

EDITORIAL COMMENTS

CRIMINALS, COMBATANTS, OR WHAT? AN EXAMINATION OF THE ROLE OF LAW IN RESPONDING TO THE THREAT OF TERROR

By Thomas M. Franck

Both in politics and in academia, a heated polemic is being waged about the extent to which traditional norms of civil rights and international humanitarian law have become obsolete and counterproductive in the face of new realities engendered by modern terrorism.

Less noted is the considerable degree of overlapping consensus, which the polemic tends to obscure. By approaching the important areas of disagreement from this basis of shared assumptions, constructive progress could be made toward achieving reform of national and international law to make both more responsive to new challenges without undermining the civilizing mission of the rule of law.

Among both supporters and opponents of the legal strategy adopted by the Bush administration in dealing with suspected terrorists detained in Iraq, Afghanistan, Guantánamo, and the United States, there is a shared understanding that the objects of our “war on terrorism” are not precisely like our traditional models of “enemies of the people” or “aggressor states.” Al Qaeda—to take the most prominent example—does not readily fit the mold of either a crime family or an enemy state. Yet it is in response to these models that national criminal laws and international laws of war have been developed.

The criminal laws of liberal democracies require that persons cannot be detained indefinitely unless charged with an offense, given access to legal counsel, and afforded a fair trial at which guilt must be proven by the accusing state beyond a reasonable doubt and without torture, forced confessions, or other cruel or unusual forms of duress. This is the “due process” model applicable to civilians, as groups or individuals, suspected of engaging in unlawful conduct.

International law, too, has developed civilizing checks on unbridled power in the conduct of armed hostilities. This law (*jus in bello*) permits the state to detain combatants indefinitely—for the duration of a war—but prohibits torture, punishment, or the use of duress to extract information. This “prisoner of war” model applies to persons who engage in combat in recognizable uniform and carry weapons openly. Persons captured as combatants who are not in uniform and carry concealed weapons may forfeit their “prisoner of war” status, thereby becoming subject to trial under the “due process” model.

It is also common ground that both the “due process” and the “prisoner of war” models involve inconvenience for the authorities seeking to uphold law and good order in domestic and/or international society. Defiant irregular combatants may tempt authorities to seek their incarceration without trial as if they were prisoners of war, which in some ways they resemble, but without giving them the benefit of the Geneva Conventions’ prohibitions on coercion or punishment. In dealing with such prisoners, the normal rules of both domestic and international law present a considerable inconvenience to their captors.

These inconveniences, however, are tolerated because of the society's sense of reciprocal benefits accruing from imposed restraints on governments, whether engaging in the suppression of crime or resistance to aggression. In both instances, these restraints are defended for the same reason that persons agree to live within the restraints of the rule of law. Inconvenience in law enforcement is the price of the rule of law.

Still, it is also common ground among most lawyers versed in constitutional and international law that the aforementioned differences between the modern threat of terrorism and more familiar attacks on the legal order by criminals and aggressors affect the inconvenience costs of adherence to the rule of law in both its "due process" and "prisoner of war" models. For several reasons the terrorist *défi* is different.

First, the "due process" model fails fully to take into account the magnitude of the challenge involved in convicting terrorists as criminals by demonstrating culpability beyond a reasonable doubt. The obstacles include not only the risk to the prosecution of revealing sources and methods, which is likely to be much greater than in an ordinary criminal trial, but also the limitations imposed by criminal law on means of obtaining evidence. Means commonly employed overseas in covert operations, unauthorized wiretaps, for example, may render their fruits inadmissible in domestic criminal proceedings. Moreover, prosecutors are likely to find it difficult to persuade witnesses to come forward to testify, given the heightened danger of retaliation.

Second, no one questions that the costs of releasing a potential terrorist are likely to be greater than those that ordinarily accrue in the event of an accused's discharge for lack of evidence or procedural error. The adage that it is better for a hundred guilty persons to go free than for one innocent person to be incarcerated takes on a different hue in the age of high-technology terror.

In the "prisoner of war" model, too, the normal balance of convenience that supports restraints on authority is skewed by the phenomenon of modern terrorism. The logic behind the Geneva Conventions, for example, is, first, that humane treatment of prisoners of war will encourage other combatants to surrender peaceably. Second, it is assumed that, when one party to a conflict treats its prisoners humanely, the other will reciprocate. Third, it is probably an unspoken conjecture that ordinary prisoners of war do not have much information that is likely, whether revealed or unrevealed, to have a great impact on the outcome of the conflict. Simply stating these underlying assumptions of the law of war is to suggest that they are not so evidently applicable to an international terrorist conspiracy like Al Qaeda. On the other hand, to whatever extent the underlying reasons for normative constraints may be less applicable, that will alter the balance of convenience between upholding and circumventing those constraints.

Thus, there is a rather broad area of often unacknowledged agreement between those who disagree vehemently about the U.S. government's legal posture toward its detainees at home and abroad. Where that agreement dissolves into disagreement is in the consequences drawn by each side. Yes, terrorism *is* different. But what should be the legal concomitant of that difference?

The Departments of Justice and Defense of the U.S. government appeared to have concluded that the differences justify the wholesale suspension of the rule of law, in both its domestic and international manifestations. In views expressed in internal legal memoranda and, more formally in arguments made to the Supreme Court in the recent *Hamdi* and Guantánamo cases, the Justice Department had argued that terrorism challenges the nation with something approximating a state of perpetual war, in which the sole ultimate determiner of military tactics and of captives' rights must, perforce, be the president in his constitutional capacity as commander in chief. As for international law, it was also said, treaties could never diminish the illimitable constitutional powers of the supreme commander in a life-or-death struggle. Even

the Third and Fourth Geneva Conventions, strictly construed, were said not to protect detainees alleged to be members of Al Qaeda, persons who are neither conventional prisoners of war nor quite civilian criminals.

To many civil libertarians, this broad assertion of presidential powers looked like an instance of throwing out the rule-of-law baby with the bathwater of inconvenient limits on absolute governmental discretion.

Now, fortunately, the Supreme Court has intervened in this discourse, and done so firmly on the side of the rule of law.¹ Even in wartime, Justice Sandra Day O'Connor has wisely cautioned, the president remains subject to checks and balances vested by the Constitution in the Congress and the courts.

That breaks the deadlock between the president's lawyers and the civil libertarians who, all along, had argued that new circumstances cannot alone invalidate the normative constraints imposed on government by constitutional, congressional, and international law. Yet, while the Supreme Court has cleared away the doubts about applicable substantive law, it has (quite properly) not addressed the procedural problems its decision will generate, as Article III judges strive to apply normal legal rules to detainees whose circumstances differ radically from the norm.

This seems an appropriate time for scholars to talk with government lawyers and those in the law and policymaking process in searching for adjustments in applicable domestic and international law. Such a search must begin with the assumption that terrorism, as currently practiced, does constitute a new phenomenon: one to which traditional constitutional and international legal constraints may not be wholly responsive. It must equally accept, however, that no adaptation of law—no matter how efficiently responsive to the challenges of a new phenomenon that is both part crime and part combat, yet different from each—should be made at the cost of abandoning the basic concepts of the rule of law that define us and differentiate us from our adversaries. The irreducible core of the rule of law is this: that those who execute the law must *never* be the sole and final arbiters of that law.

For example, it must be a credible adjudicative process that determines whether a person has been detained for probable cause and is being treated in accordance with legal limits on coercive interrogation. After the historic decisions in the *Hamdi* and Guantánamo cases, it will no longer do to address the petitions of persons held in hard, indefinite detention by having a presidential appointee make an occasional review of their status, how cooperative they have been, and whether they still pose a danger to the national interest. We will have to come up with something more akin to a judicial hearing, more in conformity with the rule of law.

Yet it must also be acknowledged that this new modus operandi will pose unwonted responsibilities and managerial strains on judges. The process will encounter evidentiary issues and questions of onus of proof that do not quite fit the criminal law paradigm. Problems of judicial architecture will arise: what sorts of courts ought to address the new issues that will develop, and with what jurisdictional thresholds and procedures?

Similarly, the applicable international legal framework for the treatment and protection of detainees needs to be rethought in the light of contemporary conflict with terrorist movements that do not quite fit the models incorporated into the Third and Fourth Geneva Conventions.

Judges, attorneys, prosecutors, members of Congress, and the military, aided by academic experts, need to begin, now, to address these matters. There has always been a large measure of agreement that terrorism poses a new set of challenges for the rule of law. Now that it seems to have become clear that the rule of law—in both its domestic and its international configurations—still applies, the next task is to make it more responsive to the onerous new circumstances in which it must operate.

¹ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633 (2004); *Rasul v. Bush*, 124 S.Ct. 2686 (2004); *Rumsfeld v. Padilla*, 124 S.Ct. 2711 (2004).