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Promoting Human Rights

James D. Ross

All wars—and the current war on terrorism is no exception—provide serious tests for the rule of law. The demands of armed conflict, with its instantaneous decisions of life and death, do not lend themselves easily to legal constraint. It is thus not surprising that the United States, which has been outspoken historically on matters of human rights, would become less attentive to those concerns after coming under deadly attack. For Human Rights Watch (HRW) and other human rights organizations, the primary concern since September 11 has been to demonstrate that upholding fundamental rights, whether on the battlefields of Afghanistan or in the detention facilities at Guantánamo Bay, is not only consistent with fighting international terrorism, but is, in essence, what the war is all about. The unwillingness of the Bush administration to embrace this idea bodes ill for the protection of rights as the war on terrorism reaches across the globe.

In many respects HRW's approach to September 11 and its aftermath merely draws on previous work. The civil war in Afghanistan and rights abuses by the Taliban had long been a focus. After September 11, however, new urgency was given to investigating violations of international humanitarian law (the laws of war) by the various armed forces in Afghanistan and the treatment of refugees in Pakistan and Iran. HRW's examination of the U.S.–led air campaign in Afghanistan built on previous studies done following the Gulf War and Kosovo. The post–September 11 climate has also given new prominence to human rights issues in the United States, such as hate crimes against Arabs and Muslims and the arbitrary detention of noncivilians under immigration laws.

Despite the continuity with past human rights monitoring, HRW has nevertheless had to do major rethinking, redeploying, and re-prioritizing of its work. As a result, HRW has come face to face with a number of issues—some new, others long dormant in the nooks and crannies of international law—that are likely to define the human rights debate for governments and nongovernmental organizations, both in the United States and internationally, for some time to come. One thing is certain: as the war on terrorism expands globally, the boundaries of rights protection will be tested and retested.

Terrorism is not easily defined; Walter Laqueur collected more than a hundred definitions of the term.[1] The international human rights movement has long condemned terrorism in the context of civil wars, where such acts are violations of humanitarian law, but it has not addressed terrorism more generally. Because they do not entail violations of international law, terrorist acts by criminal gangs or solitary individuals are considered to be a matter for local law enforcement.

Many human rights organizations, including HRW, condemned the September 11 attacks as violations of international law—as a crime against humanity, or as a grave breach of the Geneva Conventions (that is, as a war crime). The longer-term question for the human rights community is whether it should try to address a broader range of issues commonly thought of as terrorism. This would include terrorist acts conducted outside the context of armed conflict, such as the 1998 bombings of the U.S. embassies in Africa, and attacks that do not have an international legal dimension, such as the Oklahoma City bombing. Doing so would address criticism leveled by governments that human rights groups are only concerned about certain serious acts of terrorism and not others.

Such an approach would not be cost-free. Any rights organization attempting to enter the emotional politics of labeling particular groups or acts as "terrorist" would risk its neutrality. Unless routine condemnations of terrorist attacks were presented in a way that provided new information or insight, little would be gained other than getting the organization "on the record," one way or the other.

THE WAR IN AFGHANISTAN

Human Rights Watch is not a pacifist organization. As it did during other armed conflicts, HRW adopted a position of neutrality with respect to the U.S.–led military intervention in Afghanistan. The organization's primary contribution during armed conflicts has been not to determine whether a particular war is lawful or just (*jus ad bellum*), but to monitor whether the fighting is being conducted in conformity with the rules of war (*jus in bello*). An organization risks its credibility in analyzing the conduct of a war once it has taken sides in the conflict. HRW has advocated military intervention only in exceptional cases: if it is the last plausible way to stop genocide or comparable mass slaughter, if intervention is likely to do more good than harm, and if it is conducted in accordance with international humanitarian law.

[1] Walter Laqueur, "Reflections on Terrorism," *Foreign Affairs* 65, no. 1 (1986), pp. 86–100.

The issue of neutrality resurfaced after a number of nongovernmental organizations and others called for a "humanitarian pause" in the U.S. bombing campaign. A pause was said to be needed so that humanitarian agencies in Afghanistan would have the opportunity to reach the hundreds of thousands of Afghans cut off from relief assistance by the war. Human Rights Watch (as well as some major humanitarian agencies) chose not to support (or oppose) the humanitarian pause, taking the view that calling for an end to the fighting was philosophically no different from taking a position as to whether a state should go to war in the first place.

Should the war on terrorism spread across the globe, groups like HRW will be under increasing pressure to abandon their policy of neutrality. That is, it is not difficult to present a plausible legal justification for the U.S. intervention in Afghanistan on the basis of self-defense under the UN Charter. But such might not be the case with respect to future battlefields, particularly if scant evidence is presented linking the attacked state to international terrorism. Should a government's justifications for going to war be clearly inconsistent with the UN Charter, human rights organizations will need to articulate stronger arguments for neutrality—or their technical arguments on the laws of war will run the risk of irrelevancy.

HRW and other human rights groups sent investigative teams to examine the major aspects of the armed conflict in Afghanistan, including violations of the laws of war by the Taliban and opposition Afghan forces, the treatment of refugees and displaced persons, the U.S.–led bombing campaign, and violations of human rights by warlords and their armies in the aftermath of the fighting. While fact-finding in the sprawling war-ravaged country was difficult, the legal issues were largely straightforward.

Several issues nonetheless arose that will need to be better addressed in the future, mostly concerning the international legal obligations of armed forces under what has been termed "a new kind of war."[2] For instance, there is a need for greater clarity as to the legal responsibilities of an armed force when its proxy commits atrocities—exemplified by the relationship between the U.S. coalition forces and the warlord armies of the Northern Alliance that grossly mistreated captured soldiers. The same holds true for the extent to which new military technologies, such as highly accurate bombs and improved intelligence-gathering capabilities, place greater responsibilities on commanders to reduce dangers to civilians and civilian objects. As evidenced by the recent fighting in Mindanao in the Philippines, these are issues likely to resurface as the war on terrorism expands around the globe.

[2] See the articles in the Roundtable, "The New War: What Rules Apply?" *Ethics & International Affairs* 16, no. 1 (2002), pp. 1–26.

A number of governments have used the war on terrorism to justify internal crackdowns on minority populations or groups deemed to be a threat to national security. In India, a discredited law that allows for long-term detention without trial has been resurrected—it was invoked in July to detain more than a thousand ethnic Tamils in Tamil Nadu state. Russia has taken advantage of lessened international scrutiny to ratchet up its military campaign in Chechnya. In China, a government crackdown against ethnic Uighurs in the predominantly Muslim region of Xinjiang has resulted in numerous human rights violations.

More difficult to monitor has been the treatment, primarily in closed countries, of those apprehended for alleged involvement in terrorism and deported home. Captured Uzbeks in Afghanistan, for instance, were reportedly returned to Uzbekistan, where torture of suspected Islamic fundamentalists is pervasive. International law prohibits a country from returning individuals to any state where there are substantial grounds for believing they will be tortured. The Convention against Torture specifically prohibits complicity by officials in such practices, but what constitutes complicity in these circumstances is not always clear. For example, early this year the United States reportedly provided an airplane to send a group of Egyptians from Indonesia back to an uncertain fate in Egypt.[3] As the war on terrorism expands, either through armed conflict or criminal law enforcement, greater scrutiny of state action will be required to ensure that deportation and torture do not replace criminal prosecution.

GUANTÁNAMO AND MILITARY COMMISSIONS

The capture of Taliban and al-Qaeda members in Afghanistan and their transfer to the U.S. military base at Guantánamo Bay resulted in a deluge of media coverage, mostly about the conditions of their detention. Human Rights Watch focused its attention on the legal status of the detainees—whether they were properly determined to be "prisoners of war" (POWs), "protected persons," or something else—an issue of considerable consequence both for those held now and for future detainees in the war on terrorism.

For countries such as the United States, whose armed forces take the Geneva Conventions very seriously, the status of captured combatants has not historically been a point of contention. In past conflicts, such as in Korea where Chinese

[3] See, e.g., Leslie Lopez, "U.S. Detains Suspect in Singapore Plot," *Wall Street Journal*, July 12, 2002, p. A6.

troops were technically unprotected by the Geneva Conventions, POW status was applied forthrightly. During the Gulf War, more than a thousand tribunals, as mandated by the Geneva Conventions, were convened to determine cases of unclear POW status. For reasons more political than legal, however, the Bush administration has denied POW status to Taliban prisoners and the applicability of the Geneva Conventions to captured al-Qaeda members. As a result, questions directly answered by the Geneva Conventions, such as the applicable court for prosecution of war criminals or the role for defense counsel, have been unnecessarily (and improperly) pushed into murkier territory.

HRW has repeatedly pressed the Bush administration to abide by its international law commitments both as a matter of legal obligation and as a pragmatic course of action. Applying the Geneva Conventions in full would neither undercut the legitimate aim of the United States to detain those persons posing a continuing threat to the nation nor prevent prisoners from being properly interrogated. The pick-and-choose approach adopted by the Bush administration—applying only those Geneva provisions it currently approves of—ultimately places captured American service members and civilians at risk in this or a future war when they find themselves denied the protections due.

The administration's efforts to evade existing law, rather than apply it, have been evident in the proposed creation of military commissions to try suspected foreign terrorists. The original military order announced by President Bush on November 13, 2001, was based on a World War II order and provided few legal safeguards; under the order a military tribunal could have tried, convicted, and executed persons all in complete secrecy. The resulting public uproar, by dissenters within the armed forces as well as civil libertarians, compelled the Department of Defense to revise substantially the powers of such tribunals in its implementing regulations of March 2002. The proposed commissions are still fatally flawed—they discriminate against noncitizens and permit no genuine right of appeal—and one can expect extended controversy should the administration decide to convene them.

Increasingly, however, it is becoming clear that the Bush administration has little desire to bring to trial those apprehended in connection with the war on terrorism if it can avoid doing so. Zacarias Moussaoui, the alleged "twentieth hijacker" who was arrested before September 11, and so-called shoe bomber Richard Reid are being prosecuted, appropriately, before federal courts. But in other cases the administration is creating problems for itself—and for the rights of Americans to be free from arbitrary arrest and detention. Detaining without trial captured combatants until the conclusion of active hostilities is perfectly consistent with the rules of war. But the administration has denied that the rules of war even apply to the al-Qaeda detainees.

Going a step further, the administration has labeled as an "enemy combatant" and placed in military custody an American citizen, Jose Padilla, who was apprehended not on the battlefields of Afghanistan but at O'Hare airport in Chicago. To date, Padilla has had no access to legal counsel. In this and other cases the administration has indicated it will hold detainees indefinitely without trial, creating a legal limbo where neither the Geneva Conventions nor U.S. constitutional law applies. It is an issue, part of the broader context of human rights protection and the war on terrorism, that will remain high on the agenda of HRW and other human rights organizations.

THE CHALLENGE FOR THE HUMAN RIGHTS COMMUNITY

As the war on terrorism reaches new parts of the globe, it increasingly resembles traditional law enforcement instead of armed conflict. As a matter of international law this is crucial, since the laws of war that regulate armed conflict do not, and cannot, inform law enforcement. That is, the law that permits al-Qaeda members captured on the battlefields of Afghanistan to be held without criminal charge or a lawyer does not apply to suspects arrested in Sarajevo, Chicago, and unknown locations elsewhere. That this is occurring suggests that the war on terrorism is taking on a rhetorical quality, a generalized call to action rather than an endeavor with a clearly defined aim.

The war against al-Qaeda is real. In a real war, even against an enemy without international standing, a democratic state must justify its actions and act in accordance with the rules of war. Despite the obvious horrors of September 11 and the need for an immediate response, the U.S. government nonetheless carefully articulated reasons for going to war and garnered international support. But a rhetorical war has few limits. Should the war on terrorism become the "war on terrorism," it will be as vague and open-ended as the "war on drugs." Actions adopted in a rhetorical campaign seldom require reasons or rules—the rhetoric provides its own justification. Such a war can have no ending. "Enemy combatants" detained until the end of the conflict will effectively receive a life sentence. And deeply rooted constitutional protections such as the rights to counsel and to a fair trial will remain under threat by a single branch of the U.S. government without serious explanation or public debate. An important role for the human rights community in the coming years will be to ensure that state actions remain grounded in reality, not rhetoric, and thus subject to challenge.