

Human Rights in the 'War on Terror'

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As Jon Stewart, star of the US satirical comedy programme, *The Daily Show*, observed of the persistent use of 'the war on terror' by US politicians, 'it's a catchy phrase, it has a good beat and you can detain people to it.' While, no doubt, the contributors to this collection of essays would sympathise with the intent of Stewart's remark, they offer a rather more sober reflection upon the implications for human rights of the US-led 'war on terror' since 2001. Above all, they seek to develop a counter-terror strategy in which human rights and security considerations can be reconciled. An impressive cast of human rights academics, international lawyers and activists have been assembled to take on this challenge, including Richard Goldstone, Geoffrey Robertson, Kenneth Roth and Mary Robinson. Their job is not easy in the current climate. As I write, an alleged conspiracy to blow up a number of civilian airliners mid-Atlantic has been stopped by security officials in the UK. Is it possible to reconnect human rights and national security when we believe that terrible plots on this scale are being devised?

This volume makes a convincing case that it is not only possible but necessary to reconnect rights and security. Human rights are an indispensable constituent of democratic politics required in an emergency situation. As Richard Ashby Wilson observes in his thoughtful introduction, 'for democracies to counteract terrorists without losing their democratic souls, they have to continually review the threshold between unfettered individual licence on one hand, and unnecessary governmental coercion on the other' (p. 3).

Wilson rightly accuses the administration of George W. Bush of severing rights from security concerns, although, with equal correctness, he points out that existing multilateral institutions are not constructed to deal with contemporary global terrorism and its 'apocalyptic vision that is singularly unyielding' (p. 7). For example, the 1998 Rome Statute of the International Criminal Court does not hold international terrorism to be a category of crimes over which it has jurisdiction, while the United Nations is similarly unequipped. Wilson calls for a re-conceptualising of these international agencies to meet the threat, while preserving a multilateral approach to global problems.

Several essays remind the reader that current debates about rights in a time of emergency go back to the origins of Western democracy, starting with the tumultuous years of civil war, interregnum and restoration in Britain during the seventeenth century. Geoffrey Robertson explains that with restoration of the monarchy in 1660, the new government had to confront the problem of large numbers of republicans in prison who could not be put on trial because of public sympathy for the prisoners – nor could they be detained indefinitely because of *habeas corpus*. As Robertson explains:

So some smart but devious lawyer said, ‘Why not put them on an offshore island, where habeas corpus won’t reach?’ and so they were imprisoned in Castle Orgueil in Jersey and on other island prisons. Thus Charles II provided George Bush II with the precedent for Guantanamo Bay, but as Justice Stevens explains in *Rasul* it was such a deplorable precedent at the time that Parliament passed the Habeas Corpus Act of 1679 to endow the great writ with extraterritorial effect, and it applies today to provide the Guantanamo detainees with due process. (p. 171)

It was, however, in the 1990s that human rights achieved a more prominent role in the discourse on international security. Despite the genocides in Rwanda and the former Yugoslavia, the human rights agenda saw great advances, such as the creation of the mandate for the International Criminal Court, and the partial adoption of a rights-based approach by agencies such as the World Bank and the International Monetary Fund. As John Wallach explains, whereas human rights previously functioned as ‘a powerless, moral conscience haunting international politics, it has now become a tool of the powerful’ (p. 108). The language of human rights entered the public pronouncements of politicians and has been deployed in part as a justification for the military interventions in Afghanistan and Iraq.

Iraq is, of course, a common thread running through most of the articles in this collection, and there are two essays devoted to the debate on the human rights case for the war in Iraq. Thomas Cushman presents a spirited defence of the war, arguing that while it was ‘probably illegal from the point of view of most bodies of statutory international law ... [it] was morally defensible in its overall consequence’ (p. 78). He points out the terrible paradox that intervention in Iraq ‘opened up the possibility for the citizens of Iraq to claim, as autonomous agents, those human rights guaranteed to them by the United Nations Universal Declaration of Human

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Rights, but denied to them by the very mechanisms of international law that are supposed to be the formal guarantors of such rights' (p. 78). Cushman argues that the majority of people in Iraq supported the war as a means of liberation and raises the question whether Iraq is better off now than it was under Saddam Hussein. Those of us who supported the removal of the regime of Saddam Hussein can still (just about) answer 'yes' to the question, but such an assertion comes with what Cushman acknowledges the horrific criminal and sectarian violence crippling Baghdad, and other areas of Iraq.

Kenneth Roth, the executive director of Human Rights Watch, disagrees. According to Roth, the war in Iraq failed to meet the test for a humanitarian intervention because the killing in Iraq at the time of the invasion was not of the exceptional nature that would justify such intervention, and because military action was not the last reasonable option to stop Iraqi atrocities. Roth is probably correct in his analysis. Undoubtedly the failures in the post-invasion administration of Iraq by the occupying powers were disastrous for the people of Iraq in many different ways, undermining much of the legitimacy of the intervention. But without the US-led action, Saddam Hussein would still be in power, not in a court room in Baghdad, standing trial on charges of genocide and crimes against humanity. This assertion of justice on behalf of the millions whose lives were lost or ruined by internal repression and external aggression should not be discounted.

Michael Ignatieff, who shared Cushman's support for the intervention in Iraq on consequentialist grounds, comes under forceful attack from John Wallach in his contribution and in Wilson's introduction. Both appear to agree with Jonathan Raban's observation that Ignatieff is open 'to the charge that he's not so much a disinterested critic of the terror warriors as their in-house philosopher.' (The Truth About Terrorism, by Jonathan Raban, *The New York Review of Books* 13 January 2005.) Wallach in a withering judgement claims that Ignatieff's articulation of human rights as an 'ethics of power' is something 'that will be practiced at the expense of much democracy and many human rights' (p. 122). Readers might also consult Eve Garrard's careful critique of Ignatieff's ideas in *Democratiya* 2 (November-December 2005).

Fernando Tesón puts forward a more convincing argument than Ignatieff for human rights defenders which, as Wilson acknowledges in his introduction, breaks new ground. Tesón contends that 'restrictions on liberty are justified, if they are, only by the need to preserve liberty itself and not by other values such as order or

security' (p. 58). The legitimacy of the state can only be upheld by the principles of freedom and rights and so the state is compelled to defend these values.

Aryeh Neier points out that in certain respects, the record of the Bush administration on human rights has been very good. The State Department has been vigorous in highlighting abuses in some countries that are allies of the US, such as Uzbekistan and Egypt. However, the obscenity of the ongoing detention of the Guantanamo detainees has placed people beyond the rule of law and stands as a symbol of US injustice which is helping to fuel unprecedented levels of anti-Americanism around the world. That the US uses the language of democratic values and human rights to justify various aspects of the 'war on terror' is doubly damaging, as it tarnishes the communication of human rights, especially in the Arab world. As Neier explains, 'when the United States speaks in the name of democracy and human rights in justifying its policy in the Middle East, Arab intellectuals who are themselves committed to democracy and human rights run away as fast as they can' (p. 139).

Carol Greenhouse analyses the effects of the 'war on terror' on the domestic policies of the US, Spain and Italy, reaching the conclusion that 'the tensions between liberty and security emerge not because they are inherently at odds, but because those terms encode an ongoing competition between central government and ground-level opposition' (p. 204) Neil Hicks confirms these findings by noting that new national security laws have allowed governments, for example in Russia, to re-define separatist or nationalist conflicts as an aspect of the global 'war on terror.'

So, what lessons can we take forward from our experiences since 11 September 2001? Terrible, grievous mistakes have been made, primarily by the US, in fighting Islamic extremists. There are faint indications that the US administration is cognisant of some of these errors – for example, the admission in July of this year by the Pentagon that detainees held by the US in Guantanamo Bay and elsewhere around the world would be protected under article three of the Geneva Convention. The US's volte face is seen as a direct result of the Supreme Court decision which ruled that military tribunals were illegal. This gives tremendous weight to Wilson's assertion that 'human rights matter not because they are absolute but because they represent the kind of democratic political values most needed at a time of war' (p. 28).

Wilson goes on to conclude that a new counter terror strategy should work within the framework of international law, with appropriate reform of the relevant

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institutions. Necessary conditions would be placed on decisions to go to war. There must be more reviews of executive prerogative and governmental counter-terror measures. The 'war model' should be replaced with an enhanced law-enforcement strategy. Finally, we should reject the doctrine of 'exceptionalism' that has dominated the debate about terrorism in the US. Some aspects of al Qaeda are new and incomparable, but much of its ideology, organisation and methodology have been seen before. Wilson states that in applying the hard-won experience of other countries that have fought terrorists for decades (for example, the British in Northern Ireland) we would benefit from 'unambiguous lessons on how not to deal with Islamic terrorists' (p. 32). Careful and measured responses, based not on a military strategy but a law enforcement model that addressed political grievances eventually helped the British Government in its struggle against terrorists.

Human Rights in the 'War on Terror' is an exceptionally useful and inspirational consideration of how countries under attack from terrorists might meet these assaults without betraying the fundamental values that make our liberal democracies worth fighting for in the first place.

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