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HUMAN RIGHTS CONSERVATION **AND THE WAR ON TERROR**

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Abstract

Acts of war or terrorism challenge the human rights framework almost to the point where it seems to collapse. It is hard to see any place for human rights when human life is deliberately targeted, or where it is seen as collateral damage in the course of mass bombing campaigns, which either directly or indirectly lead to sickness, disease, suffering, destruction of homes, and death. In times of war, particularly wars which last for years on end, every human right appears to be affected adversely. Health systems break down, education suffers, and home, work, supplies of food and water, and the legal system, freedom of the press and free speech, and accountability for abuses by the state or by the enemy state all see restrictions, if they do not disappear completely. However, poor protections were in peacetime, the rights of children, women, minority groups and refugees will almost certainly be poorer still in times of war.

War and terrorism are indeed a breakdown of humanity, acts which seem to undermine and sideline the values at the heart of human rights and the legal system which protects them. However, even in the midst of such a breakdown, human rights continue to operate, albeit in a weakened state, and although they cannot fix all evils, they can provide some minimal protection and some hope for justice.

Keywords: Human Right, War, Conflict, Terrorism, Justice, State

Introduction

The protection offered by the human rights conventions does not cease in case of armed conflict¹.

- International Court of Justice

Wars and national emergencies allow for states to derogate from – or temporarily put aside – some of their human rights commitments. However, certain human rights, such as the right to life or the right to be free from torture, inhuman and degrading treatment can never be put aside. These are regarded as so important and so fundamental that they should be observed even when a state's security is at risk.”

A judgment of the European Court of Human Rights in 2011² (Al-Skeini and Others v. the UK) found that the United Kingdom had been in violation of Article 2 of the European Convention on Human Rights, providing for the right to life, in its treatment of a number of civilians while carrying out security operations in Basra, Iraq. The case was the first of its kind in finding that the European Convention applied in times of war, in foreign territories, and over the whole region for which a signatory to the Convention had effective control. Other cases have found that the treatment given to prisoners in detention camps amounted to torture.

Before discussing whether it is necessary to sacrifice the human rights of a few select individuals to eradicate terrorism, basic theories of human rights have to be evaluated against the backdrop of the Declaration of Human Rights 1789 and The Universal Declaration of Human Rights 1948. It is also required to trace its origins and study the works of John Locke, Rousseau, Voltaire and other philosophers who postulated that it is the inherent right of a man to be granted his free will. Whether the declarations were practicable or not is also a matter of study and speculation, more so about counter terrorism practices. It needs to be ascertained whether terrorism can be treated with justice alone or are more stringent and

¹Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of the International Court of Justice of 9 July 2004, para. 106.

²Al-Skeini and Others v. the United Kingdom, European Court of Human Rights Grand Chamber (Application no. 55721/07), 7 July 2011; <http://www.bailii.org/eu/cases/ECHR/2011/1093.html>

As opposed to the basic rights of a man, we have certain state approved rights such as the right to a lawyer or a free trial. We need to differentiate between these two. Every individual that is born has the right to a secured life where he can exercise his free will in such a way as to not hurt other's right to do the same. As is mentioned in The Declaration of Human Rights 1789 articles 5 and 6, the law is an expression of the general will and that the law can prohibit actions that are hurtful to the society, and every member of the state is granted active participation in the legal framework either through representation or personally (Freeman, 2002)⁴.

These are human rights, which have been evolved by the consensus built on arguments within the society for a better framework for governance. However, the inherent right of man is to a dignified, secured, liberal life. Locke mentions that every individual that is born is born with a mind that is a blank slate. Rousseau believed in the basic goodness of man. Coming back to article 1 of The Universal Declaration of Human Rights 1948, it states that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. (UN.org; 2008-2009).

When war considered as Terrorism?

In many ways war and terrorism are very similar. Both involves an act of extreme violence, both are motivated by political, ideological or strategic ends, and both are inflicted by one group of individuals against another. The consequences of each are terrible for members of the population –whether intended or not. War tends to be more widespread and the destruction is likely to be more devastating because a war is often waged by states with armies and huge arsenals of weapons at their disposal. Terrorist groups rarely have the professional or financial resources possessed by states.

Apart from the methods used and the extent of the violence, however, war and terrorism are also seen differently by international law. The differences are not always clear-cut and even experts may disagree about whether a violent campaign counts as terrorism, civil war, insurgency, self-defence, legitimate self-determination, or something else.⁵

³Clapham, A (2007) Human Rights: A Very Short Introduction Oxford: Oxford University Press

⁴Freeman, M (2002) Human Rights – an Interdisciplinary Approach Cambridge: Polity

⁵Al-Skeini and Others v. the United Kingdom, European Court of Human Rights Grand Chamber (Application no. 55721/07), 7 July 2011; <http://www.bailii.org/eu/cases/ECHR/2011/1093.html>

⁶Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of the International Court of Justice of 9 July 2004, para. 106.

Problems in Defining War

Wars are sometimes defined by the fact that they take place between nation states: but where does that leave civil war, or the so-called War on Terrorism? Sometimes a formal declaration of war is taken as defining an act of war, but that excludes low-level bombing campaigns which take place over a number of years, such as the United States' attacks on the borders of Pakistan or in the no-fly zones declared over Iraq in the 1990s.

Should a definition of war include economic or trade wars, both of which may be enormously destructive in terms of human life? Are sanctions a form of war? UNICEF estimated that the sanctions on Iraq in the 1990s led to the deaths of over half a million children (and many adults).

What is terrorism?

Terrorism is another of those terms that everyone seems ready to use, but no-one can agree on an exact definition. Even the experts continue to argue about the way the term should be applied, and there are said to be over a hundred different definitions of terrorism, not one of which is universally accepted.

This lack of agreement has very practical consequences: to take just one example, the UN has been unable to adopt a convention against terrorism, despite trying for over 60 years to do so, because its member states cannot agree on how to define the term. The UN General Assembly tends to use the following in its pronouncements on terrorism:

Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.⁷

The Sicarii, otherwise known as the Zealots, were a Jewish movement in the 1st century who tried to expel the Romans from Palestine. They used ruthless methods, including mingling in crowds at public gatherings and stabbing their victim before disappearing back into the crowd.

⁷1994 United Nations Declaration on Measures to Eliminate International Terrorism annex to UN General Assembly resolution 49/60, Measures to Eliminate International Terrorism, of December 9, 1994

The Assassins were a medieval Shia Muslim sect who aimed to purify Islam, and targeted prominent religious leaders, using similar methods to the Sicarii in order to gain publicity.

The Thugi (Thuggee) were an Indian group sometimes classified as a cult or sect, which operated over the course of about 600 years, brutally murdering travellers by strangulation, and according to very specific rules. They are the longest lasting such group, and were eliminated in the 19th century largely as a result of recruiting informants from within the group.

International Law on Human Rights Conservation in Times of War

In Today's world when one cannot trust the person standing next to him we need to re-evaluate these theories. The act of terrorism has shaken people's beliefs. How do we treat the perpetrators of such barbaric acts, who are not endowed with any reason or conscience? How do we ensure that the blank slate is not filled with corrupt ideas? How can we stop these impressionable minds from being corrupted? These people do not believe in the human rights of others and are fundamentally opposed to it, which is what their handiwork implies. So is it necessary to protect theirs? Is there a need to bypass these laws section of people to establish the good for a larger section of the society? (Ishay, 2004).⁸

The Mahatma said, "An eye for an eye would make the whole world go blind." (Gandhi, 2001)⁹ He was of course dealing with an educated enemy, one that was at least ready to sit down for talks and reason. They and their acts were at least visible to others. The fact that there were human rights violations under their regime and that they were largely let go without any punishment is another fact. Anyways the Indians found solace in their freedom. However, how do we reason with fanatic's hell bent on destruction? Desperate situations call for desperate measures. The bite is always more dangerous than the bark. In addition, whenever anyone tries to do that naysayer shout aloud condemning these measures. If the human rights of the perpetrators are to be maintained, are we not giving them rope? The fact that they will not hang themselves is another matter.

We have international organizations crying aloud to protect human rights of these people. Are not the acts of terrorizing innocents, killing irresponsibly, man woman and child, abuse of human rights? In addition, should not the perpetrators of such ghastly acts be held

⁸Ishay, M (2004) The History of Human Rights, Berkeley, University of California Press

⁹Gandhi, MK; 2001; Collected Works, TrustBooks

accountable and handed exemplary punishments? How can we have the same legal framework for protecting human rights of the people who in the first place abused the right of so many victims to a secure, free, liberal life? Should we fight terror with terror? Is it the time to ensure that the terrorists have been terrorized themselves? These are moral questions and the response of people would vary according to their own judgments' and conscience (Donnelly, 1989)¹⁰.

Article 5 of The Universal Declaration 1948 states that 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. (UN.org; 2008-2009) What if the only resort to make the terrorists admit their crimes is by torture and not general reasoning? They may choose to remain silent. Then they go scar free if no other evidence exists. The fact that these declarations have to be followed can also impair the speed of such inquisitions of these crimes. In addition, if exemplary punishment were not meted out to such individuals they would be bracketed in the same category as a petty thief. In addition, that would be a shame!

Article 10 of The Universal Declaration 1948 states that, 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'. (UN.org; 2008-2009) Nobody sympathizes with the terrorists and everyone has a negative opinion about them. So how can an impartial tribunal be constituted because the tribunal in itself would be prejudiced beforehand.

It is necessary to ensure that some states do not intentionally draft draconian rules to marginalize a section society based on their religious belief, colour or creed but the proven guilty should be punished. To fight terror a gloves off approach has to be adapted (Clapham, 2007).

Article 12 of the Declaration of Human rights 1789 states that the security of the rights of man and of the citizen requires public military forces. These forces are, therefore, established for the good of all and not for the personal advantage of those to whom they shall be entrusted. (Lafayette, 1789)¹¹ Now, if the military forces are burdened with legalities to maintain human rights it may act as an assurance to the terrorists that despite of their acts they would be really safe and free of harm as no one can torture them. This can be

¹⁰Donnelly, J (1989) Universal Human Rights in Theory and Practice Ithaca: Cornell Press

¹¹Lafayette, Marquis de; Murphy, Gerald; 1789; Declaration of the Rights of Man and of the Citizen; Cybercasting Services Division of the National Public Telecomputing Network (NPTN);

debilitating to the confidence of the military forces and the public. It is necessary to establish that the military does not misuse its powers but about fighting terror, they need to be given a free hand. Additionally the terrorists may choose to withhold information that can result in future actions against these organizations they are affiliated to.¹²

There has been a lot of clamour as to whether the death sentence be abolished or not. Article 11 (2) of the Universal Declaration of Human Rights states that, No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed. (Bossuyt, 1987)¹³

Once a proven terrorist is to be punished how we can ascertain what his punishment should be. Doesn't the life term seem an easy escape to such an offender? What it does is prevent him from committing such a crime again but it does not make a future assassin cringe at the consequences of his offence. It would seem a small price to pay. He would be free to live his life behind bars, meet his family occasionally. The injustice is done to the victim's family who would never get to see their loved one again (Ishay, 2004).

Article 11 of the declaration of human rights 1789 states that, 'The free communication of ideas and opinions is one of the most precious of the rights of man'. Every citizen may, accordingly, speak, write, and print with freedom, but shall be responsible for such abuses of this freedom as shall be defined by law (Lafayette, August 26, 1789). It is the need of the hour to crack down on the ideology of terrorism and its preachers. The one who corrupt the minds of impressionable youth and turn them into foot soldiers of this barbaric ideology. They are to be held responsible and further growth of this cancer has to be stopped and to do that we need to crack down and prevent the spread of this ideology.

In addition, to do that the very apostles of these ideas are to be stopped from publicly opinionating or spread their opinions through any form of the media. They cannot be allowed to preach hatred in any way. Any public congregation meant to spread this ideology has to be stopped. It can be interpreted as misuse of power or human right violation but such unavoidable have to be introduced to cure the cancer. That may ensure that these organizations at least would find it hard to find new recruits (Freeman, 2002).

¹²Lafayette, Marquis de; 1789; Declaration of the Rights of Man and of the Citizen; Approved by the National Assembly of France, 1789; hrcr.org; Web.

¹³Bossuyt, Marc J; 1987; Guide to the travauxPréparatoires of the International Covenant on Civil and Political Rights; MartinusNijhoff Publishers

The declaration of 1789 also emphasized that a society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all. (Lafayette, August 26, 1789) Hence, it is necessary to ascertain that in any state, the judiciary is maintained at its position and if the framework does not invoke respect in the mind of the offenders then stricter norms are to be formed to ensure compliance for the same for these offenders. Currently the world is in a state of war against the terrorists and under these circumstances the militia should be allowed to interrogate any organization or an individual or his associates that it suspects to be involved. Depending on the result of the investigation, the law can take its own course.

However, if there is no co-operation between the two involved parties the militia should be allowed to resort to any means necessary to extract information or stop an unlawful activity, if there exists, substantial proof of the party's involvement. The militia here is not dealing with ordinary citizens but potential terrorists and may sometimes be required to act outside of law in order to maintain decorum and protect the rights of others. In these times its hard to say whether one can trust anyone, so, detailed and extensive combing operations are required and the general public should co operate with such agencies in their operations. Only the guilty have something to hide (Donnelly, 1989).

Article 3 of the declaration of 1948 states that everyone has the right to life, liberty and security of person. (IPPF; 2007)¹⁴ Additionally, no one has the right to take it away and anyone trying to take it away has to be brought to book. The very act of terrorism has shaken man's faith in another man. This cannot be allowed to happen and it is to be ensured that anyone found guilty of crimes against humanity should be punished. Every newborn in this world has the right to a better, secure future and the warmongers cannot be allowed to take that right away from them or to pollute their minds with hatred. It is time that harsh actions are taken. It may draw dissension from certain corners but that is the only way to ascertain that a man's belief in the basic goodness of another man is restored.

The Use of Force in International Law

International law covers a number of different cases involving the use of force by states. Sometimes – as in the quote at the start of the chapter – the law applies to cases when one state uses or threatens force against another state. Such cases are normally classed as wars, and are regulated by the UN Charter and the Security Council. Sometimes the law applies to

¹⁴IPPF; 2007; The Right to Liberty and Security of the Person Charter Right 2; IPPF. Web.

the way force is used in the course of war – whether legal or illegal. This is generally the area of international humanitarian law. Even while a war is taking place, however, human rights law continues to function, although for certain rights, restrictions by the state may be more permissible than they would be in peace time.

UN Charter, Kellogg-Briand Treaty

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

From the Kellogg-Briand Pact (also known as the General Treaty for the Renunciation of War, or the Pact of Paris)

As the most grandiose act in a series of peacekeeping efforts after the First World War, the Kellogg-Briand Pact was signed by 15 states in 1928, and later on by 47 others. Although the Treaty did not prevent later military actions between signatories, nor the eruption of the Second World War, it was important because it established a basis for the idea of crimes against peace and thus played a central role at the Nuremberg Trials. According to the Nuremberg (or Nürnberg) Principle 6, crimes against peace include the planning, preparation, initiation, or waging of wars of aggression, or a war in violation of international treaties¹⁵.

After the Nuremberg Trials, the Charter of the United Nations became the key international treaty regulating member states' use of force against each other. The Charter does not forbid war completely: it allows, in certain tightly defined circumstances, states to engage in war where this is necessary for them to defend themselves. Even such wars of self-defence, however, must be approved by the UN Security Council, except in rare cases where immediate action is necessary and there is insufficient time for the Security Council to meet.

Responsibility to Protect (R2P)

In recent years, some countries have pushed for the idea that where people are suffering grave abuses at the hands of a state – for example, genocide is threatened – the UN should have the power, and the obligation, to step in to protect the people. This has included the possibility of military action against the state responsible. The genocide in Rwanda, where the international community failed to intervene, sparked the debate. The war in Kosovo was seen as one of the

¹⁵1994, United Nations Declaration on Measures to Eliminate International Terrorism annex to UN General Assembly resolution 49/60, Measures to Eliminate International Terrorism, of December 9, 1994

first examples of humanitarian intervention by military means and in 2011, NATO's military intervention in Libya was based on a similar principle.

The idea of R2P is not uncontroversial. Genocide and the other acts included are serious and terrible acts. However, critics have argued that R2P may be used as a pretext and some military interventions have not really been based on the likelihood of mass atrocity crimes but have been more political in nature. Many mass atrocity crimes do not appear to evoke R2P, and some of those where intervention has taken place have seemed less serious in terms of the dangers people face. Even the Responsibility to Protect involves the idea that intervening states should explore all other possible means before undertaking military action. It is not always clear that these avenues have been explored.

Conclusion

Every individual that is born has the right to a secured life where he can exercise his free will in such a way as to not hurt other's right to do the same. A large number of factors pose threat to human life and create a feeling of insecurity among the population, resulting in a disruption in personal and social life. Thus, the objectivity of law is the protection and sustenance of public safety and conservation of human rights. It should be remembered that the disaster of 9/11 took place when the terrorists took advantage of the American social way of life where the number of domestic frequent fliers is high enough to suffer a low security system. The same is true about London underground rail blast. In both cases, the terrorists took advantage of the countries' way of social life and it would be impossible to alter this way of life putting security as an alibi where the menace is organized by a fundamentalist motive. However, to impose public safety sometimes human rights clauses are violated. War and terrorism are indeed a breakdown of humanity, acts which seem to undermine and sideline the values at the heart of human rights and the legal system which protects them. Although they cannot fix all evils, they can provide some minimal protection and some hope for justice.