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## Fighting evil or evil fighting?

- A constructive analysis of the Bush administrations "war on terror"

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## Abstract

The 9/11 attacks became the starting point to the Bush administrations “war on terror”. This thesis confronts the measures and consequences of this war with a legal framework. There is clear evidence that in order to fight terror the Bush administration has become “outlaws” and has in this process also contributed in the distortion of the practice of international law. Preventive interventions and the use of torture are once again argued as justifiable measures when dealing with terrorist or “savages”. Could there not be an alternative? Is the US forced to become criminals themselves in order to fight criminals? This may be tempting to assume but I differ from this conviction. This thesis will provide some constructive recommendations that suggest that it is possible to stay within the legal framework and still be effective in combating terrorism. I will further argue that it should be in the interest of the US to maintain international law thus the alternative is legal anarchy.

***Keywords:** “war on terror”, international law, the Bush administration, Iraq, The USA Patriot Act*

1. Introduction	3
1.1. Purpose and methodological considerations	4
1.2. Questions	5
1.3. Limitations	5
1.4. Disposition	6
1.5 Material	7
2. Discussing legality	8
2.1. Legality as a value	8
2.2. Legal framework	10
3. The “war on terror” – a normative analysis	13
3.1. National policies	14
3.1.1. Patriot Act – protecting or violating?	14
3.2. Foreign policies	17
3.2.1. Preventive intervention - the Iraqi case	18
3.2.2. The occupation of Iraq	20
3.2.3. Abu Ghraib – a case of exception?	23
3.2.4. Palestine – the case of double standards?	26
4. Combating terrorism - constructive recommendations	28
4.1. National policies	28
4.1.1. Respecting civil liberties	28
4.2. Foreign policies	29
4.2.1. Contra productive rhetoric’s	30
4.2.2. Staying within the legal framework	30
4.2.3. Retaining believable policies	32
5. Conclusions	34
6. References	36
6.1 Academic litterateur	36
6.2 Journalistic material	38
6.3 International and national legal instruments	39

# 1. Introduction

There are not many historical events that have marked the collective awareness of the world as much as the “twin tower” collapse in 9/11 2001. The event has come to define the first years of the new millennium in many ways. Central for this thesis will be the “war on terror” which the Bush administration declared only days after the attack. It will focus both on the measures, which this war is fought, and the consequence it imposes on the value of legality.

President Bush states in his address to the nation (Sep 21, 2001) “This is not, however, just Americas fight. And what is at stake is not just American freedom. This is the world’s fight. This is civilisations fight...”. This use of rhetorics was meant to signify the threat that terrorism poses to the free democratic society. He also expresses his gratefulness to the world for its “outpouring support” (Bush, Sep 21, 2001). At this time there was a strong support around the world. The attacks had claimed victims from about 80 countries and furthermore there was an ethnic diversity among these victims.

Today the situation is quite the opposite whereas protests and critic is widespread both within and outside the boarders of America. What was changed the situation around? To understand this I will undertake a normative analysis on various aspects of this war such as, the notion of *Homeland security* and the *Patriot Act* which were put in place by the US Congress to strengthen the protection against renewed acts of terror. But is the nature of this act in line with the American bill of rights or for that matter with international judicial practice? *Guantanamo* and other institutions like it became crowded soon after the war on terror was initiated. But what is the legality of these institutions and also of the measures used by the interrogators assigned there? The invasion of *Iraq* was argued as necessary in fighting terrorism at its core and also protecting the free world from weapons of mass destruction (Bush: Oct 7, 2002). In hindsight we now know there were no weapons of mass destruction and that there where no connection between Saddam and the 9/11 attacks. So what consequence does this self-righteous preventive interventions have on the international society and the practice of international law? These are some of the questions I will try to answer in this thesis.

## 1.1. Purpose and methodological considerations

This thesis is an attempt to analyse the Bush administration and its acts in “the war on terror” against a legal framework. My first purpose is to make a normative statement regarding the means used in “the war on terror” but also the consequences deriving from this means. For this purpose I need to regard the theoretical standpoints, which exist within the academic literature, regarding also the values of legality. In order to make a normative statement I will need to acknowledge questions about the individual rights in contrast to the security of the group, but also the punishment of a group for the atrocities of individuals. For this I need to establish a framework of legality and argue for the protection of the legal value. This is as a methodological necessity whereas it is a question of conflicting values that make out the core in the normative analysis. In other words I will analyse the legality of the means and actions in “the war on terror” in the scenes that there is a legal value based on authority. I will then also analyse whether there are desirable consequences in terms of legal values in otherwise “illegal” actions.

The relevance of this first purpose derives from the fact that “the war on terror” has resulted in a humanitarian crisis as we can see in the aftermath of the Iraqi war. I also argue that there is a risk of creating double standards in the understanding of legality but also the creation of second-class citizens where the stereotypical image of a terrorist makes it acceptable to discriminate and persecute the imaged match. I also argue that there is a danger in disregarding legality in the protection of a democratic society that is formed on the foundation of *rule of law*. It is essential for my thesis that the value of legality acts as a normative standpoint. Without this statement of value there is little chance in arriving at statements about the war on terror (Badersten 2004:208).

The second purpose of this thesis derives from these above-mentioned arguments whereas I aim to compose some constructive recommendations in how the Bush administration could combat terrorism and still remain within the legal framework and at the same time be effective. I am also aware that there is a risk that this thesis is on taking the role of condemning the Bush administration and its actions whereas parts of this analysis will be regarding historical actions and consequences without the possibility to change them. But I argue that the main purpose of this thesis rather is to inform all parties that it concerns that there could be more legally acceptable and

effective means in combating terrorism. My intentions with this are also to highlight the possible effectiveness in these alternative means. The methodological use of a framework of legality will here act as a standpoint.

For this purposes I will be conducting a *theory testing* approach whereas I will question the assumptions made by the Bush administration regarding what measures is effective in fighting terror. Secondly I will have a *theory consuming* approach whereas I need to support my argument with the academic literature on various aspects of the “war on terror”. And finally I have the ambition to also include a *theory developing* approach in the sense that I make constructive recommendations regarding how the Bush administration could reach its assumptions (Esiasson – Gilljam – Oscarsson & Wängnerud 2004:40ff).

## 1.2. Questions

In making a constructive analysis I first need to answer the questions of *how* “the war on terror” is fought. This is to reach an understanding of which legal aspects I need to regard in my normative analysis. This makes it possible to make normative statements to questions regarding how something *should* be (Badersten 2004:210). For this thesis it is also central to answer questions of how it *could* be. My constructive analysis is based on the hypothesis that the “war on terror” is fought with illegal and inefficient measures. And therefore my main question is:

In what ways could the current U.S. administration combat terrorism in a more legal and also effective manner?

## 1.3. Limitations

The contents of this thesis will be focused on the actions of the Bush administration but also the direct and indirect consequences of these actions. I have chosen the Bush administration mostly for the sake of it being the most obvious subject, especially in regards to the collective image of the western world. A world which I live in and a collective image that I, as an individual in many ways are a product of. “The war on terror” which is the phrase I use for this thesis is also bounded by *time* and in some

aspects *place*. The main focus will be on the period post the attacks on the ninth of September 2001.

As I have mentioned earlier the main purposes with these thesis is to test these actions and consequences against a framework of legality and also arrive at a constructive analysis. Knowing that *legality* in some aspects may be a to narrow limitation I will allow myself to wonder into other areas of interests such as aspects of democracy, morality, genus, efficiency and so on. These out spurs of interest are not to be seen as isolated phenomena's but rather highlighting aspects of the normative and constructive analysis in order to make both specific but also more general statements.

In the disposition of my analysis I have also chosen to limit my self to some main aspects of "the war on terror". These are organized within the titles *national policies* and *foreign policies*. In doing so I am aware that I will not be capable of making altogether holistically statement regarding the actions of the Bush administration and the consequences of these. It would be impossible to include all aspects within the limits of this thesis manly because of the nature of this "war" that is fought on so many levels and which are included in almost every aspect of the Bush administrations politics. For example I have chosen not to include the CIA activities in Europe and elsewhere mainly because I find the circumstances unclear and also involves other parties. Furthermore I will not at depth discuss foreign aid policies or diplomatic relations, which for example could have clarified whether, the US are persistent in its disgust for tyrannical dictators like Saddam Hussein and the Talibans. This could have assisted the reader and myself to understanding the intricacy of the system that creates phenomena's as the "coalition of the willing" or for that matter what composes "god and evil". But I regard this aspect to vast for this thesis. I will how ever touch on these subjects in various parts of the thesis. I still argue that my limitations are fully plausible for the purpose and nature of my study.

#### 1.4. Disposition

My ambition in this thesis is to "climb the ladder" of the Blooms taxonomy (Rienecker & Stray Joergensen 2000:34 f). In doing this I have chosen a disposition where the empirical answers on the questions of *how* "the war on terror" is fought is applied in a normative analysis. The ambition here is to make use of the knowledge to

answer questions of *should*. The normative analysis and also the following constructive analysis are as I have mentioned in need of a framework of legality. In constructing such a framework I have to make an effort to wonder to the upper steps of the ladder in an attempt to construct recommendations in how to combat terrorism and thereby answering the questions of *could*.

More specific in chapter 2, *Discussing legality* I will try to illustrate some aspects of the value of legality. I will also clarify the legal framework that will guide me in my analysis. The contents of chapter 3 "*The war on terror*" – a normative analysis as the title implies a normative analysis in which I will make statements upon the legality of the actions and the consequences of these actions. This analysis will be organized under the subtitles *national policies* and *foreign policies* whereas under national policies I will focus mainly on the legal nature of the "Patriot Act" and the effects it have or may have on civil liberties. Under foreign policies I will analyse the *Iraqi war*, *Guantanamo* and *Palestine* all in an aspiration to pinpoint the questions of legality and results the Bush administration achieve in fighting terror. In chapter 4 *Combating terrorism – constructive recommendations* I will give some specific and general recommendations in what ways the Bush administration could respect the value of legality and also become more effective in as the title implies combating terrorism.

## 1.5 Material

In spite the relatively recent nature of the subject the volume of available material is vast. This implies the validity of my argument I made in the introduction regarding the attacks and their impact on our collective memory. What then is to say that the references that I rely on in this thesis are the most prestigious or most suited? There is an overrepresentation of academic material, which is natural for this assignment but it also, forces me to rely on secondary information. I have also used some transcripts of speeches and interviews and I hope that the reader understands that I have neither the time nor the influence to conduct similar interviews myself. The journalistic material I have used will mostly serve as gap fillers. The dramaturgical nature of some of these sources could be questionable but I argue that there are room for drama when you are dealing with aspects of war.



## 2. Discussing legality

The Philosophical discussion about legality is as old as civilisation. What is right and what is wrong? This depends on what you believe is ethical. There are little consensus on the matter of ethics in history and present tense. The UN human rights paradigm could be regarded as a mainstream of ethics in modern times but everyone far from accepts it as being the true morality. Is there then a possibility that we could argue that there is a legal value based on authority? And could this act as a framework for my normative statements?

### 2.1. Legality as a value

The culture relativist would argue that the human rights paradigm is the product of a western tradition (Ignatieff 2001:141). With this view there is not one understanding of right and wrong or as the ethical subjectivist would argue that there is no collective ethic (Rachels 2003:32 f).

In the world of philosophy there are a number of antagonists to this belief whereas the authoritarian belief is that mankind is at birth given an ethical understanding. This could be given from Good or as a human rationality (Bok 1995:70, Rachels 2003:56f). The UN human rights paradigm is more of the latter character whereas it is stated that rational individuals inhabit value, which is accompanied by rights (Gunner & Namli 2005:280 f). To be able to argue this authoritarian framework of legality there may be no need to include good or even the belief on a birth given sense of ethics. Rawls argues that even if we have different or pluralistically value systems we will make the rational choice to adopt principals that are considered as most “fair” which in some way on takes the role of a modern form of the historical contract model. We are able to understand that what I want for myself, I should want for others to. This notion of a “rational autonomy” makes it possible to argue that individuals would aspire a society of legality over a society of criminality whereas no rational person would like to be inflicted by crime (Marsh &

Stoker 2002:187). The minimalist approach suggests that the collective understanding of ethical values could have been reached through discussions over the minimal. A process of unification or anyway the agreement to negotiate disparate beliefs (Bok1995:71, 76ff). Walzer develops this further in his dualistic approach to morality. The argument is that one person persists a minimal and maximal ethic where the minimal could be seen as an abstraction of the universal moral and the maximal is subjective. In other words the term legality could be understood and shared by more or less everybody but the individual interpret the notion of legality subjectively (Walzer 1994:16 ff).

For this thesis it is crucial to argue that legality could be regarded as a value to not only worth protecting but also a norm, which we are aspiring to achieve, this would indicate the *intrinsic value* of legality (Badersten 2004:209). Whether we achieve this is then according to some measured after our actions and whether they are legal or not, is often called *deontology*. Others are of the opinion that it is the *consequences* of these actions that are essential in regarding the fulfilment of a norm of legality. Furthermore the ambition is also to achieve greatest possible benefit for the greatest possible number (Rachels 2003:102 ff). In this thesis both parties will have it's saying whereas it is the norm itself that acts as a standpoint for my normative statements about "the war on terror". Furthermore legality could also inhabit *extrinsic values* or in other terms act as an instrumental value. Whereas legality is a pretence to achieve other values like security, democracy and so on (Badersten 2004:209). This understanding is crucial in my ambition to argue the effectiveness of a legal behaviour in combating terrorism.

Although I have applied some form of authoritarian approach to legality I will not argue that the understanding of legality doesn't change over time. I will even go so far to say that this is god. But basic legal principles should not be changed in a way that isn't agreeable with the norm shared by the majority or in a swiftly matter. It is even worse to distort the law while this leaves you without knowing what the law is anymore (Castresana 2007:126f).

What then are the law and what aspects of the law should act as a framework in my normative analysis?

## 2.2. Legal framework

In the national perspective I will mostly be dealing with the values of civil liberties. To give an example we could regard the understanding of privacy. The value of privacy is one of the key issues that should be discussed in regards to the Patriot Act. Privacy could be regarded both as an intrinsic value and an instrumental value. The instrumental distinction is that among other things privacy prevents interference and pressure to conform or to on take other measures of hostility. This could help you to improve yourself and thereby perform better on your workplace or elsewhere (Rubel 2007:147f). The value of privacy and furthermore freedom of speech are important parts of the American bill of rights<sup>1</sup> but also international treaties<sup>2</sup>.

The civil liberties are corner stones in the democratic society and furthermore act as a protection against state oppression. The right to speech, write or in other ways express your opinion is what keeps a democratic society democratic. Individuals or in most cases the press has here the possibility to on take the function as guard dogs against dictatorship in making the state transparent and its officials accountable for its actions (Rubel 2007:133). Important is also the prohibition to discriminate people from these rights on grounds such as ethnicity, religion and so on (Gunner & Namli 2005:112).

In international law there are some principles that will be discussed further in relevant chapters. But there are the aspect of righteousness that president Bush

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<sup>1</sup> The Bill of Rights

Amendment I: “congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”.

Amendment IV: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons of things to be seized”.

<sup>2</sup> Relevant international treaties are: CCPR – International Covenant on Civil and Political Rights (Ratified by the US 05/10/77), CERD – International Convention on the Elimination of all Forms of Racial Discrimination (Ratified by the US 28/09/66), CESCR – International Covenant of Economic, Social and Cultrual Rights (Signed only by the US in 05/10/77) ([United Nations High Commissioner for Human Rights](#)).

addresses after the 9/11 attacks. The argument that terrorism is an especially horrifying crime not only against the US but also against the international society as a whole. With this statement he claims the principle of *jus cogens*. Terrorism is one of the crimes that through practice have reached a universal conviction of justice, *opinio juris* (Wong 2004:214 f). Crimes that are regarded by the international society as unusual objectionable and fundamental, *jus cogens*. Furthermore as Bush clearly states these crimes of *jus cogens* status are regarded as a crime not only against the inflicted but also against the international society as a whole. This norm of *jus cogens* thereby obligates every member to take actions against these crimes, *erga omnes* (Malanczuk 1997:58, May 2005:25).

The crimes that are predominantly mentioned as unusually objectionable are *piracy, slave trade, apartheid, war crimes, torture, crimes against humanity, genocide* and as well *terrorism* (Ratner 2001:162)<sup>3</sup>. This would imply that “the war on terror” not only is a war based on a universal conviction of justice but also an obligation for the international society to assist the US in its effort. The understanding of *universal jurisdiction* however lacks regularity, and is more often applied *ad hoc* by the member states (Wong 2004:214 f). One reason for this is whether the states apply a dualistic approach towards the relation between national and international law (Malanczuk 1997:63). The preferences to written law over an international treaty are often the case in the dualistic approach (Bassiouni in Macedo 2004:45 f). However in situations when national law conflicts with international treaties the later should be regarded as a primary resource of legality (Hjerner, Bring & Mahmoudi 2000:333).

Furthermore the *principle of legality* is crucial in national and international law for it poses the judicial demand of, *nullum crimen sine lege, nullum poene sine lege* which means no crime without a law, no punishment without a law (Bassiouni in Macedo 2004:45). In this case it would require the US to ratify relevant treaties as mentioned above. International law is also capable to act according to *the principle of complementary*<sup>4</sup> where it supports states that for some reason is incapable to take

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<sup>3</sup> Relevant international treaties that covers these crimes are the Genocide Convention (1948 – Ratified by the US), Geneva Convention (1949 – Ratified by the US), Torture Convention (1984 – Ratified by the US) and The Statue of ICC (1998 – Signed only) (Ratner 2001:162, [United Nations High Commissioner for Human Rights](#)).

<sup>4</sup> ICC-statute article 1 and 17

legal action against offences of jus cogens status (Macedo 2004:19, Nowak 2003:302). Furthermore the obligations on states to extradict or prosecute offenders, *aut dedere aut judicare*<sup>5</sup> is today a usual practice in international law (Ratner 2001:163, jfr. Bassiouni in Macedo 2004:46).

In other words there is an international legal framework that not only could assist the Bush administration in fighting terrorism but also in many ways obligates other member states to do so. My question then is why the Security Council and others didn't see it fit to do so? This is the normative part of my thesis where I investigate the legality of the means of which the war is fought.

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<sup>5</sup> Torture Convention article 7.1, and the Geneva Convention IV article 146 explicitly implies the obligation to extradict or prosecute (Ratner 2001:162 ff).

### 3. The “war on terror” – a normative analysis

”Then said a legally skilled, but how is it then with our laws, master? And he replied: You find pleasure in establishing laws. Nevertheless you find greater pleasure in breaking them. Like a child that plays by the sea and builds sandcastles with eagerness and then destroys them with a laugh....” (Free translation of Kahlil Gibran 1999:69).

Only ten days after the 9/11 attacks President Bush declared war in his address to the nation. The subject was Al-Qaida but he added: “...It will not end until every terrorist group of global reach has been found, stopped and defeated” (Bush, Sep 21, 2001). In other words this meant that he had declared war against the phenomena, terrorism. The president then continues “...Every nation in every region now has a decision to make: Either you are with us or you are with the terrorists” (Bush, Sep 21, 2001). The US Congress joint resolution then authorized the president “to use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided” the 9/11 attacks (Castresana 2007:126). The problem is that according to international law you can’t wage war against a person or much less so against a phenomenon. But the state of “moral panic” that the Americans were in, and which now had spread to all of them who didn’t consider themselves as “with the terrorists” allowed exaggerated and turbulent responses to the crime. The media and politicians started using the stereotypical images of a terrorist to create a threat against our society and our values. This threat is also argued to justify new and tougher laws (Welch 2003:1). In demonising your enemy you allow yourself to imitate his actions with the argument that “if they aren’t playing by the rules then neither will we”. This leaves us with a war that risks distorting the practice of international law.

“The war on terror” has come to shape much of the Bush administrations policies in form of major reforms in national legislation and even military interventions. I will in this chapter take a closer look on a few of these policies with the ambition to arrive at some normative statements regarding their legality and effectiveness.

### 3.1. National policies

In the years following the 9/11 attacks the American congress passed major legislative reforms, and did so swiftly. A large part of these reforms was connected to the Patriot Act and later the war in Iraq. The consensus was to enhance the power of the executive branch in "the war on terror". The swiftness of the legislation process is not unusual in congress history but the process of passing the Patriot Act could not be characterized as anything but uncritical and hasty (Farrier 2007:93f). The understanding that the Patriot Act was part of a temporary reform for times of crises has changed and is since the passing of the additional act in 2006 regarded as a permanent part of US legislation (Farrier 2007:95). There have been temporary, wartime infringements on civil liberties in the past. The difference with the war on terror is that it has no clear end and therefore the rights of the citizens are at risk for an indefinite future (Pike 2006:40).

#### **3.1.1. Patriot Act – protecting or violating?**

In fear of new terrorist attacks the *Department of Homeland Security* was created shortly after 9/11. The purpose was to face the terrorist threat with a comprehensive approach whereas everything from intelligence services and the nuclear defence systems to public health institutions would be involved. The *Patriot Act* was also according to vice-president Dick Cheney put in place by the congress to strengthen the protection against renewed acts of terror. He also argues that it is "enforced with careful regard to civil liberties of the American people (Cheney Nov 17, 2006:55). Or as it is stated on homepage of the US Department of Justice:

The Department of Justice's first priority is to prevent future terrorist attacks. Since its passage following the September 11, 2001 attacks, the patriot Act has played a key part – and often the leading role – in a number of successful operations to protect innocent Americans from the deadly plans of terrorists dedicated to destroy America and our way of life. While the results have been important, in passing the Patriot Act, Congress provided for only modest, incremental changes in the law. Congress simply took existing legal principles and refitted them to preserve the lives and liberty of the American people from the challenges posed by a global terrorist network.

This is a lengthy reassurance that the Patriot act is not incrementing any of the principles that makes out the notion of the American way of life. But my question is whether the nature of this act is in line with the *Bill of Rights* or for that matter with international judicial practice and treaties? And furthermore what are the consequences deriving from these legal reforms, for example what effects do they have on the civil liberties of its subjects or for that matter the ethnic minorities in America?

The main concerns of the civil liberty and human rights activist are Section 213 and 215 of the Patriot Act that allows the authorities to conduct more secret searches of property, or so-called “sneak and peek” operations but it also includes the so called “gag rule”<sup>6</sup> on officials. These aspects are some of the challenges to the first and fourth Amendment of the US Bill of Rights but also international conventions as mentioned in part 2.2.1.

Although there still is a need for a search warrant under section 213 the subject of this search is not informed until later on when the investigations are finished. There are many implications for these reforms among others unawareness of a search of your property does not effect your behaviour. For example there could be findings in a search or investigation that is based on the suspicion of terrorist activity that could lead to the issuing of an unrelated search warrant (Rubel 2007:131). Or as we saw under the McCarty era where people where “tagged” as communists because of their relationships to suspected “reds”. Section 215 of the act allows FBI officials to gather information about the subject’s library borrowing records, financial institution records and so on without the subjects knowing of it. The reasons for conducting this should be suspicion of terrorism or espionage but the burden of evidence for this is low. The definition of terrorism has been broadened and therefore the activity that is included has become blurry (Rubel 2007:123-128, Pike 2006:40). The controversy in section 215 are still the “gag-rule” that prevents librarians an other officials from talking about the states activity and therefore infringes on their first Amendment right to free speech. The consequence of the “gag rule” could be a decrease in government transparency and accountability (Rubel 2007:133).

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<sup>6</sup> Patriot Act: sec 215 (d) “No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the federal Bureau of Investigation has sought and obtained tangible things under this section”



Furthermore these sections of the act are at risk of infecting people's belief in their privacy against- and civil liberties from the control of the state. So even if the reforms themselves could be argued as not being a violation of privacy, the belief of them being so affects people's behaviour and feelings about whether their privacy and autonomy are valued (Rubel 2007:151ff).

On the subject of ethnic minorities there are concerns that the "moral panic" submerging in the aftermath of the 9/11 attacks will allow the Patriot Act to be used to harden the lives of American Muslims and other immigrant groups. This because "moral panic" reinforces demeaning stereotypes of immigrants at the same time as the Patriot Act grants the federal government expansive powers in dealing with those who are suspected of criminal activities. The concerns for ethnic minorities are given empirical support by resent terrorist attacks in the US<sup>7</sup> which were followed by public hostility against immigrants and especially against Arabs and Muslims (Welch 2003:2ff). The aftermath of 9/11 was no different. Within days of the attacks there were discussions in Congress on how to strengthen the control over immigrants. The impact of the Patriot Act was renewed ethnic profiling and control of immigrants. Thousands of suspects have been detained but not one of these has been charged with anything related to terrorism (Welch 2003:5f, Roberts 2004:723). One example of this is Yusuf Islam the artist formerly known as Cat Stevens who was detained and denied entrance to the US. The US Department of Homeland Security argued that he "was placed on a watch list because of concerns that the US has about activities that can potentially be related to terrorism". The purpose of Islam's visit to the US was to record a song together with Dolly Parton for his comeback album (BBC News 22 Sep, 2004).

The Justice department still argues that even if the registration and mass incarceration has not found any terrorists it has been effective in the sense that they have found "wife beaters and narcotic dealer". This is clear evidence that the authorities given by the Patriot Act are a risk to the value of legality whereas it is regarded as legitimated to arrest anybody without suspicion to find criminals in general (Welch 2003:6f). The ethnic profiling has also led to numerous complaints of harassments mostly by American citizens looking like Arabs or practicing Muslims

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<sup>7</sup> The bombings of the World Trade Centre 1993 and the Murrah federal building in Oklahoma City in 1995. The latter was conducted by US born Timothy Mc Veigh (Welch 2003:3).

that are targeted by airport security personal or in their place of work or in schools. This discriminative behaviour alienates both immigrants that could possible have some helpful information but also American citizen that feels violated by their own government (Welch 2003:8f). Furthermore the current US administration are with these policies creating different standards of rights whereas they are erasing the concept of *human rights* and replacing it with *citizen rights*. This means that in order to enjoy rights or privacy you need to be an American citizen (Roberts 2004:722).

These above mentioned aspects concerning the Patriot Act shows that there are some questions about whether the act itself could be regarded as in line with the Bill of rights and for that matter with international conventions as the Convention on civil and political rights, CCPR or the Convention against racial discrimination, CERD. Furthermore there is deficit in the value of legality in the practice of the act that moreover led to consequences that is all but effective in combating terrorism.

My interest now becomes how the Bush administration is handling “the war on terror” abroad. As I mentioned there is an international legal framework that president Bush activates in his address to the nation. My question is whether the US is consistent with this framework?

### 3.2. Foreign policies

After the 9/11 attacks the Bush administration changed their foreign policy from a more introvert to a more extrovert character. One of the reasons for this is given in a speech of vice president Cheney who regards interventions in Afghanistan and Iraq only as self-defence. In his rhetoric he is determined to portray terrorists as global actors that sees the entire world as its battleground and thus America will do the same (Cheney Nov 17, 2006:56).

The invasion of Iraq was argued as necessary in fighting terrorism at its core and also protecting the free world from weapons of mass destruction. President Bush furthermore understood himself to be the liberator of oppressed women and political opponents but also minorities like the Kurds (Bush: Oct 7, 2002). Among others Amy Hudnall where of an other opinion and argued in her article, *Feminists Around the World Protest War with Iraq* (2003) that a war in Iraq would lead to an even more

unsafe world for women. The well-known Spanish judge Baltasar Garzon who tried to convict the Chilean dictator Pinochet today has a similar opinion on the matter. Garzon describes the Iraq war as “one of the dirtiest and indefensible episodes in modern history” (Dagens nyheter March 20, 2007). Garzon further argues that the “war on terror” has been an excuse to destroy international law.

Is there a substance in Hudnalls worries or in Garzons condemnation? And furthermore could the foreign policies in the “war on terror” be regarded as illegal measures?

### **3.2.1. Preventive intervention - the Iraqi case**

In a deontological perspective it is ones actions that decides the moral legitimacy. In the case of Iraq I mean that it is the international law, the humanitarian law and the occupational law that can function as a framework of legality but also morality. I argue this on the grounds of it being the products of enduring practice and written treaties (Rivkin Jr & Bartram 2003:87).

The invasion that takes place in March 2003 is in itself legally questionable in regards that it ignores international law described in chapter 7 of the UN charter. The Bush administration failed to convince the security council of the necessity of a military intervention and the connection between Iraq and 9/11. We could therefore argue that the “war on terror” in its nature of ignoring international law and public opinion become an act of terror itself but also that it makes the Bush administration into terrorist themselves (Nuzzo 2004:339). This form of *preventive intervention* as the Iraq war is an example of can’t be regarded as anything but a crime against peace in similarity to the convictions of the Nurnberg trials (Chomsky 2004:21). Thus being a crime the U.S. actions is not unpredictable. We have more and more come to realize that UN as an institution is in bad shape. The fact that the host country for its facilities ignores it or even despises it and international law as a whole (Chomsky 2003:26).

Furthermore the measures of which the actual war was fought could be questioned against a framework of humanitarian law. The method of high-tech air bombing has proclaimed advantages whereas it is understood that it is a clinical technique in terms of direct civilian deaths. This may be the case if one disregards the aftermath consisting of a grave destruction of infrastructure including among others water supply, electricity and the surrounding environment. Destruction, which in the long

run would lead to severe deterioration of human rights (Howard 1994:158f, Smith 2002:356, 62 f). This could be considered as a crime against humanitarian law or in other words a *war crime*.

The humanitarian law is meant to act as a defence for civilians in time of war and to protect them from unnecessary suffering. In the Iraq case there are empirical support to describe the war as a humanitarian disaster whereas the number of deaths among Iraqi civilians is frightening. The Iraq Body Count Project (IBC) estimates that about 65000 civilians have died directly from causes of violence<sup>8</sup>. Les Roberts observations in *Mortality Before and after the 2003 Invasion of Iraq: Cluster sample survey* points to a figure of 200 000 deaths direct or indirect caused by the conflict. This survey differs from the before mentioned among else in the matter that it includes the effects of the destruction of the Iraqi infrastructure<sup>9</sup>.

What about Amy Hudnalls worries then? According to president Bush one of the reasons to invade Iraq was to end the oppression of among others women. Hudnall argued that women directly and indirectly suffers in time of war but also that violence for different reasons is directed against women (Hudnall 2003:100f). There are a number of theories supporting this statement. Among others Mary Kaldor (1999:58ff) argues that the wars of today are more or less fought by organized criminal groups against the democratic society. Furthermore she argues that in the Balkan wars sexual assaults against women was part of strategy (Kaldor 1999:63). This could be a result of the invented roles of men and women where women acts as a symbol for the nation and men are the protectors of the nation. Assaulting the women of your enemy is an attack on the nation (Yuval-Davis 1999:272f). There is empirical support for these theories from Afghanistan where one of the purposes for the invasion was to liberate oppressed women under the Tallibans. The result has in many cases been everything but success. Women are instead in today's Afghanistan assaulted by warlords and their soldiers (Scweickart 2006:8f). What about Iraq? Can we see these patterns there to? According to Human Rights Watch there has been an increase of violence against women since the invasion. Furthermore there is a general breakdown of the rule of

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<sup>8</sup> The numbers are escalating and 46% of the victims died during 2006. IBC remarks that this is the result of both acts of war and acts of terror.

<sup>9</sup> There have been mentions of deaths exceeding 650 000 in the media but I have been unable to find the sources of these results.

law. The infrastructure that could help women from being assaulted and women that already has been, are in ruins<sup>10</sup>. And another aspect is that women's mobility has decreased in Iraq. The risks related to attend lectures at the few remaining schools holds young women prisoners of their homes (Palmehag 2007:13).

After invading Iraq US forces and the Bush administration are faced with a new situation. The dictator is gone and so are all the governing officials. The war now turns into an occupation, a situation governed by a different framework of legality.

### **3.2.2. The occupation of Iraq**

After the invasion the US are faced with chaos. Iraq is a land in ruins as a result of periods of war but also as a result of sanctions implemented during the first gulf war. Though a sanction could be considered as less violent than an armed conflict the results can be dreadful. Iraq is an example where the sanctions shattered the country and its people (Alnasrawi 2001:208 f, Gordon 2002). The breakdown of the economy and infrastructure in addition to a lack of food and medicine resulted in about 500 000 dead Iraqi children (Halliday 1999:30ff, Gordon 2002, Ali & Shah 2000:1855f, Alnasrawi 2001:212). Furthermore there are risks of civil war whereas post-Saddam Iraq is dimmed by ethnic conflicts and also a growing terrorist activity. How then is the Bush administration handling this situation and what are the consequences?

One of the purposes of the invasion was to liberate the Iraqi people from dictatorship. Liberate to what? Some would ask after being acquainted with the situation presented above. But if the ambition is to create a functioning society based on rule and law ones actions as an occupant and the consequences of these actions are crucial. The legal framework is chapter 27 in the fourth Geneva Convention where it is stated that the occupied people are to be treated humanly. As an occupant you are also obligated to protect the people even in situations where the people are not friendly towards you (Amnesty international 2003:3). With this framework it is hard to understand the Abu Grhaib controversy. A controversy we could follow in the media that exemplified American interrogation techniques, which will be discussed further in the next part of this chapter. These are techniques that hardly can be considered in-line with the Geneva Convention (Human rights Watch 2004:25).

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<sup>10</sup> HRW. *Climate of Fear: Sexual Violence and Abduction of Women and Girls in Baghdad*

If we then are to consider the aspect of sovereignty the ambition to free the Iraqi people from tyranny should according to occupational law not inflict with the future self-governing of the nation. The actions of the occupant are therefore crucial when it comes to among else the preserving of the institutional abilities of the country. The process of clearing out government officials from the Bath-party could in this case be seen as a transgression on the Iraqi sovereignty. The new government that where selected is a step towards newfound sovereignty but there are problems with legitimacy when it is believed to be a tool for the occupational power and at the same time act as a generator for the process of rewriting the Iraqi constitution (Stirk 2004:532ff). The interim constitution is not only a question of legitimacy but also in itself a crime against occupational law whereas it is not allowed to change the legal system of the country you occupy (Amnesty international 2003:1).

We can from the actions presented above derive to the conclusion that the occupation of Iraq is a transgression of international law, which in this thesis operates as deontological norm. However the question I raise is whether the treaties are too hard to follow and we should instead regard the effects of the actions taken by the occupant.

The constitutional process that above was considered as a threat to Iraqi sovereignty and also a transgression of international law could for example have positive results. This also becomes a question of the value of legality whereas overwriting laws created by a tyrannical regime and replacing them with a constitution that is more in-line with human rights norms could although illegal be regarded as something to aspire. And furthermore if “operation free Iraq” through illegal actions would result in an Iraq where the people could experience the rights that others have come to be accustomed with. Could we then not accept some of these atrocities?

The problem is that “operation free Iraq” doesn’t seem to achieve many of admirable goals. As mentioned today’s Iraq is characterized by chaos and fear. “The war on terror” in general and Iraq specifically has rather resulted in an increased terrorist activity. This could be argued on many levels. One aspect is that the semantics being used by the Bush administration transforms Iraqi soldiers, oppositional fighters or other insurgency activity into terrorists (Nuzzo 2004:341). The criminal elements aside I ask since when is fighting an invader considered illegal? Furthermore the unwanted American military presents itself gives rise to

animosity from Bath-loyalists but also from former oppositional and US friendly. The chaos has also made Iraq into a setting where local criminal- and international terrorist groups thrives (Hashim 2004:1 f).

In order to succeed with an occupation it is crucial to win the “hearts and minds” of the Iraqi people. The Bush administration will be judged for its actions and its result but also its capability to present a clear and believable plan for a future winding-up of the occupation. If the occupant doesn’t show an ambition to rebuild the damages resulted from the invasion and also the capability to establish law and order there is little hope of winning the people (Edelstein 2004:59). The Iraqi reality with chaos and criminality in combination with no clear plan from the Bush administration for when and how to leave are therefore threatening to escalate the already serious opposition (Hashim 2004:3f). Nir Rosen describes the situation in Iraq with unrest. The unrest the Iraqi people are experiencing are harder to cope with today than under Saddam. With the dictatorship you knew what to fear but today anything could be a potential danger in a society without law and order (Rosen 2006-05-28, Washington post).

The inability to win the “hearts and minds” of the Iraqi people has led to a situation of mistrust and leaves the occupant unwanted. The jury are still out regarding the consequences of “operation free Iraq” but I ask whether the price of a possible success already could be regarded as too costly? Is not the fact that the Iraqi people are experiencing the tyranny as less fearful not in itself a failure? To combine this with the humanitarian catastrophe that the sanctions and the invasion represents and furthermore the ethnic disparities doesn’t it leave the country worse off than before “operation free Iraq”? Nir Rosen argues that it is the American presents that are the threat to a possible future stability. And the best chance of stability in the region with a decrease in terrorist activity is if the occupation of Iraq ends in a near future (Rosen 2005-12, The Atlantic Monthly).

Finally I would like to say that there is a chance that we will see a bright future for Iraq. There is nothing constructive in hoping for anything else. But the question whether this then could be seen as a success for the bush administration is debatable. Couldn’t this possible future be reached without illegal actions and humanitarian catastrophes?

As I mentioned earlier there is one aspect of the occupation that needs a closer look, the so-called “Abu Ghraib scandal”. What was behind the images of

mistreatments in the Iraqi prison that were displayed in the media? And furthermore is this an isolated event in “the war on terror”?

### **3.2.3. Abu Ghraib – a case of exception?**

During the last 60 years the use of torture has been regarded with prohibition in both domestic and international law. But since the war on terror was initiated this boundary has blurred. Arguments about the justifiable need to use measures considered inhuman has been given by among others politicians, intelligence services and academics (Castresana 2007:119). Former CIA director, George Tenet stated under an interview with CBS 60 minutes that “enhanced interrogation techniques” were crucial in “the war on terror”. He argues that under the circumstances after 9/11 acts that could be described as torture<sup>11</sup> were used and justifiable (Tenet, CBS April 29, 2007). Where does this practice of torture within the American administration come? And is there a justification to torture, could it prevent new attacks planned by terrorists?

The UN Committee Against Torture (CAT) differs in opinion with Tenet and the Bush administration regarding “enhanced interrogation techniques”. Their concerns and recommendations to the US report testify grave concern with how the Bush administration are relating to the treaties. CAT is objecting to the administrations principal that in an armed conflict there is a “law of war”, *lex specialis*, which enables them to disregard treaties such as the Torture Convention (CAT 1-19 May, 2006:3). Furthermore the argument that Al-Qaida or Taliban fighters shouldn’t be treated as soldiers and therefore not subjects to the Geneva Conventions should be regarded as inaccurate. According to the additional protocol article 75 among else states that “persons who are in the power of a party to the conflict and who do not benefit from more favourable treatment under the Geneva Convention should be treated humanly in all circumstances”. This is regarded as either legally binding or part of international

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<sup>11</sup> Techniques of psychological torture used have included sensory deprivation, isolation, sleep deprivation, forced nudity, the use of military working dogs to instil fear, cultural and sexual humiliation, mock executions, and the threat of violence or death toward detainees or their loved ones. There is strong evidence that psychological torture remains in use today (PHR. May 2005:20ff).



customary law, and even by the US judge advocate general<sup>12</sup> (Brower - Rodley & Gross 2005:403 f, PHR 2005:77).

The committee has further concerns with the administrations arguments regarding jurisdiction. According to the Bush administration the obligation to uphold the treaties stops at the American borders. The recommendation from the committee is that everyone under American authority anywhere should enjoy the provisions of the convention (CAT 1-19 May, 2006:4). With other words institutions like Guantanamo and Abu Ghraib shouldn't be regarded as "safe havens" for torture.

After the Abu Ghraib scandal we where to believe that this was an isolated incidence carried out by individuals or as president Bush addressed it "disgraceful conduct by a few American troops that dishonoured our country and disregarded our values" (Human rights Watch 2004:1) According to Human Right Watch Abu Ghraib should rather be regarded as representative for the US interrogation and incarceration culture in Iraq and elsewhere (Human rights Watch 2004:25). The worst abuses at Abu Ghraib prison where committed after the interrogation officer from Guantanamo arrived (Human rights Watch 2004:5). This would indicate that the techniques used where not in time or place isolated to this institution.

The images from Abu Ghraib are whether we want to believe it or not unusual in time of war. The way the photographs are arranged has been seen before. Soldiers that pose as hunters over their victims could be found on numerous occasions in the history. The fact that there are women soldiers that are sexually assaulting Muslim men suggests that the acts are a part of a strategic process of humiliation (Tetreault 2006:34ff). Torture and other inhuman treatment is not an avant-garde technique used by American personal. One reason for this Robert N. Strassfeld argues is that it is part of American warfare to in humanize the enemy and has been so since the Indian wars. The frontier soldier or translated into our time the CIA agent is regarded as somebody who knows how to deal with savages (Strassfeld 2006:283f). And since World War II there are numerous examples of CIA using or educating colleges in other countries in how to use the craft of torture (Blum 2003:38, 72). This became evident in Vietnam where American soldiers where instructed in "countermeasures to hostile interrogation" which could be considered more as an education in how the soldiers should torture the enemy themselves (Blum 2003:128).

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<sup>12</sup> Operational Law Handbook (2003).

The instructions to disregard treatment in line with the conventions is resulting in an inhuman considerations of prisoners, or as a member of the military police states it “whe where told that they where nobodies” (Human rights Watch 2004:2). Here he is concerning the semantic reformation of Afghani soildiers into “enemy combatants”, for whom it is ilegal to kill but in the same time are targets to kill. These enemy combatants are neither civilians nor combatants, detanies not prissonors (Castresana 2007:126f). But in order to hide or distance Americans from torture the use of rhetoric are not the only measure. In the current war on terror we have seen institutions like Guantanamo that is meant to separate torture from American jurisdiction in a geographical sense but also the use of secret locations in Eastern Europe and elsewhere. The latter has also the benefits of separating US personal from the atrocities and making the victims into “ghosts” (Strassfeld 2006:288f).

I have now stated that torture is used as a measure in the Bush administrations war on terror but also that this is illegal. Could we then in a consequensialistic perspective accept the act for its beneficial results? George Tenet is of the conviction that the “enhanced interrogation techniques” has helped protecting Americans from new terrorist attacks (Tenet, CBS April 29, 2007). What creadebilty does this statement deserve?

The understanding that torture should be regarded illegal dosent only derive from the notion that it is inhuman, imoral or even leagal norms about inocent until proven guilty and punishment after judgement could give a complet explanation. It is rather the ineffective nature of torture as a interrogation technique that was establised centuries ago. Information received from torture should be considered as unreliabile or even useless and should therefor be regarded as punishment rather than as a interrogation technique. There is also a risk that an acceptance of torture in the extreme cases will lead to a more excessive use, this deriving from understanding that it is almost impossible to monitor the utilization or to indict those who exceed the rules (PHR 2007:3ff, Castresana 2007:120f, 124ff).

In conclusion this means that in using methods that according to the Geneva Convention and other treaties should be regarded, as torture the bush administration becomes criminals. And in distorting the law to make the use acceptable we run the risk of widespread torture and at the same time not receiving any reliable information on where the next terrorist attack could take place. I also ask whether the so-called detainees at Guantanamo and elsewhere could have any information to give even if

they wanted to. If they once where terrorists what information do the have that is of an interest several years later?

What about the persuasion that it is the democratic society that is under threat by the terrorists? One of the major purposes of “operation free Iraq” was to spread democracy and get rid of tyrannical dictators like Saddam and the Talibans. Is this a standard that regards to all dictators and are all results of democracy acceptable? Is there a risk that Palestine case could act as an example of American double standards?

#### **3.2.4. Palestine – the case of double standards?**

In the midst of “the war on terror” the first national elections that could be characterised as democratic in Palestine where held and resulted in a change in power. The al-Fatha government was replaced with Hamas; an organisation condemned as terrorists by among others the Bush administration. The reaction came and the new Palestine government became the target of sanctions. The questions I raise are whether this couldn’t be regarded as contra productive in “the war on terror”? Condemning democratic evolution at the same time as the Bush administration is forced to align themselves with tyrannical regimes like the Saudi Arabian and the Pakistani in fighting terrorism in the region. What are the consequences of this condemnation in regards to terrorist activity and the stability in the region?

The Hamas win creates a policy dilemma for the Bush administration whereas their ambition to spread democracy in the region has no room for this outcome of democracy. At the same time as the US are encouraged by the free and fair elections in Palestine the US House of Representatives voted to cut aid to the new Palestine authorities. Furthermore Condoleeza Rice stated, “No money will go to an Hamas government”. This could be seen as an example of double standards whereas the former government under Arafat was condemned as being corrupt and dictatorial but still they received money (Davis 26 Jan, 2006, BBC News 16 Feb, 2006).

The economic boycott that has been imposed on Palestine by the US but also the EU and Israel has produced small political gains and at the same time inflicted grave economic damage. The shortage of supplies and strikes imposed by unpaid workers has deteriorated among others the health and education sectors. The long-term economic effects are staggering. The boycott has also undone the fiscal transparency that had been achieved during the last years (The Economist. Mar 24, 2007).

Furthermore the concept of law and order seems no longer to exist in the Gaza strip whereas criminal gangs have taken control over the streets and poverty and starvation is widespread. Those relief organisations that still are remaining in the area are forced to travel with armed escorts (Boss, May 10, 2007). The violence is at risk of turning in to a civil war between al-Fatha and Hamas loyalists. And there are cases of journalists being kidnapped (Boss, May 17, 2007).

Palestine is hereby an example of the double standards that characterises the Bush administration foreign policies. There is little hope for the spreading of democracy if the reaction is boycott when the results of the elections aren't approvable. The consequences are great suffering for the people and an increased activity of violence. Furthermore this sends a signal to other countries in the region that democracy is a risky business.

In the next chapter I will summarize my normative statements regarding the Bush administrations national policies and foreign policies. My ambition is to provide some constructive recommendations in how terrorism could be combated without distorting the legal framework but also in a way that could be more effective than what the empirical evidence presented in this chapter have implied.

## 4. Combating terrorism - constructive recommendations

It is clear that the Bush administrations “war on terror” is creating numerous challenges for the structure of international law. The sometimes-extreme measures have created a situation of animosity between on the one hand those who argue that there is a value in legality and on the other hand those who violate the value of legality. This is not a unique situation but what is more troublesome is that it is the “freedom loving people” that is responsible for the distortion of those principals that once assisted in creating the democratic society. I have argued that there is a legal framework I will therefore give some recommendations in what ways the current US administration could combat terrorism in a more legal and effective manner.

### 4.1. National policies

In my normative analysis of the Patriot Act it became clear that there were some questions whether the act itself could be regarded as compatible with the principals that the US is believed to be created on. The civil liberties that are included in the Bill of rights and which could also be found in international convention is at risk of being violated. Furthermore the deficit in the value of legality that the practice of the act has resulted in has also proven to be ineffective in combating terrorism. I will therefore give some recommendations that could help the US Department of Homeland Security or others it may concern in alternative measures in combating terrorism.

#### **4.1.1. Respecting civil liberties**

In president Bush address to the nation after the 9/11 attacks there is a clear message that he regards it not only as an act of aggression but also as an attack on the American way of life. The foundation of this way of life could reasonably be understood as the revolution against the colonial power England and the creation of the Bill of rights. Civil liberties and privacy is dominant parts of this document and

the understanding that these values could be regarded as intrinsic and instrumental and therefore should these rights not be violated (Rubel 2007:147f). The patriot act has been revised<sup>13</sup> in hope to correct this deficit but there are still concerns.

The administration is also missing opportunities in its war. As president Bush mentioned there were many Muslims that died in the attacks but instead of making an example of this the administration feeds the moral panic and the resentment against ethnic minorities. Instead of arresting and harassing the Muslim community there should be incentives given for them to assist in the combating of terrorism. Instead of regarding this community as a threat mostly based on ignorance they could be a source of information and not resentment (Welch 2003:6). The same goes for immigrants whereas many of the immigrants that are denied entry could be of assist to the US cause. On a less serious note I mentioned earlier Yusuf Islams denial of entry and my question is if the association with Dolly Parton couldn't act as bridge between communities or as a facade to the Muslim world. What is safe to say is that it would have been a spectacle.

## 4.2. Foreign policies

The normative statements I have presented in this thesis regarding the Bush administrations foreign policies are at risk of being of a condemning character. I see the need for combating terrorism I will therefore in this part discuss some recommendations to the administrations use of among else religious rhetoric's and how this could be regarded as contra productive when combating terrorism. I will also argue that in protecting the free democratic society based on rule of law it is essential to do so with legal measures or anyway the legal norm as a guideline. But also that this is possible. And finally I will with the help of the Palestine case point out the need for believable policies and how these policies exists in the administration but they lack credible practice.

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<sup>13</sup> In 2006 the president signed a renewal of the act that includes 30 additional protections of civil liberties (Cheney Nov 17, 2006:55).

#### **4.2.1. Contra productive rhetoric's**

The "moral panic" that characterises the Bush administrations national policies should also be regarded as a contributing factor in foreign policies. The religious rhetoric that is being used by the administration where God blesses America and the stereotypical image of the terrorist becomes a fundamentalist Muslim could be argued as contra productive. It is a step back to the dark ages and the crusades to the holy land or even worse it risks becoming a self-prophecy of Huntington's "clash of civilisations". With religious rhetoric's the war against terror is easily understood as a war against Islam.

My recommendations here will be similar to the ones I gave in the last part regarding ethnic profiling and the Patriot Act. There is no need to create a religious disparity out of the 9/11 attacks. As president Bush states in his address to the nation (Sep 21, 2001) there were also Muslim and Arab victims. My recommendation is to make an example of this, to honour these victims. This would make it easier to understand the 9/11 attacks as an act of criminals. The support from other countries that the president mentions could hereby be used whereas there were citizens from all over the world that became victims this criminal act. And through these victims a potential ally in the war on terror could for example be Iran, a country that today has more fragile diplomatic relations with the US.

#### **4.2.2. Staying within the legal framework**

When president Bush states that the 9/11 attacks not just is an attack on America but the whole free world he activates as I have mentioned a legal framework of *erga omnes*. This because the act of terrorism is by the practice and treaties regarded as an unusual objectionable and fundamental crime, *jus cogens* (see part 2.2.). The problem then becomes the measures that the US themselves use in their war on terror. When using the card of morality it is essential to stay moral. Otherwise there is the risk that the same moral could be used against you.

First there is the aspect of terrorism. The decision to invade Iraq was a clear breach with the international legal framework and creates a situation where the bush administration becomes terrorists themselves (Nuzzo 2004:339). This form of preventive intervention as the Iraq war becomes compatible with the convictions for crime against peace in the Nurnberg trials (Chomsky 2004:21). Furthermore the measures of which the actual war in Iraq was fought could be considered as a crime

against humanitarian law or in other words *war crimes* (Howard 1994:158f, Smith 2002:356, 62 f). We can also derive to the conclusion that the occupation of Iraq includes transgressions of international law. The inability to win the “hearts and minds” of the Iraqi people has led to a situation of mistrust and leaves the occupant unwanted. To combine this with the humanitarian catastrophe that the sanctions and the invasion represents and furthermore the ethnic disparities Iraq is a country worse of than before “operation free Iraq”. The conduct at Abu Grhaib prison and Guantanamo should also according to the legal framework given by the Geneva Convention and other treaties be regarded as torture. So in conclusion the Bush administration has becomes international outlaws that distorts the law after their own needs. I will also argue that in doing so you risk being addicted by those who are interested in a functional legal system with the principal of universal jurisdiction.

As I mentioned earlier (Part 3.2.) the Spanish judge Baltasar Garzon is appalled by the war and argues its illegal nature. Garzon and his colleges in Belgium have tried to use the principal of universal jurisdiction to convict among others state leaders and American officials. I have earlier mentioned Pinochet but also Prime Minister Sharon has been prosecuted for his actions in the invasion of Lebanon in 1982 (Roht-Arriaza 2004:385, Reydams 2004:117). The Sharon case was forcedly submitted whereas the US defence minister Donald Rumsfeld threatens to move the NATO-headquarters from Brussels if the Belgian government don’t infringes the possibilities to uphold the legal framework that the ICC statue and the principal of universal jurisdiction possesses (Roht-Arriaza 2004:387).

The US should rather than obstruct the creation and practice of the International Crime Court (ICC) embrace this institute as an effective instrument in maintaining international law. ICC could thereby also be effective in combating terrorism and other criminal acts. This because the ICC is a subject to the *principal of complementary jurisdiction*<sup>14</sup> and can therefore act as a subsidiary to national law. In situations where states lack the political will, or the judicial competence the ICC statue can within the frames of the principal of universal jurisdiction prosecute offenders of unusual objectionable and fundamental crimes. The subsidiary competence in international law is hereby not only to assist national law but it also acts as a form of pressure on those states that doesn’t accept their *erga omnes*

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<sup>14</sup> ICC-statue article 1 and 17



obligations (Macedo 2004:19, Nowak 2003:302). What's more is that there has been an increasing tendency in the practice of international law to extradite or prosecute, *aut dedere aut judicare*, offenders according to this principals (Ratner 2001:163, Bassiouni in Macedo 2004:46). This implies that there is a resource of competence in international law to combat terrorism. The ICC could assist the US or others that are being attacked by terrorists. The ICC furthermore has the competence to put pressure on states that don't maintain international law, or as in this case hides or assists terrorists. But to do so it requires the assist from states like the US that in many ways has the power to do so.

The ways in which the "war on terror" is described to be fought in this thesis, but also previous US behaviour in the matter thus leaves us to believe that the maintaining of international law only is relevant when it is of an American interest. There are also clear double standards regarding the Geneva conventions whereas the Americans where outraged when their soldiers where mistreated by the Iraqis but instead of showing themselves more civilian they have as I have shown violated the same rules (Roberts 2004:731).

#### **4.2.3. Retaining believable policies**

Concerning Palestine I have argued that the decision to boycott Hamas could be regarded as an example of double standards. The problem here is that the purposes behind the preventive interventions are becoming less believable. The Iraqi case have shown us that no weapons of mass destruction could be found, no link to al-Qaida could be proven and now with the Palestine case the credibility of the democratisation argument are weakening. Furthermore the effects of boycotting the election results are an increase in violence. There is something in this equation that is starting to get familiar. Is there not as Michael Herzog (2006:83) wonders "a way to tame Hamas" and could this not be done without impoverishing the Palestine people?

Herzog himself gives some recommendations. He argues that there could possible be a chance for Hamas to liberalize. If we disregard the violent streak in Hamas history there are for example evidence of a social pathos in the organizations conducts. And if they are given better conditions to operate the process of liberalisation could be shortened. He argues further that there should be incentives along with the disincentives. There should still be a demand on Hamas to renounce

violence but there should also be given a meaningful alternative (Herzog 2006:89). And what better conditions could there be for the stability in the region than democracy? This if one regards the often-argued hypothesis that democratic states don't wage war on each other. In addition Stephen Patrick Cain (2007:12) argues; and this relates to all the aspects of foreign policies, that there is an alternative weapon to guns in the war on terror and this would be trade or economic development. This becomes relevant in the Palestine case. Cains experience derives from the work as a counter terrorist consultant in the British army and the Northern Ireland conflict. The economic upswing that he refers to as the "Gaelic tiger" carries much of the explanation to the diminishing violence caused by the IRA (Cain 2007:13). Others have come to the same conclusion in the past. In the protest against the Iraqi sanctions the humanitarians found support in the business community who foresaw the economic disaster. Boycotts are in other words "bad for business"(Elliot & Hufbauer 1999:406). So instead of fighting the poor and in hope to put an end to terrorism the US should fight poverty.

## 5. Conclusions

The purpose of this thesis has been to confront the Bush administrations “war on terror” with a legal framework. My ambition was to identify aspects of questionable tactics and consequences of this war in order to give constructive recommendations in how to remain within the legal framework and still be effective in combating terrorism. Although this thesis has been imposed by limitations in time and research areas, which have enabled me to give complete instructions in how to combat terrorism, I argue that I have proven that there exist such legal alternatives and that these could prove themselves to be more effective than the ones adopted by the current US administration.

The obligation to find solutions to acts of terror should be taken serious by researchers, politicians and others because it is a part of a criminal tendency that threatens the stability of our society but also the fragile societies in their ambition to reach stability. I have furthermore argued in this thesis that it is important that these solutions themselves don’t pose a similar threat. Maintaining the international law should be in the interest of the US whereas the alternative is legal anarchy. The distortion of international law that the “war on terror” has inflicted should according to the Bush administration be regarded as *lex specialis*. I argue that the nature of the war poses the threat to create a situation where these exceptions in the law become exceptions *in definito*.

It should also be in the interest of the US to spread the order of democracy and the principal of law and order in societal organisation but also to separate police- and military interventions whereas it could not be regarded as effective to impose military violence when removing dictators. There should instead be given a clear alternative where law and order and civil liberties and this without any exceptions are the potential outcome of such a reform.

The message that the boycott of the Palestine elections sends is relevant here as it is a test of the Bush administrations moral ambitions. Furthermore there is a risk of silencing those who objects to their own despotic regimes if there is a cooperation between the US and countries like Saudi Arabia and Pakistan in the “war on terror”. The outcome of this behaviour could be a continued oppression of those principals of

freedom that the “war on terror” was meant to defend but also a more violent world that in fact feeds more terrorism.

If the defenders of legality conduct themselves with illegal measures others will regard this as behaviour acceptable to imitate. There can't be double standards in the practice of law. A believable international legal framework should be of interest to the US. Only in protecting the value of legality there is a possibility to combat terrorism, and there should be no exceptions to this principal.

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- Geneva Convention of 1949**
- OHCHR** - **United Nations High Commissioner for Human Rights**
- Patriot Act** – *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* (USA Patriot Act) Act of 2001
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