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International Organizations Bulletin

The Newsletter of the American Society of International Law (ASIL)
International Organizations Interest Group

A Message from the Chair

I am pleased to present the 2003 Spring Issue of the *International Organizations Bulletin*, which is the Newsletter of the *International Organizations Interest Group* of the American Society of International Law. This *IO Bulletin* issue contains five timely articles that I hope you will find of interest.

Our Interest Group's 2003 Annual Meeting Panel topic is "The United Nations & Administration of Territory: Lessons from the Frontline". Participants include ***H.E. Rosalyn Higgins DBE***, Judge, International Court of Justice; ***Ambassador Peter Galbraith***, National War College, Washington DC & former Director of Political Affairs, UN Transitional Administration in East Timor (UNTAET), Ambassador to Croatia (former); ***Ambassador Jacques Paul Klein***, former Head, UN Transitional Administration in Eastern Slavonia (UNTAES) & UN Mission in Bosnia & Herzegovina (UNMIBH); & ***Ralph Wilde***, Lecturer in Law, University College London. Special thanks to Panel organizers, including ***Daniel Bethlehem***, Lauterpacht Research Centre for International Law, Cambridge University Law Faculty & ***Ralph Wilde***. The Panel takes place Friday, 4 April 2003, 12:30–1:30 p.m.. For more Panel details, please see page 16 of this *IO Bulletin*.

Would you like to become more involved in the *International Organizations Interest Group*? If you would like to join our Executive Committee, propose a Panel for the 2004 Annual Meeting, Chair an Interest Group Sub-Section, submit an article for the next issue of the *IO Bulletin*, propose a new title for the "*International Organizations Bulletin*," or get involved in any other way, please contact me or Vice-Chair Michael Scharf!

I hope that your travels to Washington and elsewhere are safe. I look forward to seeing you in D.C.!

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PS: Thanks to the following from Indiana University who assisted with this issue of the IO Bulletin: Daniel Foote, Amin Husain, Patrick McKeand, Tenzin Namgyal, Edward Queen & Chalanta Shockley.

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Assembly of States Parties Elects Eighteen Judges to the International Criminal Court

Dorothea Beane*

Introduction

In early February 2003, after four days of feverish negotiations, strategizing, and perhaps even "horse trading", and following more than 30 rounds of official voting, the first slate of eighteen judges was elected to preside over the newly constituted International Criminal Court ("ICC"), which sits in the Hague, Netherlands. The elections, which were conducted by the ICC Assembly of States Parties at a meeting in New York, mark a momentous step in the process leading to the official inauguration of the ICC in March 2003, and the eventual full coming into operation of the court.

The judges themselves reflect an impressive diversity of expertise in many respects, including diversity in: international criminal law, international humanitarian law, and international human rights law; in geographical representation; in gender; and in nationality. Though the election atmosphere was charged, the elections were conducted smoothly, and without rampant controversy. Celebrating the ICC's most recent progression from an ideal to reality in international law, this article briefly describes the ICC, and its mandates related to the election of judges; explains the election process at New York; identifies the elected judges; and concludes by explaining the responsibilities these judges have shouldered.

Background to the ICC

The Rome Statute for an International Criminal Court, which came into force in the 2002 summer following sixty ratifications and accessions to the treaty, calls for eighteen judges to preside over prosecutions of individuals accused of various international crimes, including war crimes, crimes against humanity, and genocide. Unlike the Rwanda and Yugoslavia War Crimes Tribunals, the ICC's jurisdiction is not chronologically or geographically limited. Furthermore, its jurisdiction extends to both international armed conflicts and crimes occurring within a state, during intrastate wars. The ICC may exercise this jurisdiction only when national systems are unwilling or unable to carry out the investigations/prosecutions of crimes relevant to its mandate. Therefore, the primary responsibility of crime prosecution remains with States and the ICC complements these national legal systems thereby increasing their efficacy in crime prosecution and prevention.

The Election Rules

The procedures for electing the judges and prosecutor were created at "preparatory conference" meetings held at the United Nations in New York conducted by delegates of the various countries ratifying[1] the 1998 Rome Statute. Only countries that have ratified or acceded to the Rome Statute are entitled to participate in the ICC Assembly of States Parties, which is charged with numerous duties, including electing the judges and the prosecutor.[2] Article thirty-six of the Rome Statute, which is titled "Qualifications, nominations and election of judges", outlines the principal substantive rules regarding judges. Article 36(3)(a) provides that "judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices." Judges must have either established competence in criminal law and procedure along with relevant experience in criminal proceedings, or established competence in relevant areas of international law, such as international humanitarian law and human rights law, along with extensive experience in a professional legal capacity of relevance to the judicial work of the ICC. Judges must hail from a State Party to the Rome Statute, and must be fluent in French or English, which are the two working languages of the court. In the election of judges, the States Parties were directed to take into account the need, within the membership of the court: (i) the representation of the principal legal systems of the world; (ii) equitable geographical representation; and (iii) a fair representation of female and male judges. Furthermore, the Rome Statute directs the States Parties to take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

The Election

In New York, the States Parties elected the judges by secret ballot, subject to obtaining the highest number of votes and a two-thirds majority of the States Parties present and voting. The judicial nominees exemplified a diverse pool hailing from forty-three nations, and from all geographical regions of the globe. Further, the judicial nominees provided a mix of professional experiences: some nominees had international criminal law experience, while others had international law experience (including experience in human rights and/or humanitarian law) or experience in both areas. Ultimately, the elections yielded ten judges with competence in criminal law, and eight judges with competence in international law. Of the eighteen elected judges, eleven are men and seven are women.

Eighty-five of the eighty-eight nations that had ratified or acceded to the Rome Statute participated in the elections of the first slate of judges. Campaigning at New York was fierce

[1] One hundred and thirty-nine countries signed the treaty, and as of 1 March 2003 eighty-nine countries have ratified or acceded to the treaty.

[2] Countries failing to ratify the treaty may not officially participate in the nomination, election or appointment of Judges, prosecutors or the administrators of the court. In his last days of office, President Clinton signed the treaty creating the ICC. However, George W. Bush notified the United Nations of the U.S. intent not to ratify the Rome Statute. Though the United States government had no official role in the election of judges, US non-governmental observers were present at the elections and lobbied for a fair and representative court with women and candidates from all regions of the world represented as nominees.

and strategic throughout the thirty-three rounds of voting. Before the voting sessions commenced, some delegations prepared and distributed photo information sheets on judicial candidates. Lobbying continued, up until the final gavel dropped calling the meeting to order, as aides distributed last minute biographical information at the tables and seats of delegates. Much behind the scenes strategizing had obviously occurred, as evidenced by some nations voting in blocks.

At the conclusion of the first two rounds of balloting only seven judges received the requisite number of votes for appointment to the court. Six of the seven women appointed judges were elected in the first round of balloting. This result shocked the room filled with at least eighty non-governmental observers located in the gallery who could not hold back their applause at the historic vote. The election of the nominee from Trinidad and Tobago was of particular moment because Trinidad's early initiatives regarding the creation of an international criminal court to try drug traffickers were instrumental in the process that culminated in the Rome Conference and ultimately the Rome Statute.

Strictly enforced voting requirements ultimately resulted in judges being elected from mandatory groupings that assured representation from all regions of the world. After the first four rounds, the Assembly of States Parties delegates were free to vote for the remaining candidates without voting limitations. The candidates who obtained the highest number of votes without respect to region, gender or specialty were then added to the court in those subsequent rounds. Randomly, the Judges were assigned terms of three, six, and nine years.

The Elected Judges

The first slate of eighteen judges elected to preside over the ICC consists of the following (with the number at the end of each description reflecting the number of years on their term):

- *Rene Blattmann of Bolivia*, law professor and former justice minister (6);
- *Maureen Harding Clark of Ireland*, ad litem judge for the U.N. tribunal for the former Yugoslavia, lawyer for 26 years as prosecutor and in criminal defense (9);
- *Fatoumata Dembele Diarra of Mali*, ad litem judge for the U.N. tribunal for the former Yugoslavia, former Bamako Appeal Court Criminal Chamber president (9);
- *Sir Adrian Fulford of the United Kingdom*, judge in the Crown Court, textbook author on human rights and criminal procedure (9);
- *Karl Hudson-Phillips of Trinidad and Tobago*, former attorney-general and minister for legal affairs (9);
- *Hans-Peter Kaul of Germany*, international lawyer, diplomat, and his country's negotiator for the ICC (3);
- *Philippe Kirsch of Canada*, ambassador to the United States, legal advisor to the Department of Foreign Affairs and International Trade (6);
- *Erkki Kourula of Finland*, director-general of legal affairs at the Foreign Affairs Ministry, international law expert (3);
- *Akua Kuenyehia of Ghana*, Dean of the Law Faculty and acting director of the University of Ghana (3);
- *Elizabeth Odio Benito of Costa Rica*, international law professor, former judge of the U.N. tribunal for the former Yugoslavia (9);
- *Gheorghios Pikis of Cyprus*, Justice on the Cyprus Supreme Court, former ad hoc judge of the European Court of Human Rights (6);
- *Claude Jorda of France*, president of the U.N. tribunal for the former Yugoslavia, former Paris Appeals Court prosecutor (6);
- *Navanethem Pillay of South Africa*, president of the U.N. criminal tribunal for Rwanda, former acting judge on the High Court of South Africa (6);
- *Mauro Politi of Italy*, ad litem judge for the U.N. tribunal for the former Yugoslavia, former appellate court judge, international law professor (6);
- *Tuiloma Neroni Slade of Samoa*, ambassador to the U.N. and to the United States, former attorney-general of Samoa (3);
- *Sang-hyun Song of the Republic of Korea*, professor of law at Seoul National University, author (3);
- *Sylvia de Figueiredo Steiner of Brazil*, judge on the Federal Court of Appeals of Sao Paolo, former federal prosecutor (9); and
- *Anita Usacka of Latvia*, judge on the Latvia Constitutional Court, professor of law at the University of Latvia (3).

Conclusion

In the last fifty years, the international community has witnessed many crimes against humanity and war crimes for which no individuals were held accountable. In Cambodia in the 1970s, the Khmer Rouge killed an estimated two million people. In armed conflicts in Mozambique, Liberia, El Salvador and other countries, many innocent civilians died, including horrifying numbers of women and children. No one was held accountable. Today, massacres of civilians continue in Algeria and the Great Lakes region of Africa. However, for the first time in history, the ICC presents a judicial entity that is competent, independent, and permanent, to prosecute the criminals who instigate such heinous crimes. The ICC also aims at making victims whole, whether the victims are individuals or peoples. The eighteen distinguished ICC judges owe great duties to the Court and to the international community. In today's conflict-ridden world, the ICC, guided by its first slate of judges, is positioned to be at the forefront of international efforts to seek peace, provide justice, end impunity, help end conflicts, and deter the commission of future war crimes, crimes against humanity, and genocide.▲

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The International Criminal Court: Justice v. Human Rights Protections in an Age of Terrorism

George E. Edwards*

Introduction

The Rome Statute for the International Criminal Court has come into force.[1] The ICC's Assembly of States Parties has agreed upon the court's principal operational instruments, including the Elements of Crimes and the Rules of Procedure and Evidence. The first slate of eighteen ICC judges has been elected and sworn in. ICC personnel have moved into provisional quarters in The Hague. The Prosecutor will soon be in place, and the defense bar is being organized. Perhaps some prospective ICC accused have committed, or are committing, crimes over which the court may exercise jurisdiction – crimes against humanity, genocide, and war crimes. The first ICC investigations and prosecutions are likely not far away. The world is witnessing the birth of a permanent international criminal court to wrest impunity away from persons who commit heinous international crimes.

The global community has long recognized the need to prosecute perpetrators of serious international crimes, including terrorists. Though the international crime of terrorism was excluded from ICC jurisdiction,[2] the inaugural ICC prosecutions may be for behavior that could conceivably constitute "terrorism." For example, behavior that might be construed as terrorism – e.g., flying airplanes into buildings killing numerous civilians – might also, depending on the circumstances, also constitute genocide, a crime against humanity, or a war crime.[3]

In a "war on terrorism," various nations from different corners of the globe have taken measures that have compromised individual and group human rights and fundamental freedoms. These compromises have occurred and are occurring in the context of various areas of law, including international human rights law, international humanitarian law, international criminal law, and domestic criminal law and procedure. In discussing human rights under the Rome Statute, it is appropriate to refer to these bodies of international and domestic law, because ICC law blends aspects of these areas of law, all of which inform the interpretation and application of ICC law.[4]

It is instructive to highlight United States' anti-terrorism actions that allegedly breach human rights, because some view the U.S. as a model to follow in protecting human rights.[5] The United States has been accused of directly or indirectly perpetrating rights abuses, despite internationally recognized rights standards regarding treatment of suspects and the accused, by: arbitrarily detaining international crime suspects and holding such persons incommunicado; denying arrested persons the right to a fair trial or to any trial at all; failing to inform arrested persons of charges against them; failing to permit or provide for counsel to arrested persons; engaging in conduct that could be construed as inhuman or degrading treatment or punishment or perhaps even torture, such as submitting suspects to "stress and duress" tactics;[6] killing

[1] The Rome Statute for the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf.183/9, came into force on 1 July 2002, sixty days following the 60th ratification and accession to the treaty. Only crimes committed after 1 July 2002 are within the jurisdiction of the Court. In this Article "ICC" and "Court" refer interchangeably to the International Criminal Court as an international organization and as a judicial organ functioning in a judicial capacity.

[2] The crime of terrorism was excluded from the jurisdiction of the ICC in part because a definition of the crime could not be agreed upon. Resolution E of the Rome Statute provides that the Rome Conference, negotiators "*Regretting* that no generally acceptable definition of the crimes of terrorism and drug crimes could be agreed upon for the inclusion within the jurisdiction of the Court . . . *Recommends* that a Review Conference pursuant to article 123 of the Statute of the International Criminal Court consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court." (emphasis in original) Indeed, no universally accepted definition of "terrorism" exists, though numerous domestic and international instruments address the topic. *See, e.g.,* League of Nations Convention for the Prevention and Punishment of Terrorism 1937; US Antiterrorism Act of 1990 (18 U.S.C. sections 2331 *et. seq.*)

[3] "Terrorist" suspects will likely not be among the early ICC accused, as such individuals might be dealt with through the executive and judicial branches of concerned nations. However, terrorist behavior could be construed as falling within the scope of the crimes for which the ICC is permitted to exercise jurisdiction. For example, terrorist acts could be deemed a crime against humanity if the requisite elements of that crime exist, including that the acts are part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack, where the acts include murder, extermination, torture, or imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, or other inhumane acts of a similar character intentionally causing great suffering. Similarly, such terrorist acts could conceivably be construed in such a way as to qualify them as elements of genocide or a war crime, depending on the circumstances.

[4] *See* Rome Statute, Article 21 (listing sources of law to be applied by the ICC). These bodies of domestic and international law overlap in application. For example, the Inter-American Commission recognized that international human rights law applies at all times, including at times of peace and war, and that both international humanitarian law and international human rights can be used to determine fundamental rights of persons within the authority and control of a state and where circumstances of armed conflict might be involved. *See Inter-American Commission Decision on Provisional Measures Regarding Detainees at Guantanamo Bay, Cuba* (12 March 2002).

[5] Even though the U.S. is not a party to the Rome Statute, for various reasons, the ICC may look to U.S. jurisprudence and practice as the ICC seeks to define the scope of the human rights protections the Court will enforce. First, the ICC is directed to apply general international law, and United States practices and policies contribute to the formation of general international law. Second, various states have already followed the example of the United States in adopting measures that restrict fundamental rights and freedoms in the name of a "war on terrorism," and the ICC will want to remain cognizant of those restrictive trends.

[6] Such tactics reportedly include: forcing detainees to stand or kneel for hours in non-see-through head and face coverings; being held in awkward, painful positions; depriving them of sleep; subjecting them to

extra-judicially;[7] denying persons of their search and seizure and other privacy rights; etc. The United States has taken some of these actions against both U.S. citizens and non-citizens, and both within and outside of the United States.

The United States and other countries have failed to comply with human rights provisions contained in international instruments which bind the United States such as: international humanitarian law treaties (e.g., the Third Geneva Convention); and international human rights law treaties (e.g., the International Covenant on Civil and Political Rights). United Nations treaty bodies, special procedures, and political bodies, along with non-governmental organizations, have criticized human rights abuses of various governments involved in anti-terrorism campaigns.

This article argues that the Rome Statute requires the ICC fully to afford human rights protections, and that the ICC in its quest to quash impunity must not follow the lead of various domestic jurisdictions that have curtailed human rights protections in the name of a "war on terrorism". ICC officials – including ICC judges and the Prosecutor – are certain to be mindful that the Court was created to prosecute perpetrators of the most serious international crimes. "Justice" – prosecution of alleged perpetrators – is a paramount goal of the Court. But, ICC officials must remain mindful that as they seek justice, they must not compromise their mandate to protect all human rights at every step in the ICC criminal justice process.

For the Court to be effective and remain credible and with integrity, the Court must be fair, be seen to be fair, be independent, and be acutely mindful of the need to protect human rights at every turn. In particular, the ICC must protect the human rights of persons who in the minds of some are the most vulnerable in the process – suspects and the accused – irrespective of how reprehensible the conduct is of which they may be suspected or accused. Protecting the human rights of suspects and the accused – some of whom may be guilty – is in line with the international community's general mandate to ensure that international human rights are fully protected.

ICC general human rights mandate

The International Criminal Court is not a "human rights court" in the sense that it has no jurisdiction to prosecute individuals for "ordinary" international human rights law violations. However, it is a "human rights court" in the sense that the Rome Statute expressly obligates the ICC to ensure extensive human rights safeguards for all individuals who have any exposure to or experience with the Court.[8]

Article 21 of the Rome Statute outlines the law to be applied by the Court. That article provides that the Court shall apply the Rome Statute, the Elements of Crimes, the Rules of Procedure and Evidence, treaties and principles and rules of international law, and general principles of law. Furthermore, it provides that the Court "may apply principles and rules of law as interpreted in its previous decisions." (Article 21(1)-(2)). Regarding human rights protections, Article 21(3) provides:

> The application and interpretation of law pursuant to [Article 21] must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

The human rights promises of the Rome Statute broadly require that all aspects of all ICC proceedings must be "consistent with internationally recognized human rights," and "be without any adverse distinction" on a broad range of discriminatory grounds.[9] Thus, all four ICC organs – (1) the Presidency; (2) the Appeals Division, Trial Division and a Pre-Trial Division; (3) the Office of the Prosecutor; and (4) the Registry – in every action they take, individually or in concert, must comply with the strict human rights mandates of the Rome Statute. Likewise, all ICC divisions, including the Assembly of State Parties, must follow the call for human rights protections. Furthermore, the human rights mandate would quite probably extend, at least indirectly, to acts of

24-hour light bombardment; or subjecting them to culturally humiliating practices such as having female officers kick them. *See, e.g.*, Jonathan Turley, *Rights on the Rack: Alleged Torture in Terror War Imperils U.S. Standards of Humanity*, March 6, 2003, LOS ANGELES TIMES; Alan Parra, *U.S. Interrogation of Al Qaeda and Taliban Suspects: Is It Torture*, *infra* at p. 9; Andrew Gumbel, *America admits suspects died in interrogations*, 7 March 2003, THE INDEPENDENT.

[7] *See, e.g.,* Dana Priest, *CIA Killed U.S. Citizen In Yemen Missile Strike: Action's Legality, Effectiveness Questioned,* Washington Post, Friday, Nov. 8, 2002; Page A01 (assassination of suspected Al Qaeda operatives by missile launched from remote controlled CIA Predator aircraft as the suspects rode in a vehicle near Sanna, Yemen; US asserted justifications included self-defense and that the victims were "combatants" thus lawful targets, while critics considered the killings to be unlawful extra-judicial killings or assassinations).

[8] *See generally* George E. Edwards, *International Human Rights Law Challenges to the New International Criminal Court: The Search and Seizure Right to Privacy,* 26 YALE J. OF INT'L LAW 323 (2001).

[9] The Rome Statute drafters rejected simplified non-discrimination language such as that proposed by Guatemala. *See* PROPOSAL SUBMITTED BY GUATEMALA, U.N. Doc. A/Conf.183/C.1/WGAL/L.4 (1998) (proposing that the "principle of non-discrimination shall be applied to men, women and children"). Instead, the drafters adopted a non-discrimination clause similar to those contained in international human rights law instruments, such as ICCPR article 26 (containing "or other status" phraseology). Article 21(3)'s broad, all-inclusive non-discrimination clause reflects a dramatic compromise struck regarding the term "gender," the definition of which was rigorously negotiated during the final week of the Rome Conference. The qualifying language following each mention of "gender" in the Rome Statute was inserted to satisfy delegations who were wary of the term "gender," because of the purported non-existence of the term or concept of "gender" in the Arabic language, and to satisfy Arab delegations, the Holy See, and others that stridently objected to including "gender" in the list, in part because they were concerned that "gender" would include "sexual orientation" (which is nevertheless incorporated either as part of the Article 7, paragraph 3 definition of gender itself, or as an "other status"). Ironically, the attempt to restrict the anti-discrimination provision ended up expanding the provision's anti-discrimination reach.

Indeed, the Article 21 human rights protections are broad, and include rights that are not expressly provided for, but are included because they fall within the ambit of "internationally recognized human rights".

States Parties themselves, inter-governmental organizations, and other individuals and entities who assist or cooperate with the ICC. International human rights norms are to be followed by the Court, its bodies and its agents in all decisions or actions taken involving all ICC substantive and procedural law. The human rights obligations imposed by article 21(3) extend to all law to be applied and interpreted by the ICC, and to all aspects of the operation of the Court.

Via Article 21, and through miscellaneous other pronouncements sprinkled throughout the Rome Statute, human rights protections are to be afforded to suspects and to the accused, before, during, and after trial. Furthermore, the Rome Statute provides for the protection of witnesses, victims, and other members of the international community at large. Human rights protections are to be afforded in matters related to cooperation and judicial assistance, as the ICC reaches out to national governmental bodies and inter-governmental bodies for aid in carrying out the ICC mandate.

These far-reaching human rights promises serve multiple purposes, not the least of which is to render the ICC a model for States Parties domestically. Importantly, the promises must set an example for the entire global community that the ICC will be a court of fairness, independence, and of true justice. The ICC will not bend to political whims, and will not compromise individual human rights, of suspects or the accused, for the sake of securing prosecutions or convictions.

Who has rights – alleged perpetrators, actual perpetrators, the innocent? Why?

The ICC must protect all rights that are expressly enumerated in the Rome Statute, or that are implicitly protected because they exist as customary international law norms or as general principles of law, or are protected because they fall within the Article 21(3) ambit of "internationally recognized human rights." The rights contained in the Rome Statute can be traced to numerous sources, including international instruments such as the Universal Declaration of Human Rights (UDHR)[10] (which applies to all nations that participated in the Rome Conference), the International Covenant on Civil and Political Rights[11] (which has been ratified by most nations), the Geneva Conventions of 1949[12] (which also have been widely ratified), and other international instruments such as the virtually universally adhered to Convention on the Rights of the Child.[13]

Balancing justice and human rights is particularly important because suspects or accused persons may be subject to rights violations in the perceived greater interest of promoting justice and eradicating impunity for heinous crimes. Respecting Rome Statute rights is of particular concern, given the view of some in the international community that though human rights for suspects and accused persons may be important, suspension of rights is permitted in the interests of society, the victims, law enforcement and prosecutorial needs, and politics. Unfortunately, deviation from human rights enforcement may increase in the fervor to quell terrorism and other international crimes.

The international community should be concerned with this balancing because the rights of society and of law-abiding citizens are threatened whenever a legal system impinges on the rights of suspects and accused persons, who may indeed be guiltless, and are at least to be considered innocent until proved guilty. These rights apply equally to all persons – not only ordinary, law-abiding citizens, but also suspected criminals, even those suspected of genocide, crimes against humanity, or war crimes. The Constitutional Court of South Africa, in speaking about that country's new constitution, endorsed the notion that protecting rights of criminals serves to protect the rights of all:

> [T]he Constitution is not a set of high-minded values designed to protect criminals from their just desserts; but is in fact a shield which protects all citizens from official abuse. They must understand that for the Courts to tolerate the invasion of the rights of even the most heinous criminal would diminish [the citizens'] constitutional rights.[14]

Respecting the human rights of alleged criminals will not hinder the fight against impunity. First, even if the Court applies the treaty's human rights provisions liberally, it is unlikely that prosecutorial or societal interests would be compromised by, for example, the dismissal of prosecutions. It is highly likely that overwhelming evidence acquired in a rights-respecting lawful manner will exist to support convictions.

Second, affording suspects and accused persons full rights is consistent with eradicating impunity and with full human rights for all. Ultimately, such commitments positively affect all of society. Respecting the rights of suspects and the accused will educate officials and the public about the sanctity of human rights, and will encourage human rights compliance. Human rights education at the international level will likely trickle down to the grassroots. As governments and citizens become more aware of the need to enforce these rights, fewer human rights violations will occur.

Rome Statute: Basic human rights provisions

Rome Statute negotiators sought to balance prosecutorial effectiveness and the rights of suspects and the accused.[15] Accordingly, the Rome Statute provides for a panoply of individual rights. In inter-related yet scattered provisions, the Rome Statute outlines human rights protections for many different categories of persons at all stages of ICC functions—

[10] G.A. Res. 217A (III), art. 12, U.N. Doc. A/810 (1948).

[11] Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force Mar. 23, 1976)

[12] The 3rd Geneva Convention is of particular relevance to individuals being held prisoner by the United States government in Guantanamo Bay, Cuba. *See* Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950.

[13] 28 I.L.M. 1448, U.N. Doc. A/44/25 (1989) (entered into force Sept. 2, 1990) (Somalia and the United States are the only two nations that have not ratified or acceded to this treaty).

[14] S. v. Nombewu, 1996(12) BCLR 1635, 1661(E)(SA).

[15] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, G.A., 50th Sess., Supp. No. 22, 696 ¶ 132, U.N. Doc. A/50/22 (1995), *reprinted in* THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 3-19 (M. Cherif Bassiouni ed., 1998), at 617-56.

from early investigation, through trial, through appeal and revision of sentence, to sentence execution.

On the "defendants'" side, the categories of persons whose human rights might be breached would include: (1) suspects pre-charge; (2) suspects post-charge (the accused); (3) suspects or others who are never charged; (4) non-suspects who become suspects, who may be charged only after evidence incriminating them was obtained through means violative of rights; or (5) non-suspect, third parties. Others who might suffer human rights abuses include: (1) crime victims; and (2) witnesses. Individuals and entities who might perpetrate human rights violations in the context of ICC investigations or prosecutions could, include: (1) national police and other governmental authorities; (2) the law enforcement arms of the ICC (broadly including the Prosecutor or a judge who may request a warrant, or another ICC agent); (3) civilians; (4) an inter-governmental organization (such as NATO); or (5) a combination of the above.

Rights of persons during an investigation

Article 55 of the Rome Statute provides for rights of persons during an investigation. Article 55 rights broadly protect suspects and the accused, and persons who may never become suspects or accused.

Article 55(1)(a)-(d) provides that in respect of an investigation under the Rome Statute, a person has the right not to be compelled to incriminate herself or to confess guilt (art 55(1)(a)), the right to be free from all forms of coercion, duress or threat, as well as from torture or any other form of cruel, inhuman or degrading treatment of punishment (art 55(1)(b)); and, "if questioned in a language other than a language the person fully understands and speaks," the person has the right to "have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness" (art. 55(1)(c)). Furthermore, all persons have the right not to be subjected to arbitrary arrest or detention, and to not be deprived of their liberty except on such grounds and in accordance with such procedures as are established in the Rome Statute. (art. 55(1)(d)).

Article 55(2)(a)-(d) provides that "[w]here there are grounds to believe that a person has committed a crime within the jurisdiction of the Court," and where "that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9 [of the Rome Statute]," then "that person shall also have the following rights of which he or she shall be informed prior to being questioned." (art. 55(2)). The Statute then lists the following rights: "[t]o be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court" (art. 55(2)(a)); the right to remain silent, "without such silence being a consideration in the determination of guilt or innocence" (art. 55(2)(b)); the right "[t]o have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it" (art. 55(2)(c)); and the right "[t]o be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel." (art. 55(2)(d)).

The Rome Statute also enumerates rights for arrestees or persons who appear in response to a summons (art. 57(3)(c)(privacy protection).

Rights of the accused

The Rome Statute article 67 provisions for rights of the accused mimic rights contained in article 14 of the International Covenant on Civil and Political Rights. Article 67 provides that "[i]n the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of the [Rome Statute], to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality": the right "[t]o be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks"(67(1)(a)); the right to have adequate time and facilities to prepare the defense and "to communicate freely with counsel of the accused's choosing in confidence,"(art. 67(1)(b)); the right "[t]o be tried without undue delay" (art. 67(1)(c)); and the right to be present at trial (arts. 63(1), 67(1)(d)), subject to article 63(2), providing for removal of a disruptive accused from the Courtroom.

Also, pursuant to Article 67 of the Rome Statute, the accused has the following rights: the right "to conduct the defense in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it" (art. 67(1)(d)); the right "[t]o examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her" (art. 67(1)(e)); the right "to raise defences and to present other evidence admissible under the [Rome Statute]" (art. 67(1)(e)); the right "[t]o have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks" (art. 67(1)(f)).

Furthermore, under Article 67, the accused has the right "[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence"(art. 67(1)(g)). In addition, under Article 67, the accused has the right "[t]o make an unsworn oral or written statement in his or her defence" (art. 67(1)(h)); and the right "[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal" (art. 67(1)(i)).

Rome Statute, article 67(2) provides that the "Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence."

Furthermore, the Rome Statute provides that, regarding accused persons, the Trial Chamber "shall ensure that a trial is

fair and expeditious and is conducted with full respect for the rights of the accused," (art. 64(2)).

Rights of others

The Rome Statute also provides for human rights protections for other individuals, including victims and witnesses,[16] acquitted persons, wrongfully convicted persons, rightfully convicted persons, persons to be sentenced, wrongfully arrested, and youth. Many of these categories of persons are particularly vulnerable to human rights abuses. One such category is persons tried and acquitted of perpetrating international crimes. At least in the context of terrorism charges, arguments have been made favoring the continued detention of persons tried and acquitted of such charges, on the grounds that though rendered not guilty under law, such persons still pose a threat to society.

Conclusion

Adoption of the Rome Statute was the culmination of almost a century of governmental, non-governmental organization (NGO), inter-governmental organization (IGO), and individual perseverance to establish a permanent international criminal tribunal to wrest away the power of systemic impunity and bring to justice perpetrators of the most heinous international crimes. As the ICC seeks to wrest impunity away from perpetrators of heinous international crimes, it must remain mindful of its obligation to protect the human rights and fundamental freedoms of all persons, including persons suspected or accused of perpetrating crimes against humanity, war crimes, or genocide.

The world has witnessed the deprivation of fundamental human rights of individuals caught up in the anti-terrorism wave, for example in the systematic arbitrary detention of persons not charged with any crime, alleged inhuman and degrading treatment of captives, denial of right to counsel, etc. The ICC must not follow the lead of governmental entities involved in such abuses, either for the cause of a "war on terrorism" or in a battle to end impunity. The ICC is indeed a "human rights court" that must respect and protect the human rights of all who come into contact with the ICC. It is hoped that the ICC will fully recognize, respect, protect, and enforce the rights of all persons who have any exposure to or experience with the Court, its agents, or any national or inter-governmental entity, or individual upon whom the Court relies for cooperation or assistance. It is hoped that there will never be a need for the ICC to give effect to any remedy for the breach of human rights under the Rome Statute, because it is hoped that no breaches will ever occur.[17]

The International Criminal Court, as a premier 21st century inter-governmental institution with primary competence in the field of international criminal law, also has an international human rights law mandate. At the 1998 diplomatic conference of plenipotentiaries that adopted the Rome Statute, United Nations Secretary-General Kofi Annan remarked: "We have before us an opportunity to take a monumental step in the name of human rights and the rule of law". Let the ICC fulfill that mandate, and let the court fully respect the human rights of all.[18] ▲

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[16] Article 68(1) of the Rome Statute enumerates rights for witnesses and victims: "The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses." Furthermore, it seeks to balance rights of the accused against rights of victims and witness: "The Prosecutor shall take such measures particularly during the investigation and prosecution of such crimes. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." Id. Prosecutors must respect the rights of victims and witnesses (arts. 54(1)(b)), as must the Pre-Trial Chamber (art. 57(3)(c)) and the Trial Chamber (art. 64(2)). (arts. 54(1)(b), 57(3)(c), 64(2)). A trust fund will be established for victims. (art. 79); Draft Rules of Procedure, rule 97. Reparations may also be awarded. (art. 75); Draft Rules of Procedure, rules 94-98.

[17] Remedies for Rome Statute human rights breaches could take many forms, including excluding from trial evidence acquired in violation of human rights. In some domestic jurisdictions, remedies might include civil tort remedies against offending governmental agents or private individuals; criminal prosecution of offending government agents or private individuals; governmental sanctions of offending governmental agents; or internal discipline within police departments for offending officers. In any event, any remedy must necessarily balance competing victims interests' versus suspects' and accused persons' interests.

[18] *UN Secretary-General Declares Overriding Interest of International Criminal Court Conference Must Be That of Victims and World Community as a Whole*, U.N. Doc. L/ROM/6.r1 (June 15, 1998), http://www.un.org/icc/pressrel/lrom6r1.htm; *see also Summary Record of the 1st Plenary Meeting, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, ¶¶ 11-12, U.N. Doc. A/Conf.183/SR.1 (1998).

U.S. Interrogation of Al Qaeda and Taliban Suspects: Is it Torture?

Alan M. Parra*

Introduction

In a story first appearing in *The Washington Post*, allegations emerged that U.S. agents have subjected terrorist suspects held in overseas facilities to so-called "stress and duress" tactics. [1] These tactics reportedly include forcing detainees to stand or kneel for hours in black hoods or spray painted goggles; being held in awkward, painful positions; and, depriving detainees of sleep with a 24-hour bombardment of lights. These reports further allege that the detainees are often "softened up" by MPs and Special Forces, who beat them and confine them in tiny rooms.[2]

Because these detainees have been held incommunicado, it is impossible to determine the veracity of these allegations. In contrast to the detainees being held at Guantanamo, those held at the Bagram Air Base in Afghanistan and detention facilities on Diego Garcia are prohibited from receiving visitors. Nevertheless, the anecdotal information provided by anonymous sources within the Administration appears to be credible, and is consistent with interrogation measures known to be used by many intelligence agencies. Perhaps more importantly, U.S. officials have not denied the use of these tactics, outside of general claims that the detainees have been treated humanely and in a manner consistent with the Geneva Conventions.

This article explores whether the "stress and duress" tactics used by the U.S. government against Al Qaeda and Taliban detainees constitutes torture, or inhuman and degrading treatment under standards incorporated into international human rights law instruments, as interpreted in the jurisprudence of United Nations treaty bodies, and as interpreted and applied by United Nations special procedures.

Torture v. inhuman or degrading treatment or punishment – Ireland v. Northern Ireland

Human rights organizations have been quick to characterize the "stress and duress" tactics reportedly used against Al Qaeda and Taliban detainees as "torture".[3] Other commentators, however, argue that these tactics, if they are in fact used, do not constitute torture.[4] To support this position, these commentators cite the well-known *Northern Ireland* decision handed down by the European Court of Human Rights.[5] In that case, the Court concluded that the '5 techniques'[6] used by British forces to obtain information from suspects did not rise to the level of torture. The Court did conclude, however, that these acts constitute inhuman or degrading treatment also prohibited by Article 3 of the European Convention, a holding ignored by those arguing that "stress and duress" tactics reportedly used by the U.S. interrogators do not constitute "torture".[7]

The distinction drawn between torture on the one hand, and cruel, inhuman or degrading treatment on the other, is reflected in all of the major international human rights instruments, as well as in the jurisprudence of various bodies and procedures that have addressed the issue.[8] As such, the

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[1] Priest, Dana and Gellman, Barton. (2002, December 26). U.S. Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities. The Washington Post, p. A1.

[2] Id. This article also reported that some detainees are handed over to foreign intelligence services that have a reputation for using brutal methods to extract information from detainees. This comment will not address this particular issue. Nevertheless, if true, this would be a clear violation of Article 3 of the Convention Against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment. This is particularly true when one takes into consideration the reports that the U.S. interrogators use the threat of handing over a detainee as a means of coercing him to provide information.

[3] *See e.g.,* Human Rights Watch. United States: Reports of Torture of Al-Qaeda Suspects. HRW Press Release, December 27, 2003.

[4] *See e.g.,* Rivkin, David B. and Casey, Lee A. (2003, January 11) It is not torture and they are not lawful combatants. The Washington Post, p. A19.

[5] *Ireland v. United Kingdom,* European Court of Human Rights, Series A, No. 25, 41 (1978).

[6] The 5 techniques consisted of the following:

(a) wall standing: forcing the detainees to remain for periods of some hours in a "stress position", described by those who underwent it as being "spreadeagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers;

(b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;

(c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;

(d) deprivation of sleep: pending their interrogations, holding the detainees in room where there was a continuous loud and hissing noise;

(e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the center and pending investigation.

Id., para. 96

[7] *Supra,* n.4.

[8] For example, Article 7 of the International Covenant on Civil and Political Rights provides: "No one shall be subjected to torture *or to cruel, inhuman or degrading treatment or punishment…".* (emphasis added). Article 16 (1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides:

> Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

question at hand is not simply whether the "stress and duress" tactics reportedly used by the United States are torture, but whether they are cruel, inhuman or degrading treatment also prohibited by international human rights law.

International human rights law instruments & UN treaty bodies

While it is natural to look to the *Northern Ireland* case for guidance because it is the seminal case on the topic and the facts presented are analogous to those found in the question at hand, the *Northern Ireland* case is now more than a quarter century old. As with any norm, what constitutes a violation of the prohibition is subject to evolving interpretations. In the intervening years there has been a substantial body of law developed by other human rights bodies, most notably the Human Rights Committee and the UN Committee Against Torture (CAT). Moreover, since the United States is a party to both the International Covenant on Civil and Political Rights and the UN Convention Against Torture, the jurisprudence of these bodies is arguably more relevant for purposes of determining whether the "stress and duress" tactics reportedly used by the United States violate its international legal obligations. There is also little doubt that the United States will be questioned about these allegations when it presents its second periodic reports to both of these treaty bodies;[9] it can also be anticipated that the UN Special Rapporteur on Torture, as well as other special procedures, will express concern about these allegations at the upcoming session of the UN Commission on Human Rights. Accordingly, it is important to understand how these bodies interpret the prohibition in determining whether the United States is in violation of its obligations.

The Human Rights Committee, the treaty body established under the International Covenant on Civil and Political Rights, has been presented with a number of cases in which the facts are reminiscent to those found in the *Northern Ireland* case. In *Cariboni v. Uruguay*, the Committee concluded that torture had occurred where the person was blindfolded (the eyes become inflamed and purulent), hooded, forced to sit up straight, day and night, for a week, in the presence of piercing shrieks apparently coming from others being tortured, and threatened with torture himself.[10] Similarly, the Committee has found inhuman or degrading treatment where the victim was forced under threat of punishment to stand blindfolded for 35 hours, or to sit motionless on a mattress for several days. [11]

Perhaps a closer analogue to the facts presented in the U.S. interrogation of Al Qaeda and Taliban suspects is seen in CAT's consideration of the second and third periodic reports of Israel. In its concluding observations to these reports, CAT addressed the techniques approved by the Landau Commission involving "moderate degree of pressure, including physical pressure." Although the techniques are secret, they have been described as follows:

> Sitting in a very low chair or standing against a wall (possibly in alteration with each other); hands and/or legs tightly manacled; subjection to loud noise; sleep deprivation; hooding; being kept in cold air; violent shaking (an 'exceptional' measure, used against 8000 persons according to the late Prime Minister Rabin in 1995). Each of these measures on its own may not provoke severe pain or suffering. Together – and they are frequently used in combination – they may be expected to induce precisely such pain, especially if applied on a protracted basis of, say, several hours. In fact, they are sometimes apparently applied for days or even weeks on end.[12]

In its consideration of Israel's second periodic report, the CAT concluded that interrogations applying methods approved by the Landau Commission (i.e., hooding, shackling in painful positions, sleep deprivation and shaking of detainees) are in conflict with articles 1,2 and 16 of the Convention and should cease immediately.[13] It also recommended that interrogation procedures pursuant to the Landau Commission should be published.[14] In its consideration of Israel's third periodic report, the CAT welcomed the 1999 judgment by the Israeli Supreme Court[15] which held that the use of certain interrogation methods by the Israel Security Agency (ISA) involving the use of "moderate physical pressure" was illegal as it violated constitutional protection of the individual's right to dignity.[16] The Committee, however, was critical of the Supreme Court's conclusion that the use of sleep deprivation for purposes of breaking the detainee was not unlawful if it was merely incidental to interrogation. The CAT noted that in practice in cases of prolonged detention, "it would be impossible to distinguish between the two conditions."[17] The Committee also expressed its disapproval of the Supreme Court's conclusion that ISA interrogators who use physical pressure in extreme circumstances (ticking bomb cases) might not be criminally liable as they may be able to rely on the "defence of necessity."[18]

The UN bodies' conclusions reflect an evolved interpretation of the torture prohibition since the European Court of Human Rights ruled in the *Northern Ireland* case,

[9] The U.S. submission of its second periodic report to both Committees is overdue by several years.

[10] *Cariboni v. Uruguay* (159/1983), Report of the Human Rights Committee, GAOR, 43rd Session, Supplement No. 40 (1988), Annex VII A, paras. 4, 10.

[11] *Bouton v. Uruguay* (371/1978), Report of the Human Rights Committee, GAOR, 36th Session, Supplement No. 40 (1981), Annex XIX, para. 13.

[12] Report of the Special Rapporteur on Torture, UN doc. E/CN.4/1997/7, para. 119.

[13] Concluding Observations of the CAT: Israel, 18/05/98, A/53/44, para. 240. The UN Special Rapporteur on Torture has also concluded that the techniques constitute torture: "they can only be described as torture, which is not surprising given their advanced purpose, namely, to elicit information, implicitly by breaking the will of the detainees to resist yielding up the desired information." (UN doc. E/CN.4/1997/7, para. 121)

[14] Id.

[15] Public Committee Against Torture in Israel v. State of Israel, 38 I.LM. 1471.

[16] Concluding Observations of the CAT: Israel, 23/11/2001, CAT/C/XXVII/Concl.5.

[17] Id.

[18] Id.

with the UN bodies identifying treatment comparable to the 5 techniques as torture. This may reflect a greater willingness on their part to find the requisite degree of mental suffering necessary for an act to constitute torture. In his authoritative work on the treatment of detainees, Sir Nigel Rodley suggests that "the views of the four judges who dissented from the Court findings [in the *Northern Ireland* case] will provide a sounder guide for authoritative understanding of what constitutes mental torture."[19] At the same time, Rodley accepts that "the notion of 'intensity of suffering' is not susceptible of precise gradation and in the case of mainly mental as opposed to physical suffering, there may be an area of uncertainty as to how the forum in question may assess the matter in any individual case."[20]

Torture v. inhuman and degrading treatment: qualitative differences?

It is this subjectivity and area of uncertainty that allows some to argue that the "stress and duress" tactics reportedly being used by U.S. interrogators do not occasion suffering of the particular intensity and cruelty implied by torture. In the words of David Rivkin and Lee Casey, "to say these practices do [constitute torture] trivializes the torture that does take place in so many areas of the world." One may concede that there is a qualitative difference between the "stress and duress" tactics and more barbaric measures (such as electrocution, suspension or *falanga*), which is why international instruments and the bodies interpreting those instruments differentiate between "torture" and "cruel, inhuman or degrading treatment or punishment". Torture is generally considered to be an aggravated form of cruel, inhuman or degrading treatment. Yet, the Human Rights Committee has also stated, "It may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment." [21]

If one does attempt to make such a distinction, the existence of more barbaric measures does not necessarily support the conclusion that the "stress and duress" tactics are not torture. To the contrary, the suggestion that these tactics do not occasion the requisite intensity and cruelty trivializes the intensity of the mental suffering that can result from "stress and duress" tactics. Studies done on the victims subjected to the 5 techniques in the *Northern Ireland* case found that most suffered from severe psychological problems after their release and had extreme difficulty integrating back into society.[22] Moreover, some of the measures used not only result in mental suffering, but also severe physical pain. This is graphically seen in the following description on the effects of requiring a prisoner to stand throughout the interrogation session or to maintain some other physical position:

> Another form which is widely used is that of requiring the prisoner to stand throughout the interrogation session or to maintain some other physical position which becomes painful. This, like other features of the KGB procedure, is a form of physical torture, in spite of the fact that the prisoners and the KGB officers alike do not ordinarily perceive as such. Any fixed position which is maintained over a long period of time ultimately produces excruciating pain. Certain portions, of which the standing position is one, also produce impairment of the circulation. Many men can withstand the pain of long standing, but sooner or later all men succumb to the circulatory failure it produces. After 18 to 24 hours of continuous standing, there is an accumulation of fluid in the tissues of the legs. This dependent edema is produced by the extravasation of fluid from the blood vessels. The ankles and feet of the prisoner swell to twice their normal circumference. The edema may rise up the legs as high as the middle of the thighs. The skin becomes tense and intensely painful. Large blisters develop, which break and exude watery serum. The accumulation of the body fluid in the legs produces impairment of the circulation. The heart rate increases, and fainting may occur. Eventually there is renal shutdown, and urine production ceases. Urea and other metabolites accumulate in the blood. The prisoner becomes thirsty … Men have been known to remain standing for periods as long as several days. Ultimately they usually develop a delirious state, characterized by disorientation, fear, delusions, and visual hallucinations. This psychosis is produced by a combination of circulatory impairment, lack of sleep and uremia.[23]

Conclusion

In the case at hand, it is difficult to make a definitive determination as to whether the "stress and duress" tactics reportedly used in the interrogation of Al Qaeda and Taliban detainees would be found by UN bodies to constitute torture. Several facts would have to be clarified to make such a determination: To what extent are the measures used in combination? What is the duration of the treatment? What are its physical or mental effects? What is the age and health condition of the victims? Nevertheless, the cases to date considered by the Human Rights Committee, the Committee Against Torture and the Special Rapporteur on Torture suggest that the alleged conduct, at a minimum, would be found to be cruel, inhuman or degrading treatment that is also prohibited by international human rights law. The Post article most definitely presents reasonable grounds to require a prompt and independent investigation required by Article 12 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. OMCT, a Swiss based NGO focusing on torture, has already called upon the United States to allow the UN Special Rapporteur on Torture to visit the Bagram Air Base.[24] While it is highly unlikely that the

[19] Rodley, Nigel S. (1999). The Treatment of Prisoners Under International Law (2nd ed.). Oxford: Clarendon Press, p. 94.
[20] Id.
[21] Report of the Human Rights Committee, *GAOR*, 37th Session, Supplement No. 40 (1982), Annex V, general comment 7(16), para.2.
[22] For an excellent summary of the problems experienced by the victims in the *Northern Ireland* case, *see* Conroy, John. (2000) Unspeakable Acts, Ordinary People: The Dynamics of Torture, pp. 123-137. New York: Alfred A. Knopf
[23] Id., pp.128-129.
[24] OMCT Press Release, 28 Jan. 2003.

U.S. would extend such an invitation, there is no question that the issue will be raised at the upcoming session of the UN Commission on Human Rights and will be addressed by various special procedures of the Commission, as well as by the respective treaty bodies. In the interim, the U.S. would be well advised to follow its practice in Guantanamo and allow ICRC access to all detainees in order to ease concerns that they are being treated inhumanely.▲

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Could the US/UK Lawfully Invade Iraq Without Explicit Authorization from the UN Security Council?

Michael P. Scharf*

At the time of this writing, the United States and United Kingdom are about to launch a war against Iraq, with the objective of overthrowing the regime of Saddam Hussein, which is alleged to be producing weapons of mass destruction. At this point, the United States and United Kingdom have not received specific authorization from the Security Council for the invasion and have argued that they may lawfully attack Iraq in the absence of such authorization. This article examines the merits of their case, and indicates why in the end they are likely to do everything possible to obtain a new resolution from the Council authorizing the attack.

Article 2(4) of the U.N. Charter prohibits any nation from using force against another. The Charter contains only two exceptions to this prohibition: A nation can attack another (1) when such action is authorized by the United Nations Security Council, or (2) when it is acting in self-defense in the face of an armed attack. The United States and United Kingdom have argued that an invasion of Iraq is permissible under both of these exceptions. The United States and United Kingdom's first argument is that the invasion is legally justified because of Iraq's failure to disarm as required by Security Council Resolution 687, which established the cease-fire at the end of the Gulf War in 1991.

Under the terms of Security Council Resolution 687, Iraq agreed to discontinue its weapons of mass destruction program in return for a cessation of hostilities. Since Iraq has failed to live up to its promise, the argument goes, the cease-fire is no longer in effect and the members of the international community can rely on Security Council Resolution 678, which was adopted in 1990, authorizing U.N. member states to use "all necessary means" to expel the Iraqi occupiers from Kuwait and "to restore international peace and security in the area." Under this view, the 1991 Gulf War is not over, and military operations could be resumed by the United States and its allies under the original Security Council authorization to use force.

The problem with this argument is that Resolution 687 did not authorize individual states to break the cease-fire in the future based on their belief that Iraq has violated the terms of the cease-fire by producing chemical, biological or nuclear weapons. Instead, the resolution states that the Security Council "decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area." This language suggests that the responsibility for overseeing and enforcing the cease-fire was left with the Security Council itself, not individual states. It is notable that three of the Permanent Members of the Security Council – France, Russia and China – have taken the position that this clause means that another Security Council resolution would be needed to authorize a resumption of the war against Iraq.

It is also significant that the administration of Bush the elder did not view Resolution 678 as a broad enough grant of authority to invade Baghdad and topple Saddam Hussein. It is ironic, critics assert, that the current Bush Administration would now argue that this resolution could be used ten years later to justify a forcible regime change.

The second U.S./U.K. argument is that an invasion of Iraq can be justified under international law in light of Iraq's failure to cooperate fully with weapons inspections as required by Security Council Resolution 1441.

Resolution 1441 was adopted on November 8, 2002, after eight weeks of intense negotiation. The final text of the resolution represents a compromise between the French/Russian view and the American/British perspective. The Security Council acquiesced to the United States by deciding that Iraq "was and remains in material breach" of prior resolutions, and recalling that the Council has repeatedly warned Iraq that it will face "serious consequences" as a result of its continued violation of its obligations. Further the resolution does not explicitly require another Security Council vote on authorization of military force as France and Russia had proposed, although it does provide that any breach must be reported by the Chairman of the Inspection Team to the Security Council, which shall convene immediately to consider the situation and decide what to do.

The United States has argued that the "material breach" and "serious consequences" language impliedly authorizes the use of force if it concludes that Iraqi is not fully cooperating with inspections or if the inspections provide evidence that Iraq is producing weapons of mass destruction – without the need for further Security Council action. But it is significant that France, Russia, China, and other members of the Council made clear at the time they voted in favor of the resolution

that it "excludes an automaticity in the use of force" and that the use of force is only valid "with the prior, explicit authorization of the Security Council."

The United States has made similar implied authorization arguments two other times in the past. The first was in the context of Operation Desert Fox, a series of air strikes on Iraq in December 1988. The second was with respect to its 1999 intervention against Serbia. On both occasions, Russia and China objected to the U.S. interpretation. If the United States once again insists on an implied authorization argument despite the opposition of Russia and China, it is likely that the long-term result will be their increased use of the veto to prevent the Council from adopting Chapter VII resolutions, thus undercutting the possibility of useful political consensus being expressed in those instruments.

The third argument is that the attack is legally justified as an act of pre-emptive self-defense as permitted by Article 51 of the United Nations Charter. Article 51 provides that "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations". A literal interpretation of this clause would rule out using force until another state had actually launched its attack, which in the modern age of weapons of mass destruction would often be too late to respond successfully. Arguing that the U.N. Charter was not meant to be a "suicide pact," governments and legal scholars have long maintained that Article 51 should be read as permitting "anticipatory" or "pre-emptive" self-defense in the context of an imminent and overwhelming threat.

It is noteworthy that the equally authentic French version of Article 51 uses the phrase "aggression armee," meaning "armed aggression," instead of the more restrictive term "armed attack" contained in the English version. The right to respond to armed aggression would include the right to respond to credible threats, since aggression can exist separate from and prior to an actual attack.

The contours of the right to pre-emptive self-defense were mapped by the international response to two actions by Israel. The first was Israel's 1967 air strikes against Egyptian military airfields, which were launched after several weeks of frantic diplomacy while hostile troops were massing against Israel in the Sinai, the Golan Heights, and the West Bank.

Many countries supported Israel's right to conduct defensive strikes prior to armed attack and draft resolutions condemning the Israeli action were soundly defeated in both the United Nations Security Council and the General Assembly.

The second action occurred fourteen years later, on June 7, 1981, when Israeli aircraft bombed the Iraqi Osirik nuclear reactor. In a statement released after the air strike, the Israeli government justified its action as an act of self-defense, claiming that "sources of unquestioned reliability told us that the reactor was intended for the production of atomic bombs, which were to be used against Israel." This time, the United Nations Security Council (including the United States) and General Assembly responded by adopting resolutions condemning Israel for the strike, largely on the basis that Israel had failed to prove the Iraqi threat was sufficiently immediate to justify pre-emptive self-defense.

Now flash forward to 2003. The Bush Administration has said that an attack against Iraq is justified because (1) Iraq possesses chemical and biological weapons and is on the verge of possessing nuclear weapons; (2) Iraq has used weapons of mass destruction in the past (against Iran and the Kurds of northern Iraq); and (3) Iraq has manifested its hostile intentions toward the United States and its allies (especially Israel). On its face, this case would seem to be more like the widely condemned 1981 Israeli bombing of the Osirik reactor than the widely accepted 1967 Israeli air strikes against Egypt. As explained below, in the case of Iraq in 2003, the imminence of the threat is just not present.

Although the Bush Administration claims Iraq could get nuclear weapons soon, most experts, including the U.S. Central Intelligence Agency and the International Atomic Energy Agency, have concluded that it would take Iraq several years or more to develop nuclear weapons. Further, it is generally acknowledged that Iraq has no missiles, planes, or other means to hit the United States with chemical or biological weapons. And, as former U.S. National Security Adviser Brent Scowcroft and others have pointed out, Saddam Hussein, for all his evils, has not had a record of cooperating with terrorist groups who might utilize unconventional means of delivering such weapons. (In contrast, al-Qaeda has received support from Kurd-controlled northern Iraq which is protected from Saddam Hussein by the U.S. and British-patrolled no fly zone).

Baghdad has been deterred from taking any provocative action over the course of the last decade, and Saddam Hussein's military strength has been substantially diminished by years of sanctions and periodic bombings by U.S. and British air forces. Even if the U.N. inspectors discover evidence that Iraq is producing agents for use in chemical or biological weapons, there is just no credible evidence that Iraq is going to use them to attack another nation any time soon. In addition, none of Iraq's neighbors including Israel have appealed for protection from an imminent attack by Iraq – something the International Court of Justice has held is a pre-requisite for the use of collective self-defense.

In its National Security Strategy, issued by the White House in September 2002, the Bush Administration argued for a relaxation of the imminent threat requirement for pre-emptive self-defense in the aftermath of the deadly attacks of September 11, as to which the United States had no warning. In President Bush's words, since "unbalanced dictators with weapons of mass destruction can deliver those weapons on missiles or secretly provide them to terrorists allies[,] if we wait for threats to fully materialize, we will have waited too long."

It is noteworthy in this regard that, subsequent to Iraq's 1990 invasion of Kuwait and its use of chemical weapons against the Iranians and Kurds, there has been a re-appraisal of the legality of Israel's 1981 action by many diplomats and legal scholars. In hindsight, Israel's justification does not look farfetched, after all.

But critics of an expanded notion of pre-emptive self-defense maintain that a nation's capacity alone should not be sufficient to trigger defensive strikes against it. The world is full of other countries such as North Korea that possess weapons of mass destruction and have been generally hostile

toward the United States, but they have not been seen as legitimate targets for pre-emptive attacks. And if the law is interpreted as permitting any country that feels threatened to attack any country from which it feels the threat is emanating, the international taboo against using force will be severely diminished and the international system will be dangerously destabilized.

International law is governed by the principle of reciprocity: what is good for the goose is good for the gander. Critics worry that the example set by the invasion of Iraq will undoubtedly be invoked by others pressing for war, such as Russia in Georgia, India against Pakistan, China against Taiwan, or North Korea against South Korea. The precedent would encourage nations to strike first under the pretext of preemption.

. . . .

After World War II, German and Japanese leaders were tried and convicted for planning and participating in an aggressive war. But there is no international court existing today with jurisdiction to consider the issue of the legality of the U.S./U.K. invasion of Iraq. Consequently, unilateral action taken by the U.S./U.K. would be judged not in a court of law, but in the court of world opinion. Based on this analysis, it is far from clear how that court would rule. If the military intervention were judged to have violated international law, the United States and United Kingdom would suffer diplomatically, most notably through an erosion of international support for their continuing war against al-Qaeda. To avoid this, at the end of the day, the United States and United Kingdom will make every effort to obtain a new Security Council resolution explicitly authorizing the use of force against Iraq whether or not they believe such a resolution is legally necessary.▲

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Saddam Hussein Exile Offer Violated International Law

Michael P. Scharf*

Harkening back to the tactic that averted the U.S. invasion of Haiti 10 years ago, Bush Administration officials have publicly suggested that the United States would be willing to accept exile for Saddam Hussein and the members of his ruling clique as an alternative to war.

The Administration evidently believed it had nothing to lose by floating this proposal, since it is exceedingly unlikely that Saddam Hussein would ever seriously entertain the offer of exile. At the same time, by publicly making the offer, the Administration could portray itself as pursuing peaceful alternatives to war, thereby mollifying critics of its Iraqi policy at home and abroad. In reality, the Administration has sacrificed a great deal through this unnecessary maneuver.

The problem is that the United States has publicly accused Iraq of committing atrocities that constitute grave breaches of the Geneva Conventions and acts of genocide. These include the systematic rape of civilians and torture of POWs during Iraq's invasion and occupation of Kuwait, the use of prohibited chemical weapons during Iraq's war with Iran, the destruction of 4,000 Kurdish villages, the massacre of tens of thousands of Kurdish civilians in Northern Iraq, and the application of tactics that led to the starvation of over one million Shi'i in Southern Iraq. The Bush Administration recently declared that Saddam Hussein and the other responsible members of the ruling clique should be brought to justice for these crimes before Allied occupation courts at the conclusion of the upcoming military intervention.

In floating the exile proposal, the Bush Administration failed to comprehend that its prior allegations triggered the application of the Geneva Conventions and the Genocide Convention. The United States and other Parties to these treaties have undertaken an obligation to search for, prosecute, and punish suspected perpetrators. After ratifying these two important treaties, the United States voted in favor of several United Nations resolutions confirming that states are prohibited under international law from offering asylum, amnesty or any other form of immunity from prosecution to persons suspected of grave breaches of the Geneva Conventions or genocide. Consequently, the offer of exile to Saddam Hussein, and the implied promise of impunity, is patently inconsistent with America's obligations under international law.

To the extent that this signals that the United States does not take its obligations under the Geneva Conventions and Genocide Convention seriously, history tells us that rogue regimes around the world will be encouraged to engage in gross abuses that are prohibited by these treaties. For example, the international amnesty given to the Turkish officials responsible for the massacre of over one million Armenians during World War I encouraged Adolf Hitler some twenty years later to conclude that Germany could pursue his genocidal policies with impunity. In a 1939 speech to his reluctant General Staff, Hitler remarked, "Who after all is today speaking about the destruction of the Armenians?"

In a similar vein, 20 years from now, a future tyrant is likely to look back at the offer of exile made to Saddam Hussein and conclude that he has nothing to lose by committing war crimes and genocide. If things start going badly, he can always bargain away his criminal liability by accepting exile.

Furthermore, the United States has no right to offer Saddam Hussein a way to avoid facing justice. The international community owes a duty to the victims and their families to

hold the perpetrators of these international crimes accountable for their acts. Prosecuting and punishing the violators would give significance to the victims' suffering and serve as partial remedy for their injuries. Conversely, to his victims, the offer of exile for Saddam Hussein represents the ultimate in hypocrisy: while they struggle to put their suffering behind them, Saddam and his cronies could be enjoying a comfortable retirement abroad courtesy of the United States. In this way, the offer of exile to Saddam Hussein will only make it more difficult for the Iraqi people to believe in the principle of the rule of law and to respect a new U.S.-installed Iraqi government after the war. Consequently, rather than bolstering international support for the pending war against Iraq as the Bush Administration intended, the offer of exile to Saddam Hussein only highlighted the Bush Administration's lack of respect for international law. ▲

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2003 CARIBBEAN REGIONAL CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION

The Faculty of Law of the University of the West Indies is pleased to announce that it will host the first regional conference of the International Law Association in the Caribbean, March 26-29, 2003, in Bridgetown, Barbados. The conference will focus on the role of international law in the Caribbean—a region comprised primarily of small island states located in and states bordering on the Caribbean Sea and rich in cultures and languages, including English, French, Spanish, Dutch and Portuguese. The conferences' three central aims are:

- **encouraging international and regional dialogue on pressing international legal issues;**
- **fostering contacts between the international community and the peoples of the Caribbean; and**
- **establishing the first Caribbean Branch of the International Law Association.**

International & national practitioners, legal advisers, government representatives, academics, & students are invited to attend.

For further information about the conference themes as well as for registration, accommodation and contact details, please see the conference's web site: http://law.uwichill.edu.bb/2003ILA/intro.htm or contact:

Dr. David S. Berry, Conference Organizer
Faculty of Law, University of the West Indies
Cave Hill Campus, P.O. Box 64
Bridgetown, BARBADOS
Tel: (246) 417-4243; Fax: (246) 424-1788

Consider Joining….

THE AMERICAN NATIONAL SECTION OF THE INTERNATIONAL ASSOCIATION OF PENAL LAW (IAPL)

The International Association of Penal Law (IALP) was founded in 1889 in Vienna. It has over 3,000 members and affiliates in 120 countries and has 47 national sections. The IALP publishes the *International Revue of Criminal Law* and the *Nouvelles Etudes Penales* and hosts an international conference every five years. Its next conference will be in 2004 in Beijing, China, and will focus on a variety of issues such as: (1) Criminal Responsibility of Minors in a National and International Legal Order; (2) Corruption and Related Crimes in International Economic Activity; (3) Principles of Criminal Procedure and the Application of Disciplinary Proceedings; and (4) Concurrent National and International Jurisdiction and the Principle of "Ne bis in idem". Members of the American Section will have the opportunity to prepare reports on these and other topics for discussion at the regional meetings this year.

For more information, please contact:
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INTERNATIONAL ORGANIZATION INTEREST GROUP PANEL & BUSINESS MEETING AT THE ASIL ANNUAL MEETING, WASHINGTON, D.C. – APRIL 2-5, 2003

PANEL TOPIC: THE UNITED NATIONS & ADMINISTRATION OF TERRITORY: LESSONS FROM THE FRONTLINE

Date: Friday, April 4, 2003

Time: 12:30 – 1:30 pm

Place: Omni Shoreham Hotel, 2500 Calvert Street, NW

The administration of territory by international organizations, as in Kosovo (UNMIK) and East Timor (UNTAET), represents a peculiar phenomenon: while retaining their identity as international civil servants, UN officials assume the duties of government ministers. This dual role generates both practical tensions and difficult questions of principle. For example, what law applies to the UN when it administers territory? Is the UN willing and able to accept the legal responsibilities – for example, in human rights – that come with the governmental role? How might the organization better equip itself for such missions in the future? What happens when the needs of the territory conflict with the interests of other states?

Chair:	***H.E. Rosalyn Higgins DBE*, Judge of the International Court of Justice.**
Panelists:	***Ambassador Peter Galbraith*, National War College, Washington DC; former Head of Political Affairs, UN Transitional Administration in East Timor (UNTAET); former Ambassador to Croatia; and** ***Ambassador Jacques Paul Klein*, former Head, UN Transitional Administration in Eastern Slavonia (UNTAES) and UN Mission in Bosnia & Herzegovina (UNMIBH).**
Commentator:	***Ralph Wilde*, Lecturer in Law, University College London, University of London.**
Facilitator:	***George E. Edwards*, Associate Professor of Law, Indiana University School of Law at Indianapolis.**
Organizers:	***Daniel Bethlehem*, Lauterpacht Research Centre for International Law, Cambridge University Law Faculty; *George E. Edwards*, Associate Professor of Law, Indiana University School of Law at Indianapolis; And *Ralph Wilde*, Lecturer in Law, University College London.**

International Organizations Interest Group Business Meeting immediately follows the Panel, in the same room as the Panel.

International Organizations Interest Group
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