Human Rights in the 'War on Terror'

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Introduction

Since the end of the cold war, human rights has become the dominant vocabulary in foreign affairs. The question after September 11 is whether the era of human rights has come and gone.

Michael Ignatieff, *New York Times*, 5 February 2002

The idea of rights is nothing but the concept of virtue applied to the world of politics. By means of the idea of rights men have defined the nature of license and of tyranny . . . no man can be great without virtue, nor any nation great without respect for rights.

Alexis de Tocqueville, *Democracy in America*, [1835]1991: 219

After the 9/11 attacks and the subsequent 'war on terror'[1], have human rights irretrievably lost their status in international affairs and national policy-making? Or, as de Tocqueville declares, must rights always remain a fundamental part of democratic politics since they define the boundary between individual license and government tyranny? There now exists a plethora of books on international affairs after 9/11, too many to cite here, which examine the political fallout of the attacks on the United States and the subsequent U.S. response. Many are concerned with judging the proportionality of the U.S.

[1] Although no less normative than other ideas such as security or human rights, the 'war on terror' is rather more identified with the specific counter-terror policies of successive Bush Administrations since 9/11, and therefore I keep it in quotation marks throughout.

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response to Islamist terrorism[2], and in particular determining the justness or otherwise of U.S. military interventions in Afghanistan and Iraq.

In this literature, human rights issues such as the treatment of terror suspects may appear in passing, but usually to the extent that they impinge on other, wider political aims, such as holding credible elections in Iraq. Human rights and questions of national and global security have become disconnected in these discussions, as if they were independent of one another. This volume builds upon a body of literature that evaluates the implications for human rights of the military actions and anti-terror legislation that constitute the 'war on terror', in the United States as well as globally[3]. What have been the repercussions of the 'war on terror' for the individual human rights of Afghanis, Iraqis, Britons, Americans, Spaniards and others? In what specific ways have their rights been violated or protected by counter-terror measures?

In addition to determining the impact of the new counter-terror context on human rights, there is a further need to identify the ways in which human rights and security concerns can be reconciled in the future. This is more than just a question of expediency, as when anti-terror experts conduct a pragmatist calculus to determine which government policies are most efficient in combating terrorism[4]. While knowing which measures are effective is valuable and necessary, I am referring to a rather different kind of project, one which takes seriously the security threat of Islamist terrorism whilst advancing the normative case for respecting human rights in the international order.

This volume brings together leading international lawyers, policy-makers, activists and scholars in the field of human rights to evaluate counter-terrorist policies since 9/11, as well as to develop a counter-terror strategy which takes human rights seriously. We should note that human rights scholars, lawyers and advocates, whilst sharing a primary commitment to individual rights and liberties, have adopted different stances on the 'war on terror', and not all of them are fully compatible. Our first observation, therefore, is that just valuing human rights does not answer the question of how best to respond to terrorism. Despite their differences over major issues such as the war in Iraq, all the contributors agree that governments need to uphold human rights

[2] By 'terrorism' I mean deliberate and systematic attacks by state or non-state actors upon civilian non-combatants with the intent to create a generalized state of terror in order to further an ideological cause. See Freeman in this volume for a discussion of definitions of terrorism.

[3] Including Cole 2003; Dworkin 2003; Leone & Anrig 2003; Neier 2002; and Schulz 2002, 2003.

[4] See Freeman 2003.

from the outset, and integrate human rights into the core of government anti-terror policies.

The contributors do not advance the case for human rights by mounting an absolutist defence; for instance, by asserting that human rights are 'trumps' or transcendental claims or privileges that can never be questioned[5]. Instead, human rights matter because they are an indispensable component of the liberal democratic politics required in emergency situations, a politics which insists upon the importance of individual rights, the separation of powers and a systematic review of executive power by the judicial and legislative branches. Borrowing from de Tocqueville, rights allow us to define and regulate the nature of both licence and tyranny. For democracies to counteract terrorists without losing their democratic souls, they have to continually review the threshold between unfettered individual licence on the one hand, and unnecessary governmental coercion on the other. At a time of seemingly perpetual 'war', a politics of human rights promotes the establishing of reasonable review procedures and constraints upon the conduct of the executive branch and its military command structure. This approach resonates with the majority position adopted by the U.S. Supreme Court, as articulated by Judge Sandra Day O'Connor. In the 2004 *Hamdi* decision, Judge O'Connor wrote that the executive's detention of terror suspects without trial during wartime 'serves only to *condense* power in a single branch of government. We have long since made clear that a state of war is not a blank check for the President' (124 S. Ct. 2633, 2650 (2004) (emphasis in original)).

Global Security Through Human Rights: The 1990s in Retrospect

The present disjuncture between rights and security in public and political discourse is all the more remarkable given that it comes after a decade in which human rights occupied a more prominent position in international affairs than at any other point in history. Whereas during the Cold War, human rights were often idealistic aspirations obstructed by a deadlocked U.N. Security Council, in the post-Cold War 1990s, human rights values and institutions played a greater role in establishing stability in the global order and ensuring more democratic forms of political and economic participation at the local level. During this time, significant advances were made in establishing international legal institutions which could actually pursue accountability,

[5] See Dworkin 1977 on rights as trumps. The classic view of universal constitutional right within a vision of cosmopolitanism comes from Immanuel Kant (1983) in his 'Perpetual Peace' essay, written in 1784.

albeit after most of the mass human rights violations had been committed. After 9/11, the emergent project of international legal justice is in danger of being derailed entirely.

In the 1990s, two significant factors propelled human rights to a more prominent role in the conceptualization and realization of collective security concerns. Firstly, in the context of rapid economic and political globalization, a greater premium was placed on global solutions to international security, and a contingent consensus emerged that human rights could play a greater role in promoting stability[6]. The United Nations and government overseas aid agencies came to insist upon basic human rights, the rule of law and accountability as a central part of their reconstruction strategy in post-conflict zones.

Secondly, with the ending of the Cold War, there was more scope for international responses to prevent further mass human rights abuses. In some instances such as Sierra Leone and East Timor, the United Nations successfully intervened militarily to prevent further violence against civilian populations[7], and embarked upon a relatively comprehensive reconstruction of those countries. In other cases such as Kosovo in 1999, there was no consensus at the level of the U.N. Security Council and NATO carried out a bombing campaign against Serb forces which contravened international law, but according to Samantha Power likely saved hundreds of thousands of lives (2002: 472).

The human rights agenda went beyond questions of geopolitical stability and shaped debates in other areas such as development, the environment and participation in political processes. For governments as well as social movements, human rights came to justify a range of activities in diverse fields such as economic development, reconstruction and political reform. Intergovernmental agencies such as the World Bank and International Monetary Fund, along with an array of non-governmental organisations advocated a rights-based approach to economic and social development, to replace top-down models of modernization. The brilliance of Nobel Prize winner Amartya Sen's (1999) thesis lay in the connections it drew between economic development and human rights, and in Sen's demonstration of how human rights were not just desirable political freedoms, but necessary preconditions for social justice and material development in impoverished countries.

Finally, and most importantly for this volume, the foundations were laid in the 1990s for a global system of legal justice. In contrast to the 'paper tiger' conventions on human rights during the Cold War, there were significant

[6] Brysk 2002; Falk 2003; Soros 2002.

[7] See Robertson 2001.

advances in the implementation of human rights. Governments, with policy guidance from human rights organizations, began constructing intergovernmental instruments of accountability for mass atrocities such as tribunals and truth commissions. The International Criminal Tribunals for the Former Yugoslavia and Rwanda advanced international criminal law to another level, and they secured the first international convictions for crimes against humanity since the Nuremberg and Tokyo trials, including the first conviction of a head of state (Jean Kambanda of Rwanda) for genocide. The 1998 Rome Statute, ratified by 120 countries but opposed by the United States, Israel and China, created the mandate for an International Criminal Court (ICC) that would have jurisdiction over four categories of crimes: war crimes, crimes against humanity, genocide and aggression[8].

These worldwide developments were underlined by decisions of national courts, which asserted 'universal jurisdiction' to try crimes against humanity. In the Pinochet extradition proceedings of 1998, Spanish and British courts ruled that Pinochet could be tried for offences such as torture, even though they were committed elsewhere and against non-nationals. The British House of Lords waived the centuries-old concept of 'sovereign immunity' to define the legitimate exercise of power of a head of state and concluded that torture did not fall within the official duties of a head of state[9]. In this era, individual human rights edged slightly closer to Immanuel Kant's late eighteenth-century vision of cosmopolitan justice which could, in certain cases of genocide and torture, override the traditional boundaries of national sovereignty.

Yet this would be a Whig history of human rights in the 1990s unless tempered by a recognition of the profound failures of the emergent human rights system, the most notable being the inability to prevent two (repeatedly predicted) genocides in the former Yugoslavia and in Rwanda. There still exists no permanent international mechanism to enforce the prevention requirements of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, a fact that is painfully evident as a genocide unfolded in 2004 in Darfur, Sudan. Politicians such as U.S. Secretary of State Colin Powell recognized in September 2004 that the slaughter was indeed 'genocide' but failed to take the necessary steps to put a stop to it (Kessler & Lynch 2004). Worse still, during 2004 politicians from the African Union and Arab League and China denied that genocide was occurring and the European Union sat on the fence, saying it did not have enough information.

[8] See Schabas 2001.
[9] On the Pinochet case, see Richard J. Wilson 1999 and Woodhouse 2000.

In trying to fathom the complexities of the 1990s, John Wallach makes the case in this volume that human rights talk rose to such prominence because their ideological fluidity and ambiguity allowed them to become a 'tool of the powerful.' On the one hand, they represent stasis, constraining political actors and institutions within a universal and international code, and on the other hand they represent a powerful moral charter to pursue social change. In the 1990s, the definition of rights shifted from the former to the latter, thus furnishing states with an 'ethics of power' that permitted them to reshape domestic policies, as well as to refashion foreign policy and intervene militarily in regions of political instability. While it is true that human rights came to coincide with the national self-interest of powerful states, in so doing, national self-interest was itself transformed. This was especially the case in a Europe pursuing greater economic and political integration, where seeking intergovernmental solutions to political conflicts became an ingrained way of conducting international affairs.

Unprecedented Challenges to Rights and Security?

After 2001, the Bush Administration advanced a formulation of international security that detached rights from security concerns. The gulf between human rights and international security manifested itself in a number of different ways, including the U.S. government's hostility to the International Criminal Court (ICC) and its attempts to undermine the ICC through bilateral agreements which grant a special exemption from prosecution for U.S. soldiers[10]. The reorientation of U.S. foreign policy away from multilateral institutions had already begun in early 2001 but gathered pace after 9/11. Secondly, in contrast to the humanitarian interventions of the 1990s, post-war reconstruction efforts in war-torn countries like Afghanistan and Iraq placed much less emphasis on re-establishing basic rights, the rule of law and accountability. Making the world safe from terrorism quickly became seen as antithetical to strong international human rights institutions.

Although it is tempting to explain the diminished role of human rights by reference to the neo-conservative nature of the Bush Administration, the reasons go deeper than the political complexion of one particular administration and result at least in part from the changing nature of the security threats since 2001. The new anti-terror doctrine responds to real security threats which existing international institutions were not originally designed to deal with. United Nations agencies are intended to prevent mass human rights

[10] This opposition to key tenets of the ICC existed during the Clinton Administration also.

violations and/or an unfolding genocide in an internal conflict, where a temporary U.N. peacekeeping force might help preserve a negotiated peace and prevent further atrocities against civilians after hostilities have ended.

The 1990s system of international criminal justice was not constructed with international terrorism in mind. The 1998 Rome Statute of the ICC does not mention global terrorism as a category of crimes it has jurisdiction over. Since the court's inception in July 2002, the prosecutor Luis Moreno Ocampo has carried out his investigations primarily in weak states such as the Central African Republic, the Democratic Republic of the Congo and Colombia. It could be argued that the 9/11 attacks might be dealt with under the rubric of 'crimes against humanity' but the ICC can only deal with crimes committed after 2002. Global anti-terror policing would therefore require a profound overhaul of the ICC mandate and operating structures. Further, the ICC relies (e.g., for powers of search, seizure and arrest) on a state sovereignty model that seems outmoded when faced with global Islamist terrorist networks. Many observers note that what makes al Qaeda unique is that it is a deterritorialized terrorist network spread across dozens of countries in different regions of the world, and instead of being highly centralized (e.g., the Shining Path in Peru), it is based upon a loose cell structure. It has a global reach and has demonstrated its capacity to strike at the heart of U.S. government and financial institutions.

Not only is the structure of 9/11 terrorist groups unique, but so is the particular strain of radical Islam motivating them. The religious fanaticism of Islamic Jihad or Jamal Islamiya or al Qaeda engenders unquestionable ideological unanimity and dedication among its followers, and engenders an apocalyptic vision that is singularly unyielding. The core aims of Islamist terrorists are quite unlike the secular political objectives of most nationalist groups which have used terrorist methods. The political platforms of Irish or Basque nationalists at least allowed the possibility of pragmatic concessions and power-sharing agreements.

In contrast, Osama bin Laden's 1998 declaration of war against the United States called on all Muslims to go forth, sword in hand, to kill all infidels in a 'Jihad Against Jews and Crusaders' and thereby to restore the Seventh-Century Islamic Caliphate. Regarding the extremist ideology of al Qaeda, the 9/11 Commission concluded: 'It is not a position with which Americans can bargain or negotiate. With it there is no common ground – not even respect for life – on which to begin a dialogue. It can only be destroyed or utterly isolated' (2004: 362). And yet, other core Islamist terrorist aims potentially do have political solutions and are quietly being resolved, such as the withdrawal of U.S. troops from Saudi Arabia. The official position of Tony Blair and the

British government has been that a peaceful and negotiated settlement to the Israeli-Palestinian conflict is a crucial part of the 'war on terror' insofar as it would undermine sympathy for Islamist terror networks (Freedland 2002).

The methods of Islamist terrorists also indicate how religious zealotry differs from broadly secular nationalist political violence. While the Irish Republican Army (IRA) targeted civilian non-combatants, the IRA never deployed any suicide bombers in a thirty-year terrorist bombing campaign, although IRA prisoners such as Bobby Sands did undertake 'suicide fasting'. Irish nationalists planting bombs in London railway stations or crowded shopping districts in Belfast always sought to evade capture and to avoid death. Operatives of al Qaeda or Jordanian Abu Musab al-Zarqawi's group are enmeshed in a cult of death that leaves them unbound by such restraints, and this makes their attacks potentially more devastating.

In a number of ways, then, the U.N. and other intergovernmental agencies, based upon a state sovereignty model, oriented to internal civil wars in developing countries and driven by a *post facto* law enforcement model, are not fully adequate for the new security challenges raised by global Islamist terrorism. Despite the emergent consensus and multilateralism of the 1990s, we cannot simply hark back to the institutions of that era and expect them to function adequately for present needs, without a comprehensive re-orientation and reconceptualization. It should be possible to recognize this without sanctioning the Bush Administration's antipathy to multilateral solutions to international terrorism.

While we are in some respects in a new era with new challenges, it is also important to recognize the historical precedents to our present deliberations on rights, the rule of law, war and security. We only have to consider the two-thousand-year-old Roman maxim *Inter arma silent leges* ('In times of war, the laws are silent') to know that these issues are not being faced for the first time[11]. One could even go further back to the origins of Western democracy and the Peloponnesian war between democratic Athens and oligarchic Sparta and chart the struggle between Athenian oligarchs such as Critias and democrats such as Pericles who held fast to democratic and humanitarian principles, as they were then conceived[12].

America's relatively short history also provides instances of emergency wartime powers which curtailed basic legal rights. Supreme Court Justice

[11] See Walzer 2004: ix for a discussion of this proposition.

[12] See, for instance, Pericles' Funeral Oration. One has to recognize, of course, that the Athenian conception of democracy did not extend to women and slaves. For a philosophical deliberation on the political debates in Athens during and after the two wars with Sparta, written at a time of war with totalitarian Germany, see Popper [1945] 1962: chapter 10.

William Rehnquist's (1998) book *All the Laws But One: Civil Liberties in Wartime* scrutinizes the early phase of the U.S. Civil War, when Abraham Lincoln sought to suspend the writ of habeas corpus in the U.S. Constitution to allow the military to detain individuals accused of sabotaging the war effort. This attempt was temporarily thwarted by the Supreme Court, but eventually certain civil liberties were curtailed for the duration of the Civil War, as they were again in World Wars I and II. Few now question the restrictions on press freedoms during those wars. Other executive decisions are now utterly discredited and have become a source of national embarrassment, such as the internment of Japanese Americans during World War II, upheld in 1944 by the U.S. Supreme Court in the *Korematsu* decision. Yet Rehnquist's conclusions are important, since he commends the historic trend in the United States against the 'least justified' curtailment of civil liberties in wartime: 'The laws will thus not be silent in time of war, but they will speak with a somewhat different voice' (1998: 224–5).

The debate about law and rights during wartime, then, is very, very old and we can learn something from its historical twists and turns. Michael Freeman's chapter in this volume takes us back to the classic distinction scholars have drawn between the writings of Thomas Hobbes and John Locke. Both wrote their treatises during the political and social ferment of seventeenth-century England, a century distinguished both by civil war and violent upheaval (including the beheading of Charles I in 1649 and ferocious clashes between religious fanatics), as well as by the consolidation of parliamentary authority and individual rights (e.g., the Habeas Corpus Act of 1679).

Thomas Hobbes famously believed the state of nature to be 'nasty, brutish and short' and characterized by the war of all against all, thus requiring a strong central sovereign authority (preferably a monarchy) to provide the order and security. For Hobbes, then, order is the fundamental prerequisite for all social institutions and civil society, requiring individuals to surrender their natural rights in exchange for security. John Locke appreciated the significance of a strong government in providing order, but he was more attentive to the penchant of governments to abuse their authority. Governments must therefore be accountable to their citizens, and among their primary responsibilities are the establishment of legislative power and the rule of law, the legitimacy of which derives from the consent of society. Freeman evaluates Locke's prescient theory of emergency powers, or 'executive prerogative' which grants the executive the power to suspend the rule of law in order to defend the public good from unforeseen threats. While Locke was fully aware that executive prerogative can be dangerous in the hands of unscrupulous rulers, he never proposed a system of checks and balances upon emergency powers. In balancing security and human rights in the present context, Freeman seeks

to amend that oversight and he recommends a Lockean view of prerogative power, reinforced with robust protections for basic human rights.

Thus, we are confronted with questions which have been encountered before in the English Civil War, by the United States during the Civil War and two World Wars, and by many other democratic countries facing terror threats in the twentieth century, the most basic of which is, how do we safeguard security whilst preserving the human rights that are essential to democratic government? If in war some rights are suspended, which rights may be legitimately suspended in the 'war on terror', which most would accept is not like other more conventional wars? What fundamental principles of reasoning guide our decisions on which rights may be suspended and which rights are, to use the legal parlance, non-derogable in the context of democratic rule?

The Lockean executive prerogative question asks: If we grant governments the authority to temporarily curtail certain liberties in emergency situations, how can we positively ensure (rather than blindly trust) that governments will not overstep the boundaries? Regarding the conduct of war, how are foreign prisoners of war and our own citizens to be treated? Do individuals in either or both groups hold any rights to due process within the domestic legal system? Is ordinary law robust enough to judge their guilt or innocence? If not, then what special review procedures are to be introduced, and for what duration? Should terror suspects have access to the evidence against them, to a lawyer, to a trial and if so, then to the right to cross-examine witnesses? Despite the incessant references to the uniqueness of the post 9/11 context, the hoary questions of habeas corpus and the legal rights of detainees – questions which fueled political upheaval in seventeenth-century England – are the ones that have generated incendiary disagreements in twenty-first-century human rights debates.

Human Rights Arguments for War

Prepare you, generals.
The enemy comes on in gallant show.
Their bloody sign of battle is hung out,
And something to be done immediately.

Julius Caesar, Act 5, Scene 1

Whereas human rights overtly inspired the humanitarian interventions of the 1990s, the two governments most dedicated to the 'war on terror' – America and Britain – have by and large deployed human rights as a subsidiary and *ex post facto* rationalization for military intervention in the post 9/11 era. Where