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PROTECTING RIGHTS IN THE AGE OF TERRORISM: CHALLENGES AND OPPORTUNITIES

ROSA BROOKS*

I. THE BEST OF TIMES, THE WORST OF TIMES

Depending on whom you speak to these days (and the mood in which you find them), international law is either practically moribund, or it's more vibrant and important than it has been for years. To take the good news story first, international law issues have been at the forefront of public discourse over the past few years. Pick your issue: the U.N. Charter and the international law on the use of force? The Convention Against Torture? The Geneva Conventions? You'll find it on the front page these days. Journalists are phoning international law professors for background briefings, and students are flocking to courses on international law and human rights. On law school faculties, even those grumpy sorts who have always greeted the mention of international law with a skeptical "harrumph" have taken to buttonholing their international law colleagues in the hallways, demanding an explication of how the Torture Convention regards so-called "stress and duress" tactics.

Even the Supreme Court has weighed in, with recent decisions referencing everything from the European Convention on Human Rights (cited by Justice Kennedy in *Lawrence v. Texas*¹) to the Hague and Geneva Conventions (cited by Justice O'Connor in *Hamdi v. Rumsfeld*²). For international lawyers who have long labored in obscurity, this is definitely good news. Right? Right.

Good news, that is, except for the fact that these issues are in the news mainly because international law and institutions are also under attack as never before. Or, at least, this is the story emphasized by the many people who find themselves in very bad moods these days, who tend to feel that international law is at death's door—and as a result of an assassination attempt by the Bush Administration, not natural causes. Those who prefer this story can point to a host of examples. There was the Administration's "unsigning" of the treaty establishing the International Criminal Court. Then there was the Administration's

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1. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

2. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2641 (2004).

refusal to apply the Geneva Conventions to Guantanamo detainees, following White House Counsel Alberto Gonzales's memo advising the President that the Conventions were "obsolete." After that came the so-called doctrine of pre-emptive self-defense articulated by the Administration in defiance of long-standing interpretations of the U.N. Charter and the subsequent invasion of Iraq, which U.N. Secretary-General Kofi Annan called "illegal."³ Not to speak of the Administration's efforts to evade international obligations under the Convention Against Torture and to stymie the Red Cross by holding some terror suspects as "ghost detainees" in secret locations around the globe.

Both the good news and the bad news stories oversimplify, of course. The true story, like most true stories, is complicated and ambiguous, and at this point, it is very hard to say whether "international law" as such is alive and well or in deep trouble. But though the longer-term legacy of this period of turmoil is not clear, it is important to note that the current challenges facing international law and institutions are not brand new. They did not appear suddenly in the wake of the September 11 terrorist attacks, and they did not emerge as a direct result of recent Bush Administration positions. In fact, the challenges we are discussing in this symposium have been present, and growing, for some time; the post-9/11 environment has simply brought them to the fore.

II. CHALLENGES: GLOBALIZATION AND "HYPERPOWER"

I think it is fair to say that right now there are two fundamental challenges to international law. The first is the rise of non-state actors as influential participants in global affairs, and the second is the emergence of the United States as the world's sole superpower. Let me discuss each briefly, and then turn to a particularly tough issue that has only gotten tougher, as a result of these recent developments: the challenge of protecting human rights in times of conflict.

First, the rise of non-state actors. The international legal order is premised on the idea that states are the main actors in the international sphere and on the related legal fiction of sovereign equality. But globalization, in its many forms, has altered the state-centered international order. Advances in communications and transportation technologies have enabled organizations to mobilize support across national borders and have enabled the development of numerous transnational forms of identity, from membership in Amnesty International to affiliations with al Qaeda. Changes in weapons technologies challenge the

3. *Annan Says Iraq War Was "Illegal"*, BOSTON GLOBE, Sept. 16, 2004, at A12.

PROTECTING RIGHTS

state's traditional monopoly on organized violence and enable relatively small groups of people to do inordinate amounts of harm with shoulder-launched missiles, chemical weapons, and so on. Changes in the international financial system (which are related, of course, to better communications technologies) now permit multinational corporations to maintain a global presence and annual revenues rivaling those of many states.

Today, non-state actors from NGOs to corporations to terrorist groups can have an impact on international affairs in a way that would have seemed unimaginable fifty years ago. In parts of the world where state structures are weak, such non-state actors can wield considerable local influence. In the Niger Delta, large oil companies perform many traditional governance functions—for example, building roads, schools, and hospitals.⁴ In many fragile states, international relief agencies do the same.⁵ In other societies, organized criminal enterprises and even terrorist groups exercise substantial control (consider the relationship between the Taliban and al Qaeda in Afghanistan). And in the international sphere, non-state actors such as human rights and environmental NGOs have increasingly demanded a seat at the treaty-making table, with some success: NGOs have profoundly influenced the creation and shape of treaties from the Rome Statute of the International Criminal Court to the Kyoto Protocol.

Globalization has challenged traditional understandings of international law by permitting the rise of powerful non-state actors and by diminishing the control states once had over populations, finances, and organized violence. But traditional understandings of international law are equally challenged by the second development mentioned above, the emergence of the United States as the world's sole superpower. The international legal system relies on the fiction of sovereign equality. Certainly some states have always been more equal than others; the U.N. Charter and the Security Council reflect the power balance that existed after World War II. But "balance" is the key word. Until the decline of the Soviet Union, no one great power was capable of dominating all others. Today, as an economic and military power, the United States clearly overshadows all other contenders.

4. See, e.g., Norimitsu Onishi, *As Oil Riches Flow, Poor Village Cries Out*, N.Y. TIMES, Dec. 22, 2002, at 1.1.

5. See, e.g., Allen Gerson, *Peace Building: The Private Sector's Role*, 95 AM. J. INT'L L. 102 (2001); Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law* (unpublished manuscript, on file with author).

This is not to say that U.S. power is unlimited. Globalization means that the United States is constrained by an ever more complex spider web of institutions and economic relationships, and it has been no more immune from the effects of globalization than have other states. But the United States has also disproportionately benefited from globalization. Relative to all other states—and even to all other regional groupings of states, such as the European Union—the United States maintains a unique capacity to act on its own rather than through multinational institutions. The Guantanamo Bay detentions and the invasion of Iraq are both cases in point. Each sparked enormous international outcry from states around the globe, but neither was prevented nor significantly altered by global opposition. The United States has consistently been able to trump competing interpretations of international law by dint of its superior power.

Both globalization and the rise of the United States as sole superpower (a “hyperpower,” to its critics) predated the September 11 terrorist attacks, and international law scholars were debating the implications of these developments well before September 11. After September 11, however, these issues ceased to be of concern primarily to scholars and international lawyers. Al Qaeda’s devastatingly successful attacks on the United States highlighted as nothing else ever had the increasing vulnerability of states to non-state actors. And U.S. government efforts to respond to these new kinds of security threats, complete with predictable overreactions, highlighted as never before the increasing asymmetry between U.S. power and the power of other states. In this sense, if international law faces serious challenges today, it is not merely because of September 11 or because of the U.S. government. It is because the international legal order is premised on various assumptions that bear less and less relation to the realities on the ground.

III. PROTECTING RIGHTS IN TIMES OF CONFLICT

I want to turn now from the general to the particular and address the challenge of protecting human rights in times of war and conflict. Here too, of course, it is important to begin by noting that human rights activists and scholars have been struggling for years with the very same set of issues discussed above. In important ways, the very existence of human rights law is (and always has been) a powerful challenge to the centrality of the state in international law. After all, human rights law insists on the limits of sovereignty. But human rights law (and its close cousin, international humanitarian law) is very much like the rest of

PROTECTING RIGHTS

international law in that it has traditionally assumed that states are the primary actors. International human rights law has traditionally seen the state both as the primary threat to individual human rights and as the primary guarantor of these rights. Human rights treaties are, by definition, agreements between states. To the extent that they bind anyone at all, they bind states, not individuals or non-state organizations.

The paradigmatic Cold War human rights violation was the jailing or torture of a political dissident by a repressive state regime. Since the Cold War ended, however, human rights advocates and scholars have increasingly drawn our attention to threats to human rights that come from non-state actors, such as insurgent groups or security forces in the pay of corporations. From the rise of child soldiers to the increase in modern forms of slavery, non-state actors are as likely to be implicated as state actors. Moreover, human rights abuses are as likely to result from state weakness as from overzealous state control. As human rights abuses by non-state actors have increased, human rights NGOs and states have both sought to develop new international norms and institutions to address these changing threats. Some institutions, like the International Criminal Tribunal for the Former Yugoslavia, seek to enforce international law directly against individuals who violate it. Others, like the U.N.'s Global Compact, seek merely to induce voluntary compliance from multinational corporations through norm enunciation.

The rise of globally diffuse terrorist networks presents only the latest in a series of challenges to those interested in protecting human rights. To begin with, terrorism is obviously a human rights abuse in itself, and human rights advocates share with governments the related goals of preventing terrorism and seeking to hold terrorists accountable for their violations of international law. There is no disagreement on this. The problem is not whether to try to prevent terrorism and punish terrorists. The problem is finding a way to respond to one massive human rights abuse without causing still more human rights abuses.

To put it a little differently, the problem is responding effectively to the human rights abuses committed by non-state actors without eviscerating the capacity of international law and institutions to protect individuals from the human rights abuses committed by states. This is a place where the twin challenges to international law that I mentioned earlier—the simultaneous rise of powerful non-state actors and rise of the United States as the world's most powerful state—each push in different directions.

IV. TERRORISM AND THE LAW OF ARMED CONFLICT

It is not news that the Bush Administration regards the United States as being in the midst of a global war on terror. It is also no longer news that the Administration is not using the term “war” in a metaphorical sense, but in a literal sense. “War” is an archaic term, devoid today of clear legal content, but when the Bush Administration says that the United States is in a war against terrorism, it is nonetheless making a specific claim about the United States’ legal prerogatives and obligations in combating terrorism. Concretely, the Bush Administration is claiming that the United States is engaged in an “armed conflict” with al Qaeda and that the applicable law governing the actions of both parties to the conflict is therefore the international law of armed conflict.

One could, of course, object to the Administration’s characterization of the struggle against terrorism as “war.” The Administration’s argument is that a criminal law framework cannot deal adequately with global terrorism. The scale of the September 11 attacks far exceeded the degree of violence associated even with particularly lethal organized crime networks such as drug traffickers. And al Qaeda’s transnational reach makes it difficult to combat using traditional law enforcement tools.

It is true that the challenges of terrorism require us to go beyond the traditional criminal law paradigm. However, if terrorism is not mere “crime,” does that mean it is “war”? This is less clear, but a tremendous amount hinges on the distinction. In particular, if terrorism is conceptualized as “war” rather than “crime,” that implicates a whole different regime of rights protection—one which, as we shall see, does not stand up well to the conceptual challenges that terrorism poses.

If terrorism is conceptualized as a form of armed conflict, then the most clearly applicable body of law is what we variously refer to as “the laws of war,” “international humanitarian law,” or “the law of armed conflict.” I will not address the technical disputes one might have over the proper label, nor go into the question of whether it is properly seen as a subset of human rights law or as a wholly separate body of law. Regardless, the function of the law of armed conflict is to tell us what is or is not permitted in times of conflict and struggle.

The law of armed conflict is *lex specialis*, which is to say that it does not apply when there is no armed conflict, but it trumps other legal regimes when an armed conflict exists. This is why much is at stake in deciding whether terrorism is “armed conflict.” If there is no armed conflict and peacetime rules prevail, then the U.S. Government is bound by the constraints of ordinary criminal law in its efforts to fight

PROTECTING RIGHTS

terrorism. This means that terrorist suspects are entitled to the usual panoply of due process rights enshrined in U.S. law, in addition to any rights they may have as a matter of international human rights law. But if there is an armed conflict, the rights protection regime becomes more permissive and ambiguous, as a matter of both domestic and international law.

Here, as in other areas of international law, the forces of globalization and technological change make it difficult to apply the law of armed conflict in the context of current security threats such as terrorism. The concept of “armed conflict” itself is problematic. The Geneva Conventions reflect the state-centric approach traditional to international law; they evolved in an era in which most non-trivial armed struggles were between uniformed soldiers employed by states. In any given conflict, the assumption was that you could follow the paper trail right back to a sovereign state. Conflicts were fought over the control of territories and populations, and parties to the conflict could ultimately negotiate an end to the conflict through an explicit peace treaty.

As a result, much of the law of armed conflict assumes interstate conflict and applies solely to interstate conflict. Only a very small portion of the law of armed conflict applies to conflicts that are not between states, and even here, the assumption is that conflict that is not between two or more states is instead between a state and an armed insurgent group. In any case, the law of armed conflict spells out the rights and duties of parties to non-interstate conflicts in far less detail than is provided for conflicts between states.

As a threshold matter, a conflict between the United States and al Qaeda immediately creates legal conundrums. Al Qaeda is a very real threat: It has a proven capacity to kill large numbers of people in acts of organized violence (in addition to 9/11, al Qaeda has taken responsibility for the Kenyan and Tanzanian embassy bombings and the attack on the U.S.S. Cole, to cite just a few instances of its destructive capabilities). Yet al Qaeda is clearly neither a state nor a traditional insurgent group. It does not seek to control territory or defined populations; it does not seek to engage in formal diplomatic relations; its “soldiers” wear no uniforms, share no common nationality, and operate across borders. This has caused some to argue that the international law of armed conflict cannot be applied at all to conflicts with al Qaeda.⁶

6. See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 677 (2004); Press Release, White House

Even if we accept that the law of armed conflict is applicable to conflicts with groups like al Qaeda, we still confront a range of legal puzzles. The law of armed conflict takes for granted, for instance, that conflict has reasonably clear spatial boundaries. The law of armed conflict makes certain conduct permissible in conflict zones, but not outside them. But if we are in a conflict with al Qaeda, and al Qaeda has members in states around the globe who are actively engaged in planning and carrying out operations against the United States, does this mean that every state containing such al Qaeda operatives is a conflict zone? If so, the war on terrorism is indeed a global war, and there are few states in which the United States could not lawfully carry out military operations. It is worth emphasizing that the distinction between conflict zones and non-conflict zones is not merely technical. Consider the 2002 U.S. missile strike against a truck full of suspected al Qaeda operatives in Yemen, which killed several people, including a U.S. citizen.⁷ If Yemen is a conflict zone, this preemptive strike against enemy combatants was legally permissible. If Yemen was not, the strike takes on the character of an extrajudicial execution.

The law of armed conflict also assumes that conflicts have clear temporal boundaries. Various activities are permitted during the period of conflict, but not after the cessation of hostilities. Prisoners of war, for instance, must be repatriated at the cessation of hostilities. But there is no likelihood of an “end” to the war on terror. The United States is hardly likely to sign a peace treaty with al Qaeda. And in any case, it is not clear that there can be any “prisoners of war” in the war against terror, since the Geneva Conventions grant that status only to regular soldiers who bear arms openly, wear uniforms, and satisfy a

Press Office, Statement by the Press Secretary on the Geneva Convention (May 7, 2003) (citing President Bush’s affirmation that while the U.S. has an “enduring commitment to the important principles of the [Third] Geneva Convention . . . the war on terrorism is a war not envisaged when the Geneva Convention was signed in 1949” and in this war the Geneva Conventions “simply [do] not cover every situation in which people may be captured or detained by military forces, as we see in Afghanistan today”), available at <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html>; Amnesty International, *Yemen: The Rule of Law Sidelined in the Name of Security* 23, AI INDEX: MDE 31/006/2003 (Sept. 24, 2003) (“Under existing international humanitarian law, it is not possible to have an international armed conflict between a state on the one hand and a non-state actor on the other, should the armed group not form part of the armed forces of a Party to the Geneva Conventions. . .”), available at <http://web.amnesty.org/library/print/ENGMDE310062003>.

7. Dana Priest, *CIA Killed U.S. Citizen in Yemen Missile Strike; Action’s Legality, Effectiveness Questioned*, WASH. POST, Nov. 8, 2002, at A1.

PROTECTING RIGHTS

range of other technical requirements.⁸ A conflict against al Qaeda or similar organizations also makes it harder than ever to determine who qualifies as a “civilian,” with correspondingly protected status. As a legal matter, if we don’t know how to categorize the *dramatis personae*, we don’t know which people are entitled to which protections.

Here I find myself in an extremely rare moment of agreement with White House Counsel Alberto Gonzales, who advised President Bush in a January 2002 memo that the war on terrorism makes certain provisions of the Geneva Conventions seem rather quaint.⁹ To the extent that he was simply noting the obvious, Gonzales was quite correct. The Geneva Conventions were framed with other kinds of conflict in mind, and it is not easy to stretch them to fit a conflict between a state and a global terrorist network. As a result, as a strictly legal matter, it is far from obvious that the Geneva Conventions are fully applicable to the conflict between the United States and al Qaeda.

But it is important to distinguish between legal questions and policy questions. In my view, the indefinite detentions at Guantanamo, the similar detentions of U.S. citizens Hamdi and Padilla, and numerous other U.S. government actions violate basic human rights norms. If the executive branch of the U.S. government can detain or kill people at will, based on unreviewable determinations that they are “enemy combatants” in a war that has no geographical boundaries and will never come to an end, then we might as well toss the whole idea of the rule of law out the window. As a policy matter, the way the Bush Administration has pursued the “war on terror” seems tragic and misguided: In the name of protecting us from the human rights abuse that is terrorism, the Administration has itself trampled on human rights. Nonetheless, as a strictly legal matter, if the law of armed conflict applies to the war on terror, none of these U.S. actions are clearly unlawful. Many are not clearly “lawful,” either, but there is genuine ambiguity about what is permitted and what is required.

If we care about human rights, we need to start by acknowledging that the Geneva Conventions were designed in a different era, and they do not fully reflect the unique challenges to both security and rights that we now face. Acknowledging this seems to me much better than

8. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 3320, 75 U.N.T.S. 134, 138, 140.

9. Memorandum from White House Counsel Alberto R. Gonzales, to the President of the United States, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), available at http://www.msnbc.com/modules/newsweek/pdf/gonzales_memo.pdf.

burying our heads in the sand, since only if we understand the nature of the problem can we begin to think about different legal paradigms that are better adapted to the world as it is today. In the longer term, we need to find ways to combat terrorist organizations while ensuring that human rights are protected and vulnerable populations do not suffer needlessly.

That is a long-term project, however. In the short term, we are in a perilous situation. The old legal framework designed to protect rights in times of conflict does not fit the facts well anymore, but we do not yet have a better legal framework to replace it. This creates the possibility of a very dangerous kind of logical slippage, where genuine ambiguities in one area of the law lead the overly zealous (or the merely disingenuous) to conclude that no legal rules need be followed at all.

The obvious case in point concerns the ongoing scandals relating to U.S. interrogation practices. The endless hemorrhaging of leaked memos from the Bush Administration documents the kind of false syllogism I have in mind. It goes something like this: "The war on terror makes it difficult to know how and whether to apply the Geneva Conventions to detainees suspected of terrorism. Therefore, these detainees are not entitled to the protections of the Geneva Conventions. Therefore, they are entitled to no protections at all and can legally be subjected to interrogation methods that would be considered torture or inhumane treatment under the Geneva Conventions. And since they are not entitled to the Geneva Conventions' protections, these interrogation methods are not torture or inhumane treatment." The logical slippage is apparent when you lay it out like this: We go from the claim that it is difficult to identify the rights of detained terror suspects under a particular legal regime to the claim that these detainees therefore have no rights at all.

We end up in an "anything goes" environment in which the abuses documented at Abu Ghraib became inevitable, and in which the Bush Administration cleared U.S. personnel to use a range of interrogation techniques such as hooding, frightening prisoners with dogs, keeping prisoners naked, dangerously hot, dangerously cold, in agonizing positions for hours at a time, and so on. We also continue to hear reports that the CIA received explicit clearance to use "water boarding," a technique in which a prisoner is subjected to simulated drowning.

To imagine that these techniques are legally permissible requires one to accept the fallacious reasoning outlined above. Even if the Geneva Conventions were as dead as the dodo, these techniques would violate both international and federal law. It does not matter whether

PROTECTING RIGHTS

one looks at the Geneva Conventions and their minimal requirements for humane treatment, or customary international law and *jus cogens* norms, or the Convention Against Torture and the International Covenant on Civil and Political Rights, or U.S. federal criminal law, or U.S. constitutional norms. There is no legal regime in which these techniques are permissible.

One of the most chilling of the recent revelations well illustrates the slipperiness of these particular slopes. You will recall that some Bush Administration legal experts concluded that the President's inherent power as Commander-in-Chief trumps even conflicting federal laws, such as the torture statute or the war crimes statute. In other words, even if the interrogation methods approved by the Administration come to be viewed by some future prosecutor as federal crimes, it does not matter, since the President is above the law whenever he acts as Commander-in-Chief. This completely eviscerates the delicate system of checks and balances upon which our democracy depends; one can imagine the framers of the Constitution turning in their graves.

V. BAD NEWS, GOOD NEWS, AND AN IRONY

I began by noting that there is some truth to both the bad news and the good news stories about the future of the United States and international law, and I want to return to the question of what the future holds.

The bad news first, this time. I have suggested that the many challenges to international law and institutions result from two not unrelated developments. One is the rise of non-state actors as influential participants in global affairs, and the other is the emergence of the United States as the world's sole superpower. The difficulties inherent in trying to protect rights while combating modern security threats are illustrative of these broader challenges. But unfortunately, the Bush Administration has so far handled the struggle against terrorism in a ham-fisted manner, trampling on rights and needlessly alienating allies. By leaping from the valid conclusion that terrorism challenges traditional law of war paradigms to the invalid and dangerous conclusion that there are thus no legal constraints on U.S. actions in the war on terror, the Bush Administration has done the political equivalent of throwing the baby out along with the bath water. This has created the perception amongst both our allies and our enemies that the United States is contemptuous of international law and institutions. As a result, many around the world now believe that the United States is hypocritical when it talks about human rights and the rule of law. This damages our national security interests in the long term: It pushes away friends,

empowers repressive regimes who point to our example, and provides a recruiting boon for our enemies.

There is some good news, too, however. If September 11 dramatically demonstrated the power that non-state actors have to cause trans-border devastation, and the overzealous U.S. response showed that a one-superpower world can also be a dangerous place, the years since 9/11 have also pointed to the continuing vitality of international law and institutions. Many of the extreme positions initially taken by the Bush Administration have been tempered, partly in response to global criticism, and the need to sustain an international anti-terror coalition and stabilize post-war Iraq forced even the most extreme unilateralists to accept the value of international institutions. The simple fact that the many issues I have touched on here are subject to public debate is also genuinely good news. Although critics may bemoan what they see as the Administration's attacks on international law, it is not insignificant that the Administration denies that it is violating or undermining international law. On the contrary, the Administration has strenuously sought to justify U.S. actions in the war on terror on the basis of international law.¹⁰ No one argues that international law is irrelevant; the terms of the debate are over how we should interpret and use international law.

I will close by noting a nice irony. Many prominent members and supporters of the Bush Administration have been openly hostile to the idea of international law finding its way into U.S. courts. Consider the Administration's position on the Alien Tort Claims Act,¹¹ or its efforts

10. See generally Brooks, *supra* note 6.

11. In its brief in *Alvarez-Machain*, the Administration summed up its position on the Alien Tort Claims Act as follows:

Relying on the presumption that statutes do not have extraterritorial reach, the court of appeals held that respondent's arrest was not authorized by 21 U.S.C. 878, and was therefore tortious, because it was carried out in a foreign country. Applying the so-called "headquarters doctrine," the court then held that the tortious conduct was actionable under the Federal Tort Claims Act (FTCA) because it did not "aris[e] in a foreign country." 28 U.S.C. 2680(k). Both holdings cannot be correct.

Indeed, as the government demonstrated in its opening brief, both holdings are wrong. While the arrest did, in fact, occur abroad, the court of appeals' reliance on the presumption against extraterritoriality to find the authority to arrest absent was misplaced for a number of reasons, including that the relevant statute applies to all felonies, a number of which expressly cover extraterritorial conduct, and that the presumption does not apply to statutes that grant the Executive Branch authority to enforce the law, as *Maul v. United States*, 274 U.S. 501 (1927), makes clear. The court's application of the "headquarters doctrine" is equally misguided, and irreconcilable

PROTECTING RIGHTS

to convince courts of the irrelevance of international norms to the U.S. death penalty.¹² Notwithstanding its usual hostility to the idea that international law should be directly (or even indirectly) applicable in U.S. courts, the Bush Administration has recently insisted, in several terrorism-related cases, that international law effectively trumps even the U.S. Constitution.

Recall the government's position in the *Hamdi* and *Padilla* cases, for instance. The Bush Administration's argument boiled down to a single

with the text of the FTCA, because, among other things, every element of the alleged tort occurred in Mexico.

More broadly, the court below erred in limiting the Executive's authority to enforce the law extraterritorially at the same time it vastly expanded the role of Article III courts in applying the law abroad, despite the FTCA's foreign-country exception. The result cannot be squared with either the text of the relevant statutes or the Constitution's allocation of power over foreign relations.

Brief for the United States as Respondent Supporting Petitioner at 1-2, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339).

12. This is well-illustrated by language from the Solicitor General's brief in *Medellin*:

Petitioner seeks a holding from this Court that the ICJ's Avena decision is the product of a binding treaty obligation, giving him a judicially enforceable right to review and reconsideration of his conviction and sentence; alternatively, he asks that Avena be enforced as a matter of comity. This Court should not address those claims. Petitioner, who was denied a writ of habeas corpus in federal district court, requires a certificate of appealability in order to pursue the merits of his claims on appeal. He is, however, jurisdictionally barred from obtaining a COA. First, a COA may be obtained only for constitutional claims, not for treaty claims. Second, a COA may not issue in this case because petitioner cannot meet the Antiterrorism and Effective Death Penalty Act requirement to show that the state court's denial of relief was contrary to, or an unreasonable application of, any holding of this Court. To the contrary, the state court's decision was consistent with this Court's decision in *Breard*. The Court should therefore either affirm the judgment below or dismiss the writ as improvidently granted.

Should the Court reach the merits, it should reject petitioner's reliance on international treaties and the ICJ's decision as free-standing sources of law under which he can obtain judicial review and reconsideration of his conviction and sentence. Neither the Vienna Convention, the Optional Protocol, nor the U.N. Charter—the relevant treaties at issue—provides petitioner with judicially enforceable private rights. Article 36 of the Vienna Convention confers no private, judicially enforceable rights, and the ICJ decision, standing alone, establishes solely an international obligation for the United States. It is for the President, not the courts, to determine whether the United States should comply with the decision, and, if so, how.

Brief for the United States as Amicus Supporting Respondent at 8-9, *Medellin v. Dretke*, 125 S. Ct. 1622 (2005) (No. 04-5928) (emphasis added).

claim: When the President announces that an armed conflict exists and designates someone an “enemy combatant,” the international law of armed conflict immediately displaces constitutional law in U.S. courts.¹³ This was the Administration’s justification for plucking Hamdi and Padilla, both U.S. citizens, out of the civilian court system and holding them indefinitely in military detention, without charge, trial, or access to counsel. Such executive actions are clearly constitutionally impermissible, but the Administration’s claim was that this did not matter, because its actions were lawful under its own (controversial) reading of the international law of armed conflict. And note that the Administration backed its claims not merely by citing the Geneva Conventions, but also by citing norms of customary international law, a mushy concept at which it normally sneers.¹⁴

The Supreme Court did not accept this position, which is fortunate from the perspective of substantive right. In *Hamdi*, the Court instead insisted that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”¹⁵ Still, few ever expected to see the Bush Administration arguing for the direct applicability of international law in U.S. courts—any more than one expected to see human rights advocates insisting on a rigid and formalistic reading of international law, as some have done in an effort to counter Bush Administration claims about the “obsolescence” of the Geneva Conventions.¹⁶

Instead where we will go from here remains to be seen, but these ironies suggest that the future of international law and institutions is neither clearly sunny nor clearly dark. As always, we face a complex mix of challenges and opportunities. What happens next depends on us—on our willingness to confront uncomfortable realities, our willingness to think clearheadedly about emerging challenges, and, most of all, our willingness to continue this debate.

13. See *Hamdi v. Rumsfeld*, 124 S. Ct. at 2636; *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2715-16 (2004).

14. See *Hamdi*, 124 S. Ct. at 2653.

15. *Id.* at 2650.

16. See generally Amnesty International, *supra* note 6.