jilir Journal of International Law & International Relations Vol. 3, No. 1 (Spring 2007)

jilir | journal of & international law international relations

SPECIAL ISSUE: THE 'WAR ON TERROR'
Spring 2007

ARTICLES

Volume 3, Number 1

UNIVERSITY OF TORONTO FACULTY OF LAW

UNIVERSITY OF TORONTO MUNK CENTRE FOR INTERNATIONAL STUDIES AT TRINITY COLLEGE

jilir | journal of & international law international relations

Volume 3, Number 1 **Spring 2007**

 ISSN: 1712-2988

jilir | journal of international law & international relations

Printed in Canada by Thistle Printing Limited

The *Journal of International Law & International Relations* aims to promote critical, informed, and interdisciplinary debate on the intersection of international law and international relations. To this end, the *JILIR* provides a forum for contributions from Canada and abroad on matters of current concern in international affairs in general and on issues of particular interest to Canada. The opinions expressed in the *JILIR* are those of the individual authors, and none of the *JILIR*, its editors, the Faculty of Law or the Munk Centre accept any responsibility for them.

The *Journal of International Law & International Relations* gratefully acknowledges the financial and institutional support of the Faculty of Law and the Munk Centre for International Studies at the University of Toronto.

Subscriptions: Each volume of the *JILIR* consists of two issues, published in the Winter and the Spring.

The subscription cost is C$64 per volume (2 issues).

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Citation: (2007) 3 J. Int'l L. & Int'l Rel.

jilir | journal of international law & international relations

Special Issue: The 'War on Terror'
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Editors' Note: International Law, International Relations and the 'War on Terror'

One of the recurrent charges levelled against International Law it that, when questions of high politics get into the picture, its relevance in world affairs inexorably wanes. This condition is even more apparent when issues of national security are at stake. As the argument goes, when states are trying to protect their very existence in an anarchical world, formal legal preoccupations should give way to the pragmatism of realpolitik.

The events of 9/11 in the United States and the ensuing 'War on Terror' have bolstered this sceptical view of International Law. Security has become a top priority in contemporary national and international political agendas, and governments have felt legitimized in adopting 'exceptional' measures to deal with real and perceived threats. The grounds to use force against rogue regimes have thus expanded, and the 'right' to security is now frequently used to trump other long established legal guarantees such as the right to a fair trial.

Seen in this light, the War on Terror has represented a serious challenge to International Law. At the same time, however, its controversial nature has rekindled the debate over the importance of the legal and normative dimensions of world affairs. In the post 9/11 geopolitical landscape, do the old rules of the game still apply, or is a more 'realistic' approach to International Relations and International Law required? If that is the case, is this move justified? And what are the consequences, both in the short and long term, of moving beyond existing normative and legal commitments encapsulated in International Law?

The four articles included in this special issue of the JILIR contribute to this ongoing debate about the War on Terror. They do so by critically exploring current responses to terrorism around the world and the new meanings security has acquired in this context. Craig Barker, in the article "The Politics of International Law-Making: Constructing Security in Response to Global Terrorism" argues that the international response to global terrorism has been characterized by an apparent 'rush to law', which is evidenced by the adoption of a growing number of global and regional counter-terrorism treaties and the legislative activism of international institutions such as the United Nations. Relying on an eclectic analytical framework that draws from both International Law and International Relations theory, the author contends that the success of this legalization process is not based on pure self-interest on the part of the main actors involved (i.e. states), as most rationalist theorists would suggest, but on social influence and coercion (e.g. the shaming effect of the provision requiring states to report to the UN's Counter-Terrorism Committee). In turn, the legitimacy of this process does not depend on 'internal morality' of the law enacted, as Fuller's legal positivism would suggest, but on compliance with the set of shared understandings about what is an appropriate response to terrorism that have emerged through an ongoing open dialogue among both state and non-state law-makers in the international arena. It is through this type of exchange, which

Barker equates to the Habermasean idea of communicative action, that a 'balanced' construction of security in response to global terrorism can take place.

The legality of current efforts to fight terrorism is also a central theme in Barbara Falk's article. In "The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III," the author examines the debate over the long-term detention and legal status of 'enemy combatants' in the context of the War on Terror. At the core of this debate is the issue of the applicability of international humanitarian law to these individuals. Falk shows how in the aftermath of the conflict in Afghanistan the US administration has emphasized the gaps in the existing legislation regarding the distinction between civilians and combatants. This attitude has been in sharp contrast to that of the International Committee of the Red Cross, which has refused to engage in a debate about the Geneva Conventions, claiming that their provisions applied to both civilian and combatants. According to Falk, these stubborn and uncompromising positions have limited a healthy discussion about the issue of 'enemy combatants'. Using as term of reference the recent *Hamdan v Rumsfeld* decision of the US Supreme Court, the author then looks at ways in which this conversation over international humanitarian law can be fruitfully (re)opened.

In the third article of this special issue, the focus shifts from Afghanistan to Iraq, the other key front in the War on Terror. In "Why Did the U.N. Security Council Support the Anglo-American Project to Transform Postwar Iraq?: The Evolution of International Law in the Shadow of the American Hegemon," Carlos Yordán analyzes the power dynamics underlying the application of International Law in Iraq after the 2003 US-led invasion. Building on Detlev Vagts's notion of 'hegemonic international law', the author contends that in the post-Cold War era, American power and influence have come to define the dominant 'neo-liberal' worldview about intrastate order. This worldview in turn has shaped the workings of international institutions, including the UN Security Council. In the case of Iraq, the Council not only legitimized the post war American occupation, but also accepted most of the US administration's requests aimed at transforming the local social order according to neo-liberal values. This was not the first time the Council acquiesced to the American hegemon in a postwar mission. Yordán shows that this hegemon-subject relation characterized other recent UN-led missions, such as the one in Kosovo.

In the special issue's concluding article, "Manufacturing Threats: Asylum Seekers as Threats or Refugees?" Scott Watson takes into consideration the other battleground in the ongoing War on Terror, namely the 'home front'. Using as a term of reference Buzan and Waever's notion of 'securitization', the author shows how in the Canadian context the discursive practices of political and media elites have constructed the identity of asylum seekers arriving to North America. These constructions have clear practical implications, since they have shaped immigration and refugee policy in the host country. In recent years, the portrayal of immigrants and refugees as a potential threat to national security around the world has favoured the adoption of restrictive border control measures. Watson, however, warns us that while border security has become a hot political issue after the events of 9/11, the securitization of immigrants and refugees is not a new phenomenon. To

support this claim, the author looks at the case of the Sikh asylum seekers arriving in Canada in the mid 1980s and the 'securitized' debate that this event sparked in the local media and among policy-makers. At the same time, Watson shows that this is not the only type of discourse surrounding asylum seekers. In certain circumstances, these individuals might be framed as individuals in need of the protection of the state, not as a threat. This was the case, for example, of the group of Sri Lankan asylum seekers that arrived in Canada few months before the Sikhs. The existence of alternative 'humanitarian' discourses about immigrants and asylum seekers implies that the now prevalent 'securitarian' arguments are not as natural as they seem today, and thus they might be replaced by more progressive ones in the future.

These articles, taken together, demonstrate that the debate over the role of International Law in the current 'securitized' political environment has not faded away. On the contrary, it has become more relevant than ever.

Ruben Zaiotti and Laura Zizzo
Editors-in-Chief
Journal of International Law and International Relations, 2006-2007

The Politics of International Law-Making: Constructing Security in Response to Global Terrorism

J. CRAIG BARKER*

The response of the international community to the problem of global terrorism has been multifaceted and complex. At the heart of this response has been an apparent rush to law, as evidenced by the adoption of a considerable number of global and regional counter-terrorism treaties, supplemented by an increasingly sophisticated role of key institutions, including, in particular, the United Nations Security Council. At one level it might be possible to argue that international law is coming of age and is, as a result, developing into a sophisticated legal system which is capable of analysis and application at both the domestic and international level. However, this apparent rush to law, whilst generally positive and indicative of a potentially greater normativity of international law, brings with it certain difficulties. For example, the newly asserted legislative role of the United Nations Security Council, augmented by the supremacy provision of Article 103 of the United Nations Charter, creates an hierarchically superior law-making authority which is capable of overriding state consent and has the potential to remove political dialogue from the law-making process.

This paper seeks to analyze the various normative processes at work in the legal response to international terrorism from an interdisciplinary perspective. The first section of the article will provide a brief overview of the institutional responses and the legal issues relevant thereto. Particular focus will be given to the emerging congruence between primary rules and secondary processes which assimilate closely with the positivist legal analysis of H.L.A. Hart,[1] as well as the liberal institutionalist

* Sussex Law School, University of Sussex. I should like to thank John Grant, Duncan French and Sandy Ghandhi for their comments on various drafts of this paper and Malcolm Ross and Jo Bridgeman for their continuing support and encouragement. The comments I have received from the two anonymous reviewers have proved to be invaluable and have helped development of a number of aspects of this paper, particularly in relation to my understanding of the complexities of IR theories. However, because of this I must especially emphasize that any errors and misunderstandings are entirely my own responsibility.

[1] See, in particular, H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press (1994) at 155. The legal responses to global terrorism will be taken at face value and the legal analysis will draw primarily on positivism and critiques thereof. It is accepted that Hart's version of legal positivism is but one variation of this theory. For an account of a more modern approach to legal positivism, see Bruno Simma & Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 Am. J. Int'l L. (302). Nevertheless, as noted in the text, it is the apparent congruence of primary and secondary rules visible in the institutional response to global terrorism which is at the heart of the present article. This insight demands the use of Hart's concept of law as the stating point for the present analysis. By focusing on the positivist legal responses to global terrorism the article does not seek to develop more critical analysis, for example, by drawing on New Haven scholarship, critical legal studies or feminism.

vision of 'legalization'.[2] Central to the institutional response to global terrorism is the emerging legislative role of the United Nations Security Council, as evidenced, in particular, by Resolution 1373. Consideration will be given to the legality of this legislative response before the legitimacy of the process is examined. A range of theoretical insights from both international law and international relations will be examined to argue that the legitimacy of the process of Security Council legislation derives from state compliance secured through the development of shared understandings as a result of iterative discourse and increased socialization.[3] It will be argued thereafter that, even if legitimate, the positivist legalization model is limited insofar as the internal morality of the ensuing law is open to question. Thus, it will be argued that continued state compliance with law-making responses to global terrorism cannot be secured without greater involvement of states and non-state actors in the law-making process itself through processes of communicative action and rhetorical activity.

Law-Making Responses to Global Terrorism – An Overview

As was noted in the introduction, there has been an apparent rush to law in response to the threat of global terrorism. In particular, there has been a significant development in primary rules. The process of rule making in response to terrorism began in the 1960s with a series of conventions, which were aimed at dealing with particular types of terrorist offences. By the early 1990s there were ten sectoral or offence-specific anti-terrorism conventions in total,[4] all of which 'had evolved

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[2] See the special issue of *International Organization*, Volume 54, Summer 2000. This work builds upon the dual agenda analysis of liberal institutionalism developed by Anne-Marie Slaughter in her groundbreaking article 'International Law and International Relations: A Dual Agenda' (1993) 87 Am. J. Intl L. 205 and relies directly on the legal positivism of H.L.A. Hart. See Kenneth W. Abbott, Robert O Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, 'The Concept of Legalization' 54 *International Organization* 401 at 403.

[3] In developing insights from IR theory, in addition to the analysis of liberal institutionalism inherent in the concept of legalization, consideration will be given also to the rationalist/constructivist debate. The primary theoretical framework for the article, alongside legal positivism, derives from constructivism, which this author believes is the IR theory that offers the most to international lawyers. Insights derived from realism might inform the analysis of legal positivism in the first part of this article but the deliberate decision to focus on the Hartian model of legal positivism mitigates against the specific development of realist analysis in this context.

[4] Tokyo Convention on Offences and Certain other Acts Committed on Board Aircraft 1963 (704 *UNTS* 219); Hague Convention for the Suppression of Unlawful Seizure of Aircraft 1970 (860 *UNTS* 105); Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971 (974 *UNTS* 177); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents 1973 (1035 *UNTS* 167); International Convention against the Taking of Hostages 1979 (1316 *UNTS* 205); Convention on the Physical Protection of Nuclear Material 1980 (1456 UNTS 246); Protocol to the Montreal Convention for the Suppression of Unlawful Acts of Violence Serving International Civil Aviation 1988 (1589 *UNTS* 474); Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (1678 *UNTS* 221); Protocol to the Rome Convention for the

piecemeal, usually in response to particular terrorist activities.'[5] This process of law making might usefully be referred to as a process of crisis management.[6] However, the process changed significantly during the 1990s. First, the General Assembly adopted a Declaration on Measures to Eliminate International Terrorism in 1994.[7] It followed this up in 1996 with a Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism. Article 9 of the latter resolution indicated the decision of the General Assembly to establish an Ad Hoc Committee 'to elaborate an international convention for the suppression of terrorist bombings and, subsequently, an international convention for the suppression of acts of nuclear terrorism, to supplement existing international instruments and, thereafter to address by means of further developing a comprehensive legal framework of conventions dealing with international terrorism.'[8] The Convention for the Suppression of Terrorist Bombings was adopted by the General Assembly in 1997 and entered into force in May 2001, three and a half months before the events of 9/11.[9] The Ad Hoc Committee has subsequently promulgated two further Conventions on the Suppression of the Financing of Terrorism in 1999[10] and on Nuclear Terrorism in 2005.[11] This process is continuing in the form of the current work of the General Assembly's Ad Hoc Committee focusing on the promulgation of a Comprehensive Terrorism Convention, which is intended to supplement rather than replace the existing anti-terrorism Conventions. The Ad Hoc Committee has been working on the draft articles for this convention for a number of years[12] but has yet to agree on a final draft. It is commonly asserted that the primary stumbling block is a failure to agree on a definition of terrorism, although other factors, including the relationship between the comprehensive convention and the exiting anti-terrorism conventions, remain problematic, as does the exclusion of the operation of the activities of armed forces of

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Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 1988 (1678 *UNTS* 304); Convention on the Marking of Plastic Explosives for the Purposes of Detection 1991 (30 *ILM* 721 (1991)).

[5] John P. Grant, 'Beyond the Montreal Convention' (2004) 36 Case W. Res. J.Int'l.L 453 at 454-5.

[6] See Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 Mod. Law Rev. 377.

[7] UNGA Resolution 49/60.

[8] UNGA Resolution 51/210.

[9] 37 *ILM* 249 (1998).

[10] International Convention on the Suppression of the Financing of Terrorism 1999 (39 *ILM* 268 (2000)).

[11] Adopted by the General Assembly on 13 April 2005 (UNGA Resolution 59/290). The treaty will be open for signature between 14 September 2005 and 31 December 2006 and will enter into force 30 days after being ratified by the twenty-second party (Article 25).

[12] The original draft of the proposed convention was based on a working document submitted to the Committee by India in 2000 (UN Doc. A/C.6/51/6).

states by virtue of proposed Article 18 of the draft convention.[13] In spite of the difficulties apparent in drafting a comprehensive terrorism convention, the development of primary rules by the United Nations dealing with the problem has been substantial.

Regional organizations have also promulgated a significant number of counter-terrorism treaties. The OAS Convention to Prevent and Punish Acts of Terrorism taking the form of Crimes against Persons and Related Extortion that are of International Significance,[14] the European Convention on the Suppression of Terrorism 1977[15] and the SAARC Regional Convention on the Suppression of Terrorism 1987[16] were early examples of regional treaties responding to the problem of terrorism. The latter treaty evidences the fact that these conventions were not only being developed by Western-focussed organizations. Indeed, it is particularly noticeable that by the late 1990s some key instruments were beginning to emerge from non-Western regional organizations. Thus, the year 1999 saw the adoption of the Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism 1999,[17] as well as the Convention on the Prevention and Combating of Terrorism, which was adopted by the Organisation of African Unity (now the African Union) in 1999[18].

Perhaps even more significantly, Islamic States were beginning to work together to adopt their own anti-terrorism measures. These included the Arab Convention on the Suppression of Terrorism 1998, which was adopted by the Arab League on 22 April 1998,[19] as well as the Convention of the Organisation of the Islamic Conference on Combating International Terrorism of 1 July 1999.[20] Major regional anti-terrorism instruments adopted since 9/11 include the Inter-American Convention Against Terrorism 2002, the OSCE Charter on Preventing and Combating Terrorism

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[13] For a more detailed discussion of the work of the *Ad Hoc* Committee on the drafting of the proposed Comprehensive Terrorism Convention see J. Craig Barker, *The Protection of Diplomatic Personnel* (Aldershot: Ashgate, 2006) at 136-8 and John Dugard, 'The Problem of the Definition of Terrorism' in Paul Eden & Thérèse O'Donnell, eds., *September 11 2001: A Turning Point in International and Domestic Law?* (Ardsley, N.Y.:Transnational Publishers Inc., 2005) 187.

[14] Concluded at Washington DC on 2 February 1971 (Deposited with the Secretary-General of the Organization of American States)

[15] ETS 090 (1977)

[16] Signed at Kathmandu on 4 November 1987 (Deposited with the Secretary-General of the South Asian Association for Regional Cooperation).

[17] Done at Minsk on 4 June 1999 (Deposited with the Secretariat of the Commonwealth of Independent States).

[18] Adopted at Algiers on 14 July 1999 (Deposited with the General Secretariat of the Organization of African Unity).

[19] Signed in Cairo on 22 April 1998 (Deposited with the Secretary-General of the League of Arab States).

[20] Adopted at Ouagadougou on 1 July 1999 (Deposited with the Secretary-General of the Organisation of the Islamic Conference.)

2002 and the European Union Framework Decision on Terrorism of June 2002. A new Council of Europe Convention on the Suppression of Terrorism[21] was adopted on 16 May 2005 but has yet to be ratified by a sufficient number of states to enter into force.

This development of primary rules has been supplemented by the invocation of secondary processes. In particular, the involvement of the United Nations Security Council in dealing with the problem of terrorism within this new legal framework has been considerable and began long before the events of 9/11. The direct involvement of the Security Council in the problem of terrorism arguably began with its response to the bombing of Pan Am flight 103 over Lockerbie on 21 December 1988. Although initially slow to react,[22] the Security Council became involved in the process of pressuring Libya to surrender the two persons accused of the Lockerbie bombing to trial. The process, which began with a request to the Libyan government to cooperate,[23] quickly moved to the imposition of sanctions on Libya under the authority of Chapter VII of the UN Charter.[24] Ultimately, the Security Council mandated the creation of the Scottish Court sitting in the Netherlands which tried the two accused.[25]

The position of the Security Council in relation to terrorist attacks has developed considerably in the course of the last decade. The unique circumstances of the Lockerbie process, which facilitated the invocation of domestic criminal law against the two accused, have yet to arise again. In the context of the emerging threat of global terrorism, the near simultaneous attacks on the United States embassies in Kenya and Tanzania, which occurred on 7 August 1998, provided the impetus for the development of a more proactive role for the Security Council. The attacks were immediately 'strongly condemned' by the United Nations Security Council but no specific measures were called for. However, a year after the East African bombings, in Resolution 1269 (1999), the Security Council expressed the view that terrorist acts could be considered as constituting threats to international peace and security thereby raising the possibility of Chapter VII action being taken against terrorist organizations.[26] The resolution called for states to take appropriate steps to combat terrorism. These measures included calls for cooperation and exchange of information to prevent and suppress terrorist acts, including measures to prevent and suppress the preparation and financing of terrorism.[27] However, the resolution was not adopted under the authority of Chapter VII and was accordingly not mandatory and did not

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[21] CETS No. 196.

[22] The destruction of Pan Am Flight 103 was met with an immediate condemnation of the attack by the President of the Security Council but no resolution of the Council ensued.

[23] UNSC Resolution 731 (1992) of 21 January 1992.

[24] UNSC Resolutions 748 (1992) of 31 March 1992 and 883 (1993) of 11 November 1993.

[25] UNSC Resolution 1192 (1998) of 27 August 1998. On the Lockerbie trial see generally John Grant, *The Lockerbie Trial: A Documentary History*, (New York: Oceana, 2004)

[26] UNSC Resolution 1269 (1999).

[27] *Ibid*, paragraph 4.

include any monitoring mechanisms. As a result, the provisions of the resolution were largely ignored.[28]

The tragic events of 11 September 2001 heralded a new approach by the Security Council to the problem of global terrorism. Resolution 1368 (2001) of 12 September 2001 contained the immediate response to the terrorist attacks. In that resolution the Security Council 'unequivocally condemned in the strongest terms' the 9/11 attacks and recognized them as a threat to international peace and security. The resolution also recognized 'the inherent right of individual or collective self defence, in accordance with the Charter.' On 28 September 2001 the Security Council passed Resolution 1373.[29] The resolution imposed a number of mandatory requirements on states in relation to the prevention of terrorist attacks. Crucially, by virtue of paragraph 6 of the resolution, the Security Council established a Counter-Terrorism Committee (CTC), which was charged with monitoring the implementation of the resolution. In addition, states were required to report to the CTC on the steps they had taken to implement the resolution. Since 2004, the work of the CTC has been supported by the creation of the Counter-Terrorism Executive Directorate, which was set up to support the implementation of Resolution 1373 and to further develop the capacity-building work of the CTC.[30] This new approach of the Security Council to the problem of global terrorism has been described as having four prongs: 'condemnation of discrete acts of terrorism,[31] imposition of counterterrorism obligations on all states, capacity building, and imposition of sanctions.'[32]

The counter-terrorism work of the United Nations has been supplemented by a plethora of measures by international governmental organizations, including, in particular, regional organizations. It is beyond the scope of this work to examine these developments in depth. However, it is worth noting the significant structural initiatives which have taken place in a number of key, primarily Western-oriented regional organizations. For example, the Organisation of American States was the first

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[28] Curtis A. Ward, 'Building Capacity to Combat International Terrorism: The Role of the United Nations Security Council' (2003) 8 J Conflict & Security L.289 at 290.

[29] UNSC Resolution 1373 (2001).

[30] The CTED was introduced by virtue of UNSC Resolution 1535 (2004)

[31] Since 2001 the Security Council has passed a number of resolutions in direct response to specific terrorist attacks identifying these attacks as threats to international peace and security. See Resolution 1377 (2001) (on the events of 11 September 2001); Resolution 1438 (2002) (in relation to the attacks in Bali, Indonesia on 12 October 2002); Resolution 1440 (2002) (in relation to the taking of hostages in Moscow, Russia on 23 October 2002); Resolution 1450 (2002) (in relation to attacks in Kenya in November 2002); Resolution 1465 (2003) (in relation to an attack in Bogotá, Columbia); Resolution 1530 (2004) (in relation to the attacks in Madrid, Spain on 11 March 2004); Resolution 1611 (2005) (in relation to the attacks in London, UK on 7 July 2005). See also more general resolutions on threats to international peace and security caused by terrorist acts including 1390 (2002); 1452 (2002); 1455 (2003); 1526 (2004); 1535 (2004); 1566 (2004); 1617 (2005).

[32] Eric Rosand, 'The Security Council's Effort to Monitor the Implementation of Al Quaeda/Taliban Sanctions' (2004) 98 Am. J. Int'l. L.745 at 745.

regional organization to react to the emerging terrorist threat. It established, in 1999, the Inter-American Committee Against Terrorism (CICTE) which was designed to coordinate the efforts of the organization directed against terrorism. CICTE performs an executive role within the organization in response to terrorism. It assists member states in the implementation of domestic anti-terrorism legislation and was responsible for the drafting of the Inter-American Convention Against Terrorism 2002.[33] The Organisation for Security and Cooperation in Europe created an Action Against Terrorism Unit in December 2001.[34] The following year, the OSCE Ministerial Council adopted the OSCE Charter on Preventing and Combating Terrorism.[35] The Council of Europe has also made significant structural adjustments in response to the terrorist threat. In 2003, the Council of Europe created the Committee of Experts on Terrorism (CODEXTER), which is responsible for the coordination of the Council of Europe's counter-terrorism activities.

Amongst the non-Western regional organizations, the Organisation of the Islamic Conference has taken the lead in seeking to dislodge the many misconceptions about the role of Islamic states in the struggle against terrorism. According to Javaid Rehman, the OIC 'can be seen as the mouthpiece of the community of Islamic States.'[36] Rehman explains that 'since its establishment, the OIC has expressed a special commitment to the eradication of all forms of terrorism. The OIC [has] adopted the Convention on Combating International Terrorism and in the aftermath of the attacks on the United States in September 2001 has actively campaigned for further initiatives to condemn and combat terrorist acts.'[37] One such initiative was the establishment, as a result of the Kuala Lumpur Declaration of April 2002, of the Ministerial Level OIC Committee on International Terrorism.[38]

The Legalization of International Law

The congruence of primary and secondary rules apparent in the law-making responses outlined above points towards the emergence of international law as a fully functioning legal system. Such an analysis is based on the highly influential work of H.L.A. Hart who has argued that a legal system must possess both primary rules, that is the rules that directly regulate the conduct of the members of a society, and secondary rules, which state the criteria by which the primary rules are identified,

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[33] OAS Document AG/RES. 1840 (XXXII-O/02)

[34] The Unit was suggested by the Bucharest Plan of Action for Combating Terrorism adopted at the Ministerial Council in December 2001. See OSCE Document MC(9).DEC/1,

[35] OSCE Document MC(10).JOUR/2

[36] Javaid Rehman, *Islamic State Practices, International Law and The Threat from Terrorism: a Critique of the 'Clash of Civilizations' in the New World Order* (Oxford: Hart, 2005) at 191.

[37] *Ibid* at 191-2.

[38] For a detailed discussion of the establishment and role of this committee and the work of the OIC in general, see Rehman, i*bid*, Chapter 7 and pp. 218-9 in particular.

altered and applied.[39] Hart's own conclusion was that international law could not be considered as a legal system because it lacked the necessary secondary rules and the required rule of recognition.[40] However, even if this was a valid assertion of the limits of international law in the 1960s, which it may or may not have been, it is certainly not true of modern international law. Possibly in response to Hart's trenchant criticisms, international lawyers have been working to draft conventions which do not simply state the 'rules' but provide mechanisms for the change and development of those rules within the framework of those conventions.[41] Similar developments are apparent in evolving customary international law.[42] Thus, at one level, it can be asserted that the development of the law-making responses to global terrorism are but a further example of the emerging sophistication of the international legal system.

As well as influencing international lawyers, Hart's analysis has been utilized in international relations scholarship, particularly in relation to the liberal institutionalist vision framed around the concept of 'legalization'. The concept of legalization was proposed by a number of institutionalist writers in 2000 as a way of bridging the gap between international law and international relations scholarship.[43] According to these writers, international institutions can be tested on a scale of legalization depending on three criteria: 'the degree to which rules are obligatory, the precision of those rules and the delegation of some functions of interpretation, monitoring and implementation to a third party.'[44] As noted in the introduction, these writers acknowledge that their work draws heavily on Hart's version of legal positivism:

> Hart's concepts of primary and secondary rules are useful in helping to pinpoint the distinctive characteristics of the phenomenon we observe in international relations. The attributes of obligation and precision refer to international rules that regulate behaviour; these closely resemble Hart's primary rules of obligation. But when we define obligation as an attribute that incorporates general rules, procedures and discourse of international law, we are referring to features of the international system analogous to Hart's three main types of secondary rules: recognition, change and adjudication. And the criterion of delegation necessarily implicates all three of these categories. [45]

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[39] Hart, *supra* note 1 at 155.

[40] *Ibid* at 231.

[41] On the process of secondary norm development in international law see further J Craig Barker, *International Law and International Relations* (London: Continuum, 2000) at 18.

[42] See, in particular, the development of the law of state responsibility which emerged primarily within customary international law before being codified.

[43] See the special issue of *International Organization*, Volume 54, Summer 2000, *supra* note 2.

[44] Judith Goldstein, Miles Kahler, Robert.O Keohane & Anne-Marie Slaughter, 'Introduction: Legalization and World Politics' (2000) 54 International Organization 385 at 387.

[45] Abbott *et al, supra* note 2 at 403.

Testing the institutional reaction to the problem of global terrorism against the forms of international legalization proposed by the legalization theorists indicates increasing degrees of legalization apparent in the development of new counter-terrorism treaties, which provide moderate to high levels of obligation and precision in the treaties themselves. The actual degree of legalization will, of course, depend upon the nature of the instrument in question as well as its purpose. However, insofar as most of these new treaties are modelled on treaties developed by the United Nations, substantial differences between the various regional treaties are not marked. Similarly, the structural developments apparent in most, if not all of the responses by regional organizations to the problem are indicative of the increasing delegation of some functions of interpretation, monitoring and implementation. The variations between the approaches of different organizations in this regard are perhaps more apparent here than in relation to the promulgation of the substantive legal instruments as the level of delegation is dependent upon the relevant constitutional frameworks of each organization. Thus, for example, the Ministerial Level Committee on International Terrorism of the Organisation of the Islamic Conference, which, as the name suggests, operates at the ministerial level, may be significantly less 'legalized' than the Council of Europe's Committee of Experts on Terrorism, which envisages considerably more delegation of supervisory powers.

Given the potential variations in the degree of legalization among regional organizations, it is perhaps surprising to assert that the United Nations, a universal organization, is the most 'legalized' of all of the institutions in relation to its response to global terrorism. However, within the context of the response to global terrorism, the analysis of the promulgation of primary rules and the invocation of secondary process by the United Nations points clearly to the veracity of such a conclusion. Thus, the development of primary rules by the United Nations has led the way in the development of law-making responses to global terrorism. Furthermore, the Counter-Terrorism Committee has established itself as the primary body charged with the interpretation, monitoring and implementation of not only the relevant United Nations law but, more generally, in relation to the operation of counter-terrorism measures regionally and indeed in the domestic sphere.

Security Council Legislation: The Way Forward?

One final, and perhaps crucial, element of the Hartian and legalization models must be addressed at this point, that is, the role of legislation. Both models lead international law in a particular direction, which assimilates very closely with the 'gold standard' of domestic law. However, international law lacks some of the key characteristics of the domestic legal order which Hart was seeking to describe. In the context of the present discussion, the lack of a legislature is key. Although the concept of international legislation is not mentioned in the work of the legalization scholars, it is implicit in their work that the ultimate legalized institution would be one which is capable of enacting legally binding measures on states without their consent. It is no surprise, therefore, that liberal institutionalists who have developed the concept of legalization

repeatedly point to the European Union (EU) as the 'archetype' liberal institution.[46] However, the European Union is a unique organization which benefits from close proximity between the ideals and aspirations of the member states. It is also the case that the process of European Union legislation is complex and highly developed. In particular, the constitutional framework of the European Union contains significant checks and balances on the legislative process sufficient to minimize, if not eliminate, the problem of the so-called democratic deficit. It is unlikely that this level of sophistication will ever be matched in a more globalized institution such as the United Nations.

In spite of this, many international lawyers have highlighted the emerging legislative role of the United Nations Security Council as marking a new stage in the development of international law.[47] For example, according to Curtis Ward, an independent expert of the Security Council Counter-Terrorism Committee, the response of the international community in general, and the Security Council, in particular, was unprecedented and extraordinary. He has noted that, 'A new dynamic was created and the level of co-operation among the members of the Security Council in dealing with the issues surrounding international terrorism was greatly enhanced … [the Security Council] was quick firm, and unequivocal,' [48] and its response to the events of 9/11 was 'a necessary and prudent exercise of the power and prerogative of the Security Council [as provided for in Article 24(1) of the United Nations Charter].'[49] More broadly, Paul Szasz has argued that Resolution 1373 should stand as a precedent for institutional law-making in the future. According to Szasz:

> The members of the Security Council were most likely unaware, when they hastily adopted Resolution 1373, of the pioneering nature of that decision. Now that this door has been opened, however, it seems likely to constitute a precedent for further legislative activities. If used prudently, this new tool will enhance the United Nations and benefit the world community, whose ability to create international law through traditional processes has lagged behind the urgent requirements of the new millennium.[50]

Some international lawyers have challenged the power of the Security Council to enact legislation. Matthew Happold, for example, has forcefully argued that the

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[46] See, for example, Anne-Marie Slaughter & William Burke-White 'The Future of International Law is Domestic (Or, The European Way of Law)' (2006) 48 Harv Int. L. J. 327 at 327-329.

[47] See, for example, Eric Rosand, 'The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative' (2005) Fordham Int'l L.J. 542; Jane E. Stromseth 'An Imperial Security Council? Implementing Security Council Resolutions 1373 and 1390' (2003) 97 Am. Soc'y Int'l. L. Proc. 41; Paul Szasz, 'The Security Council Starts Legislating' (2002) 96 Am. J. Int'l. Law 901, Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 Am. J. Int'L. L. 175.

[48] Ward, *supra* note 28 at 292-3.

[49] *Ibid*.

[50] Szasz, *supra* note 47 at 905.

legislative role adopted by the Security Council when it promulgated Resolution 1373, as well as a number of prior and subsequent resolutions, was *ultra vires* the power of that organ.[51] He argues that the Security Council can only exercise its power in response to specific situations or conduct.[52] Similarly, José Alvarez has noted that in relation to its counter-terrorism work, 'the Council is no longer responding with discrete action directed at a particular state because of a concrete threat to the peace arising from a specific incident.'[53]

It is, of course, possible for new institutional practices to emerge through teleological interpretations of the constitutive instruments of international organizations. A similar argument to that put forward by Happold and Alvarez in relation to Security Council Resolution 1373 was developed by Burns Weston in relation to Security Council Resolution 678 in 1991.[54] It will be recalled that Resolution 678 authorized 'member states … to use all necessary means to uphold and implement Security Council Resolution 660 and all subsequent relevant resolutions …'[55] in relation to the 1990 invasion of Kuwait by Iraq. At the time Weston argued that Resolution 678 lacked legitimacy. He was of the opinion that the United Nations Security Council 'made light of fundamental UN Charter precepts and thereby flirted precariously with "generally accepted principles of right process".'[56] Nevertheless, the practice of the Security Council authorizing states to take military action to uphold relevant United Nations resolutions is now an established feature of the operation of Article 42 of the United Nations Charter. A similar process of evolution of practice might be occurring in relation to the legislative power of the United Nations.

It is a fact that states have moved quickly to comply with the requirements of Resolution 1373 and all member states have submitted reports to the Counter-Terrorism Committee.[57] Furthermore, the activities of many of the regional organizations referred to above have drawn on the specific mandate of Security Council Resolution 1373 as providing the legal basis for their activities. Notably, the OSCE Charter recognized that 'the relevant United Nations conventions and protocols, and United Nations Security Council resolutions, in particular the United Nations Security Council Resolution 1373 (2001), constitute the primary international legal framework for the fight against terrorism.'[58] Similarly, the Euro-Atlantic Partnership

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[51] Matthew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' in Eden & O'Donnell, *supra* note 13 at 617.

[52] *Ibid.* at 639.

[53] José Alvarez, 'Hegemonic International Law Revisited' (2003) 97 Am.J.Int'l. Law 873 at p. 874.

[54] Burns Weston, 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy' (1991) 85 Am. J. Int'l. L. 516.

[55] UNSC Resolution 678 (1990), paragraph 2.

[56] Weston *supra* note 54 at 516.

[57] Eric Rosand, 'Security Council Resolution 1373, the Counter-Terrorism Committee and the Fight Against Terrorism' (2003) 97 Am. J. Int'l Law 333 at 335.

[58] OSCE Document MC(10).JOUR/2, paragraph 11.

Council, which is closely linked to NATO, endorsed a Partnership Action Plan against Terrorism in November 2002 with a view to 'making all efforts within their power to prevent and suppress terrorism in all its forms and manifestations, in accordance with the universally recognized norms and principles of international law, the United Nations Charter, and the United Nations Security Council Resolution 1373.'[59] Such has been the response to Resolution 1373 that the United Nations Secretary-General has recently observed that, 'The work of the Counter-Terrorism Committee, and the cooperation it has received from Member States, have been unprecedented and exemplary.'[60]

The Legitimacy of Security Council Legislation

How can this 'unprecedented and exemplary' response be explained? One possible explanation might be the threat of sanctions, which arises from the fact that Resolution 1373 was passed by the Security Council under the authority of Chapter VII of the United Nations Charter, which allows for the imposition of economic and military sanctions on non-complying states. However, it is unlikely that the United Nations Security Council would use sanctions against non-cooperating states in the context of Resolution 1373.

An alternative argument arises from the international relations sourced rational choice theory. In their recent work on *The Limits of International Law,*[61] Jack Goldsmith and Eric Posner have relied on rational choice theory to explain that international law 'can be binding and robust, but only when it is rational for states to comply with it.' [62] Although not dealing directly with the threat of global terrorism, Goldsmith and Posner's analysis could go some way to explaining the high degree of cooperation around the problem. All states have an interest in ensuring that the threat of global terrorism is effectively addressed, if not eliminated. Crucially, the counter-terrorism effort, although dominating the international legal agenda, is not an issue of high-level politics. It is not seeking to achieve a balance between conflicting state interests but is, rather, focussed on the development and coordination of measures directed against terrorist organizations.

However, the limits of the rational choice analysis are all too apparent. Goldsmith and Posner's stated aim is to assert the limits of international law and the rational choice theory provides the conceptual framework not only for the possibility

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[59] See http://www.nato.int/docu/basictxt/b021122e.htm.

[60] Quoted at <http://www.un.org/News/Press/docs/2002/sgsm8105.doc.htm>.

[61] Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (Oxford: OUP, 2005).

[62] *Ibid* at 202. Although Goldsmith and Posner deny that their work is based on a realist account of international relations, this assertion comes remarkably close to that of Morgenthau who noted that international law is complied with by states when their interests demanded it. Thus, where national self interest demanded action contrary to perceived rules of international law, the only obligation on states was to act in their own self-interest. Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: Knopf, 1973, 5th rev. edn.) at 291.

of cooperation in the context of legalized international institutions but also provides the opportunity for states to ignore international law when it is in their interests to do so. In the context of global terrorism, Goldsmith and Posner would apparently have little difficulty in asserting a lack of legal rules prohibiting the detention of alleged terrorists at Guantanamo Bay or the use of extraordinary rendition and secret detention centres in spite of the apparent breach of established human rights and humanitarian norms inherent in these activities.[63] It should not be surprising therefore that the criticisms of Goldsmith and Posner's rational choice analysis have been severe.[64]

A common thread in such criticism is that Goldsmith and Posner's analysis is overly simplistic and fails to take account of 'much of the texture of international cooperation.'[65] Paul Berman is particularly dismissive of Goldsmith and Posner's analysis. According to Berman, 'Goldsmith and Posner have first constructed a straw man version of international law – a lumbering positivist enforcer of international moral discipline – that almost no one believes exists and then dispatched this straw man to the dust bin while suggesting that they have therefore said something meaningful about the limits of international law.'[66] This is not to say that the self-interest of states is not important in international law – it clearly is. However, the problem arises where one makes the leap from the assertion that states comply with international law when it is in their self-interest to do so to the conclusion that international law has no independent causal force.[67]

A more subtle and nuanced approach to the importance of state self-interest is to be found in the work of the so-called compliance theorists who argue that compliance with international agreements is best achieved through 'an iterative process of discourse among the parties [to a treaty], the treaty organization, and the wider public.'[68] According to Abram and Antonia Chayes, the iterative discourse, which leads to compliance, occurs not only with other states but also with the treaty organization itself.[69] In relation to Resolution 1373, the iterative discourse between states and the Counter-Terrorism Committee, which represents the treaty organization

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[63] On the apparent conflict between anti-terrorism security measures and established human rights and humanitarian norms, see further below.

[64] See, for example, Paul S. Berman, 'Seeing Beyond the Limits of International Law', (2006) 84 Tex. L. Rev. 1265; Oona A. Hathaway & Ariel N. Lavinbuk, 'Rationalism and Revisionism in International Law' (2006) 119 Harv. L. Rev. 1404; Kal Raustiala, 'Refining the Limits of International Law' (2006) 34 Ga. J. Int'l & Comp. L. 423; Anne van Aaken, 'To do Away with International Law? Some Limits to the Limits of International Law' (2006) 17 Eur. J. Int'l. L. 289.

[65] Raustiala, *supra* note 64 at 424.

[66] Berman, *supra* note 64 at 1277.

[67] *Ibid.*

[68] Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995) at 25.

[69] Abram Chayes & Antonia Handler Chayes, 'On Compliance' (1993) 47(2) International Organization 175 at 180.

in this context, is ongoing. Although nominally presented as a coercive process, Security Council legislation in the context of Resolution 1373 and the development of the Counter-Terrorism Committee is often seen as being more about persuasion and capacity-building than coercion per se. It is certainly the case that the Counter-Terrorism Committee has been careful not to use its powers to prosecute or directly condemn states. This is made clear by Eric Rosand who notes:

> 'By not targeting individual states, not condemning states and focusing instead on technical capacity building [the CTC] was thus able to garner the support from virtually all 191 UN members … the CTC has sought to engage in dialogue with all member states concerning their implementation of Resolution 1373, and intends to continue with such dialogue until it is confident that each has taken effective action on all the issues covered by the resolution.[70]

However, mere persuasion may not suffice as an explanation for state compliance with Resolution 1373.

Alastair Iain Johnston has highlighted the importance of treating international institutions as social environments within which cooperation occurs through a process of socialization.[71] Drawing on and developing the work of the compliance theorists and other social science inquiries,[72] Johnston focuses on persuasion and social influence, which he identifies as two basic microprocesses in socialization theory. According to Johnston, persuasion 'involves changing minds, opinions and attitudes about causality and affect (identity) in the absence of overtly material or mental coercion.'[73] However, he considers that theorists have over-emphasized persuasion and paid insufficient attention to social influence which he defines as 'a class of microprocesses that elicit pro-norm behaviour through the distribution of social rewards and punishments.'[74] For Johnston, social influence would include both social back-patting and shaming or opprobrium.[75]

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[70] Rosand, *supra* note 57 at 335.

[71] Alastair Iain Johnston 'Treating International Institutions as Social Environments' (Dec. 2001) 45(4) *International Studies Quarterly* 487 at 492.

[72] *Ibid* at 488.

[73] *Ibid* at 496.

[74] *Ibid* at 499. Johnston uses the term pro-norm 'to indicate action that is consistent with the norm in question, whether done because the norm has been internalized or because some kind of consequentialist calculation makes it useful to follow.' *Ibid* at p. 492.

[75] Crucially, these microprocesses must be public, observable and carried out within an institutionalized setting. Thus, according to Johnston: 'The constructivists and institutionalists are both right. Constructivists are right that socially induced cooperation requires shared understandings of what appropriate behaviour looks like. But this may not be enough without an institutional structure that provides information about the degree to which actors are behaving in ways consistent with this shared understanding.' *Ibid* at p. 502.

Applying Johnston's analysis to Resolution 1373 and the work of the Counter-Terrorism Committee, it would seem that, in addition to the capacity-building elements, there are within the procedures of Resolution 1373 compliance elements of social coercion. Thus, the publication of reports to the CTC by member states involves a high degree of exposure which increases pressure on states to comply with their obligations under Resolution 1373. Furthermore, the reports themselves are subject to detailed analysis by one of three Sub-Committees of the CTC. This involves assessment of the report by a panel of experts, an invitation to the relevant member state to attend the Sub-Committee discussion of the report, and a decision on the necessity of follow-up action.[76] Although all states had submitted their first report by June 2004, the deadline for submission of follow-up reports had already passed and, in November 2003, the Security Council specifically 'named and shamed' 58 states that had failed to submit further reports by the deadline of 31 October 2003.[77] Finally, the creation of the Counter-Terrorism Committee Executive Directorate (CTED) by Resolution 1535, although specifically aimed at providing technical assistance to states to enable them to comply with their obligations, has the effect of ensuring that states are unable to complain of lack of capacity as an excuse for non-compliance.

The participation of states in the process of regular reporting to the Counter-Terrorism Committee and the fulfilling of the domestic requirements of Resolution 1373 provide legitimacy to the institutional response to the problem of global terrorism. In terms of Thomas Franck's legitimacy thesis, this participation of states in the process establishes both symbolic validation and adherence.[78] Participation is secured by a process of iterative discourse which comprises both persuasive and socially coercive elements. Nevertheless, continued participation in the process cannot be guaranteed. Indeed, it has been observed that the need for the Security Council to name and shame non-cooperating states provides evidence to suggest that 'states' efforts to increase their counter terrorism capacity may be beginning to lose momentum.'[79] One of the reasons for this relates to the impact of Security Council legislation on other established rules of international law, including, in particular, human rights and humanitarian norms. It is submitted that this insight is crucial not only to the Security Council's response to the problem of global terrorism but also that of the United Nations and other international institutions more generally. By focusing exclusively on state security and by failing to address the relevance of other, equally important and well-established norms of international law, anti-terrorism law-makers have undermined the authority of their efforts in the longer term. Thus, even if the legality and legitimacy of Security Council Resolution 1373 can be established, questions remain as to the internal morality of the law.

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[76] Eric Donnelly, 'Raising Global Counter-Terrorism Capacity: The Work of the Security Council's Counter-Terrorism Committee' in Eden & O'Donnell, *supra* note 13 at 764.

[77] *Infra*.

[78] Franck, *The Power of Legitimacy Among Nations* (Oxford: OUP, 1990) at 90-5 & 184.

[79] Donnelly, *supra* note 76 at 766.

The Limits of the Positivist/Legalized Response to Global Terrorism

As has already been highlighted, Hart's positivist concept of law requires the presence of both primary and secondary rules. This suggests the limits of a legal system's normativity where the necessary secondary processes are not present. Similarly, the legalization project limits the potential role of international law. Thus, while the legalization analysis welcomes the possibility of the 'ideal type' of legalization where all three criteria are maximized, it also accepts the possibility of the complete absence of legalization, referred to as anarchy, which is described as 'another ideal type'.[80] Taken to its logical conclusion, this analysis identifies a central role for international law where states are seeking to cooperate through an institutionalized framework but predicts the limits of international law where such cooperation and desire for institutionalization is lacking. Accordingly, over-reliance on Hart's concept of law has the potential to create a two-tier system of international law, that is, institutionalized international law which is hard law and binding upon those to whom it is addressed, and soft law which assimilates more closely with political persuasion. It may be argued that such a two-tier normative system already exists in international law.[81] However, the legalization model would effectively compress the category of 'hard' law to the extent that many existing rules of international law might be regarded as hierarchically inferior and, as a consequence, open to being trumped by 'harder' law.

To some extent this process is already occurring in the context of the response to global terrorism. The promulgation and facilitation of counter-terrorism measures has often occurred at the expense of apparently competing considerations of human rights and humanitarian norms. At the domestic level in particular, individual states have, since 9/11, begun to ratchet up domestic responses to terrorism. In certain totalitarian states this process has led to the imposition of draconian anti-terrorism measures.[82] Even in liberal democracies, state legislatures and governments have struggled to find an appropriate balance between security and civil liberties and new laws have been passed which undermine well-established human rights norms in the name of state security.[83] This ratcheting up of state domestic responses to

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[80] Abbott et al, *supra* note 2 at 401-402.

[81] For a discussion of the concept of soft law, see Alan Boyle, 'Soft Law in International Law-Making' in Malcolm Evans, ed., *International Law* (Oxford: OUP, 2006, 2nd. Ed.).

[82] See, for example, the work of Human Rights First, which has highlighted the problem of the imposition of draconian detention laws in states such as Tanzania, Indonesia, Russia, Pakistan and Uzbekistan. Human Rights First, 'Imbalance of Powers: How Changes to US Law and Policy Since 9/11 Erode Human Rights and Civil Liberties' Cited in Slaughter & Burke-White, *supra* note 46 at 348. The report is available online at http://www.humanrightsfirst.org/us_law/loss/imbalance/powers.pdf.

[83] In support of this assertion see Kim Lane Scheppelle, 'Law in a Time of Emergency: States of Exception and the Temptations of 9/11' 6 U. Pa. J. Const. L. 1001 (2004) and 'We Are All Post-9/11 Now' 75 Fordham L. Rev. 607 (2006). See also Joan Fitzpatrick, 'Speaking Law to Power: The War Against Terrorism and Human Rights' 14 Eur. J. Int'l L 241 (2003), which examines the issue of the impact of terrorism on human rights norms more generally.

international terrorism has, to a considerable extent, been encouraged, if not made possible by, developments at the international level.

Anne-Marie Slaughter and William Burke-White have recently highlighted the danger that 'by compelling national action, the international legal system may undermine local democratic processes and prevent domestic experimentation with alternate approaches.'[84] Slaughter and Burke-White recognize that

> [t]he most significant danger in [the] new functions of international law ... lies in the potential of national governments to co-opt the force of international law to serve their own objectives. ... By strengthening state capacity, international law may actually make states more effective at the very repression and abuse the interference challenge seeks to overcome. Similarly, by compelling state action, international law may give national governments new license to undertake otherwise illegal or unjust policies. Where critical values such as human rights and state security are seen to be in conflict, international legal compulsion of policies that favor one value may come at the expense of the other. This tension is particularly problematic where a repressive regime is able to use compulsion at the international level as a cover or an excuse to undertake its own domestic policies that may undermine legitimate opposition groups and violate citizens' rights.[85]

Slaughter and Burke-White's response to this danger is apparently quite simple. By focusing on the importance of domestic institutions they argue that: '[t]he challenge ... is to design rules that will harness the strengths of well-functioning domestic institutions while targeting and restricting the reach of abusive ones.'[86] Attractive as this response may appear, given the need for universal application of international law, the task of designing international rules that are able to achieve this objective is practically impossible.

Constructing Security in Response to Global Terrorism

A broader and more inclusive understanding of the international political system is provided by constructivist theorists within international relations. The basic tenants of constructivism will be well-known to the readers of this journal and are premised first on the assertion that social or 'normative and ideational structures' are as important as material structures; second, that the social identities of states and other actors condition their interests and actions and thus need to be analyzed; and finally, that normative and ideational structures 'only exist because of the routinised practices of knowledgeable social agents which makes them human artefacts amenable to

[84] Slaughter & Burke-White, *supra* note 46 at 347.

[85] *Ibid.*

[86] *Ibid.* at 348.

transformation.'[87] These basic tenets resemble closely the insights of compliance theorists referred to earlier. Accordingly, constructivists should have little difficulty in accepting the analysis set out above to the effect that state compliance with Security Council Resolution 1373 and the work of the Counter-Terrorism Committee provides legitimacy to that process of institutional law making as a response to global terrorism.

In response to the question of how to balance human rights with state security, however, constructivist analysis may not appear able at first sight to provide much assistance. Thus, the process of interest and identity formation is not necessarily benign. Even liberal democracies have an interest in ensuring the security of the state. Accordingly, in constructing their own security, liberal democratic states appear to be willing to accept diminution in human rights and civil liberties within the domestic polity in order to ensure enhanced state security against internal and external threats. This insight should not be regarded as particularly controversial insofar as it is reflected in existing regional and international human rights regimes. Thus, for example, Article 4 of the International Covenant on Civil and Political Rights allows for derogations in times of public emergency as does Article 15 of the European Convention on Human Rights and Fundamental Freedoms 1950, although only in relation to certain rights.[88] As a consequence, it becomes difficult for liberal democratic states to challenge the activities of more authoritarian regimes engaging in similar processes but in a more draconian way.

On the other hand, a considerable body of constructivist scholarship focuses on broader questions of morality, ethics and justice in the international political process than this explanation portrays.[89] Indeed, in relation to its relevance to international law, constructivism has been portrayed by Jutta Brunnée and Stephen J. Toope as the possible antidote to legal positivism.[90] Brunnée and Toope's analysis is, to some extent, an attempt to re-introduce moral analysis into international law and draws directly on the scholarship of Lon Fuller who engaged in a debate in the 1950s about

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[87] Christian Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit, ed,. *The Politics of International Law* (Cambridge: CUP 2004) 14 at 22. On the question of agency and structure see further Alexander Wendt, 'The Agent Structure Problem in International Relations Theory' (1997) 41 *International Organization* 2.

[88] These instruments generally provide a wide margin of appreciation for states to derogate from, or at least limit application of, certain substantive rights in times of public emergency. However, both treaties provide that there shall be no derogation in relation to certain rights, including, *inter alia,* the right to life (ICCPR, Article 6; ECHR, Article 2) and the prohibition on torture (ICCPR, Article 7, ECHR, Article 3). See generally Dominic McGoldrick, The Interface Between Public Emergency Powers and International Law' (2004) 2 Int'L J. Const. L. 380.

[89] See Christian Reus-Smit, 'Society, Power and Ethics' in Reus-Smit, *supra* note 87 at 281.

[90] Jutta Brunnée & Stephen J Toope 'International Law and Constructivism: Elements of an Interactional Theory of International Law' (2000) 39 Colum. J. Transnat'l L. 19 at 38-43. It should be noted that Brunnée & Toope berate some leading constructivist thinkers such as Frederich V. Kratochwil and Nicholas Greenwood Onuf for being 'constrained by an unconscious positivism.' *Ibid.* at 38.

the concepts of positivism and fidelity to law.[91] Fuller's key insight was the development of the idea of 'the internal morality of the law' which focuses on the legitimacy of the law. According to Brunnée and Toope,

> Fuller's concept of 'internal morality' was rooted in his belief that certain conditions need be in place to allow human beings to pursue their purposes through law. If the internal morality of the law is not fulfilled, if the conditions are not met, then the process of law creation, be it through legislation, adjudication or negotiation, is fundamentally flawed and therefore illegitimate.[92]

In relying on Fuller's internal morality of the law thesis, Brunnée and Toope reject Thomas Franck's legitimacy analysis referred to earlier. While acknowledging that Franck's variables of legitimacy, that is determinacy, coherence and adherence 'map onto Fuller's conditions of internal morality,'[93] Brunnée and Toope note that Franck 'treats his variables as elements of 'process fairness', which is distinct, in his view, from 'moral fairness', his term for distributive justice.'[94] For Brunnée and Toope, 'moral fairness' requires a further element, which is to be found in Fuller's 'interactional theory of international law.'[95] Put simply, interactional theory requires mutuality amongst the governing and the governed as well as 'pervasive interaction' between ends and means. Thus, according to Brunnée and Toope, '[W]hen understood as a purposive activity, law is inevitably a construction dependent upon the mutual generative activity and acceptance of the governing and the governed.'[96]

Central to this understanding is communication, referred to by Brunnée and Toope as rhetorical activity, which leads to the development of mutual expectations and shared understandings. Thus, according to Brunnée and Toope, 'Within all systems of legal normativity, even state systems of law, law is constructed through rhetorical activity producing increasingly influential mutual expectations or shared understandings of actors.'[97] This insight assimilates closely with the theory of 'communicative action' propounded by Jürgen Habermas in the 1980s[98] and which

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[91] See H.L.A. Hart, 'Positivism and the Separation of Law and Morals, (1958) 71 Harv. L. Rev. 593 and Lon Fuller, Positivism and Fidelity to Law: A Reply to Professor Hart, (1958) 71 Harv. L. Rev. 630.

[92] Brunnée & Toope, *supra* note 90 at 52-3.

[93] *Ibid.* at 53.

[94] *Ibid.*at 53.

[95] According to Brunnée & Toope: 'contemporary commentators identify this 'interactive' understanding of law, rather than the linkage of law and a special kind of morality, as Fuller's most fruitful insight.' *Ibid.* at 49.

[96] *Ibid.* at 48.

[97] *Ibid.* at 65.

[98] See, in particular, Jürgan Habermas, *The Theory of Communicative Action* (Boston, MA: Beacon Press, 1984).

involves 'processes of argumentation, deliberation and persuasion.'[99] According to Cornelieu Bjola, communicative action allows us to move beyond purely rhetorical activity which is identified as 'instrumental bargaining on the basis of fixed preferences' to a more reasoned process which includes 'a mode of interaction between actors based on the logic of arguing, that is, of convincing each other to change their causal or principled beliefs in order to reach a reasoned consensus.'[100] It is apparent that Brunnée and Toope's understanding of rhetorical activity goes beyond mere instrumental bargaining, although, after referring to the work of Habermas in this context, they chose to refer to rhetorical activity as opposed to communicative action.[101]

For Brunnée and Toope communicative action and rhetorical activity requires not only the input of states but also that of non-state actors.[102] Thus, they note that 'acknowledging multiple sites of legal influence allows international lawyers to move away from a fixation on state sovereignty, as if it were an immutable and objective structure that exhaustively defines the nature of the legal system. This move allows appropriate recognition of the normative influences of non-state actors in international society.'[103]

At first sight, it might appear that Security Council legislation in the response to global terrorism is the antithesis of communicative action and rhetorical activity. Thus, not only is the process of Security Council legislation undertaken to the exclusion of non-state actors, but the vast majority of states are also excluded from the law making process. However, in terms of the interaction thesis, the source of legal obligation may in fact be irrelevant. This point is in fact acknowledged by Brunnée and Toope who note that, 'Once it is recognized that law's existence is best measured by the influence it exerts, and not by formal tests of validity rooted in normative hierarchies,

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[99] Thomas Risse, ''Let's Argue!' Communicative Action in World Politics' (2000) 54 *International Organization* 1 at 1. According to Risse 'Arguing implies that actors try to challenge the validity claims inherent in any causal or normative statement and to seek a communicative consensus about their understanding of a situation as well as justifications for the principles and norms guiding their action. Argumentative rationality also implies that the participants in a discourse are open to being persuaded by the better argument and that relationships of power and social hierarchies recede in the background.' *Ibid.* at 7.

[100] Corneliu Bjola, 'Legitimating the Use of Force in International Politics: A Communicative Action Perspective' (2005) 11 European Journal of International Relations at 266.

[101] See Brunnée and Toope, *supra* note 90 at 26-7. For ease of discussion, reference will be made hereinafter to the process of 'communicative action and rhetorical activity' as a process of communication between actors directed to the development of mutual expectations and shared understandings through a process of argumentation leading to the identification of the better argument.

[102] In this regard, Brunnée and Toope echo the understandings of modern positivists who identify the growing importance of actors other than states, including intergovernmental organizations, non-governmental organizations, global economic players and the global media, in the international legal process. See, for example, Simma & Paulus, *supra* note 1 at 306.

[103] Brunnée & Toope, *supra* note 90 at 65.

international lawyers can finally eschew the preoccupation with legal pedigree (sources) that has constrained creative thinking within the discipline for generations.'[104]

Brunnée and Toope's further assertion that '[l]aw is persuasive when it is perceived as legitimate by most actors,'[105] might simply take us back to Franck's process fairness position. However, when the involvement of non-state actors is taken into consideration, the overwhelmingly positive response of states to the legitimacy of Security Council legislation may not be enough to ensure moral fairness. This is not to say that non-state actors can or should have the power to overrule the legitimacy of a particular process which has received overwhelming state compliance. Rather, it suggests that the process of law creation, as well as the interpretation, application and further development of the law, may well be assisted by reference to actors other than states. Thus, according to Brunnée and Toope,

> international lawyers, like constructivists, must pay close attention to non-state actors. NGOs, corporations, informal intergovernmental expert networks, and a variety of other groups are actively engaged in the creation of shared understandings and the promotion of learning amongst states. Although states remain fully dominant within the system, they are influenced (admittedly in different ways and to different extents) by the persuasive activities of less obviously powerful actors.[106]

It is interesting that Brunnée and Toope have missed from their list of non-state actors perhaps the most influential example, that is, *formal* intergovernmental expert networks. These might include judges constituting an international court, such as the judges of the International Court of Justice, treaty-monitoring bodies, such as the Human Rights Committee, and other formal groups of experts, including, most notably for present purposes, the expert members of the Counter-Terrorism Committee. It is, perhaps, by recognizing the importance of formal intergovernmental expert networks existing alongside the direct interactions of states as well as non-governmental actors that a richer sense of communicative action and rhetorical activity can be developed, particularly when such communicative action and rhetorical activity is undertaken within an institutional framework.

Such an approach would continue a recognition of the importance of formal and informal governmental institutions and regimes as providing 'sets of principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue area.'[107] However, it would allow for international law and legal discourse to be more than simply a process of 'legal bureaucratization', which

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[104] *Ibid.* at 65.

[105] *Ibid.* at 70.

[106] *Ibid.* at 70.

[107] Stephen Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36 *International Organisation* 185 at 186.

might be the outcome of a purely legalized process.[108] It would recognize that institutions provide the opportunity, perhaps the best opportunity, primarily for states, but also for non-state actors, to engage in communicative action and rhetorical activity in order to develop mutual expectations or shared understandings and to facilitate the persuasion of better argument.

The way in which the United Nations and other international institutions are addressing both the process of Security Council legislation and the balance of security and human rights in response to global terrorism provides a useful case study into how communicative action and rhetorical activity might be occurring. In relation to the law-making process, one of the primary deficiencies of Security Council legislation is the limited participation of states and non-state actors in the process. Stefan Talmon has highlighted this lack of communicative action and rhetorical activity involved in the adoption of Resolution 1373.[109] However, he notes that in subsequent 'legislative' resolutions, including Resolution 1422 (2002), 1487 (2003)[110] and 1540 (2004),[111] the Security Council has been more open and transparent. In relation to Resolution 1540, Talmon points out that the adoption of the resolution involved consultation not only

[108] Krasner's analysis of international regimes suggests that international law exists at the level of rules and decision-making procedures rather than at the level of principles and norms, thereby restricting the role of international law to affecting regimes internally but being unable to affect the norms and principles which 'provide the basic defining characteristics of a regime'. *Ibid.* at 187. This insight forms the basis of the constructivist critique of the concept of legalization. Thus, Martha Finnemore and Stephen J. Toope dismiss legalization as 'legal bureaucratization' Finnemore and Toope, 'Alternatives to 'Legalization' Richer Views of Law and Politics' (2001) 55 *International Organization* 743 at 743.

[109] According to Talmon: 'Resolution 1373 was adopted in just over forty-eight hours. The United States began consultations with the other four permanent members on September 26, 2001; the next day, when the Council met in informal consultations, the United States circulated a draft resolution. The draft resolution as prepared during the Council's informal consultations was adopted in a formal public meeting-- lasting only five minutes--on September 28, 2001. No Council member spoke on the draft resolution or explained its vote; nonmembers of the Council were not consulted and were not present.' Talmon, *supra* note 47 at 187.

[110] Resolutions 1422 and 1487 request the International Criminal Court not to instigate proceedings against current or former officials or personnel from a State not a Party to the Rome Statute over acts or omissions relating to a UN-established or authorized peace-keeping operation for a period of 12 months. Whether these resolutions truly constitute examples of UN legislation is debateable. For a discussion of the conflicting arguments in this regard, see Happold, *supra* note 51 at 643-645.

[111] Resolution 1540 is considerably more akin to Resolution 1373 and imposes obligations on member states not to provide any support to non-state actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear chemical or biological weapons and their means of delivery (Paragraph 1) as well as further obligations concerning the amendment of their domestic laws. The resolution also set up a Committee referred to as the 1540 Committee, which operates in a similar manner to the Counter-Terrorism Committee (Paragraph 4).

with members of the Security Council itself but also with different groups of states, such as the Non-Aligned Movement as well as an open meeting with member states.[112]

Increased communication is undoubtedly occurring not only in relation to the adoption of the relevant resolutions but also to the actions of the Security Council in responding to criticisms from member states and non-governmental actors about the need for openness and transparency in the process. The echoes of Fuller's interactional theory are clearly audible in the comments of the representative of Spain at the open debate on Resolution 1540, who declared that 'since the Council is legislating for the entire international community,' the draft resolution should be adopted 'after consultation with non-members of the Council.'[113] But, as Risse makes clear, 'communicative behavior is all-pervasive in international relations.' [114] Accordingly, communicative action and rhetorical activity must be more than cheap talk if it is to be meaningful. Relevant questions must be asked about whether consultation is genuine and serious. Answers to such questions may not be immediately apparent. However, if it can be shown that the relevant increased consultation was meaningful, it might be possible to argue that the Security Council is learning through a process of communicative action and rhetorical activity how best to ensure the legitimacy of its legislative acts.[115]

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[112] According to Talmon: 'The five permanent members of the Council spent some six months working on the text of the draft resolution. On March 24, 2004, the text was shared with the ten elected members of the Council. At the same time, offers were made to different groups of states, such as the Non-Aligned Movement (representing 116 countries), to brief them on parts of that text. The Council members that sponsored the draft resolution went to great lengths to explain the text and listened closely to member states within and outside the Council. Informal consultations of the Council members took place on April 8, 20, and 28. On April 22, at the request of several states, the Council held an open debate with the active participation of fifty-one UN member states, including thirty-six that were not members of the Council.' Talmon., *supra* note 47 at 188.

[113] UN Doc. S/PV.4950 at 7. Quoted in Talmon, *ibid.* at 188.

[114] Risse, *supra* note 99 at 8.,

[115] The concept of learning is a controversial one within international relations analysis. Amongst compliance, and constructivist theorists, the possibility of states learning from their interactions with one another is a key insight. See, for example Chayes and Chayes who noted as far back as 1993 that: 'Treaties, like other legal arrangements, are artifacts of political choice and social existence. The process by which they are formulated and concluded is designed to ensure that the final result will represent, to some degree, an accommodation of the interests of the negotiating states … But modern treaty making, like legislation in a democratic polity, can be seen as a creative enterprise through which the parties not only weigh the benefits and burdens of commitment but explore, redefine, and sometimes discover their interests. It is at its best a learning process in which not only national positions but also conceptions of national interest evolve.' Abram Chayes & Antonia Chayes, *supra* note 69 at 180. Rationalists argue, on the other hand, that 'Compliance is most often a game of altering strategies and behavior only with agents leaving a regime (or its institutional home) as they entered it.' Jeffrey T. Checkel, 'Why Comply? Social Learning and European Identity Change' (2001) 55(3) *International Organization* 553 at 556. Checkel has sought to bridge the divide between constructivist and rational thinking on the issue of learning by introducing the concept of social learning which focuses on the micro- and agency level. (*Ibid.* at 560). Whether any of this analysis can be extrapolated to the level of the

Returning to the question of how to achieve the balance between state security and human rights in the context of Resolution 1373 and the actions of the Counter-Terrorism Committee, it has already been noted that the Counter-Terrorism Committee's primary role is one of capacity building and communication with states about how best to implement their obligations under international law. Early pronouncements from the Committee viewed human rights as a separate issue falling outside its mandate.[116] However, the establishment of the Counter-Terrorism Committee Executive Directorate (CTED) by virtue of Security Council Resolution 1535 envisaged greater cooperation between the Committee and the Office of the United Nations High Commissioner for Human Rights and other human rights organizations.[117] Thus, the process of dialogue and debate is being formalized within the United Nations and is also taking place in the dialogue between the Counter-Terrorism Committee and the member states.

Similar processes of communicative action and rhetorical activity are occurring in the United Nations General Assembly which promulgated, on 8 September 2006, the United Nations Global Counter-Terrorism Strategy and Plan of Action which includes, in addition to measures on further capacity-building and other actions to combat terrorism, a series of measures aimed at 'ensuring human rights for all and the rule of law.'[118] In addition, regional organizations, through the developments outlined in the first part of this article, have set in place the institutional framework for communicative action and rhetorical activity to occur. Outside the institutional framework, these processes are occurring in the work of non-governmental organizations and other interest groups who are not only probing the work of the Counter-Terrorism Committee but also highlighting the draconian measures being implemented in totalitarian states in the name of counter-terrorism.[119] They are occurring also at the domestic level where judicial and democratic institutions are being given the opportunity to question some of the more illiberal measures being proposed or implemented by domestic authorities.

Communicative action and rhetorical activity are not an immediate solution to the promulgation of excessive counter-terrorism measures at either the domestic or the international level. Nor will they always lead to the development of a moral result. However, they contribute to the process of development and learning of mutual expectations or shared understandings. The extent of communicative action and rhetorical activity is continually developing at the international level and may well contribute to an understanding of the interaction of the governing and the governed in international law and ultimately to the 'internal morality of international law'.

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institution itself is questionable but may be possible if one accepts that international institutions are as much socially constructed as states themselves.

[116] See the comments of the first Chair of the Committee to the Security Council on 18 January 2002. Reported online at http://www.un.org/sc/ctc/humanrights.shtml.

[117] *Ibid.*

[118] See http://www.un.org/terrorism/strategy

Conclusions

The immediate reaction of states to the events of 11 September 2001 was to focus on state security and develop a range of institutional measures which were designed to criminalize terrorism-related activities, to deny funding and safe havens to terrorists and to provide for the exchange of information on terrorist groups.[120] This was achieved through the process of what has come to be referred to as United Nations Security Council legislation and, in particular, the promulgation by the Security Council of Resolution 1373. Measures taken by regional organizations imposed similar obligations on states through the more traditional means of treaty negotiation and saw the introduction of a range of secondary processes designed at ensuring the efficient implementation of the relevant primary rules. All of these measures point towards the increased legalization of international law. However, the positivist/legalization project brings with it attendant difficulties relating not only to the constitutional question of the power of the Security Council to enact legislation but also in relation to the legitimacy of the process and the impact of Security Council legislation on other well-established rules of international law.

All members of the United Nations have complied with the obligations imposed by Resolution 1373. Furthermore, states have complied assiduously with their obligations in the context of regional organizations. This compliance points towards the legitimacy of these various institutional counter-terrorism efforts. It also points towards a conclusion that institutionalism and legalization provide a useful theoretical framework for an analysis of the developments referred to above. However, this should not be an end to the matter. Positive law making at the international level, especially where it occurs outside the 'normal' processes of negotiation and ratification, such as through Security Council legislation, brings about the possibility of one set of state interests being preferred to others. It is only when communicative action and rhetorical activity occurs that the entire range of interests and identities of international actors can be fully developed and a balanced construction of security in response to global terrorism can take place.

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[119] See note 82 above

[120] See http://www.un.org/sc/ctc/mandate.shtml

The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III

BARBARA J. FALK*

I. Introduction

On October 7, 2001, less than one month after the 9/11 terrorist attacks in New York and Washington, D.C., the United States commenced conflict operations in Afghanistan, with the express purpose of removing the Taliban from power and capturing and destroying al Qaeda leaders, agents, and bases of activity and training.[1] By late November, the legal status and treatment of combatants captured in the new 'Global War on Terror' (GWOT) became a matter of international debate and concern. However, in the succeeding five years, much of the controversy has shifted to the long-term detention, treatment and legal status of 'enemy combatants', particularly those held in US custody in Guantánamo Bay and other secret detention centers abroad.

Commencing with a general discussion of the applicability of international humanitarian law (IHL) to the initial conflict in Afghanistan, this article will examine, through a close textual analysis, the original contours of this debate as it emerged in memoranda produced by key members of the Bush executive from the fall of 2001

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* Associate Professor, Department of Defence Studies, Canadian Forces College. The author wishes to thank Richard Goldstone, Jutta Brunnée, Harvey Rishikof, Jules Bloch, and Ben Shaer for reading earlier versions of this article and providing insightful comments and suggestions in the course of my research, as well as Kimberly Lawton for her superb editorial and research assistance.

[1] I am assuming, for the purposes of this paper, that the debate on the nature of the conflict in Afghanistan as an international armed conflict has been settled. Although there were clearly overlapping conflicts, e.g. the US versus the Taliban, the US versus al Qaeda and Northern Alliance versus al Qaeda, the definitive international aspect of the conflict in the end was the removal of the Taliban from power. This primary character of the conflict was recognized by the United Nations, v ia Security Council Resolution 1193, as well as the International Committee of the Red Cross (ICRC); see ICRC press release 1/47, (24 October 2001), online: ICRC <http://www.icrc.org>. Whether it was categorized as an 'internationalized civil war' (as argued by Adam Roberts) or as an internal conflict 'upgraded to an international conflict' (as suggested by Jordan Paust), by the time the issue of POW status determination became an issue, there was considerable agreement as to the triggering of international humanitarian law given the international nature of the conflict. See Adam Roberts, 'The Laws of War,' in Audrey Kurth Cronin and James M. Ludes, eds., *Attacking Terrorism: Elements of a Grand Strategy* (Washington, DC: Georgetown UP, 2004) 207; Jordan Paust, 'After 9/11: Attacks on the Laws of War' (Summer 2003) 28 Yale J. Int'l L. 325 at 325-335. For more on this debate, see J. Wouters & F. Naert, 'Shockwaves Through International Law after 11 September: Finding the Right Responses to the Challenges of International Terrorism' in C. Fijnaut, J. Wouters, and F. Naert, eds., *Legal Instruments in the Fight against International Terrorism* (Leiden and Boston: Martinus Nijhoff Publishers, 2004) at 411-545. Whether or not it is appropriate to consider larger US claims about fighting an international armed conflict against al Qaeda, a non-state actor, or against a social and criminal phenomenon (terrorism), is still subject to debate. On this point, see Marco Sassoli, 'Use and Abuse of the Laws of War in the War on Terrorism' (2004) 22 Law & Ineq. J. 195 at 195-221.

through to the winter of 2002. This internal debate was broadly illustrative of a pattern of thinking with respect to the applicability of IHL to the GWOT that allowed difficult policy choices to both eclipse and displace adherence to international law. Indeed, this early American debate crystallized an approach to fighting terrorism based on the presumption that real or perceived 'gaps' in IHL exist, regardless of the condemnation of the international community and serious inconsistencies internal to the US approach. The International Committee of the Red Cross (ICRC), by contrast, has consistently taken what it perceives to be the moral high ground by refusing to engage in a debate about the difficulties of applying the Geneva Conventions to non-state actors or terrorists in this 'new kind of war.' While officially acknowledging the widening differential in practice, the ICRC publicly argues that there is no 'gap' in IHL – one is either a civilian or a combatant (lawful or unlawful) – and in *either* case is protected by the Geneva Conventions. While examining some of the arguments for and against the existence of such a gap, I suggest that given both the rhetorical and real intransigence of the Bush administration and the uncompromising position of the ICRC as the global custodians of IHL, a dispassionate opportunity for a fruitful examination of alternatives has been unfortunately lost for the last half decade. If we are indeed embarking on another 'Long War' akin to the Cold War, in which the United States is compelled to craft an effective foreign and defence policy response as structurally consistent and robust as containment, then this initial lack of consensus and ongoing controversy has been a key indicator of failure on the terrain of law, politics and international diplomacy. Nonetheless, potential alternatives or compromises *are* available and *do* merit further exploration, if only to shed light on the nested security dilemmas involved in a conflict that is incompatible with either a purely military or a criminal paradigm and involves largely non-state actors uninterested in compromise or immediate political or territorial gain. Particularly in light of the June 2006 *Hamdan v. Rumsfeld* decision of the US Supreme Court,[2] which minimally required adherence to Common Article 3 of the Geneva Conventions, while striking down the military commissions the Bush administration had proposed to try detainees, the time may yet be ripe for a sustained international and diplomatic effort to re-examine IHL and other alternatives that could assist in bringing the United States back 'into the tent' of IHL and, at the same time, allow for the effective prosecution of the GWOT.

II. Applicability and Relevance of International Humanitarian Law: Geneva Convention III

Geneva Convention III, relative to the Treatment of Prisoners of War, was signed in 1949 and remains the international standard of care with respect to their detention and overall treatment. Like the other Geneva Conventions, Common Article 2 applies to all cases of declared war or 'any other armed conflict which may arise between two or more of the High contracting Parties, even if the state of war is not recognized by

[2] *Salim Ahmed Hamdan, Petitioner v. Donald H. Rumsfeld, Secretary of Defense, et al.,* 548 U.S. 4 (2006) (*Hamdan v. Rumsfeld*).

one of them.'[3] High contracting parties are responsible for the proper treatment of prisoners of war (POWs); at the same time, individuals who mistreat prisoners are also legally liable for their actions. POWs are defined as individuals in the following categories who have 'fallen into the power of the enemy': members of armed forces (as well as militias or volunteer corps that form part of the armed forces, or members of regular armed forces who profess allegiance to a government that is not recognized by the detaining power),[4] and members of other militias or volunteers corps, or members of organized resistance movements so long as they fulfill the conditions set out in Article 4(2):

> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war [herein referred to as the four criteria].

As will be seen below, part of the debate turns on whether the four criteria apply to all belligerents, or simply to those specifically mentioned in Article 4(2). The Convention makes it clear that under Article 5, if there is any doubt as to whether or not persons 'having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal.' The convention does not describe what a 'competent tribunal' means and this became an important issue in determining the status of detainees in the Afghan conflict.

The designation of an individual as a POW is highly relevant because POWs are afforded significant protection. Upon receiving POW status, one can no longer be considered a target and receives full combat immunity. In particular, POWs cannot be transferred by the detaining power to another power, which is itself not a party to the Convention (Article 12). Moreover, POWs must 'at all times be humanely treated' and cannot be denied medical treatment (Article 13). At the beginning of captivity, a POW is required to provide only her or his name, rank, date of birth and army, regimental, personal or serial number, or equivalent information (Article 17). Significantly, Article

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[3] *Geneva Convention (III) relative to the Treatment of Prisoners of War*, 12 August 1949, online: ICRC <www.icrc.org/ihl>. Further references made in the text by article number.

[4] See Article 4 for full text. Also included but not relevant for my argument are persons such as civilian members of military air crews; war correspondents; supply contractors (at least some members of private security organizations could claim coverage here), members of merchant marine and civil air crews from parties to the conflict; and a *levée en masse*, or those who 'spontaneously take up arms to resist invading forces.' *Not included* as eligible for POW status are civilians who take part in a conflict other than through *levée en masse*, mercenaries, and spies. However, this does not excuse the detaining power from providing humane treatment for such classes of individuals. Somewhat different is the case of medical and religious personnel, who are considered retained persons and not POWs; however, they must be treated to the same standard of POWs.

17 also states: 'no physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.' They cannot be held in danger in a combat zone (Article 19), cannot be used as human shields (Article 23), and must be quartered under the same, or as favourable, conditions as forces of the detaining power who are in the same area (Article 25).

Common Article 3 of the Geneva Conventions, which applies to armed conflicts 'not of an international character' (which can be interpreted literally to mean all conflicts not between sovereign states, that is, unconventional conflicts) that occur 'in the territory of one of the High Contracting Parties,' requires that 'each Party to the conflict' shall be bound to treat all individuals rendered *hors de combat* humanely. Common Article 3 also requires that such actions as violence and the taking of hostages are prohibited, and further provides that the wounded and sick shall be cared for.[5] Importantly, Common Article 3 demands minimal humanitarian guarantees for those detained or placed *hors de combat*, and thus specifically prohibits all kinds of murder, cruel treatment, and torture.[6] Finally, although the wording does not expressly *require* fair hearings, the 'passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,' suggests a high-level of procedural fairness.[7] Indeed, that is exactly the approach taken by Justice John Paul Stevens in *Hamdan v. Rumsfeld*, the US Supreme Court decision that affirmed the applicability of Common Article 3 in particular, and treaty obligations more generally, to US conduct in the GWOT. In addition, the wording of Common Article 3 is relevant because further arguments can be made that 'each Party to the conflict' presupposes situations may exist where the strict definition of combatants/non-combatants does not apply. One can easily imagine future militarily-executed counter-terrorist operations that do not amount to armed conflicts of an international character, likely involving special forces and

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[5] Neither the Geneva Conventions nor the Additional Protocols fully define an 'armed conflict' although, Common Article 3 aside, an interstate conflict is implicit. One authoritative definition is provided by the Appeals Chamber in the *Tadić* case in the ICTY: 'a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.' See *Prosecutor v. Duško Tadić*, [2 October 1995], Appeals Chamber, ICTY at para. 70.

[6] These guarantees are elaborated on more completely and comprehensively in Article 75 of Additional Protocol I and Articles 4 and 5 of Additional Protocol II. See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, online: ICRC <www.icrc.org/ihl>. As well as Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, online: ICRC <www.icrc.org/ihl>. Further references made in the text by article number.

[7] Article 6 of Additional Protocol II elaborates procedural and due process guarantees in penal prosecutions, such as full answer and defence, the presumption of innocence, the right against self-incrimination and to be present at a hearing, and the requirement of voluntariness of confessions.

counter-insurgency operations in a complex threat environment with multiple parties to the conflict.

The philosophical rationale for Geneva Convention III is straightforward. Underlying the clear distinction between combatants and civilians is the desire to limit the 'business' of war to the 'professional' armed forces of a state, whose job it is to conduct it. Under the principle of combatant immunity, professional soldiers are not held responsible for violence committed in lawful acts of war. They are exempt from the moral imperative not to kill, insofar as their obedience to the laws and customs of war has been secured.[8] To be considered soldiers, and thus eligible for POW status if captured, individuals who are *not* members of regular armed forces have to meet certain defining criteria, that is, those outlined in Article 4(2). Complying with the rules means that, if captured, such persons are considered 'privileged' and are accorded status as 'prisoners of war' and afforded considerable protection by their captors, as well as a particular kind of treatment. Obviously, the desired result is to reward fair fighting with fair treatment and, at the same time, discourage civilians from entering combat. The reasoning remains that the clearer the distinction can be drawn between combatants and civilians, the greater the likelihood and ability of conflicting forces to maximize the safety of civilians in the midst of conflict.

The principle of combatant immunity, as well as the status, definition, and protection of POWs, was not invented out of whole cloth and then inserted into the Geneva Conventions, but rather has a long history that predates initial efforts to codify the law of armed conflict, back to medieval ideas of chivalry, warriors' codes of honour and, not unimportantly, economic efficiency. Under such codes, the 'normal' rule of law in civil society was suspended for the noble soldier fighting under political authority for a just cause. One must keep in mind, however, that the Geneva Conventions of 1949 were drafted in the aftermath of the Second World War, a total war that signalled a historical turning point in the deliberate targeting of civilian populations, resulting not only in massive civilian casualties, but the unparalleled destruction of domestic infrastructure. Indeed, in reading the ICRC's detailed commentaries regarding the diplomatic and political history that led to the precise wording of the Conventions, references are continually made to the World War II experience.[9]

> Prompted by the conflict in Afghanistan, a core feature of the US debate is an assumption that the Geneva Conventions were stale-dated and inadequate to the complicated task of fighting a war against terrorism. Unlike the Cold War era, which was dominated by conventional state-based conflicts – whether of

[8] Article 43(2) of Additional Protocol I codified customary international law with respect to the principle of 'combatant immunity', which can be understood historically as a legal shield. Article 43(2) states: 'Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.'

[9] See *1949 Conventions & Additional Protocols & their Commentaries*, online: ICRC <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>

the inter-state or intra-state variety – the GWOT is fought on global terrain where at least some of the parties to the conflict are not state-based, are 'networks' rather than militias, do not fight according to the laws and customs of war and are not specifically interested in territorial domination. How these concerns generated new, controversial and arguably incorrect interpretations of IHL became the subject of intense internal debate among senior members of the Bush administration in the fall of 2001. With the advantage of hindsight, we can see how the contours of the 'detention debate' were initially framed by intense deliberation among senior members of the Bush Executive.

III. The Gonzales Memo, the Executive Debate, and the US Argument

On November 13, 2001, the White House publicly released a military order concerning the 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism' (hereafter referred to as Military Order of November 13, 2001).[10] At the outset, it was clear that the United States government had construed the 9/11 attacks as creating a state of armed conflict, thus triggering the general application of the laws and customs of war (and, implicitly, the Geneva Conventions as well). The document states that to be able to protect US citizens and effectively conduct military operations, 'individuals subject to this order…[will be] tried for violations of the laws of war and other applicable laws by military tribunals.' Moreover, detainees charged would be subject to full and fair trials before military commissions.[11] During detention,[12]

[10] The memoranda circulating among members of the US Executive branch referred to in this section and later in the paper, which were not originally publicly released, are contained as appendices to Mark Danner, *Torture and Truth: America, Abu Ghraib, and the War on Terror* (New York: New York Review Books, 2004) as well as in Karen J. Greenberg and Joshua L. Dratel, eds., *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge UP, 2005). Subsequent references in this paper are made in the text according to author and date of the memoranda.

[11] Military commissions, according to this order, are triers of both fact and law, admit evidence that would 'have probative value to a reasonable person,' and may sit at any time and place as provided by the Secretary of Defense. In addition, convictions and sentencing can only occur with a majority of two thirds of the members of the commission present, and the only avenue of appeal is either to the President of the United States or to the Secretary of Defense if so designated by the president. Anyone subject to this order shall be tried for '…any and all offenses triable by military commission…and may be punished in accordance with the penalties provided under applicable law, including life imprisonment and death.' The phrase 'applicable law' is not elaborated upon but further executive analyses and memoranda clearly refer to earlier US jurisprudence involving the use of military commissions, e.g. the Civil War case of *Ex Parte Milligan* 71 US (4 Wall.) 2, 121 (1866) and the important Second World War case of *Ex Parte Quirin* 317 US 1, 45 (1942). Under *The Paquette Habana* (175 US 677, 700 (1900)), United States law incorporates the international law of war. In the US, military commissions are separate from military courts martial, which are set up to try service members for violations the US Uniform Code of Military Justice (UCMJ). In *Hamdan v. Rumsfeld*, *supra* note 2, the United States Court of Appeals held that *Ex Parte Quirin* and congressional approval for the War on Terror effectively authorizes military commissions; despite *The Paquette Habana*, the same court held that Geneva law could not be judicially

individuals would be treated humanely, given equitable treatment, afforded adequate food, drinking water, shelter, clothing and medical treatment and be allowed free exercise of religion.

On January 25, 2002, Alberto R. Gonzales, then-White House counsel, advised the president that Geneva Convention III applied neither to the conflict with al Qaeda nor the conflict with what are carefully referred to as 'Taliban fighters' (and not combatants). The now-infamous Gonzales memorandum was prepared in response to (a) an earlier opinion written by the Department of Justice which also concluded that Geneva Convention III did not apply to al Qaeda, stating that there were 'reasonable grounds' to conclude non-application to the Taliban; and (b) a request by then-Secretary of State Colin Powell to reconsider the carte-blanche rejection of the application of Geneva Convention III to al Qaeda and the Taliban, as this could be done only on a case-by-case basis. Clearly, the State Department read closely the Geneva requirement to hold a status determination hearing by a competent tribunal under Article 5, along with the concomitant requirement to presumptively treat persons as POWs until such a determination is made. Gonzales advised that the non-application of the Geneva Conventions vis-à-vis the Taliban can be argued on the basis that (a) Afghanistan was a failed state, where 'the Taliban did not exercise full control over its territory and people, was not recognized by the international community, and was not capable of fulfilling its international obligations;' and (b) 'the Taliban and its forces were, in fact, not a government, but a militant, terrorist-like group.' [13] Importantly, and central to my argument here, much of the Gonzales memo is not a *legal* analysis per se, but in reality a *policy options* document, wherein the advantages and disadvantages of the non-applicability of Geneva are compared and contrasted. Gonzales echoed previous presidential statements that this is a 'new kind of war,' not a traditional inter-state conflict and in an oft-quoted passage he discussed why Geneva may be obsolete in this context:

> The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians. In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions requiring the captured enemy to

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enforced in the United States. This reasoning was overturned by the Supreme Court; see note 58 below.

[12] The Military Order states that those detained will be 'at an appropriate location designated by the Secretary of Defense outside or within the United States' – there is no mention that such a location shall be on the territory of a Detaining Power or another power which is a party to Geneva Convention III, as is required by Article 12. The first detainees arrived at Guantánamo Bay, Cuba in January 2002.

[13] Alberto R. Gonzales, 'Memorandum for the President,' January 25, 2002.

> be afforded such things as commissary privileges, scrip (i.e. advances of monthly pay), athletic uniforms, and scientific instruments.[14]

However, Gonzales also noted that the US had never previously denied applicability of Geneva to either US or opposing forces in earlier armed conflicts, and pointedly reminded Bush that in the administration of George Bush Sr., the US publicly declared its policy of applying Geneva 'whenever armed hostilities occur with regular foreign armed forces, even if arguments could be made that the threshold standards for the applicability of the Conventions ... are not met.'[15] Moreover, Gonzales added that the US could hardly invoke Geneva if 'enemy forces threatened to mistreat ... U.S. or coalition forces captured during operations in Afghanistan,' and that such an approach, even if accompanied by assurances that core humanitarian principles would be followed, would likely 'provoke widespread condemnation among our allies and in some domestic quarters' and could encourage others to look for 'technical loopholes' in future conflicts – thus lessening the effectiveness of the Conventions as a whole.

One day after the Gonzales memorandum, Secretary of State Colin Powell swiftly responded to Gonzales, copying then-National Security Advisor Condoleeza Rice. Alarmed by the argument that Geneva law did not apply to the conflict in Afghanistan *at all*, Powell firmly recommended an option that admitted the application of Geneva, as providing 'a more defensible legal framework,' while maintaining a more 'positive international posture,' ensuring potential POW status for detained US forces and reducing the likelihood of international criminal investigations directed against US officials and troops. Having maintained that the 9/11 attacks constituted the opening salvo in a sustained armed conflict, while construing US actions as both legal and legitimate self-defense, denying the applicability of Geneva was for Powell a slippery slope to delegitimizing the choice of the military paradigm.[16] Powell concluded his case with the following reservation: 'If, for some reason, a case-by-case review is used for Taliban, some may be determined to be entitled to POW status' and carefully added that this '...would not, however, affect their treatment as a

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[14] Gonzales, January 25, 2002.

[15] Gonzales, January 25, 2002. Prior to the GWOT, presumptive applicative of the Geneva Conventions had been the norm.

[16] The Bush administration was very keen early on to follow a military rather than a criminal paradigm in its conduct of the GWOT. It was aided in this portrayal by NATO's invocation on October 2, 2001 of Article 5 of the 1949 Washington Treaty, wherein armed attack on one or more of the Allies of Europe or North America is considered an attack against all, as well as UN Security Council Resolution 1368 which condemned the attacks as a 'threat to international peace and security,' and the State Parties of the 1947 Inter-American Treaty of Reciprocal Assistance (the Rio Treaty) which, on September 21, 2001, likewise construed the attacks as threatening to continental security. If the 9/11 attacks are viewed as part of a continuum of sustained al Qaeda efforts that include the 1998 embassy bombings in Kenya and Tanzania, as well as the 2000 attack on the USS Cole in Yemen, then the US government is strengthened in its case that (a) it is subject to an ongoing armed attack; and (b) its actions, particularly in the case of Afghanistan, are within Article 51 of the UN Charter which allows for self-defense.

practical matter.'[17] One can suppose from this wording that the Powell memo assumed the presumptive application of Common Article 3 regardless of combatant status. However, even Powell's memo, which is the most supportive of the Geneva Conventions in this series of memoranda, treats application as a matter of policy choice – where a state chooses to comply with international law *not* because it is the law but because there are more advantages than disadvantages in doing so.[18]

At this point, Attorney-General John Ashcroft entered the fray, voicing his support for the non-application of Geneva. In curious wording, Ashcroft stated that it was his 'understanding that the determination that al Qaeda and Taliban detainees are not prisoners of war remains firm' – the only item remaining for discussion was the applicability of Geneva III. Read as a whole, the memorandum is a singular example of putting the cart before the horse – rather than decide to apply IHL to Afghanistan and then figure out whether or not al Qaeda and Taliban detainees might be POWs, Ashcroft's approach was to foreclose any possibility of POW determination, but *then* consider the application of IHL to the conflict, presumably for the same reasons outlined above by Powell, that is, American soldiers would be better protected and American allies assuaged. As Attorney-General, Ashcroft seemed concerned primarily with preserving the legal latitude of the president and thus reminded President Bush that non-applicability would provide him with 'the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees.'[19]

By February 2, 2002, William H. Taft, Legal Advisor to the Department of State, also responded to the Gonzales memorandum. Consistent with the earlier

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[17] Colin Powell, January 26, 2002.

[18] The Powell memorandum also makes several factual corrections to the Gonzales memorandum, noting that any claim to Afghanistan as a 'failed state' was counter to the official US government position and that the 'positive consequences' of the application of Geneva Convention III would apply 'equally if the President determines that GPW [the Geneva Convention on the treatment of Prisoners of War] does apply but that the detainees are not entitled to POW status' (Colin Powell, January 26, 2002). The Gonzales memorandum tended to conflate Geneva coverage with the particular issue of POW status, thus confusing the application of Common Article 3 with the articles covering the detention and treatment of POWs. Finally, Powell strategically reminded his colleague that application had been the norm in the past wherever the US forces had been engaged (even in Panama, regardless of the assertion to the contrary). Gonzales, like Powell, speaks of the 'policy reasons' to comply with Geneva Convention III, as well as the 'policy of providing humane treatment' (as opposed to the legal requirement to do so) bringing 'credibility' (rather than international legal compliance). Thus, when Gonzales speaks of the US 'commitment to treat the detainees humanely,' it is unclear whether or not this commitment is a result of presidential choice or compliance with international law, and thus the distinction is again obscured.

[19] John Ashcroft, Attorney General, Letter to the President, February 1, 2002. Ashcroft reminded Bush that in cases of presidential interpretation of treaty protections (in this case the Geneva Conventions), courts have in the past refused to defer to such interpretation, as in *Perkins v. Elg*, 307 US 325 (1939). In essence, shutting down Geneva also served the useful purpose (in Ashcroft's view) of shutting down judicial review.

Powell memorandum, the Taft letter argued in favour of Geneva applicability, because such an approach 'demonstrates that the United States bases its conduct not just on its policy preferences, but on its international legal obligations.'[20] Again, one is reminded in re-reading the memoranda that policy and law are consistently juxtaposed in a manner that reduces international law to policy choice. Taft reminded Gonzales that Geneva applicability was consistent with UN Security Council Resolution 1193, which called for all parties to the conflict in Afghanistan to comply with IHL. Finally, Taft reminded the president of the risks to US service members if deprived of any reciprocal claim to the Geneva Conventions in the event of capture.[21]

The final volley in this fusillade of advice received by the Bush White House was a very long and detailed memorandum written for Gonzales and William J. Haynes II, General Counsel of the Department of Defense, by Jay S. Bybee, Assistant Attorney-General. Bybee first dismissed the idea that the Taliban could be classified as a 'militia' under Geneva Convention III and then found that the Taliban also does not constitute the 'armed forces' of Afghanistan.[22] On evidence provided from the Department of Defense, Bybee noted that the Taliban lacked the characteristics of a military organization; they did not function under centralized command, wear uniforms with distinct insignia nor conduct operations in accordance with the laws and customs of war and thus could not be categorized as either a militia or the regular armed forces of Afghanistan. On this point, Bybee also referred to ICRC commentary – generally considered to be highly authoritative – on the application of the four criteria to the *regular* armed forces of a state, presumably to reinforce the view that the Taliban could not be considered as regular armed forces and thus the four criteria did not apply.[23] Finally, Bybee concluded that, given his presidential powers of treaty interpretation, President Bush could legally determine that the Taliban do not fit any of the categories of coverage in potentially obtaining POW status, thus obviating the need for any tribunals under Article 5. Bybee carefully quoted Article 5 which requires

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[20] William H. Taft IV, February 2, 2002.

[21] This has remained a concern for current American soldiers and veteran's groups, who argue that deliberately blurring Geneva Convention III (and Common Article 3) will continue to endanger US troops and create a recruiting and propaganda tool for terrorist networks such as al Qaeda. See in particular Paul Riekhoff, 'Do unto your enemy,' and Arthur T. Hadley, 'Firing potent words, from a tank,' both in *International Herald Tribune* (26 September 2006).

[22] Bybee also supported Gonzales' view that Afghanistan was a 'failed state' and argued on that basis presidential authority to suspend treaty obligations could be justified in a decision to suspend Geneva Convention III obligations. See Jay S. Bybee, January 22, 2002.

[23] Although Bybee presents this unproblematically, there is considerable debate as to the applicability of the four criteria to regular armed forces and other classes of combatants referred to in Article 4 or simply as a practical and legal means whereby POW coverage can be extended to non-members of armed forces (such as militias) or other groups that nonetheless meet the requirements imposed by the four criteria. See the contrasting legal opinions of Robert Kogod Goldman, A.P.V. Rogers, H. Wayne Elliot, and Michael Noone in the discussion 'POWs or Big Unlawful Combatants? September 11th and its Aftermath' from January 2002, written contemporaneously with the Bush administration memoranda discussed here, archived online: Crimes of War <http://www.crimesofwar.org>.

status determination by a competent tribunal only in 'cases of doubt.' If no doubt exists, reasoned Bybee, then there is no need for a status determination by a competent tribunal.[24] Finally, the Bybee memorandum reinforces the opaque distinction between policy and law, again casting presidential decision-making in a policy options framework. The subtitle of Section D of the Bybee memorandum is particularly telling: 'Application of the Geneva Conventions as a matter of *policy*' (emphasis added). A later subtitle makes it clear that Geneva Convention requirements are justified but again the reasoning collapses the policy/law distinction.

President Bush brought the debate to a close on February 7, 2002 in a memorandum directed to the Vice-President, Secretary of State, Secretary of Defense, Attorney-General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs and Chairman of the Joint Chiefs of Staff. Pursuant to his authority as Commander in Chief and Chief Executive of the United States, Bush confirmed that 'none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan' and, while reserving the right under the Constitution to suspend Geneva in the conflict between the US and Afghanistan, declined to do so. Further, Bush denied the applicability of Common Article 3 to either conflict, thus reaffirming the international nature of the conflict.[25] Following the advice of Taft, Bush made a blanket determination that Taliban detainees were 'unlawful combatants' and thus not eligible for POW protection; since the Geneva Conventions were was not found to apply in the final analysis to al Qaeda, neither were members of al Qaeda determined to qualify for POW protection. This memorandum, which was not declassified in full until June 17, 2004, also states that the US would continue to support Geneva principles: 'As a matter of *policy*, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva' (emphasis added).[26]

Essentially, the views of Bybee and Gonzales won out over those of Taft and Powell. A traditional bipartisan consensus on the applicability of IHL to conflicts had effectively been replaced by the more radical vision of the Bush lawyers – what journalist Anthony Lewis has referred to as *la trahison des avocats*.[27] Thus, until the trio of Supreme Court decisions of June 28, 2004, it remained the position of the United States that there never was any need for Article 5 tribunals and that neither al Qaeda nor the Taliban were eligible for POW status (the former as a non-state group, the latter as having not complied with the four criteria).[28] The US claimed it was

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[24] Jay S. Bybee, January 22, 2002. It should be noted that Article 5 is not clear as to *who* must have the doubt for the status determination requirement to be triggered.

[25] This argument was later rejected by the Supreme Court in *Hamdan v. Rumsfeld*.

[26] George W. Bush, 'Humane Treatment of al Qaeda and Taliban Detainees,' February 7, 2002.

[27] Anthony Lewis, 'Making Torture Legal,' *The New York Review of Books* (15 July 2004) at 6.

[28] In *Hamdi et al. v. Rumsfeld, Secretary of Defense, et al*, Justice Sandra Day O'Connor, writing for the majority, examined whether the President's exercise of congressional authority (to detain

acting within well-established authority to detain combatants until hostilities ceased, although the law and customs of war posit the detention of POWs and non-combatants, not a third category of 'enemy combatants'.[29]

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enemy combatants without serious judicial review) violated the US Constitution's Fifth Amendment, which states that no person may be deprived of liberty without 'due process of law.' She wrote that a 'proper balance' must be struck between the individual rights of prisoners and the dangers to national security from allowing prisoners to claim judicial review of their detentions. According to Justice O'Connor, this balance requires that 'a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker' (at 26). Thus, the court held that citizen-detainees designated as 'enemy combatants' have the right to challenge their detainment under the 'due process of law' clause. However, she further elaborated some detailed suggestions about what, exactly, this might entail; for example, (1) a 'neutral tribunal' need not be an ordinary court – it could be a kind of military commission; and (2) the normal burden of proof might be reversed – a detainee could be required to prove that he was *not* an enemy combatant. Furthermore, and more disturbingly, O'Connor said that while Hamdi must be freed at the cessation of fighting, that juncture would be determined by the government, when they feel that the 'war against terrorism' has finally been won.

Jose Padilla's petition of habeas corpus in *Rumsfeld, Secretary of Defense, et al. v. Padilla et al.* 542 U.S. 426 (2004) (*Padilla*) also yielded important legal precedents. Padilla's lawyer filed the petition in the New York federal court naming Donald Rumsfeld as the defendant. The Supreme Court later held that Padilla's lawyer had wrongly sued Rumsfeld as (1) Padilla's immediate custodian was not Rumsfeld, but Melanie A. Marr, the Commander of the naval brig in which he was being held; and (2) the district of custody was South Carolina, where the brig is located. While this might appear to have only procedural importance, this ruling had considerable substantive impact because the decision meant the government could go 'forum shopping' in search of the most sympathetic court.

Unlike *Hamdi* and *Padilla*, the third in the trio of June 2004 cases, *Rasul et al v. Bush, President of the United States,* 542 U.S. 466 (2004) (*Rasul*), provided a clear step forward for detainee rights. The federal habeas corpus statute states that federal district courts have the authority to hear applications for habeas corpus 'within their respective jurisdictions.' The Bush administration built its facility in Guantánamo Bay, Cuba precisely around this requirement, arguing that because the United States is not the sovereign power in Cuba, the premises are not under the jurisdiction of any federal court, ruling out any habeas corpus actions. In *Rasul*, the court ruled against this argument stating that 'respective jurisdictions' refers to the jurisdiction in which the officials responsible for the detention may be found. The Court further stated that when the government holds prisoners in foreign territory under effective and permanent US control – e.g. in the facility in Guantánamo Bay – a habeas corpus petition could be brought to a federal court in the US, which has jurisdiction over the President. Essentially, the ruling in *Rasul* made the later decision in *Hamdan* possible. For an excellent summary of the implications of all three rulings, see Ronald Dworkin, 'What the Court Really Said' *The New York Review of Books* (12 August 2004).

[29] There is considerable controversy over the legal meaning of the 'enemy combatant' designation. For example, Joanna Woolman argues that based on its legal roots, the US government's use of the term is inaccurate and unprecedented. Indeed, she states that the term 'enemy combatant' has 'no formal legal authority at home or abroad.' Tracing the origins of the term from its first appearance in the 1942 *Ex parte Quirin* case to the present, she finds a number of faults with affixing the term to supporters of al Qaeda and/or the Taliban. For instance, the court in *Quirin*

The decision, made public on February 7, 2002, provided the Bush administration with some key advantages. First, by denying POW status, combatants could be tried by military commissions rather than courts-martial.[30] Second, the

uses 'the terms "unlawful combatant", "enemy combatant", and "enemy belligerent" seemingly interchangeably to refer to enemy soldiers who had violated the rules of war.' The court even expressly defined 'unlawful combatant'. *Inter alia*, 'unlawful combatants' are subject to trial and punishment by military tribunals for 'acts which render their belligerency unlawful.' In other words, they are considered 'unprivileged combatants' who do not receive POW treatment and can be tried by military tribunals for their violations of the rules of war. After the *Quirin* case, the term 'unlawful combatant' went on to become an established term of international law, when it was referred to in the 1949 Geneva Conventions. According to Woolman, there is no reason to assume that the *Quirin* court intended to carve out a distinct meaning for the term 'enemy combatant' separate from 'unlawful combatant'. See Joanna Woolman, 'Enemy Combatants: The Legal Origins of the Term "Enemy Combatant" Do Not Support its Present Day Use' (Fall 2005) 7 J.L. & Soc. Challenges 145 at 145-167.

[30] This is matter of some debate. Lt. Col (Ret.) H. Wayne Elliott, former Chief, International Law Division of the US Army, suggested in early 2002 that policy choice and not law historically dictated the use of courts-martial rather than military commissions. Under customary international law and Common Article 3, one could argue that combatants, whether privileged with POW status or not, are entitled to a fair hearing, in accordance with due process and with access to legal counsel. At this early stage, some US arguments began to hinge on the precedent of *Ex Parte Quirin*, wherein eight German saboteurs challenged the constitutionality of President Roosevelt's 1942 military order creating a military tribunal. In its decision, the Supreme Court used the terms 'unlawful combatant' and 'unlawful belligerent' to refer to a person who 'having the status of an enemy belligerent enters or remains, with hostile purpose, upon the territory of the United States in time of war without uniform or other appropriate means of identification.' Roosevelt's actual declaration is revealing: Presidential Proclamation 2561 states as follows:

> ...the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory invasion, or who have entered in order to commit sabotage, espionage, or other hostile or warlike acts, should be promptly tried *in accordance with the laws of war* (emphasis added).

The language here is clear: the proclamation deliberately refers to the laws of war, still then undefined by statute and a less-settled body of principles and customs in international law. If Roosevelt had chosen instead to use the phrase 'Articles of War', the statutory apparatus for courts-martial enacted by Congress would have been triggered. The proclamation also made it clear that 'all persons...[that would be]...charged with committing or attempting or preparing to commit sabotage, espionage, hostile, or warlike acts, or *violations of the laws of war*, shall be *subject to the law of war* and to the jurisdiction of military tribunals' (emphasis added). There are a number of problems with reliance on the *Quirin* precedent. First, it was decided before the Geneva Conventions of 1949. Second, the alleged saboteurs were essentially charged with attempting to commit war crimes, which was already one of the exceptions to combat immunity under customary law. Indeed, Jordan J. Paust has interpreted *Ex Parte Quirin* at a minimum as providing *implicit* support for the principle of combat immunity for *lawful* acts of combat, given that the judgment represents the defendants as enemy belligerents or combatants who were in *violation* of the law of war applicable to enemies. Finally, at issue in the end was not their status *per se*, but the fact that they were planning to engage in acts of sabotage by bombing railroads,

administration could argue that, while being treated humanely, and thus in accordance with the 'spirit' of Geneva, unlawful combatants without the privilege of POW status could be more effectively interrogated – an important goal of the administration being the collection of 'actionable intelligence.'[31] Third, the US position meant that there was no requirement to release them upon the cessation of the conflict – already an issue given the open-ended nature of the GWOT.

Clearly these memoranda were not written for public consumption, but their eventual release illustrates much of what is at stake in the GWOT. First, the debate about the applicability of Geneva affirmed suspicions about the Bush administration's view that compliance with IHL is optional, something subject to debate, with decisions based upon a policy analysis of advantages and disadvantages. Second, the arguments play very superficially with the idea that Geneva does not and cannot apply to 21st century conflicts in the GWOT given their unconventional and non-state based nature. Thus, Afghanistan-as-a-failed-state is offered up as one rationale, or terrorists-as-not-being-state-parties as another rationale, but the memoranda never engage seriously or thoughtfully with these arguments, their potential long-term ramifications or possible compromises that might be multilaterally negotiated via diplomatic conference among the state parties to Geneva. Third, the memoranda display a deep-seated ambivalence about the ongoing designation of 'prisoner of war' *as a legitimate status* in conflict, hence Gonzales' famous quip that this new kind of war rendered much of the Geneva Conventions 'quaint' or 'obsolete'. This ambivalence has carried over into the US-led intervention in Iraq, where a distinction has been made between former members of the Iraqi National Army (who have received POW status) and those classed as 'insurgents', who do not.[32] Fourth, this understandable ambivalence about potentially

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bridges, and other strategic targets in the US. See opinions of H. Wayne Elliott, 'Terrorism and the Laws of War: September 11th and Its Aftermath,' (21 September 2001), online: Crimes of War <http://www.crimesofwar.org/expert/attack-elliott.html>; Jordan J. Paust, 'After 9/11: Attacks on the Laws of War' (Summer 2003) *28 Yale J. Int'l L.* 325 at 331-332; and Jordan J. Paust, 'There is No Need to Revise the Laws of War in Light of September 11,' paper prepared for The American Society of International Law Task Force on Terrorism, online: ASIL website <http://www.asil.org/taskforce/paust.pdf>.

[31] However, even though POWs are not *required* to provide more information than the 4 items of information listed in Article 17, they could be *asked* to provide further information, provided there is not mental or physical coercion.

[32] Under IHL, the US, UK and other coalition members are considered 'occupying powers' in Iraq. As insurgents are not part of Iraqi forces, they are not entitled to combatant immunity; moreover, they can be prosecuted under Iraqi domestic law (i.e. they are criminals, not soldiers). Civilians may also be detained in a conflict under Geneva IV 'for imperative reasons of security.' A major concern, from the US and coalition perspective, remains 'actionable intelligence'. My argument here is that, given the trend and approach established early on with respect to Afghanistan, there has been a strong policy desire to override legal determination; in Iraq this has translated into the classification of as many as possible of those captured as either insurgents or security threats. See Bill Gertz, 'Most prisoners in Iraq jails called "threat to security",' *The Washington Times* (6 May 2004) and Human Rights Watch, 'Legal Aspects of the Ongoing Fighting in Iraq: Frequently Asked Questions,' at < http://hrw.org/campaigns/iraq/ihlfaq042904.htm> last updated 29 April 2006.

'legitimizing' terrorists by considering possible POW status has been, unfortunately, negatively reinforced with the repeated labeling of US adversaries in public pronouncements since 9/11 as *terrorists*, regardless of the specific location or particular circumstances of the conflict (Afghanistan versus Iraq, for example, or alleged terrorists detained in the United States or in other states). The overall approach has arguably contributed to an organizational and political culture of disrespect for longstanding and widely-held humanitarian norms, thus making easier the willfully blind violation of such norms, as is evidenced by the now well-documented inhumane treatment of detainees at Guantánamo Bay and the Abu Ghraib prison torture and abuse scandal.[33]

Because of how the detention debate was originally framed by these memoranda, followed by subsequent concerns about the humane treatment of detainees at Guantánamo, Bagram air base, and elsewhere, an opportunity to look dispassionately and without prejudice at the potential future applicability of the Geneva Conventions to the GWOT has been lost, at least in the short-to-medium term future. Understandably under these circumstances, the ICRC response has remained rigid and absolute.

IV. ICRC Response to the United States and Related Commentary

After the memo of February 7, 2002, the International Committee of the Red Cross, as the global guardian of Geneva law, stated that it 'stands by its position that people in a situation of international conflict are considered to be prisoners of war unless a competent tribunal decides otherwise.'[34] This was a fairly bold statement for the ICRC, which has carefully preserved its neutral status and generally does not criticize or challenge detaining powers publicly or directly. However, the issue of status determination goes to the heart of the protection afforded to POWs under IHL. More recently, the ICRC elaborated its views in the July 21, 2005 Official Statement, 'The relevance of IHR in the context of terrorism.'[35] First, the ICRC stated that IHL applies to the 'Global War on Terror' only to the extent that it coincides with either an international armed conflict or a non-international armed conflict. Second, the ICRC reiterated its longstanding position that IHL allows armed forces and militias (at least those who fulfill the requisite four criteria) to lawfully engage in conflict and upon

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[33] Regular updates and reports are provided by Human Rights Watch and Amnesty International (www.hrw.org and www.amnesty.org). Violations of international humanitarian law have been reported regularly in the US media, particularly in *The Washington Post* and *The New York Times*. See also Michael Byers, *War Law: Understanding International Law and Armed Conflict* (Vancouver and Toronto: Douglas & McIntyre, 2005) for an excellent discussion of the protection of civilians, combatants, and prisoners of war and violations of international humanitarian law by the US since 9/11.

[34] See 'Red Cross, jurists' group fault US on status of prisoners,' *Vancouver Sun* (9 February 2002) A.19.

[35] ICRC Official Statement, 'The relevance of IHL in the context of terrorism' (21 July 2005), online: ICRC <www.icrc.org/web/eng/siteeng0.nsf/htmlall/terrorism-ihl-210705?opendocument >.

capture be entitled to POW status. Without intending to be coy, the only meaning the ICRC ascribes to 'enemy combatant' is a combatant who is fighting for the other side in an armed conflict, but it acknowledges a very different use of 'enemy combatant'. While not mentioning the United States by name, the ICRC stated that the term is 'currently used – by those who view the 'global war against terror' as an armed conflict in the legal sense – to denote persons believed to belong to, or believed to be associated with, terrorist groups, regardless of the circumstances of their capture.' The ICRC further stated that, regardless of what a person is called, if captured in an international armed conflict, the provisions and protections of IHL still apply. If combatants do not qualify for POW status, then they are either minimally covered by Common Article III or Geneva Convention IV, which covers the treatment of civilians. As well, at a minimum, all detainees regardless of status are afforded the fundamental guarantees of Article 75 of Additional Protocol I to the Geneva Conventions.[36] The ICRC reiterated that Additional Protocol I does not provide POW status to persons who unlawfully participate in hostilities – but it does not use the label 'enemy combatants' or 'unlawful combatants' for such persons. Additional Protocol I, just like the antecedent Geneva Conventions, 'does not provide protection to either organizations or individuals who act on behalf of a State or an entity that is a subject of international law.' The ICRC also clarified that '"terrorist" groups acting on their own behalf and without the requisite link to a State or similar entity are excluded from prisoner of war protections.'[37] Essentially, a terrorist acting under her or his own authority is a criminal, not a soldier.

While the ICRC claims to speak with monopolistic authority, Adam Roberts interprets the ICRC position at the time as an overstatement of Geneva law. Roberts emphasizes Geneva Convention III requires 'not that in all cases prisoners should be considered to be POWs but that *in all cases of doubt* prisoners shall be *treated as* POWs' (emphasis in original).[38] The ICRC, together with NGOs such as Amnesty International and Human Rights Watch, are incorrect in Roberts' view in claiming that all detainees must be first *presumed* to be POWs. In many cases, the status of prisoners is quite clear; only if there is a doubt must the capturing state treat such individuals *as if* they are POWs until assessed by a competent tribunal. In this respect, Roberts both follows and mimics the logic of the Bybee memorandum. Moreover, he suggests that denying the existence of the category of the unprivileged or illegal combatant falsely denies both its 'long history' and the fact that it '…is implicit in the criteria for POW status in the 1949 Geneva Convention III, and is more or less explicit

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[36] Although the US is not a state party to Additional Protocol I, the fundamental guarantees provided in Article 75 essentially codify international customary law, for example, the right to humane and equitable treatment, as well as protection against violence and information regarding reasons for detention, including the requirement that no sentence be passed without conviction by a 'regularly constituted court' which follows 'principles of regular judicial procedure.'

[37] Article 4(2)(d) of Additional Protocol II also prohibits 'acts of terrorism', however, these are undefined.

[38] See Roberts, *supra* note 1 at 207.

in Article 75 of the 1977 Geneva Protocol I.'[39] In essence, he argues that the wording of the Geneva Conventions posits a potential gap; the 'Global War on Terror' provides a concrete example for the reality of the gap.

Contrary to Roberts and reinforcing the ICRC position, Jordan J. Paust has argued that under the Geneva Conventions, it is not logically possible to 'become' an unlawful combatant or lose POW status because *other* members of the armed forces violate the laws and customs of war. Moreover, although individual transgressors can be charged with war crimes, the denial of status to a group on the basis of the actions of one or more individuals amounts to reprisals, which are also prohibited under Geneva law. Paust also interprets the four criteria as expressly applying only to one group under the treaty, those who are not 'members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.'[40] Requiring the four criteria to apply to the armed forces of a party to the conflict would, in his view, '…result in a nonsensical policy-thwarting denial of POW status to all members of the armed forces of a party to an armed conflict whenever several members do not wear a fixed distinctive sign recognizable at a distance or several members violate the laws of war.'[41]

V. A 'Gap' in International Humanitarian Law? Evidence and Arguments

The US administration's 'detention debate' highlighted by the various memoranda outlined above speaks to the possibility of a 'gap' in IHL that, if real, remains an ongoing challenge for both reasons of policy and law. In this sense, the debate lives on and has significant and contemporary relevance for the current and future conduct of the GWOT, not only in Afghanistan but in other theatres as well. However, it is still critical to understand the debate and potential gap by examining its genesis with respect to the conflict in Afghanistan in the 2001-2002 timeframe, as here the stage is set for all subsequent legal arguments.[42] More broadly, however, the arguments against the existence of a gap in IHL can be made, first in the realm of interpretation;

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[39] *Ibid.* at 208.

[40] Paust, *supra* note 1 at 333. Paust also argues such an approach is inconsistent with current general state practice, which informs treaty interpretation. Paust uses the example of the My Lai massacre in Vietnam: if denying POW protections to regular forces is primarily contingent on not violating the laws and customs of war, then the actions of a few (regrettably always possible) will condemn the status of many. Under this logic, Lt William Caley's war crimes could have resulted in a blanket denial of POW status for all US soldiers captured in Vietnam (at 325-335).

[41] See Paust, *ibid.* at 334. Paust, echoing concerns of Colin Powell, also argues that the current US approach could have 'dire consequences' for US soldiers as current and future adversaries could adopt the same precedent as pretext. Moreover, many elite units, which are nonetheless members of the armed forces, often do not wear distinctive uniforms in an attempt to 'blend in.'

[42] Keep in mind that several of the key cases before the Supreme Court decided in 2004 (e.g. *Hamdi*, *Padilla* and *Rasul*) and 2006 (*Hamdan*) concern detainees from this time period. See note 28 above, and notes 44, 62, and 63 below.

second, by looking at diplomatic history; and third, by examining on-the-ground historical practice. At the outset, if Geneva Convention III is interpreted in a broad and purposive manner, there is less of an opportunity to draw a sharp distinction between combatants who comply to some degree with the four criteria, and those who do not. For example, authoritative ICRC commentary makes it clear that carrying arms openly is not the same thing as carrying them 'visibly' or 'ostensibly'. The goal of the provision is not to undermine surprise or camouflage, but to be inclusive. Similarly, soldiers must have some kind of 'fixed distinctive sign', but this need not be a uniform or even conventional insignia – it could be a particular t-shirt or kind of headgear. The purpose of such provisions, according to this line of reasoning, is not to render the criteria overly restrictive; the intent, rather, is to evidence some display of loyalty and identification. In the end, what is critical in modern warfare is not the wearing of uniforms *per se*, but whether or not belligerent forces recognize members of their own force, and those they are fighting against, and that members of parties to a conflict do not confuse each other with civilians and thus enlarge the opportunity for greater civilian casualties. An additional and critical rationale is that soldiers cannot fight in each other's uniform or wear the other's insignia as an effective battlefield tactic. The final criterion is that operations must be conducted in accordance with the laws and customs of war. This, after all, is the entire purpose of international humanitarian law – not to render war obsolete, but to establish well-founded and followed rules for its practice. Again, however, this should not be deployed as a weapon to deny POW status to members of armed forces or militias.

Applying the four criteria to alleged al Qaeda terrorists and members of the Taliban was difficult in the fall of 2001, and remains so. The sociological evidence of a command structure and common identifying insignia (or lack thereof) in the information provided by the US Department of Defense has not been made fully available to the public or legally defended. More complicated was the original US assertion that POW status did not apply to the Taliban because they did not operate in accordance with the laws and customs of war. Unfortunately, individuals do transgress the laws and customs of war with unhappy regularity: that is why we have domestic and international laws regarding war crimes, as well as the newly-constituted International Criminal Court (ICC). Finally, the empirical case for particular Taliban fighters as violating the laws and customs of war has never been argued before any competent tribunal or international body. Theoretically, such war crimes could be prosecuted by any state with appropriate legislation wishing to claim universal jurisdiction.

A further interpretive argument suggests that, status determination aside, Geneva Convention III must also be read in context and in light of Geneva Convention IV. Thus, Marco Sassoli argues that in looking at the 'text, context, and aim' of both Conventions, '[N]o one can fall in between the two categories and therefore be protected by neither....'[43] One is either a civilian or a combatant, but in either scenario is legally deserving of protection. In his view, no one is outside the purview of Geneva

[43] See Sassoli, *supra* note 1 at 207.

law, logically, legally, or practically. Minimally, Common Article 3 would apply to unlawful or unprivileged combatants, and maximally Geneva Convention IV would cover them as civilians.

A second approach to expanding interpretive reach is to search deeply into the diplomatic and political history of the Conventions. For example, in the ICRC commentary on Geneva Convention III, there is a discussion of the 'Report on the Work of the Conference of Government Experts,' produced at the time of the negotiation of the conventions. At this time, the Committee imagined 'situations analogous to those of war, but not explicitly covered by the International Conventions,' but their intent was clear – that 'the principles of international law and humanity should nevertheless be regarded as applicable.'[44] Although this is but one example and a thorough examination is clearly beyond the scope of this article, a cursory view of the diplomatic history suggests (a) that the government experts involved imagined conflicts beyond conventional inter-state conflicts and beyond the minimal requirements of Common Article 3; and (b) that the express intention of the experts was to have the conventions apply insofar as possible to such conflicts. It is certainly typical in domestic law that doctrines of interpretation allow the 'reading in' of provisions that accord with the spirit of the intention of the framers although they could not posit all future instances of possible applicability. As well, at international law, Article 32(b) of the Vienna Convention on the Law of Treaties (VCLT) states that 'the preparatory work of the treaty and the circumstances of its conclusion' are a valid recourse that can be used as a supplementary means of interpretation, when the meaning of a treaty is ambiguous or obscure.' Combining the further protections afforded via the Additional Protocols, some provisions of which have arguably attained the status of customary law, along with an overall goal to regulate conflict, a generous and substantive interpretation of IHL is to assume coverage of all conflicts, regardless of their type, location, and status of belligerents. Such an approach accords with the underlying values of Geneva law.

Finally, an examination of the on-the-ground practice of the more than half a century of application of Geneva law yields a fairly uniform interpretation of application.[45] Among inter-state conflicts involving state parties, two conclusions can be drawn. First, presumptive application of POW status has been the norm. This is true of both regular armed forces and militias specified under Article 4(2). A pointed example is American practice in Vietnam, where captured Viet Cong were regarded as POWs. Second, members of regular armed forces have not been held strictly to the four criteria *as a precondition* for obtaining combatant status, combat immunity, or POW status. This is particularly the case with respect to the important fourth criterion

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[44] See Convention (III) relative to the Treatment of Prisoners of War, Commentaries, online: ICRC <www.icrc.org>. Although the authoritative status of ICRC commentaries at customary international law is open to debate, notably, Justice Stevens in *Hamdan v. Rumsfeld* accepted the ICRC commentary as authoritative (for example, at 123-33).

[45] Article 31(3) b of the VCLT states that 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' may be taken into account, together with the context, as a general rule of interpretation.'

of respecting the laws and customs of war. Accusations of violating the Geneva Conventions have often been hurled among belligerents in the fog of war. Indeed, one could argue that this is one of the more effective off-battlefield tactics to be used in winning 'hearts and minds'. However, such accusations have never been used to deny POW status to members of a regular armed force; here US treatment of the German Wehrmacht is a useful example.[46] Practice also accords with the historical logic of reciprocity. Moreover, since the implementation of Geneva, where the US has engaged in an assessment of status and actually convened tribunals for such purpose (as in Vietnam and the 1991 Gulf War), POW status was accorded presumptively. Only in the GWOT has the US attempted to eliminate the possibility of doubt, thus erasing the need for competent tribunals under Article 5.

The ICRC and respected NGOs such as Human Rights Watch, who offer what they see as an uncompromising and principled approach, have suggested that to the extent the GWOT exists outside the realm of international humanitarian law, it is more properly the province of domestic criminal or international criminal law. Since 9/11 the US government has chosen a largely military paradigm to fight this 'war', but it does still resort to the criminal law for prosecution of terrorist suspects, as has been the case of the 'twentieth hijacker' Zacarias Moussaoui and will occur with the upcoming trial in civilian court of José Padilla.[47]

Those in the Bush administration who claimed to identify and exploit a real gap in Geneva Convention III may not have been convinced by such arguments. The United States government has repeatedly stressed the non-state nature of al Qaeda, which therefore cannot be a high contracting or state party to the Geneva Conventions.

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[46] Sassoli, *supra* note 1 at 204-205.

[47] The Padilla case is particularly important to note, since the US government has switched back and forth between paradigms as the case has progressed. Padilla is an American citizen who was captured on American soil. Federal officials, who had been tracking Padilla for months, arrested him at Chicago's O'Hare Airport on May 8, 2002. They suspected that he was planning to detonate a radioactive 'dirty bomb' on behalf of al Qaeda and he was subsequently detained as a material witness without any charge. On June 9, 2002, Padilla was swept out of the civilian justice system and into military custody when President Bush designated him an 'enemy combatant'. Two days later, Padilla's legal counsel filed a writ of habeas corpus questioning the power of the president to indefinitely detain American citizens in the United States without charge or trial. In January 2006, after three and a half years in the Charleston naval brig, the US government switched strategies again. The government asked that Padilla be transferred from military custody back to the civilian justice system to stand trial for new charges, which are unconnected to the earlier 'dirty bomb' accusations. On January 4, 2006, the Supreme Court agreed to let the military transfer Padilla to Miami to face criminal charges. Padilla is now charged with one count of conspiracy and one count of providing material support for terrorists. His civilian trial has been scheduled to begin in January 2007. See David Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: New Press, 2003) at 43; Jonathan Freiman, 'Padilla's Real Message: The Grace Period is Over' *Jurist* (4 April 2006), online: Jurist <http://jurist.law.pitt.edu/forumy/2006/04/padillas-real-message-grace-period-is.php>; David Stout, 'Supreme Court Allows Transfer of Padilla to Civilian Court' *The New York Times* (4 January 2006); and Eric Lichtblau, 'Judge Throws Out Overlapping Charges in Padilla Case' *The New York Times* (22 August 2006).

Moreover, terrorism is a substantially different kind of asymmetric threat than that posed by guerrillas, insurgents, or even national liberationist movements who were nonetheless historically labelled as terrorists by their adversaries. Terrorism, on this logic, is not a method, but a new kind of war, not fought on state terrain, but globally and without clearly-defined military or territorial objectives. Terrorists have no regard for the soldier/civilian distinction, and their attacks are indiscriminate, purposefully target civilians, are lacking in proportion and designed to induce fear. Such an analysis demands a creative interpretation or indeed a re-working of IHL and the customary law of armed conflict to fit 21st century realities. We have moved beyond state-based conflict into a post-Westphalian world of contested sovereignty, multiple and disaggregated sites of global governance and increasing prevalence and power of non-state actors.[48] Without such a context-relevant interpretation and re-examination of the Geneva Conventions, and international humanitarian law more generally, the existing rules governing armed conflict may become irrelevant and fall into disuse. In an extreme case, future state practice that disregards the Geneva Conventions, combined with expressions of *opinio juris* – along the lines of the Gonzales memorandum of January 25, 2002 – could produce an interpretation of the Geneva Conventions as increasingly irrelevant at customary international law. If Geneva Convention III is seen as less binding, numerous negative consequences might ensue for US, Canadian, and other international armed forces engaged in the GWOT. Obviously, mutual reciprocity would be undermined in such a scenario.

Although Canada and European allies of the United States have not adopted the US approach and continue to argue for the presumptive application of POW status to all combatants, one does not have to be friendly to the American position to recognize the legal and practical difficulties in addressing terrorism. IHL is stretched – some would say to the breaking point – when opting for a 'military' solution to the problem of transnational terrorist networks. However, Geneva law itself does not refer to terrorists, either in terms of applicability, as in the case of militias or regular armed forces, or non-applicability, as with mercenaries. At present, there is no comprehensive UN terrorism convention, which speaks to the potential difficulty of obtaining an international consensus on the highly contestable concept of terrorism. Moreover, the new ICC does not have jurisdiction over terrorist offences.

VI. Toward Alternatives

Ronald Dworkin has argued strongly in favour of setting aside the 'enemy combatant' label, which would force the US government to choose whether or not an individual is subject to POW status and protection or not, in which latter case the same individual

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[48] On these issues specifically, see Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, N.J.: Princeton University Press, 1999), especially at 9-42; Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, (Cambridge: Cambridge UP, 1996), especially at chapter 4; and Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004).

could be tried as a criminal, with the normal safeguards of due process.[49] Dworkin's 'principled approach' involves elements of both the criminal and military paradigms, where terrorists might be pursued first as criminals, through concerted international police action, and when that approach proves inadequate, by means of a military campaign.[50] However, once an individual is detained on the battlefield or by conventional arrest, the government must determine status within a reasonable period of time (Dworkin suggests a matter of months, not years). POW status would involve the likelihood of a more indefinite detention (although Dworkin suggests a congressionally-imposed cap of three years to avoid the problem of an indefinite war on terrorism) but is more legally defensible given the strict requirements of adherence to the Geneva Conventions. Domestic criminal prosecution is the other alternative, particularly since the US government has 'unsigned' the Rome Treaty establishing the International Criminal Court.

Sassoli pushes Dworkin's point further. Logically following his argument that there is 'no gap' and that battlefield detainees are both *de facto* and *de jure* either civilians or combatants, he suggests that categorizing terrorists as civilians (and thus covered by Geneva Convention IV, not III) might make more sense. If civilians unlawfully participate in hostilities, reasons Sassoli, they are unlawful combatants and can be attacked and if necessary punished for war crimes. Such an approach would permit 'administrative detention for imperative security reasons and ... allows for derogations from protected substantive rights of civilians within the territory of a State and from communication rights within occupied territory.'[51] There is an inherent logic consistent with Geneva values in this argument: soldiers get combat immunity and protection as a group; terrorists-as-renegade-civilians are prosecuted and held responsible for their actions individually. This mirrors the model of individual guilt for war crimes (and crimes against humanity) adopted at Nuremberg and continued

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[49] The normal safeguards of the criminal process would apply and hearsay evidence and involuntary confessions – i.e. extracted via some form of coercive interrogation – would not be permitted. However, this is a far cry from the standard of 'probative value to a reasonable person.' For an elaboration of Ronald Dworkin's evolving views, see both 'Terror and the Attack on Civil Liberties' *New York Review of Books* (6 November 2003) at 1-11 and 'What the Court Really Said' *New York Review of Books* (12 August 2004) at 26-29.

[50] Dworkin also suggests that, under such an approach, the US could revise its decision to detain an individual as a POW or charge as a suspected criminal based on fresh evidence. However, Paust argues that even a POW prosecuted or convicted of war crimes does not lose POW status or protections; see Paust, *supra* note 1 at 332. This argument assumes that future military action conforms to the UN Charter, which prohibits unilateral action except under Article 51, which provides for self-defence. At minimum, compliance should conform with the proposed 'legitimacy criteria' for intervention outlined in the recent report *A More Secure World: Our Shared Responsibility*, authored by the Secretary-General's High-level Panel on Threats, Challenges and Change, consonant with UN adoption of the 'responsibility to protect' approach. The five criteria are (1) seriousness of threat; (2) proper purpose; (3) last resort; (4) proportional means; and (5) balance of consequences. Full report online: United Nations <www.un.org/secureworld>.

[51] Sassoli, *supra* note 1 at 208-209.

through the ICTY and ICTR and finally to the ICC. Moreover, law should apply to everyone; inherent in the rule of law is its universal applicability.

Some version of the Dworkin or Sassoli approach assumes that, given an ongoing 'Global War on Terror', Geneva is not broken and does not need fixing – a partial solution lies outside of Geneva law in the greater use of a criminal paradigm, or by an expansive application of all Conventions read and applied together. Taken together, one might even argue that such a response, which 'disaggregates' into multiple or overlapping approaches, responds to the disaggregated nature of 21st century global governance and decentralized terrorist networks.

The following five suggestions, however, are more radical approaches and would require either amending Geneva law or focusing on other institutional alternatives. The first would require the amendment (and widespread adoption) of Additional Protocol I; the second imagines the negotiation of a 'new status' of combatant within Geneva Convention III; the third posits an extension of jurisdiction to the ICC to include terrorism; the fourth would be to envision a new international body directly responsible for terrorism; and the fifth would be to create a new federal 'terrorist' or 'national security' court in the US.

(a) Historically, Geneva law has restricted POW status and protection to another group of 'soldiers' who do not easily fit the mold of domestic or international criminals: mercenaries. Article 47 of Additional Protocol I denies mercenaries lawful combatant status regardless of their much longer and deeper historical connection to legitimate war fighting. Essentially, mercenaries belong to a prohibited class of fighters that have no combat immunity and, if captured, are subject to domestic or international criminal law. It would certainly be a conceptual stretch to imagine terrorists legally construed in the same category as mercenaries, as both the foreignness of the mercenary and the compensation received for services rendered can hardly be assumed and is not definitive regardless, given the variable and mixed motives of terrorist operations and/or operatives.[52] However, to the extent that terrorism is entering the lexicon of customary law in a military rather than a criminal context, one way of addressing the problem head-on is to class terrorists in a separate category, as is the case with mercenaries. If mercenaries have been considered undeserving of POW status, then it is certainly logically consistent to argue that terrorists, with proven proclivity to target civilians, are even less so. Additional Protocol I could be amended to both define and specifically exclude terrorists from having the right to be considered combatants (unlawful or otherwise) or eligible for POW status. Thus, they would be afforded no combatant immunity and be subject to both detention and prosecution. Such an approach would require agreement on a *de minimus* definition of 'terrorist', unfortunately, a term as contestable as 'terrorism'. Even assuming such a consensus might be reached, the United States is not currently a state party to Additional Protocol I. However, a future US administration, with fewer options given

[52] On this point, see, for example, Jessica Stern, *Terror in the Name of God: Why Religious Militants Kill* (New York: HarperCollins, 2003); Walter Laqueur, *Voices of Terror* (New York: Reed Press, 2004); and Bruce Hoffman, *Inside Terrorism* (New York: Columbia UP, 1998).

recent Supreme Court jurisprudence, may be more inclined to look for alternative legal means under the umbrella of the Geneva Conventions to justify differential treatment, yet within a continued militarization of the conflict.

(b) Rather than focus on Additional Protocol I, amendment efforts could instead concentrate on Geneva Convention III itself. A third class of combatants could be defined as not entitled to full POW protection for demonstrable reasons of (a) knowingly and willingly engaging in any conspiracy, attempt, or action to violate the laws and customs of war; (b) being an ongoing danger to international peace and security; and (c) not belonging to a state party or having allegiance to either a state party or a detaining or occupying power. Such an approach would have the advantages of meeting US concerns about the applicability of Geneva to the 'Global War on Terror'; would amount to a recognition on the part of the international community that the traditional paradigm of state-based conflict must be adapted to consider the challenges of 21st century terrorism; would potentially bring the US back 'into the fold' in terms of both *de jure* commitment and *de facto* implementation of international humanitarian law; and afford a level of transparency and accountability to the process. Obviously, such a 'third class' would have to be treated in accordance with at least the minimal humanitarian guarantees that are currently provided in Common Article 3. However, this is a very high-risk strategy, entailing the same kind of logic currently employed by noted American legal scholar Alan Dershowitz in his advocacy of 'torture warrants' to ticking time bomb scenarios.[53] Such a radical rethinking of the Geneva Conventions might serve only to provide a mirage of justice, given persistent difficulties regarding detention, eventual prosecution, or controlled release that would not necessarily be answered by a third status. Furthermore, such an approach could set a dangerous precedent which would be perceived as dramatically weakening or undermining the morally robust purpose and intention of the Conventions while ending what Dershowitz calls the 'hypocritical exploitation' of the laws of war. Nonetheless, the viability of any option that would involve serious multilateral discussion among state parties to amend the Geneva Conventions could be enhanced with the leadership of a significant and neutral state sponsor, quite possibly Switzerland.[54]

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[53] For a full elaboration of this controversial proposal, see Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (New Haven and London: Yale UP, 2002) especially at 149-163. Dershowitz advocates the use of 'torture warrants' as a means of keeping something that is going to happen anyway – and might be justified on a utilitarian calculus in any event – 'on the books' in a 'formal, visible, accountable, and centralized system.' A principled argument that opposes the Dershowitz approach that is nonetheless grounded in the creation of a 'morality' of counter-terrorism operations can be found in Michael Ignatieff, *The Lesser Evil: Political Ethics in An Age of Terror* (Princeton and Oxford: Princeton UP, 2004), especially at 139-145.

[54] The Swiss government has indirectly acknowledged many of the post-9/11 dilemmas discussed here by convening several conferences to discuss the Geneva Conventions and Protocols in light of the realities of the GWOT. With leadership and vision, a new round of codification could be as significant as the original diplomatic negotiations in the late 1940s in response to World War II or the 1970s effort to respond to the anti-colonial wars and intrastate conflicts of the postwar era. For

(c) A possible institutional alternative would imagine an extension of the current jurisdiction of the ICC to include the prosecution of terrorists and terrorist offences – within the context of existing or amended definitions of war crimes and crimes against humanity. Given current US opposition to the ICC, this seems at present a non-starter. A variant on this theme would be to set up a mixed or 'internationalized' court for a specific series of terrorist actions, such as the 9/11 attacks.[55] An approach that builds on extending the paradigm of international criminal law presumes an unlikely constellation of events: (a) US willingness to bend to international pressure that the presumption of innocence could be guaranteed only in the internationalized court; and (b) key alleged perpetrators such as Osama bin Laden and Ayman al-Zawahiri are captured alive. This might seem far-fetched, particularly considering the current debacle over the trial of Saddam Hussein in Iraq, which is a timely demonstration of the difficulty of trying a former head of state within that state in the midst of an ongoing conflict. At the same time, it seems likely that many rank-and-file terrorists and those recruited to be suicide bombers would evade capture, arrest, and extradition. Long term detention resulting from decisive military action may be illegal and morally reprehensible, but those in favour argue for its necessity given the high risks of leaving terrorists (potentially with access to weapons of mass destruction) at large. Unlike earlier conflicts, or in accordance with the logic of peacebuilding and transitional justice approaches, effective demobilization, disarmament, and reintegration cannot be safely assumed in dealing with ideologically committed terrorists. Moreover, such an asymmetric and unpredictable threat cannot be effectively met with the slow, partial, and dangerously after-the-fact approach of international justice.

(d) An even bolder proposal has been offered by William Carmines, a recent graduate of the Case School of Law at Case Western Reserve University in Cleveland, Ohio. Carmines has proposed the creation of an 'International Terrorism Tribunal' and has written a draft fifty-page treaty.[56] Modelled largely on the Rome Treaty, which created the International Criminal Court, the Carmines proposal suggests that, via ratification, states effectively 'pool' their domestic jurisdictions and in the process create a consistent body of international terrorism and security law, with a uniform

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some scholars, this kind of discussion is necessary to tailor and expand the existing corpus of IHL to respond to the security dilemmas of this new kind of warfare. See, for example, Ruth Wedgwood, 'The Supreme Court and the Guantánamo Controversy' in Peter Berkowitz, ed., *Terrorism, The Laws Of War, And The Constitution: Debating The Enemy Combatant Cases* (Stanford, CA: Hoover Institution Press, 2005) at 183. By contrast, Steven R. Ratner argues that multilateral diplomacy is unlikely to yield significant new norms, because demands for reform of IHL are premised on misconceptions about the existence of a gap. See Steven R. Ratner, 'Rethinking the Geneva Conventions' (30 January 2003), online: Crimes of War <http://www.crimesofwar.org/expert/genevaConventions/gc-ratner.html>.

[55] See a brief discussion of this possibility in Antonio Cassese, *International Criminal Law* (Oxford, Oxford UP, 2003) at 456-457.

[56] A link to the Carmines proposal can be found at the website for the Case Western School of Law Institute for Global Security Law and Policy, online: <http://law.cwru.edu/curriculum/news/pdfs/itt_treaty.pdf>.

definition of terrorism.[57] Unlike the ICC, however, there is no possibility of trying a suspected terrorist in a domestic court under the principle of complementarity; the case is automatically uploaded to the international arena. However, one can assume this would be even less acceptable to the US than the ICC, where the principle of complementarity was designed with US concerns in mind. Both approaches could be consistent with the negotiation of a new UN Convention on Terrorism, which would then be subject to the same difficulties of ratification and practical implementation as the Genocide Convention and the Convention Against Torture. Both approaches would essentially eclipse the POW status issue under the Geneva Conventions by forwarding the problem elsewhere, but by necessity only selectively. Large groups of people can be detained as POWs or detained illegally; only a select few could realistically and effectively be tried as terrorists, which begs the question of what to do with the remainder. Both the ICC approach and the Carmines proposal are also fraught with predictable but no less mundane concerns: such institutions are inherently reactive rather than proactive and require considerable financial and human resources, expertise, time and sustained international commitment.[58] Creating rules of evidence that could be balanced with demands of national and international security might prove insurmountable.[59] Finally, trials are lengthy, complicated, and cannot be easily framed to serve as a deterrent or fulfill a larger didactic purpose.[60]

(e) While Carmines proposes an international terrorist court, Harvey Rishikof has written a detailed analysis proposing a new federal 'national security' or 'terrorist' court.[61] Specifically, Rishikof suggests that since terrorists do not fit neatly into existing legal classifications, a new US federal court is required. Such a court, created by Congress, could function as a hybrid between criminal courts and administrative boards and tribunals, and could balance security concerns with demands for procedural fairness. A dedicated court would specialize in the crafting of

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[57] Carmines defines an act of international terrorism as involving the use or threat of violence made for the purpose of advancing a political, religious or ideological cause, and requires that use or threat be against either property or citizens. See Carmines' proposal, *ibid.* at 2.

[58] An oft-quoted example that illustrates the problem of international terrorist trials is the difficulty in establishing an ad hoc tribunal set up for the express purpose of trying the Lockerbie bombing suspects, which involved a lengthy process of negotiation, was time-consuming and expensive and resulted in one acquittal.

[59] This has proven to be a difficult exercise in the GWOT; for example, in *Hamdan v. Rumsfeld*, the Supreme Court ruled that the military commission proposed to try Hamdan was in violation of Article 36 (a) of the Uniform Code of Military Justice, because he would have been excluded from hearing some of the evidence and hearsay evidence would have been permitted given the proposed (and relaxed) standard of probative value.

[60] For an authoritative account and defence of the 'didactic' purpose of trials and legal discourse more generally, see Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven and London: Yale UP, 2001).

[61] See Harvey Rishikof, 'A New Court for Terrorism' *New York Times* (8 June 2002); and Harvey Rishikof, 'Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes' (2003) 7 Suffolk Univ. L. J. of Trial and Appellate Advocacy 1 at 1-38.

procedures for the admission of sensitive and classified evidence, support the creation of a dedicated defence bar whose members had appropriate security clearance and even oversee the construction of a special fortified courthouse to protect against security risks. The right to counsel would be assured and appeals could be made from the proposed court to appellate court and, assuming certiorari, ultimately to the Supreme Court. Rishikof points out existing precedents: there are already specialized courts in the federal system in banking and international trade. Moreover, under the *War Crimes Act* of 1996, Federal courts have been given jurisdiction over 'grave breaches' of the Geneva Conventions and violations of Common Article 3. Rishikof also grants potential drawbacks: there would again be the difficulty of defining 'terrorism' and 'terrorist' (although this would be done in one state, rather than being subject to interstate negotiation) and that not enough care would be taken to ensure defendants' rights, thus opening the entire enterprise to constant judicial review, which would in turn delegitimize and undermine the jurisdiction of the court.

None of the options posited above completely 'solves' a central security dilemma, which is that neither a military paradigm for fighting terrorism within the norms of international humanitarian law nor a prosecutorial approach premised upon the rule of law and relying on norms and practices – either existing, extended, or newly created – of international or domestic criminal justice effectively addresses the particular nature of terrorism as an ongoing threat. Fundamental questions of effective deterrence and interdiction will remain and these can only be solved in the long-term in the political arena.

VII. Conclusion

To some degree, the earlier debate on status determination in the detention debate has been eclipsed with the trio of landmark US Supreme Court decisions of June 28, 2004 and, more recently, by the *Hamdan* decision of June 26, 2006. In *Rasul,* a majority of six justices overruled the practice of status determination by executive fiat, and held that detainees who are not citizens can petition for *habeas corpus* relief in US Federal Courts.[62] In *Hamdan v. Rumsfeld*, a decision made possible by *Rasul*, the Supreme Court struck down the military commissions designed by the Bush administration in response to the 2004 decisions as violating both the US Uniform Code of Military Justice (UCMJ) as well as Common Article 3.[63] Justice John Paul Stevens, following

[62] In the earlier ruling, *Hamdan v. the United States*, the Unites States Court of Appeals ruled that *Rasul* had no bearing on the enforcement of any Geneva Convention, even going so far as to conclude that Geneva law cannot be judicially enforced in the United States. This logic was reversed in the majority decision penned by Justice Stevens at the Supreme Court and his confirmation of the applicability of the Geneva Conventions to US law.

[63] The Bush administration has now responded to *Hamdan v. Rumsfeld* with the *Military Commissions Act* (MCA), the result of a negotiated compromise with Congress, largely via the efforts of Senators John W. Warner, John McCain, and Lindsey O. Graham. Although the three senators have argued that under the MCA detainees will not lose their right of habeas corpus, the window opened by *Rasul v. Bush* that made *Hamdan v. Rumsfeld* possible. It is expected that, like the previous military commission proposals effectively defeated by *Hamdan*, the legislation will

up Justice Sandra Day O'Connor's earlier and much quoted admonition in *Hamdi v. Rumsfeld* that 'a state of war is not a blank cheque' for executive authority, has also trimmed the aggressive legal sails of the Bush administration. Stevens was particularly troubled that the military commissions proposed to try Hamdan and others would have excluded the detainees from the hearings and that relaxed rules of evidence would not meet the requirement of procedural fairness explicit in Common Article 3.[64] Although these decisions have not addressed the merits of the al Qaeda/Taliban distinction or the ongoing issue of POW status, the Supreme Court has made it clear that, minimally, Common Article 3 must apply to all detainees regardless of their status.[65] At the congressional level, 'cruel, inhuman, and degrading treatment' has been prohibited by the so-called McCain Detainee Amendment, which has been incorporated into the US *Detainee Treatment Act* of 2005.

However, the underlying contradictions of the Bush administration approach, evident early after 9/11 as my previous analysis has illustrated, have yet to be fully addressed. Similarly, the ICRC may be technically correct in saying that terrorist detainees must either be treated as combatants or civilians under the current rules; however, American concerns about the ongoing relevance of those rules have not been thoroughly examined either. As my brief discussion of possible alternatives attests, there are no uncomplicated answers, no cases where advantages significantly outweigh disadvantages and international humanitarian law can easily be respected. Nonetheless, early foreclosure of the POW option has had very infelicitous consequences.

In the immediate aftermath of the Abu Ghraib prison abuse and torture scandal, Pierre Krähenbühl, Director of Operations for the ICRC, was reported at a news conference as saying that Abu Ghraib 'represented more than isolated acts, … a pattern and a system.'[66] In documenting the processes and internal debates of executive decision-making that allowed such a culture of impunity to develop,

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be tested in the courts. Critics also suggest the MCA weakens the legal standard requiring evidence to be shared with the defendant, and that the definition of 'illegal enemy combatant' in the Act legitimizes and legalizes this status under US law, thus undercutting the Geneva Conventions. See John W. Warner, John McCain, and Lindsey O. Graham 'Look Past the Tortured Distortions' *Wall Street Journal* (2 October 2006) at A10; and Draft *Military Commissions Act of 2006*, (25 September 2006).

[64] The proposed rules of evidence were distinctly different from those used in US criminal courts. For example, hearsay evidence would have been permissible, a relaxed standard of probative value would have applied, and no sworn statements would have been required. See Barbara J. Falk, '*Hamdan v. Rumsfeld*: What the Supreme Court said and how the US government responded' *The Bulletin* (Summer 2006) at 5-7.

[65] Edited transcripts of status review cases have now been released on the website of the US Defense Department, in response to a lawsuit brought under freedom of information legislation by The Associated Press <http://www.defenselink.mil/pubs/foi/detainees/csrt/index.html>. See also Tim Golden 'Voices Baffled, Brash and Irate in Guantánamo' *New York Times* (6 March 2006).

[66] Quoted in Hendrik Hertzberg 'Comment: Unconventional War' *The New Yorker* (24 May 2004) at 32.

investigative journalists such as Mark Danner and Anthony Lewis for the *New York Review of Books* and Seymour Hersh and Jane Maher at *The New Yorker* traced the abuse not simply to a number of enlisted men and women – mostly reservists and intelligence officers – but back to these original discussions in the memoranda drafted in late 2002 and early 2003.[67] A President and a Secretary of Defense who labelled detainees variably as 'enemy' or 'unlawful combatants' effectively separated out a group of persons exempt from the protections of the Geneva Conventions. White House Counsel derisively referred to the Geneva Conventions as both obsolete and inflexible, even quaint. Given the expressed need to allow for interrogation as required by the exigencies of this new kind of war, 'enemy combatants' were denied any doubt as to their status determination. None of these actions alone were directly causative but they collectively signalled a deep ambivalence toward the effectiveness and future relevance of the Geneva Conventions, which in turn was translated as both disrespect for and an outright violation of international humanitarian norms. Throughout 2003 and 2004, shocking and troubling information became known about the Guantánamo detainees: they were kept shackled and incommunicado, subject to sensory deprivation, humiliation and coercion and without access to legal counsel.[68] By the time of the invasion of Iraq in March 2003 (a clearly international conflict with defined armies that met every possible condition under Geneva law), the desire for 'actionable intelligence' had already overshadowed any concern for conducting hostilities in a manner consonant with international humanitarian law. The methods of physical and psychological coercion reported by the ICRC in February 2004 – months before the Abu Ghraib photos were displayed on American newsstands and on American television – were part of a process that had been developed and deployed by American interrogators since 9/11, and pioneered at Guantánamo Bay. With no possibility of status determination on a case-by-case basis, hundreds of detainees have been subjected to considerably less than the humane treatment that even the Bush memorandum of February 7, 2002 suggested would be the case. The 'spirit' of the Geneva Conventions was not respected, despite Bush's assurances to the contrary. By revisiting this early debate five years hence, we can see with the unfortunate clarity of hindsight not only 'what went wrong', but also how policy choices, however difficult, essentially eclipsed international law and adherence to law was reduced to policy

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[67] See especially Mark Danner, 'Torture and Truth' *The New York Review of Books* (10 June 2004), 'The Logic of Torture' *The New York Review of Books* (24 June 2004), and 'Abu Ghraib: The Hidden Story' *The New York Review of Books* (7 October 2004); Seymour Hersh 'The Gray Zone' *The New Yorker* (24 May 2004); Jane Maher, 'Outsourcing Torture' *The New Yorker* (14 and 21 February 2005); Anthony Lewis, 'Un-American Activities' *The New York Review of Books* (23 October 2003), and 'Making Torture Legal' *The New York Review of Books* (17 June 2004).

[68] See for example, the 'emerging' story in Joseph Lelyveld, 'In Guantánamo' *The New York Review of Books* (7 November 2002), and Ted Conover, 'In the Land of Guantánamo' *New York Times Magazine* (29 June 2003). For a more recent discussion of the same problem at Bagram, see Tim Golden & Eric Schmidt, 'A Growing Afghan Prison Rivals Bleak Guantánamo' *New York Times* (26 February 2006).

choice. Finding a mixture of solutions and a combination of political and legal policy instruments is regrettably no easier than in the days and months after 9/11. Although the many contradictions and difficulties highlighted here help to provide an explanation, there is no convenient excuse not to engage in an important debate that will shape the contours of a conflict that, at present, has no discernable end in sight.

Why Did the U.N. Security Council Support the Anglo-American Project to Transform Postwar Iraq? The Evolution of International Law in the Shadow of the American Hegemon

CARLOS L. YORDÁN*

Introduction

Since the early 1990s, a great number of scholars have argued that the increasing pace of globalization is eroding state sovereignty, while empowering transnational networks and international institutions.[1] In essence, their studies have described the emergence of a system of cosmopolitan international law that can 'impose legal constraints on government.'[2] Other scholars, while admitting that this may be the case in certain areas of international politics, such as global economic transactions and the formation of regional regimes, question this reality. This is especially the case in the aftermath of the American-led invasion of Iraq in March 2003. Jean L. Cohen, for instance, warns that 'the sovereignty-based model of international law appears to be ceding not to cosmopolitan justice but to a different bid to restructure the world order: the project of empire.'[3] This warning echoes Ugo Mattei's views on the subject. [4]

It is difficult to say which side of this debate is right. Evidence shows that in some areas of international politics legal rules are constraining states' ability to pursue their national interests. But not all states are equally constrained. Some powerful states have the ability to disregard international law, though in so doing sacrifice the legitimacy of their policies. The Bush administration's reluctance to seek the approval of the United Nations (UN) for its policy of ousting Saddam Hussein's regime from power is a good example. States will sometimes ignore international law if they feel that established rules are hurting innocent civilians in other states or if their actions are informed by 'humanitarian'

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[1] For an oft-cited study, see: Gunther Teubner, 'Global Bukowina: Legal Pluralism in World Society' in Teubner, ed., *Global Law Without a State* (Brookfield, VT: Dartmouth Publishing Group, 1997).

[2] Judith Goldstein, Miles Kahler, Robert O. Keohane and Anne-Marie Slaughter, 'Introduction: Legalization and World Politics' (2000) 54 Int'l Org. 385 at 386.

[3] Jean L. Cohen, 'Whose Sovereignty? Empire Versus International Law' (2004) 18:3 Ethics & International Affairs 1 at 2.

[4] Ugo Mattei, 'A Theory of Imperial Law: A Study on US Hegemony and the Latin Resistance' (2003) 10 Ind. J. of Global Legal Stud 383.

interests. The North Atlantic Treaty Organization's (NATO) 1999 air campaign against Yugoslavia over Kosovo has been touted as a noteworthy example.[5] Given that Russia and China were not willing to support NATO's request for a United Nations Security Council resolution sanctioning the military campaign, the allies were forced to take matters into their own hands.[6] But, as Hilary Charlesworth notes, it is important not to overstate the humanitarian character of the campaign, as NATO planners were willing to intervene only as long as NATO fighter pilots were not in too much danger.[7]

While the Kosovo air war violated the UN Charter's provisions, the post-war reconstruction mission, organized by the UN with the co-operation of NATO, the European Union (EU), the Organisation of Security and Co-operation in Europe (OSCE), and the UN High Commission for Refugees, was supported by the international community. Thus, criticisms that NATO violated Yugoslavia's sovereignty dissipated as the UN-led post-war mission suspended Belgrade's rule over the province and started an ambitious project to transform Kosovo's political and economic system along neo-liberal lines. It is not surprising that many scholars argue that the Kosovo crisis was a catalyst for a new legal framework that upheld cosmopolitan principles at the expense of states' rights.[8] Of course, some do not agree with this view. David Chandler, for example, maintains that the Kosovo crisis showed that the principle of sovereignty equality, which informs the UN Charter, has been abandoned, while a new international legal system is emerging that favours 'great power authority' and reasserts the importance of 'military and economic inequality.' He argues that cosmopolitanism is just a façade and any sense of 'progress' that may be earned by upholding humanitarian standards has actually been replaced by 'a less progressive era of "gun-boat diplomacy" and "might makes right",' as legal standards have no way of constraining the actions of powerful states.[9]

Interestingly, while scholars sharing Chandler's or Cohen's views were a minority before March 2003, many more scholars have questioned the legitimacy of the invasion and the subsequent occupation of Iraq on similar grounds. It is clear that the Bush administration's decision to go to war without the Security Council's authority supports

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[5] Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* 4 (New York, NY: Oxford University Press 2000).

[6] Martti Koskenniemi, '"The Lady Doth Protest Too Much" Kosovo, and the Turn in Ethics in International Law' (2002) 65 Modern L.R. 162 at 163.

[7] Hilary Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 Mod. Law Rev. 377 at 383.

[8] Anne-Marie Slaugther and William Burke-White, 'An International Constitutional Moment' (2002) 43 Harv. Int'l L. J. 1 at 7-9; and Andrew Linklater, 'The Good International Citizen and the Crisis in Kosovo' in Schnabel and Thakur, eds., *Kosovo and the Challenge of Humanitarian Intervention*, 492-93 (Tokyo, Japan: United Nations University Press, 2000).

[9] David Chandler, 'Kosovo and the Remaking of International Relations' (2002) 1 Global Review of Ethnic Politics 118.

Chandler's view. Cohen's warning that international law is becoming more imperial in character is not as clear cut, however. Her main contention is that some powerful states can use existing legal standards, precedents, and global norms to legitimize their actions and re-write established international rules to advance their interests, while seemingly advancing those of the international community.[10] Does this reasoning apply to the Anglo-American occupation of Iraq?

Legal and international relations scholars have argued that the United States and the United Kingdom violated the international law of occupation, as the occupiers wanted to transform Iraq along neo-liberal lines. This criticism became more pronounced when the Coalitional Provisional Authority (CPA), which was established to administer post-war Iraq, set out an ambitious programme to privatize state-owned industries.[11] The United States and the United Kingdom have argued that their actions were within the bounds of United Nations Security Council Resolution 1483, which sanctioned the Anglo-American occupation.[12] Did this resolution sanction this project? If so, why did the Security Council support it, if it did not support the invasion? Given that this project helps the United States expand its influence in the Middle East and violates key aspects of the international law of occupation, which protects Iraqis' rights and interests, the UN should have constrained the occupiers' plans. But was this possible given the UN's role in post-war peacebuilding during the 1990s, especially its operations in Kosovo and East Timor?

Building on Detlev Vagts's work on the development of 'hegemonic international law',[13] this article argues that the combination of American preponderance and the international community's growing support for democratic and capitalist ideals have fostered an environment that favours American understandings of intrastate order. That is to say, while the international community may not have supported the invasion of Iraq, it did not necessarily object to the Bush administration's post-war strategy. In addition, this article maintains that the Security Council was not in a position to counter the United States's project. Its primary purpose is to preserve and restore international peace and security. Since the end of the Cold War, the Security Council has accomplished its main objectives by sanctioning a number of controversial post-war peacebuilding missions. For the purpose of this article, the most noteworthy is the United Nations Mission in Kosovo (UNMIK), as many of its challenges were similar to the ones the Anglo-American occupation faced in Iraq. In the end, this article shows that the CPA's administration of

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[10] *Supra* note 3 at 10-11. For a similar argument, see Detlev F. Vagts, 'Hegemonic International Law' (2001) 95 Am. J. Int'l L. 847.

[11] Daphne Eviatar, 'Free-Market Iraq? Not So Fast' N. Y. Times (January 10, 2004).

[12] "Legal Perspectives from Iraq: Castle and McGurk Share Experiences on Post-Conflict Rebuilding," (Charlottesville, VA: University of Virginia School of Law, November 23, 2004), online: <http://www.law.virginia.edu/home2002/html/news/2004_fall/iraq.htm >.

[13] *Supra* note 10 at 843, 848.

Iraq was within the legal parameters established by Resolution 1483, demonstrating the influence of American interests and values in the workings of the Security Council.

This article is divided into four sections. The first section presents Vagts's conceptualization of hegemonic international law and expands on it using research in the discipline of international relations. The next section demonstrates the impact that American hegemony has had on the evolution of international law in the post-Cold War. It not only argues that American values and the state's idealized vision of intrastate order has directly influenced the workings of international institutions but it also claims that the Security Council has become an agent of the United States. Section three maintains that NATO's war against Yugoslavia over Kosovo in 1999 and UNMIK's post-war strategies represent an important turning point in the evolution of a new set of standards that, while seemingly in line with cosmopolitan values, are of the United States's hegemonic power. The discussion of UNMIK's strategies illustrates the influence of neo-liberal values, while highlighting how the principle of sovereign equality waned after this war. New understandings of sovereignty stressed the need to transform state legal systems so these could secure their citizens' human rights and basic needs. Again, these developments deepen the United States's hegemony, as the transformation of state structures creates an environment favourable to American interests. The last section examines the Security Council's debates concerning the United Kingdom and the United States's request for a resolution that legitimized its occupation of Iraq and its project to transform the social order according to neo-liberal values. It demonstrates that Resolution 1483 met most of the occupying powers' demands, confirming that it was an outcome of American hegemonic international law.

I. Defining Hegemonic International Law

The concept of hegemonic international law sits between two opposing views of international law and international relations. As noted above, the first view argues that current international dynamics is giving way to a new system where state and non-state actors construct rules that erode state sovereignty and promote a new international order based on emerging cosmopolitan principles.[14] More cynical views have recently emerged,

[14] In the case of how the evolving human rights discourse is changing the domestic policies of nation-states' and international relations in general, see: Ruti G. Teitel, 'Humanity's Law: Rule of Law for the New Global Politics' (2001-2002) 35 Cornell Int'l L. J 355. On other areas, refer to: Martha Finnemore and Katherine Sikking, 'International Norm Dynamics and Political Change' (1998) 52 Int'l Org. 887; and Daniele Archibugi, 'Immanuel Kant, Cosmopolitan Law and Peace' (1995) 1 European Journal of International Relations 429. For views that tend to be critical of cosmopolitanism but reach similar conclusions due to an increasing need to promote global economic regulation, see: Kal Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002-2003) 43 Va. J. Int'l L. 1; and Anne Marie Slaughter, 'The Real New World Order' (1997) 76 Foreign Affairs 183.

arguing that international law and international politics are increasingly being dominated by American foreign policy interests, especially by its imperial ambitions.[15] These two views are not without their shortcomings but scholarship in different areas of international relations and international law seem to sustain each view's claims.

Vagts describes hegemony as a relationship between a patron (a hegemonic power) and client states (secondary states). Using the Roman Empire's relations with client states as an example, he maintains that this relationship 'imposed obligations on each of them, although not reciprocal ones. In return for fidelity, the patron was supposed to provide protection and sustenance. Rome as a patron tended to define the rights and duties of the relationship in its own interests.'[16] Building on these observations, José Alvarez adds: 'The hegemon promotes, by word and deed, new rules of law, both treaty based and customary. It is generally averse to limiting its scope of action via treaty; avoids being constrained by those treaties to which it has adhered; and disregards, when inconvenient, customary international law, confident that its breach will be hailed as a new rule.'[17] Consequently, the hegemon uses its superior military and economic capabilities and its position of leadership in multilateral fora[18] to create 'indeterminate rules – whose vagueness benefits primarily (if not solely) the hegemon.'[19]

While seemingly unfair, hegemony is welcomed by secondary states. A wide body of international relations research demonstrates that a hegemon is necessary to maintain international peace[20] and to promote economic interactions.[21] Hegemony, however, is difficult to maintain over the long term if the hegemonic state cannot find ways to legitimate its rule. In other words, hegemony is a hierarchical condition that secondary states accept 'so long as the hegemon provides goods and services that are valued by the

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[15] Apart from Cohen, 'Whose Sovereignty?' *supra* note 3 or Mattei, 'A Theory of Imperial Law' *supra* note 4, see also: Antony Anghie, 'The War on Terror and Iraq in Historical Perspective' (2005) 43 Osgoode Hall L. J. 45. For a competing understanding that does not necessarily see this outcome as an American project but a Western one, see: B.S. Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 Eur. J. Int'l L. 1.

[16] *Supra* note 10 at 844.

[17] José E. Alvarez, 'Hegemonic International Law Revisited' (2003) 97 Am. J. Int'l L. 873.

[18] *Supra* note 9 at 846.

[19] *Supra* note 17 at 873.

[20] Niall Ferguson, 'A World without Power' (2004) 143 Foreign Policy. 32; and Robert Gilpin, *War and Change in World Politics* 33 (Princeton, NJ: Princeton University Press, 1981).

[21] James Scott and David A. Lake, 'The Second Face of Hegemony: Britain's Repeal of the Corn Laws and the American Walker Tariff of 1846' (1989) 43 Int'l Org. 1; and Charles Kindlerberger, *The World in Depression, 1929-1939* (Berkeley, CA: California University Press, 1973).

community at large and does not attempt to use its position to exploit the other powers.'[22] The repeated use of a hegemon's power to fulfill goals not in tune with secondary states' interests provides incentives for the creation of counter-hegemonic alliances. Thus, G. John Ikenberry's research on American hegemony explains why the United States supported the creation of the present multilateral system in the late 1940s.[23] Although the United States attempted to lock secondary states into these structures, while 'simultaneously leaving itself as unencumbered as possible',[24] the emerging international order placed clear limits on American power. However, these multilateral institutions served two clear purposes. First, they legitimated the United States's hegemony, assuring secondary states that the hegemon would be bound by a set of rules. Second, these institutions helped the United States manage interstate relations.

Even though the hegemon may bemoan limits to its power, it understands the value of multilateral institutions. Similarly, secondary states may want to use international law to constrain the hegemon's interests but are also aware that its superior economic and military capabilities give the hegemon the ability to execute policies without international consent or outside the boundaries of international law. For secondary states, the strategy is to preserve the functioning of multilateral institutions because these serve as fora where they can influence the hegemon's preferences and even create rules that may socialize the hegemon into accepted patterns of international behaviour.[25] Thus, on certain issues, secondary states may have to look the other way because the hegemon's withdrawal from these institutions could weaken them, compelling the hegemon to reconsider the value of the *status quo*. In order to preserve its supremacy, the hegemon feels the need to pursue strategies to transform the international order according to values and interests. This could potentially disrupt global economic interactions and undervalue the institutions that manage interstate relations and sustain the stability of the international system.[26]

Hence one important goal for secondary states is to keep the hegemon involved in international institutions, hoping that diplomatic bargaining will soften its positions and preserve the legal and institutional foundations of the *status quo*.[27] This does not mean that this bargaining process will always constrain the hegemon or shape its preferences. At

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[22] Bruce Cronin, 'The Paradox of Hegemony: America's Ambiguous Relationship with the United Nations' (2001) 7:1 European Journal of International Relations 108.

[23] See, G. John Ikenberry, *After Victory: Institutions, Strategic Restraints, and the Rebuilding of Order after Major Wars* (Princeton, NJ: Princeton University Press, 2001), especially at chap. 6.

[24] *Ibid*. at 9.

[25] Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 Eur. J. Int'l L. 369 at 374.

[26] *Supra* note 17 at 888.

[27] The logic of this argument is based on the author's reading of: Stephen G. Brooks and William C. Wohlforth, 'Hard Times for Soft Balancing' (2005) 30 International Security 72 at 99-104.

most, secondary states can refuse to recognize the legitimacy of the hegemon's actions or decline to support the execution of its strategies. If they cannot counter the hegemon's strategies, their best strategy is to work with the hegemon to preserve the *status quo* by allowing it to fulfill most of its interests. For its part, the hegemon will participate in this bargaining process, if it expects to get a measure of support for its project and access to other states' military and economic resources. Thus, the hegemon's willingness to negotiate with other states is seen as a measure of support for the *status quo*, increasing the chances that secondary states will acquiesce to the hegemon's demands, or at least take into consideration the hegemon's views. This process does not only secure the hegemon's primacy but it also assures secondary states the maintenance of the established international order.

At first glance, Vagts's and Alvarez's interpretation of hegemonic international law seems to suggest that the hegemon will be able to adapt existing laws according to its interests. However, as noted in the explanation above, the hegemonic state does not operate in a vacuum; if it wants to secure the legitimacy of its actions, it will need to take into account the views of secondary states. In essence, the laws may be rewritten but the bargaining process, while enacting new rules or rewriting existing laws that benefit the hegemon, can also give secondary states the mechanisms to strengthen international institutions' powers of oversight, in hope that they may construct norms that may limit hegemonic power in the future. This view of hegemony emphasizes the interactive nature of international affairs and also suggests that international law (even those rules that can potentially limit the hegemon's power) can emerge and evolve in the hegemon's shadow. Indeed, not all forms of hegemonic international law are negative. As Alvarez notes: '[D]efenders of the [Security] Council-generated ad hoc war crimes tribunals would be the first to argue, it may sometimes be necessary for Council members to use their exclusive legislative capacity to short-circuit arduous international treaty negotiations.'[28] Of course, Alvarez thinks that most examples of hegemonic international law are problematic but can this be rectified in a world dominated by American power and by weak international institutions that can be swayed by the United States or other powerful states?[29]

II. The Evolution of American Hegemonic International Law in the Post-Cold War Era

Building on the historical analyses of Charles Beard and William Appleman Williams, Andrew Bacevich argues that American foreign policy since the end of the Cold War has been pursuing 'openness' or 'the removal of barriers to the movement of goods, capital, people, and ideas, thereby fostering an international order conducive to American

[28] *Supra* note 17 at 887.

[29] W. Michael Reisman raises a similar question but addressing the topic of the unilateral use of pre-emptive force. See, his: 'Assessing Claims to Revise the Laws of War' (2003) 97 Am. J. Int'l L. 82 at 90.

interests, governed by American norms, regulated by American power, and above all, satisfying the expectations of the American people for ever greater abundance.'[30] How did the United States achieve and maintain its position of hegemony? Using the terms 'gunboats', 'gurkhas' and 'proconsuls' as metaphors,[31] Bacevich explains that American foreign policy has primarily relied on coercive mechanisms to sustain and expand its hegemony.

Even though Bacevich makes a strong case, he tends to overlook the importance of international institutions, as mechanisms, created by the United States, to manage the international system. Moreover, Bacevich does not explain how America's hegemonic position also rests on the seductiveness of its values, which help the United States legitimate its project of transforming the world according to its image.[32] As G. John Ikenberry and Charles A. Kupchan argue, hegemonic power must not only rely on the 'manipulation of material incentives.' It must also socialize leaders in 'secondary nations' so they pursue policies consistent with the hegemon's notions of international order.[33] In line with Gramscian definitions of hegemony,[34] while the United States has the capabilities to enforce its preferences, it understands that coercion is an inefficient way of safeguarding the established international order. The United States has been able to sustain its hegemony by making sure that multilateral mechanisms support its values and interests. Consequently, because these *seem* to result from international bargaining processes, core

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[30] Andrew J. Bacevich, *American Empire: The Realities and Consequences of US Diplomacy*, 88 (Cambridge, MA: Harvard University Press, 2003).

[31] According to Bacevich, '[T]he Clinton administration found the modern equivalent of old-fashioned 'gunboats' in cruise missiles and aircraft armed with precision-guided munitions" (at 148). As for the 'ghurkas', he argues that the US relied on 'third parties' to carry out missions that could stabilize different regions of the world, allowing US troops to direct their attention to other more pressing matters. A good example is the Clinton administration's funding of the Africa Crisis Response Initiative, which trained African militaries so they could undertake peacekeeping missions in their continent (at 158). The Clinton administration also relied on private military contractors to achieve key interests in different parts of the world (at 11-62). The new American 'proconsuls' are essentially the military commanders that are responsible for US interests in different regions of the world (at 173-180).

[32] *Supra* note 22 at 110.

[33] G. John Ikenberry and Charles Kupchan, 'Socialization and Hegemonic Power' (1990) 44 Int'l Org. 283.

[34] See, Robert W. Cox, 'Gramsci, Hegemony, and International Relations: An Essay in Method' in Cox with Sinclair, eds., *Approaches to World Order* (Cambridge, England: Cambridge University Press, 1996).

American 'values and understandings' come 'to be seen as legitimate' by the rest of the international community.[35]

Neo-Liberalism and American Hegemony

Since the end of the Cold War, these American 'values and understandings' have permeated international regimes and inter-governmental organizations and have influenced their decisions.[36] Roland Rich notes that in the early 1990s, the international community accepted that democracy was an important element of the human rights debate. For example, in 1993, the Vienna Declaration and Programme of Action established the link between human rights protection and the expansion of democracy. In 1999, the Commission of Human Rights adopted Resolution 1999/57, entitled 'Promotion of the Right of Democracy.' This resolution reaffirmed the 1993 Vienna Declaration and Programme. The Commission went even further in Resolution 2000/47 by declaring that single-party states' claims that 'they have in place the mechanisms for functioning democracy' were inconsistent with international human rights law.[37]

Democratization, as an international goal, also became a key United Nations objective in 1996, with Secretary General Boutrous Boutrous-Ghali's release of *Agenda for Democratization*. As Rich maintains, this document, plus the UN's work in electoral monitoring and related democracy-building programmes throughout the early- and mid-1990s, established 'the concept of international democracy promotion and co-operation outside the domain of the world powers.'[38] Even though the United States and other major democratic states took the lead in this project, Boutrous-Ghali's initiative re-oriented the work of the UN system's organs and specialized agencies to support the promotion of democracy.

On the economic side, international financial institutions (in particular the World Bank and the International Monetary Fund) and the World Trade Organization have dominated debates concerning international economics and development policy. Although the international community has recently become more critical of the so called 'Washington Consensus',[39] the prevailing opinion still is that neo-liberal mechanisms are

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[35] Ian Johnstone, 'US-UN Relations After Iraq: The End of the World (Order) As We Know It?' (2004) 15 Eur. J. Int'l L. 813 at 818.

[36] *Supra* note 4 at 384-387; and *supra* note 15.

[37] Ronald Rich, 'Bringing Democracy into International Law' (2001) 12 Journal of Democracy 20 at 24.

[38] *Ibid* at 25.

[39] The phrase was coined by John Williamson in 'What Washington Means by Policy Reforms', in John Williamson, ed., *Latin American Adjustment: How Much Has Happened?* (Washington, DC: Institute for International Economics, 1990) 7. For a criticism of this approach, see Joseph E. Stiglitz, 'Whither Reform? Ten Years of the Transition', in Boris Plesovic and Joseph E. Stiglitz, ed., *Annual World Bank*

the best means to strengthen states' economic potentials and that these reforms will put poor countries on the path towards integration into the global marketplace. The neo-liberal policies of choice include the privatization of state-controlled industries, the contraction of the welfare state, de-regulation of financial markets and the banking industry, trade liberalization, tax reform, the end of subsidies for domestic industries and a competitive exchange rate, among many others.[40]

The international community's willingness to promote neo-liberal economics and democratic procedures is informed by the belief that 'openness' is conducive to international co-operation, economic growth and global stability. The United States, since the end of the Cold War, has also supported these efforts but for more selfish reasons. The United States is one of the strongest proponents of globalization as it empowers forces that sustain and expand American hegemony.[41] Strategists in the Pentagon have traditionally been a little hesitant to support this strategy.[42] Although globalization has the potential to spread liberal values and to expand American hegemony, these same forces can have a destabilizing effect on societies with weak states or underdeveloped economies. Internal problems or external shocks could hamper these states' survivability, fostering civil wars, serious humanitarian crises and refugee flows that can destabilize neighbouring countries and promote further regional instability.[43] Weak states can also become havens for terrorist groups, drug cartels, or weapons proliferators. The United States has actively supported foreign interventions in intrastate wars, though it only participates in operations in regions where its interests are at stake; hence it played a leading role in the Balkans and a supportive role in East Timor and Sierra Leone.

To address the challenge posed by these intrastate conflicts and weak states, the UN has led or authorized a number of post-conflict peacebuilding missions, where the main goals are to stabilize these societies and to transform them according to democratic and neo-liberal principles.[44] While these missions have been controversial, there is growing

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Conference on Development Economics 1999 (Washington, DC: World Bank, 2000); and Joseph E. Stiglitz, *Globalization and its Discontents* (New York, NY: W.W. Norton, 2002).

[40] John Williamson, 'What Should the World Bank Think of the Washington Consensus?' (2000) 15 World Bank Research Observer 251.

[41] *Supra* note 30 at 88.

[42] Thomas P. Barnett, *The Pentagon's New Map: War and Peace in the 21st Century*, 194 (New York, NY: Putnam, 2004).

[43] Joseph Grieco and G. John Ikenberry, *State Power and World Markets: The International Political Economy* 17 (New York, NY: W.W. Norton, 2003); and Robert K. Schaeffer, *Understanding Globalization: The Social Consequences of Political, Economic, and Environmental Change*, chapter 13 (Lanham, MD: Rowan and Littlefield, 1997).

[44] Alejandro Berdana, 'From Peacebuilding to State Building: One Step Forward, Two Steps Back?' (2005) 48 Development 5 at 9; and *supra* note 15 at 15-16.

international recognition that they are necessary to ensure regional stability and the protection of human rights standards.[45] The main criticism is that these missions are a new form of colonialism, in which the international community treats these operations as a 'modern rendering of the mission *civilisatrice*.'[46] For instance, Roland Paris explains these missions as a 'globalisation of the very idea of what a state should look like and how it should act.'[47] This re-conceptualization of peacebuilding practices is in line with Oliver Richmond's belief that post-Cold War peacebuilding missions are an 'attempt by hegemonic actors to preserve their own value systems, through international organizations via cosmopolitan structures that freeze the world's cartographies in their dominant members' favour.'[48] As a result, the UN, since the early 1990s, has promoted economic practices and political values that have strengthened and expanded America's hegemonic position, even though this was not the original intention.

Are these missions a result of American hegemony and do they serve as examples of hegemonic international law? If they are, then Paris's and Richmond's controversial views have some validity. The next section's review of UNMIK suggests that they can be seen as an outcome of American hegemony. One reason is that the international community's ability to enforce international legal standards regarding the resolution or prevention of armed conflict is ultimately dependent on the United States's willingness to work with the UN Security Council to support such enforcement actions.[49] By the same token, this article's hegemonic international law thesis suggests that if the UN or other international bodies are not willing to intervene in conflicts that threaten American interests, the United States will intervene and set up the necessary mechanisms to

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[45] Recently, the UN General Assembly and Security Council concurrently approved the formation of the UN Peacebuilding Commission to rethink the practice of peacebuilding and to develop new mechanisms that can advance peace and stability. See, S.C. Res. 1645, UN SCOR, 5335th mtg. UNDOC S/RES/1645 (2005). Similarly, a recent study calls for the restoration of the UN Trusteeship Council so it can manage war-torn societies until these are ready to assume full sovereignty. See, James D. Fearon and David D. Laitin, 'Neotrusteeship and the Problem of Weak States' (2004) 8 International Security 5.

[46] Ronald Paris, 'International Peacebuilding and the Mission *Civilisatrice*' (2002) 28 Review of International Studies 637 at 638. A similar argument is presented by Kimberly Marten Zisk in *Enforcing the Peace: Learning from the Imperial Past* (New York, NY: Columbia University Press, 2004); and Marina Ottaway & Bethany Lacina, 'International Interventions and Imperialism: Lessons from the 1990s' (2003) 23 SAIS Review 71.

[47] *Ibid.* at 639.

[48] Oliver P. Richmond, *Maintaining Order, Making Peace* 186 (Basingstoke, England: Palgrave, 2002).

[49] Thomas Weiss, 'The Illusion of UN Security Council Reform' (2003) 26 Washington Quarterly 147 at 153.

transform these societies according to its values and interests.[50] Given these realities, what is the role of international institutions, such as the Security Council, in the present international order? Are they supposed to limit America's hegemonic power?

The UN Security Council: An Agent of American Hegemony?

Andreas Paulus argues that the founders of the post-1945 world did not create the UN for the purposes of 'the enforcement of international law as such. On the contrary, the goal was to maintain and, if necessary, to restore international peace and security.' In fact, he asserts that the UN Charter is 'not based on the primacy of law but on collective security provided by superpower involvement and broad Security Council discretion. The Council is not bound by international law itself but only by the "Purposes and Principles of the United Nations."'[51] Accordingly, the function of the UN is tied to the hegemon's will. If it wants to pursue its main goal of preserving and restoring international peace and security, the UN will bring together the United States and other states to re-interpret existing international laws and develop new laws that can empower the UN and its members to achieve a number of universal objectives, including peace, stability, democracy and market capitalism.[52]

Paulus's views are controversial. But they are in line with the views of scholars analyzing the impact of American hegemony on international law.[53] Indeed, the Security Council's quasi-legislative power provides an incentive for the hegemon to actively participate in the body's proceedings and increases the likelihood that it will try to influence Security Council mechanisms to ensure that its resolutions advance hegemonic interests. This reality does not mean that the UN Secretary General, the General Assembly, or other organs do not have the moral authority to challenge American strategies but American preponderance and the United States's position in the Security Council forces the

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[50] This observation is not only applicable to the Bush administration's decision to oust Saddam Hussein's regime from power in March 2003; it can also be applied to the United States's invasion of Panama in 1989 and its post-invasion efforts to secure the country's transition to democracy. The Organization of American States condemned the actions. The UN Security Council attempted to follow suit but the effort was vetoed by the United States, Britain, and France. However, the General Assembly passed a resolution condemning American actions. For more information, see Paul Lewis, 'Fighting in Panama: United Nations; Security Council Condemnation of Invasion Vetoed' N.Y. Times (24 December 1989) A8; and John Goshko and Michael Isikoff, 'OAS Votes to Censure U.S. for Intervention' Washington Post (23 December 1989) A7.

[51] Andreas Paulus, 'The War Against Iraq and the Future of International Law: Hegemony or Pluralism?' (2004) 25 Mich. J. Int'l L. 691 at 715-716.

[52] S*upra* note 49 at 153.

[53] For instance, see: Alvarez, *supra* note 17 at 873, 888; Thomas D. Grant, 'The Security Council and Iraq: An Incremental Practice' (2003) 97 Am. J. Int'l. L. 823 at 829-830; Paul C. Szasz, 'The Security Council Starts Legislating' (2002) 96 Am. J. Intl'l L 901; Frederic L. Kirgis, 'The Security Council's First Fifty Years' (1995) 89 Am. J. Int'l L. 506 at 520-525.

UN to fall in line with American interests. But does this reality increase the legitimacy of the hegemonic order?

The United States may be able to force secondary powers to re-write established laws via the Security Council but doing so may undercut the legitimacy of the values it seeks to promote. In many ways, this would question America's benevolence and reveal the coercive tools it uses to establish and maintain its rule.[54] Hence, Joseph Nye's 'soft power'[55] gives way to Bacevich's 'gunboats', 'gurkhas' and 'proconsuls'. As noted above, in the long term, the United States's over-reliance on coercive mechanisms can force secondary states to form alliances against its hegemonic position.[56] However, the more likely scenario, at least in the short term, is that America's actions would reduce the incentive for international co-operation, forcing the hegemonic state to devote more of its resources to achieve its key interests.[57] In other words, the United States may convince other states to re-write existing laws but these laws' lack of legitimacy mean that secondary states will not be willing to expend its resources to help Washington keep its control over the international system. Of course, this is the dilemma that the Bush administration has faced in Iraq since March 2003. In line with this logic, the hegemon's inability to manage the international system over the long term weakens its power potential and invites other states to challenge its preponderance.[58]

Ironically, many countries did not disagree with Bush's policy of regime change or Iraq's post-war transformation but did object to the president's unilateralist inclinations and his contempt for international law.[59] Therefore, the international community criticized

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[54] *Supra* note 22 at 105.

[55] Joseph Nye, *Soft Power: The Means to Success in World Politics* 7 (New York, NY: Public Affairs, 2004). The concept was originally developed in Joseph Nye, *Bound to Lead: The Changing Nature of American Power* (New York, NY: Basic Books, 1990).

[56] For the logic of this argument, see Christopher Layne, 'The Unipolar Illusion: Why New Great Powers Will Rise' (1993) 17 International Security 5.

[57] G. John Ikenberry, 'State Power and the Institutional Bargain: America's Ambivalent Economic and Security Multilaterism' in Foot, MacFarlane, and Mastanduno, eds., *US Hegemony and International Organizations: The United States and Multilateral Institutions* 51-53 (Oxford, England: Oxford University Press, 2003).

[58] S*upra* note 20 at 33.

[59] While it is true that the members of the UN Security Council had expressed their outrage at Britain's and the United States's decision to invade without the body's approval, the Security Council, as noted below, endorsed the Anglo-American occupation of Iraq and supported its transformational agenda. It is important to keep in mind that this approval was awarded knowing that regime change and post-war transformation were two guiding principles of American and British policy towards Iraq. Also, while France had voiced its decision to veto the so-called 'second resolution', it had previously expressed its willingness to cooperate with Washington's plan if the UN Security Council approved the mission. Indeed, President Jacques Chirac started to mobilize its military for a possible engagement. Even

the American-led Coalition for going to war without the Security Council's authorization. Because America's post-war objectives were in line with the international community's neo-liberal agenda and its interest in restoring peace and stability, the UN endorsed the Coalition's transformative agenda. Most secondary powers have not been willing to use their resources in this project, even though a democratic and stable Iraq is also beneficial to the rest of the international community.

Keeping in mind that American hegemony affects the workings of intergovernmental organizations, leading to the evolution of hegemonic international law, it is important to consider whether the Coalition's actions in Iraq are in line with established international standards of post-war governance. The next section provides a review of UNMIK's post-war agenda. The purpose of this analysis is threefold. First, it presents a case in which American hegemonic international law had a significant influence over the UN's decisions. Second, the section shows the development of what Michael Ottolenghi calls the 'law of post-conflict governance',[60] which may provide an explanation as to why the Security Council endorsed the Coalition's plan to transform post-war Iraq. Finally, NATO's war over Kosovo and the UN's decision to administer the province after the war raised important questions regarding the principle of sovereign equality, leading to a re-conceptualization of sovereignty that reinforces the hierarchical character of the international order, while indirectly supporting America's hegemonic project.

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though this may have been part of France's strategy to force the United States to take the Security Council's concerns seriously, it is also important to remember that at the beginning of the invasion, the French ambassador to the United States promised his country's participation in Iraq's reconstruction. In the end, the possibility of participating in these post-war efforts were spoiled by the American Secretary of Defense Donald Rumsfeld, who had made it clear that reconstruction contracts were only to be awarded to members of the American-led coalition. For the possible French military contribution, see Phillip Gordon and Jeremy Shapiro, *Allies at War: America, Europe, and the Crisis Over Iraq* 142-43(New York, NY: McGraw-Hill, 2004); on Rumsfeld's decision, *ibid.* at 202; and on the French ambassador's comments, see David Sanders, 'France to Help After War with Iraq' Washington Times (13 March 2003) A10.

[60] It has to be emphasized that this concept is used by Ottolenghi to describe a series of *ad hoc* mechanisms devised to address the challenge of war-torn societies. These by themselves do not constitute a body of law per se. However, it is important to stress the similarities between UN-mandated peacebuilding missions in Eastern Slavonia, Bosnia and Herzegovina, Kosovo and East Timor showing that each experience informs the UN Security Council's decisions in regards to this type of challenge. For more on the concept, see Michael Ottolenghi, 'The Stars and Stripes in Al-Fardos Square: The Implications for the International Law of Belligerent Occupation' (2004) 72 Fordham L. Rev 2177.

III. The UN's Post-War Efforts in Kosovo, the Waning Principle of Sovereign Equality and American Hegemony

The UN Security Council did not sanction NATO's 1999 war against Yugoslavia over Kosovo. However, the UN, '*bearing in mind* the purpose and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security,'[61] agreed to assume responsibility over the civilian administration of post-war Kosovo. Although the UN had played different roles in various post-war peacebuilding missions during the 1990s, UNMIK was established according to a 'purposive interpretation' of Chapter VII of the UN Charter.[62] Prior missions, though also authorized under these provisions, tended to uphold the spirit of Chapter VI.

Most of the pre-Kosovo missions were set up at the behest of the warring parties. Their goal was usually to monitor and support the implementation of a peace agreement negotiated by the parties.[63] Accordingly, the UN played an advisory role, though at times the Security Council authorized UN peacekeepers or military units of member-states operating under the UN-mandate to use force in order to secure the implementation of these peace agreements or to prevent a humanitarian crisis. These missions were in line with the provisions of Article 2 of the UN Charter, which states that 'The organization is based upon the principle of sovereign equality of all its Members'[64] and clearly claims that the UN shall not 'intervene in matters which are essentially within the domestic jurisdiction of any state.'[65] In other words, because these missions were established with the consent of the parties, the UN was not technically violating the sovereignty of these states.

UNMIK was not created with the consent of the warring parties and the establishment of the mission 'suspended' Yugoslavia's sovereignty over the province and established 'temporary' authority over the territory. The same rationale was used to establish the UN Transnational Administration in East Timor.[66] These missions clearly contradict the principle of sovereign equality, reinforcing the hierarchical nature of international politics and underscoring the fact that the Security Council can be turned into an instrument of American hegemony.

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[61] S.C. Res.1244, U.N. SCOR, 54th Sess., 4011 mtg., U.N. Doc. S/RES/1244 (1999).

[62] Epaminontas E. Triantafilou, 'Matter of Law, Question of Policy: Kosovo's Current and Future States Under International Law' (2004) 5 Chi. J. Int'l L. 355 at 359.

[63] Ottaway & Lacina, *supra* note 46 at 76.

[64] United Nations Charter, art. 2, para. 1.

[65] United Nations Charter, art. 2, para. 7.

[66] Alexandros Yannis, 'The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics' (2002) 13 Eur. J. Int'l L. 1037 at 1047-1048.

Having assumed the right to suspend the sovereignty of the states, as a means to secure the basis of international peace, the Security Council has subordinated Article 2 of the UN Charter to Article 1, which asserts that the organization's main responsibility is to:

> maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Is this a reasonable interpretation? While this is debatable, it is important to recognize that the international community's understanding of sovereignty, as an organizing principle of international life, has evolved since the UN Charter's provisions were negotiated in the mid-1940s. What effect have these changes had on international law? Have these changes been informed by America's hegemonic position? Before answering these questions, it is important to provide a review of UNMIK's efforts, as the international debate on the legality and legitimacy of NATO's aerial bombing campaign against Yugoslavia and the UN's work in the province have had an important influence on international debates regarding the meaning of sovereignty and the UN's role in the current international order.

American Hegemonic International Law and UNMIK's Post-War Efforts

Under the authority provided by Chapter VII, specifically Article 39, the Security Council deemed the situation in Kosovo to be a breach of international peace. However, the members of the Security Council failed to find a common approach to address the situation. In accordance with Article 40, the Security Council instructed the parties to work together 'to prevent an aggravation of the situation.'[67] It supported the Contact Group's Rambouillet talks,[68] which were being sustained by the Clinton administration's threat to go to war if Yugoslav President Slobodan Milosevic failed to sign a peace agreement. Although not sanctioned by the Security Council, NATO, at Washington's behest, decided to launch attacks against Serb positions in Kosovo in hopes that it would lead Milosevic to capitulate to the Contact Group's demands.[69] After 72 days of aerial bombardment, Milosevic was forced to accept the provisions of the Rambouillet Accords.

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[67] United Nations Charter, Art. 40.

[68] At the time, the Contact Group included representatives from the following states: the United States, the United Kingdom, Germany, France, Italy and Russia.

[69] Alex J. Bellamy, 'Lessons Unlearned: Why Coercive Diplomacy Failed at Rambouillet' (2000) 7 International Peacekeeping 95 at 110.

Led by the United States, the Contact Group asked the UN to organize and lead a post-war peacebuilding mission. According to its interpretation of Article 41,[70] the Security Council, through Resolution 1244, agreed to this request, setting-up a mission unprecedented in at least three respects. First, the UN established a mission with expansive civilian powers. Although recognizing Kosovo as part of Yugoslavia, it specified that UNMIK was to perform 'basic civilian administrative functions where and as long as required.'[71] As Carsten Stahn observes, '[t]he UN assumed the role of "international governance" not by consent, but rather by way of unilateral decree.'[72] Milosevic objected to UNMIK's broad powers, as it challenged Yugoslavia's sovereignty but the UN dismissed his views on the grounds that the presence of Serb authorities was not conducive to the restoration of peace and stability.[73] Similarly, the Kosovo Liberation Army did not welcome UNMIK's creation because it contradicted its efforts to secure the province's independence. The presence of NATO troops forced both sides to acquiesce to UNMIK's authority over the province.

Second, Resolution 1244 instructed the 'Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence.'[74] In regards to peacekeeping duties, the document authorized 'Member States and relevant international organizations to establish a security presence.'[75] Resolution 1244, making use of Article 48 of the UN Charter, organized the peacebuilding mission with the assistance of regional organizations.[76] The

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[70] United Nations Charter, art. 41. It reads: 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. This may include complete or partial interruption of economic relations and of rail, sea, air, postal telegraphic, radio, and other means of communication, and the severance of diplomatic relations.' This list of measures is not comprehensive. As Ottolenghi notes, Article 41 has been used to establish international criminal tribunals. See Ottolenghi, *supra* note 60 at 2194.

[71] Resolution 1244, *supra* note 61 at para. 11(b).

[72] Carsten Stahn, 'Governance Beyond the State: Issues of Legitimacy in International Territorial Administration.' Paper presented at the SIGR Fifth Pan-European Conference (The Hague, The Netherlands: 9-11 September 2004): 6, online <http://www.sgir.org/conference2004/papers/Stahn%20-%20Governance%20Beyond%20the%20state.pdf>.

[73] *Ibid.* at 6-7.

[74] Resolution 1244, *supra* note 61 at para. 6.

[75] *Ibid.* at para. 7.

[76] Ottolenghi, *supra* note 60 at 2194. UN Charter, art. 48, para. 1 reads: "The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine." Para. 2 also asserts that: "such decisions shall be carried out by the Members of the United

peacekeeping force, known as KFOR, has been under NATO's authority. UNMIK, though under the UN's control, is divided into four functional pillars, two lead by the UN and the other two by the EU and the OSCE.[77]

Finally, the UN clearly wanted to transform Kosovo according to democratic and capitalist values. Ottolenghi argues that Resolution 1244 granted the Special Representative 'broad powers compared to the restrictions imposed on an occupying power by the law of occupation.'[78] In fact, the Special Representative has the power to 'make new laws as needed.' UNMIK's first regulation affirmed its broad powers: 'all legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative.'[79] The regulation also stated that Yugoslav law, promulgated prior to 24 March 1999, would remain applicable unless these contradicted UNMIK's mandate or its regulations.[80] Ottolenghi is right to point to UNMIK's transformative agenda but he fails to mention that U.N. lawyers initially recommended the Special Representative to observe the limitations set in the international law of occupation. According to Henry Perritt, the UN was unsure of whether it could execute the transformation of Kosovo's economy, even though the Resolution's language, as captured in operative paragraph 17, implicitly averred that the transformation was to be guided by the principles set out by the Stability Pact for South Eastern Europe.[81] Kosovo's economic stagnation and increasing pressures from the international community, especially the United States, forced UNMIK to abandon these reservations and embrace

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Nations directly and through their action in the appropriate international agencies of which they are members."

[77] Pillars I and II are under the UN's control. The first deals with police and justice issues. The second is responsible for civil administration. Pillar III is led by the OSCE. Its responsibility includes the promotion of democracy and human rights, the organization and supervision of elections, and the administration of capacity-building programs. Pillar IV is responsible for reconstruction efforts and the EU is responsible for this Pillar's programs. Originally, Pillars I and II were one and the UN High Commission for Refugees used to administer Pillar I which dealt with humanitarian issues and established programs to help internally displaced people and refugees. For more information, see UNMIK's website: <http://www.unmikonline.org/intro.htm>. For an excellent review of UNMIK's efforts, see: Michael J. Matheson, 'United Nations Governance of Post-Conflict Societies' (2001) 95 Am. J. of Int'l L. 76 at 80.

[78] Ottolenghi, *supra* note 60 at 2200.

[79] Cited in: Matheson, *supra* note 77 at 80.

[80] *Ibid.* at 80.

[81] Antonio F. Perez, "Legal Frameworks for Economic Transition in Iraq – Occupation Under the Law of War vs. Global Governance Under the Law of Peace" (2004) 18 Transnat'l Lawyer 53 at 68-69.

this transformative agenda.[82] As Matheson argues, UNMIK was charged with more than just reconstruction of Kosovo's infrastructure, it was also responsible for 'the development of a market-based economy, the coordination of international financial assistance, and the resolution of trade, currency, and banking matters.' Clearly, 'the reason for the UN administration was not to remedy a governmental breakdown, but to engineer a fundamental change in governmental policy.'[83]

Accordingly, UNMIK's efforts are not only in line with American interests and understandings of intrastate order but they also capture the growing international consensus that democratic values and neo-liberal economic principles should guide the transformation of war-torn society. Post-war peacebuilding missions organized or authorized by the UN during the 1990s have led to the development of a set of ad hoc mechanisms Ottolenghi groups under what he calls the 'law of post-conflict governance.' Although these mechanisms are informed by cosmopolitan interests and the UN's duty to promote international peace and stability, it is also a consequence of American hegemony, which supports the transformation of these societies as a means to preserve and expand American influence. Hence, the United States's motivation for intervention may not be in line with the cosmopolitan values that inform the UN's decisions but support for such missions, as discussed in the next section, legitimates American understandings of intrastate order, while at the same time cementing and further expanding its hegemony.

As noted above, NATO's war against Yugoslavia and UNMIK's work also had a significant impact on international debates concerning the principle of sovereign equality as a roadblock to the UN's efforts to prevent serious humanitarian crises or the wanton violation of human rights. Although these discussions had taken place prior to this conflict, they influenced the analysis of several international commissions, shaping current attempts to reform the UN. If UNMIK's work is an example of American hegemonic international law, are these reform efforts going to deepen the United States's primacy over the international system?

Re-conceptualizing Sovereignty and its Impact on International Law

Commenting on the decision to intervene in Kosovo and East Timor on humanitarian grounds, then UN Secretary General Kofi Annan argued that the international community had to reconsider the longstanding definition of sovereignty. Even though he was critical of NATO's decision to bypass the Security Council, he also stressed that the memory of Rwanda perhaps justified this action. The clear message was not only that sovereignty

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[82] Henry H. Perritt, "Note on the 'Political Trustee' Concept," Symposium – Final Status for Kosovo (Chicago, IL: Chicago-Kent College of Law, April 16, 2004), online: <http://operationkosovo.kentlaw.edu/symposium/note-on-political-trusteeship.htm>.

[83] Ralph Wilde, 'Representing International Territorial Administration: A Critique of Some Approaches' (2004) 15 Eur. J. Int'l L. 71 at 85.

could not serve as an excuse for inaction when serious human rights violations were taking place but that the Security Council had to find ways to act to rectify these wrongs.[84]

Annan's views on sovereignty were in line with Stephen Krasner's research which expands the traditional definition of sovereignty by fusing it with the principle of self-determination.[85] As such, sovereignty cannot be solely seen as legal sovereignty – recognition of a nation-state as 'an independent political and legal entity';[86] it must also include two other elements: 'Westphalian sovereignty' and 'domestic sovereignty.' Taken together, sovereignty does not only mean international recognition of control over a specific territory but it also means that a government 'must not only be seen to be ruling but be felt to be ruling in the interests of the people.'[87] Hence, this characterization combines the principles of sovereignty and self-determination to demonstrate that political rule is based on legitimacy and citizens' participation in the political system. This re-conceptualization informs the findings of the International Commission on Intervention and State Sovereignty's (ICISS) report, *The Responsibility to Protect*, and the report of the UN Secretary General's High-Level Panel on Threats, Challenges, and Change titled, *A More Secure World: Our Shared Responsibility*.

While many UN members have endorsed this expanded conception of sovereignty, many legal scholars are concerned that there are not enough parameters to specify under what conditions the Security Council can authorize a humanitarian intervention or similar peace operations.[88] Similarly, if the Security Council sets a precedent by recognizing that sovereignty is dependent on a state's protection of its people and other international standards (basic humanitarian standards, human rights, democracy, peace and so forth), could this logic be used to legitimize unilateral humanitarian interventions? The ICISS's document argues that such an intervention can take place, if the Security Council or the General Assembly fails to act, if a regional organization is unwilling to take up the matter and if the intervener's actions are guided by

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[84] Kofi Annan, 'Two Concepts of Sovereignty', The Economist (18 September 1999), online <http://www.un.org/News/ossg/sg/stories/kaecon.html >.

[85] Stephen Krasner, *Sovereignty, Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999). For a similar interpretation but based on international law, see Kal Raustiala, 'Sovereignty and Multilateralism' (2000) 1 Chi. J Int'l L 401.

[86] Toby Dodge, 'A Sovereign Iraq?' (2004) 46:3 Survival 39 at 40. It is important to note that Dodge's interpretation builds on Stephen Krasner's work on this subject.

[87] *Ibid*. at 45.

[88] See, for example, I. Maxine Marcus, 'Humanitarian Intervention Without Borders: Belligerent Occupation or Colonization' (2002) 25 Hous. J. Int'l L. 99 at 108.

the interests of the affected population.[89] Although this is a very high threshold, the ICISS's consideration of a possible 'illegal' but legitimate intervention was shaped by the NATO's decision to attack Yugoslavia. Did this opinion influence the High-Level Panel's recommendations?

On its view of sovereignty, the High-Level Panel goes a step further. Released after the 2003 Iraq war, it argues that UN membership, which has been traditionally seen as an affirmation of a state's right to sovereignty, carries with it an obligation to honour international and domestic legal commitments, as defined by the provisions of international humanitarian law and human rights law.[90] Hence, states that do not meet these commitments are subject to international sanction in accordance with the UN Charter's provisions. More importantly, the report suggests that 'sovereignty misused' could become 'sovereignty denied'.[91] Thus, the UN also reserves the right to intervene in order to establish new state structures that will be able to live up to this new definition of sovereignty.[92] While this definition expands the 'circumstances in which the international community can decide to use force,'[93] the High-Level Panel's report establishes that all decisions regarding enforcement action lie with the Security Council.[94]

In contrast to ICISS, the High-Level Panel's report fails to explain how it will prevent or resolve these conflicts if the Security Council is unable to act. This is an important problem because it suggests that the Security Council can only work if the permanent members can work together to advance the general interests of the international community. In many ways, it confirms Paulus' controversial views on the operation of the Security Council discussed in the previous section. The report recognizes this problem and calls on the Security Council to adopt 'a set of agreed guidelines', developed by the High-Level Panel, that will help the Security Council reach consensus regarding how to address the challenges posed by states that violate basic human rights standards.[95] This recommendation, on paper, sounds very good. But given this re-

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[89] *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (Ottawa, Ontario: International Commission on Intervention and State Sovereignty, 2001), available: < http://www.iciss.ca/pdf/Commission-Report.pdf>, at paras. 6.36-6.40.

[90] *A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges, and Change*, UN Doc. A/59/565 (2004) at paras. 29-30.

[91] Anne-Marie Slaughter, 'Security, Solidarity, and Sovereignty: The Grand Themes of UN Reform' (2005) 99 Am. J. Int'l. L. at 628.

[92] *Ibid.* at 629.

[93] *Ibid.* at 621.

[94] *Supra* note 90 at paras. 203-207.

[95] *Ibid.* at paras. 205-207. These guidelines include the following: 'seriousness of threat', 'proper purpose', 'last resort', 'proportional means' and 'balance of consequences'. These are similar to the

interpretation of sovereignty and the importance the report puts on the need to act, the Security Council should have taken the United States's case for ousting Saddam Hussein's regime more seriously. However, the debate in the Security Council was not centred on the plight of the Iraqi people or the threat Iraq posed to the region but on how the United States should use its power. This is similar to the debate concerning the Clinton administration's case for a Security Council resolution authorizing the use of force against Yugoslavia in 1999. The Kosovo war was criticized on legal grounds but praised for upholding humanitarian standards: does this mean that this war and the UN-mandated peacebuilding mission inform these two reports' recommendations, especially those offered by High-Level Panel as these are guiding current reform efforts at the UN?

NATO's war over Kosovo and the establishment of UNMIK are important precedents. Indeed, there are important parallels between this episode and the international community's reaction to the invasion of Iraq in March 2003 and to the Anglo-American request to establish a post-war mission. Moreover, even though the two reports discussed above did not discuss directly the benefits of neo-liberal values, the underlying logic, especially in the High-Level Panel's findings, is that the international community has a responsibility to force states to adapt their legal structures according to the precepts of international humanitarian law and human rights law. This report also called on the Secretary General to establish a Peacebuilding Commission to re-think the practice of peacebuilding and to develop new guidelines that will inform future operations.[96] Is this emphasis on transforming states a result of an emergent cosmopolitanism ethos? At first glance this may seem to be the case but it must also be considered a development influenced by American values and its idealized vision of intrastate order, generating condition that allows the United States to sustain its hegemony over the international system.

Taken together, UNMIK's efforts and this re-conceptualization of sovereignty not only highlight the influence of American values but also shed light on the issues considered by the Security Council when it addressed the United Kingdom's and United States's request for a resolution legitimizing their occupation of Iraq and the project to transform Iraqi social order along neo-liberal lines.

IV. American Hegemony, UN Security Council Resolution 1483 and the Legalization of Iraq's Post-War Transformation

The UN Security Council passed Resolution 1472 during the Iraq war on March 28, 2003. Its main purpose was to call on the international community to assist the American-led

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ICISS's criteria, which include: 'right authority', 'just cause', 'right intention', 'last resort', 'proportional means', and 'reasonable prospects'. See, *The Responsibility to Protect*, *supra* note 89 at para. 4.16.

[96] *Supra* note 90 at paras. 82-85. This Commission was concurrently established by the UN Security Council and General Assembly on December 20, 2005. See, S.C. RES 1645, *supra* note 45.

coalition to prevent a humanitarian crisis in Iraq and to ensure the delivery of humanitarian supplies to the Iraqi people. While this was in line with the Coalition's interests, the document made it clear that the United States and the United Kingdom were occupying powers and requested them 'to strictly abide by their obligations under international law, in particular the Geneva Conventions and the Hague Regulations.'[97] It also reaffirmed the right of Iraqis 'to determine their own political future and to control their own natural resources.'[98] Critics of the Coalition's policies may have included references to the international law of occupation in the resolution to contradict the United States's self-description as a 'liberator.'[99]

Resolution 1472 is not mentioned in American or British government documents explaining the Coalition's reasons to create the CPA;[100] the United States and the United Kingdom resisted the idea of occupying and administering the country. The original post-war strategy for Iraq, designed by Jay Garner and the staff of the Office for Reconstruction and Humanitarian Affairs (ORHA), planned to transfer power to an interim Iraqi government three months after the end of military operations.[101] In early May 2003, the Bush administration abandoned this strategy for two reasons. First, the liberation of Baghdad was followed by the massive looting of many state-owned enterprises, most governmental buildings and the country's electrical grid. Thus, Iraq needed a more robust strategy that could address the country's socio-economic challenges. Second, even though President George W. Bush and Prime Minister Tony Blair called on Iraqis to work with the ORHA to establish an 'Iraqi Interim Authority' to administer the country until the 'people of Iraq' could institute a permanent government,[102] this was abandoned once the Pentagon noticed that Ahmad Chalabi and other like-minded exiled Iraqi leaders had little support

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[97] S.C. Resolution 1472, U.N. SCOR, 58th Session, 4732 mtg., para. 1, U.N. Doc. S/RES/1472 (2003).

[98] *Ibid.* at preamble.

[99] Gregory H. Fox, 'The Occupation of Iraq' (2005) 36 Geo. J. Int'l L. 195 at 233-234.

[100] See, for instance L. Elaine Halchin, 'The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities' No. RL 32370 (Washington, DC: Congressional Research Service, April 29, 2004) and Paul Bowers, 'Iraq: Law of Occupation' Research Paper No. 03/51 (London, England: House of Commons Library, 2 June 2003).

[101] On Garner's views on the duration of the post-war mission, see Adam Garfinkle, 'The Daunting Aftermath: L. Paul Bremer & Co. Have a Different of War on Their Hands' (28 July 2003) 55:14 The National Review 29. For a review of the 'original' post-war strategy, see Carlos L. Yordán, 'Failing to Meet Expectations in Iraq: A Review of the Original Post War Strategy' (2004) 8 Middle East Review of International Affairs 52; and David Rieff, 'Blue Print for a Mess: How the Bush Administration's War Planners Bungled Postwar Iraq' N.Y. Times Magazine (November 2, 2003).

[102] Bowers, *supra* note 100 at 10.

among Iraqis and that Islamist political groups would play a dominant role in the new Iraq.[103]

Learning from its experience in Afghanistan, the Bush administration knew that the premature transfer of power to an Iraqi interim administration would make it difficult for the United States and its coalition partners to influence the government's policies and to push for the necessary reforms to secure Washington's vision of post-Saddam Iraq as a secular, multiethnic democracy supportive of its global war on terror and a beacon of hope in the heart of the Middle East.[104] Facing this dilemma and building on post-war efforts in Kosovo and East Timor, some officials, especially in the United Kingdom, wanted the UN to set up a mission to administer post-war Iraq. The Bush administration opposed this proposal. The ORHA considered ways the UN could be used to pay for the occupation[105] and to increase the chances non-Coalition members would send troops to stabilize Iraq[106] but Bush made it clear that the UN could not run the show.[107] Knowing that the United States would be in post-war Iraq longer than three months, a new strategy was needed to secure America's interests but without angering the international community, as the Bush administration wanted UN support to legitimize its occupation and to increase the chances the international community would commit troops, financial resources and personnel to post-war efforts.

On 8 May 2003, the United States and the United Kingdom sent a letter to the President of the Security Council expressing their willingness to 'strictly abide by their obligations under international law, including those relating to the essential humanitarian needs of the people of Iraq' and to 'ensure that Iraq's oil is protected and used for the benefit of the Iraqi people.' The occupying powers also informed the Council of their decision to replace the ORHA with the CPA to administer the country until Iraqis could establish their own representative government. Even though the letter satisfied the Security Council's demands as set out in Resolution 1472, it stopped short of agreeing to administer Iraq in accordance with the international law of occupation.[108] One reason they resisted this label was because this body of law, as captured in the Hague Regulations of

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[103] Larry Diamond, *Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq* 33-34 (New York, NY: Times Books, 2005); and David Phillips, *Losing Iraq: Inside the Postwar Reconstruction Fiasco* 136-139 (Boulder, CO: Westview Press, 2005).

[104] David B. Rivkin and Darin R. Bartram, 'Military Occupation: Legally Insuring a Lasting Peace' (2003) 26 The Washington Quarterly 87 at 92.

[105] Simon Chesterman, 'Bush, the United Nations and Nation-Building' (2004) 46 Survival 101 at 106.

[106] Michael R. Gordon, 'The Strategy to Secure Iraq Did Not Foresee a 2nd War,' *N.Y. Times*, 19 October 2004.

[107] Bob Woodward, *Plan of Attack* (New York, NY: Simon and Schuster, 2004) at 359.

[108] 'Letter from the Permanent Representatives of the UK and the US to the **UN** addressed to the. President of the Security Council,' UN Doc. S/2003/538 (2003).

1907 (HR) and the Fourth Geneva Conventions of 1949 (GC), does not allow occupying powers to carry out the transformation of countries under military occupation.

A Brief Synopsis of the International Law of Occupation

The international law of occupation was established to limit the occupier's power. In the HR's case, diplomats participating in the document's negotiations wanted to protect the ousted sovereign's powers and to prohibit the annexation of occupied territory through war. At the time, occupations tended to be short affairs, mainly disputes between militaries and governments, rather than entire nations. Once the dispute was settled, the occupant would return the occupied territory to the defeated government.[109] Consequently, the occupying power, as stipulated in Article 43, would assume authority for the ousted sovereign, taking 'all the measures in his power to restore and ensure as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'[110] This is not to say that the occupier cannot make changes to the established legal order or suspend certain laws. These actions are possible in cases of 'military necessity', that is to say, when the occupant believes that these laws are 'injurious to the interests of the occupant or to his wartime aims.'[111] Although 'military necessity' warrants some changes, these apply to the penal code, and not to the civil code. The occupying power is required to rule the territory with existing governmental institutions.

The HR also limits the occupant's administration of state-owned property and its ability to requisition private property to support the occupant's military activities in the occupied territory.[112] The document recognizes two types of state-owned property: movable and immovable. Examples of movable property include: 'cash, funds, and realizable securities which are strictly property of the State, depots of arms, means of transport [and] stores and supplies….'[113] All property must be returned to the ousted government once authority is transferred. In regards to immovable property, Article 55 determines that:

> The occupying state shall be regarded as an administrator and usufructuary of public buildings, real estate, forests and agricultural estates belonging to

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[109] Grant T. Harris, 'The Era of Multilateral Occupation' (2006) 24 Berkeley J. Int'l L. 1 at 3; and Eyal Benvenisti, *The International Law of Occupation* 7 (Princeton, NJ: Princeton University Press, 1993).

[110] Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, *Regulations Respecting the Laws and Customs of War on Land,* Annex, 36 Stat. 2277, 1 Bevans 631, art. 43 [hereinafter Hague Regulations].

[111] Gerhard von Glahn, *Law Among Nations: An Introduction to Public International Law*, 6th edition, 787 (New York, NY: Macmillian, 1992).

[112] For the conditions occupying powers need to follow before destroying or expropriating private property, see, Hague Regulations, *supra* note 110 at Arts. 23, 46, 52 and 53.

[113] *Ibid.* at art. 53.

> the hostile State and situated in the occupied country. It must safeguard the capital of these properties and administer them in accordance with the rule of usufruct.

This article has been used to limit the occupant's operation of state-owned enterprises and the administration of the territory's natural resources. According to the rule of usufruct, the occupant's authority is '"measured not by his own needs but by the duty to maintain integrity in the corpus."'[114]

Can the occupant privatize state-owned enterprises? Even though the HR did not address this issue, legal scholars argue privatization would conflict with 'the rule of usufruct.' Similarly, the occupant can administer these natural resources and related industry as long as the proceeds are employed to cover 'expenses of occupation' and to 'benefit the indigenous population.'[115] In the case of Iraq's oil industry, there was a debate concerning the occupant's authority to drill new wells or develop new oil fields. One perspective argued that the occupant could tap unused oil resources but it had to do it responsibly. In other words, it needed to make sure that production did not deplete the country's resource base or damage the industry's infrastructure, which would threaten the sovereign's ability to use this industry once it assumed authority over the country.[116]

Because diplomats negotiating the HR's provisions considered occupations to be short affairs, they did not explain in detail whether an occupying power could manage an occupied country's financial, economic, or commercial systems.[117] However, this is an area where international customary law suggests that the occupant can administer these systems if it does not 'serve to accomplish forbidden ends.'[118] This is a controversial interpretation due to the HR's disapproval of long occupations. Another contentious issue is whether an occupying power can appoint a private firm to manage a state-owned industry. R. Dobie Langenkamp and Rex J. Zedalis note that Article 55 grants this authority as long as the selection of such firm 'was economically sound, made in good faith, and not somehow inuring to the occupant's "own enrichment."'[119] This interpretation of Article 55 is consistent with 'the realities of modern commerce.' The occupant, as a trustee

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[114] Cited in Ottolenghi, *supra* note 60 at 2186.

[115] R. Dobie Langenkamp and Rex J. Zedalis, 'What Happens to the Iraqi Oil? Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields' (2003) 14 Eur. J. Int'l L. 417 at 432 and 433.

[116] *Ibid.* at 428-429.

[117] Laurence Boisson De Chazournes, 'Taking the International Rule Law of Seriously: Economic Instruments and Collective Security' 11-12 (New York, NY: International Peace Academy, October 2005).

[118] von Glahn, *supra* note 111 at 802.

[119] S*upra* note 115 at 434.

of this industry, should not ignore the local capacities of experts and firms. However, international law is silent on whether private local firms, state-owned companies, or foreign corporations can best administer these types of industries; thus, the occupant has the freedom to choose the best strategy as long as it does not conflict with the usufructuary principle.

In 1949, the International Committee of the Red Cross called a conference to revisit the international law of occupation, asking diplomats to focus on 'the indigenous community under occupation rather than the wishes of the ousted government.'[120] The GC did not supersede the HR; it strengthened the rights of civilians and required the occupying power to meet the humanitarian needs of individuals in the territory under occupation. Thus, like the HR, the GC limits the occupying power's ability to transform the legal order, although Article 64 allows for some modifications if the existing penal code is not in line with the GC's human rights standards. While the GC prohibits changes to the civil code, some research shows that a liberal interpretation of Articles 51 and 64 allows occupying powers to execute a transformation of the political and socio-economic systems.[121] Nevertheless, most interpretations clearly show that an occupying power is 'not competent to enact reforms that fundamentally alter governing structures in the territory and create long term consequences for the local population' because it lacks local legitimacy.[122] Thus, in the case of post-war Iraq, such reforms, even if executed with the best intentions, would violate Iraqis' collective sovereignty.

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[120] Adam Roberts, 'What is a Military Occupation?' (1984) 55 British Yearbook of International Law 249 at 252; and Benvenisti, *supra* note 109 at 6.

[121] Benvenisti argues that the Convention provides a tool to pursue a more maximalist strategy. Article 64 clearly enables the occupant to alter the penal code to make sure that citizens are protected under the law. However, Article 51 of the GC, which regulates labor related issues, provides for changes in the civil code, if the labors laws are not consistent with accepted standards: fair compensation, training, normal work hours, compensation for work-related accidents and so on. Benvenisti points that if the occupant can change an aspect of the civil code, then it should be able to adjust other areas as well. Of course, these revisions must comply with the GC's human rights principles. This is an interesting argument. However, the GC backed Article 64 with the provisions of Articles 65 to 78. Each of these Articles explains by what steps the occupant is authorized to change the law and what principles it needs to adhere to when changes are proposed. For instance, modifications to the penal law must be presented in writing and in the language of the local population before these changes take effect. Similarly, individuals charged for any type of crime must have access to a fair trial. Also, new laws cannot be applied retroactively and if an individual is found guilty by the courts, the sentence should be proportional to the crime. Thus, its conception of social change is very minimal and not as expansive as Benvenisti would argue. See, *supra* note 109 at 101-102.

[122] *Supra* note 99 at 240.

Negotiating Resolution 1483: A Revision of the International Law of Occupation?

Given the limitations inherent in the international law of occupation, it is not surprising that the United States, and the United Kingdom to a lesser extent, were considering their options once 'major' military operations ceased in Iraq. Although this body of law goes into effect once an occupation takes place, not when occupying powers decide to abide by these rules, both governments considered ways to legitimate their plans to transform Iraq's political and socio-economic systems.[123] This was especially true for the Blair government following Claire Short's resignation as Secretary of State for International Development on 12 May 2003. Based on the British Attorney General's opinion that Iraq's transformation would be illegal without a mandate from the Security Council,[124] her resignation may have been part of an effort to call public attention to this fact and to force the United States to work with its Coalition partners to secure a new resolution.[125] In fact, at the time of her resignation, the United States, the United Kingdom, and Spain had tabled a draft resolution on Iraq and there were fears that the United States would bypass the Security Council if France, Germany and Russia opposed its interests. Although the Bush administration believed that it already had the legal authority, if not the moral responsibility, to carry out this project,[126] the White House may have decided to search for the Security Council's support to help Blair silence his critics.

The draft resolution was welcomed by the Security Council's members but it did not enjoy unanimous support.[127] Conceding to international pressure, and in accordance with Resolution 1472, the draft requested that 'all concerned' parties 'comply fully' with the GC and HR, suggesting that the United States and the United Kingdom would act in accordance with this body of law. But the Resolution also called on the Secretary General to support Iraq's transition to democracy and its economic transformation by appointing a Special Coordinator that would help the occupying powers achieve these goals, which clearly contradicted the standards set out in the GC and HR. In addition, it demanded the transfer of assets controlled by the UN Oil for Food Programme to an 'Iraqi Assistance

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[123] *Supra* note 110 at Article 42. It reads: 'Territory is considered occupied when it is actually placed under the authority of the hostile army.'

[124] In a memo to Prime Minister Blair, Attorney General Lord Goldsmith explained that 'a further Security Council resolution is needed to authorize imposing reform and restructuring of Iraq and its Government', as this would violate the law of international occupation. Cited in John Kampfner, 'Blair Was Told that it would be Illegal to Occupy Iraq' New Statesman 17 (May 26, 2003).

[125] Bowers, *supra* note 100 at 12.

[126] Nile Gardiner and David B. Rivkin, 'Limiting the U.N. in Iraq', United Press International (April 28, 2003) [Lexis/Nexis].

[127] For a copy of the draft resolution, see: 'US-UK Draft Resolution on Postwar Iraq', Global Policy Forum (May 9, 2003) at s.12, on-line: <http://www.globalpolicy.org/security/issues/iraq/document/2003/0509postwardraft.htm>.

Account,' managed by the Coalition to pay for post-war efforts, including the provision of humanitarian goods, economic reconstruction, and civilian administration. This account would be monitored by an international advisory board, which members were to be chosen by the Secretary General. Although explaining that the occupation would last a year, the occupying powers wanted the Security Council to grant them the authority to extend the mandate if they could not meet their objectives in this time frame.

One member expressed deep reservations: 'What is asked of the Security Council is to provide the occupying powers with a kind of authority that goes far beyond international conventions.' [128] France, Germany and Russia were dissatisfied with the coalition's unwillingness to give executive power or a say on military matters to a Special Representative, appointed by the Secretary General. In fact, the draft document did not refer to the Secretary General's appointee in Iraq as a 'Special Representative' but as 'Special Coordinator', suggesting his efforts would be in line with the occupying power's interests. These three governments wanted the coalition to transfer post-war administration to a UN mission, similar to the one established for Kosovo. They also wanted the draft resolution to include a provision that gave UN weapons inspectors the authority to finish their investigation on Saddam Hussein's alleged weapons of mass destruction programmes. Moreover, they objected to the Coalition's desire to extend its mandate without the Security Council's approval, as this would have reduced the international community's influence on issues regarding Iraq's future.

After twelve days of intense negotiations, the Security Council passed Resolution 1483 by a vote of 14-0, with Syria abstaining, on 22 May 2003. In certain respects, the United States, United Kingdom and Spain bowed to international pressure. The document stated that the Security Council had the authority to extend the occupying powers' mandate in Iraq if they felt that more time was needed to accomplish the goals of the occupation.[129] The Coalition also agreed to allow UN weapons inspectors to finish their investigation concerning Iraq's alleged weapons of mass destruction programmes. Furthermore, the resolution called on the Secretary General to appoint a Special Representative. Although the appointee would help the occupying powers, he had independent responsibilities. Consequently, the Special Representative was also asked to report regularly to the Security Council, increasing the body's oversight over the Coalition's efforts.[130] Building on the proposed 'Iraqi Assistance Account', the Security Council established a 'Development Fund for Iraq' to pay for post-war efforts. It also ordered the creation of an 'International Advisory and Monitoring Board' to certify that the Coalition, and an anticipated interim

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[128] Felicity Barringer, 'U.N. Reaction to Resolution Seems Positive But Reserved' *New York Times* A13 (May 10, 2003).

[129] S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg. at para. 25, U.N. Doc. S/RES/1483 (2003).

[130] *Ibid*. at para. 8 and para. 24.

Iraqi administration, used these funds to benefit the Iraqi people.[131] Moreover, the resolution decided to phase out the UN Oil-For-Food-Programme and to transfer any accrued funds to the 'Development Fund for Iraq'.[132]

The Security Council resolution established that the United Kingdom and the United States were occupying powers, recognizing the Coalition Provisional Authority as the civilian body responsible for post-war Iraq. However, the resolution made it clear that these powers' main responsibility was to re-establish security and stability in order to allow the Iraqi people to 'freely determine their own political future,' expressing its interest in a speedy end to the occupation.[133] While the resolution did indicate that the United Kingdom and the United States had to 'comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907,'[134] a careful reading suggests otherwise. Resolution 1483's provisions are in line with the logic that informs Resolution 1244 and its wording, although no evidence exists that one directly informed the other.[135] The Security Council, employing its Chapter VII powers, watered down the limits found in the international law of occupation and authorized the Coalition's plan to transform Iraq's economy and political system.[136]

Accordingly, Resolution 1483 invited international financial institutions to help the Coalition's civilian administrators in rebuilding the economy.[137] In addition, the Security Council called upon the Paris Club to consider what to do with Iraq's foreign debt.[138] Noting that the Paris Club works closely with the International Monetary Fund and the World Bank to put together structural adjustment programmes to transform the economies of debtor nations according to neo-liberal principles,[139] it is safe to say that the Security Council supported Iraq's economy transformation only as long as the CPA drew its plans with the advice of international economic institutions.[140] Similarly, the document called on the CPA to work with the Special Representative to 'restore and establish national

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[131] *Ibid.* at paras. 12-14.

[132] *Ibid.* at paras. 16 and 17.

[133] *Ibid.* at para. 4.

[134] *Ibid.* at para. 5.

[135] *Supra* note 99 at 262.

[136] David J. Scheffer, 'Beyond Occupation Law' (2003) 97 Am. J. Int'l. L at 844-846.

[137] *Supra* note 106 at para. 2 and para. 15.

[138] *Ibid.* at para. 15.

[139] For information on the Paris Club, see, Theodore Cohn, *Global Political Economy: Theory and Practice*, 2nd edition 200-201 (New York, NY: Longman, 2003).

[140] Brett McGurk, 'Revisiting the Law of Nation-Building: Iraq in Transition' (2005) 45 Va. J. Int'l L. 451 at 461.

and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq.'[141]

For all their similarities, two main differences between Resolutions 1244 and 1483 are important to note because these show the Security Council's desire to limit the occupying powers' authority and preserve some of the guiding principles that inform the international law of occupation. First, Resolution 1483 'lacked the infinite character' found in Resolution 1244. The Security Council wanted the Iraqi occupation to be short, limiting the CPA's power to one year, consistent with Article 6 of the GC. This contradicted the CPA's original plan of occupying Iraq for 'several years'.[142] In the case of Kosovo, and due to the Security Council's unwillingness to address the status of the province in 1999, it was understood that UNMIK's work was going to be expansive and would take a long time.[143] Second, Resolution 1483 wanted the CPA to administer Iraq with the assistance of an 'Iraqi interim administration'. This provision may have been added to reassure Iraqis that the CPA's decisions took into consideration Iraqi interests. However, it emphasized that the CPA did not enjoy complete sovereignty over the country and that the occupying powers could not use the occupation to advance their self-interests. In Kosovo, and due to the uncertainty of its status, UNMIK was not required to transfer its authority to local institutions until a political settlement was reached between Kosovar Albanians and the Serb government[144] and it has generally been reluctant to transfer power to local institutions.[145]

The Security Council also tried to constrain the occupying power's authority by trying to empower Iraqis and by placing a Special Representative to monitor the CPA's work. The United States did create the Iraqi Governing Council but it was not the Iraqi interim government the international community expected the CPA to establish. While the UN played an important role in post-war Iraq, al Qaeda's bombing of the UN compound in Iraq, which claimed the life of the Special Representative Sergio Viera de Mello, forced the UN to reduce its presence in Iraq until the security situation improved. This gave the CPA the freedom to enact its ambitious post-war transformation programme. Its efforts, however, were spoiled by the insurgency, increasing Iraqi sectarian and ethnic divisions, and by Ayatollah Ali al Sistani's challenges to the Coalition's authority. Although the CPA passed over 100 regulations, a lot of these were not enforced because the Coalition was

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[141] *Supra* note 137 at para. 8(c).

[142] *Supra* note 103 at 155.

[143] S*upra* note 140 at 460-461.

[144] *Supra* note 61 at para. 11(f).

[145] Carsten Stahn, 'Justice Under Transitional Administration: Contours and Critique of Paradigm' (2005) 27 Hous. J. Int'l L. 311 at 332-333.

understaffed,[146] failed to control Iraqi territory, or was unable to persuade local institutions to execute these reforms.[147]

Consistent with this article of hegemonic international law, the Bush administration used its political and economic influence to force the Security Council to re-write the law of occupation, empowering the United States and the United Kingdom to carry out the transformation of post-Saddam Iraq along neo-liberal lines. While the Security Council did pass the resolution unanimously, it could not engineer the legitimacy the occupying powers needed to convince the international community to send peacekeepers and financial resources to stabilize and transform Iraq. Similarly, the CPA's responsibilities and regulations may have been in line with the requirements set out in Resolution 1483 but its lack of legitimacy undermined the CPA's ability to persuade Iraqis of its benign intentions. Thus, Iraqis and the international community understood that the CPA's work was not informed by cosmopolitan principles but by the Bush administration desires to use the transformation of Iraq as a step to strengthen and expand America's hegemony in the heart of the Middle East.[148]

Conclusion

Did the CPA violate the international law of occupation? While its actions seem to contravene the logic that informs this body of law, the CPA's strategies were within the bounds of Resolution 1483, which sanctioned the post-war occupation. Consequently, and similar to the Kosovo experience, the Security Council, using its Chapter VII powers, revised the international law of occupation, allowing the CPA to carry out its plan to transform Iraq according to neo-liberal values. Why did the Security Council rewrite the international law of occupation, especially if it was unwilling to support the American invasion of Iraq?

Building on Vagts's work on the evolution of 'hegemonic international law', this article argues that the combination of American hegemony and the international community's growing support for neo-liberal values and new definitions of sovereignty has fostered an international order that favours American conceptions of intrastate order and reinforces the hierarchical nature of the international system. Even though the international community may have been critical of the Bush administration's decision to oust Saddam Hussein's regime without a mandate of the Security Council, it did not necessarily object to its plan to transform Iraq along neo-liberal lines. In line with the UN's

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[146] Supra note 103 at 289.

[147] Mark Etherington, *Revolt on the Tigris: The Al-Sadr Uprising and the Governing of Iraq* 236-241 (Ithaca, NY: Cornell University Press, 2005).

[148] Carlos L. Yordán, 'America's Quest for Global Hegemony: Offensive Realism, the Bush Doctrine and the 2003 Iraq War' (2006) 110 Theoria: A Journal of Social and Political Theory 125.

work in Kosovo and East Timor, the Security Council worked with the occupying powers to restore international peace and security in the Middle East.

Although legal scholars and international relations researchers have lamented the United States's ability to reshape international law according to its interests,[149] it is important to keep in mind that Washington had to work hard to get Resolution 1483 passed. Indeed, negotiations between the members of the Security Council on the draft document tabled by the Bush administration and its coalition partners demonstrate that the UN did not fully capitulate to American interests. For the Bush administration, a new resolution was necessary to legitimize its plans to transform Iraq and to call on other states to contribute peacekeepers and to help finance post-war efforts. Even though the Security Council unanimously passed the resolution, the CPA's programme did not receive widespread Iraqi support. Equally important, the international community did not send troops to Iraq or pay for its reconstruction, forcing the United States and its partners to assume complete responsibility over post-war Iraq.

Resolution 1483 may have called on the CPA to observe the international law of occupation, but its provisions clearly endorsed the CPA's plan to transform Iraq according to neo-liberal values. Although the Security Council seems to have succumbed to American pressure, its decision was in line with the international community's belief that long term peace and stability can be attained by transforming war-torn societies along neo-liberal lines. The UN's experience in Kosovo and East Timor illustrates this perspective's strength. These neo-liberal values may mirror American values but the growing influence of democratic states in the UN serves as a reminder that these are not solely American views. Similarly, Resolution 1483's revision of the international law of occupation did not give the CPA *carte blanch*; its activities were closely monitored by the Security Council via the reports submitted by the UN Secretary General's Special Representative in Iraq. More importantly, the Resolution made it clear that the CPA had to work alongside an Iraqi interim government and limit its activities to one year. These provisions were in line with the standards set out in the Fourth Geneva Conventions of 1949 and they were used to force the CPA to take into consideration Iraqi interests as they set out to transform their war-torn society.

Given that the Security Council did not fully succumb to American interests, is Resolution 1483 an example of American hegemonic international law? As noted in section I, the United States will be able to force the Security Council to rewrite established international rules but it will not always get all that it wants. Indeed, the hegemon, while a strong power, is not omnipotent.[150] It will have to take into consideration the views of

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[149] See, Fox, *supra* note 99; and Marco Sassoli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers' (2005) 16 Eur. J. Int'l L 661.

[150] Michael Cox, 'September 11th and US Hegemony – or Will the 21st Century be American Too?' (2002) 3:1 International Studies Perspectives 53 at 64.

secondary states in hopes that it will gain a token of legitimacy for its policies. Similarly, secondary states will have to yield to American interests, as the United States has the capacity to work outside the international legal system, calling into question the *status quo* and forcing the hegemon to consider new ways of advancing its interests. By definition, hegemonic international law benefits the hegemon at the expense of the interests of secondary states. Thus, Resolution 1483 is an outcome of American hegemony as it legalized the Anglo-American occupation and its project to transform Iraq along neo-liberal lines.

The emergence of a system of cosmopolitan international law may still be a distant reality but it is not clear that the present condition is giving way to a system of imperial law either. The best description of the current status of international law is this article's understanding of hegemonic international law, where the United States enjoys a substantial amount of influence over international institutions and the ways these institutions define and deal with threats to peace and international stability. However, America cannot guarantee that these institutions will always yield to its needs or interests, forcing it to negotiate with other states to advance its interests. In this way, hegemonic international law sits uncomfortably between the promises of cosmopolitanism and fears of American imperialism.

Manufacturing Threats: Asylum Seekers as Threats or Refugees?

SCOTT D. WATSON*

Introduction

Since the terrorist attacks of September 11, 2001, the issue of cross-border movement into Canada has not merely become a prominent item on the political agenda, it has been thoroughly securitized. While this has had a significant impact on several facets of Canadian border policy, including Canada's economic security vis-à-vis trade with the U.S., perhaps the most significant impact has been on individuals seeking protection in Canada and on the importance of international refugee law. The increased use of detention and deportation and the implementation of a safe third country agreement with the U.S undermine the humanitarian principles of international refugee law[1] that have been a fundamental aspect of Canada's approach to asylum seekers and refugee claimants. As significant as these post-9/11 changes have been, it is, in fact, not the first time in Canada's history that Canadian political elites have sought to 'securitize' the issue of asylum seeking and have sought to alter their commitments under the international refugee regime.

Immigration and security have been tightly linked throughout Canada's history, dating back to the racially exclusive nature of Canada's earliest immigration policies. The Canadian state has long employed exclusion clauses to prevent the potential entry of persons considered a risk to Canadian national security – defined in various ways throughout Canada's history. Even Canadian refugee policy, often considered the exemplar of Canada's humanitarianism, has long been connected with security concerns. The makeup of refugee intakes and the nature of post-intake surveillance of refugees have often reflected strategic Cold War interests[2] and fears over the demise of Canadian ideological cohesion[3] as well as fears of importing supporters of various national liberation and terrorist movements.[4] Concerns over the security implications of the 1951 Convention Relating to the Status of Refugees ('Refugee Convention'), namely the ability to deport individuals who were a threat to

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[1] I posit that there are four fundamental principles of the international refugee regime: non-refoulement (customary), legal processing of claims (Articles 16 and 32), non-arbitrary detention (Hathaway and Dent, UN Executive Committee Conclusion 44) and non-punishment based on mode of entry (Article 31, UN Executive Committee Conclusions 15, 22, 44 and 58).

[2] Reginald Whitaker 'Refugees: The Security Dimension' (1998) 2:3 *Citizenship Studies* 413.

[3] Gerald Dirks *Canada's Refugee Policy: Indifference or Opportunism* (Montreal, McGill-Queen's University Press, 1977) at 258.

[4] Sharryn J Aiken 'Manufacturing "Terrorists": Refugees, National Security and Canadian Law' *Refuge* 19:3 (2000) at 55.

national security, even delayed Canada's signing and incorporation of that pivotal international agreement.[5]

At the same time, Canada's refugee policies since the Second World War have also reflected a strong humanitarian commitment, demonstrated by Canada's large-scale refugee resettlement program, its commitment to the principles of the international refugee regime and the treatment it has afforded to those who arrive on its shores seeking refugee status. Compared with other states, Canada's treatment of asylum seekers has been generous, offering asylum seekers a full and fair determination process, considerable socio-economic rights while their claims are processed and protection from being deported to states where they face persecution. Canada's humanitarianism toward refugees has even been acknowledged by the United Nations High Commission for Refugees (UNHCR) when the Canadian people were awarded the Nansen Medal, the only people given such an honour.

While refugees and asylum seekers – like most potential Canadian immigrants – face security checks prior to entry into Canadian society to establish whether or not they are a threat to Canadian security, the dominant discourse on refugee and asylum seekers in Canada has not been securitized. The Canadian immigration and refugee determination system is designed to weed out security threats but, on the whole, treats unauthorized humanitarian migration as a normal, manageable and necessary element of international politics. Thus, the normal, or dominant discourse relating to refugees and asylum seekers in Canada reflects both security and humanitarian concerns. Challenges to this dominant discourse occur with regard to particular refugee movements – either by 'humanitarians', who reject the notion that some unauthorized migrants may not be in need of protection and may, in fact, pose a threat to the nation's security, or by 'securitizers' who contend that all, or most, unauthorized migrants are 'bogus' refugees, criminals, terrorists or otherwise threaten the nation by virtue of the magnitude of the flow.

Altering the dominant discourse toward either the humanitarian or securitized position would permit or even force Canadian political elites to fundamentally alter the manner in which the Canadian state deals with asylum seekers and refugees. This article is primarily concerned with the impact of a successful challenge by the securitizing discourse – such as we have witnessed post 9/11. This article demonstrates that the consequence of successful securitization is to narrow the range of appropriate responses to unauthorized humanitarian arrival. The result is a limiting of the government's options to deterrence and detention policies to the exclusion of the normal procedures for processing refugee claims that were reflective of Canada's concern for humanitarian principles as well as domestic security concerns.

The ability to challenge the dominant discourse relating to Canadian refugee policy, and to alter the manner in which the state deals with asylum seekers, raises a number of important questions. How is it that a relatively small number of asylum seekers were re-construed as a threat to the Canadian state? Furthermore, who decides

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[5] Reginald Whitaker *Double Standard: the Secret History of Canadian Immigration* (Toronto: Lester and Orpen Dennys, 1987) at 57-58.

when a development constitutes a crisis requiring emergency response? In essence, who defines security, and how?

To answer these questions, I examine two asylum seeker 'events' in detail, revealing how the issue of asylum seeking has been constructed as a national crisis requiring an emergency response, and revealing what actors played a critical role in that process. In each crisis, I examine the discursive practices of political leaders and the media, to demonstrate how these actors challenged the humanitarian representation of asylum seekers and contributed to the securitizing discourse. To do so, this article employs a thematic textual analysis of these episodes in four Canadian daily newspapers and one national newsmagazine. I examined the news and editorial content of the *Globe and Mail*, the *Toronto Star*, the *Vancouver Sun*, the *Montreal Gazette* and *Macleans* over the period July 1986 – August 1987. All articles, editorials and letters in each source were categorized as humanitarian or securitized; based on their representations of the asylum seekers and the Canadian state. In addition to the analysis of media texts, I also examined political speeches and parliamentary debates during this period.

Through the examination of migration crises in Canada, this article helps illuminate how security is defined and what actors are most pertinent to this process. It does so by tracing the process through which national borders become securitized and by identifying factors that impact the likelihood of success of these securitizing attempts.

Securitization and Migration

Securitization, associated with Barry Buzan, Ole Waever and the Copenhagen School, is the process whereby existential threats to a designated referent object, such as the state or society, are identified and, if the process is successful, acted upon through the implementation of extraordinary measures. For securitizing claims (statements that identify the existential threat and the referent object) to be successful, the credibility of the claim and the social position of the securitizing agent are important factors.[6] Thus, not just anyone can 'speak security' or make credible claims regarding existential threats; one must have sufficient social capital and be in a position of authority. Buzan and Waever identify a number of potential securitizing actors; of note, they identify political leaders[7], military/security managers, such as military, police and intelligence agencies[8] and, in the case of societal security and migration issues, the media[9]. Through the empirical examination of multiple migration securitizing crises, I have found that political elites, the media and military/security managers play the most important role in the securitizing process, and as such, are the focus in this article.

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[6] Buzan *et al.*, *Security: A New Framework for Analysis* (London: Lynne Reinner, 1998) at 32-33.

[7] *Ibid.* at 40.

[8] *Ibid.* at 55.

[9] *Ibid.* at 124.

Of course, these groups still have to convince an audience of the credibility of their claim. The credibility of a claim depends not only on the speaker, but also on the nature of the threat and the referent object. According to Buzan, Waever *et al.*, migration is a credible security issue – that is, one that is commonly constructed as a threat to society – because migration threatens to alter the current ethnic or religious composition of society.[10] Along a similar vein, Huysmans argues that migration can further be portrayed as a threat to fundamental components of the national identity, such as supra-national integration processes and the continuation of the welfare state. Consequently, there are various ways in which migrants could be portrayed as threatening during a securitization attempt. The most striking example of societal security concerns regarding migration to Canada occurred in the late 1800's and early 1900's with respect to Chinese immigration. As Kelley and Trebilcock document in detail, a significant portion of Canadian societal and political elites felt that 'the Chinese way of living compromised the safety of other communities'.[11] Commensurate with this discourse on Chinese immigrants, immigration restrictions were put in place to limit Chinese immigration to Canada.

The measures taken to prevent Chinese immigration are indicative of successful securitization, whereby extraordinary means are implemented to block the threatening development. According to Buzan and Waever, these extraordinary means ultimately impact interunit relations by breaking free of normal rules.[12] Once an issue becomes successfully securitized, political or societal leaders implement extraordinary measures to counteract the threat, usually through the use of force, though not exclusively.[13] In the case of migration, implementing extraordinary means usually involves the use of the coercive capacity of the state to detain and deport the offending group in order to deter or prevent further arrivals or to otherwise ensure that the offending group remains marginalized in society.

In cases where state leaders securitize the issue of migration, they break free of the normal rules of immigration and border control: first, by violating current legislation governing the treatment of migrants and second, by making these violations the norm by passing new legislation authorizing the extraordinary measures taken. In instances where societal leaders securitize the issue rather than state leaders, the extraordinary measures introduced are not explicitly sanctioned by the state and involve practices ranging from discriminatory hiring practices to violence against migrants – practices evident in a growing number of European countries. Such

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[10] O. Waever *et al.*, *Identity, Migration and the New Security Agenda in Europe* (New York, NY: St. Martin's Press, 1993).

[11] Ninette Kelley & M. Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration* (Toronto: University of Toronto Press, 1998) at 95.

[12] B. Buzan, O. Waever & J. de Wilde, *Security: A New Framework for Analysis* (Boulder: Lynne Reinner, 1998) at 26.

[13] O. Waever, 'Securitization and Desecuritization' in R. Lipschutz, ed., *On Security* (New York: Columbia University Press, 1995) 46.

practices break free of the normal rules governing the relationship between individuals and groups in a society.

Individuals crossing an international border may represent a threat to the state or society in a variety of ways, not just to the current ethno-cultural composition of society. They may also represent a threat to the economic stability or physical integrity of the state and its individual citizens. Under this construction, criminals, terrorists, those with highly contagious diseases or those likely to be economically dependent on the state represent a threat to the state and society. Such concerns are evident throughout Canadian history. Not surprisingly, and as noted in the introduction to this article, this aspect of international migration has been securitized since the early twentieth century. Throughout its history, the Canadian state has consistently placed entrance restrictions on those with serious contagious diseases such as tuberculosis, those likely to be dependent on the state for their economic well being, serious criminals and those deemed terrorists.[14]

Security concerns necessitating control of the border has made unauthorized migration a particularly problematic issue. Unauthorized migrants are essentially unknown, since representatives of the state do not know whether unauthorized migrants belong to a previously securitized group of migrants, such as terrorists or those carrying communicable disease, or whether they belong to another non-securitized categorization, such as refugees or economic migrants. Furthermore, unauthorized migrants represent a problem for the state because they circumvent state efforts to control the borders and, in doing so, demonstrate the inability of the state to fully control cross-border movement. The issue is even more complex because refugees and humanitarian migrants often have to enter the state illicitly in order to escape their home state. In states that have signed the 1951 Refugee Convention, and for whom the admission and protection of humanitarian migrants is a fundamental element of the national identity, this is a particularly difficult issue. According to the Convention, refugees are not to be punished for entering the state illegally or without proper documentation. Consequently, states have had to balance two fundamental components of the constructed national identity: maintaining their 'humanitarianism' by upholding their international commitments to refugees, and protecting the 'national interest' by ensuring criminals, terrorists and those with contagious diseases do not gain access to the state.

Most western states have attempted to strike a balance between the competing values consistent with these identity constructs, by setting up a refugee determination process, whereby asylum seekers are permitted to enter the state on a temporary basis in order to demonstrate that they are, in fact, refugees – regardless of their mode of entry. Thus, over time, in keeping with the principles of the international refugee regime, the normal rules governing the entry of asylum seekers have been established. Asylum seekers, regardless of how they entered the state ('non-

[14] For an overview of Canadian immigration and those excluded, see Kelley & Trebilcock, *supra* note 11; Dirks, *supra* note 3 and Freda Hawkins, *Canada and Immigration: Public Policy and Public Concern* (Montreal: McGill-Queens University Press, 1988).

punishment'), would not be refouled ('non-refoulement') until they had access to a legal determination of their refugee claim, which would be both reviewable and in accordance with the laws of the country ('legal processing of claims'). Their basic needs would be covered during the determination process and they would not be subject to arbitrary detention for the duration of the determination process ('non-arbitrary detention').[15] If an asylum seeker's claim to the 'refugee' identity construct is rejected in accordance with the legal determination process, the receiving state is no longer bound by the obligations it owes to refugees, or the temporary obligations owed to asylum seekers.

Thus, in the case of successful securitization, the norms and rules of the international refugee regime and domestic legislation pertaining to the refugee determination process are challenged and broken. As the identities of asylum seekers are challenged by securitizing actors who cast them as a security threat rather than the object of threat in their home state, their relationship to the receiving state is altered. When the asylum seeker identity is successfully reconstructed such that they are no longer identified as potential refugees, the humanitarian state is no longer bound by the rules governing the relationship between humanitarian states and asylum seekers. Consequently, successful securitization results in one or more of the four normal rules outlined in the previous paragraph being broken and replaced by other, more restrictive policies.

At its core, the securitized discourse reconstructs the identity of the asylum seeker and reifies the identity of the state, essentially denying its multiple identities, values and goals. In this discourse, the receiving state is portrayed strictly as a sovereign state with a right to determine who can and cannot enter the state and with a need to prevent the current influx,[16] while its humanitarian identity is either ignored or portrayed as a source of weakness that is being exploited by those threatening the state.

Paradoxically, in these instances, it is often the state's humanitarian identity that is portrayed as requiring protection. The state's ability to maintain its humanitarian identity is constructed as dependent upon its ability to maintain its basic sovereignty – interpreted as maintaining control over the border. Thus, in the securitized discourse, the state's humanitarianism is either being used by the asylum seeker to undermine their sovereignty or actually being threatened internally by a decline in humanitarianism due to the arrival of the asylum seekers.

While there are various manners in which the unauthorized humanitarian migrant can be portrayed,[17] there are two primary ways in which the asylum seeker is construed as a threat to the state. The first is as belonging to a class of migrants

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[15] Though the exact duties prescribed by the Convention are contested, in practice, these are the basic principles contained in the 1951 Convention Relating to the Status of Refugees, articulated by the Executive Committee of the UNHCR and identified *supra* note 1.

[16] Peter Gale, 'The Refugee Crisis and Fear: Populist Politics and Media Disclosure' (Dec. 2004) 40 Journal of Sociology 321.

[17] See Peter Nyers, *Rethinking Refugees* (New York: Routledge, 2006).

already securitized and, consequently, excluded from the state – notably criminals, terrorists or those infected with contagious disease. The second is as a threat to the ability of the state to control its borders, primarily by virtue of the magnitude of the flow of asylum seekers. In both instances, the discourse of threat implies that it is imperative that the state ensures that the asylum seekers remain outside the community. As asylum seekers become cast as a threat to the state, the state is forced to enact emergency measures, breaking the normal rules noted above. In essence, this means preventing their arrival, or, if they have already arrived, keeping them out of the community. This strategy is what migration scholars refer to as a policy of deter, detain and deport.

While the securitization of migration has become an accepted component of international politics and is now relatively well-established in the literature on international security,[18] there is a surprising lack of empirical evidence of the process, particularly respecting cases outside the European Union. This article aims to help rectify this deficiency. In the following section, I show how this process has occurred in the Canadian context. The two Canadian cases examined in the next section of the article demonstrates how asylum seekers have been constructed as a threat, identifying actors central to the process and factors likely to impact the success of securitizing attempts.

Background

During the 1980's, the number of asylum seekers arriving on Canada's shores increased dramatically. In 1980, fewer than 1,600 asylum seekers reached Canada's shores; in 1986, there were 18,000 asylum seekers.[19] Canada's refugee determination system was ill designed to cope with the number of refugee claims. Consequently, as the number of asylum seekers increased, there was a growing backlog of cases to be resolved. The Liberal government in the early 1980's, and the subsequent Conservative government, regarded the backlog as a growing political problem, yet there is little indication that it was regarded in any way as a national crisis or a threat to Canadian security. Consequently, asylum seekers continued to be processed in line with Canada's relatively generous refugee determination system.

There was, however, a consensus amongst all political parties that changes needed to be made to Canada's refugee determination process to reflect its new identity as a country of first asylum. The Liberal Government authorized two reports on the issue: the Ratushny Report and the Plaut Report. Both reports recommended streamlining the process, though they differed significantly in some areas. The Ratushny Report recommended tightening the determination process to exclude a

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[18] For example, see Waever, *supra* note 10; N. Poku & D. Graham, eds. *Redefining Security: Population Movements and National Security* (Westport: Praeger, 1998); and R. Miles & D. Thranhardt, eds., *Migration and European Integration: the Dynamics of Inclusion and Exclusion* (London: Pinter, 1995).

[19] Alan Nash, *International Refugee Pressures and the Canadian Public Policy Response* (Ottawa: Institute for Research on Public Policy, 1989) at 34.

number of claimants and to streamline the process,[20] though it was essentially ignored. The Plaut Report recommended minor changes to speed up the process, but changes that highlighted Canada's humanitarian approach.[21] The Plaut Report received much more 'air time' than the Ratushny report, and was tabled in Parliament in 1985. Until the events of 1987, it appeared that the Plaut Report would serve as the general guideline for legislative reform of the refugee determination process.[22]

Rather than overhaul the refugee determination system as recommended by both reports, the Conservative government adopted rather ad hoc measures to deal with the backlog issue. The two primary tools the government implemented to solve the growing problem was an administrative review process (an amnesty in all but name) as well as a fast track process for claimants from particular countries known to produce refugees (identified by the newly created B-1 list).[23] Both policies were aimed at resolving the backlog problem and speeding up the refugee determination process, yet they clearly reflect a greater concern with maintaining a humanitarian approach than with Canadian national security.

Despite the ad hoc, humanitarian approach of the amnesty and B-1 list, it is clear that the government was motivated by security considerations as well. During this same time, visa requirements were introduced for a number of countries producing questionable refugee claims[24] and the surveillance of refugees and immigrants continued in an effort to identify 'threats to the security of Canada'[25] – both of which are indicative of a greater concern for national security than for the security of individual asylum seekers. Yet, the general approach of the Canadian government to the asylum seeker issue does not demonstrate a prevailing concern for security but, rather, demonstrates a concern with upholding humanitarian values. Asylum seekers that arrived in Canada at this time were released into the Canadian population rather quickly (usually less than two days), very few were detained for any length of time and most were given extensive socio-economic rights, including work and travel rights. The Canadian tendency to favour humanitarian over security concerns is further illustrated by the initial response to the 1986 arrival by boat of a group of Tamil asylum seekers.

The 1986 Arrival

The discourse emanating from the media and political elites pertaining to the 152 Tamil asylum seekers reveals a strong humanitarian component. From the outset of

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[20] Ed Ratushny, 'A New Refugee Status Determination Process for Canada,' submitted to the Minister for Employment and Immigration, Ottawa: Supply and Services, 1984.

[21] Gunther Plaut, 'Refugee Determination in Canada: Proposals for a New System,' submitted to the Minister for Employment and Immigration, Ottawa: Supply and Services, 1985.

[22] Nash, *supra* note 19.

[23] *Ibid.*

[24] Kelley & Trebilcock, *supra* note 11 at 415.

[25] Aiken, *supra* note 4 at 62-64.

the 1986 episode, the asylum seekers were portrayed as individuals with legitimate refugee claims, characterized as refugees fleeing persecution in Sri Lanka. According to the newspaper coverage at the time, 'the Tamil minority in Sri Lanka fear persecution'; 'conflict (had) turned Sri Lanka into a killing ground' and Sri Lanka was a country that was 'embroiled in civil war'.[26]

The message relayed by the media was that the past success of Tamils bolstered the current group's identity claims: by reporting that Sri Lanka was one of the countries on the B-1 list (the list of 18 states to which Canada would not deport people because of repressive regimes); that refugee claimants from Sri Lanka ranked third overall in Canada with over 1920 claims in the past five years; and that, of those claims, over 960 had been accepted, an acceptance rate of close to 50%.[27] Additionally, the terminology employed by the Canadian media depicted the Tamils as refugees. The newspapers and news magazines almost exclusively used the term 'refugees' to describe the arrivals. The use of this term, prior to an actual determination process to establish their refugee identity claim, served to construct the asylum seekers as victims that had a genuine claim to the protection of the Canadian state under international law. Use of the term 'castaways' also maintained the humanitarian discourse.

The term 'castaway' served to construct the asylum seekers as victims as it emphasized their plight on the open ocean and their helplessness due to abandonment at sea. They were further constructed as helpless victims by the coupling of humanitarian terms such as refugee and castaway with a narrative account of being 'rescued' by Canadian fishermen, after being 'abandoned' by the transport ship's captain.[28] In nearly all accounts, the captain was accused of the 'transporting', 'smuggling', 'unloading', and 'casting away' of 'Tamil refugees'[29]. In only a very few cases were his activities described as smuggling 'illegal migrants', a construction that has been visited on many others in reasonably comparable situations, in Canada and Australia as well as most other countries around the world. The intense media attention devoted to finding the ship and its captain was due to the overall perception that the captain had 'abandoned refugees at sea' and had 'exploited refugees'.[30] This narrative further emphasized the asylum seekers' victimhood. Contributing to the

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[26]Ann Finlayson, 'Violence in Paradise,' *Macleans*, August 25, 1986 14-5; and Canadian Press, 'Sri Lanka: Each Day brings more terror' *Montreal Gazette*, August 13, 1986 2.

[27] Nash, *supra* note 19.

[28] Ron Lowman, '152 Castaways rescued by fisherman after 5 days adrift off Newfoundland,' *Toronto Star*, August 12, 1986 1; John Picton, 'Skipper now confesses: I took Tamils to Canada.' *Toronto Star*, August 29, 1986 1; and Canadian Press, 'Castaways wet, hungry say rescue skippers,' *Montreal Gazette,* August 13, 1986 2.

[29]Canadian Press, 'Castaways' vessel located off Azores,' *Globe and Mail*, August 16, 1986 1, 'Ship Captain Denies he smuggled Tamils,' *Vancouver Sun*, August 16, 1986 1, 'Smuggling scheme was captain's idea, 2 Sri Lankans say,' *Globe and Mail*, August 19, 1986 4; and Bill Schiller, 'Refugee ship captain broke no law, lawyer says,' *Toronto Star*, August 28, 1986 3.

[30] Nick Auf Der Maur, 'Response to refugees has depressing tone,' *Montreal Gazette*, August 20, 1986 2; Canadian Press, 'Accepting Castaways lauded by opposition,' *Globe and Mail*, August 17, 1986 5; 'Canada needs to stop refugee exploitation, cleric says,' *Toronto Star*, August 15, 1986 4.

humanitarian discourse was the attribution of passive characteristics to the asylum seekers such as: 'living in fear', 'found adrift', 'fleeing', 'fleeing violence', 'rescued', 'discharged', 'forced to leave', 'smuggled', and 'cast away'.[31]

In addition to portraying the asylum seekers as victims of the Sri Lankan state and a sea captain who abandoned refugees at sea, the media portrayed Canada as a humanitarian country that offered protection to those fleeing danger. In the news articles, editorials and letters to the editor, Canada's action in permitting entry to the 152 Tamil refugee claimants was described as 'welcoming', 'sympathetic and understanding', 'humanitarian and generous', 'commendable' and 'morally responsible'.[32] At the same time, calls from those challenging the Canadian government's decision were called 'unthinkable', 'small-minded and ignorant', 'devoid of compassion' and a 'knee jerk reaction' to 'racist backlash'.[33]

Coverage of the incident by four major daily newspapers clearly favored a humanitarian discourse, as illustrated in Table 1.

TABLE 1: HUMANITARIAN MEDIA CONTENT: AUG 13-OCT 7,1986

% Humanitarian (Total)	Front Page	Articles	Editorials	Letters
Globe and Mail	67% (18)	89% (55)	100% (4)	53% (15)
Toronto Star	81% (42)	84% (75)	100% (4)	44% (27)
Vancouver Sun	43% (7)	74% (27)	0% (2)	25% (4)
Montreal Gazette	79% (14)	61% (33)	100% (3)	43% (21)
Macleans	100% (1)	100% (4)	-	67% (3)
Total	74% (82)	80% (194)	85% (13)	46% (70)

[31] Mark Kingwell, 'Canada best of choices, US spokesman says,' *Globe and Mail*, August 13, 1986 4 and Alan Story, 'Fisherman informed coast guard blip may have been mystery ship,' *Toronto Star*, August 14, 1986 16.

[32] See, for example: Robert Brehl, 'Canada's policy called "humanitarian",' *Toronto Star*, August 16, 1986 6; David Miller, 'Mississauga family welcomes exhausted refugees into home,' *Toronto Star*, August 15, 1986 4; Joe O'Donnell, 'Show compassion for Tamil refugees Mulroney urges,' *Toronto Star*, August 18 1; Canadian Press, 'Accepting Castaways lauded by opposition,' s*upra* note 30; Joe Serge, 'How Canada treats people seeking asylum,' *Toronto Star*, August 14, 1986 20, and 'Metro Tamils open homes for brethren found at sea,' *Toronto Star*, August 14, 1986 16; and Globe and Mail Staff, 'A passage to Canada,' *Globe and Mail*, August 13, 1986 6.

[33] A few examples are: Marjorie Nichols, 'BC bears shame of VanderZalm's racist view of migrants,' *Vancouver Sun*, July 28, 1986 7; Canadian Press, 'Doors open to those seeking freedom,' *Globe and Mail*, August 17, 1986 1, 5; Montreal Gazette Staff, 'Is protest against Tamils racism?' *Montreal Gazette*, August 25, 1986 2; Toronto Star Staff, 'PM shows heart on Tamil refugees,' *Toronto Star*, August 19, 1986 14.

As table 1 indicates, the dominant representation of the boat arrivals was humanitarian. 74% of the 82 front-page articles maintained a humanitarian discourse, describing the asylum seekers as having legitimate refugee claims and permitting their entry as fulfilling Canada's international obligations. 80% of the 194 other articles and 85% of 13 editorials sustained this discourse. Notably, less than 46% of 70 letters to the editors supported the humanitarian discourse – a subject to which I will return below.

The humanitarian portrayal of the Tamil asylum seekers was largely consistent with the humanitarian discourse that was the norm in Canada with regard to asylum seekers. Consequently, the asylum seekers were treated in the same manner that other asylum seekers had been – after initial security checks had been completed they were given permits to enter Canada, which allowed them to find employment while their refugee claims were being processed. The humanitarian discourse was so dominant that the notion that the Tamil asylum seekers may not actually qualify for protection in Canada was rarely expressed in the early stages of the episode. It was not until the media uncovered that the asylum seekers had actually embarked on their journey from Germany, where they already technically enjoyed protection, that competing discourses arose. While Canadian law dictated that their applications still be processed, having arrived from Germany was an element of their journey that opened the way for securitizing actors to identify the asylum seekers as migrants 'shopping' for an ideal migration outcome, rather than fleeing persecution.

The governing Conservative Party publicly supported the humanitarian construction of the asylum seekers. Prime Minister Brian Mulroney repeatedly emphasized Canada's humanitarian tradition in dealing with refugees. In the face of public opposition to permitting entrance to the asylum seekers, on August 18, PM Mulroney urged 'Canadians to show compassion' to the Tamil refugees and argued that 'Canada's humanitarian traditions dictate that they not be turned away'.[34] Again, on September 6, he defended the decision to grant the Tamils entry by comparing the Tamils to Jewish refugees in World War Two and explicitly stated that 'refugees are welcome in Canada and we will open the doors'.[35] The government quickly rejected claims that the asylum seekers were terrorists by asserting that security checks had been completed, and that there was no connection between the refugees and militant groups.[36]

The Liberal and New Democratic parties initially supported the government's approach to the asylum seekers and endorsed the course of action they had taken. On August 18, Ed Broadbent of the NDP and John Turner of the Liberals publicly lauded the response of the Mulroney-led Conservative government.

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[34] Joe O'Donnell, 'Show compassion for Tamil refugees Mulroney urges,' *supra* note 32.

[35] Joel Ruimy, 'People trust me despite the polls, Mulroney says,' *Toronto Star*, September 6, 1986 A.12.

[36] Joe O'Donnell, 'No evidence Tamils tied to militants, Ottawa says,' *Toronto Star*, August 20, 1986 1.

Broadbent stated that 'providing refuge was the only option' while Turner stated that 'Tamils had to be given temporary shelter in Canada'.[37]

Despite the dominant humanitarian discourse evident in the media coverage of the incident and articulated by Canadian political elites, there were clear indications of hostility within the Canadian populace. The majority of the letters to the editors and a few editorials revealed the deep suspicion with which the asylum seekers were regarded. Many claimed that the refugees were 'bogus' or 'illegal' and depicted Canada as 'a dumping ground', a 'soft touch', as 'suckers' or as 'gullible'.[38] This discursive challenge sought to construct the asylum seekers as economic migrants and Canada not as a humanitarian or generous country, but as having fallen for some elaborate trick. Canada's humanitarianism was not to be praised but, rather, to be corrected and stopped. Based on the percentage of letters to the editor and anecdotal evidence from MPs regarding the number of calls their office received, there is evidence to suggest that this perception of the asylum seekers and Canada was well supported within the public at large.[39] Opinion polls also seem to support this. An Angus Reid poll, published in the Toronto Star on September 29, 1987 noted that 58% of Canadians favored a policy review to allow fewer refugee entries, 18% felt Canada should do more for refugees, while 17% wanted no change to the current policy.[40]

As the episode wore on and public opposition became evident, Liberal leader John Turner sought to take advantage of public hostility and challenged the government's response to the asylum seekers. By late August, he was critical of the government for acting too hastily and for not completing a more thorough investigation into their story before allowing them into Canadian society. Turner stopped short of depicting the asylum seekers as a threat but did publicly question whether they should have been admitted so quickly and without investigating their story first. Turner accused the government of not making refugee policies clearer to the Canadian public, which, Turner claimed, fuelled the public backlash against the refugees.[41]

The governing Conservative Party also showed signs of internal disagreement over the decision to admit the asylum seekers in the normal way. Immigration Minister Benoit Bouchard warned that the refugees 'could open the

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[37] Canadian Press, 'Canada right to accept Tamils, Turner declares,' August 16, 1986 6.

[38] Rod Ludlow, 'Immigration system open to abuse: bogus refugees jump the line while others face wait of years,' *Vancouver Sun*, August 17, 1986 3; Toronto Star Staff, 'How Canada's papers view the 155 refugees,' *Toronto Star*, August 15, 1986 21; Hugh Winsor, 'PR flurry an attempt to paper over Tamil immigration gaffes,' *Globe and Mail*, August 25, 1986 2.

[39] Canadian Press, 'Public outrage greets refugee entry,' *Montreal Gazette*, August 16, 1986 2; Francois Shalom, 'Connection to Germany still denied,' *Globe and Mail*, August 16, 1986 4; David Vienneau, 'Confusion over laws blamed for backlash against refugees,' *Toronto Star*, August 20, 1986 8.

[40] Toronto Star Staff, 'Canada outdoes others in accepting refugees, poll says,' *Toronto Star,* September 29,1987 3.

[41] Joe. O'Donnell, 'Ottawa erred in giving permits to Tamils so quickly,' August 21, 1986 8.

doors' to a flood of Third World castaways and that Canada would need to review its refugee policies.[42] Other Conservative backbench MPs raised concerns over the government's quick acceptance of the asylum seekers.[43] In response to the perceived public backlash, divisions within its own party and increased pressure from the leader of the Liberal Opposition, the government initiated a review of Canada's refugee policies, and by February of 1987 had introduced legislation (Bill C-55) designed to streamline the refugee determination process and prevent false refugee claims.

Securitization in 1987

While the 1986 episode illustrates the relatively humanitarian response of Canadian officials to unauthorized asylum seeker arrivals, it also revealed a potentially hostile public, created divisions among the political elite and highlighted deficiencies in the Canadian refugee determination system. By the end of the 1986 episode, there was a significant challenge to this humanitarian approach, one that highlighted the security component of Canada's refugee policy. In this discourse, the government's quick acceptance of the asylum seekers demonstrated the lack of security screening given to refugee claimants. The government's response was also depicted as a contributing factor to the growing backlog of cases and the public backlash against asylum seekers. By early 1987, it was widely asserted by the media and the governing party that Canada's refugee determination system was being abused by non-genuine claims and that the significant backlog of claimants in the system necessitated legislative changes. At that time, the Conservative government introduced Bill C-55, a piece of legislation designed to speed up the refugee determination process and to exclude certain individuals from the determination system, including those who had already been recognized as a Convention refugees in another state, those making a repeat claim, those who fail to make a refugee claim at the beginning of an inquiry and those deemed a national security risk by the Minister.[44]

The measures proposed in this bill were a result of the growing security concerns expressed toward the end of the 1986 episode. Proposed legislative changes to deal with the growing backlog had been in the works since at least 1984 when the Ratushny report was first commissioned.[45] The Plaut Report, with its humanitarian focus, had seemed to be the guiding principle for legislative reform. Immigration minister Flora MacDonald commended the report and its author and hinted that a legislative package based on the report would be tabled in early 1986.[46] Despite all of

[42] Canadian Press, 'Refugees "tip of iceberg",' *Montreal Gazette*, August 14, 1986 1.

[43] Joe O'Donnell, 'Show compassion for Tamil refugees Mulroney urges,' *supra* note 32.

[44]Nash, *supra* note 19.

[45] Recommendations for legislative change to the refugee determination system date back to 1981, with the Robinson report, but by 1984 there were expressed concerns over dealing with the backlog. Both the Ratushny and Plaut report were to address that problem.

[46] Charles Campbell, *Betrayal and Deceit: The Politics of Canadian Immigration* (Vancouver: Jasmine Books, 2000) at 75.

the concerns expressed prior to the summer of 1986 and a number of commissioned reports, no major legislative changes were tabled until the introduction of Bill C-55 in May of 1987 – which ignored almost all of the recommendations of the Plaut Report. In the face of heavy criticism and internal division exposed by the 1986 arrivals the generally humanitarian approach to legislative reform contained in the Plaut Report had been replaced by the more security conscious approach of Bill C-55.

By the summer recess of 1987, Bill C-55 did not appear to be on its way to becoming law any time soon. The government appeared in no hurry to get the bill passed or even through second reading. The opposition had stalled passage of the bill, and on June 18th recommended suspending second reading for six months. Attempting to get the bill to committee and avoid suspension of second reading, Government MP Jim Hawkes essentially agreed with the opposition and acknowledged the bill's deficiencies, arguing that the proposed law "needed to be changed" and recommended that it be referred to committee where it would "benefit from expert testimony".[47] Bill C-55 was not referred to committee and nothing more was said about the bill before the summer recess of Parliament.

The arrival of 174 Sikh asylum seekers in the summer of 1987 changed the context in which the bill came to be viewed. The discourse constructing the identity of these arrivals was distinctly different from the year previous. The Canadian government and the media challenged the identity claims of the asylum seekers upon their arrival, signaling an important shift away from the dominant discourse concerning asylum seekers that focused primarily on humanitarian considerations.

Media coverage of the arrival of Sikh asylum seekers cast serious doubt on their refugee claims. Despite the fact that India had been a prominent source of refugee claims in Canada, ranking second only to Guyana over the previous five year period, the media was quick to point out that refugee claimants from India had been far less successful in their claims.[48] The *Globe and Mail* and *Toronto Star* reported that very few Indians had been given the status of refugee in Canada since 1982.[49] The *Toronto Star* reported that the 'Canadian immigration boards have, with only six exceptions since 1982, decided that East Indians, including Sikhs, do not suffer religious repression in their homeland.'[50] From the very beginning of this event, media coverage had made it clear that Canadian immigration officials did not regard India as a refugee producing state. The media also reported that, unlike Sri Lanka, India was

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[47] Canada, Hansard, *Debates in the House of Commons*, 32nd Parliament, 18 June 1987 (Jim Hawkes, MP) at 7354.

[48] Alan Story, '174 are unlikely to get refugee status, official says,' *The Toronto Star*, July 21, 1987 8.

[49] Toronto Star Staff, 'Few Indians given status of refugee since 1982,' *Globe and Mail*, July 15, 1987 4; and Toronto Star Staff, 'Are they refugees or queue-jumpers?' *Toronto Star,* July 14, 1987 12.

[50] Alan Story, '174 are unlikely to get refugee status, official says,' *The Toronto Star*, July 21, 1987 8.

not on the B-1 list of countries to which Canada would not remove individuals due to repressive regimes.

The language used in 1987 differed drastically from the year previous. The term 'refugee' was used far less often and less consistently across the papers to identify the 174 Sikh boat arrivals. In the first few days of the episode, many papers did refer to them as refugees, (some even mistakenly referred to them as Tamil refugees) but that quickly gave way to terms more consistent with a securitized discourse. The *Toronto Star* reported that the various newspapers across the country had used 23 different terms to describe the asylum seekers. The Toronto papers, the *Star* and *Sun*, still had used the word 'refugees', but the *Globe and Mail* primarily used 'migrants', while stories from the Canadian Press, which featured prominently in all Canadian newspapers, used national identifiers such as 'East Indians or Asians'.[51]

Across the four newspapers and one news-magazine that I examined, 'migrants' or some variation thereof ('economic migrants', 'illegal migrants', and 'illegal aliens') was the most common term employed to identify the newest arrivals.[52] Employing the term 'migrant' removed humanitarian considerations from the discourse. When the traditional humanitarian term 'refugee' was employed, there were often a host of qualifiers such as 'illegal', 'economic', 'financial', 'would-be', 'legitimate', 'bogus' and 'bona fide' that were used to differentiate between genuine refugees and the current asylum seekers.[53]

More importantly, securitizing agents, such as the RCMP, members of the media and government, portrayed the Sikh asylum seekers as a potential threat to both Canadian and Indian security. The Air India bombing had occurred just two years earlier, and, as such, provided a recent national event on which to draw in the reconstruction of the asylum seekers' identity. Thus, a number of articles and letters connected the arrivals with Sikh 'terrorist' and 'militant' groups[54], terminology that would have been familiar to most Canadians as referring to the perpetrators of the Air India bombing. They were also labeled as 'mysterious', implying that their intentions were hidden and potentially dangerous.[55] This general air of suspicion surrounding the

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[51] Rod Goodman, 'Are they migrants or refugees,' *Toronto Star*, July 18, 1987 2.

[52] Bill Fox, 'Don't let illegal aliens circumvent the system,' *Toronto Star*, August 2, 1987 B.3; Patricia Poirier, 'House meets Tuesday on Migrants,' *Globe and Mail*, August 8, 1987 1; Canadian Press, 'Ottawa to get tough on immigrant-smugglers: Government wants MP recalled to stem the flow of illegals and increase fines and jail terms,' *Montreal Gazette*, July 31, 1987 1; Mike Trickey, 'Alien issue keeping phone wires burning,' *Vancouver Sun*, July 31, 1987 8.

[53] Rod Ludlow, 'Immigration system open to abuse: bogus refugees jump the line while others face wait of years,' *Vancouver Sun*, August 17, 1986 3; Canadian Press, 'All should be detained under supervision, MP says,' *Toronto Star*, July 16, 1987 12, and 'Don't let illegal refugees come to Canada, irate immigrants say,' *Montreal Gazette*, July 22, 1987 1; and Globe and Mail Staff, 'Custody rule could halt bogus refugees,' *Globe and Mail*, August 5, 1987 7.

[54] Peter Edwards, 'Sikh terrorists here worry Gandhi, aide says,' *Toronto Star*, July 21, 1987 1.

[55] Julian Beltrame, 'N.S. set for more boat people; Mystery surrounds "refugees",' *The Gazette*, July 13, 1987 A.1.FRO and Toronto Star Staff, 'Confusion of rumors, denials set stage for mysterious landing,' *Toronto Star*, July 13, 1987 10.

asylum seekers intentions was highlighted by descriptions of the asylum seekers as living in 'secrecy' and 'silence' after they had been freed from detention.[56]

The RCMP played a prominent role in the securitization attempt, by portraying the asylum seekers as a threat. The RCMP publicly announced that seven of the 'refugees said they would kill' if instructed to do so by Sikh terrorist groups[57] and that it had discovered that one of the claimants had killed two men in India, while another had already been deported from Canada for working illegally.[58] These stories, which featured prominently in all four of the print news sources under examination, constructed the asylum seekers as threatening to Canada and Canadian society. These public announcements, from the most prominent Canadian military/security manager, later proved to be either unfounded or untrue, yet they profoundly shaped the discourse on the asylum seekers. Statements from the RCMP regarding security checks on refugee claimants were extremely rare and thus were prominently reported in all news sources under examination, were frequently repeated and created a general sense that the asylum seekers were considered a serious national security threat by one of the Canadian institutions most qualified to make such an assessment. Furthermore, such public statements from the RCMP, an organization that enjoys a prominent social standing from which to discuss security, went virtually unquestioned until lawyers for the asylum seekers attempted to set the record straight. By then, the RCMP and the media had successfully portrayed the asylum seekers as a security threat.

In addition to the construction of the asylum seekers as threatening to Canada, they were also portrayed as representing a threat to India. The Canadian newspapers widely reported that the Indian government had expressed concerns about the asylum seekers, particularly the timing of their arrival.[59] These news articles left the impression that the timing of the arrival of the 174 Sikhs seemed to fortuitously coincide with an upcoming visit to Canada by Indian Prime Minister Rajiv Gandhi. The Indian government's speculation that the asylum seekers might have been sent to Canada for the purpose of assassinating the Indian Prime Minister was widely reported by the Canadian news press. According to the Indian envoy in Canada, Canada had become 'the world's largest exporter of Sikh terrorism', a phrase prominently reported and largely undisputed in the Canadian media.[60]

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[56] Toronto Star News, 'Secrecy and Silence follow 92 refugees to Sikh sanctuaries,' *Toronto Star*, July 30, 1987 1.

[57] Kevin Donovan, '7 Detained refugees said they'd kill if asked, Mounties testified at hearings,' in *Toronto Star* July 24, 1987 1.

[58] Victor Malarek, 'Killed two men in India, immigrant told hearing,' *Globe and Mail*, July 27, 1987 1; Alan Story & Kevin Donovan, 'East Indian says he'd kill if asked, hearing told,' *Toronto Star*, July 23, 1987 1.

[59]Peter Edward, 'Lax Canada top exporter of Sikh terror,' *Toronto Star*, July 20, 1987 1; Peter Edwards, 'Sikh terrorists here worry Gandhi, aide says,' *Toronto Star*, July 21, 1987 1; and Patricia Poirier, 'Foreign Terrorists able to Slip in Undetected, Senate study finds,' *Globe and Mail*, Friday, July 31, 1987 3.

[60] See *ibid.*

Table 2 illustrates that the dominant discourse concerning the Sikh asylum seekers was significantly different than in 1986. Of the total 146 front-page headlines, just 38% portrayed the asylum seekers in a humanitarian way, identifying them as victims in some manner and Canada as having a responsibility to take them in. Over 60% of front-page articles portrayed the asylum seekers in a securitized manner, either as illegal migrants, bogus refugees, Sikh terrorists or some combination of the three. The back-page articles were slightly more favorable to the asylum seekers with close to 60% portraying the asylum seekers in a humanitarian fashion. Even the news magazine Macleans, which had strongly favoured a humanitarian discourse in 1986, adopted a significantly less humanitarian tone in its coverage.

TABLE 2: HUMANITARIAN MEDIA CONTENT: JULY 11-OCT 31, 1987

% Humanitarian (Total)	Front Page	Articles	Editorials	Letters
Globe and Mail	43% (44)	64% (101)	44% (9)	69% (26)
Toronto Star	43% (54)	61% (108)	64% (14)	44% (34)
Vancouver Sun	23% (22)	52% (67)	67% (6)	40% (10)
Montreal Gazette	23% (26)	55% (31)	100% (1)	28% (18)
Macleans		57% (7)		33% (3)
Total	38% (146)	60% (314)	60% (30)	47% (91)

In addition to the media and the RCMP (through the media), the governing Progressive Conservative Party played a prominent role in the securitization attempt. Immediately after the arrival of the asylum seekers, Immigration Minister Benoit Bouchard informed the media and government agencies that the asylum seekers should not be called 'refugees' but rather should be called 'migrants'.[61] Government officials also employed the term 'illegal aliens' to describe the 174 Sikh arrivals, a term that was not widely used in Canada, but more commonly used in the United States to refer to illegal economic migrants.[62] On July 18, the Toronto Star reported that a spokesman for the Prime Minister's office referred to the 174 Sikh arrivals as 'illegal aliens'. Again, with the emergency recall of Parliament in late July, the Star reported

[61] Canadian Press, 'Seized freighter had been in Rotterdam, 2 charged in Nova Scotia as ship drops 174 refugees,' *Toronto Star*, July 13, 1987 1.

[62] Joe O'Donnell, 'Mulroney rules out special treatment,' *Toronto Star*, July 13, 1987 1.

government officials using the term to describe the asylum seekers.[63] The use of this term represented a radical shift from the language used by the Prime Minster's office concerning the 152 Tamil refugees a year earlier. It implied not only that the asylum seekers were doing something illegal, but also that they were alien to Canada and hence did not belong. On another occasion, Bouchard called the asylum seekers 'bogus refugees… because they lie'.[64] The discourse emanating from the governing elites was that these asylum seekers were illegal migrants.

The leader of the Liberal Party, John Turner, played an important role in the securitizing attempt, declaring that had he been leader he would have intercepted and turned back the boat carrying the asylum seekers.[65] He later accused the asylum seekers of exploiting Canada's refugee system, of 'destroying the humane and open way our country deals with visitors and refugees' and of 'underhanded cutting of queues or the jumping of the line'.[66]

Other political elites contributed to the securitized discourse. Canadian military officers were reported as saying that the arrival of the asylum seekers had exposed Canada's long coastline as 'easily penetrated'.[67] Within days of the asylum seekers' arrival, the findings of a task force instructed to examine Canada's immigration security was leaked to the media. The task force, set up well before the arrival of these asylum seekers, found that Canada's immigration security was too lax.[68] The leaked report lent considerable support to the securitized discourse regarding the Sikh asylum seekers. Just one week after the leak, a Senate committee investigation into Canada's immigration program revealed that it found that foreign terrorists were able to slip into Canada largely undetected.[69] The committee's report depicted Canada's refugee determination system to be near collapse.[70] Through the early part of July, it was clear that the dominant discourse portrayed the Sikh asylum seekers as illegal migrants, terrorists and a threat to a Canadian system on the verge of collapse.

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[63] Martin Cohn, 'Parliament being recalled in bid to end refugee abuse' *Toronto Star,* July 31, 1987 1

[64] Toronto Star News, 'Bouchard believes refugees lied about departure from India,' *Toronto Star*, August 1, 1987 11.

[65] John Temple, 'Turner says he would have turned ship away,' *Toronto Star*, July 17, 1987 14.

[66] Toronto Star News, 'Refugees are exploiting laws, Turner tells B.C. constituents,' *Toronto Star*, July 26, 1987 4.

[67]Robert Matas, 'Coast easily penetrated, Canadian officer says,' *Globe and Mail*, July 15, 1987 4.

[68] Richard Cleroux, 'Task Force Condemns Immigration Security,' *Globe and Mail*, July 22, 1987 1 and Peter Edward, 'Report attacks lax security on immigrants,' *Toronto Star*, July 22, 1987 8.

[69] Patricia Poirier, 'Terrorists can slip in, Senate report says,' *Globe and Mail*, Friday, July 31, 1987 3.

[70] David Vienneau, 'Lax screening of immigrants lets in terrorists, senators say,' *Toronto Star*, July 31, 1987 1.

Implementation of Extraordinary Means

The securitized discourse made certain policies acceptable that had hitherto not been seriously considered or enacted. Unlike previous boat and air arrivals, the asylum seekers were detained for a significant amount of time while their identity and security checks were carried out. Most of the boat arrivals were held in detention for over two weeks and, in an effort to establish their identity, the Canadian government released the names of the asylum seekers to the Indian government.

These two policies were indeed extraordinary. In Canada at this time, it was unusual, and legally questionable, for asylum seekers arriving in Canada to be detained for longer than a couple of days while security checks were carried out. These asylum seekers were held for over two weeks after making their refugee claim – violating the principle of non-arbitrary detention. At this time, there was no domestic legislation authorizing the prolonged detention of the asylum seekers. It was not until after a legal challenge mounted on the asylum seekers' behalf that the asylum seekers were ordered released from detention. Even then, they were only permitted to leave detention and enter the community after sponsors were found to post a bond on their behalf.

Releasing the names of the asylum seekers to the Indian government was an unusual step for the Canadian government and violated the principle of limiting harm to the asylum seekers; it clearly indicates that the immigration department did not regard the arrivals as individuals with genuine refugee claims. Traditionally, the names of refugees and asylum seekers are not reported back to their home state for fear of retribution to their families, though in this case it was done almost immediately. This practice reflected and reproduced the identity of India as a non-refugee producing state; that is, it was seen not to be tyrannical, totalitarian, genocidal or even repressive.

Another measure made available by the securitized discourse was the use of Canada's military to detect and prevent further boat arrivals. The Canadian government ordered a full air and sea search for a second asylum seeker vessel.[71] The mobilization of Canada's military forces to find the vessel represented an extraordinary response to the arrival of an estimated 50 or so asylum seekers. It was not clear what they would have done had they located a second ship carrying asylum seekers, as there was no domestic legislation authorizing the Canadian navy to turn away a ship carrying asylum seekers from its territorial waters.

Most notably, the Conservative government announced an emergency recall of Parliament on July 30 to implement a crackdown on illegal immigrants and to prevent the smuggling of migrants.[72] It was only the second emergency recall of Parliament in Canada in the 20th century.[73] The government had taken the exceptional

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[71] Peter Edward, 'Another refugee boat is off our coastline,' *Toronto Star*, August 1, 1987 1.

[72] Richard Cleroux & Victor Malarek, 'Tip on new voyage checked Mulroney will recall House for crackdown on migrants,' *Globe and Mail*, July 31, 1987 1.

[73] Howard Adelman, 'Canadian Refugee Policy in the Postwar Period' in H. Adelman, ed., *Refugee Policy: Canada and the United States* (Toronto: York Lanes Press, 1991) 174.

step of recalling Parliament during the summer in order to pass two pieces of legislation that would legalize the measures they had taken in response to the Sikh asylum seekers, and that would allow the government to take more drastic measures in the case of future arrivals.

Addressing Parliament immediately after the recall, immigration minister Benoit Bouchard stated that Parliament had been recalled to deal with an issue of 'grave national importance'. In his speech, Bouchard claimed that the number of migrants entering Canada by posing as refugees had reached critical proportions. He claimed that the arrival of the Sikh asylum seekers had endangered the physical safety of the migrants, imperiled the security of Canada and, worst of all, jeopardized public support for Canadian immigration and refugee programs.[74]

According to the government, the two refugee bills, including the stalled C-55, were essential to equip the government with the necessary tools to prevent smuggling people to Canada and illegal immigrants from abusing the refugee determination system. As originally formulated by the government and presented to Parliament, the two pieces of legislation provided the government with extraordinary powers in combating abuse of the refugee system, including the right to search, without a warrant, properties suspected of being used to aid the smuggling of people; the authority to turn back boats without processing the refugee claims of those on board; the power to detain asylum seekers for up to 28 days without review (and potentially indefinitely with reviews every 7 days); the (re)introduction of security certificates[75] and the power to return asylum seekers to a safe third country. These policies represented a formal breaking of the rules of Canadian refugee law and signalled a fundamental shift in the government's approach to asylum seekers and Canadians who assisted them. The proposed legislation changed the relationship from a humanitarian approach moderated by national security concerns, to a security- and control-oriented approach. Some of the proposed legislative changes, such as the authority to turn back boats and to deport foreign nationals without first processing their refugee claims, clearly violated international laws regarding the treatment of refugees.

Limitation of Securitization

Facing strong opposition from opposition parties and NGOs, the Canadian government succeeded in passing the two refugee bills with significant amendments

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[74] Canada, Hansard, *Debates in the House of Commons*, 17 August 1987(Benoit Bouchard, Minister of Immigration).

[75] Security certificates, in one form or another, have been in place in Canada since 1977, having been established in the Immigration Appeal Board Act and again in Section 39 and 40 of Bill C-24. It appears as though the certificates were rarely used until 1991, two years after they had been re-introduced with the passage of Bill C-84. With the implementation of Bill C-84, security certificates were used to detain and remove inadmissible non-Canadians – including those in the refugee determination process – while keeping some or all of the evidence confidential. Since 1991, 27 security certificates have been issued.

and the inclusion of sunset clauses on some of the more controversial elements. While, during the crisis itself, extraordinary measures, such as detention, air and sea search and a recall of Parliament were implemented without opposition, the government was unable to implement a number of its proposed changes. The media, NGOs and the opposition parties successfully constructed the government's legislation as un-Canadian and in violation of its humanitarian identity.

There were two key factors that limited the degree of securitization first proposed by the government's legislation in 1987. The first was that the immediate threat of further boat arrivals had passed and the issue had been de-securitized. The media reported on the failure of the air and sea search to find any asylum seekers aboard the second suspected asylum seeker vessel on August 3rd. The well-publicized failure of the search allowed political elites to de-securitize the issue. The opposition parties, with support of the Canadian media in the form of coverage and editorial commentary, accused the government of 'overreacting' and of wasting a 'shocking' amount of money.[76] Second, the findings of the refugee determination committee that the Sikh asylum seekers did not pose a threat to Canadian security and that they did not have connections with terrorist groups undermined the rationale for the securitizing move.

Political elites in Canada were clearly divided over the securitizing move. The Liberal opposition, whose leader had initially contributed to the securitization process, now harshly condemned the government's course of action. Immigration critic Sergio Marchi accused the government of whipping up the fears of Canadians.[77] With the sudden discursive change brought about by the two developments noted above, the two bills the government sought to implement faced a serious challenge. The bills were overwhelmingly depicted as 'draconian', 'harsh', 'wide sweeping powers', 'overreaction', and 'un-Constitutional'.[78] NGO and church groups condemned the bills, while lawyers raised fears that the bills would allow the government to 'arrest church groups' and 'kick in the doors of ordinary Canadians.'[79] The government, in an effort to defend the bills, argued that they would not use the powers contained in the bills.[80] This assurance, however, was not enough; the government was forced to amend the

[76] Richard Cleroux, 'Mulroney "occupied with other things," still has not requested recall of House,' *Globe and Mail*, August 5, 1987 A.1.

[77] *Ibid.*

[78] Linda Diebel, 'Asians test Tory refugee policy, boatload may provide excuse for get tough law,' *Montreal Gazette*, July 18, 1987 B.1; Victor Malarek, 'Church, rights group urge Senate to take close look at refugee bills,' *Globe and Mail*, September 16, 1987 2; Marjorie Nichols, 'Its nothing but an immigration war measures act,' *Vancouver Sun*, August 12, 1987 9; and Lorne Waldman, 'Why is there a queue for queue-jumpers to jump,' *Toronto Star*, July 28, 1987 13.

[79] Pearl Chud & Yew Lee, 'Proposal too harsh,' Letter to Editor, *Globe and Mail*, September 2, 1987 A.6; Ian McCuaig, Chairman, Human Rights Committee, 'Refugee entry system,' Letter to Editor, *Globe and Mail*, August 13, 1987 A.6; and Geoffrey York, 'Immigration Staff could kick down doors, Lawyers warn,' *Globe and Mail*, August 15, 1987 1.

[80] Patricia Poirier, 'Ottawa not bound to use powers in tough refugee bill, minister says,' *Globe and Mail*, August 20, 1987 5.

two pieces of legislation. In an effort to legitimize its actions and to maintain the appearance of humanitarianism, the government drastically increased its intake of refugees for the following year, as a 'carrot' for the NGO and church groups critical of the bill.

While the opposition parties, members of the media and humanitarian NGOs had succeeded in having the bills amended, the provisions contained in Bills C-55 and C-84 still gave the Canadian government exceptional leeway to prevent, detain and deport asylum seekers. The incorporation of the two bills represented a clear break in the Canadian approach to asylum seekers and refugees.

Conclusion

While the 1987 case clearly demonstrates the process of securitization, it also illustrates that governing parties are not able to fully securitize an issue simply through rhetoric, unconstrained by 'real-world' events. They are constrained not necessarily by material, objective criteria, but by socially constructed relevant criteria that they have used to substantiate their securitization claims. Once the criteria on which the government had based their securitizing move (i.e. more boats and terrorists ties) were shown to be false, political opponents had an opportunity to challenge the government's securitizing discourse and its subsequent policies. While the Canadian government did succeed in securitizing the issue of asylum seeking to a significant extent, this episode demonstrates that there are limits on the ability of political elites to securitize. The emergency measures implemented indicated the extent to which the issue had become securitized, while the powers contained in Bills C-55 and C-84 indicated a stark change in the direction of Canadian refugee policy.

This event provides further insight into the conditions for successful securitization. The core group, which includes the media and opposition parties, must accept that the response is proportionate to the level of threat. The cases examined here empirically demonstrate Buzan and Waever's contention that failure to gain acceptance or to maintain cohesion during the securitization process can result in a failed or abortive securitization attempt.[81] In the Canadian case in 1987, the failure to legitimize all of the proposed changes occurred because the attempt failed to maintain cohesion. The media, NGOs and opposition parties attempted to de-securitize the issue by presenting the government's legislation as a violation of Canada's identity as a generous, humanitarian, compassionate state. In essence, the government's securitization attempt was limited because the extraordinary measures the government attempted to implement were successfully reconstructed as an overreaction and a betrayal of Canada's humanitarian identity.

In addition to demonstrating the importance of maintaining cohesion in the core group, the Canadian case provides a number of important lessons regarding the securitization process. First, it demonstrates the power of discourse in shaping and legitimizing policy response. Furthermore, it demonstrates the ability of certain actors

[81] See Waever, *supra* note 13 at 58-59 and Buzan, Waever & de Wilde, *supra* note 12 at 23-35.

– namely, the government and the media – to influence the discourse on migration and border security and, ultimately, on the national identity. However, it also demonstrates that these actors are not the only actors capable of influencing discourse, identity and, consequently, policy. The opposition parties and humanitarian NGO groups were instrumental in challenging the securitizing discourse. Furthermore, the Canadian case shows that securitizing actors can be constrained by the logic and credibility of their securitizing claim. Evidence demonstrating the weakness of the securitizing discourse can produce resistance to the emergency measures advanced.

While border security has risen to prominence in domestic and international political agendas since the events of 9/11, the association of migration as a potential threat to national security is not a new phenomenon. As the cases examined in this article illustrate, unauthorized arrivals of asylum seekers have been constructed as a threat to national security, in various ways – as a flood, as criminals, as importing disease and social problems and as potential terrorists. This securitized portrayal, however, is not the only construction of asylum seeker identity, nor has it been the norm. Asylum seekers have been portrayed as humanitarian migrants and refugees; individuals in need of the protection of the state. As the preceding cases demonstrate, the humanitarian construction prescribes a radically different response on the part of state leaders.

Through the examination of two episodes of asylum seeker arrivals to Canada in the mid-1980's, this article shows how the discursive practices of political and media elites construct the identity of asylum seekers and in turn, make particular policy options more or less available to state leaders. Humanitarian portrayals, in which the asylum seekers were portrayed as genuine refugees, made policies that were consistent with international laws regarding the treatment of asylum seekers most acceptable. Media coverage and the 'speech acts' of state elites contributed to a securitized discourse in which the asylum seekers were constructed as a threat to the state. This securitized discourse made the adoption of harsh border control policies, some of which undermined key principles of the international refugee regime, acceptable.