Opinion

TheDailyStar, MONDAY, JULY 3, 2000

US foreign policy: the judge as metaphor

by Chibli Mallat

If one agrees that an American president should intervene – militarily if necessary – in order to help the helpless in genocidal environments, a meaningful threshold familiar to American lawyers obtains when "the danger is clear and present." The term is used by the US Supreme Court to allow the state to curtail freedom of expression when the danger of disruption to the social fabric is imminent. It is then the duty of the state to intervene, even at the cost of otherwise sacrosanct civil liberties.

As in all comparisons between the domestic and international arena, standards that are extremely difficult to articulate inside America are even more complex elsewhere, even if the reality of an America ruled by law is itself relative: against an exceptionally stable history since independence, the system has nonetheless broken down; once totally as during the Civil War, and a few times partially, as in the shameful excesses of the internment of US nationals of Japanese descent during World War II, or in the McCarthy era.

These exceptions notwithstanding, curtailment of civil liberties in the US operates against a constitutional background which is stable and well regulated. This is not the case in the post-Cold War world of ethnic, religious and national conflicts.

The problem in these conflicts is that the common standard is the total breakdown of societies; stability, let alone the rule of law, becomes the exception. In such cases, even if a successful military intervention is conducted under the principle of saving the helpless from genocide, the intervention is painful, and "the day after" is particularly difficult.

Inevitably, armies become entangled in the domestic quagmire and the all-too-familiar issues of the Vietnam or Mogadishu syndromes reemerge. The former Yugoslavia and the Indonesian archipelago are living examples of this difficult reality.

This calls for one qualitative addendum to the military component in foreign intervention, a requirement that remains beyond the pale of foreign-policymaking in America: the establishment of accountability, that is, the rule of law, in those societies whose territory is the subject of international coercion and may be temporarily occupied by foreign "peace-keeping" troops. In practical words, one needs to investigate the ways for an American president to project the judge as metaphor abroad, as indeed he is the metaphor of constitutional America

The trend has started with international criminal tribunals, set up to make accountable those who have committed atrocities as in Rwanda (ICTR) and in the Former Yugoslavia (ICTY). One should never tire of appreciating and supporting these institutions, along with the fledgling International Criminal Court (ICC) promised by the Rome conference in 1998. A US president must help to take these courts seriously. Neither the Balkan nor the Gulf wars would so glaringly appear as unfinished business if the top leaders in Bosnia, Yugoslavia and Iraq had been brought to justice. Ten years after the "cease-fire" in the Gulf, five years after the ICTY was established, these leaders remains at large. Two years after Rome, Washington still balks at signing the ICC Treaty, or improving it in a reasonable way. An urgent move for the US president is to act on these pressing issues and help deliver the top indictees.

Accountability is therefore a key element in the process, especially since a functioning judiciary is capable of distinguishing between the leaders, who bear a criminal responsibility for their massive violations of basic human rights, and between innocent populations whom those very leaders generally use as a shield and who suffer the brunt of blanket international sanctions. In other words, international criminal tribunals are the most tangible response in the search for "smart sanctions," currently led by UN Secretary-General Kofi Annan.

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International criminal tribunals are heavy machinery, however, and pressing issues cannot be resolved exclusively, or quickly, at that top level. I would therefore suggest, in addition to and within the framework of accountability, that any military intervention should be accompanied henceforth by "human-rights theaters" as a continuation of Red Cross field hospitals introduced by Henry Dunant in the 19th century, and of the remarkable humanitarian aid provided by non-governmental organizations and UN agencies in the 20th century.

Human-rights theaters are operated by two types of agents: some, such as Amnesty International and Human Rights Watch, work with impressive efficiency, but they tend to deploy slowly during bloody crises calling for military intervention. This is why the presence of Amnesty International in south Lebanon during the Israeli withdrawal should be a model for future action.

This, however, is on the passive side of things. International interventions must be able to deploy their own high-level human-rights theaters to collect evidence and provide accountability for crimes that occur in the phase during and after military intervention, as in the kind of reverse ethnic cleansing against Serbian Kosovars after the rout of Slobodan Milosevic's forces. This is where the role of a visionary US president is called for. America should develop, alongside any necessary military operation, a full panoply of human-rights measures to be contemporaneous with any armed action.

To the cynic, this would appear to be the ultimate aberration: how could a commander-in-chief conduct war, yet strive to accompany it with "human-rights soldiers," a phrase just coined by Amnesty International's general secretary? How more contradictory can one get ?

To the cynic, one may suggest that life is more complex than dreamt of in any general's philosophy, and that the topsy-turvy world of war and peace calls for a new Clausewitz to bring some shape to that new order for the world, an order in which accountability and human rights have, or should, become the first priority in the international arena.

To the cynic, a response grounded in history is that the so-called laws of war have developed in similarly contradictory conditions and can be clearly traced to original thinking in American history, from humanitarian efforts *a la* Dunant at the time of the American Civil War, to Raphael Lemke and his military-legal manuals in 1942, in the midst of Nazi horrors. Considering Gettysburg, Dresden and Hiroshima, the progress is arguably marginal, but the introduction of the new parameters of accountability and rehabilitation has a strong historical pedigree.

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There are other useful arguments and signals: the Pentagon has been developing a timid civil-military relations program with Iraqi opposition groups. This is the right way forward: whether in Iraq or elsewhere, a visionary US president should support full human-rights/rule-of-law programs to precede, accompany, and follow any necessary military intervention abroad required by an ethnic and/or religious civil war.

In such bombed-out social fabrics, the less cynical argument is that one should start with providing economic and social correctives. This is hard to argue against, even if actual investment is notoriously slow on the ground, as in the $25 million paid up in post-independence Timor, against the $522 million pledged last summer, or in the soon-forgotten pledges by the European Union to revive Kosovo's economy.

Despite the acknowledgment of the importance of economic development, I propose that an American president should be more radical with regard to the priorities. The priority in a collapsed system is not economic development – it is the establishment of due process built on a crash rehabilitation of the rule of law and the establishment of a working judicial system. Even before day one of the military intervention, the local or international judge must be transformed into the central metaphor of rehabilitation, so that immense grievances are stored, heard, and eventually responded to judicially.

After all, the war in Bosnia stopped when the US envoy dug in his heels against the attempts of warlords to stop the killings in return for an amnesty of sorts; the Kosovo intervention was effectively sparked when the ICTY prosecutor was prevented from investigating atrocities in the city of Racek; the generals stopped the bloodshed in Kosovo and in Timor when the whole apparatus started fearing prosecution.

Of course, a threat to indict criminals in such conflicts is meaningless if not backed by the use of force.

There is no gainsaying that the need for a working judiciary is always more pressing than traditional wisdom in international relations has it: in Kosovo, Montenegro and Serbia, to avoid the repeat of ethnic cleansing by pursuing the accountability process all the way to Belgrade; in East Timor, where the UN mission seems to have achieved a unique job but where the lack of human resources and the decimation of the middle class over 25 years of colonization threatens the future of the rule of law every day; in Palestine, where the executive branch of the Palestinian Authority is bent on suppressing basic liberties and the right to dissent very much in the way that the Israelis did; in Chechnya, where another 20-year war has started, with no end to the spiraling cycle of violence in sight. And so on. Only the judge as metaphor can give some future to these societies.

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