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Michael Galchinsky, “Quaint and Obsolete: The ‘War on Terror’ and the Right to Legal Personality”

1. The Post-9/11 Crisis in International Law

The Bush administration’s “war on terror” did not cause consternation in the international law community; it caused outrage and panic. The “war on terror” was understood to be, among other things, an attack on international law—specifically, on international human rights law (IHRL) and the law of armed conflict (also known as international humanitarian law, or IHL). International law supporters responded to the US administration’s attack by behaving as though the foundations of the global legal order had to be rearticulated and reinforced.

Do suspected global terrorists have rights? In debating this question in the post-9/11 period, lawmakers, judges, and activists began to reconsider fundamental questions, such as the degree to which human rights may be restricted or suspended in armed conflicts and states of emergency, and whether the boundary between “civilians” and “combatants” is clear. While the objects of all this activity have been a relatively small group of detainees at Guantanamo Bay, Bagram Air Base, its successor at Parwan, and the ghost prisons, the result has been nothing less than a reevaluation of the grounds on which hopes for global security and rights rest.¹ How have proponents of IHL and IHRL responded to this challenge?

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This debate on first principles has encompassed many rights, but the right of everyone to recognition everywhere as a person before the law lies at the heart of them all. To be recognized as a person before the law means, among other things, to have standing to exercise one's rights. That the right applies to "everyone" means that there can be no derogation based on contingent factors such as nationality, race, religion, or sex. That the right applies "everywhere" suggests universal coverage across territorially-bounded jurisdictions. In any governance system dedicated to the rule of law, the right to be recognized as a legal person is indispensable. For this reason the right, which is declared in Art. 6 of the Universal Declaration of Human Rights and codified in Art. 16 of the International Covenant on Civil and Political Rights, is regarded as a peremptory norm of customary international law that may not be suspended under any circumstances.² The derogation clause in the International Covenant for Civil and Political Rights (Art. 4(2)) specifically prohibits the restriction or suspension of the right to recognition for any reason. The right's very breadth makes it symbolically appropriate to the charged atmosphere after September 11, since which the objects of debate have not just been the legitimacy of *this* or *that* right, but of international right itself.

The Development of the Right to Recognition

¹ In the United States context, see Justice John Paul Stevens decision in *Padilla v. Rumsfeld* 124 S. Ct. 2711, 159 L. Ed. 2d 513 (2004) that "At stake in this case is nothing less than the essence of a free society," qtd. in Richard Ashby Wilson, ed., *Human Rights in the 'War on Terror'* (Cambridge UP, 2005), 22.

² Nijman, *supra*.

The right to recognition, also known as the right to legal personality, would seem like the natural starting-place for the debate over whether a suspected terrorist has legal standing in international law. While one finds debates about the suspects' standing in the national jurisprudence of many countries, however, one looks in vain in the post-9/11 jurisprudence produced by international courts and treaty bodies for an explicit analysis of the relevance of this right to 9/11 suspects. The absence is likely due to the history of the right's usage in earlier decisions, where it had typically been cited in reference to questions far removed from the context of terrorism.

The concept of legal personality was developed in the seventeenth century by Hugo Grotius and Thomas Hobbes. It emerged in order to give "personhood" status to organized groups—which entailed bequeathing upon the legal person will and agency, manifested in the legal person's ability to make contracts, own property, sue in court—to exercise civil rights as if it were an individual. In the Westphalian model, the preeminent legal person was the state.³ Over the course of the nineteenth century, the corporation was granted full personhood status; in the twentieth, the non-governmental organization were granted elements of that status as well.

While the organizational model gained force, however, the definition of legal personality began to take a new turn at the start of the twentieth century—from the organizational person toward the individual person. During the establishment of the League of Nations, the legal person, for purposes of international jurisprudence, began to be identified with the individual human person. The legislative history of the right's

³ Janne Elisabeth Nijman, The Concept of International Legal Personality (Hague: T. M. C. Asser Press, 2004).

incorporation into the UDHR shows that the drafters linked legal personality to civil rights (except in the case of age, mental condition, or felony conviction), specifically the capacity to marry, own property, make contracts, and work.⁴ Bodies like the Human Rights Committee monitoring the ICCPR have usually referred to this right in discussions of persons belonging to groups historically denied legal standing: slaves, women, apartheid victims, stateless individuals, aliens, homosexuals, minorities, and children.⁵ Odd as it seems, the Bush administration placed terrorist suspects in this group by asserting that, as Helen Duffy put it, “some...persons are so ‘evil’ or dangerous that they are rendered beyond the protection of law.”⁶

The post-9/11 jurisprudence in international bodies has responded to the US attack on the right to recognition by spelling out four general principles it considers immanent within IHRL and IHL. These principles are: 1) **complementarity**, that, with some caveats, human rights and humanitarian law are both compatible and compulsory in conflict situations; 2) **maximal extension**, that where there is doubt about the

⁴ See, e.g., Commission on Human Rights Drafting Committee on an International Bill of Human Rights, First Session, Report of the drafting committee to the Commission on Human Rights, E/Cn.4/21 1 July 1947; Commission on Human Rights Drafting Committee, International Bill of Rights, Documented Outline, Part I--Texts, E/CN.4/AC.1/3/Add.1.

⁵ Joseph Wronka, *Human Rights and Social Policy in the 21st Century*, rev. ed. (UP of America, 1998), 100; *Human Rights Watch World Report 2008* (Seven Stories Press, 2008), 38.

⁶ Duffy, *supra*, 449.

applicability of humanitarian or human rights provisions, those provisions must be extended to those whose status is doubtful; 3) **restricted derogation**, that during threats to the life of a nation, which permit states to restrict or suspend certain human rights, derogability is limited to specific rights, and even then the freedom to derogate must conform to strict protocols regulated by law; and 4) **regulated detention**, that detention of suspected terrorists must comply with the prescriptions of both human rights and humanitarian law. The right of everyone to recognition everywhere as a person before the law is a useful staging ground from which to examine how these four principles have begun to be applied.

The right to recognition becomes significant after 9/11 in the context of three distinct theories regarding the rights of terrorist suspects. Here, “theory” refers to a consistent approach to legal argument and policy-making on the basis of a set of explicitly articulated principles. The Bush administration’s theory—what its critics have dubbed the “legal black hole” theory—suggests that suspected terrorists of global reach are not addressed by current international law, necessitating the creation of new law that offer substantially fewer protections for such suspects. The black hole theory has been answered by two alternatives that could be called the “full coverage” and “evolutionary” theories. The full coverage theory argues that suspected terrorists do find a place in both IHL and IHRL, which in their current form adequately address the challenge al Qaeda suspects represent. The evolutionary theory seeks a middle ground, recognizing facets of global terrorism that are beyond the reach of current law, but seeking principles from within the law with which to extend it.

Legal Black Hole

According to a variety of Bush-era officials—Secretary of Defense Donald Rumsfeld, Attorney General Alberto Gonzales, Justice and Defense Department attorneys Jay Bybee and William Haynes II, White House Counsel John Yoo, and President Bush himself—terrorists of global reach like members of al Qaeda had no status as legal persons under any international treaty. The administration maintained that detainees suspected of global terrorism could not be considered lawful combatants or civilians within the meaning of IHL, nor could they be protected by IHRL. Finally the administration argued that the US was not bound to treat terrorist suspects according to the strictures of customary international law—that body of law constituted by the general behavior of states. The Bush administration was not monolithic and there were intense internal debates about the legality of its approach throughout the presidency, with dissents by, among others, Secretary of State Colin Powell, General Counsel of the Navy Alberto Mora, and Attorney General for the Office of Legal Counsel Jack Goldsmith, but their voices did not prevail, and the administration’s behavior was generally dictated by the theory that terrorist suspects were not legal persons.⁷

On the black hole theory, terrorist suspects cannot be classed as combatants, either in international or internal armed conflicts. Because IHL defines international conflicts as hostilities between states, suspected terrorists, who are members of a private group rather than soldiers, cannot be parties to such a conflict.⁸ Nor can they be classed

⁷ Jack Goldsmith gives an account of the internal debates in *The Terror Presidency* (W. W. Norton, 2007).

⁸ Common Art. 2 of the Geneva Conventions.

as combatants in an internal armed conflict because they do not fulfill requirements set out in Geneva Convention III relative to the prisoners of war (1949) and their additional Protocols (1977) for such conflicts—including, for example, controlling a single territory, wearing insignia, observing IHL, and being organized in a central command structure.⁹ Because they do not fall into the categories currently prescribed by IHL, the Bush administration decided that they were not due the prisoner of war protections guaranteed to combatants. These protections include the right to challenge their detention in a regularly constituted court, as specified by common Article 3 of the Geneva Conventions.¹⁰

Denial of POW status thus risked denial of the right to recognition, and in fact many suspects remained in detention for years without being charged or tried. Only when the Supreme Court ruled in *Hamdan v. Rumsfeld* (2006) that Guantanamo detainees were entitled to habeas corpus hearings did Congress pass the Military Commissions Act setting up the military tribunals system. Fierce debates raged as to the extent to which

⁹ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 4(2); 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Art. 1; James A. Schoettler, Jr., “Detention of Combatants and the Global War on Terror,” in Michael W. Lewis, ed., *The War on Terror and the Laws of War: A Military Perspective* (Oxford UP, 2009), 77.

¹⁰ The United States Supreme Court, in *Hamdan v. Rumsfeld* (No. 05-184), June 29, 2006, 415 F. 3d 33; Matthew Evangelista, *Law, Ethics, and the War on Terror* (Polity, 2008).

this system constituted adequate access to justice. International human rights organizations accused the tribunals of being kangaroo courts that violated the detainees' rights to be protected from coercive interrogation, be presumed innocent, have full access to evidence and counsel, be informed of the charges and evidence against them, face an independent and impartial judge, and appeal adverse rulings.

While the Bush administration did not find al Qaeda fighters to be combatants, neither did it find them to be "civilians." As civilians, terrorist suspects could be tried for crimes in a domestic or international criminal court, but the Bush administration declared that apprehended al Qaeda members could not be considered civilians because they had engaged in armed conflict, albeit not of a type that falls within the competence of current IHL. Hence, while not combatants, they could not be protected under the fourth Geneva Convention guiding the treatment of civilians, either.

Alberto Gonzales pithily summarized the administration's position on the inapplicability of IHL in his January 25, 2002 memo to President Bush declaring that "the war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war.... In my judgment, this new paradigm renders obsolete Geneva's strict limitations on the questioning of enemy prisoners and renders quaint some of its provisions...."¹¹

The administration contended that international human rights law (IHRL) was as inapplicable as IHL. It asserted, first, that human rights law was meant for peacetime,

¹¹ Michael Ratner, *The Trial of Donald Rumsfeld* (The New Press, 2008); Marco Sassòli, "Query: Is There a Status of 'Unlawful Combatant?'," *Int'l L. Stud. Ser. US Naval War Col.* (2006): 57-68.

not armed conflict or states of emergency, but the “war on terror” was, if not an armed conflict, then at least a state of emergency.¹² Second, it argued that a state is bound to apply IHRL only within its own territory or the territory it occupies, and then only selectively. It would not extend to the Qaeda detainees, who were being held at locations outside of the geographical boundaries of the United States, nor would it extend to Qaeda operatives who had voluntarily chosen to enter a US-occupied territory such as Afghanistan.¹³ Third, it asserted that the International Covenant on Civil and Political rights, which the US ratified in 1992, could not hold sway in US courts unless it was incorporated into domestic law through special legislation. In language the US has used since the 1950s to avoid enforcing human rights treaties, the Covenant was non-self-executing.¹⁴ Fourth, unlike the UK, the Bush administration did not formally derogate from the Covenant; rather, it simply asserted that the treaty, which the US ratified in

¹² President Bush formally issued a proclamation declaring a national state of emergency on Sept. 14, 2001 in Declaration of National Emergency by Reason of Certain Terrorist Attacks, Federal Register 66.181 (September 18, 2001): 48199. The state of emergency has been extended repeatedly.

¹³ Schoettler, *supra*, 85.

¹⁴ United Nations Treaty Collection, ICCPR Declarations and Reservations, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec, Declaration (1). But note that this Declaration conflicts with the US Supreme Court’s decision in *Paquete Habana.; The Lola*, [175 U.S. 677](#) (1900) which integrated the Law of Nations with US law.

1992, was non-binding under the circumstances.¹⁵ Fifth, it asserted that under post-9/11 immigration law, it had the power to detain suspects who were not US citizens indefinitely.¹⁶

Along with IHL and IHRL, the administration also rejected customary international law on the grounds that it was not really law but at best policy or moral aspiration. Legal theorists the administration found congenial include Jack Goldsmith (who later dissented from Bush hard-liners like John Yoo), and Eric A. Posner, a University of Chicago Law Professor. Goldsmith and Posner argued that customary international law is not actually a record of state custom, but a set of claims jurists have made based on evidence they have gathered from the language of treaties, resolutions, and scholarly writings, leavened with a heavy dose of moral argument.¹⁷ Because it is not really what it claims to be, customary law does not have the authority its supporters claim. Even *jus cogens* norms—that core of customary rights long considered in force regardless of the circumstances—could not tie the administration’s hands.

If IHL, IHRL, and customary law were inapplicable to the detainees’ case, then, the administration said, it was bound to construct a “law-of-war paradigm” designed to

¹⁵ United Nations Treaty Collection, ICCPR Declarations and Reservations, *supra*.

¹⁶ Daniel Moeckli, *Human Rights Non-discrimination in the ‘War on Terror’* (Oxford UP, 2008), 114-115.

¹⁷ Jack Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford UP, 2005), 132ff.

meet the new challenges.¹⁸ The new paradigm would certainly conflict with the old law, because the latter did not foresee global terrorism. In other words, if a) the Qaeda detainees' human rights could be restricted or suspended during a states of emergency, b) human rights law and customary international law were inapplicable to their case, and c) their position was not addressed by the current laws of armed conflict, then a new law of armed conflict would have to be constructed, one based on traditional humanitarian law principles (however and by whomever defined) but tailored for a new era.

In one respect, the Bush administration's attempt to keep security and human rights issues separate coincides with how the United Nations has historically structured the relationship between them, with military questions located in the Security Council and human rights questions in various Charter and treaty bodies. The institutional structure reflects the notion that war is governed by one set of laws and procedures, peace by another. A month after 9/11, when the Security Council passed Res. 1373 creating its Committee on Counter-Terrorism, the resolution reinforced this separation: it mandated that states cooperate with each other in the fight against terrorism but, in typical fashion, made only one vague mention of human rights having to do with asylum. By 2003, however, in reaction against the US position, Secretary-General Kofi Annan and the General Assembly, among others, began to pressure the Counter-Terrorism Committee to acknowledge that security and human rights are "mutually reinforcing." From that point, the CTC worked increasingly with the High Commissioner for Human Rights, the Human Rights Council and the Special Rapporteur for the promotion and protection of

¹⁸ David B. Rivkin Jr. and Lee A. Casey, "The Laws of War Have Served us Well," *Wall Street Journal*, WJS.com Forums, Jan. 26, 2009.

human rights and fundamental freedoms while countering terrorism.¹⁹ CTC and its administrative arm, the Counter-Terrorism Committee Executive Directorate (CTED), worked to ensure that IHL and IHRL would be taken into account at every stage of the UN's work on counter-terrorism.²⁰ CTED hired a Senior Human Rights Officer, Edward

¹⁹ “Secretary-General Kofi Annan Launches Global Strategy against Terrorism in Madrid: Agreement on Terrorism Convention, Respect for Human Rights, and Strengthening State Capacity to Prevent Terrorist Acts Are Key Elements of Strategy,” UNIS/INF/64, 10 March 2005; “Policy Guidance regarding Human Rights and the CTC,” S/AC.40/2006/PG2 (25 May 2006); Office of the High Commissioner for Human Rights, “Human Rights, Terrorism, and Counter-terrorism Fact Sheet No. 32,” July, 2008, <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>; “Report of the Counter-Terrorism Committee to the Security Council for its consideration as part of its interim review of the work of the Counter-Terrorism Committee Executive Directorate” S/2009/289 (4 June 2009); CTED, “Thematic Discussion on Human Rights and Resolution 1373,” 7 Oct. 2010, http://www.un.org/en/sc/ctc/docs/2010/2010_10_07_humanrights.ppt; Report of the Counter-Terrorism Committee to the Security Council for its comprehensive consideration of the work of the Counter-Terrorism Committee Executive Directorate, S/2010/616.

²⁰ Duffy, *supra*, 359, 373-74; Report of the Human Rights Council, Supplement No. 53 (A/63/53), 2007, 6/4, 7/7; A/HRC/2/9; SC res. 1456 (2003); Counter-Terrorism Committee, Chair's briefing to Security Council, Jan. 18, 2002; Security Council res. 1535 (2004), S/2004/124, S/2005/800; S/2006/989; SS Res. 1624 (2005); SC res. 1805

Flynn, to ensure visibility, and instituted a set of routine and recursive procedures, through its Preliminary Implementation Assessment, to monitor each state's compliance, carry out country visits, provide technical assistance, and engage in dialogue with states about the extent to which their counter-terrorism measures complied with IHL and IHRL.²¹ Ironically, although human rights are still the poor stepchild in the CTC, the backlash against the "war on terror" has produced closer ties between the UN's security and human rights apparatuses, which has appreciably strengthened monitoring of states' compliance. In reaction to the "war on terror," the Security Council has become, for the first time in its history, a human rights organization.²²

Full Coverage

International law supporters who opposed the legal black hole theory produced an alternative that could be called the "full coverage" theory, which asserts that IHL and IHRL do provide guidelines (i.e., the principles of complementarity, maximal extension, restricted derogation, and regulated detention outlined above) that, together, enable an

(2008); Security Council Counter-Terrorism Committee, "Human Rights,"

<http://www.un.org/sc/ctc/rights.html>.

²¹ See, e.g., E.J. Flynn, "The Security Council's Counter-Terrorism Committee and Human Rights," *Human Rights Law Review* 7.2 (2007): 371-384.

²² I expanded on these developments in a paper titled, "Countering Jack Bauer: How the War on Terror Strengthened Human Rights," available in the ISA archives for the 2011 conference. The fully fleshed-out version of the argument is scheduled to appear in 2012 as "A Sea Change in Security," in the *Journal of Conflict Studies*.

adequate response to the legal challenges presented by global terrorism. The full coverage theory takes the principle of complementarity as its starting. That principle was summed up by the Office of the High Commissioner of Human Rights in its 2003 “Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism.” It said that IHR and IHRL “may complement” one another because they share a “common nucleus of non-derogable rights and common purpose of promoting human life and dignity.”²³

Here, complementarity does not mean that the two legal regimes are exactly the same. While a given right must be respected during armed conflict, the test for evaluating its observance “may be distinct from that applicable in time of peace.”²⁴ Hence, IHL is more flexible than IHRL regarding how certain rights are observed. Second, during hostilities, IHL will take precedence over IHRL if their provisions are in conflict, because IHL is the more specifically relevant law—the *lex specialis*.²⁵ Yet rights restrictions during armed conflict must conform to the prescriptions of the Covenant’s derogation clause (Art. 4(2)) or the more specific laws of IHL. Derogation from a right in the Covenant does not invalidate a parallel right in IHL. For example,

²³ “Digest,” *supra*, 16. Cf. the different meaning of “complementarity” in the International Criminal Court, Rome Statute, A/CONF.183/9 (17 July 1998), Art. 17.

²⁴ “Digest,” *supra*, 16; also Duffy, *supra*, 290.

²⁵ “Digest,” *supra*, 16-17; International Court of Justice, Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, para. 106 and fn. 123.

derogating from fair trial rights in IHRL does not invalidate fair trial rights guaranteed by an IHL treaty, even when they are phrased in exactly the same language.

For this theory, the fact that there is no international agreement on the meaning of the term “terrorism”²⁶ and that no terrorism convention has been adopted does not prevent IHL and IHRL from addressing acts associated with terrorism under most definitions, because such acts have long been prohibited through more specific instruments.²⁷

The full coverage theory has been advanced by all of the relevant international judicial bodies, as well as by international law publicists, the International Committee of the Red Cross, the International Law Commission, and human rights NGOs. As regards IHL, these authorities have argued that the “war on terror” is not technically a war at all. Still, they have maintained, even if it *is* a war, terrorists do not fall into a limbo between combatant and civilian status. The definitive commentary on Geneva Convention IV by the International Committee of the Red Cross holds that there is a “general principle which is embodied in all four Geneva Conventions of 1949” that every person detained during armed conflict is either a combatant or a civilian: “There is no intermediate

²⁶ Thomas Weigend, “The Universal Terrorist: The International Community Grappling with a Definition,” *Journal of International Criminal Justice* 4 (2006): 912-932.

²⁷ For a list of the fourteen terrorism-related multilateral treaties, see www.un.org/terrorism/instruments.shtml.

status; nobody in enemy hands can be outside the law.²⁸ Here there is an implicit appeal to the right to recognition.

For this reason, the trend in IHL since 1949 has been toward maximal extension of the law to cover doubtful cases. The third Geneva Convention relative to prisoners of war, Art. 5, extends combatant status to doubtful cases pending a judicial determination of their status. What Geneva III does for doubtful cases of combatancy, Protocol I of 1977 does for determination of civilian status, asserting that “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”²⁹ It is not a theoretical question of whether everyone can be covered by the law—IHL assumes everyone can—but a practical question requiring case by case determination.

Maximal extension specifically applies to fair trial rights during states of emergency, even if, like the state of emergency that existed in the US after the 9/11 attacks, the type of emergency has not been foreseen in IHL. In the Human Rights Committee’s General Comment No. 29 on States of Emergency, the Committee asserted that

²⁸ ICRC, “Commentary on Geneva Convention IV relative to the protection of civilians in time of war, 12 Aug. 1949,” para. 4, <http://www.icrc.org/IHL.nsf/COM/380-600007?OpenDocument>.

²⁹ Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 50(1).

As certain elements of the right to a fair trial are explicitly guaranteed under IHL during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations.³⁰

In a similar way, international courts have ruled that, if the definition of dissident armed groups in current IHL is too restrictive to cover terrorism, IHL needs to be extended to include even such extraordinary cases.³¹ For example, the Appeals chamber of the International Criminal Tribunal for the former Yugoslavia found in the *Tadić* and *Delalić* cases that international humanitarian law's primary object is to protect civilians "to the maximum extent possible."³² In other words, every captive is a person before the law.

The black hole and full coverage theories agree that IHL does not apply to everyone in its current form. The difference is that the full coverage theory seeks to uncover the law's inner logic, to reveal the principles inherent to it, in order to extend the law, as it were, from within. By contrast, the black hole theory seeks to narrow the law's

³⁰ General Comment No. 29, *supra*, para 16; also paras. 11, 13. For IHL rules on fair trial rights, see 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, Articles 84, 99-108, and Article 3 common to the Geneva Conventions.

³¹ Cf. Bakhtiyar Tuzmukhamedov, "International Humanitarian Law and Non-State Actors," *Soc'y Int'l L. Proc* (2008) 441-444.

³² ICTY, Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment of Appeals Chamber, July 15, 1999, para. 168; ICTY Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment of Appeals Chamber, Feb. 20, 2001, para. 73.

scope to the vanishing point.³³ For the Bush administration, the evident end of this approach was to weaken the normative claims of law in order to consolidate power in the Executive. One could see an example of this trend in a March, 2009 Justice Department memorandum to the US District Court of the District of Columbia regarding the habeas corpus claims of Guantanamo detainees: “The President has the authority to detain persons the President determines planned, authorized, committed or aided terrorist attacks on September 11....”³⁴ There is no mention of legislative or judicial review of the president’s determination. The memorandum adopts this language from the congressional Authorization to Use Military Force (2001) enacted immediately after 9/11, which under the declaration of a national state of emergency gave President Bush sweeping powers.

In addition to defending IHL’s adequacy to global terrorism, full coverage theory defends the relevance and jurisdiction of IHRL. The US claim that the Covenant was non-self-executing was thought by many experts to show “contempt for the international legal process.”³⁵ The Human Rights Committee resoundingly rejected the view that the

³³ Derek Gregory uses the term “vanishing point” in a geographical sense to analyze the way Abu Ghraib and Guantanamo Bay “direct the politico- legal gaze through an extended series of vanishing points towards ‘non-places’ for ‘non-people’.” See “Vanishing points: Law, Violence and Exception in the Global War Prison, in Derek Gregory and Allan Pred, eds., *Violent Geographies: Fear, Terror and Political Violence* (New York: Routledge,2006).

³⁴ Qtd. in Schoettler, *supra*, 80.

³⁵ Duffy, *supra*, 347.

Covenant fails to govern a state's human rights behavior outside of its own territory. In its 2003 Concluding Observations to Israel's periodic country report, the Committee asserted that a state's extraterritorial practice "does not preclude the application of the Covenant, including article 4 which covers situations of public emergency."³⁶ The full coverage theory rejects the black hole theory's assertion that when a state fights terrorism it is entitled to pick and choose which humanitarian law principles it will abide by. If a state seeks to rely on the law of armed conflict, it must swallow IHL whole.³⁷

For proponents of the full coverage theory, the main challenge is not to develop new laws but to enforce existing laws. For example, Geoffrey Robertson, a British law professor, litigator, and Appeals Judge for the war crimes court in Sierra Leone, has argued that any reforms that need to be made are not to the law but to the "delivery systems;" hence, he has criticized the new international courts as slow, expensive, inefficient, corrupt, and prone to giving grandstanding defendants airtime.³⁸

In sum, the full coverage theory maintains that whatever challenges global terrorism poses to IHL and IHRL can be met with complementarity, maximal extension, and restricted derogation, in an atmosphere of strengthened enforcement mechanisms.

Evolution

³⁶ Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant/Concluding Observations of the Human Rights Committee/Israel CCPR/CO/78/ISR, Aug. 21, 2003, D(11).

³⁷ Duffy, *supra*, 343, 294.

³⁸ Geoffrey Robertson, "Fair Trials for Terrorists?" in Wilson, *supra*, 177, 181.

Between these two poles an intermediate argument has emerged that could be called the “evolutionary” theory, which, while denying that terrorist suspects fall into a legal black hole, recognizes that some areas of IHL and IHRL may need to be elaborated to address the unprecedented circumstances. Mary Robinson, former High Commissioner of Human Rights, agrees with the Bush administration that global terrorism has challenged the international community in “new ways,” but while the administration’s reaction was to dispense with rights in favor of security, Robinson’s is to protect IHRL because, like national security, it was “also the object of terrorist attacks.”³⁹

On this view, while the Bush administration fundamentally and deliberately misused and ignored IHL and IHRL, it nevertheless was partially correct in its diagnosis of their incapacity to address current problems. An armed conflict between a state and non-state actor based in multiple states, capable of causing widespread harm to civilians, and intent on sowing terror through the sophisticated use of mass media was unprecedented, and unanticipated by IHL.⁴⁰ However, for evolutionists, the proper response is not to discard the law, but to grow it.

In response, the evolutionary theory has identified 3 areas where legal innovation may be needed or should be feared. First, some have suggested that states should relinquish part of its sovereignty so that in cases where a state refuses to police terrorists

³⁹ Mary Robinson, “Connecting Human Rights, Human Development, and Human Security,” in Wilson, *supra*, 308-309. Also cf. International Commission of Jurists, “Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism,” Aug. 28, 2004, http://icj.org/news.php?id_article=3503?en.

⁴⁰ Schoettler, *supra*, 71-72.

in its midst, a more robust police power can be vested in an international organization. In the introduction to his collection, Human Rights in the 'War on Terror,' Richard Ashby Wilson explains how state sovereignty has impeded international criminal justice from dealing with cases of terrorism. He argues that

the new anti-terror doctrine responds to real security threats which existing international institutions were not originally designed to deal with.... The 1990s system of international criminal justice was not constructed with international terrorism in mind.... The I[nternational] C[riminal] C[ourt] relies (e.g., for powers of search, seizure, and arrest) on a state sovereignty model that seems outmoded when faced with global Islamist terrorist networks.⁴¹

Wilson's observation goes to the heart of the Westphalian model of sovereignty, and even apart from the terrorist threat one could imagine a role for a supranational police force in cases of international criminal justice. The weakness of the current system was evident when in 2009 and 2010 the International Criminal Court issued two warrants for the arrest of President Omar Bashir of Sudan in connection with the Darfur genocide. The Sudanese authorities refused to hand him over to the court, as did neighboring countries he visited (Chad and Kenya), starkly revealing the limits of international justice in the context of state sovereignty. While there is no chance that a global police form will emerge any time soon, the value of the evolutionist position is that it points out areas where global terrorism has exposed gaps in existing law.

⁴¹ Wilson, *supra*, 6-7.

Second, the doctrine of universal jurisdiction has been invoked to argue that European courts may try officials in the Bush administration for violating IHL or IHRL. Universal jurisdiction empowers a national court or international tribunal to try a citizen of a state for serious crimes such as genocide and war crimes, even though the prosecuting state or tribunal has no historical connection to the events. This doctrine existed well before 9/11, and was gaining acceptance during the 1990s when many new experiments in international criminal justice were emerging, including the tribunals for the former Yugoslavia and Rwanda, and the ICC.⁴² The doctrine was invoked, for example, in the 1998 decision by the Law Lords of the British Parliament to permit the extradition of Chilean dictator Augusto Pinochet to Spain for prosecution for crimes in which neither Spain nor the United Kingdom had any direct national interest.⁴³ Debates over whether it is permissible to try Donald Rumsfeld or Dick Cheney in a European venue turn on the legality of universal jurisdiction. Like the proposal for a global policing organization, this universal jurisdiction doctrine has met many obstacles, but again it is useful in pointing out the need to supplement existing law.

Not all responses to gaps in the law are positive, from evolutionists' perspective. The change they most fear is the change in customary international law that might take place if too many states follow the US lead and pass "exception laws." These laws restrict or suspend IHRL for detainees they classify as terrorists, who in practice are often

⁴² Richard Goldstone, "The Tension between Combating Terrorism and Protecting Civil Liberties," in Wilson, *supra*, 158-159

⁴³ "Pinochet Faces Extradition Battle," BBC News, Nov. 25, 1998, http://news.bbc.co.uk/2/hi/uk_news/221718.stm.

merely their political opponents or disfavored minorities.⁴⁴ Indeed, numerous states passed just such laws during the decade following 9/11. Richard Goldstone and others have documented that the UK, India, Russia, the Phillipines, Thailand, South Africa, Zimbabwe, Liberia and Indonesia, amother others, cited US behavior as precedent for exception laws restricting or suspending IHRL for detainees.⁴⁵ The worry is that each exception law risks contributing to the establishment of new, more permissive, customary law. As Richard Goldstone put it, “What is of particular concern is that this violation of international law...might well weaken the Geneva Conventions and be used to justify similar violations by other countries.”⁴⁶

Goldsmith and Posner concur with Goldstone on the possibility that US behavior might change customary law, but seem less unnerved by the prospect. They suggest that every state action inconsistent with existing international law “might be said to be a proposal for revision of existing international law.”⁴⁷ For them, the fact that international law changes when states change their behavior means that “we cannot condemn a state merely for violating international law. The question is whether by violating international law a state is likely to change international law from a moral perspective. This is why so much international legal argument seems indistinguishable

⁴⁴ Goldstone, *supra*; Neil Hicks, “The Impact of Counter Terror on the Promotion and Protection of Human Rights: A Global Perspective,” in Wilson, *supra*, 209-224.

⁴⁵ Goldstone, *supra*; Hicks, *supra*.

⁴⁶ Goldstone, *supra*, 164.

⁴⁷ Goldsmith and Posner, *supra*, 198.

from moral argument.”⁴⁸ From this point of view, the Bush exception laws may well have contributed to the establishment of new, less restrictive state customs with regard to counter-terrorism, but the value of that change will depend on a retrospective moral judgment by an unspecified observer, according to unstated moral assumptions. This pragmatic take on change sees international law less as a codification of shared norms than as an instrument of power. For Goldstone and other evolutionists, however, it is precisely the consolidation of power in the Executive that post-9/11 international jurisprudence sought to curtail. The evolutionist would object that when violations come to be seen merely as proposals, when the exception is no longer regarded as exceptional, the rule of law becomes meaningless.

While evolutionary theory recognizes that international jurisprudence must, in some cases, develop new law, it argues that any new law must be developed according to the general principles that organize existing IHL and IHRL, and insists that the existing law will generally suffice to meet the challenges posed by global terrorism.

The Right to Recognition After 9/11

The attempt to strip terrorist suspects of legal personality became evident in the Bush administration’s denial of fair trial rights, in particular the right of habeas corpus. In the Presidential Military Order of Nov. 13, 2001, the administration declined to grant terrorist suspects the right to judicial review of their detention, and when the Supreme Court, in *Hamdan v. Rumsfeld* (2006) overturned the suspension of habeas corpus for Guantanamo detainees, Congress passed the Military Commissions Act (2006), denying

⁴⁸ Ibid., 199.

habeas to “unlawful enemy combatants,” a designation found nowhere in IHL but applied at the discretion of the Executive.

As the restriction of habeas corpus makes clear, legal personality is associated with a cluster of other rights, which it makes necessary, and without which it cannot be observed. These include non-derogable rights listed in the Covenant like the right to life, prohibition of torture and slavery, and prohibition of retroactive criminalization.⁴⁹ Other rights associated with legal personality are immune to derogation due to their status as *jus cogens* norms—for example, equality before the law and some fair trial rights.⁵⁰ Even legitimate derogations must be limited to strictly necessary, proportionate, and temporary measures that are subject to regular judicial review.⁵¹ For example, the Covenant’s derogation clause cannot justify prolonged or incommunicado detention in any circumstances, because such a violation would deprive the detainee of legal personality.⁵²

⁴⁹ ICCPR Articles 4(2), 6, 7, 8, 15.

⁵⁰ *Ibid.*, Articles 9, 14, 26, and Human Rights Committee, General Comment No. 29, “States of Emergency (Article 4)” CCPR/C/21/Rev.1/Add.11, Aug. 31, 2001, para. 13(b); Duffy, *supra*, 295-296.

⁵¹ General Comment No. 29, *supra*, para. 7, 10; OHCHR, “Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism,” HR/PUB/03/1, 2003, p. 59.

⁵² General Comment No. 29, *supra*, para. 11; also Duffy, *supra*, 394.

International jurisprudence, resisting the black hole theory, has insisted that the rights associated with legal personality are too fundamental to be compromised, even for the sake of countering terrorism. Moreover, numerous bodies have found the right in both IHL and IHRL, which has prompted them to propose that the principle of complementarity between the two legal regimes is relevant to the conflict with global terrorism. As the Counter-Terrorism Committee has repeatedly asserted since 2005, “any measure taken to combat terrorism should...adopt such measures in accordance with...human rights law...and humanitarian law.”⁵³ Regional bodies including the European Court of Human Rights and the Inter-American Court of Human Rights have agreed.⁵⁴

Even where rights may be restricted during armed conflict, their restriction is constrained by IHL and IHRL, due to the principle of limited derogability. Contrary to the Bush administration’s suspension of non-derogable and peremptory rights like the right to legal personality, international jurisprudence since 9/11 has indicated that even when there is a “threat to the life of a nation,” there are seven considerations that limit derogability, including the principle that derogated rights must always be under judicial control, which assumes that an individual detained on suspicion of terrorism must have legal standing.⁵⁵

While some rights may be restricted during armed conflict and other states of emergency, as prescribed by IHL and IHRL, even they may not be restricted in such a

⁵³ Annual Review of the Committee on Counter-Terrorism, S/2005/800, Dec. 16, 2005.

⁵⁴ Cf. “Digest,” *supra* 42.

⁵⁵ “Digest,” *supra*, 18-35, 53 ; General Comment No. 29, *supra*, paras. 2, 4, 16.

way as to violate the right to legal personality.⁵⁶ The Human Rights Committee has asserted that the Covenant's derogation clause cannot justify violating fair trial rights, in particular the presumption of innocence, even though fair trial rights are among those that do not appear in the derogation clause.⁵⁷ This is because fair trial rights are considered peremptory norms of customary international law, and thus do not need to be codified as non-derogable in treaty law.

An important example of a derogable right, the derogation from which is illegitimate because it would invalidate legal personality, is the prohibition of arbitrary and prolonged detention. By 1998, the Human Rights Committee had already determined that, although the prohibition of arbitrary and prolonged detention does not appear in the derogation clause, such detention is nonetheless "incompatible" with the Article 16 right to legal personality, the latter of which *is* non-derogable.⁵⁸ Legal personality is violated when detention is unregulated because then the detainee is at the mercy of his jailers. To be lawful, the detention must not be arbitrary, it must be subject to judicial control, the detainee must have the right to challenge the detention in an independent and impartial court, the detainee must be informed of the charges against him, the detention must be temporary so as not to violate the presumption of innocence, and incommunicado

⁵⁶ General Comment No. 29, *supra*, para. 7, 10; OHCHR, "Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights While Countering Terrorism," HR/PUB/03/1, 2003, p. 59.

⁵⁷ General Comment No. 29, *supra*, para. 11; also Duffy, *supra*, 394.

⁵⁸ Human Rights Committee, Concluding observations on Israel (1998), CCPR/C/79/Add.93, para. 21

detention (in which the detainee is not permitted contact with counsel, the ICRC, or family) is prohibited.⁵⁹ As with restricted derogation, the philosophical basis for these regulations is that they protect the detainee's fundamental right to be recognized as a person before the law.

4. Evolution in the United States

The Obama administration has not rushed to reinstate legal personality for detained terrorist suspects. Once in office Obama resisted moving some detainees into the criminal justice system, citing state secrets concerns familiar from the Bush administration. A month after his term began, on February 20, 2009, the administration filed a brief in federal court arguing that detainees at Bagram Air Base in Afghanistan had no habeas rights.⁶⁰ While arguing that suspected terrorists should be tried in criminal court rather than military tribunals, the Attorney General Eric Holder nonetheless maintained that standard Miranda rules for interrogation should be loosened to be "more consistent with the threat we now face."⁶¹

The administration has since made some movements toward respecting IHL and IHRL. In 2008, President Obama affirmed in an Executive Order that detainees at

⁵⁹ "Digest," *supra*, 51.

⁶⁰ Charlie Savage, "Obama Upholds Detainee Policy in Afghanistan," *New York Times*, Feb. 21, 2009.

⁶¹ Charlie Savage, "Holder Backs a Miranda Limit for Terror Suspects," *New York Times*, May 9, 2010; Charlie Savage, "Obama Said to Be Open to New Miranda Look," *New York Times*, May 10, 2010.

Guantanamo have the right to challenge their detentions in court.⁶² In April, 2009 it began granting some Bagram detainees habeas rights by setting up review boards enabling prisoners to challenge their detention.⁶³ Once the review boards began to function, the administration transferred some of the detainees to the authority of local elders, while freeing others no longer thought to be a threat. So far the administration has released the names of over 600 of the detainees.⁶⁴

But in 2010, the Obama administration was still resisting granting some high value Bagram detainees habeas rights, on the grounds that, unlike the Guantanamo prisoners, they were captured on the sovereign territory of another state in an active theater of war.⁶⁵ However, in *Boumediene vs. Bush* (2008), the Supreme Court had

⁶² Cf. Michael Ratner, *The Trial of Donald Rumsfeld* (The New Press, 2008); President Barack Obama, Executive Order—Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, Jan. 22, 2009, http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/.

⁶³ Charlie Savage, “Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus,” *New York Times*, April 2, 2009; Alissa J. Rubin, “U.S. Readies New Facility for Afghan Detainees,” *New York Times*, Nov. 15, 2009.

⁶⁴ Rubin, “Bagram Detainees,” *supra*.

⁶⁵ Editorial, “A Bagram Reckoning,” *New York Times*, Jan. 17, 2010; Alissa J. Rubin, “Bagram Detainees Named by U.S.,” *New York Times*, Jan. 16, 2010; Charlie Savage, “Detainees Barred from Access to US Courts,” *New York Times*, May 21, 2010

denied this claim.⁶⁶ Nonetheless, the administration continued to behave as if the right to legal personality were derogable rather than a norm that is both non-derogable and *jus cogens*. As of Jan. 31, 2011, only one Guantanamo detainee, Ahmed Ghailani, was tried in US domestic court, and the Obama administration subsequently set up new military tribunals at Guantanamo for high-value detainees.⁶⁷

The Obama administration's approach indicates that when it comes to countering terrorism states will proceed with caution regardless of their leaders' political leanings. If the US sets the tone for international custom in the coming decade, what we are likely to see is a general shift from the black hole to the evolutionary approach. This would be a positive development, avoiding both the black hole theory's resistance to the rule of law in counter-terrorism, and the full coverage theory's insistence that existing law is adequate to the unforeseen challenges posed by terrorism.

Evolution is not a radical break. It is a development from within. As international tribunals, councils, and monitoring bodies; national courts; and global civil society organizations have insisted, evolution from within must begin by respecting the principle that everyone has the right to recognition everywhere before the law.

⁶⁶ Schoettler, *supra*, 117.

⁶⁷ Benjamin Weiser, "Ex-Detainee Gets Life Sentence in Embassy Blasts," *New York Times*, Jan. 25, 2011.