

**International Commission of Jurists**

**Eminent Jurists Panel**

**on**

**Terrorism, Counter-terrorism and Human Rights**

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**Remarks of Gabor Rona**

**International Legal Director**

**Human Rights First**

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**Headquarters**

333 Seventh Avenue  
13<sup>th</sup> Floor  
New York, NY 10001  
Tel: 212.845.5200  
Fax: 212.845.5299

**Washington D.C. Office**

100 Maryland Avenue, N.E.  
Suite 500  
Washington, DC 20002  
Tel: 202.547.5692  
Fax: 202.543.5999

[www.humanrightsfirst.org](http://www.humanrightsfirst.org)

Mr. Chair, distinguished members of the Panel,

My name is Gabor Rona and I am the International Legal Director of Human Rights First. I thank the Eminent Jurist Panel for having invited HRF to speak. I intend to focus on the following issues, with an emphasis on looking back only to the extent necessary to look forward:

- the special role of the United States as a standard setter
- the false choice of rights against security
- the false choice of war against law enforcement
- the good and the bad of the Detainee Treatment Act
- the importance of keeping faith with Common Article 3
- the meaning and importance of fair trials

### **I. Why is the work of the Eminent Jurists Panel so important?**

But first, I want to say a word about why your project is so important. As Justice Chaskalson has noted, the threat of terrorism is universal. It is also, obviously, a serious challenge to human security. Along with all the accurate generalizations that we can make about terrorism, there remain great differences within the international community concerning the nature of the threat, its causes, its very definition, and perhaps most poignantly, the best ways to counter it.

As we near the 5<sup>th</sup> anniversary of our national tragedy, you will no doubt hear about the unprecedented nature of 9/11 and its Rubicon-like status in our national experience. But you

will also have heard, and will surely continue to hear in your meetings here and elsewhere, that while the threat of terrorism is universal and universally serious, it is not unprecedented. That fact alone raises serious doubt about the assertion that the old rules are either quaint or somehow no longer operable.

International cooperation is essential in the campaign against the transnational criminal phenomenon that is terrorism. By gathering and analyzing experience and expertise from throughout the world, you gain invaluable insight into the global debate on how to effectively counter terrorism. Your inquiries will help determine what unites us and what divides us, and your recommendations will be most helpful to point the way toward effective, common strategies and tactics that respect universal principles and rules of law.

## **II. The case of the United States**

Let me turn to the case of the United States. Human rights advocates normally chafe at the idea of U.S. exceptionalism, and for good reason, since we believe that human rights are neither situational nor culturally bound, but are universal. However, there is at least one respect in which the US *is* exceptional, and that is in the degree to which it has positively influenced the human rights agenda in the post-WW II era. And of course, there is now the corollary: the extent to which its practices, policies and pronouncements remain a template for others, for better or worse. Even as staid a publication as *The Economist* this week echoed

Admiral Huston's words to you yesterday when it said that in a battle that is largely about ideas, America's practices and policies have been "hugely counter-productive."<sup>1</sup>

### **A. Reject the rights vs. security paradigm**

The big question, then, is how can the US effectively promote national security and contribute to the global effort to combat terrorism and at the same time, regain its well-deserved reputation as a beacon for human rights, a reputation tarnished by the legacy of Abu Ghraib, Guantanamo, extraordinary rendition, secret detention, torture memos and the specter of unfair trials?

As a general organizing principle, there is the premise of a natural antagonism between collective security and individual rights – the belief that the two comprise a zero-sum game in which the effort to advance one necessarily comes at the expense of the other. I mentioned before the "Q" word, "quaint," which acts as a talisman for the post 9/11 assumption that circumstances have overtaken the efficacy, if not applicability, of time-tested rules. This assumption reflects a belief that we cannot counter terrorism without restricting our own rights and liberties - that compromising our rights and liberties will indeed buy us added security.

Oddly enough, we have seen little, if any, evidence that this is true. I was still in the legal division of the ICRC when post-9/11 attacks against proper application of international

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<sup>1</sup> September 2, 2006, page 10.

humanitarian law and human rights norms began to surface. I recall how consistently the critics assailed reliance upon the “old rules” in relation to the “new threat,” but just as consistently failed to identify what exactly they wanted to do to suspected terrorists that existing law did not permit. Shoot them on sight? Already permitted in armed conflict and a terrible idea beyond the circumstances in which it is permitted. Detain them indefinitely? Already permitted in armed conflict and under certain circumstances, in other situations, as well. Abuse them and subject them to trials that fail to comport with international standards of humanity and due process? Another terrible idea that quite obviously has negative repercussions for our collective security interests. Evidence suggests that cutting legal corners has reaped little more than derision and distrust, fueling further animosity against us and creating obstacles to international cooperation with us. While Ben Franklin is reputed to have said that those who are willing to sacrifice liberty for security deserve neither, our experience is that we will in fact, lose both. Human rights do not compete with security, they complement security.

## **B. Reject the war vs. law enforcement argument**

A second topic of debate: Is it a war? Is it a law enforcement problem? Some might, with good reason, advocate against going to war with terror, terrorism and terrorists. They would prefer arrests, prosecutions and prison terms. One clever humanitarian law grammarian has noted his preference for wars against proper, rather than common nouns. Germany can surrender and promise not to do it again. Evil cannot. Others insist that it *is* war because of the nature of the attack, the number of casualties, NATO’s invocation of its mutual defense

provision, and other reasons. But the fact is that although the so-called “war on terror” is not *an* armed conflict, it does, occasionally manifest itself *in* armed conflict. When it does, prosecution of detainees suspected of grave breaches of the Geneva Conventions is required and prosecution of lesser war crimes is certainly an option, but the application of the laws of war, including its rules for trials, is mandatory. Perhaps of even greater importance, when the “war on terror” does *not* manifest itself in armed conflict, the laws of war do not apply. In peacetime, there is no right to target people or to detain without independent judicial review, and detention and trials must comply with human rights norms. So by all means, let’s continue the discussion about what is the best way to counter terrorism, but let’s also acknowledge that the applicable legal framework is not determined by personal preferences, but rather, by determining which body or bodies of law are triggered by facts on the ground.

### **C. A selective history of, and commentary on, the post 9/11 role of the executive, judicial and legislative branches**

Since 9/11, we have found ourselves at numerous forks in the road, with one direction leading to compromised rights and no security benefit, or worse, a deterioration of our nation's security, and the other leading to respect for human and civil rights and a moral high ground that complements our security interests. In the earlier days, most of these choices were taken by our executive branch, which often chose unwisely. After a period of initial shock, judicial challenges began to mount, with mixed results. As cases made their deliberate way to our highest court, time and again, the administration's policies and position were found wanting in the face of domestic and international law, first concerning the right to challenge

detention, then concerning the requisites of fair trial and almost parenthetically, the right to humane treatment.

#### **D. The Detainee Treatment Act**

Congress has come late to the game and with mixed results. The Detainee Treatment Act authored by Senator McCain reflected the overwhelming sense of our Congress that the American people cannot and will not accept the position taken by our administration that certain people are not legally entitled to humane treatment in U.S. custody. No doubt, the torture memos, reports of secret detention and rendition to torture, Abu Ghraib and the persistent blossoming of evidence that we were misled about the nature of who was being detained in Guantanamo - all these facts fueled increasing resistance to the "just trust us" doctrine asserted by the administration.

This watershed piece of legislation, as important as it is, does not, however, solve our problems. As with any legislation, the devil is in the details of implementation. In the case of the DTA, implementation is hampered by the fact that the portion of the act that mandates humane treatment creates no oversight mechanism and no penalties - a serious omission especially as relates to detainees beyond Department of Defense custody. Instead, the DTA would deny detainees redress for violations of the right to humane treatment by leaving only limited rights to appeal military commission trial results and the determination of Combatant Status Review Tribunals, or CSRTs, the procedure by which detainees are determined to be "enemy combatants." It's a classic case of "no right without a remedy."

The use of the term “enemy combatant” to designate a legal status is, by the way, a recent invention foreign to, and inconsistent with, the laws of war. Contrary to frequent assertions by its supporters, the discredited Quirin case did not recognize such a status. I’ve been reading the Geneva Conventions almost daily for ten years and have yet to find “enemy combatant” or “unlawful combatant” as a status. Indeed, unprivileged belligerency is not even a violation of the laws of armed conflict. It is merely a disqualifier of PoW status. The problem is that when used as a status, “enemy combatant” effectively displaces otherwise lawful statuses of PoW and civilian that the US is bound to apply by the Geneva Conventions, and that it has long applied in its conflicts without compromise to national security. Another pernicious aspect of “enemy combatant” is the vagueness of its definition and therefore, the potentially overbroad nature of its use. You may recall the administration’s assertion in court that even a hypothetical little old lady in Switzerland who donates to a charity without knowledge that her contribution will be used to support terrorism could qualify for “enemy combatant” status. This reflects an unprecedented assertion of the scope of application of the law of armed conflict. That law gives latitude to target and to detain people without criminal charge and without the same rights to challenge detention that exist in peacetime. The belief that this kind of latitude is now reasonable and necessary in all aspects of our campaign against terrorism because that campaign has been labeled a “war” is simplistic and dangerous - a classic example of assumptions that lead us into counterproductive security policies and practices.

In addition, the President gave every indication in a statement made at the time he signed the DTA that he would not enforce it if it conflicted with his views on what was needed to assure our security - views that, I might add, got us into much trouble in the first place.

### **E. The fate of Common Article 3**

As the DTA continues to make its way through the courts, the Supreme Court's correct and courageous decision to require fair trials for detainees has spawned a new set of initiatives. The Court's determination, contrary to stated administration policy, that Common Article 3 of the Geneva Conventions protects all armed conflict detainees, has generated renewed concern that those who authorized and executed policies and practices in violation of CA 3 are at risk of prosecution for war crimes. We are now at another fork in the road. Thus, one ill-conceived portion of yesterday's legislative initiative would redefine CA 3 to permit abusive interrogation and another portion would effectively remove violations of CA 3 short of murder and torture from our war crimes statute. If this bill becomes law, it would signal the will of a small group of individuals to sacrifice the very foundation of universally accepted treaty law principles of fair treatment in armed conflict on the altar of impunity. We say "leave CA 3 alone."

### **F. Fair trials**

Another part of the administration's proposed legislation would essentially, with minor modifications, codify the fault-ridden military commission scheme overturned by the Supreme Court in the Hamdan case. This initiative rests on the premise that neither our

civilian criminal justice system nor our gold-standard system of courts martial pursuant to the Uniform Code of Military Justice is appropriate to the task at hand.

One argument offered in this vein is that "terrorists don't deserve these rights." Aside from the faulty logic of presuming guilt in order to assign the process by which to determine guilt, I am reminded of Justice Jackson's opening statement at Nuremberg: "the complaining party at your bar today is civilization" and he added that if we pass a poison chalice to the lips of these defendants we pass it to our lips as well. In effect, he was making a case even then for the complementary nature of human rights and security.

Another argument, specifically attacking the application of the fair trial provisions of Common Article 3 is that its requirement of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples," is vague. But as Professor Goldman suggested yesterday, this language is merely a place holder for the explicit laundry list of due process attributes found in Article 75 of the First Additional Protocol, and I might add, in the rest of the Geneva Conventions and the ICCPR.

A more reasoned, but also questionable argument is that terrorism cases present insurmountable challenges to our standard, pre-existing systems of trial. Some of the concerns cited, such as the supposed requirement to read Miranda warnings in the battlefield or to get a warrant before knocking down a door in urban combat, are simply foolish. Others, such as the need for hearsay evidence and for admission of statements that might not pass a standard

voluntariness test, as well as the need to protect national security information, are more substantive, but hardly dispositive. By the Justice Department's own reckoning, we have had 1,329 successful terrorism prosecutions in the US since 9/11.<sup>2</sup> Pre-9/11, prosecutions in the first World Trade Center bombing case and the African embassy bombing cases also ended in convictions and lengthy prison terms. The post-9/11 Moussaoui case, which was litigated in our civilian federal criminal court, is often cited as a poster child for military commission, as opposed to civilian trials, due to the number of complications that arose in respect of the accused's right to a fair trial. In fact, it is precisely the contrary. A number of lessons can be taken from the case.

First, tensions between the rights of the accused and the interests of the government in protecting national security involving the right to confront witnesses, the right to counsel, the right to open and public trial, as well as the underlying issue of admissibility of evidence obtained through coercive means were all resolved in the Moussaoui case within our existing constitutional framework. The military commissions envisioned by the Administration in yesterday's proposed legislation, would instead avoid most of these tensions by simply denying the rights of the accused.

Second, trials must be fair not only to protect the rights of the accused, but also to assure maximum accountability for terrorist crimes. *We want terrorists to be tried and if found*

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<sup>2</sup> Report by Transactional Records Access Clearinghouse, a data research group at Syracuse University. [http://news.yahoo.com/s/ap/20060903/ap\\_on\\_go\\_ca\\_st\\_pe/terrorism\\_prosecutions](http://news.yahoo.com/s/ap/20060903/ap_on_go_ca_st_pe/terrorism_prosecutions). Last visited on September 4, 2006.

*guilty, to be punished.* Unfair trials are a recipe for other states to withhold cooperation, in accordance with their domestic and international legal obligations, potentially causing the guilty to go unpunished.

Third, rules of procedure and evidence in our existing public trial system are, in any case, in constant flux and there is no doubt that some aspects of those rules could be adjusted to respond to legitimate concerns, while maintaining the essence of fair trial. This is an area worthy of further study.

And finally, trials must be seen to be fair, for the reasons articulated by Justice Jackson at Nuremberg, for the reason articulated by Senator McCain who has so simply but eloquently reminded us that "This is not about who they are, but about who we are," and also because the appearance of fairness helps create conditions that add to, rather than detract from, our ability to discourage the growth of terrorism. Secret trials, no matter how proper, cannot create the all-important appearance of fairness that is necessary to give the American people and the world confidence in the process.

For the moment, though, the salient fact is that in responding to Hamdan, Congress, which has remained on the sidelines for too long, should not now over-react with legislation that:

- creates a new, and inferior trial process without having investigated the need
- catches within its grasp any alien with even the most remote nexus to terrorists

- includes numerous crimes that do not exist under the laws of war, some with impossibly vague and overbroad elements
- permits exclusion of the accused from trial and denial of access to evidence
- permits admission of evidence obtained by ill treatment
- permits use of unreliable hearsay evidence, and
- limits judicial review of convictions.

In addition to its provisions on military commissions, the proposal

- compromises the meaning and enforceability of Common Article 3,
- effectively permits the use of so-called “enhanced” or “alternative” interrogation techniques by the CIA – techniques to which the President approvingly alluded in his speech yesterday. These could include induced hypothermia, threats of violence to the detainee and his family, prolonged sleep deprivation, "stress positions" and waterboarding
- immunizes such conduct from judicial review and denies detainees the right to assert the protections of the Geneva Conventions in the courts, and
- seeks to eliminate habeas corpus.

This then is the administration’s “new policy” reflected in yesterday’s announcements and legislative proposal. Concerning treatment of detainees, the same day that a new Army Manual was released containing, by and large, permissible interrogation techniques, the President addressed the nation with a resounding defense of unspecified “alternate”

techniques that have been used by the CIA against secretly held detainees. In addition, the administration released a new legislative initiative that would effectively legalize treatment in violation of international law by re-defining our obligations under Common Article 3. This is nothing less than an attempt to legislatively assert a reservation to a fundamental provision of humanitarian law. And while the President claimed that there are now no additional detainees in secret detention, he argued that the program was both necessary and legal. As concerns trial of detainees, the new proposal is functionally a carbon copy of the administration's previous Military Commission scheme that the Supreme Court found to be in violation of Common Article 3. Rather than rejuvenating the march toward accountability for alleged terrorists held at Guantanamo, this bill, should it become law, will merely guarantee several new and protracted rounds of legal challenge, very possibly culminating in another defeat for the administration, with no resolution for either the detainees or the victims of their alleged crimes.

### **III. Conclusion**

We ask the Eminent Jurist Panel to consider the following conclusions and recommendations:

1. Confirm that security and human rights are not in conflict, but are complementary

2. Detainee status

Call for legislation and administrative initiatives to assure that detention pursuant to the armed conflict paradigm is limited to persons actually detained in armed conflict as that term

is understood in international humanitarian law. This would include abandoning the concept of “enemy combatant” as a legal status and returning to the status of combatant and civilian reflected in the Third and Fourth Geneva Conventions, as implemented in long-standing military procedure, including Army Regulation (AR) 190-8.

### 3. Detainee treatment

Call for legislation and administrative initiatives to assure implementation of the humane treatment provisions of Common Article 3 and of the McCain Amendment (the Detainee Treatment Act), including procedures by which detainees can effectively complain and seek redress, in a court of law, for violations of their right to humane treatment. In no event should Common Article 3’s requirements be “re-defined,” nor should the War Crimes Act be amended to exclude criminal responsibility for violation of the humane treatment requirements of Common Article 3.

### 4. Fair Trials

Call on Congress to engage in a detailed investigation into the benefits and burdens of using existing criminal justice mechanisms and to consider ways in which they might, if necessary, be adjusted to deal with particular challenges posed by terrorism cases. Any such changes must be consistent with the fair trial requirements of Common Article 3, as per the decision of the U.S. Supreme Court in the Hamdan case, and with our abiding and coinciding national interest to be both effective and fair in the campaign against terrorism. If there is to be new legislation establishing military commissions, it should follow closely the system of courts

martial under the Uniform Code of Military Justice and its jurisdiction should be limited to recognized war crimes committed by persons directly participating in that which is truly armed conflict.

With these policies and practices in place, we greatly improve our odds of winning the battle of ideas that is central to defeating terrorism, with human rights and dignity remaining intact.

Thank you.