

PRESERVING CIVIL LIBERTIES IN AN AGE OF GLOBAL TERROR: INTERNATIONAL PERSPECTIVES

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I would like to thank Cardozo for inviting me to come to this gathering. It is my first participation in the discussions in this forum, and I look forward to them.

The underlying concern of the authors of the book¹ we are discussing is that there is considerable danger in vesting anyone with uncontrolled and arbitrary power, and that there needs to be a clear legal paradigm within which issues raised by the threat of terrorism must be addressed. That seems to me to be an important principle about which there should be no dispute. The question that may give rise to differences between us concerns the drawing of the boundaries.

The argument for the adoption of special procedures to combat terrorism is based on the nature of the crime. It goes like this: Because of the potential harm that can be done as evidenced by the events of 9/11, train bombings in Europe and other attacks elsewhere against civilian targets, the emphasis has to be on prevention. Existing provisions of the criminal law are inadequate to cope with this threat. Arrest and conviction of offenders is an inadequate deterrent and there is accordingly a need for new provisions, and for special procedures directed at prevention.

Much of the public debate around counter-terrorism measures that have been adopted in the U.S. has been directed at concerns raised in relation to Guantanamo Bay, renditions, secret prisons, and torture. These are issues relevant to the discussion that is called for at this symposium.

The context in which counter-terrorism policies have been adopted has been characterized by the U.S. government as the war on terror. In its primary sense “war” refers to an armed conflict between nations, which is governed by international humanitarian law. War is also used rhetorically to emphasize the seriousness of a particular threat.

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¹ PHILIP B. HEYMANN & JULIETTE N. KAYYEM, *PROTECTING LIBERTY IN AN AGE OF TERROR* (2005).

Governments refer, for instance, to the war against crime, or the war on drugs, in order to drum up support for special measures taken by them to combat particular criminal activities, and to demonstrate to the public that the threat posed by these activities is being taken seriously. It is in this sense that the expression “war against terror” is used in most democracies. The government of the United States of America, alone amongst governments of established democracies, treats the war against terror in both senses, actual and rhetorical. In so doing, it conflates the wars it waged in Afghanistan and Iraq with criminal acts or conspiracies which constitute crimes.

Resort to the law of war rather than the ordinary criminal law for such matters has consequences. It is the war paradigm which has led to the assertion by some in the United States administration, that in times of “war” uncontrolled executive power is vested in the President. This is said to be necessary for waging war, and consequently to be necessary to combat the threat of terrorism. But because the “war” is not a conventional war between states, well established rules of international humanitarian law are said to be inadequate and not to be applicable to the conflict. It is claimed that so-called “enemy combatants” are not entitled to the protection of the Geneva Convention; they are in effect “outlaws” beyond the protection of the law. Yet the “war” is of a character that may go on for generations and be of indefinite duration. In such circumstances the sanctioning of uncontrolled executive power has far reaching consequences for society and its legal system.

This panel has been asked to address the issue of detention and interrogation. Let me begin by saying that as far as torture is concerned, I agree with Bernard Schlink and cannot usefully add anything to what he has said.

One cannot accept as a general proposition that torture is prohibited, yet attempt to justify it in “exceptional circumstances.” The reasons that make torture unacceptable apply in all circumstances and that has long been recognized. It is a requirement of the Convention against Torture and of the International Covenant on Civil and Political Rights.

I do not say that torture won’t ever produce accurate information. There are times when it does. But the damage that it does to your society is not worth the potential gain. Moreover, you cannot be sure that information obtained through torture is reliable. You usually get information which the interrogator wants to hear. You get information, that may well be incorrect, which an innocent person may provide in order to stop the torture or the interrogation. And that information is then used to justify action being taken against the detainee and other persons.

I should add that that we should be careful not to get drawn into semantic quibbles about the meaning of torture, attempting to draw a distinction between torture and “intensive methods” of interrogation. If the methods involve isolating detainees, holding them incommunicado, and subjecting them to severe pain, discomfort, and intolerable conditions—designed to induce them to provide information sought by the interrogator that would not otherwise be given, and which is given only because the conditions are intolerable—that is unacceptable, whether you call it torture or intensive interrogation.

If it is not torture, it is at least cruel and degrading treatment, which is prohibited by civilized legal systems, and should not be sanctioned by the state.

What is happening now is that “intelligence” is being substituted for evidence. Action is being taken against people on the basis of information which cannot be proved in the ordinary way. Suspects are held incommunicado for indefinite periods of time to procure information sought by their interrogators. That has great dangers for a society. We have, over centuries, learned the dangers of such practices. We have learned what happens to a society when governments deal with their opponents and their enemies secretly under the pretext that they pose a threat to the security of the state, and for that reason are not entitled to the protection afforded to suspects by the ordinary principles of the criminal law. Torture, disappearances, harassment, and other abuses become part of the fabric of law enforcement. As soon as you depart from principles which have been built up over years to ensure that justice is done, and power is not abused, you have to ask what the cost of this is to your society.

I say this on the basis of my own experience. I lived in South Africa through apartheid, and I saw what happened as security laws were put in place to combat what was said to be terrorism. The initial incursion into rights proved to be insufficient to meet the perceived threat and so bit by bit additional measures were put in place. Over a period of time this led to a collapse of the protection—or of most protection—that the law could afford. Detention without trial, holding detainees incommunicado, denying detainees access to legal or medical advisors, stripping courts of their jurisdiction to make habeas corpus orders or to enquire into the conditions in which detainees were held, led to torture and other abuses.

It is also important that particular measures should not be looked at in isolation; one must look at the cumulative effect of all the measures that are taken to combat terrorism. It is the cumulative effect of the erosion of established rights and the power of courts over a period of time, which changes society. And therein lies the danger. Limitations upon fundamental freedoms, such as freedom of speech, freedom of

association, privacy, habeas corpus, fair trial procedures, and the humane treatment of detainees seep into the practices of the security establishment. If you can do this to combat terrorism, well, why not to combat drug dealing? Why not to combat organized crime? Why not to combat any crime? Why not to curtail political opposition? And if laws are necessary to sanction such conduct, well, why not change the law to make this possible? The same rhetoric, the same arguments, are raised to justify this. It is necessary for the security of the state. If you are law abiding, you need not worry—it won't affect you.

Now you may say this cannot happen in the United States. There is a strong civil society and a strong commitment to rights. I agree that this is so, but it is precisely because of this tradition that it is important to ensure that abuses of power are not tolerated; that the law is applied equally to citizens and foreigners alike, and that no one is put beyond the reach of the law. And that is why Guantanamo Bay, secret prisons, renditions, detention incommunicado, and other incursions into established rights in fields other than detention and interrogation provide a threat to society as a whole. They also provide examples that are relied upon by other countries which do not necessarily have a strong rights tradition. The United States is losing the moral high ground, and its ability to be a force against human rights abuses by other countries. When human rights organizations draw attention to abuses in such countries, the retort they sometimes get is: "Why speak to us? Why not speak to the United States? If the United States does it, why can't we do it?"

If we believe in human rights and democracy, we need to respect what democracy stands for. If the United States engages in methods that are inconsistent with accepted practices of democratic countries it undermines democracy, not only in the United States, but elsewhere as well. If you ask what has happened in other societies where extreme measures have been taken as responses to perceived threats to the security of the state, you will find that extreme measures are seldom successful. They not only undermine democracy, they also tend to create a victim community, and in so doing promote sympathy for the victims and support for the cause with which they have been identified by the security forces. This affects the ability of the security forces to secure the cooperation of friends and associates of suspects, and to gather intelligence that is necessary for their investigations.

There are lessons to be learned from past experience. Those lessons tell us that laws which sanction detention without trial and limit the jurisdiction of the courts place detainees in a vulnerable position and expose them to abusive methods of interrogation including torture or cruel and degrading treatment. In the long run such methods are counter-productive. The lessons of history tell us that the best way to

counter terrorism, without damaging the fundamental values of an open and democratic society, is to do so according to established and accepted principles of human rights law and international humanitarian law.

Thank you.