

Weapons of mass destruction and human rights

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You can't trade your freedom for security, because if you do you're going to lose both.

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With few exceptions those who think, write and speak about Weapons of Mass Destruction (WMD) live in a different world from those who think, write and speak about human rights.² WMD experts in the field of arms control consider such problems as how to abolish these weapons or at least reduce the risk of their being used, how to prevent their proliferation, what damage they cause to humans and other living things, etc. Human rights specialists contemplate which human rights are 'real', what should be their order of priority, how best to enforce them and whether a culture of human rights can be introduced into society. Rarely do these two communities consider the overlapping issues of their respective fields.

And yet the linkages between WMD and human rights are manifold, including the following:

- The incompatibility of the right to peace and the right to life with the existence of WMD;
- The vanishing line between the humanitarian law aspects of WMD and the human rights aspects in the strict sense;
- The fear engendered by the thought of WMD 'in the wrong hands', which has been used by governments as a justification for curtailing or suspending human rights; and
- The effect of WMD on the perpetuation of the war system and the resulting drain on resources that would otherwise be available for the implementation of economic and social human rights.

As this article will explore, the linkages have become more complex since the 11 September 2001 terrorist attacks and the invasion of Iraq. To be sure, much has not changed. The risk of nuclear war with which the world has lived since the Second World War remains. Shockingly, the United States and the Russian Federation, despite their apparent partnership, still are locked in a nuclear stand-off in which each side maintains many hundreds of warheads ready for launch at a moment's notice. India and Pakistan have more than once teetered on the brink of a major war that could go nuclear. Other scenarios for use of nuclear arms cannot be ruled out, for example on the Korean Peninsula or in a China-United States conflict over Taiwan. But the world now faces new consequences of states' reliance

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on WMD. The spectre of its spread to additional states has become a stated rationale for war. And the fear of its acquisition by Al Qaeda-like groups has given powerful impetus to the worldwide efforts to suppress terrorism.

While the category of WMD encompasses chemical, biological and nuclear weapons, it must be remembered that, while chemical and biological weapons have the capacity to cause great and indiscriminate harm, their overall effect is infinitesimal compared with that of today's strategic nuclear weapons, some of which have a destructive capacity thirty times or more that of the bombs the United States dropped on Hiroshima and Nagasaki in 1945.³ In this article, the emphasis will be on nuclear weapons.

WMD and the right to peace

While the UN Charter exudes a commitment to peace as its principal objective—from the first sentence of the Preamble, 'We the Peoples of the United Nations determined to save succeeding generations from the scourge of war', to the prohibition of aggression in Article 2(4) and the mandate for peaceful resolution of conflicts in Article 33—the right to peace as such is not found in the Universal Declaration of Human Rights, nor in any of the conventions that have evolved from it. The closest the Universal Declaration comes is Article 28, which provides that '[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.' However, this omission was cured by General Assembly resolution 39/11, adopted on 12 November 1984, the 'Declaration on the Right of Peoples to Peace'. It '[s]olemnly proclaims that the peoples of our planet have a sacred right to peace' and declares that 'the promotion of its implementation constitute[s] a fundamental obligation of each State.'⁴

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But the right to peace has fallen on hard times and WMD have played a central role in its demise. A section containing contributions on the legal aspects of the Iraq war in the July 2003 issue of the *American Journal of International Law* begins with the following words from the editors: 'The military action against Iraq in Spring 2003 is one of the few events of the UN Charter period holding the potential for fundamental transformation, or possibly even destruction, of the system of law governing the use of force that had evolved during the twentieth century.'⁵ These are strong words, to be sure, but justifiably so when seen in the context of the new doctrine of pre-emptive war propagated by the United States and accepted by a number of other countries, a doctrine which should more accurately be called preventive war and which bears a close connection to WMD.

In order to examine this connection we must first review briefly the principles that have governed the legality of going to war since the UN Charter came into force in 1945. The first is Article 2(4) of the Charter, which states that '[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.'

Only two exceptions are allowed to this prohibition against the threat or use of force by one nation against another. Article 42 permits the Security Council to 'take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security' once it has determined that a threat to the peace, breach of the peace or act of aggression has occurred and that measures not involving the use of force would be or have proved to be inadequate to maintain or restore international peace and security. Article 51 states that '[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the UN, until

the Security Council has taken measures necessary to maintain international peace and security.' This Article is the codification of the definition of self-defence as it has existed in customary law since at least the famous *Caroline Incident* of 1837, when Daniel Webster, then the American Secretary of State, defined justifiable self-defence as requiring that it be 'instant, overwhelming and leaving no choice of means, and no moment for deliberation.'⁶

How far from the mandate of the Charter the new policy of preventive war digresses is made plain by President Bush's introduction to the *National Security Strategy* of 17 September 2002,⁷ in which he states: 'As a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed.'

What are these emerging threats that, according to some, call for the scrapping of the fundamental structure of the UN Charter insofar as it relates to the use of force? We find the answer in the following comments by defenders of the legality of the Iraq war:

According to William Howard Taft IV and Todd F. Buchwald, the Legal Adviser and Assistant Legal Adviser of the United States Department of State: 'A central consideration, at least from the U.S. point of view, was the risk embodied in allowing the Iraqi regime to defy the international community by pursuing weapons of mass destruction.'⁸

Professor John Yoo of the University of California states: 'In addition to the probability of the threat, the threatened magnitude of harm must be relevant. The advent of nuclear and other sophisticated weapons has dramatically increased the degree of potential harm, and the importance of the temporal factor has diminished. Weapons of mass destruction threaten devastating and indiscriminate long-term damage to large segments of the civilian population and environment.'⁹

Professor Ruth Wedgwood of John Hopkins University uses President Kennedy's handling of the Cuban missile crisis as a precedent for President Bush's decision to invade Iraq: 'The introduction of nuclear weapons into Cuba', she writes, 'reducing Soviet launch time to seven minutes, would have destroyed any adequate interval for the assessment of nuclear warnings,' thus justifying the United States in imposing a defensive quarantine.'¹⁰

What about this new doctrine of pre-emptive/preventive war has made it palatable to so many people, despite the fact that it undermines the very essence of the United Nations Charter? Apparently it is the *magnitude* of the armed attack that the pre-emptor sees coming from the presumed attacker, as well as the impossibility of determining just when the attack will occur. It has been argued that the 11 September 2001 attacks on the United States radically altered interpretations of international law. It is doubtful that the United States would have felt justified in invading and occupying Afghanistan *before* the tragic events of 2001, simply on the speculation that a devastating terrorist attack might occur someday.

Thus, the characteristics of WMD, and of nuclear weapons in particular, provide both the magnitude and the condensed launch time that expand the concept of self-defence from a reaction to actual or imminent aggression to a preventive strike against aggression that may occur at any time in the future, be it weeks, months or years from now. What makes this frontal attack on the Charter's regime of *ius ad bellum* particularly invidious is that it leaves each state the sole judge of when preventive war is justified, even when, as in the case of Iraq, the 'emerging threat' proves eventually to have been based on faulty or deliberately misconstrued intelligence.¹¹

The mere invocation of the threat of nuclear weapons, whether delivered by plane, by missile or by suitcase, the rhetorical projection of a mushroom cloud over Manhattan—or London, Mumbai or

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any other city—tends to cut off rational discussion. It is likely, therefore, that the pre-emptive/preventive war doctrine will spread as long as the spectre of nuclear weapons in the arsenal of a state or in the hands of a non-state actor can be summoned up. It is worth noting in this connection that, according to United States Deputy Secretary of Defense Paul Wolfowitz, when justification for going to war with Iraq was being discussed at the highest levels of the American government, 'For bureaucratic reasons, we settled on one issue, weapons of mass destruction, because it was the one reason everyone could agree on.'¹²

According to Mohamed ElBaradei, the Director-General of the International Atomic Energy Agency (IAEA), in addition to the known nuclear-weapons powers, 'there are an increasing number of countries with the technological capability of making ... nuclear weapons.'¹³ This makes it imperative that the world community find a way to end, once and for all, the chimera of nuclear weapons as a deterrent and address in a serious way the mandate of the International Court of Justice 'to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.'¹⁴

WMD and the right to life

In the contest for primacy among the variety of human rights, the right to life arguably occupies the highest rank. As provided by Article 6(1) of the International Covenant on Civil and Political Rights, 'Every human being has the inherent right to life. This right shall be protected by law. *No one shall be arbitrarily deprived of his life.*'¹⁵

While there is clearly an overlap between the right to peace and the right to life, they are not coextensive. In the armed conflicts of today, increasing numbers of civilians are being deprived simultaneously of the right to peace and the right to life. However, the right to life survives in wartime, if only because of the humanitarian law prohibition of weapons and tactics that fail to discriminate between combatants and non-combatants.

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Although we are witnessing a strong trend towards the convergence and integration of human rights law and humanitarian law, it was not always so. The 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions were negotiated by separate bodies, the first in the UN General Assembly in New York, and the second in a diplomatic conference in Geneva with the assistance of the International Committee of the Red Cross, and mostly by different diplomats. There was little recognition of commonalities despite the fact that the Third and Fourth Geneva Conventions manifestly seek to safeguard the human rights of prisoners of war and of civilians in occupied territories.¹⁶ The initial division of the branches of international law arose from the newness of *international* human rights law and a desire in the wake of a disastrous war to focus on the maintenance of peace through the UN Charter and on respect for human rights during peacetime. The two branches also have differing approaches: one focuses upon the articulation of *rights* held by individuals vis-à-vis states; the other imposes *duties* upon states and their personnel in inter-state conflicts as well as in internal conflicts with organized armed forces.¹⁷

As human rights law grew in prominence, and as the necessity was recognized of limiting the ravages of war, especially internal conflicts, that persisted around the world during the Cold War, it became impossible to ignore the core idea shared by the two branches: the protection of the human person. In the case of humanitarian law, the idea is exemplified by the principle of civilian immunity—that civilians are never to be the target of attack and are additionally to be protected against the effects of warfare to the maximum extent possible consistent with military necessity.

In 1968, a resolution entitled 'Human Rights in Armed Conflicts' was adopted by the Teheran International Conference on Human Rights.¹⁸ The resolution began by observing that 'peace is the underlying condition for the full observance of human rights and war is their negation' but that 'nevertheless armed conflicts continue to plague humanity.' It went on to call for new or revised agreements 'to ensure the better protection of civilians, prisoners and combatants in all armed conflicts', as well as the 'prohibition and limitation of the use of certain methods and means of warfare'. By 1977, a comprehensive codification of humanitarian law protecting civilians against the effects of warfare had been negotiated, Protocol I to the Geneva Conventions. Agreements providing for the prohibition and elimination of weapons that inflict mass or indiscriminate destruction also were created, initially the 1972 Biological Weapons Convention, and later the 1993 Chemical Weapons Convention and the 1997 Mine Ban Convention.¹⁹

In the years following the Teheran conference, while the formal division between human rights law and humanitarian law remained, there was widespread recognition of their interdependence and common elements. This was spurred in part by the fact that in situations of internal strife, the distinction between the two branches becomes hard to maintain, as it is not always possible to determine whether or not violence has reached the level of intensity and organization qualifying as 'armed conflict' to which humanitarian law applies.²⁰ The close relationship is well illustrated by the fact that NGOs specializing in human rights, notably Human Rights Watch, have undertaken in-depth monitoring of compliance with humanitarian law requirements.²¹

In 1985, the UN Human Rights Committee, the body charged with overseeing implementation of the Covenant on Civil and Political Rights, strongly asserted the relevance of human rights law to the consequences of reliance on nuclear weapons, both in the context of war, traditionally the province of humanitarian law, and of international relations more generally. The Committee commented that:

It is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today. This threat is compounded by the danger that the actual use of such weapons may be brought about, not only in the event of war, but even through human or mechanical error or failure.

Furthermore, the very existence and gravity of this threat generate a climate of suspicion and fear between States, which is itself antagonistic to the promotion of universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter of the United Nations and the International Covenants on Human Rights.²²

In 1994, overcoming the determined opposition of the nuclear-weapons states, non-nuclear weapons countries mustered a majority in the UN General Assembly for a resolution requesting the International Court of Justice to render an advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?' In vivid and extensive written and oral argumentation by more than forty states, the focus was mostly on the UN Charter, the requirements of necessity and proportionality for the lawful exercise of self-defence, and humanitarian law governing the conduct of warfare. But human rights arguments also had their part, with many states referring to the right to life, and some advancing comprehensive and sophisticated analyses encompassing economic and social rights.

Thus the Solomon Islands linked the right to life with the right to health and with international law requiring global protection of human health and the environment, arguing that a nuclear explosion—with effects well beyond the target state—would violate the human rights of persons in neutral as well as target states.²³ As the Solomon Islands noted, Article 12(1) of the International Covenant on Economic, Social, and Cultural Rights recognizes 'the right of everyone to the enjoyment of the highest attainable

standard of physical and mental health,' and mandates in Article 12(2)(b) that states take steps to accomplish 'the improvement of all aspects of environmental and industrial hygiene.' Article 25 of the Universal Declaration of Human Rights provides that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family'. A right to a clean and healthy environment has been implied from these provisions and other instruments of international law and policy.

Professor Philippe Sands commented regarding the counterarguments of the nuclear-weapon states France, Britain, the Russian Federation and the United States:

[T]hese are the same States which pride themselves—with some justification—on their role in promulgating the rule of law, promoting human rights, and preserving the environment. Yet when it comes to those very weapons of mass destruction which pose a greater threat to human rights and the environment than anything else imaginable, these States ask you to set aside that body of principles and rules so carefully put in place over the past 50 years. They ask you, in effect, to re-situate yourself in 1945, to ignore all subsequent developments and to follow Balzac's dubious proposition, 'that laws are spider webs through which the big flies pass and the little ones get caught.'²⁴

Arguing for Costa Rica, human rights specialist Carlos Vargas-Pizarro invoked a still larger frame, stating that 'nuclear threat or use cannot coexist with the achievement of a global order embodying common security that realizes the purposes of the United Nations and provides fundamental human rights for all persons ...'.²⁵

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In its 1996 opinion, the International Court of Justice primarily addressed the human rights arguments under the rubric of the right to life. The Court held that, contrary to the position advanced by some states, this fundamental human right applies in time of war as well as in time of peace, subject to the following qualification:

The test of what is an arbitrary deprivation, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant [on Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.²⁶

In other words, the interpretation of the human right to life in wartime depends on applicable principles of humanitarian law. Citing particularly the humanitarian law principles forbidding the infliction of indiscriminate harm and unnecessary suffering, the Court held the threat or use of nuclear weapons to be generally contrary to international law. It follows that use of nuclear weapons would necessarily entail a massive violation of the most basic of human rights, the right to life.²⁷

The human rights arguments also seem to have influenced the Court's strong discussion of the relevance of environmental law. The Court stated that the 'use of nuclear weapons could constitute a catastrophe for the environment' and observed that the environment 'represents the living space, the quality of life and the very health of human beings, including generations unborn'.²⁸ Further, in explaining the principles of humanitarian law upon which it primarily relied, the Court stated that there is broad adherence to the Hague and Geneva Conventions because 'a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity"'.²⁹

Why is it important to insist on respect for the human person and elementary considerations of humanity—on fundamental human rights—even during the chaos and intentional violence of war?

The international lawyer Henri Meyrowitz answers:

The true foundation of civilian immunity ... resides ... in what one could call the necessity of the long run, the necessity of beyond-war. ... [It] represents an indispensable barrier, which, due to its nature as a *recognizable threshold*, constitutes the unique means preparing civilization to survive in resisting the destructiveness, potentially unlimited, of modern war.³⁰

The political philosopher John Rawls, articulating a modern Kantian view, similarly holds: 'The aim of war is a just peace, and therefore the means employed must not destroy the possibility of peace and encourage a contempt for human life that puts the safety of ourselves and of mankind in jeopardy.'³¹

The essential fact about nuclear weapons is that they inherently surpass the boundaries of warfare and make impossible the resumption of civilized, peaceful life. That is why human rights law and humanitarian law join hands to condemn them; that is why, as the International Court of Justice unanimously affirmed, the world must create mechanisms for their elimination as has already been done in the conventions on chemical and biological weapons; that is why, ultimately, war must be abolished and the right to peace secured. As Kant presciently wrote, 'a war of extermination ... would allow perpetual peace only on the vast graveyard of the human race. A war of this kind and the employment of all means which might bring it about must thus be absolutely prohibited.'³²

WMD and civil and political rights

Since 2001, in many parts of the world the fear of terrorist attacks has combined with the fear of chemical, biological and nuclear weapons to produce a climate in which governments are increasingly prone to enact 'emergency measures' that infringe civil liberties and that citizens find increasingly difficult to undo. Terrorists acts of the past—assassinations, train derailments, arson—are as nothing compared with the technologically sophisticated and militarily coordinated mass assaults of Al Qaeda and its imitators.

Every time one of these dreadful incidents occurs, the natural reaction is to think 'What if?' What if it had been a nuclear device? What if the still-identified anthrax terrorist had managed to more widely distribute the substance? What if Aum Shinrikyo had succeeded in spreading sarin throughout the Tokyo subway system? It is a line of thinking to which only hyperboles can do justice. Thus, former United States Defense Secretary William Cohen, testifying on 23 March 2004 before the National Commission on Terrorist Attacks Upon the United States, stated that terrorism, combined with WMD, 'is likely to pose an existential threat to the world.'³³

It is also a line of thinking that leads people like Daniel J. Popeo, Chairman of the conservative Washington Legal Foundation, to run an advertisement on the Op-Ed page of the *New York Times* entitled "'Civil Liberties' for Terrorists?" and to conclude with the following rhetorical flourish: 'So it's time we got our priorities straight. Do we defer to the ideologues' rigid agenda of absolute "civil liberties" for all, including our enemies, or do we trust government officials and our military to use their powers wisely and protect us from the horror terrorists can unleash?'³⁴

When 'civil liberties' gets bracketed in quotation marks to indicate a concept dear to ideologues but alien to right-thinking lawyers, when citizens used to holding their leaders accountable for their actions are asked to put blind trust in government officials and the military, something serious has happened to the culture of human rights. Poorly conceived counter-terrorism efforts are encouraging this trend around the world.

Needless to say, there would be tension between security and human rights even if there were no WMD. However, as in the case of security and war, a whole new dimension is given to the security/human rights equation when WMD are factored in. In order to appreciate just how serious this phenomenon is, it is necessary to take a closer look at the impact on the observance of certain fundamental civil and political rights since 11 September 2001. These impacts have taken a variety of forms, from torture and degrading treatment of prisoners and detainees to privacy issues. A few are briefly mentioned here.

Article 7 of the International Covenant on Civil and Political Rights explicitly prohibits torture: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.' A similar set of prohibitions is contained in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to which 136 states were parties as of June 2004. As of this writing, it remains to be seen what various investigations currently underway will reveal about the level of command and authorization from which the culture of 'aggressive' interrogation and pre-interrogation measures of prisoners of war and other detainees by the American military in Afghanistan, Guantanamo and Iraq have emanated. What is already clear is that somewhere along the line the notion of fighting fire with fire, or terror with terror, replaced the notion of intransgressible norms of behaviour mandated by the Geneva Conventions and the above-mentioned treaties.³⁵ Thus Alan Dershowitz, the well-known Harvard law professor, has publicly taken the position that torture is justified when undertaken to prevent a terrorist nuclear attack.³⁶

A report issued on 2 June 2003 by the Inspector General of the United States Department of Justice confirmed that the treatment of large numbers of mostly illegal immigrants arrested in the United States since the 2001 attacks clearly exceeded the bounds of applicable legal and moral norms.³⁷ Additionally, the 'rendering' of prisoners to other countries known to practice torture, such as Jordan, Egypt and Morocco, is a particularly disturbing trend.³⁸

The instances above also involve violations of Art. 10(1) of the Covenant on Civil and Political Rights, which provides that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

Article 9(1) of the Covenant states that '[n]o one shall be subjected to arbitrary arrest or detention', while Article 16 guarantees that '[e]veryone shall have the right to recognition everywhere as a person before the law.' These articles are violated by the Kafkaesque rationale developed by some governments for holding large numbers of persons for long periods without charging them with a crime or other offence.

Much anti-terrorist legislation has been passed in many countries since 2001.³⁹ Some of these laws and regulations, like those aimed at drying up sources of terrorist funding or improved exchanges of information between various intelligence agencies, serve a useful and legitimate purpose. Others, however, are of doubtful international legal validity and may be tested in the courts for years to come.

WMD and social and economic rights

In 1998, Stephen I. Schwartz and nine other nuclear experts produced a book containing the results of an extensive study of the cost of the American nuclear weapons programme up to that year.⁴⁰ The figure they arrived at was 5.5 trillion US dollars. Imagine if one were to include the amounts spent on nuclear weapons programmes by other countries and the amounts spent by all countries on other WMD. It requires no particular proficiency in the art of economics to appreciate what this amount could have produced if used instead on providing millions of people with their right to health, housing, education, culture, social security and all the other desiderata guaranteed to them—on paper—by the International Covenant on Economic, Social and Cultural Rights.

The eighteen targets for implementation of the right to development to which the world community committed itself in the Millennium Declaration,⁴¹ including eradication of extreme poverty, full primary education, gender equality and empowerment of women, reduction of child mortality, combating HIV/AIDS and ensuring environmental stability, among others, still seem far out of reach, especially in the poorest countries. Yet billions of dollars go into the maintenance of nuclear arsenals, research into modified or new nuclear weapons, and measures to prevent or mitigate WMD attacks like research on vaccines. The G-8 meetings, originally intended to develop a common plan for meeting these goals, now seem increasingly concerned with questions of non-proliferation and counter-terrorism, at the expense of economic progress and human rights. As one non-governmental leader put it following the latest G-8 meeting in Sea Island, Georgia, in June 2004:

Bold action at this year's summit could have taken the issues of AIDS, debt-relief and peacekeeping off the table and offered new hope for those with so little. Instead, the people on the run from militias in Sudan or those dying from AIDS from lack of medicine will have to see whether they can stay alive until next year's summit.⁴²

Conclusion

There can be no doubt that a world rife with weapons of mass destruction is less safe a place than a world without them, a point only reinforced by the rise of catastrophic terrorism.

The elimination of WMD is a matter of political will. It can be achieved through full implementation of the Chemical Weapons Convention and the Biological Weapons Convention and the negotiation of measures to eliminate nuclear arms within the overarching framework of a convention. The nuclear-weapons states are pledged to negotiate in good faith toward this end, but so far have refused to honour their pledge. When they do, they will also be acting to uphold the human rights to life and peace.

The elimination of terrorism may be a more difficult goal to reach. When leaders speak of waging the war against terrorism to its final victory, one can only wince and wonder what they have in mind. What war? Where fought? Against whom? With what weapons?

The last question is probably the crucial one. Yes, competent intelligence and brute force can reduce the danger of terrorist attacks. But if there is one lesson that history teaches it is that social, economic, ethnic and religious differences can translate into feelings of powerlessness and give rise to violence—which the powerless call the search for justice and those at whom the violence is directed call terrorism.

This is where human rights come in. There may never be a world without terrorism. But it is reasonable to expect that the closer the world comes to realizing the full panoply of human rights enshrined in the Universal Declaration and the International Covenants, the closer it will be to freedom from terrorism, not least WMD terrorism. It is a goal worth striving for.

Notes

1. S. Kershaw and E. Lichtblau, 2004, Bomb Case Against Lawyer is Rejected, *New York Times*, 25 May, p. A16. Mr Mayfield is an Oregon lawyer who was arrested and released after two week's detention by order of a federal judge after the Federal Bureau of Investigation admitted that it had erroneously associated his fingerprints with those of another person found at the site of the Madrid train bombing.

2. One such exception is Douglas Roche, former Canadian Ambassador for Disarmament, author of *Bread Not Bombs* (University of Alberta Press, 1999).
3. 475 kiloton warheads are deployed on American submarine-based missiles. See NRDC Nuclear Notebook, US Nuclear Forces, *Bulletin of the Atomic Scientists*, May/June 2004, at <www.thebulletin.org/issues/nukenotes/mj04nukenote.html>. The Hiroshima and Nagasaki bombs had yields of 12–15 kilotons. In his recent book *Disarming Iraq*, Hans Blix says that '[w]hile nuclear weapons are routinely lumped together with biological and chemical in the omnibus expression 'weapons of mass destruction', it is obvious that they are in a class by themselves. The outside world's concerns about Iraq's weapons would never have been a very big issue if it had not been for Iraqi initiatives to acquire nuclear weapons capacity.' H. Blix, 2004, *Disarming Iraq*, Pantheon Books, p. 260.
4. See <www.unhcr.ch/html/menu3/b/73.htm>; J. Fried, 1994, *Toward a Right to Peace: Selected Papers of John H.E. Fried*, Aletheia Press, pp. 81–88.
5. L.F. Damrosch and B.H. Oxman, 2003, Agora: Future Implications of the Iraq Conflict, Editors' Introduction, *American Journal of International Law*, vol. 97, no. 3, p. 553 (emphasis supplied).
6. Letter from Daniel Webster to Lord Ashburton, 6 August 1842. See R.Y. Jennings, 1938, The Caroline and McLeod Cases, *American Journal of International Law*, vol. 32, pp. 82–99.
7. See <www.whitehouse.gov/nsc/nss.pdf>.
8. W. Taft and T. Buchwald, 2003, Preemption, Iraq, and International Law, *American Journal of International Law*, vol. 97, no. 3, p. 563.
9. J. Yoo, 2003, International Law and the War in Iraq, *American Journal of International Law*, vol. 97, no. 3, p. 572.
10. R. Wedgwood, 2003, The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense, *American Journal of International Law*, vol. 97, no. 3, p. 584.
11. See 'The Deceptions Exposed' in B. Burrough et al., 2004, 'The Path to War', *Vanity Fair*, May, pp. 286–287.
12. *Associated Press*, 'Wolfowitz's comments revive doubts over Iraq's WMD', 1 June 2003, quoting from *Vanity Fair* interview.
13. Interview in *Der Spiegel*, 'America's sense of timing is different', September 2003.
14. International Court of Justice, Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, issued 8 July 1996 (hereafter cited as 'ICJ Opinion'), para. 105(2)E.
15. Emphasis supplied. Similar language is found in the American Bill of Rights: 'No person ... shall be ... deprived of life ... without due process of law.' United States Constitution, Amendment V.
16. R. Kolb, 1998, The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions, *International Review of the Red Cross*, no. 324, pp. 409–18.
17. See generally L. Doswald-Beck and S. Vité, 1994, International Humanitarian Law and Human Rights Law, *International Review of the Red Cross*, no. 293, p. 99.
18. Resolution XXIII of 12 May 1968. Adopted as United Nations General Assembly resolution 2444 (XXIII) of 19 December 1968.
19. See N. Deller, A. Makhijani and J. Burroughs (eds), 2003, *Rule of Power or Rule of Law? An Assessment of U.S. Policies and Actions Regarding Security-Related Treaties*, Apex Press.
20. See K. Watkin, 2004, Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict, *American Journal of International Law*, vol. 98, no. 1, pp. 1–34.
21. See, for example, Human Rights Watch, 2003, *Off-Target: The Conduct of the War and Civilian Casualties in Iraq*, Washington, DC, at <www.hrw.org/reports/2003/usa1203/>.
22. *Report of the Human Rights Committee*, Official Records of the General Assembly, 40th Session, Suppl. no. 40, document A/40/40 of 1985.
23. Verbatim Record, hearing before the ICJ, 14 November 1995, 10h00 pp. 66–67 (Professor Philippe Sands); Solomon Islands' Written Observations regarding World Health Organization question on the legality of use of nuclear weapons in armed conflict (considered together with the question posed by the General Assembly which yielded the opinion on the merits), paras. 4.1–4.46, pp.76–95, esp. 86–87.
24. Verbatim Record, hearing before the ICJ, 14 November 1995, 10h00, p. 66.
25. Verbatim Record, hearing before the ICJ, 14 November 1995, 15h00, p. 31.
26. ICJ Opinion, *op. cit.* paras. 24, 25. Regarding the opinion generally, see L. Boisson de Chazournes and P. Sands (eds), 1999, *International Law, the International Court of Justice, and Nuclear Weapons*, Cambridge University Press; J. Burroughs, 1997, *The Legality of Threat or Use of Nuclear Weapons: A Guide to the Historic Opinion of the International Court of Justice*, Lit Verlag; V. Nanda and D. Krieger, 1998, *Nuclear Weapons and the World Court*, Transnational Publishers; P. Weiss, 2000, Book Review, *American Journal of International Law*, vol. 94, no. 4, pp. 815–18.
27. Except perhaps in the scenario which some WMD experts have dubbed 'The case of the mininuke in the Gobi Desert', i.e. a hypothetical situation in which a low-yield and fallout-free nuclear weapon is used in an area free of civilian population for a great distance.

28. ICJ Opinion, *op. cit.*, para. 29.
29. *Ibid.*, para. 79 (emphasis supplied).
30. H. Meyrowitz, 1981, Le bombardement stratégique d'après le Protocole additionnel I aux Conventions de Genève, *Zeitschrift Fur Ausländisches Öffentliches Recht Und Völkerrecht*, vol. 41, p. 26 (translation by J. Burroughs).
31. J. Rawls, 1971, *A Theory of Justice*, Belknap Press of Harvard University Press, pp. 378–79.
32. Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in H. Reiss (ed.), 1970, *Kant's Political Writings* (trans. H.B. Nisbet), Cambridge University Press, p. 96.
33. See <cnnstudentnews.cnn.com/TRANSCRIPTS/0403/23/se.05.html> .
34. As printed in the *New York Times*, 22 March 2004 edition, p. A23. Full text available at <www.wlf.org/upload/3-22-04civilliberties.pdf> .
35. See the articles by S. Hersh in *The New Yorker*, editions of 10, 17 and 24 May, available at <www.newyorker.com/archive/previous/?040614frprsp_previous1> .
36. D. Glenn, 2002, A Civil Libertarian Wants Professors to Talk About Morality and Tactics, *The Chronicle of Higher Education*, 6 September.
37. See United States Department of Justice, Office of the Inspector General, 2003, *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, Office of the Inspector General, at <www.usdoj.gov/oig/special/0306/index.htm> .
38. D. Priest and B. Gellman, 2002, US Turns to Torture to Crack Prisoners of War, *Washington Post*, 27 December, available at <www.smh.com.au/articles/2002/12/26/1040511135568.html?oneclick=true> .
39. For a country-by-country overview of measures to combat terrorism taken since 11 September 2001, see the reports submitted by states to the UN Counter-Terrorism Committee at <www.un.org/Docs/sc/committees/1373/submitted_reports.html> .
40. S.I. Schwartz (ed.), 1998, *Atomic Audit: The Costs and Consequences of U.S. Nuclear Weapons since 1940*, Brookings Institution Press, Washington, DC.
41. United Nations Millennium Declaration, General Assembly resolution A/55/PV.8 of 8 September 2000. See <www.un.org/millennium/declaration/ares552e.htm> .
42. D. Gartner, G-8 Summit: World Leaders Missed Good Opportunities on Several Issues, *Miami Herald*, 17 June. Gartner is policy director of the Global AIDS Alliance.