The International Law Of Human Rights Since September 11, 2001

Remarks of Steven M. Schneebaum, Esq.
Western Hemisphere Institute for Security Cooperation
Fort Benning, Georgia
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I want to talk today about developments in the international law of human rights since, and because of, what happened on September 11, 2001. While it may seem at first glance that everything is different now, I will attempt to show this afternoon that, from a legal perspective, very little has changed. The legal structure of human rights law and humanitarian law is intact and, if we are careful in our stewardship of that structure, it will become stronger. But that is a big "if": we will have to remain vigilant, and insist that our political leaders are true to first principles.

I begin with a brief description of the state of play of international human rights law immediately before last September 11th. Certain themes in the international law of human rights became quite pronounced in the latter half of the twentieth century, rather dramatically changing the legal environment.

Among these critical developments was the proliferating recognition and acceptance of human rights law as law. In the years following World War Two, precepts of human rights that had always been formulated in the language of ethics or of political philosophy were translated with increasing frequency around the world into the idiom of law. That transformation had and has some very important consequences, both for those who suffer abuses of their human rights, and also for those accused of being the abusers.

This late twentieth century development may be seen, for example, in the expansion of the body of treaty law: the texts and conventions, both regional and global, which formulate human rights as enforceable legal rights. The closing years of the last century also witnessed a rise in the number and profile of legal institutions, of courts and of bodies that look like courts, whose job it is to hear accusations of human rights violations, to adjudicate those charges, and, more and more frequently, to dole out punishments.

Along with the increasing legalization of human rights came the increasing acceptance around the world of the proposition that respect for human rights is a matter of individual responsibility. It is, at the end of the day, individuals who carry out violations of the human rights of others, whether they do so in civilian dress or in military uniforms, and whether they are "just following orders" or are acting on their own initiative. Those individuals may be held personally responsible for the consequences of their actions.

This trend has been seen in at least three separate arenas. First, even a former head of state like General Pinochet may be called to the bar of justice in national courts, to respond to the charge of having violated the laws of individual nations whose citizens he may have abused. With the request for General Pinochet's extradition from the United Kingdom to Spain, and finally his return to Chile, there opened a chapter that is still unfinished. With mounting frequency, nations have passed legislation in effect "criminalizing" human rights abuses overseas, citing as authority either the right to protect their own citizens or the principle of universal jurisdiction over those who are

"enemies of all mankind." There have recently been efforts, for example, in Belgium, to prosecute both Abdulaye Yerodia Ndombasi, the Foreign Minister of the Democratic Republic of Congo (formerly Zaire, once a Belgian colony), and Ariel Sharon, the current Israeli prime minister, for human rights abuses of which they stand accused, albeit ones that occurred very far from the borders of Belgium.[1]

Along with these instances of criminal prosecution in domestic courts, we have seen an increase in support for the proposition that international human rights abuses should be tried in international courts. The United Nations has established courts which are now sitting to consider human rights abuses alleged to have occurred in the Balkans and in Rwanda. The International Criminal Tribunal for the Former Yugoslavia has now opened what may be its most important -- and what will surely be its most complex, lengthy, and expensive – proceedings, the trial of Slobodan Milosevic. The permanent International Criminal Court, whose Charter has been subscribed by many nations of the world but, unfortunately in my view, not yet by the United States, will probably begin operations within the next year or two.

In addition to criminal proceedings in which alleged human rights abusers have been prosecuted, civil courts have played an increasing role in the protection of human rights and in the provision of remedies for their violation. The United States has for two decades been in the forefront of this movement. Under U.S. law, individuals claiming to have been victims of human rights violations may file civil lawsuits, in an attempt to recover money damages for the offenses that were done to them, if they can find the perpetrators within this country. The logic for this approach is that international law, including customary international law in general and the customary international law of human rights in particular, is part of the law of the United States. Therefore, a person who has violated those legal precepts has violated the law of the United States, and may be pursued in exactly the same way as anyone else who has committed a civil offense against the person of another human being. In the United States, we have seen judgments entered against people as powerful as former President Marcos of the Philippines, as well as serving general officers in the armies of, for example, Indonesia and Guatemala. In hearing those lawsuits, U.S. courts have been transformed into forums capable of evaluating evidence and deciding allegations of human rights abuse wherever and whenever they may have occurred.

All of these developments are relatively powerful tools in creating a world in which violations of human rights are a matter of individual legal responsibility. This does not mean, of course, that responsibility is **only** individual: the states on whose behalf they act may certainly be liable for the actions of human rights violators, as has always been the case. But developments in the United States on the civil law side, and in Europe and before the two United Nations tribunals in the criminal law context, have also demonstrated that one does not need to be a commanding

[1] On February 14, 2002, the International Court of Justice in The Hague ruled that the Belgian warrant for the arrest of Yorodia, accusing him of violating the Geneva Conventions, was itself a violation of international law, because as a sitting Foreign Minister he is entitled to absolute immunity from foreign municipal legal process. While the Court went out of its way to suggest that its ruling was limited, and expressly noted that "immunity does not mean impunity," the decision will certainly put an end to the proposed prosecution of Prime Minister Sharon for acts that he allegedly committed or directed at refugee camps in Lebanon when he was Commander of the Israeli Army in 1982.

officer to have personal responsibility, or to be an appropriate person to be brought to justice. Individuals who act with the actual or apparent authority of states must think seriously about conforming their conduct to the international law of human rights, because that body of law imposes obligations directly on them, and they may be personally legally responsible for the consequences of their actions, in ways that are still emerging.

Along with the increasing invocation of individual responsibility, the world has seen a higher profile of human rights issues in state-to-state relations. More and more commonly, developed states are passing laws in which, for example, foreign aid, or trade relations, or various kinds of exchanges, are premised on other countries' human rights records. The United States statute book contains numerous enactments in which there are legal consequences of patterns of human rights abuse in other countries. The President may certify that the states are eligible or are ineligible for various kinds of treatment based in part on their observance of human rights. In some cases, the human rights concerns that are at issue are very specifically laid out. They might be, for example, the right of trade unions to organize workers, or the rights of minorities to practice their religions freely, or the rights of educational institutions to teach without fear of government intervention. The use of trade sanctions too has become more common, to the extent that, in many circles, the propriety of an American administration's entire geopolitical policy toward China, the largest country on Earth, turns on whether we are willing to use trade sanctions to enforce human rights objectives. States, in short, increasingly employ economic and political weaponry to reward or to punish other states purely on the basis of perceptions of patterns of compliance with or violation of human rights norms.

The United States is surely not alone in basing laws on such concerns: the Western European democracies have done so as well. What is new is that the resulting pressure is no longer limited to the diplomatic arena. There are now real and significant consequences. Nations can find themselves targets of boycotts or of substantial trade restrictions on the basis of their human rights records. Many observers would credit the use of international economic sanctions, at least in part, with bringing about the end of the criminal apartheid regime in South Africa. Burma has in recent years managed to make itself an outlaw with which many nations simply refuse to have trading relations simply because of a consistent and unapologetic pattern of human rights abuse.

And, of course, the international community indicated in the closing years of the twentieth century that concern for human rights can even justify otherwise illegal military activity. In Kosovo, the United Nations was prepared to tolerate an armed operation inside the territory of a UN member state in the name of humanitarian intervention. Not only was the concept of using armed force to achieve humanitarian objectives openly debated in a forum that includes every country in the world, but the discussion led actually to the dropping of bombs. Importantly, there was no proffered legal justification for the military exercise in Kosovo **other than** concern for a new set of victims of the unremitting Serbian pattern of human rights abuse. While there have been other occasions in which the UN has effectively permitted individual members to carry out interventions grounded in human rights concerns, this was the first case in which the sovereignty of a UN member was essentially overridden in open deference to such principles.

The expanding role and profile of human rights law and humanitarian law at the end of the twentieth century set the backdrop for where we were on September 10th, just before the first attack in New York City. Other themes were dominant as well. Non-governmental organizations, NGOs, private citizens united and inspired by their concern for human rights, had begun to become

essential participants in the evolution of the international human rights legal regime. And other "non-state" actors also took up their positions: international law has come gradually to recognize that rights and obligations may attach also to organizations that are striving to exercise government authority, but do not currently exercise it. Examples are insurgent movements, rebel forces, and even ethnic alliances that perform some of the administrative functions characteristic of governments.

While it may once have been true that these entities were not considered "subjects" of international law – that they lacked "international legal personality" – it is difficult to defend that proposition now. We live in a world, after all, in which even individuals have rights and bear obligations established by international law. It would be strange indeed if movements that outfit their fighters in uniforms, levy taxes, and command the loyalty of civilian subjects, were unaffected by such developments.

The United States legal community recently witnessed a very important discussion of the extent to which non-state actors are subject to international legal rules. I am going to take a moment to discuss it, because I think it has relevance to our analysis of September 11th.

About five or six years ago, a group of women, claiming to have been victims of ethnic cleansing during the war in Bosnia in the early 1990s, filed a lawsuit in New York City. The defendant was Radovan Karadzic, who among other things said he was President of the Republika Srpska, the Serbian ethnic enclave within Bosnia, which was not recognized by any other state. Karadzic was attending a meeting of the United Nations General Assembly in New York City, when the women served him with a civil complaint alleging that he had been the architect of the campaign to abuse their human rights.

Karadzic appeared in court and presented a defense, which in essence was this: he argued that either he was the head of state that he claimed to be, in which case he was immune from the jurisdiction of the U.S. domestic courts, or he was not a head of state. If he was not a head of state, then the entity of which he was in fact the leader had no international legal personality. It may have been a Serbian civic association, or even an informal street gang, but it was not an international "thing." That argument, made on his behalf by a former attorney general of the United States who was his lawyer, persuaded the trial court judge to dismiss the case. The United States Court of Appeals for the Second Circuit in New York reversed.

The Court of Appeals first deferred to the executive branch of the United States Government, which has the constitutional authority to make these decisions, and on that basis concluded that the Republika Srpska was not a state, and that Karadzic was therefore not a head of state. But, the court said, it does not follow that the entity does not constitute an international legal person, or that those who carry arms in its name have no international legal obligations. In fact, the court recognized, non-state actors in the modern world **do** have to comply with international law, and in particular must observe the human rights of the people over whom they exercise power.

I suggest to you that the propositions at issue in the *Karadzic* case are of importance in analyzing the international legal personality of the Taliban and Al Qaeda: in particular for determining whether they are bound by international law, and whether we are bound by it in our dealings with them.

I want to call attention to just one more "theme" that was emerging prior to September 11th. The point here is that the internationalization and legalization of human rights necessarily entail that states have no legal authority to violate those rights, even on their own territory, and even with respect to their own citizens. This truth, which I would argue is beyond serious doubt, means nothing less than that the concepts of statehood, of sovereignty, and of independence are now undergoing a fundamental change similar to nothing that has happened in the Western world, perhaps since the Treaty of Westphalia in 1648.

The notions of sovereignty, statehood, and international legal personality have been brought into the spotlight because of issues arising in the international law of human rights. Even the United Nations Charter recognized that there is an intractable tension between the traditional concept of sovereignty and the existence of legal obligations constraining states' treatment of people on their own soil. The resolution of this tension will have enormous consequences for membership in international organizations, and more broadly for the development and contents of the international legal regimes of the future. So human rights law in the second half of the last century was, among other things, the engine for revision of fundamental terms of international law, calling into question assumptions that had been accepted for hundreds of years.

Although the world before September 11th was a world in dramatic change, there were, of course, certain international legal propositions that most observers thought were beyond controversy. Some of these must now be reconsidered, in light of the attacks on the United States and the world's reaction to those attacks.

It used to be thought – and I daresay it was taught at this Institute -- that there was a fairly clear distinction between the body of law called human rights law and the one called the law of war. To say this, of course, does not mean that there are not individual cases in which the two regimes overlap; it does not mean that an individual military officer, for example, out on patrol may not on the same day have to take into account his or her obligations under the law of war and also under the broader concepts of human rights law. But the subjects were typically taught and written about as if they were two different bodies of law with two different purposes, and two different reasons for existence.

That proposition is now open to some doubt. While human rights law and the law of war have always had certain commonalities – for example, both define minimum standards of behavior, and neither permits derogations from those minimum standards -- it seemed clear that when there was a war going on, the law of war governed what soldiers were permitted to do, and when there was no war, human rights law controlled the activities of agents of states. Has this changed since September 11th?

Let me repeat the conviction with which I began this talk: the legal system itself is capable of surviving, expanding, and maturing to incorporate the challenges that September 11, 2001, and its aftermath have posed for us. But even at the threshold, there are certain very important questions that must be addressed. Some are being considered by our political leaders and are being discussed in the media. This is a good thing, very much in keeping with the democratization and openness that characterize political developments in most of the world right now. Other issues, however, which are essential to a legal analysis of the new situation, are receiving inadequate attention.

Let us start with definitions of key terms, like "war." Last night, from the very first sentence of his State of the Union address, the President of the United States spoke of our country being at war. There has never been a doubt as a matter of international or U.S. constitutional law what that means. A war is an armed conflict in which there is an enemy who is identifiable. Shots are fired, bombs dropped, and intelligence gathered and exchanged, but it is known who is on the other side. Even in Vietnam, and certainly in Kuwait and Iraq, we knew who the enemy was, even if we could not always identify the enemy or distinguish those who were acting for him. In the war on terrorism, who is the enemy? How do we know him when we see him?

Is this a "real" war? Or a metaphorical one? Is it different from the "wars" on poverty, crime, drugs, and hunger, all of which were solemnly announced by Presidents in my lifetime, and all of which did in fact involve, to one degree or another, the taking up of arms?

The Constitution of the United States says that Congress shall have the power to declare war. This conflict has of course not been designated as a war by Congress. So is it legally correct to refer to it as a war? Is the President acting within his constitutional authority when he sends troops into harm's way? And to what extent is the law of war implicated by whatever armed conflict is taking place, now in Afghanistan, and perhaps elsewhere later?

I will not have any more to say about the U.S. constitutional law issues, not because I do not think that they are interesting, but because they go far beyond the topic on which I want to focus today.[2] Instead, let us consider international law questions raised by the conflict, and especially issues concerning human rights. We can find guidance in answers to these questions, both in the Geneva Conventions and the other instruments that formed the basis of the law of war in the twentieth century, and in the interpretation and development of those instruments, not only by diplomats and by scholars, but also by judges.

One such question has to do with whether Taliban and Al Qaeda fighters are entitled to be considered combatants, and, if they are captured, whether they are prisoners of war. There is substantial legal authority on that, and resolving it in a manner consistent with existing law would not seem to be terribly controversial. For some reason, however, the United States Government seems intent on creating an issue here: the President has announced that he will not extend to these people the protections of the Geneva Convention on Prisoners of War, insisting instead that they are "unlawful combatants," an expression not used in the Convention, although apparently devised to refer to those who are outside its protections.

The Geneva Convention sets out criteria for determining whether a detainee is to be treated as a prisoner of war. The main issue is whether he is, and is holding himself out to be, under the

[2] It may be worth noting that a conflict may well qualify as a "war" in the international sense, with all of the implications of that term in international law, regardless of how it is regarded in the domestic legal system of one of the belligerents. In an analogous situation, the U.S. Constitution reserves the term "treaty" for a subset of all international agreements binding the United States in the international arena, thereby excluding certain very important and high-profile "treaties" like the General Agreement on Tariffs and Trade (GATT). There is nothing wrong or suspicious in the lack of congruence between terminologies used by international and municipal legal regimes, although it is easy to be misled.

control of a belligerent. Control may be indicated in a number of ways, such as insignia that are worn (which must be "visible from a distance"), and a command structure to which the individual must respond.

Some of you may be old enough to remember that, in the 1980s, Nicaragua filed suit against the United States in the International Court of Justice, alleging that the activities of the U.S.-sponsored rebels who came to be called the "*contras*," and in particular their mining of the harbor at Corinto, were acts of war undertaken by the United States for which it was internationally liable. The Court imposed a very high standard for the level of "control" required to entail international responsibility. To be under the "control" of a nation's military, the ICJ opined, one had to be subject not only to command, but to specific operational control. If, in other words, the *contras* were not responding to commands of the U.S. military hierarchy in carrying out their missions, then, as a matter of international law, they were not acting on behalf of the United States.[3]

But the International Criminal Tribunal for the Former Yugoslavia, in the case against the Bosnian Serb officer Dusko Tadi□, has given some new guidance on what the concept of "control" means in international law. The Tribunal rejected the ICJ's narrow view, stating instead that:

> control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of these acts. *Prosecutor v. Tadi*□, ¶ 137.

This is, of course, particularly important in the context of the fighting now going on in Afghanistan. The question is how we are to regard the participants in the Taliban and Al Qaeda

[3] The Court nevertheless decided the case against the United States, since the funding and arming of the *contras* were held to be inconsistent with the Treaty of Friendship, Commerce and Navigation between the two countries. The U.S. contested the Court's jurisdiction, refused to participate in the proceedings, and ignored the Court's order. In so doing, it perfectly replicated the response of the Khomeini Government of Iran to the ICJ suit brought by the United States concerning the Embassy hostages in Teheran.

military command structures. How do they fit into the vocabulary, to the architecture of international law? The Geneva Convention speaks of military hierarchies and visible insignia. It would seem as if both the Taliban and Al Qaeda satisfy those criteria. But the Convention also says that to be a party to combat, and to have one's soldiers entitled to claim POW status on capture, an entity must habitually adhere to the laws and customs of war. We know from sad experience that Al Qaeda, at least, does not regularly conform to the traditional laws and customs of war: indeed, Al Qaeda apparently considers it to be acceptable to murder thousands of civilians very far from any place of arguably legitimate combat.[4]

Does this mean therefore, that Al Qaeda prisoners are not entitled POW status? Does it mean that Al Qaeda is not a belligerent with whom the United States at war? Could this be a legal basis for President Bush's position?

It is reasonable to ask what the International Criminal Tribunal for the Former Yugoslavia would say. Based on the excerpt I read from the *Tadi* decision, I conclude that the Tribunal and other international bodies charged with this responsibility are interpreting the terms of the Geneva Conventions broadly, in light of their overall goals and objectives, their objects and purposes. I believe that, if tested by any international body of relevant competence, the prevailing argument would be that both the Taliban and Al Qaeda militias are military forces whose members are entitled to POW status according to the criteria set out in the Convention.

The debate is raging in Washington right now over whether Taliban and Al Qaeda internees taken captive in Afghanistan in principle do or do not qualify for treatment as prisoners of war. But even if there is any possibility for disagreement, the Geneva Convention lays down a very specific procedure for resolving any question about whether someone is a POW. This is Article 5:

> Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [the standard categories of POWs], such persons shall enjoy the protection of the present Convention such time as their status has been determined by a competent tribunal.

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[4] President Bush, on February 14, announced that he was changing his position regarding the treatment of battlefield detainees. According to the new policy, the Geneva Convention "applies" to the Taliban, but not to Al Qaeda, although he continues to say that detainees belonging to neither group are entitled to POW status. The asserted basis for this view is that the Taliban, although never recognized by the United States as the Government of Afghanistan, once exercised actual control over the territory of that country, and Afghanistan is a party to the Geneva Conventions. I am not aware of any international law scholar who finds this position defensible: for one thing, the right to be treated as a prisoner of war attaches to individuals, not states as parties to treaties. Also, even if this mattered, most Al Qaeda fighters are citizens of Saudi Arabia, which is a party to the Conventions (it would seem as if the President's announcement, even to be internally consistent, should distinguish among Al Qaeda detainees on the basis of their nationality). In any event, the announcement of the new policy included an insistence that the change would make absolutely no practical difference in treatment of any prisoners. This is probably true, deepening the mystery as to why the Government is making such an issue of it.

It is, in other words, a court that must make this decision: not an executive, not the military on the ground, and not even the Commander-in-Chief. There seems to be some resistance even to this in the White House, which appears to be certain, on the one hand, that the internees are not POWs, and on the other, that there is no need to invoke the express provisions of the Convention intended to address just such a situation. The Secretary of State appears not to share this view, or so he told the *New York Times* the other day. What does this difference of opinion imply?

Certainly no one would suggest that George Bush's objective is to be able to torture internees on the battlefield, or to perform medical experiments on them. And in fact, the Administration's track record regarding the treatment of people alleged to have been involved in the September 11th attacks, or in providing military support for the attackers, is to the contrary. The one person thus far having been accused of direct participation in September 11th, Zacarias Massaoui, the so-called "twentieth hijacker," will stand trial in the U.S. District Court for the Eastern District of Virginia, not in a military tribunal. He is not a POW, but will be tried under the regular criminal code, as a person accused of having violated United States law. And the Department of Justice, in order to obtain a conviction of Massaoui, will need to prove to a civilian jury that he is guilty of the crimes charged beyond a reasonable doubt. He will be defended vigorously by counsel, who can be counted upon to raise in their client's behalf all of the procedural and substantive safeguards of the criminal law of which American citizens are so justly and fiercely proud.[5]

Who, then, is calling for lesser standards, and why? The President's order issued in November provides for what he calls "military commissions." These commissions will, if they actually come into existence, operate according to a set of rules very different from those applicable in civil courts. For example, the burden of proof required for obtaining a conviction will not be beyond a reasonable doubt, but by a probability. Defendants will not necessarily have the right to appoint their own counsel, they will not have the right of access to all of the material being used to create the case against them, they will not have the right of appeal on points of law, and they will apparently be subject to the death penalty, even if they are convicted by less than unanimity among their judges.

The President has already indicated that he will dilute some of the provisions of his order. And yet this military commission structure, I submit to you, virtually guarantees that no nation friendly to the United States will voluntarily extradite to our country anyone accused of terrorist crimes, or war crimes, or crimes in association with September 11th, or participation in Al Qaeda. Each of our allies, probably including the United Kingdom and Canada -- here as always our closest friends -- will find that what the President has proposed does not comport with its conception of the due process of law.

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[5] The proven exceptions to this generalization appear to be relatively minor. The media carried a photograph of the internees on their arrival at Guantánamo that suggested the possibility of some physical abuse (the prisoners were being forced to kneel outside their cells), and there have been some reports of less than ideal conditions of detention. But it does not appear as if the Administration is intent on denying them POW status in order to justify inadequate treatment or the denial of basic human rights, at least on a systematic basis. This makes the President's position all the more curious.

Whether or not an individual detainee is a prisoner of war is important in terms of the way in which he can be interrogated, the kinds of questions he must answer, and whether he is entitled to counsel. It is important also in defining the offenses for which he can be prosecuted. As all of you know, a serving soldier or officer may not be tried for the act of having entered into combat, which may not, under the laws of war (*jus in bello*), be considered a criminal offense. A soldier may, of course, be accused of violating the laws of war, or the criminal law, and he may be required to stand trial for his alleged acts. But merely putting on a uniform and taking up arms is not an offense.

If we are applying civilian law to these people, however, then of course their actions may well be considered criminal, and upon conviction, they may be punished. They may be tried for **any** offenses they may have committed. This is true not only for John Walker Lindh, the American who apparently preferred the brotherhood of Al Qaeda to that of the civil society into which he was born, but also for others who may be alleged to have taken up arms against the United States. And, of course, they are still entitled to the basic elements of due process in their treatment, as well as in their eventual trials and sentencing.

I suspect – and I confess that I have no hard evidence to support my suspicion – that the reason the Administration is so reluctant to recognize either Taliban or Al Qaeda fighters as prisoners of war has to do with another aspect of the Geneva Convention. A POW has the right to be repatriated **at the end of hostilities**. I am not sure that there is going to be an announced end of this war in our lifetimes (all the moreso as the President characterizes it as a "crusade," and speaks about combating or even ending "evil" in the world). And so this is a problem implicit in the acceptance that **anyone** captured alive in Afghanistan, or wherever else the war on terrorism may be fought, is entitled to the status of a prisoner of war. If, however, this is what is really driving the White House position on the applicability of the Geneva Conventions, then there is a more serious issue lurking behind it: whether it is sensible to speak of a "war" being waged, not only against an imprecisely defined enemy, but with no foreseeable series of events that would constitute final "victory."

Another issue of great importance, as well as great precedent value, is how we define and address terrorism as a criminal offense. We all agree, I think, that what happened in New York and at the Pentagon were acts of international terrorism. We have become accustomed to applying the definitions of terrorism to acts committed by small groups of people with a political agenda, with perhaps an ethnic grievance or a historic one, who are willing to shed blood in the alleged service of their objectives, and whose deliberate intent is to instill paralyzing fear in innocent civilians. Terrorism is aimed at the disruption of daily life, and by its nature does not discriminate between lawful combatants and children or people in hospitals or churches.

Yet there is no internationally agreed definition of terrorism, and it is an old cliché that one man's terrorist is another man's freedom fighter. Paul Revere and the organizers of the Boston Tea Party, much less Simon Bolivar and Bernardo O'Higgins, would surely have been considered terrorists in their day. And so if the objective of our war is to restrain or to end terrorism itself, are we sure we know who the enemy is? There will be no peace treaty, and no white flag of surrender: how will we know when the war is over, and the enemy has been defeated? If terrorism itself is the "enemy," may Allied forces conduct military operations on the territory of a friendly or neutral state – say, Singapore, or Malaysia, or the Philippines – because it is believed that enemy, that is, terrorist, activity may be taking place there?

The terrorism perpetrated at the World Trade Center and the Pentagon, and on the airplane hijacked over Pennsylvania, of course, was especially audacious and brutal, and by any measure far exceeded any similar attack in history. The people who flew the airplanes into the towers and into the Pentagon are dead. But we will undoubtedly be able sooner or later to identify other people who were criminally responsible for some element of those outrages. Should they be tried for the commission of criminal acts in New York City or in Arlington County (as the treatment of Massaoui seems to suggest)? Since there was no international conflict between Afghanistan and Al Qaeda and the United States on the morning of September 11th, presumably they are not war criminals. But if they are found, in Afghanistan or elsewhere in the theater of war, do they have a claim to be treated as prisoners of war? Or are they simply fugitives from local justice in the United States, where the effects of their criminal behavior were most deeply felt?

Those are some of the many questions have yet to be addressed. And it is very clear that our political leaders are wrestling with these questions as much as are scholars and lawyers and judges. They are still feeling their way even in setting out the basic analytical framework of the war on terrorism, and in getting the terminology right. I for one was very encouraged last night to hear that, in his State of the Union address, the President listed the values for which we are fighting in Afghanistan, and included the rule of law as a prominent one of those values.

But as we watch this drama unfold, it is reasonable for us all to ask the questions I have raised here, as well as many others. Do all of the warring parties agree that the law of war applies to irregular, unique kinds of conflicts like the one in Afghanistan? Human rights law in its fundamentals must always be observed. It permits no derogations. Even when the Geneva POW Convention does not apply, individuals who are not entitled to any specific treaty protection are owed the recognition of their basic human rights which we all hold by virtue of our humanity. There is no need for a new paradigm, a new fit, to address the basic questions of the human rights of a 21st century enemy in a 21st century war.

Another question is presented by this conflict, which I as an American care deeply about. It is a question being discussed in the media in Europe, but which has drawn less attention than it deserves in our own country. It is this: to what extent is the United States committed to the international legal regime, when that regime imposes obligations on the United States that it would rather not obey? The rest of the world has every right to expect that the only remaining superpower will abide by the law in exactly the same way in which it expects other nations to do. Indeed, by virtue of its power alone, the United States is in a position to inflict serious harm not only in the physical sense but on the legal system itself, if it determines to disobey, or to ignore, the strictures of international law.

This is of enormous importance on many levels. Just as a practical matter, if we do not treat the Al Qaeda detainees as POWs, what will happen next time some of our irregular soldiers, on special mission and not wearing the uniform of the United States Army or Marines, are captured? To what treatment will they be entitled? What kind of precedent are we setting?

In raising the issue of precedent, I do not mean to suggest that the sense of fairness that Western countries habitually bring to bear on such things is going to be applied by our enemies. Yet we do need to think about precedent. It is a fear of misused precedent, after all, that has been asserted as the reason two U.S. administrations have been unwilling to commit to the International Criminal Court. The United States has not ratified the Charter of the ICC because we are concerned

about the possibility of jurisdiction being asserted over American military officials for what are essentially political disagreements.

We all need to read the signals carefully to determine whether the United States is really committed to the regime of international law in general, and the law of human rights in particular. This is no time for unilateralism or exceptionalism. The whole world is watching, and the whole world has a vital stake in the outcome.

We must also be very careful, not just in the United States but elsewhere, in countries that are involved in this combat as well as in those that are alleged to be the venues in which terrorists operate, that we not tolerate any dilution of domestic legal protection of human rights so long as this war lasts. No reduction in the freedom to express views contrary to those of the government can be made acceptable on the grounds that we are at war.

There is another aspect to the public discussion of this war that I find troubling, and which I do not know how to resolve. In the descriptions of the conflict in Afghanistan since September 11th, I have been hearing two different vocabularies and two different grammars. There is talk of **war** and **victory**, and there is talk of **crimes** and **justice**. These two concepts – these two paradigms for analyzing and understanding what happened on September 11th and what has happened since -- are fundamentally different. It is fine to say metaphorically that the aim of war is to establish a system of justice, but the metaphor must never be allowed to overshadow the reality. The aim of a war is to neutralize the enemy. Retaliation for wrongs perpetrated by the enemy is frequently accepted as a goal of war, and there is no prohibition even against the deliberate killing of enemy operatives. Those are neither the aims of justice nor the proper means for establishing it.

When President Roosevelt reported to the Congress in 1941 that Pearl Harbor had been infamously attacked by the Japanese Air Force, he did not ask authority to bring Hirohito to justice. He asked for a declaration of war. There is an essential difference, and the failure to take notice of that difference threatens to undermine the political consensus that maintaining this effort will require.

Just the other day a senior official of the Administration was asked whether he could justify the way in which the internees in Guantánamo were being treated, in terms of housing, food, clothing, and so on. He should, of course, have referred the questioner to the Geneva Convention, which the United States is in fact observing even while denying that it applies. Instead, however, he answered that the prisoners are being treated a lot better than the way they treated their victims.

That answer is an understandable one: an answer that everyone who has been under arms has been tempted to give at some time. Every time I have spoken to the Command and General Staff Course here at the Western Hemisphere Institute for Security Cooperation about international human rights law, someone has put to me a question that is a variation on this theme. "What you're saying is very interesting," someone is sure to say, "and it would be a very nice world if everyone behaved nicely as you are suggesting. But you don't understand. Where I come from, I am being shot at, and innocent civilians are being murdered, and homes are being burned, and women are being raped, and bribes are being extorted from people who have no money. We have to do whatever is necessary to combat that kind of thing, and if it means occasionally that we have to bend the rules and get a little physical, well, we just have to do that." How should I respond?

The answer is that human rights law does not permit derogations, no matter how understandable they might appear to be, and no matter how undeserving of protection may appear the human whose rights you are asked to honor. Neither international law nor United States Government policy has room for the justification of human rights abuse. The lessons of Andersonville and My Lai show that, in United States law, even the most vicious provocation is not a defense to the charge of human rights violations.

We are respecting the rights of suspected Al Qaeda terrorists, while they extended no such consideration to the people on the hijacked planes, or in the Pentagon, or in the World Trade Center, because the legal system on which we all depend requires that we do so. It is not for us to determine what these individuals "deserve" or do not "deserve." Feelings motivated by desires for revenge and retaliation must be understood, but they must also be overcome if we are to maintain and live within a government of laws, not of men. Those sentiments may constitute the beginning of the process of legal analysis, but they must not be allowed to be its end.

Our job as people concerned with human rights law professionally, and as men and women who operate in their daily lives under a legal regime protecting human rights, is now to continue that process. It is to ensure that, at the end of the day, as President Bush urged last night, the rule of law is a value of our culture so important that we will go to war to defend it when it is attacked, as it was on September 11, 2001.

In that struggle, we must, and will, prevail.

Thank you very much.

(Edited as of 2/22/02)