

## **Human Rights and Terrorism - The Signature of the First Decade of the 21<sup>st</sup> Century -**

In the days after September 11<sup>th</sup>, 2001, the attack on the World Trade Centre and the Pentagon was often compared to the Japanese bombing of Pearl Harbour on December 7, 1941. These events are comparable only in the shock and horror that it evoked in its victims. The differences in the events and the military actions that followed each event, illustrates the changes in warfare, the international system, and the challenges it creates for our human rights regimes.

The events of July and August 2006 in the Middle East, specifically the missiles launched by Hezbollah terrorists against Israel and the bombing of Lebanon by the Israeli Defense Force have also evoked condemnation by the victims and others around the world.

On July 19, 2006, Louise Arbour, the United Nations High Commissioner for Human Rights expressed grave concern over the killing and maiming of civilians in Lebanon, Israel, and the occupied Palestinian territory and called for accountability for any breaches of international law:

International humanitarian law is clear on the supreme obligation to protect civilians during hostilities ...This obligation is also expressed in international criminal law, which defines war crimes and crimes against humanity. International law demands accountability. The scale of the killings in the region, and their predictability, could engage the personal criminal responsibility of those involved, particularly those in a position of command and control.<sup>1</sup>

One might question whether the appeal for respect for the international rule of law will be accepted by non-state belligerents such as Hezbollah. One asks whether the international human rights law paradigm is applicable in the age of terrorism.

Former NATO Supreme Commander Gen. Wesley Clarke recently released a book entitled *Waging Modern War*. A better title would have been *Waging Post-Modern War*. Whether it was naval power, land power, or air power, power as projected by sovereign, legitimate, national military – with its ranks, banners, and insignia as defined by the Treaty of Westphalia – is by definition “modern”. Projecting power in other ways is by definition “post-modern”. World War II was a modern war. From the American perspective, Japan declared war on the US and conducted a sneak attack on a naval base. National military lined up against national military as they have done since Westphalia and one side, our side, won. Every war before and after, until this one, followed the same pattern. While some of the wars since WWII – the Korean and Persian Gulf Wars in particular – may have been under the auspices of the United Nations, the central principle of the UN Charter is that member states are equal sovereign entities that have joined voluntarily. The UN *requests* a state join a coalition. The state *chooses* to join a UN coalition. It is still the state’s decision to participate in a military operation under

---

<sup>1</sup> Press Release, UNHCHR.CH, 19 July 2006

the auspices of the UN. In fact, part of the problem in organizing peacekeeping missions is that states with the resources that are needed so often assert their sovereignty and refuse to participate.

The Westphalian international system was a realist system. It organized the world into groups called states with clearly defined and mutually recognized territorial boundaries and were the only recognized authority within those boundaries. The legitimacy of states and governments was determined by the recognition of that legitimacy by other states. In the modern era, being in control of a territory and its military was a sufficient determinant. The drawback of the Westphalian system is that there is no central governing authority to regulate the behaviour of states. Only states could encourage behaviour in other states through offers of reward for good behaviour and punishment for bad behaviour. Even the establishment of the United Nations did not change this. While it does have mechanisms to regulate behaviour, it is inherently voluntary. The UN only has as much power as its member states allow it to have. If a country, such as Iraq, decides that it does not want to comply with an agreement it supposedly entered in good faith, it is the member states of the UN, as expressed through its Security Council, that decide the course of action as opposed to the employees that handle day-to-day operations.

Where the United Nations provides a transition from modern to post-modern is on the issue of legitimate governing authority. While it is still up to individual member states to recognize who legitimately represents a given state, membership in the United Nations has become a standard norm for legitimacy. While some such as Switzerland choose not to exercise their right to apply for membership, the UN provides a forum where a government can be refused to be recognised by the world community. It ultimately can do nothing to remove a power from a government unless there is a consensus among members, but the UN can rule that a government is not the legitimate representative of a state. This is the beginning of post-modernism in the international system – unrecognized governments who rule their state illegitimacy notwithstanding.

This is how we find ourselves in the extraordinary situation today. We did not declare war on Afghanistan. The United States exercised its right of self-defence under Article 51 of the United Nations Charter, and went to work finding who attacked them. In this case, it was a terrorist organization that had also attacked them at least three times earlier – Al Qaeda. In getting at Al Qaeda and their leadership, the Taliban, the unrecognized military dictatorship of Afghanistan who allowed Al Qaeda to train and organize within their borders, got in the way. In a common law criminal justice system, accomplices are guilty of the crime that those they aided committed. By giving Al Qaeda sanctuary, the Taliban became accomplices to September 11<sup>th</sup>. The gross violations of human rights in Afghanistan under the Taliban regime since it took over in 1995 were merely incidental. Other than providing sanctuary to Al Qaeda, there was no specific grievance between the United States and Afghanistan. At least, there was no grievance that was apparently worth going to war over before September 11<sup>th</sup>.

Other issues associated with this war, if it can be called that, is the issue of the standard of treatment of those captured during it. Regardless of which standard is chosen, there is an international standard. However, in this case, for the same group of prisoners, there can be two standards. Since Al Qaeda is a terrorist organization and not a national army, legitimate or otherwise, their operatives simply do not fit the definition under the Geneva Convention of

prisoners of war. If this is in fact a “war” and they are “prisoners”, they are by the Geneva Convention still not POWs. Even mercenaries, such as those hired by drug cartels or warlords, would not fit this definition. Since the Taliban was not recognized as the legitimate authority and their “military” consists of guerillas rather than uniformed soldiers in a structured hierarchy, the case could be made that they are not a legitimate military and the Convention does not apply. Only when the captors doubt the status of their captives are they obligated to abide by the Geneva Convention until such time as a tribunal decides otherwise.

The test for our human rights regimes is that simply they are realist regimes. They apply to “state parties” or “member states”. They do not recognize the existence of non-state actors and, therefore, do not constrain the behaviour of non-state actors. Transnational corporations can move their polluting industries to developing countries to get around environmental laws. Terrorist organizations can call what they are doing war and murder civilians at random. Human rights regimes are restrictions on our actions, not theirs. Some talk has been made of the release of photographs from Camp X-Ray, where the Americans are holding Al Qaeda and Taliban prisoners being a violation of their rights under the Convention to be free from public curiosity. The same restriction did not stop the guerillas under the command of Somali warlord Mohammed Farrah Aideed from releasing to the news media video of a beaten US Army pilot and of his dead body being dragged through the streets of Mogadishu. Nor did it stop Bosnian Serb guerillas from videotaping a captured Canadian soldier handcuffed to the gate of a munitions dump, being used as a human shield. These are two of several dozen examples when soldiers from our or our allies’ armed forces have been put on public display.

Recent developments on the detainee issue have served only to highlight the problems of modern regimes in a post-modern conflict. While the Bush administration, shortly after the United State’s Supreme Court’s decision in *Hamdan v. Rumsfeld* (2006), reversed its previous policy on the status of combatants captured in Afghanistan and granted them POW status, this change in policy should be viewed as a diplomatic manoeuvre more than anything else as there is no requirement under *Hamdan* to do so. *Hamdan v. Rumsfeld* dealt with the legality of the military commissions established by Executive Order and if the crime of conspiracy (in Hamdan’s case being a member of Al Qaeda) was a crime of war that could be tried in the courts. With the former issue, the court relied on Article 3 of the US constitution, the Uniform Code of Military Justice, and the portions of the Geneva Conventions dealing with the standards of military tribunals. The court found that the military commissions were not authorized by Congress and therefore had no power to proceed. It also found that the charge of conspiracy could not be enforced as it was not indicated as a criminal act under the Geneva Conventions or the UCMJ. It did however find that trying terrorists by court martial before military tribunals duly authorized by the UCMJ was constitutional. While the question of the applicability of the Conventions in a conflict between a state and non-state actor was before the court (the court stated the laws of armed conflict “not of an international character” applied, even though those laws were intended to apply to wars within states – civil wars), the question of POW status for those non-state actors was not.

While one may find the recent change in policy agreeable, recent events in no way aid in finding an answer as to how state-centric regimes will constrain the activities of non-state actors. Again invoking the example of the current Israeli-Hezbollah conflict, how does a country like

Lebanon manage its own security when it has ceded its sovereignty over its border to a terrorist group dedicated to its neighbour's destruction? How do diplomatic efforts at the United Nations to negotiate an end to the conflict succeed without one of the combatants, Hezbollah, at the table? Since the group is sponsored by Syria and Iran, should they be part of the negotiations directly instead of acting through the Arab League? These questions are only asked because one of the combatants is a non-state actor operating in a state somewhat independently of the recognized government. If the Lebanese army was firing rockets into Israel, instead of the proxy Hezbollah, these issues would be moot.

Among other things, September 11<sup>th</sup> showed that states are no longer the sole actor in the international system. International politics is also driven by non-state actors be they NGOs, terrorist organizations, transnational corporations, or organized crime. The problem is that our human rights regimes are realist regimes. They exclusively apply to states and they are inherently voluntary. As state and non-state actors increasingly come into political, economic, or military conflict with each other. If securing the rights of their citizens means trampling the rights of non-citizens in other countries, will states ignore international human rights regimes? Yes, non-citizens do not elect governments. States will see these as handcuffs for the good guys and begin to opt out of human rights regimes unless we can reform our regimes to encompass the reality of here and now of non-state actors.