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International Human Rights and Criminal Justice in the First Decade of the 21st Century

by Richard J. Goldstone

IT IS A PRIVILEGE AND A GREAT PLEASURE to contribute to the 10th Anniversary issue of *Human Rights Brief*. I have read with interest every issue since its inception. It has displayed a uniformly high standard of articles and has kept me informed on topics relevant to my work and in areas of general interest. I congratulate the student editors at American University's Washington College of Law on the excellence of this publication.

POSITIVE DEVELOPMENTS IN THE SECOND HALF OF THE 20TH CENTURY

THE SECOND HALF OF THE 20TH CENTURY was remarkable for the development of international human rights law and the recognition of, and growing respect for, international criminal justice. It is frequently forgotten that prior to World War II, individuals had no standing at all in international law and, apart from insignificant exceptions, humanitarian law had never been enforced.

There were dramatic changes as a consequence of the Nuremberg Trials of major Nazi war criminals and the ratification of the Charter of the United Nations, the Universal Declaration of Human Rights, the four Geneva Conventions of 1949, and the international human rights conventions of the 1960s. Perhaps most importantly, these developments began to gradually penetrate the strict theories and applications of national sovereignty.

The United Nations Charter contains an irresolvable contradiction—the protection of human rights on the one hand, and the prohibition of interference in the internal affairs of sovereign nations on the other. With the passing of each decade of the post-World War II world, governments, international entities, and non-governmental organizations felt increasingly justified and free to criticize the manner in which some governments violated the human rights of their own citizens. The anti-Apartheid movement led the way in this development. In face of intransigence from South Africa's Apartheid government, the United Nations, regional organizations, and individual countries imposed multi-faceted sanctions upon South Africa. The United States, notwithstanding its uncompromising protection of its own sovereignty, began to issue annual human rights reports reflecting the human rights record of almost every member state of the United Nations.

Notwithstanding these exciting developments, there were two glaring shortcomings. The first relates to the direct lack of respect for norms of humanitarian law in the manner in which states conducted warfare. Civilians continued to be the intended targets of international and internal armed conflicts. The second shortcoming was the absence of any international criminal court and, as a consequence, the effective impunity enjoyed by war criminals.

It took ethnic cleansing in the former Yugoslavia to address these omissions. In the face of horrendous human rights violations in Bosnia and Herzegovina, the United Nations Security Council, to the surprise of international lawyers, established the ad hoc International Criminal Tribunal for the former Yugoslavia in May 1993. It did so on

the strength of its peacekeeping powers under Chapter VII of the United Nations Charter. After the Rwanda genocide that was perpetrated in the middle of 1994, the Security Council established the ad hoc International Criminal Tribunal for Rwanda.

After surviving difficult birth pangs, the advent of the two United Nations tribunals had a number of remarkable consequences. First, they demonstrated that international courts could work and provide fair trials. Second, they were responsible for substantial advances in humanitarian law, particularly in the areas of gender-related war crimes and in narrowing the artificial and unjustifiable distinction between the protections afforded to protected persons in international armed conflict and those in internal armed conflict. Third, they have been responsible for the increase of interest in humanitarian law. Prior to 1993, humanitarian law was taught only in some army colleges and was only rarely referred to in the popular media. Today, the subject is taught in thousands of law schools around the world and hardly a day goes by without reference to humanitarian law in the media of many countries.

Finally, the work of the United Nations criminal tribunals has led to the greater protection of innocent civilians in war. During and after World War II, civilian populations became the intended targets of warfare. One needs to refer only to the blitzes of London and Coventry, the fire bombing of Dresden, and the atomic bombs dropped on Hiroshima and Nagasaki. In the civil wars that proliferated during the second half of the last century, some 90 percent of those killed were civilians. It was not an issue and there was no attempt to disguise the criminal intent behind those policies.

These positive developments were primarily attributable to the leadership role played by the government of the United States. The United Nations tribunals would not have survived their first few years without the political and financial support from Washington, and, above all, the United States lawyers, investigators, and computer technicians who were sent to assist setting up the new Office of the Prosecutor for the respective tribunals.

It was the success of the two United Nations criminal tribunals and the support of the United States that were primarily responsible for the Secretary-General of the United Nations calling the diplomatic conference that met in Rome in June and July of 1998 to consider a statute for the International Criminal Court.

The Clinton administration, which did so much for the United Nations tribunals for the former Yugoslavia and Rwanda, underwent a change of heart and emerged in Rome as an opponent of the International Criminal Court. It became part of an unusual alliance with only six other nations opposing the Rome Treaty—China, Iraq, Israel, Libya, Qatar, and Yemen. However, there was a critical mass of 120 nations that voted in favor of the treaty, and the sixty necessary ratifications took less than four years to materialize. Notwithstanding the administration's opposition in Rome, President Clinton signed the Rome Treaty on December 31, 2001. As of this writing, 92 nations have ratified the treaty. The court's eighteen judges and its chief prosecutor have all been elected. Investigations into war crimes committed in the Democratic Republic of the Congo have been announced and will begin in the near future. The United States has also supported the United Nations' involvement in setting up hybrid criminal tribunals

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in Sierra Leone, East Timor, and Cambodia.

All of these developments have resulted in a changed and better world in which humanitarian law is no longer ignored. Some evil leaders in the former Yugoslavia pretended to adopt policies designed to protect civilians. Even that lip service to the norms of humanitarian law served to protect some lives. The leaders of the democracies took these legal precepts seriously. In the 78 days of bombing by NATO forces designed to protect the Albanian population of Kosovo from ethnic cleansing, the number of civilian casualties was remarkably small—less than 2000. This was the consequence of military lawyers being on hand to advise the NATO commanders on appropriate and justifiable military targets. During the United States war against the Taliban in Afghanistan, the policy there too was to avoid civilian casualties. Although the number of casualties has not been stated, that policy was a dramatic change from the pre-1993 practice. That policy was also utilized during the 2003 “coalition” war on Iraq.

THE CHANGE OF ATTITUDE IN WASHINGTON

The support of the United States for a permanent international criminal court all but evaporated in the face of the fears and objections that emerged during 1998 from the Pentagon. The American military leaders were not prepared to support an international court that would have the power to render judgments against American citizens and, in particular, its military or political leaders. It feared that such a tribunal might turn out to have an anti-American bias with negative consequences for what is perceived in Washington as the United States’ obligation to police much of the world.

The isolationist policies of the Bush Administration and its serious disregard for the civil liberties of people subject to its control have cast a shadow on the advances to which I have referred. The Clinton Administration’s policy of non-cooperation with the then nascent International Criminal Court has been replaced with an active policy to prevent the court from succeeding in its mission. The so-called article 98 agreements pedaled around the world by the Bush Administration can have no other design. To pressure countries like Micronesia to agree not to hand American citizens to the International Criminal Court is quite ludicrous and can have no other rational purpose other than undercutting the authority and jurisdiction of that court.

The opposition of the United States to the International Criminal Court may well retard its progress. I have already referred to the crucial support of the Clinton Administration during the early years of the United Nations criminal tribunals. This support went much further. Without the political and financial pressure that Washington exerted on the governments of Croatia and Serbia, the majority of the war criminals indicted by the Yugoslavia tribunal would not have faced trials in The Hague to answer the charges made against them. Certainly, without the threat of withdrawing financial aid, Slobodan Milosovic would not now be on trial. The extent to which the International Criminal Court will succeed in the absence of that support, and worse, in the face of active opposition from the United States, remains to be seen.

THE EFFECTS IN THE UNITED STATES OF 9/11

I turn now to consider the effect of attacks on the United States by *Al Qaeda* on September 11, 2001 (9/11). The first point to note is that this was not a new phenomenon. All that was new was that a serious and cold-blooded terrorist attack took place on the mainland of the United States. That there had been previous bloody terrorist

attacks on American targets in Africa and the Middle East was treated differently. The reaction of the Bush Administration was a consequence of anger and, above all, fear of more such attacks.

For more than two decades, terrorist organizations have used modern technology and even threatened the use of weapons of mass destruction. This phenomenon has made it necessary for policing authorities to be given additional powers to detect and prevent such criminal acts and to protect the civilian populations for whom they are responsible. Since the early 1970s, the United Nations General Assembly has adopted a series of international conventions designed to deter acts of terrorism.

Many democratic nations are engaged in a difficult debate on how best to balance this need for greater policing powers with the protection of the fundamental civil liberties of their citizens. When there is fear in democracies, governments tend to demand and are granted far more powers, even at the cost of substantial invasions of the privacy of their citizens or taking excessive actions to the prejudice of minority groups.

For many years, the United States has justly regarded itself as the leader of the free world and has regarded its constitution as the guarantor of the freedom of its own people from excessive interference by the government. Yet, in the aftermath of 9/11, the Bush Administration has assumed powers that traditionally have been in the domain of the legislature and the judiciary. In this regard, history is repeating itself.

After the Japanese invasion of Pearl Harbor in December 1941, 126,000 Japanese Americans were interned. Of those, 70,000 were American-born citizens. No single act of sabotage or espionage was ever uncovered. Nearly three years later, in December 1944, in *Korematsu v. United States*, the United States Supreme Court upheld the constitutionality of the mass evacuations. The issue was whether there had been military necessity to justify such extreme action. The majority of the Court held that “[w]e cannot—by availing ourselves of the calm perspective of hindsight—now say that these actions were not justified.” Today, few Americans support this decision. Indeed, in 1984 a federal district court overturned the decision in *Korematsu* on the ground that the government had “knowingly withheld information from the courts when they were considering the critical question of military necessity.” And, in 1988, President Ronald Reagan apologized to the Japanese community on behalf of the American people for what had befallen them, and Congress voted for them to be paid reparations.

In reaction to the events of 9/11, there has been a similar reaction on the part of some American judges to second-guess the executive branch or to interfere with the war powers of the president. It is reassuring that the Supreme Court has decided that it will decide the issue of whether federal courts have jurisdiction to determine the reach of the courts to protect the rights of those being detained as enemy combatants on Guantanamo Bay. As recently pointed out by one of the senior English judges, Lord Steyn:

The purpose of holding the prisoners at Guantanamo Bay was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors. The procedural rules do not prohibit the use of force to coerce prisoners to confess. On the contrary, the rules expressly provide that statements made by a prisoner under physical or mental duress are admissible “if the evidence would have value to a reasonable person,” i.e., military officers trying enemy soldiers (Presidential Military Order of 13 November 2001, s. 4(3)). At present we are

not meant to know what is happening at Guantanamo Bay. But history will not be neutered. What takes place there today in the name of the United States will assuredly, in due course, be judged at the bar of informed international opinion.

It is also disturbing that the manner in which persons detained on the battlefield are being held on Guantanamo Bay is also in violation of the Third Geneva Convention of 1949. This convention, to which the United States is a party, provides that such persons are deemed to be prisoners of war. If that status is questioned by the detaining power, the presumption continues to operate until a "competent tribunal" has determined their status. No such determination has been made in respect of anyone being held at Guantanamo Bay, and all have been denied the status of prisoner of war. I am concerned that this weakening of the Geneva Conventions might have a boomerang effect and that it might well be used to justify violations of its provisions in respect to the captured members of the U.S. armed forces abroad.

The United States Supreme Court has now also decided to consider the constitutionality of detaining United States citizens without trial and without access to lawyers. In the recent past, such conduct by other governments around the world has earned the strong criticism of the United States. Again, it is reassuring that federal courts of appeal have ruled against the extreme position taken by the White House. It is to be hoped that the Supreme Court will uphold those traditions and values for which the United States Constitution has become a beacon for those millions of people whose human rights are being violated in repressive societies.

THE EFFECTS OF 9/11 IN OTHER DEMOCRACIES

Repressive action by governments have been taken in other democracies in the wake of 9/11. Prior to September 11, 2001, the United Kingdom had enacted wide-ranging measures to counter terrorism. It did so predominantly in the face of the Irish Republican Army terrorist activities in and about London. After the 9/11 terrorist attacks, a new anti-terrorism statute was enacted. Its most controversial provision provides for the internment, without trial, of a "suspected international terrorist" if the Home Secretary reasonably believes that such person's presence in the United Kingdom is a risk to national security and suspects that such person is a terrorist. If the person is not a United Kingdom citizen, he or she can be detained for an unspecified period without charge or trial. There is no appeal to the ordinary courts but only to a government-appointed commission. It was this provision that led the United Kingdom government to derogate from the relevant human rights provisions of the European Convention on Human Rights.

Similarly, recent Indian legislation substantially invades the privacy of persons in material respects and allows for the detention of suspected terrorists without trial for periods of up to 90 days. A draft South African legislation contained a similar provision. But the Parliamentary Justice Committee removed it after protests based on the misuse of that kind of provision during the Apartheid era.

Racial profiling and the detention of illegal immigrants from Muslim countries have become frequently applied mechanisms to combat terrorism. It was the unanimous opinion of the Task Force on Terrorism established by the International Bar Association that racial profiling is not justified unless there is a factual basis that makes it

effective and proportionate to the perceived dangers.

PROSPECTS FOR THE FUTURE

THIS DISPROPORTIONATE INVASION OF CIVIL LIBERTIES, especially by the United States, is having a most unfortunate domino effect in other nations, democratic and undemocratic alike. It is being used to justify far worse repressive actions. President Mugabe of Zimbabwe and Charles Taylor, the former head of state of Sierra Leone, both relied on the United States' classification of "unlawful combatants" to commit unjustifiable actions against journalists critical of them. Leaders in Indonesia have threatened to establish their own "Guantanamo Bay."

The United Nations Security Council has also been tardy in making any effort to ensure that civil liberties are being respected in legislation that member states were peremptorily required by Resolution 1373 to enact. The attitude of the Counter Terrorism Committee of the Council is apparently that human rights are not the business of the Security Council.

A recent United States inquiry commission has recommended the establishment of a non-partisan committee to monitor the invasion of civil liberties by the executive branch of state governments. I would suggest that all democratic nations should take such action and report regularly to their legislatures. In particular, they should report on violations of their own constitutional guarantees and of the provisions of international conventions to which they are party. That kind of public oversight would unquestionably act as an effective brake on excessive and unjustified encroachments upon civil liberties.

The late High Commissioner for Human Rights, Sergio Vieira de Mello, who was tragically killed in Baghdad in August 2003, put the issue as follows:

[Such] measures must be taken in transparency, they must be of short duration, and must respect the fundamental, non-derogable rights embodied in our human rights norms. They must take place within the framework of the law. Without that, the terrorists will ultimately win and we will ultimately lose—as we would have allowed them to destroy the very foundation of our modern human civilization.

All who value the protection of human rights and the dignity of all people must remain vigilant in these difficult and worrisome times. They should help those in authority hold a balance between the necessity of protecting the lives of citizens on the one hand, and protecting their fundamental civil liberties on the other. They must ensure that governments and their officials do not rely on repressive measures for no reason other than to placate the fears of the populace and to ensure that opinion polls are favorable.

Whether these post-9/11 developments will permanently damage the advances referred to earlier or whether it will turn out to be only an unfortunate detour, it is too early to determine. Whatever their effect, I have no doubt that the movement towards an international rule of law will depend primarily upon the leadership of the United States. It is my fervent hope that America will soon resume its leadership of the free and democratic world and will do so by the exercise not of its great power but by the example of its equally great values. *HRB*