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Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11

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Abstract

What impact are US policies having on the fabric of international human rights law in the wake of September 11? This paper examines this question from three largely independent angles. First, US policies embody discrimination against non-citizens and between non-citizens, which is pushing international law to clarify the rights of non-citizens and the relationship between such discrimination and discrimination based on race, nationality and religion. Second, in assessing the impact of US policies, we must consider not only the actions of the United States but also the reactions of the rest of the world. When we broaden our focus in this way, interesting divisions emerge both between states and within states, which are relevant to the formation of customary international human rights law. Finally, the premise that the international terrorist threat is 'novel' has been used by the United States to justify picking and choosing between existing laws and to claim that there are legal vacuums in international law. This raises questions about the validity of taking an à la carte approach to international law and whether there are ways to protect against similar legal vacuums arising in the future.

1 Introduction

The policies of the United States post-September 11 have posed fundamental challenges to international human rights law. While most of the literature has focused on the legality or merits of particular US actions, this paper considers the impact of US policies on international human rights law in three more conceptual ways. First, US

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policies embody discrimination based on citizenship, nationality, race and religion, which undermines the notions of equality and universality that lie at the heart of human rights. This discrimination against non-citizens and between non-citizens requires us to clarify the rights of non-citizens under international law. Second, in assessing the impact of US policies on international human rights law, we must look not only at the actions of the United States but also at the reactions of other states. When we do this we can see that US actions are provoking interesting divisions between states and within states, which all play a role in defining the evolution of customary international law. Finally, the United States has used the apparent 'novelty' of the international terrorist threat to pick and choose between existing laws and to claim that it is not constrained by any laws in particular circumstances. This leads to questions about how international law should respond to challenges that do not fit within existing categories, and whether there are better ways to protect against similar legal vacuums arising again in the future. These sections represent three largely independent angles from which we can begin to assess the impact of US policies on the structure of international human rights law.

2 Axes of Discrimination

The policies of the United States post-September 11 involve discrimination against non-citizens and between non-citizens, which both reflect a movement away from universal human rights towards a person's rights being tied to their membership of particular groups.

A *Discrimination against Non-citizens*

Human rights are universal rights owed equally to all people, whereas citizens' rights are simply owed by governments to their own citizens. Recent US policies reflect a movement away from human rights and towards some concept of citizens' rights. By applying different standards to citizens and non-citizens, the United States appears to be endorsing the idea that certain fundamental rights are tied to one's status as a citizen rather than one's status as a human being.

This leads to the question of which rights are fundamental to humanity and which are simply privileges of citizenship? Human rights treaties clearly prohibit discrimination based on race, religion and national or ethnic origin, but do not specifically prohibit discrimination between citizens and non-citizens.[1] In fact, international law recognizes the legitimacy of distinguishing between citizens and non-citizens with respect to certain rights, such as political rights, freedom of movement and some

[1] E.g. International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 UNTS 195, Art. 1 (prohibits discrimination based on race, colour, descent, or national or ethnic origin, but does not apply to distinctions between citizens and non-citizens provided such distinctions do not discriminate against any particular nationality).

economic rights.[2] Many states use citizenship to determine who is eligible to vote, to perform jury service and to hold government positions.[3] These differentiations are usually justified on the basis that citizens are members of a particular political community, which gives rise to both rights and responsibilities, and that citizens are presumed to owe some allegiance or loyalty to their state. However, these justifications cannot be used to justify denying fundamental human rights, such as due process rights, to non-citizens because these rights are meant to apply to citizens and non-citizens alike.[4]

US policies post-September 11 involve disproportionate restrictions on the rights of non-citizens that cannot be justified by the traditional rationales for distinguishing between citizens and non-citizens. Although US citizens have not been immune from restrictions on their rights,[5] the measures adopted have primarily impacted on non-citizens. As Cole states, '[w]hile there has been much talk about the need to sacrifice liberty for a greater sense of security, in practice we have selectively sacrificed non-citizens' liberties while retaining basic protections for citizens'.[6] These restrictions have been particularly evident in two areas of US policy: immigration and the detention of non-citizens at Guantanamo Bay.

In the months following September 11, the United States detained more than 1,200 immigrants from mainly Arab and Muslim countries.[7] Although the government justified these detentions as a security measure connected to terrorist investigations, the vast majority of these people were detained on minor immigration violations.[8] The Justice Department issued a regulation increasing the period of time that the Immigration and Naturalization Service (INS) could detain someone without charge

[2] E.g., International Convention on Civil and Political Rights (ICCPR), 999 UNTS 171, Art. 12(4) (no one shall be arbitrarily deprived of the right to enter his own country), Art. 25 (every citizen shall have the right to take part in public affairs, vote and be elected and have access to the public service of his country); International Covenant on Economic and Social Rights (ICESCR), 993 UNTS 3, Art. 2(3) (developing countries may determine to what extent they guarantee economic rights to non-nationals).

[3] Nicol, 'Nationality and Immigration', in R. Blackburn (ed.), *Rights of Citizenship* (1993) 254, at 257. For example, US courts have held that non-citizens are not entitled to enjoy all of the advantages of citizenship, including the right to vote, to stand for office, to work and possibly to receive particular welfare benefits. See *Mathews v Diaz*, 426 US (1976) 67, at 78–79.

[4] UN Human Rights Committee, General Comment 15, 'The position of aliens under the Covenant', (1986) UN Doc. HRI/GEN/1/Rev.1 (1994), at 18, para. 2 (general rule that rights under the ICCPR must be guaranteed without discrimination between citizens and aliens); see also *Zadvydas v Davis*, 533 US (2001) 678, at 693 ('the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary or permanent').

[5] For example, the Bush administration has asserted a broad authority to declare American citizens enemy combatants and deny them a right to counsel. See Lichtblau, 'U.S. Reasserts Right to Declare Citizens to Be Enemy Combatants', *New York Times*, 8 January 2004; Murphy, 'Contemporary Practice of the United States Relating to International Law: U.S. Nationals Detained as Unlawful Combatants', 97 *AJIL* (2003) 196.

[6] Cole, 'Enemy Aliens', 54 *Stan. L. Rev.* (2002) 953, at 955.

[7] Office of the Inspector General, US Department of Justice, 'The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks', June 2003.

[8] *Ibid.*

from 24 to 48 hours, and allowed detentions to continue without charge for 'an additional reasonable period of time' in the event of an 'emergency or other extraordinary circumstance'.[9] The majority of detainees were detained for up to 72 hours without charge, while many others were held for weeks or months before being charged or released.[10] The Justice Department also instituted a 'hold until cleared' policy, where non-citizens 'of interest' to the FBI were held until they were cleared of any terrorist connections. Of the 762 non-citizens held on this basis, less than 3 per cent were cleared within three weeks and the average time for clearance was 80 days.[11]

On 13 November 2001, the President issued a Military Order entitled 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror', in which he claimed power as the Commander in Chief to detain non-citizens indefinitely and to have them tried by military commissions.[12] Early in 2002, the United States began transporting hundreds of non-citizens from Afghanistan and other countries to the US Naval Base in Guantanamo Bay. These transfers were deliberately restricted to non-citizens.[13] More than 600 non-citizens from over 40 countries have been held incommunicado at Guantanamo Bay for more than two years without access to lawyers or to any courts.[14] President Bush announced the creation of military commissions to try non-citizens, which are not subject to the same due process safeguards as US courts.[15] The judges will be commissioned officers of the US armed

[9] 8 CFR 287.3(d) 'Custody procedures' (2003), amended on 17 September 2001; see also 66 Fed. Reg. 48334, 20 September 2001 (explanation for changes).

[10] Office of the Inspector General, *supra* note 7.

[11] *Ibid.*

[12] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror, Military Order of November 13, 2001.

[13] For example, Lindh, who was captured in Afghanistan and identified as an American citizen, was not transferred to Guantanamo Bay, while Hamdi, who was captured in Afghanistan and originally thought not to be an American citizen, was transferred to Guantanamo Bay until it became clear that he was born in Louisiana and might not have renounced his American citizenship, at which point he was removed from Guantanamo Bay. According to the Department of Defense, 'Given the likelihood that Hamdi is an American citizen, it was deemed appropriate to move him to the United States': US Department of Defense, 'DOD Transfers Yaser Esam Hamdi', News Release, 5 April 2002.

[14] At the time of writing, the United States has charged three detainees and given a small number access to lawyers, including some in response to the Supreme Court's ruling in *Rasul v Bush*, 2004 U.S. LEXIS 4760. See Lewis, 'U.S. Allows Lawyers to Meet Detainees', *New York Times*, 3 July 2004 (13 detainees subject to the *Rasul* decision will be allowed to meet with lawyers). In addition, 134 detainees have been released without charge and 12 have been transferred to their home countries for continued detention. The decision to release detainees is not based on their guilt or innocence per se, but on 'many factors, including whether the detainee is of further intelligence value to the United States and whether he is believed to pose a threat to the United States'. See US Department of Defense, 'Detainee Transfer Completed', News Release, 2 April 2004; US Department of Defense, 'Two Guantanamo Detainees Charged', News Release, 24 February 2004; US Department of Defense, 'Guantanamo Detainee Charged', News Release, 10 June 2004.

[15] US Department of Defense, Military Commission Order No. 1, 21 March 2002. For example, the usual rules of evidence, such as the prohibition on hearsay evidence, do not apply. Instead, the commissions may consider any evidence that would have probative value to a reasonable person. See Art. 6(D)(1).

forces, so they may lack impartiality from the executive.[16] There will be no right of appeal to any civilian court, only to another military panel whose recommendation will be reviewed by the Secretary of Defense and/or the President.[17] This is worrying given that President Bush has stated that 'These are killers. These are terrorists'; and Secretary of Defense Rumsfeld has stated that they are 'among the most dangerous, best-trained vicious killers on the face of the earth'.[18] Other restrictions, including limits on the right to choose counsel and monitoring of attorney-client meetings,[19] led the National Association of Criminal Defense Lawyers to declare that it would be unethical for a criminal defence lawyer to represent a person before these commissions because the restrictions prevent adequate and ethical representation.[20] Finally, Pentagon officials have confirmed that the detainees may still be kept in detention, even if they are found not guilty or have served their sentence, if the United States still considers them to be a security risk.[21] In May 2004, the Department of Defense established an annual administrative review procedure to review each detainee to determine whether they still pose a threat to the United States or its allies.[22]

The US executive has not shown — or even attempted to show — that these measures can be justified on the basis of the traditional rationales for distinguishing between the rights of citizens and non-citizens. The United States has a strong perception of itself as being a champion of civil liberties and human rights and the existence of its Bill of Rights is sometimes used as a justification as to why the United States need not ratify international human rights instruments. Yet not only do such

[16] *Ibid*, Art. 4(A)(3).

[17] Convictions and sentences given by the military commission will be reviewed by three-member panels of military officers appointed by the Secretary of Defense, who approved the charges in the first place. This panel will then make a recommendation to the Secretary of Defense, with the final decision being made by the President or the Secretary of Defense. *Ibid*, Art. 6(H)(4)-(6).

[18] White House, 'President Meets with Afghan Interim Authority Chairman', Press Release, 28 January 2002; US Department of Defense, 'Secretary Rumsfeld Media Availability en route to Guantanamo Bay, Cuba', News Transcript, 27 January 2002.

[19] Military Commission Order No. 1, Art. 4(C). As a general rule, the detainees will only be allowed to have a civilian lawyer, in addition to their military lawyer, if that lawyer is a US citizen and has obtained appropriate security clearance. The United States reserves the right to monitor attorney-client conversations without notice.

[20] National Association of Criminal Defense Lawyers, Ethics Advisory Committee, Opinion 03–04, approved by the NACDL Board of Directors, 2 August 2003; see also Lewis, 'Rules for Terror Tribunals May Deter Lawyers', *New York Times*, 13 July 2003.

[21] 'US "may hold cleared detainees"', *BBC News*, 26 February 2004; Seelye, 'Pentagon Says Acquittal May Not Free Detainees', *New York Times*, 22 March 2002; Murphy, 'Contemporary Practice of the United States Relating to International Law: U.S. Department of Defense Rules on Military Commisions', 96 *AJIL* (2002) 706, at 733.

[22] Each enemy combatant will have the opportunity to appear, with the aid of a military officer, before a board of three military officers to explain why he should be released. The review board will also accept written information from the detainee's family and national government, and from US government agencies. The review board will make a recommendation to an official from the Department of Defense, who will determine whether the person should remain in detention. See Order by Deputy Secretary of Defense, 'Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba', 11 May 2004; US Department of Defense, 'Review Procedures Announced for Guantanamo Detainees', News Release, 18 May 2004.

claims ignore the fact that the United States has a history of recognizing some rights (such as civil and political rights) but not others (such as economic and social rights), but these rights are insufficient if they allow the United States to guarantee fundamental human rights to citizens but deny them to non-citizens. Although the Bill of Rights appears to accord rights to all people, US courts have generally accorded great deference to the executive and legislative branches of government in regulating non-citizens in relation to war and peace, national security, immigration, naturalization and foreign policy.[23]

The US movement towards citizens' rights should not be confused with the criticism that the United States believes that the only people who have or deserve rights are Americans. It is a key component of the foreign policy rhetoric of the United States that all governments owe their own citizens certain rights. However, even when the United States chooses to export certain rights, these are often limited to rights owed by a government to its own citizens, rather than the rights owed by all states to all people. Thus, in Iraq and Afghanistan, the United States justified its use of force based, in part, on the way in which leaders in those countries denied their citizens basic rights. But the United States did not focus on the way in which it might have violated the human rights of these people, such as by imposing economic sanctions on Iraq or by holding captives from Afghanistan in arbitrary detention.[24] The United States even sought to characterize the intervention in Iraq as humanitarian, despite making a conscious choice not to count Iraqi casualties caused by the war, which some researchers have estimated at over 11,000.[25]

Rights of non-citizens are not always well protected in democratic countries because non-citizens are usually a minority without any democratic voting rights, so governments can get away with imposing harsher restrictions upon them.[26] Many Americans seem apathetic about restrictions on the rights of non-citizens because such measures do not significantly impact upon their daily lives. However, other Americans actually seem hostile to, rather than simply apathetic about, the rights of non-citizens. As the September 11 attacks were perpetrated solely by non-citizens, they have given rise to an increased fear of the external, which is reflected in a tendency to conflate and confuse immigrants and asylum seekers with criminals and terrorists. For example, shortly after September 11, US Attorney General John Ashcroft stated, 'Let the terrorists among us be warned. If you overstay your visas even by one day, we will arrest you. If you violate a local law, we will . . . work to make

[23] Katyal and Tribe, 'Waging War, Deciding Guilt: Trying the Military Tribunals', 111 *Yale L.J.* (2002) 1259.

[24] See Committee on Economic, Social and Cultural Rights, General Comment No 8, 'The relationship between economic sanctions and respect for economic, social and cultural rights', UN Doc. E/C.12/1997/8, 12 December 1997.

[25] See http://www.iraqbodycount.net/; Randall, 'Ordinary Iraqis Killed: 11,500 and Not Counting', *Independent*, 23 May 2004.

[26] Margulies, 'Uncertain Arrivals: Immigration, Terror, and Democracy after September 11', *Utah L. Rev.* (2002) 481, at 503.

sure that you are put in jail and . . . kept in custody as long as possible.'[27] This fear of the external has been used to justify increased restrictions on non-citizens in general, and Arab and Muslim non-citizens in particular.[28]

B *Discrimination between Non-citizens*

The United States has not created a simple two-tiered system in which there is one standard for citizens and another for non-citizens. Instead, the post-September 11 policies involve axes of discrimination based on factors such as race, religion and nationality as well as citizenship. As the hijackers were all Arab and/or Muslim men from a particular range of countries, the United States has identified a certain profile of people whom it regards with increased suspicion and hostility. Not all citizens are treated equally, just as not all non-citizens are treated equally. And the groups that have been subject to the worst discrimination are those that fit within overlapping bases of discrimination, such as non-citizens from Arab and Muslim countries.

The United States has clearly adopted preferential policies towards non-citizens from certain countries, in the same way as it bestows trade benefits under the 'most favoured nation' policy.[29] For example, the United States agreed not to seek the death penalty or monitor consultations with counsel for UK and Australian nationals detained in Guantanamo.[30] At the same time, the United States imposed greater restrictions on non-citizens from Arab and Muslim countries. For example, in August 2002, the government instituted a National Security Entry-Exit Regulation System, which only applied to non-immigrant aliens from certain (predominantly Arab and Muslim) countries and other non-immigrant aliens who represented an elevated national security risk.[31] This programme required males aged over 16, who were from these countries and in the United States on temporary visas, to report to INS offices in order to be fingerprinted, photographed and questioned under oath. Failure to register was made a deportable offence.[32]

Much of the discrimination between non-citizens has been justified on the basis of criminal profiling.[33] Profiling is not based on the assumption that all terrorists who wish to attack the United States are Arabs or Muslims, or that all Arabs and Muslims

[27] Eggen, 'Tough Anti-Terror Campaign Pledged; Ashcroft Tells Mayors He Will Use New Law to Fullest Extent', *Washington Post*, 26 October 2001.

[28] Romero, 'Decoupling "Terrorist" from "Immigrant": An Enhanced Role for the Federal Courts Post 9/11', 7 *J. Gender Race & Just.* (2003) 201.

[29] Steyn, 'Guantanamo Bay: The Legal Black Hole', 27th F.A. Mann Lecture, 25 November 2003, at 8.

[30] US Department of Defense, 'DOD Statement on British Detainee Meetings' and 'DOD Statement on Australian Detainee Meetings', News Releases, 23 July 2003; Lewis, 'Bowing to Ally, Bush to Rethink Tribunals for British Subjects', *New York Times*, 19 July 2003; 'Hicks Will Not Face Death Penalty: Ellison', *Sydney Morning Herald*, 24 July 2003.

[31] See 67 Fed. Reg. 52584 (12 August 2002); 67 Fed. Reg. 67766 (6 November 2002), 70526 (22 November 2002), 77642 (18 December 2002). These countries included Afghanistan, Algeria, Bahrain, Eritrea, Iran, Iraq, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen.

[32] This programme ended on 25 April 2003.

[33] Cueller, 'Choosing Anti-Terror Targets by National Origin and Race', 6 *Harv. Latino L. Rev.* (2003) 9.

are terrorists. Rather, it is based on an assessment of the statistical likelihood of people with particular characteristics committing particular crimes. Creating profiles based on factors such as race and nationality is inevitably going to be both over- and under-inclusive.[34] Prior to September 11, profiling had come to be regarded by many as an ineffective policing method that created or reinforced negative stereotypes. However, since September 11, it has resurfaced as an apparently acceptable, or even necessary, policing strategy.[35] One factor making this shift possible is that the current profiling does not implicate large groups previously discriminated against in America, such as African Americans, Latino Americans or Japanese, so it has not directly inflamed old ethnic wounds. Indeed, previously 'othered' groups are being welcomed into the fold of being 'American', which is defined in opposition to a new 'other' of Arab and Muslim extremists.[36] This illustrates the way in which the 'other' is not a fixed and immutable category, but is reformulated according to political circumstances as they vary over time.

The question of whether or not to engage in profiling, and what factors are relevant in creating a profile, involve political choices, whether made consciously or not. When Timothy McVeigh was identified as the prime suspect in the Oklahoma City bombing, no-one thought to interrogate all other white people or American citizens. McVeigh was seen as an individual or a member of an extreme right-wing group, rather than being seen as just another actor from a particular racial or national group.[37] However, the September 11 hijackers were seen as members of particular racial, national and religious groups and those whole groups were implicated by the wrongdoing. The hijackers were all men yet their crime was not seen to implicate all men, but the fact that they were all Arabs or Muslims was sufficient to implicate those groups.[38] The hijackers were also all religious extremists, yet their crime was not seen to implicate all religious extremists, but only Islamic extremists.

This is not the first time that the United States has discriminated against a racial or national group as a security measure. In World War II, all persons of Japanese descent, including those who were US citizens, were interned based on a presumption of disloyalty to the United States. Interestingly, there was no mass internment of German or Italian nationals, though some were incarcerated on the basis of individual hearings. While the internment of the Japanese is now regarded as a shameful episode in American history, the parallels with the detention of many Arab and Muslim immigrants based largely on their race, religion and nationality are stark. The United

[34] For example, terrorist suspects arrested after September 11 include John Walker Lindh (a Caucasian American), Zaccarias Moussaoui (a French citizen of Moroccan descent), Richard Reid (a British citizen of Caucasian and West Indian ancestry) and Jose Padilla (a Latino American citizen). See Joo, 'Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11', 34 *Colum. Human Rights. L. Rev.* (2002) 1, at 42.

[35] Cole, *supra* note 6 at 974 (noting that a Gallup Poll taken prior to September 11 showed that 80% of Americans opposed racial profiling, while one taken shortly afterwards showed almost 60% in favour of ethnic profiling directed at Arabs and Muslims).

[36] Volpp, 'Critical Race Studies: The Citizen and the Terrorist', 49 *UCLA L. Rev.* (2002) 1575, at 1586.

[37] *Ibid.*, at 1584.

[38] Charlesworth and Chinkin, 'Sex, Gender, and September 11', 96 *AJIL* (2002) 600, at 602.

States may not have incarcerated all Arab and Muslim non-citizens, but its actions are still based on stereotyping. Worse still, these actions are potentially indefinite as the war on terrorism is an unconventional war that is unlikely to have a clear end.[39] Although some of the most extreme measures taken after September 11 are no longer applied, authority to apply them still exists and could be used again in the future.

C *Reaffirming the Rights of Non-citizens*

Intersecting axes of discrimination based on citizenship and national, racial and religious characteristics give us cause to reconsider the rights of non-citizens generally under international law, and how non-citizenship can intersect with other bases of discrimination that are more explicitly prohibited.

International law must be clear on which rights are owed, and which rights may be denied, to non-citizens. We must not lose sight of the fundamental principle that human rights are presumptively owed to citizens and non-citizens alike, unless a particular treaty provision or customary rule allows for differential treatment. Such differential treatment will only be permissible to the extent it comports with the underlying rationale for distinguishing between citizens and non-citizens and is proportional to that end. Thus, for example, states may be able to validly distinguish between the rights they afford to citizens and non-citizens in certain areas, such as the right to vote, because these differentiations relate to membership of a particular political community. But states cannot distinguish between citizens and non-citizens with respect to the recognition of fundamental human rights, such as the right not to be arbitrarily detained, because such rights are owed to all human beings and not just to citizens.

Consideration must also be given to the way in which discrimination against non-citizens may be intertwined with other prohibited bases of discrimination. Given the clear international law prohibition of discrimination based on race, religion, nationality and ethnicity, and the frequent correlation between these factors and citizenship, states may use discrimination against non-citizens as a mask for other forms of discrimination that are more clearly prohibited. There is also a heightened possibility of states discriminating against people who lie within the intersection of multiple axes of discrimination, such as Arab and Muslim non-citizens. Measures that discriminate against such people are not non-discriminatory because they do not apply to all Arabs and Muslims or to all non-citizens — rather they involve multiple axes of discrimination where each basis for discrimination should be recognized.

The process of re-examining and reaffirming the rights of non-citizens has already begun on both a national and an international level. In 2003, the Special Rapporteur for the Prevention of Discrimination and the Rights of Non-Citizens submitted his final report, in which he concluded that international law generally requires the equal treatment of citizens and non-citizens and that exceptions to this principle can only be made if they serve a legitimate state objective and are proportional to the achievement

[39] In *Hamdi v Rumsfeld*, 2004 U.S. LEXIS 4761, the Government conceded that 'given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement'.

of that objective.[40] In March 2004, the Committee for the Elimination of Racial Discrimination held a thematic discussion on non-citizens and racial discrimination, in which states and non-governmental organizations were able to make submissions.[41] And in July 2004, the US Supreme Court held that US courts have jurisdiction to hear challenges about the legality of detentions of citizens *and non-citizens* held at Guantanamo Bay because the habeas statute draws no distinction between Americans and aliens.[42] The executive has responded by informing detainees of their right to habeas relief in US courts and by creating a Combatant Status Review Tribunal to allow these detainees to contest their enemy combatants status in the same way as required for US citizens.[43] As the rights of non-citizens are often the first to be sacrificed in times of war, these national and international developments are welcome and should be watched carefully.

3 Actions and reactions: The Weight of the World's Responses

The academic literature since September 11 has primarily focused on actions undertaken by the United States in the war on terror. However, in assessing the impact of US policies on the development of customary human rights law, it is important not just to focus on the *actions* of the United States but also on the *reactions* of the rest of the world. In order to assess the current and future state of international human rights law, it is critical to broaden our frame of reference to examine whether the rest of the world has accepted, rejected, acquiesced in or emulated US policies since September 11.

A *United States versus Other States*

In assessing how other states have responded to the policies of the United States since September 11 this section focuses primarily on responses to US restrictions on the rights of non-citizens. If the actions of the United States involve a movement away from human rights and towards citizens' rights, then the reactions of other states are particularly important because it is largely up to states to protect the rights of their citizens in other countries.

The United States has a strong history of seeking to protect the rights of its citizens abroad. For example, when some diplomatic and consular staff were taken hostage in

[40] UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Final Report of the Special Rapporteur, *Prevention of Discrimination: The Rights of Non-citizens*, E/CN.4/Sub.2/2003/23, 26 May 2003.

[41] E.g., 'The rights of non-citizens', Joint Statement addressed to the Committee on the Elimination of Racial Discrimination, 1 March 2004 (joint statement by Human Rights Watch, International Commission of Jurists, International Catholic Migration Commission and Quaker United Nations Office).

[42] *Rasul v Bush*, *supra* note 14. While the Government argued that US courts would have jurisdiction over citizens (but not non-citizens) held at Guantanamo Bay, the Court noted that the 'courts of the United States have traditionally been open to non-resident aliens'.

[43] The executive drew these standards from *Hamdi v Rumsfeld*, *supra* note 39, which concerned the rights of a US citizen detained as an enemy combatant. See US Department of Defense, 'Combatant Status Review Tribunal Order Issued', News Release, 7 July 2004.

Tehran in the 1970s, the United States exerted diplomatic pressure on Iran, brought a claim before the International Court of Justice and used military force to attempt to obtain their release. The United States has also sought to protect its citizens from international justice. For example, the United States not only 'unsigned' the Rome Statute for the International Criminal Court, but began negotiating with states parties and signing agreements to help ensure that no American soldiers are ever brought before that Court.

US attempts to protect the rights of its citizens abroad sometimes result in palpable double standards.[44] For example, the United States insisted that Iraq honour the Geneva Conventions and complained that televised displays of captured American soldiers violated the laws of war because states are not meant to parade or humiliate prisoners of war. Yet the United States refused to apply the Geneva Conventions to the Guantanamo Bay detainees and even released pictures of them arriving wearing handcuffs, blacked out goggles and surgical masks. More recently, the United States showed pictures of Saddam Hussein being checked for lice and having his DNA sampled.

Adopting the rhetoric of citizens' rights suits the United States because not only does the United States take an active interest in the welfare of its citizens abroad, it also has sufficient economic and military power to be able to protect the rights of its citizens in many, though not all, situations. But how effective have other states been at protecting the rights of their citizens against abuses by the United States? This is important because states acquiescing in violations by the United States will only increase the likelihood of US actions modifying customary human rights law rather than being rejected as a breach of that law.

In the first two years following the transfer of prisoners to Guantanamo Bay, a number of nations voiced disagreement with US policies,[45] but few governments openly and vigorously criticized the United States for seriously violating the human rights of the Guantanamo detainees. For example, Prime Minister Blair declared that he would petition the United States to ensure that any trials would take place in accordance with international law, but he did not explicitly condemn the United States for refusing to recognize the detainees as prisoners of war.[46] France maintains that all detainees at Guantanamo Bay should be treated in accordance with international and humanitarian law, regardless of their status or nationality, but has not openly condemned the United States for holding people in incommunicado

[44] Fellner, 'Double Standards', *International Herald Tribune*, 31 March 2003; Amnesty International, *United States of America — The Threat of a Bad Example: Undermining International Standards as 'War on Terror' Detentions Continue*, 19 August 2003, at 6.

[45] See, e.g., comments by Cuba that the Guantanamo detention centre is a 'concentration camp' where inmates are being subjected to 'indescribable humiliations': 'Cuba decries detainees' treatment', *BBC News*, 27 December 2003.

[46] 408 PARL. DEB., H.C. (6th ser.) (2003) 1151–1152; but see *Brief of 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners*, Nos. 03–343, 03–334, 2003 US Briefs 343, 14 January 2004 (arguing that detainees should be granted the due process safeguard of independent judicial review).

detention for more than two years.[47] More generally, states did not join together to impose sanctions on the United States or to condemn it through a General Assembly resolution.

The decision not to openly criticize the United States may have represented a pragmatic political decision by many states that they had a better chance of bringing their nationals home if they did not condemn the United States.[48] However, some states, such as Australia, did not even push for the return of their nationals and even approved of the Military Commissions, declaring that such trials would be 'fair and transparent' while still 'protecting security interests'.[49] States may have feared retaliation if they had been forthright in their criticisms of the United States.[50] If a less powerful state were committing the same human rights abuses as the United States, one would expect a more vigorous reaction from other states. And if another state had been holding US citizens in indefinite detention for more than two years, one can only imagine the strength of the US response. In this way, protection of human rights seems to depend on both the nationality of the victim and the identity of the abusing state.

However, the tide of popular opinion against the Guantanamo Bay detentions appears to be rising. Graphic images of prisoner abuse in Abu Ghraib, coupled with the leaking of memos discussing whether the United States was bound by the prohibition on torture, have forced many people to question the legitimacy of the United States holding people in indefinite detention for the purposes of interrogation. These events may be proving to be a catalyst for states to take a stand against US policies, which already appears to be impacting upon US actions. For example, the United States formerly refused to allow its forces to take part in UN peacekeeping operations unless

[47] Statements by Ministry of Foreign Affairs Spokesperson: 'Prisoners in Guantanamo', 20 February 2002; 'Afghanistan/Prisoners: Second French Mission to Guantanamo Bay', 3 April 2002; 'French Detainees at Guantanamo', 22 May 2002; 'Situation of the Six Frenchmen Held at Guantanamo Bay', 7 November 2003.

[48] The United States has agreed to send some of the detainees home, to face trial or to go free. See e.g. Lewis, 'U.S. Will Free 5 Britons Held at Cuban Base', *New York Times*, 20 February 2004; 'Spain Claims Guantanamo Detainee', *BBC News*, 13 February 2004; US Department of Defense, 'Transfer of Afghani and Pakistani Detainees Complete', News Release, 15 March 2004.

[49] Joint News Release, Attorney-General Philip Ruddock, *Government Accepts Military Commissions for Guantanamo Bay Detainees*, 25 November 2003; 'Two Years without Charge, but They Must Stay: Ruddock', *Sydney Morning Herald*, 20 February 2004; 'No Return for Australian Taleban', *BBC News*, 20 February 2004 (decision justified on the basis that Australian terrorist laws adopted after September 11 are not retrospective, so the Australians could not be charged if they were returned); Banham, 'Finally, Trials for Australians Held in Cuba', *Sydney Morning Herald*, 31 May 2004 (US had agreed to Australian request for an inquiry into allegations of abuse of Australian detainees). But see Amnesty International, *Australia/USA: Guantanamo — Human Rights Are Not Negotiable*, 26 November 2003 (criticizing Australia for betraying its two nationals).

[50] This fear may be justifiable as, for example, it has been reported that the United States has retaliated against some states that have refused to sign agreements not to turn over US citizens to the International Criminal Court. See Human Rights Watch, 'US and the ICC: Extend Article 98 Agreement Waivers — Letter to U.S. Secretary of State Colin Powell', 9 December 2003 (United States threatened to cut military aid, humanitarian aid and economic assistance to states unless they signed such agreements).

they received immunity from prosecution before the International Criminal Court.[51] However, after the prisoner abuse and torture memo scandals, the United States bowed to broad opposition on the Security Council and announced that it was dropping its campaign to gain a renewal of such immunity.[52]

Just as acquiescence may be relevant to the future state of human rights law, so too may be emulation. Thus, we should consider to what extent other states have embraced the terrorism rhetoric to justify restrictions on human rights in their own countries. This development would not be surprising, given that the Security Council, in Resolution 1373, called upon states to take steps to prevent and suppress terrorism, without referring to the need to act consistently with human rights, but also set up a Counter-Terrorism Committee to monitor the implementation of the resolution.[53]

A good example of a state emulating the United States, though to a lesser degree, is the United Kingdom, which enacted the *Anti-terrorism, Crime and Security Act 2001* on 14 December 2001.[54] This legislation allows the Secretary of State to issue a certificate for a *non-citizen* if he or she reasonably believes that the person's presence in the United Kingdom is a risk to national security and suspects that the person is a terrorist.[55] 'Suspected international terrorists' may be detained indefinitely if either a point of law or a practical consideration prevents their removal from the United Kingdom.[56] Such persons may appeal to the Special Immigration Appeals Commission (SIAC) and then to the Court of Appeals,[57] but the appellant and his or her legal representative may be excluded from these proceedings and not informed of all of the

[51] The United States was able to use its veto on the Security Council to threaten to block the extension of the peacekeeping mission in Bosnia unless its soldiers were given immunity from prosecution. See SC Res. 1422 (2002).

[52] Hoge, 'Annan Rebukes U.S. for Move to Give Its Troops Immunity', *New York Times*, 18 June 2004; Hoge, 'U.S. Drops Plans to Exempt G.I.'s from U.N. Court', *New York Times*, 24 June 2004.

[53] SC Res. 1373 (2001). The human rights issue was not addressed until January 2003 when the Security Council passed SC Res. 1456 (2003), requiring states to 'ensure that any measures taken to combat terrorism comply with all their obligations under international law' and that states 'should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law'.

[54] *Anti-terrorism, Crime and Security Act 2001*, Ch. 24 (Eng.).

[55] *Ibid.*, at s. 21.

[56] *Ibid.*, at s. 23.

[57] SIAC must cancel the certificate if it considers that there are no reasonable grounds for the Secretary of State's belief or suspicion or that the certificate should not have been issued. Either party may then bring a further appeal to the Court of Appeals on any question of law that was material to that determination. *Ibid*, at ss. 7, 25. In March 2004, a Libyan man, 'M', who had been held for 16 months without being tried or charged, was released after SIAC held that he had been 'inappropriately' and 'unlawfully' certified as an international terrorist and the Court of Appeals denied the Secretary of State's appeal. At that stage, M was the only one of 13 people to have won his appeal before SIAC. See *M v Secretary of State for the Home Department*, SIAC SC/17/2002 (8 March 2004); *Secretary of State for the Home Department v M*, [2004] EWCA Civ. 324 (18 March 2004); Gillan, 'Defeat for Blunkett as Judges Free Detainee', *The Guardian*, 19 March 2004.

evidence against the appellant.[58] In adopting these measures, the United Kingdom became the only country in Europe to officially derogate from some of its human rights obligations.[59] The United Kingdom justified this decision on the basis that 'there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism . . . and who are a threat to the national security of the United Kingdom'.[60] Such statements and legislation help perpetuate the fear of terrorism as being an external threat, when the reality is that most terrorism faced by the United Kingdom has arisen over Northern Ireland. Yet when the scheme was challenged, the Court of Appeals found that targeting non-nationals only was objectively justifiable and did not involve impermissible discrimination.[61]

Other countries have been quick to copy the example of the United States by passing strict anti-terrorist legislation.[62] Pakistan passed a new Anti-Terrorist Ordinance in 2002, which allows the police to arrest terrorist suspects and detain them for up to a year without charge. The Indian Parliament passed the Prevention of Terrorism Act in 2002, which authorizes the police to detain terrorist suspects for 90 days without charge, for another 90 days with the permission of a special judge, and for 30 days without being brought before a court. In 2003, Egypt extended its emergency laws, which have been in place since 1981 and which allow the government to detain people considered a threat to national security for renewable 45-day periods without charge. Prime Minister Atif Ubayd cited the 'war on terrorism' and strict new security measures in the United States and other countries since September 11 as a justification for extending the emergency laws. And Macedonian authorities have admitted faking a terrorist attack, in which seven innocent immigrants were killed, in order to impress the United States by looking tough on terrorism.[63]

States that are reluctant to accept refugees have also exploited a supposed link between terrorism and asylum seekers. Immediately after September 11, the United States shut down its refugee resettlement programme for three months, and the number of refugees resettled by the United States dropped from an average of 90,000 per year prior to September 11 to around 27,000 in 2003.[64] The arguments against

[58] In such circumstances, SIAC may appoint a special advocate to represent the interests of the appellant, but that person cannot inform the appellant of the case against him or take direct instruction from the appellant, which places such appellants 'undoubtedly under a grave disadvantage'. *Secretary of State for the Home Department v M,* [2004] EWCA Civ. 324 (18 March 2004), at para. 13.

[59] The United Kingdom filed notices of derogation under Art. 15 of the European Convention on the Protection of Human Rights and Fundamental Freedoms and Art. 4 of the ICCPR.

[60] *The Human Rights Act 1998 (Designated Derogation) Order 2001*, Statutory Instrument 2001 No. 3644.

[61] *A & Ors v Secretary of State for the Home Department* [2002] EWCA 1502.

[62] See generally Human Rights Watch, 'Country Studies: The Human Rights Impact of Counter-Terrorism Measures in Ten Countries', in *In the Name of Counter-Terrorism: Human Rights Abuses Worldwide*, 25 March 2003, at 10–25; Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post-September 11 United States* (2003), at 75–76.

[63] 'Macedonia Says Police Faked Terror Attack', *The Guardian*, 30 April 2004; 'Killings "Staged to Win US Support"', *The Guardian*, 1 May 2004.

[64] Lawyers Committee for Human Rights, *supra* note 62, at 45.

accepting refugees shifted from being primarily economic and cultural, where refugees were accused of taking local jobs and not fitting into local cultures, to being primarily security based, where refugees are seen as a potential security risk and source of terrorism. This connection is hardly surprising given that Security Council Resolution 1373 explicitly linked refugees and asylum seekers with the terrorist threat, calling on states to ensure that refugee status was not abused by perpetrators, organizers and facilitators of terrorism.[65] Many countries were quick to adopt this rhetoric, focusing particularly on illegal immigration. For example, Spain's Foreign Minister stated that '[t]he strengthening of the fight against illegal immigration is also a strengthening of the anti-terrorist fight'.[66] Victims fleeing regimes that were targeted in the 'war on terror' were somehow paradoxically characterized as being supporters of those regimes.

B *The Executive versus the Judiciary*

Responses to September 11 not only involve tensions between states but also involve a shift of power within states. The war on terrorism has provided an opportunity for many governments to restrict civil liberties, target minorities, and shift power from the judiciary to the executive. Executives of other states have little incentive to criticize a precedent set by the United States when they can use it to enhance their own power domestically. Given the overlap of executive interests, it becomes important to look beyond the responses of executives to September 11, and towards the responses of national courts.

Whereas many executives have failed to vigorously protest US policies in Guantanamo Bay, a few courts and jurists have been more outspoken. When discussing one of the UK nationals being held in Guantanamo, the English and Wales Court of Appeals stated that, 'in apparent contravention of fundamental principles, the detainee was being 'arbitrarily detained' in a 'legal black hole'. The Court stated that it was 'objectionable' that the detainee was being subject to 'indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal'.[67] The Court further noted that it would be 'surprising' if US courts did not have jurisdiction to hear these cases and expressed the hope that its 'anxiety' would be drawn to the Supreme Court's attention.[68]

Even more strident criticisms have been made by a number of individual judges in extra-judicial speeches. Former Australian High Court Judge, Justice Gaudron, stated that Guantanamo Bay was intended to create a 'legal no-man's-land in which there would be no rule of law, only the rule of military victory.'[69] Similarly, English Law

[65] SC Res. 1373 (2001).

[66] Human Rights Watch, *supra* note 62, at 20.

[67] *Abbasi v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, at paras 64 and 66.

[68] *Ibid.*, at paras 15 and 107.

[69] Munro, 'Asylum Law is a Fiction: Ex-judge', *The Age*, 5 March 2004; Banham, 'New Boat Arrival Tests Migration Zone', *Sydney Morning Herald*, 5 March 2004.

Lord, Lord Steyn characterized the Guantanamo detentions as a 'monstrous failure of justice', designed to put prisoners 'beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors'.[70] Lord Steyn noted that we do not know much about the way in which the detainees are being treated, but what we do know is not reassuring. Detainees are kept in extremely small cells for up to 24 hours a day and are only allowed out to exercise and shower for short periods a few times a week. There have been over 30 recorded suicide attempts and the rate has been increasing. The military has used 'stress and duress' tactics in interrogating detainees, which are not prohibited by the procedural rules of the military commission, and there have been photographs of prisoners returning from interrogations on stretchers.

National courts and judges have also criticized the actions or inaction of their own governments with respect to the United States. For example, Lord Steyn asked: 'ought our government to make plain publicly and unambiguously our condemnation of the utter lawlessness at Guantanamo Bay?'[71] When the Bosnian Government handed over six men to the United States, in violation of a Bosnian Supreme Court ruling that these men be released due to a lack of evidence, the Bosnian Human Rights Chamber held that its government had violated the Bosnian Constitution and the European Convention on Human Rights, including its prohibitions against expulsion and illegal detention.[72] When the United States transported these men to Guantanamo, despite an order by the Bosnian Human Rights Chamber that four of the men stay in the country for further proceedings, one of the judges of the Bosnian Supreme Court declared: 'As a citizen, all I can say is it was an extra-legal procedure.'[73] When the Government of Malawi transferred five Al Qaeda suspects into the custody of the United States, in clear violation of a domestic court order refusing to allow deportation of the suspects, violent protests ensued.[74] And a German court acquitted an Al Qaeda suspect after the United States refused to cooperate and allow testimony from suspects in its custody.[75]

Tensions between the courts and the executive have also reached a critical stage in

[70] Steyn, *supra* note 29, at 7 and 10.

[71] *Ibid.*, at 14.

[72] *Boudellaa, Lakhdar, Nechle and Lahmar v Bosnia and Herzegovina and the Federation of Bosnia Herzegovina*, 11 October 2002; *Ait Idir and Bensayah v Bosnia and Herzegovina and the Federation of Bosnia Herzegovina*, 4 April 2003; see also 'Bosnia Violated Rights of Terror Suspects Handed to US: Court', *Agence France-Presse*, 4 April 2003.

[73] Williams, 'Hand-Over of Terrorism Suspects to U.S. Angers Many in Bosnia', *Washington Post*, 31 January 2002 (quoting Human Rights Chamber official: 'Our decision was not merely a recommendation. It was binding. Irreparable harm has been done'); see also 'Bosnia Suspects Headed for Cuba', *BBC News*, 18 January 2002; Gray and Dervisbegovic, 'Bosnia Hands Terror Suspects over to U.S. Custody', *Reuters*, 19 January 2002.

[74] Tenthani, 'Malawi Court Blocks Deportation', *BBC News*, 24 June 2003; 'Malawi Says al Qaeda Suspects in U.S. Custody', *Reuters*, 25 June 2003; Tenthani, '"Al-Qaeda" Arrests Spark Malawi Riot', *BBC News*, 28 June 2003.

[75] Butler, 'German Judge Frees Qaeda Suspect; Cites U.S. Secrecy', *New York Times*, 12 December 2003; Burgess, 'German Court Acquits 9/11 Suspect: Chief Judge Says U.S. Failure to Share Information Undermined Case', *Washington Post*, 5 January 2004; see also '9/11 Prisoner Wins German Retrial', *BBC News*, 4 March 2004 (German court quashes world's only conviction over 9/11 attacks).

the United States, with the Supreme Court rejecting the possibility of unfettered executive decision-making even in times of war. In *Rasul v Bush*, the Supreme Court ruled that US courts have jurisdiction to consider the legality of detentions of foreign nationals being held in territory over which the United States exercises plenary and exclusive jurisdiction, even if not ultimate sovereignty, such as Guantanamo Bay.[76] In *Hamdi v Rumsfeld*, the Supreme Court held that due process requires that US citizens held as enemy combatants be given a meaningful opportunity to contest the factual basis for their detention before a neutral decision-maker.[77] According to Justice O'Connor, 'a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens' — arguments seeking to 'condense power into a single branch of government' cannot be accepted because, even in times of war, the Constitution 'most assuredly envisions a role for all three branches [of government] when individual liberties are at stake'. These decisions represent attempts to recalibrate the balance between the executive and the judiciary, and between national security and individual liberties, following September 11.

C *Rethinking the Formation of Customary International Human Rights*

The fact that executives may have a vested interest in not protecting human rights demonstrates one of the problems in relying on customary international law as a basis for developing international human rights. Despite its name, some scholars embrace customary international law as a progressive source of law that can respond to moral issues and global challenges, such as human rights violations.[78] A key advantage of custom is that it has the capacity to bind all states, unlike treaties which only bind ratifying states. However, relying on custom as a source of human rights obligations is often criticized on the basis that such obligations are not based on state practice because they are honoured more in the breach than in the observance.[79] Responses to this argument typically include that: (a) while some states violate human rights some of the time, most states respect human rights most of the time; (b) even when states breach human rights standards, they often deny these breaches rather than endorsing them as official policy; and (c) human rights violations are often met with protest from other states, so they represent breaches of existing law rather than the beginnings of a new or modified law.

It is difficult to 'save' customary human rights law using these typical moves in this case because the United States is not the only state to have reprioritized security concerns over some of the most fundamental human rights. Many states are also not denying this recalibration but rather endorsing it as an official policy. Breaches of

[76] *Rasul v Bush*, *supra* note 14.

[77] *Hamdi v Rumsfeld*, *supra* note 39.

[78] E.g. T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989); Bruun, 'Beyond the 1948 Convention — Emerging Principles of Genocide in Customary International Law', 17 *Md. J. Int'l L. & Trade* (1993) 193, at 216–217; Lillich, 'The Growing Importance of Customary International Human Rights Law', 25 *Ga. J. Int'l & Comp. L.* (1995/6) 1, at 8.

[79] Weisburd, 'Customary International Law: The Problem of Treaties', 21 *Vand. J. Transnat'l L.* (1999) 1.

human rights in the name of fighting terrorism are also drawing disturbingly little protest from other states. Scholars wishing to maintain the importance of human rights may argue that we need to reconceptualize human rights obligations as general principles of international law, which may be maintained even when they are violated by states.[80] Others may argue that we need to rethink the proper formation of customary international law by, for example, minimizing the requirement of state practice in the formation of normative customs, such as human rights laws.[81] However, even if we retain custom in its traditional form, we must at least remember to look at the practice of all arms of government, not just the practice of executives.

The overlap of executive interests may also result in renewed calls to include the practice of some non-state actors, such as non-governmental organizations (NGOs), in the formation of customary international law. NGOs already play an indirect role in the development of international law by placing and keeping issues on the agenda.[82] In the war on terrorism, human rights NGOs have played a critical role in holding states accountable because they are often prepared to criticize where others remain silent. This has resulted in a backlash against NGOs by some states, with NGOs being criticized for being unelected and unrepresentative and for promoting certain interests at the expense of all others.[83] Human rights NGOs often argue that trade-offs between human rights and national security will result in more rather than less terrorism and that terrorism can be effectively countered without restricting human rights. These NGOs arguably marginalize themselves by so adamantly prioritizing human rights over other factors in decision-making. However, NGOs are not decision-makers who need to balance competing interests, but rather fulfil the task of being interest groups that push for the recognition of particular agendas if they were less adamant, they might also be less effective. Either way, human rights NGOs provide an important countervailing force against often mutually reinforcing executive interests.

In summary, in order to assess the impact of US policies on the customary development of human rights law, we must consider both the actions of the United States and the reactions of the rest of the world. When we broaden our focus in this way, we see some states acquiescing in and emulating the policies of the United States. However, since the prisoner abuse scandal and the leaked torture memo, there appears to be growing resistance against US attempts to exempt itself in the application of international law. In addition, a few courts and judges and many

[80] Simma and Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles', *Aust. YB Int'l L.* (1988–1989) 82.

[81] I have discussed this position elsewhere, see Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *AJIL* (2001) 757.

[82] Nowrot, 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law', 6 *Ind. J. Global Legal Stud.* (1999) 579, at 595; Spiro, 'New Global Potentates: Nongovernmental Organizations and the "Unregulated Marketplace" ', 18 *Cardozo L. Rev.* (1996) 957, at 959–960.

[83] Fielding-Smith, 'Muddying the World's Conscience', *The Guardian*, 9 January 2004 (war on terror is being used as a cover for a sustained assault on the independence and progressive agenda of NGOs); Lobe, 'Iraq-Attack Think Tanks Turns Wrath on NGOs', *Inter Press Service*, 12 July 2003; Lewis, 'Rights Groups Won't Get Seats at Guantanamo Base Tribunals', *New York Times*, 24 February 2004.

human rights NGOs have been highly critical of US policies. The practice of national courts is clearly relevant in establishing state practice for the purposes of determining customary international law, but perhaps it is time to re-examine the role of other actors in the development of customary human rights law as well.

4 The Development of Law in a Vacuum

One of the most worrying aspects of the war on terrorism is the way in which the United States has claimed that certain situations are 'novel' and thus are not covered by existing legal regimes.[84] The United States has used the novelty of the international terrorist threat to justify two strategies, which I will refer to as 'international law à la carte', which refers to the US pick-and-choose approach to international law, and the 'international legal vacuum', which refers to the US claim that certain situations are not governed by any existing rules.[85]

A *International Law à la carte*

The United States has been quick to emphasize the similarities and differences between its situation and a war depending on whether or not it suits its purposes to be at war. Immediately after September 11, President Bush characterized the terrorist attack as an 'armed attack', declaring 'we are at war'. Likewise, Prime Minister Blair stated 'whatever the technical or legal issues about the declaration of war, the fact is we are at war with terrorism'.[86] Explicit or implicit characterizations of the terrorist attacks as armed attacks by the Security Council and the North Atlantic Council helped to justify the use of force in Afghanistan as self-defence.[87] President Bush also issued a Military Order, giving himself power to detain non-citizens indefinitely and to try them by military commissions, based on a factual finding that the scale of the international terrorist attacks had created a state of armed conflict.[88]

However, these characterizations have stretched existing concepts of war and armed attacks. War has traditionally been defined as an armed confrontation between

[84] This section considers US practice in relation to international human rights and humanitarian law, but does not provide an analysis of the relationship between the two. For an analysis of the latter question, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004), at paras 105–106; R. Provost, *International Human Rights and Humanitarian Law* (2002); Meron, 'The Humanization of Humanitarian Law', 94 *AJIL* (2000) 239.

[85] Erlanger, 'Europeans Fault U.S. as Arrogant on Detainees', *International Herald Tribune*, 24 January 2002.

[86] 10 Downing Street, 'Prime Minister's Interview with CNN: "We Are at War with Terrorism"', 16 September 2001; 'Britain "at War with Terrorism"', *BBC News*, 16 September 2001.

[87] SC Res. 1368 (2001) and SC Res. 1373 (2001) (attacks gave rise to 'the right of individual or collective self-defence in accordance with the Charter', which seemed to be based on implicit acceptance of the terrorist attacks as armed attacks); Statement by NATO Secretary-General Lord Robertson of 2 October 2001 (attacks were 'directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies of Europe or North America shall be considered an attack against them all').

[88] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror, Military Order of November 13, 2001, s. 1(a).

two states, just as an armed attack has traditionally been thought of as emanating only from states.[89] As Al Qaeda is a non-state actor, any conflict between the terrorist group and the United States did not fit within these classical definitions.[90] Yet the United States argued that it was the gravity of the attack, and not its source, that was relevant to whether the laws of self-defence applied.

Once the United States began using force in Afghanistan, the war on terrorism took on more of the appearance of a conventional inter-state war. Yet, ironically, it was at this point that the United States tried to distance itself from the legal consequences of being at war. In particular, the United States did not want to accord the people it captured in Afghanistan prisoner of war status or repatriate them at the end of the conflict in Afghanistan.[91] President Bush initially decided that the Third Geneva Convention did not apply to any of the Guantanamo detainees, but revised this decision after widespread criticism.[92] President Bush then announced that the Third Geneva Convention applied to the Taliban detainees because Afghanistan was a party to the Geneva Conventions, but that they were not entitled to prisoner of war status because they had not effectively distinguished themselves from the civilian population or conducted their operations in accordance with the laws and customs of war.[93] As the Al Qaeda detainees were part of an international terrorist group that was not and never could be a party to the Geneva Conventions, the President decided that they were not entitled to prisoner of war status.[94] The administration has, however, stated that it is treating all of the detainees 'humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the

[89] E.g., Pellet, 'No, This is not War!', Cassese, 'Terrorism is also Disrupting Some Crucial Legal Categories of International Law' and Gaja, 'In What Sense was There an "Armed Attack"?' in *EJIL* Discussion Forum, The Attack on the World Trade Center: Legal Responses, available at http://www.ejil.org/forum_WTC/index.html.

[90] In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice stated that Art. 51 'recognizes the existence of an inherent right to self-defence in the case of an armed attack by one State against another State', *supra* note 84, para. 139. The Court concluded that the right of self-defence is not triggered by an armed attack originating within a state's own territory where that attack is not imputable to a foreign state. In doing so, the Court contrasted this situation with SC Res. 1368 (2001) and SC Res. 1373 (2001), which recognized the right of self-defence following the September 11 terrorist attacks. The latter were international terrorist attacks by non-state actors that were later imputed (at least in part) to a foreign state. It is not clear, however, whether it is sufficient for an attack by a non-state actor to come from an external source, or whether it must also be imputable to a foreign state, before the armed attack gives rise to a right of self-defence.

[91] In justifying the continuing detentions in Guantanamo Bay, the Department of Defense has stated that: 'Enemy combatants are detained for a very practical reason: to prevent them from returning to the fight. That's why the law of war permits their detention until the end of an armed conflict.' See Order by Deputy Secretary of Defense, 'Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba', 11 May 2004; US Department of Defense, 'Review Procedures Announced for Guantanamo Detainees', News Release, 18 May 2004.

[92] Murphy, 'Contemporary Practice of the United States Relating to International Law: Decision Not to Regard Persons Detained in Afghanistan as POWs', 96 *AJIL* (2002) 461, at 477.

[93] *Fact Sheet, Status of Detainees at Guantanamo*, 7 February 2002; *Statement by the Press Secretary on the Geneva Convention*, 7 May 2003. The White House did not make any statement about whether the detainees were protected under the Fourth Geneva Convention on the protection of civilians.

[94] *Ibid.*

Third Geneva Convention of 1949'.[95] However, such treatment would be given as a matter of discretion rather than as a matter of right, and the recent controversy over prisoner abuse in Iraq has caused many to question whether the United States is complying with such standards in practice.

All of the rhetoric about war that suited the United States so well in going to war did not suit it as well once it was actually engaged in the war. The United States vacillated between the serious nature of the risk, which justified going to war, and the non-state source of the risk, which justified failing to abide by some of the laws of war. It could be argued that the United States has consistently argued that it is engaged in an armed conflict, but that it simply has a narrow interpretation of the Geneva Conventions. However, it is difficult to accept that the United States has interpreted the Geneva Conventions in good faith. The status of the Taliban and Al Qaeda detainees is the subject of debate around the world, yet the United States has refused to engage in this debate. The detainees have been given none of the advantages of prisoner of war status, such as being immune from prosecution for acts of war and being repatriated at the end of the conflict, but they have also been given none of the advantages of ordinary criminal prosecution, such as the right to be promptly charged or released. To the extent that there was a war between Al Qaeda and the United States, it appeared that only the United States could engage in justified military acts and only US soldiers were covered by the Geneva Conventions.[96]

The United States has essentially claimed that it is engaged in a new form of international armed conflict that is not governed by existing norms in international law. In justifying going to war, the United States emphasized the nature of Al Qaeda's actions, whereas in justifying the non-application, or its self-serving interpretation, of the laws of war, the United States emphasized the source of the threat being a non-state actor rather than a state actor. So what is the defining feature in armed conflicts between a state and an external non-state actor: the nature of the threat or the nature of its source? If international terrorism does not fit within the existing categories of inter-state and intra-state armed conflict, should we recognize a third type of armed conflict between states and external non-state actors?[97] International law needs to develop a coherent approach to these questions in order to help prevent states picking and choosing between existing laws to suit their own purposes.

[95] *Ibid*; see also 'U.S.: Conditions for al Qaeda Detainees Humane, Not Comfortable', CNN Transcripts, 12 January 2002 (Secretary of Defense Rumsfeld stated the United States planned to, 'for the most part, treat them in a manner that is reasonably consistent with the Geneva Conventions, to the extent they are appropriate').

[96] Fitzpatrick, 'Sovereignty, Territoriality, and the Rule of Law', 25 *Hastings Int'l & Comp. L. Rev.* (2002) 303; see also Fitzpatrick, 'Jurisdiction of Military Commissions and the Ambiguous War on Terrorism', 96 *AJIL* (2002) 345, at 348 (characterizing the fight against Al Qaeda as an international armed conflict would make U.S. military installations legitimate targets for Al Qaeda); Sassòli, '"Unlawful Combatants": The Law and Whether it Needs to be Revised', 97 *ASIL Proceedings* (2003) 196 (arguing that conflict between the United States and Al Qaeda should be dealt with under the law of non-international armed conflict).

[97] Schondorf, 'Extra-Territorial Conflicts between States and Non-State Actors: Is there a Need for a New Legal Regime?', *NYU J. Int'l L. & Pol.* (forthcoming).

B *The International Legal Vacuum*

If states are free to pick and choose between existing laws when faced with novel situations, what happens when they choose not to be bound by any existing laws? This possibility became a stark reality post-September 11, with the United States seeking to locate certain people and places within legal vacuums.

Take, for example, the refusal by the United States to give the Guantanamo Bay detainees status as prisoners of war or civilians. According to the International Committee of the Red Cross, all persons detained during an armed conflict have a status under the Geneva Conventions:[98]

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of medical personnel of the armed forces who is covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can be outside the law.

In essence, if a detained person was a combatant, they should be recognized as a prisoner of war, and if the detained person was not a combatant, they should be recognized and detained as a civilian. The US administration argues that the detainees do not meet the criteria of being combatants, but that they are also not civilians because they are violent terrorists. Instead, the United States characterizes these detainees as 'unlawful combatants' or 'enemy combatants' who are not protected by either the Third Geneva Convention, which covers combatants, or the Fourth Geneva Convention, which covers civilians.[99] In this way, the United States sought to carve out an intermediate status or legal limbo not governed by existing international law.

It is strongly arguable that the Taliban detainees should be granted prisoner of war status under Article 4(1) of the Third Geneva Convention, which covers members of the armed forces of a party to the conflict, without having to fulfil the requirements of Article 4(2), such as wearing distinctive signs, which only apply to members of other militias and voluntary corps.[100] The status of the Al Qaeda detainees is less clear but Article 5 of the Third Geneva Convention provides that, should any doubt arise as to whether a person should be recognized as a prisoner of war, such persons shall enjoy the protection of prisoner of war status until such time as their status has been

[98] International Committee of the Red Cross, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958) 51.

[99] But see International Committee of the Red Cross, *supra* note 98, at 50 ('Members of resistance movements must fulfil certain stated conditions before they can be regarded as prisoners of war. If members of a resistance movement who have fallen into enemy hands do not fulfil those conditions, they must be considered to be protected persons within the meaning of the present [Fourth] Convention. That does not mean that they cannot be punished for their acts, but the trial and sentence must take place in accordance with the provisions of Article 64 and the Articles which follow it').

[100] Human Rights Watch, *Background Paper on Geneva Conventions and Persons Held by U.S. Forces*, (2002) 5–6; Amnesty International, *United States of America: Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay* (2002) 32–33.

determined by a competent tribunal.[101] The United States contended that such tribunal assessments were unnecessary because they had no doubt about the detainees' status as a group,[102] but this determination is meant to be made on an individualized basis by a competent judicial body, not on a collective basis by the executive.[103] Even the creation of the (much belated) Combatant Status Review Tribunal may not solve this problem because the cases, while heard individually, will be decided by military officers.

The Supreme Court has not yet ruled upon the status of enemy combatants in general or the rights of Al Qaeda detainees in particular. In *Hamdi*, the Supreme Court focused more narrowly on the question of whether the executive could detain a citizen alleged to be part of, or supporting, hostile Taliban forces engaged in an armed conflict against the United States in Afghanistan. A bare majority affirmed the right of the executive to detain such enemy combatants without trial for the duration of active hostilities in Afghanistan based on a Congressional resolution authorizing the President to use 'all necessary and appropriate force' against those associated with the September 11 attacks.[104] It is not clear whether the same rules would apply to all detentions in the indefinite war on terror.[105] A different majority then held that detainees must receive notice of the factual basis for their classification as enemy combatants and be given the opportunity to rebut those factual assertions before a neutral decision-maker.[106] No clear majority emerged for the procedure to govern such challenges, but there were suggestions that it could be 'tailored to alleviate their uncommon potential to burden the Executive' during wartime by allowing hearsay

[101] Third Geneva Convention, 75 UNTS 135, 12 August 1949, Art. 5. In *Hamdi v Rumsfeld, supra* note 39, Justice Souter stated that '[t]his treatment appears to be a violation of the Geneva Convention provision that in cases of doubt, captives are entitled to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal."'

[102] Seelye, 'Detainees Are Not POWs, Cheney and Rumsfeld Declare', *New York Times*, 28 January 2002 (according to the Secretary of Defense Rumsfeld, 'there is no ambiguity in this case').

[103] UN Commission on Human Rights, Working Group on Arbitrary Detention, Civil and Political Rights, Including the Question of Torture and Detention, E/CN.4/2003/8, 16 December 2002, 20 (authority which is competent to determine prisoner of war status is the judicial power, not the executive power); Inter-American Commission on Human Rights, Detainees in Guantanamo Bay, Cuba; Request for Precautionary Measures, 13 March 2002 (calling upon the United States to take the urgent measures necessary to have the legal status of the detainees at Guantanamo Bay determined by a competent tribunal); International Committee of the Red Cross, *Guantanamo Bay: The Work Continues*, 9 May 2003 (legal status of each detainee should be determined on an individual basis).

[104] *Hamdi v Rumsfeld, supra* note 39, per Justice O'Connor, joined by the Chief Justice and Justices Kennedy and Breyer, and Justice Thomas.

[105] Justice O'Connor noted the problem of indefinite or perpetual detention, given that the 'war on terror' is malleable, unconventional and has no clear end. The principle that enemy combatants may be detained for the duration of active hostilities is based on conventional understandings of a war which might begin to 'unravel' in the war on terror. However, she found that this situation was distinct from Hamdi's case because active combat operations against the Taliban were ongoing in Afghanistan, so the United States could detain persons determined to be Taliban combatants for the duration of these hostilities. Nonetheless, she noted that 'indefinite detention for the purposes of interrogation is not authorized'.

[106] *Ibid.*, per Justice O'Connor, joined by the Chief Justice and Justices Kennedy and Breyer, and Justices Souter and Ginsburg.

evidence and creating a presumption in favour of the government's evidence, and that these standards could be 'met by an appropriately authorized and properly constituted military tribunal' instead of a civilian court.[107]

The United States already ventured down the road of creating military tribunals to review the detentions of non-citizens in a bid to put them beyond the jurisdiction of any national or international courts. The Military Order, which applies only to non-citizens, states that individuals subject to the Order shall not be privileged to seek any remedy or maintain any proceeding in any court of the United States, any court of any foreign nation, or any international tribunal.[108] Yet what competence does the United States have to exempt foreign nationals from the jurisdiction of other courts by asserting that its military tribunals have exclusive jurisdiction over these individuals? The ICCPR provides that '*[a]nyone* who is deprived of his liberty by arrest or detention shall be entitled to proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.[109] The Human Rights Committee has made clear that only a court of law may try and convict people for criminal offences and that this is a non-derogable right.[110] Yet these military tribunals are executive creations and not courts of law.

The detention of non-citizens in Guantanamo Bay was no accident. The Military Order provided that non-citizens could be detained anywhere inside or outside the United States, but the executive was careful to detain these non-citizens outside its 'sovereign territory' in the hope of avoiding domestic judicial review of its actions.[111] The Guantanamo Bay lease gives the United States power to exercise complete jurisdiction and control over the area until both states agree to terminate the lease, but provides that Cuba retains ultimate sovereignty over the territory. When the executive's actions were challenged in US courts, the government consistently argued that US courts lacked jurisdiction to hear the claims about the treatment of non-citizens held outside the sovereign territory of the United States. The Supreme Court ultimately rejected this argument in *Rasul*. But it is also worth noting that attempting to exclude the jurisdiction of one's own courts seems much more attractive when no other courts appear likely to exercise jurisdiction. Would the executive have maintained their argument if, for example, Cuba referred the situation to the International Criminal Court?

The US Government is not the only government to be drawing distinctions between

[107] *Ibid.*, per Justice O'Connor, joined by the Chief Justice and Justices Kennedy and Breyer. Justices Souter and Ginsburg concluded that Hamdi's detention was unauthorized, but nonetheless held that Hamdi should be given a meaningful opportunity to offer evidence that he was not an enemy combatant in order to make a majority on this point. However, they stated that this conclusion should not be taken to 'imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on Hamdi ... or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas'.

[108] Military Order of November 13, 2001, s. 7(b).

[109] ICCPR, Art. 9(4) (emphasis added).

[110] UN Human Rights Committee, General Comment 29, 'States of Emergency (Article 4)', UN Doc. CCPR/C/21/Rev.1/Add.11 (2001) para. 16.

[111] Fitzpatrick, 'Sovereignty, Territoriality, and the Rule of Law', *supra* note 96.

control and sovereignty in order to deny rights to non-citizens. For example, shortly after September 11, Australia passed sweeping legislative reform on refugee law, which included excising certain territories from its 'migration zone' in order to prevent asylum seekers who landed on these territories from being able to apply for permanent Australian visas.[112] Clear parallels exist between Australia effectively redrawing its borders to deny asylum seekers access to its courts and administrative procedures, and the United States arguing that the Guantanamo Bay detainees cannot appeal to its domestic courts because they are being held outside its sovereign territory. Australia has also retained some *de facto* control over these asylum seekers by providing funds for other countries, such as Nauru and Papua New Guinea, to house and process the asylum seekers and by exercising some control over their processing.[113] Thus, Australia and the United States are both exercising power and control over people, while at the same time denying that they owe them rights based on arbitrary territorial distinctions.[114]

The Refugee Convention prohibits states parties from 'expelling a refugee lawfully in their territory'. Australia has exploited the ambiguity of the word 'territory' to argue that it does not owe this obligation to people landing illegally on its external territories or intercepted on the high seas *en route* to Australia. Australia's refugee policy is reminiscent of the US policy of interdicting boats of Haitian and Cuban asylum seekers in order to prevent them landing on US territory, and redirecting them to offshore areas, including Guantanamo, for processing. When this policy was challenged, the US Supreme Court held that asylum seekers intercepted outside the territory of the United States, in that case on the high seas, had no right to asylum processing in the United States so the policy of interdiction did not offend the prohibition on refoulement.[115] Yet, according to the UN High Commissioner for Refugees, international obligations under the Refugees Convention apply 'wherever a State acts' and 'proscribe State conduct both within and outside of a State's territories'.[116]

Reliance on territory or sovereignty rather than power and control has not been accepted in international law. In its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice found that the ICCPR covers individuals present within a state's territory and individuals outside a state's territory but subject to its jurisdiction.[117] The Human Rights Committee of the ICCPR has stated that states parties have an obligation to

[112] Mathew, 'Australian Refugee Protection in the Wake of the Tampa', 96 *AJIL* (2002) 661; Peyser, '"Pacific Solution"? The Sinking Right to Seek Asylum in Australia', 11 *Pac. Rim L. & Pol'y* (2002) 431.

[113] Crock, 'In the Wake of the Tampa: Conflicting Visions of International Refugee Law in the Management of Refugee Flows', 12 *Pac. Rim L. & Pol'y* (2003) 49, at 61.

[114] However, the situations are distinct because the United States exercises *complete* control over the detainees and is denying them access to *any* national or international courts.

[115] *Sale v Haitian Centers Council, Inc.*, 509 US 155 (1993), at 179–185.

[116] *Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Respondents*, Summary of Argument, 1992 US Briefs (1992) 344.

[117] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 84, at para. 109.

respect and ensure the rights under the Covenant to 'all persons who may be within their territory and to all persons subject to their jurisdiction', including 'anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party'.[118] In *Lopez v Uruguay*, the Human Rights Committee held that 'it would be unconscionable . . . to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory'.[119] Similarly, the Inter-American Court of Human Rights has held that a 'state's human rights obligations are not dependent upon a person's nationality or presence within a particular geographic area, but rather extend to all persons subject to that state's authority and control'.[120] And the European Court of Human Rights has held that extra-territorial jurisdiction may exist where a state, 'through the effective control of the relevant territory and its inhabitants abroad . . . exercises some of the public powers normally to be exercised by' the government of that territory.[121]

While there are differences between a state acting inside and outside its territory, the United States executive did not present a convincing argument as to why sovereign territory should be the defining feature for determining jurisdiction rather than actual control.[122] This distinction is particularly questionable in an age where governments act outside their traditional boundaries and in situations, such as Guantanamo Bay, where no other state is asserting jurisdiction over the detainees. It is not clear whether the Supreme Court's ruling in *Rasul* would extend the jurisdiction of US courts to hear claims about illegal detentions by the United States in any foreign location, or whether such jurisdiction would be limited to areas, such as Guantanamo, where the United States exercises plenary and exclusive jurisdiction. However, it is advisable for domestic courts to be able to review extraterritorial actions of their governments no matter where they occur or they risk creating incentives for states to engage in abusive conduct abroad.

C *Protecting against Gaps in International Law*

It is not always possible to prevent bad faith interpretations of the law. However, it might be possible to limit 'gaps' developing in international law by taking care not to

[118] UN Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/74/CRP.4/Rev.6, 29 March 2004, at para. 10.

[119] *Lopez v Uruguay*, Communication No 52/1979 (29 July 1981), UN Doc. CCPR/C/OP/1 (1984), at 88 para. 12.3; see also 'Concluding Observations of the Human Rights Committee: Israel', 18 August 1998, UN Doc. CCPR/C/79/Add.93, para. 10 (Covenant is applicable to the occupied territories and areas where Israel exercises effective control).

[120] Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc 5, rev. 1, corr., 22 October 2002, para. 44.

[121] *Bankovic & Ors v Belgium & Ors*, Application No 52207/99 (12 December 2001); see also *Loizidou v Turkey*, 23 Eur. H.R. Rep 513 (1996) ('the responsibility of a Contracting Party could also arise when as a consequence of military action — whether lawful or unlawful — it exercises effective military control of an area outside its national territory').

[122] For an argument in favour of *de facto* jurisdiction, see Burniat, 'Anomalous Spaces and Accountability: The Impact of *de facto* Jurisdiction on the Empire of International Law', paper presented at the European Society of International Law, May 2004.

premise legal rules on false dichotomies. The law of armed conflict, for example, has traditionally been divided into international and non-international armed conflicts. By their very terms, international and non-international armed conflicts appeared to cover the field of all possible types of armed conflicts. However, these terms actually represent a false dichotomy because they only cover conflicts between two or more states (inter-state conflicts) and conflicts between a state and a non-state actor or between two non-state actors within the territory of a single state (intra-state conflicts).[123] Inter-state and intra-state armed conflicts clearly do not cover all possible types of armed conflicts because they leave out the possibility of an armed conflict arising between a state and a non-state actor outside the territory of that state, or between two non-state actors in different states.

Instead of setting up independent tests for international and non-international armed conflicts, which leaves the possibility of a gap developing between the two, it might be possible to set up a positive test for one (e.g., an international armed conflict is an armed conflict between two or more states) and then a negative test for the other (e.g., a non-international armed conflict is an armed conflict that is not between two or more states). This would mean that any conflict that passes the threshold of being an armed conflict would be regulated regardless of which actors were involved or whether it was internal or external in nature. Alternatively, it may be that not all non-international armed conflicts should be treated alike and that the category should be broken down into different types of non-international armed conflicts, such as internal conflicts between a state and non-state actors, external conflicts between a state and non-state actors, and internal and external conflicts between two or more non-state actors. But even if multiple types of armed conflicts are recognized, one category should operate as the negatively defined default category in order to catch conflicts that do not fit within the positive definitions of any other categories.

In characterizing armed conflicts, international law has generally recognized two variables.[124] First, a conflict can involve state or non-state actors (NSA). Second, a conflict can occur within a single state (internal) or can cross a state border (external). These factors lead to five possible situations: state v state (external); state v NSA (internal); NSA v NSA (internal); state v NSA (external); and NSA v NSA (external).[125] Inter-state armed conflicts are limited to the first category,[126] while intra-state armed conflicts are limited to the second and third categories. The final two possibilities are not generally dealt with by the existing literature. The advantage of recognizing that armed conflicts involve two variables, rather than just one, is that it becomes clear

[123] See Art. I of Protocol II; *The Prosecutor v Dusko Tadic* IT-94–1-AR72, Decision, 2 October 1995 (Tadic Jurisdiction Appeal Decision), Part IV, para. 70; Y. Dinstein, *War, Aggression and Self-Defense* (3rd ed., 2000) 5.

[124] Schondorf, *supra* note 97.

[125] A sixth possibility of state v state (internal) is theoretically impossible because a dispute between states will necessarily involve crossing a state border.

[126] Which may also include cases where the actions of an NSA are attributable to a state: see *supra* note 90.

that inter-state and intra-state armed conflicts do not cover the field of all possible armed conflicts. It also focuses our attention on which rules should depend on the internal or external nature of the conflict, and which should depend on the nature of the parties to the conflict. However, we should be conscious that international law might come to recognize the importance of other variables, such as the legitimacy of the actors, so we need to create rules that allow for such developments without creating legal vacuums.[127]

Just as one should be careful not to mask a false dichotomy (such as inter-state and intra-state armed conflicts) with true dichotomy terms (such as international and non-international armed conflicts), international lawyers should also be careful not to use false dichotomy terms when they mean to create a true dichotomy or to cover the field. For example, if all people are meant to have a status under international law as either combatants or civilians, then it would help not to use terms that are independently defined because such terms leave room for states to attempt to drive a wedge between the concepts and create a legal vacuum in between. Instead, it is preferable to use true dichotomy terms such as combatant and non-combatant because then any person who does not meet the threshold tests for being a combatant would automatically meet the requirements for being a non-combatant. Again, it may be open to debate whether a strict dichotomy between combatants and non-combatants is appropriate when dealing with terrorist forces. It may be that terrorist forces cannot be appropriately dealt with under either category and a third category should be recognized. However, whether we create two, three or more categories, it is again important to recognize a negatively defined, default category so that no person is left without a status under the laws of war. This is far from a revolutionary concept. Indeed, the Martens clause provides that until a more complete code of the laws of war are agreed upon, everyone remains under the protection of the laws of nations, the laws of humanity and the dictates of public conscience.[128] However we choose to define the content of this default rule, the most important contribution of such a rule is that it allows international law to provide minimum guarantees of humanity in all situations.

5 Conclusion

While it is too early to tell what impact the US actions post-September 11 will ultimately have on human rights, it is clear that these actions have provided

[127] For example, in discussing non-state actors, we should remember that terrorist groups are simply one type of non-state actor. Non-state actors include corporations, groups seeking self-determination, individuals and non-governmental organizations. There are vast differences in the motivations and methods of different types of non-state actors, which might justify applying different rules to them.

[128] 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, adopted 18 October 1907, entered into force 26 January 1910, 3 *Martens Nouveau Recueil* (ser. 3) 461, 187 *Consol. T.S.* 227, preamble.

conceptual challenges to the structure of international human rights law. These have included challenges about the rights of non-citizens, the importance of acquiescence in the formation of custom and the nature of false dichotomies in legal concepts and arguments. It is important to critically appraise the policies of the United States and other states in order to identify these patterns and further a dialogue about their merits and effects.