrary killing,⁴⁶ torture or other cruel, inhuman or degrading treatment or punishment,⁴⁷ and slavery.⁴⁸ Although the rights to fair trial and personal liberty are, as a formal matter, derogable provisions,⁴⁹ the U.N. Human Rights Committee has made clear that many restrictions of these rights are inappropriate even in times of emergency.⁵⁰ 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 (retrospective 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.

49. Proposed drafts of ICCPR Article 4 submitted by French and U.S. representatives would have made the prohibition on arbitrary arrest, the right to prompt notice of charges, and the right to fair and prompt trial non-derogable. Both proposals, however, would have made derogable the right to take prompt judicial proceedings to challenge the lawfulness of detention. U.N. Doc. E/CN.4/324 (1949) (French draft); U.N. Doc. E/CN.4/325 (1949) (U.S. Draft). The representative of the U.K. argued that the prohibition against arbitrary arrest and the right to a fair trial might be impossible to respect during wartime or other grave emergency. U.N. Doc. E/CN.4/SR.126, at 4-5 (1949). The U.K. view prevailed when the list of non-derogable rights was agreed to provisionally in 1950. See Joan Hartman, *Working Paper for the Committee of Experts on the Article 4 Derogation Provision*, 7 HUM. RTS. Q. 89, 115-18 (1985).

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.⁵¹

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.⁵² Finally, the Committee, following the lead of the Inter-American Court of Human Rights,⁵³ strongly suggested that, at a minimum, the right to habeas corpus (or *amparo*) is non-derogable.⁵⁴

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.

Annual Report of the Human Rights Committee, U.N. G.A.O.R., 49th Sess., Supp. No. 40, at 120, U.N. Doc. A/49/40, at para. 2 (1994).

51. UN Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) at para. 16, available at <http://www.unhcr.ch/tbs/doc.nsf> (last visited Oct. 21, 2002).

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./VI/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./VI/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.*

54. Annual Report of the Human Rights Committee, U.N. G.A.O.R., 49th Sess., Supp. No. 40, at 120, U.N. Doc. A/49/40, at para. 2 (1994).

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.⁵⁵

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.”⁵⁶ 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.

56. See Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B.I.L. 281, 281 (1976-77).

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.”