

The War and Human Rights



The war in Afghanistan has already yielded two very positive results for human rights: the overthrow of the Taliban regime in that country, and the almost certain disruption and disabling of al-Qaida as a functioning terrorist organization. It is proper to acknowledge the beneficial impact of these results, although I had serious doubts, at the time, about the wisdom of going to war over the events of September 11, 2001.

From the perspective of the promotion and defense of universal human rights, the short-term gains resulting from the demise of the Taliban and al-Qaida may come at the expense of serious setbacks in the future. Of course, this is not necessarily the way things will turn out, but it is important to start looking at the long-term ill effects of the present war effort in order to reverse them or, at least, to minimize their impact.

First and foremost, the United States must hold its military operations to the same standards that it uses when criticizing violations of the laws of war by others. There have been several worrisome complaints about deaths among the civilian population, and the Pentagon seems to be dismissing these complaints without a serious public investigation. It may well be that each one of the incidents reported by credible human-rights monitors is "collateral damage," in the sense of unwanted and unpreventable civilian casualties in otherwise legitimate military actions. But labeling them so in response to the first question asked about such civilian

casualties prejudices any serious inquiry and smacks of cover-up. To many outside the United States, “collateral damage” is no longer a term of art in international humanitarian law, but a cynical exercise in understatement in the face of human tragedies.

There is also the need to be clear on the treatment of prisoners. Al-Qaida fighters may not qualify for prisoner-of-war status under the laws of war, but the Pentagon has made the encouraging announcement that these prisoners will, nevertheless, be treated as much as possible as if they did. But under the laws of war, the United States, as the detaining power, is obligated to make individual determinations, by an impartial panel, about who qualifies as a POW and who doesn’t. It is not up to the discretion of the commander-in-chief, because this is an issue governed by laws that bind the U.S. Those are not the only prisoners for whom the United States is responsible. U.S. allies in different parts of Afghanistan hold thousands of former Taliban fighters, reportedly in appalling conditions. In late November, there was at least one serious riot, with hundreds of prisoners dead at its conclusion. Given the close strategic and tactical relationships between American and other anti-Taliban forces, the Bush administration cannot escape responsibility for the plight of those prisoners simply by shifting blame to the Northern Alliance or to the newly installed Afghan government.

On the home front, there are also troubling developments that need to be corrected right away. If any other government in the world held hundreds of prisoners without revealing their names, as the Department of Justice is doing, the U.S. State Department would, as it has done repeatedly in the last few years, justifiably criticize the practice. The U.S. Attorney General sought authority from Congress to detain aliens indefinitely without charges. Faced with some opposition, John Ashcroft settled for a seven-day detention. But by charging aliens with an immigration-law

offense and then suspending deportation, the attorney general can bypass that limit and effectively engage in the prolonged and arbitrary arrest of noncitizens without charges. Such detention of any person under a state’s jurisdiction, whether citizen or alien, is a serious violation of international human-rights norms binding on the United States.

The most objectionable measure adopted since September 11 is the executive order by which President Bush has authorized himself to create military commissions to try any aliens who he has “reason to believe” are members of al-Qaida. These military commissions do not even meet the due-process requirements of regular U.S. courts martial and, for that reason, they should not be used, even for “illegitimate fighters” who do not qualify for what the laws of war call the “combatant’s privilege.” Commissions whose members serve at the pleasure of the president, who can admit evidence illegally obtained, whose decisions are not reviewable by any court and who can impose the death penalty by a majority of their members present hardly qualify as independent and impartial tribunals.

This initiative breaks with proud American traditions of due process and, significantly, is wholly unnecessary. In court proceedings including the trial of Timothy McVeigh, the trial of the 1993 World Trade Center bombers and matters relevant to the attack on U.S. embassies and the USS *Cole*, U.S. courts have amply demonstrated their ability to deal with difficult crimes of terrorism without danger to their effectiveness or their fairness, and with adequate protection of security interests. In response to widespread criticism, the Department of Justice has announced,

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via regulation, that the most offensive aspects of the president’s executive order will be amended. Nevertheless, it is difficult to imagine a set of regulations that can correct the fundamental lack of independence and impartiality inherent in the military commissions. The public — and, especially, concerned jurists — should be allowed to participate openly in the debate about those regulations.

September 11 undoubtedly presented us with an emergency situation. Many of the measures adopted by the current administration in response to that emergency are unobjectionable. In several important ways, however, the actions criticized above go well beyond the “exigencies of the situation.”

Recently, while on a human-rights fact-finding visit to Colombia, a journalist asked me if the September 11 attack had not changed everything about human rights. I answered that human-rights norms should be observed even — and especially — when it is difficult to do so, such as when a country faces a terrorist threat. Neither Colombia nor the United States has any claim to exceptionality in this regard. If, in the future, the United States wishes to continue to be a leader of the international community’s efforts to uphold democracy, human rights and the rule of law around the world, what we do against terrorism today, in response to our own tragedy, cannot be divorced from that goal.

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