

JUSTICE

International Rule of Law Lecture 2006

Five years on from 9/11

Time to reassert the rule of law

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advancing access to justice, human rights and the rule of law

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Five Years on from 9/11 – Time to Re-Assert the Rule of Law

Chaired by Lord Steyn.
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The International Commission of Jurists, of which Justice is the UK affiliate, was born in Berlin, then a divided city, and into a world of deep division between two political blocs. Its first Secretary General, Norman Marsh, was an English barrister, Law Commissioner and academic. He was also one of the group of ‘founding fathers’ of Amnesty International, and his wife created the card index – of course, manual in those days – on which the names of the early prisoners of conscience were recorded. When he was appointed to head the ICJ in 1956, Marsh sought to develop a clear and universal definition of the rule of law, encompassing the world’s different legal traditions.

Fifty years later, I think Norman Marsh would find some of the issues which Justice is today addressing familiar – e.g. the criminal law reform topics of hearsay, jury trial or double jeopardy. Others would surprise him, because they demonstrate the sea change which has taken place in this, and other, jurisdictions – for example, the vast body of European law, a Supreme Court for the United Kingdom, or UK adherence to the human rights treaties which now implement the Universal Declaration of Human Rights. I hope he would feel that these treaties, in particular, go a long way towards providing a universal definition of the rule of law by stating clear rules and barring arbitrary decisions.

Other issues would seem new, but they would also raise old and familiar questions about the rule of law: the balance to be struck between liberty and security, and the role of the courts in checking the excesses of the executive in the name of security – specifically, counter terrorism, restrictions on political demonstration and the introduction of ID cards.



Today Justice works in a world which is again one of division, and confusion. The need to emphasise the vital necessity to respect the rule of law and promote its values is as great as it was when the ICJ was formed.

In her book entitled *The War on Terror and the Framework of International Law*,¹ Helen Duffy writes:

‘The atrocities committed on 9/11....highlight the critical importance of the international rule of law and the terrible consequences of its disregard. Ultimately, however, the impact of such attacks on the international rule of law depends on the responses to them and in turn on the reaction to those responses. To the extent that lawlessness is met with unlawfulness, unlawfulness with impunity, the long term implications for the rule of law, and the peace, stability and justice it serves, will be grave. Undermining the authority of law can only lay the foundations for future violations, whether by terrorists or by states committing abuses in the name of counter terrorism.’

I fear that the authority of law has already been undermined in many important ways. The question facing us today is how are we to respond to this situation and what steps can we – and must we – take to restore and protect the international rule of law?

The security argument today is that the terrible terrorist attacks in New York, Madrid, Sharm al-Sheikh, Bali, London and elsewhere were so heinous, so unprecedented, that the only possible response is a global "war on terrorism".

The point is made that the enemy is not a nation state and is not willing to respect fundamental standards of international law which protect civilians. Fighting terrorism, it is said, therefore requires new strategies and sometimes "exceptional measures". This implies that human rights are somehow to be curtailed, that the security imperative outweighs all other considerations. I do not believe that, not least because if we follow

¹ Cambridge University Press, 2005., p.1



that course we will lose the moral high ground – the capacity to influence the minds and hearts.

I recall flying to New York in the aftermath of 9/11, and sitting with my colleagues in the Office of the High Commissioner for Human Rights to determine what our response to those attacks should be. Language is vital in shaping our reactions: the words we use to characterise an event may determine the nature of the response. It is worth recalling that the attacks were mainly aimed at civilians. They were ruthlessly planned and their execution timed to achieve the greatest loss of life. It was important to clarify that the scale and systematic nature of the attacks on New York and Washington qualified these acts as crimes against humanity under international jurisprudence. I stressed the duty on all states to find and punish those who planned and facilitated these crimes.

Despite efforts to frame the response to terrorism within the framework of crimes under national and international law, an alternative language dominated. That language, which has shaped to a much larger extent the response at all levels, has spoken of a war on terrorism. As such, it has brought a subtle change in emphasis in many parts of the world; order and security have become the over-riding priorities. As in the past, the world has learned that emphasis on national order and security often involved curtailment of democracy and human rights. Misuse of language has also led to Orwellian euphemisms, so that ‘coercive interrogation’ is used instead of torture, or cruel and inhuman treatment; kidnapping becomes ‘extraordinary rendition’..

Unfortunately, what I then saw and heard was undemocratic regimes using the tragedy in the United States of 9/11 to pursue their own repressive policies, secure in the belief that their excesses would be ignored. New laws and detention practices were introduced in a significant number of countries, all broadly justified by the new international war on terrorism. The extension of security policies in many countries has been used to suppress political dissent and to stifle expression of opinion of many who have no link to terrorism and are not associated with political violence. I will never forget how one Ambassador put it to me bluntly in 2002: “Don’t you see High Commissioner? The standards have changed.”



The challenge now is to overcome this view, sometimes characterized as 'the new normal', while recognizing – as it is all too easy to do in London since the bombings of July 2005 - that governments and societies face real and serious security threats..

Almost five years after 9/11, I think we must be honest in recognizing how far international commitment to human rights standards has slipped in such a short time. In the U.S. in particular, the ambivalence about torture, the use of extraordinary rendition and the extension of presidential powers have all had a powerful “knock on” effect around the world, often in countries that lack the checks and balances of independent courts, a free press and vigorous NGO and academic communities. The establishment of an off shore prison in Guantanamo, its retention in the face of the most principled and sustained criticism, including a joint recommendation by five UN human rights experts that the facility should be closed ‘without further delay’², are all aspects of this situation.

Other prisons exist, in other places, which are even less subject to scrutiny; indeed detainees are sometimes referred to as ‘ghost prisoners’, because neither their names nor in some cases their location are known³. At the same time, to take another example, the international community has failed to establish any effective oversight mechanism for the human rights abuses of the Chechnya conflict, which is within the territory of a permanent member of the Security Council, or any mechanism for Chechnya which would compare with the UN’s human rights monitoring operations for the civil conflicts in countries such as Colombia and Nepal.

What is being done to reassert the values of the rule of law? I will say something of international efforts including the work of the ICJ. I will then reflect on the changed role of the US in terms of human rights, and of the important contribution to be made by the decisions of national courts, notably in the UK...

The Club of Madrid, a group of former heads of state and government from countries in all regions, on which I serve as Vice President, came together last year – on the first anniversary of Spain’s 3/11 – to organize an International Summit on Democracy,

² E/CN.4/2006/120

³ Human Rights Watch list, <http://hrw.org/english/docs/2005/11/30/usdom12109.htm>



Terrorism and Security. Its purpose was to build a common agenda on how the community of democratic nations could most effectively confront terrorism while maintaining commitments to civil liberties and fundamental rights.

The Summit brought together leading experts who examined the underlying factors of terrorism, the effective use of the police, the military, the intelligence services and other national and international agencies to prevent and fight terrorism. Our aim was to construct a strategy against terrorism based on the principles of democracy and international cooperation and on strengthening civil society against extremists and violent ideologies. The resulting Madrid Agenda makes a compelling case not only for more effective joint action against terrorist organizations but also the need to increase resources aimed at tackling the humiliation, anger and frustration felt by many that can be manipulated to draw recruits for terrorist action.

Meanwhile, the International Commission of Jurists returned to its roots in Berlin in August 2004 and adopted a Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism. That Declaration acknowledges that terrorism poses a serious threat to human rights, and affirms that all states have an obligation to take effective measures against acts of terrorism. But it sets out boundaries as follows:

“In adopting measures aimed at suppressing acts of terrorism, states must adhere strictly to the rule of law, including the core principles of criminal and international law and the specific standards and obligations of international human rights law, refugee law and, where applicable, humanitarian law. These principles, standards and obligations define the boundaries of permissible and legitimate state action against terrorism. The odious nature of terrorist acts cannot serve as a basis or pretext for states to disregard their international obligations, in particular in the protection of fundamental human rights.

A pervasive security-oriented discourse promotes the sacrifice of fundamental rights and freedoms in the name of eradicating terrorism. There is no conflict between the duty of states to protect the rights of persons threatened by terrorism and their responsibility to ensure that protecting security does not undermine other rights. On the contrary, safeguarding persons from terrorist acts



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and respecting human rights both form part of a seamless web of protection incumbent upon the state. Both contemporary human rights and humanitarian law allow states a reasonably wide margin of flexibility to combat terrorism without contravening human rights and humanitarian legal obligations.”

The Declaration affirms 11 principles which states must give full effect to in the suppression of terrorism and calls on all jurists to act to uphold the rule of law and human rights while countering terrorism. This Berlin Declaration, available at (www.icj.org) restores the balance which was lost in the aftermath of 9/11. It is a declaration which should hang in law offices and judges’ chambers throughout the world. It is the rule of law charter to counter the imbalances of what has been called today’s “new normal.”

Arising out of this initiative, the ICJ has recently established an Eminent Jurists’ Panel, on which I am proud to serve, composed of eight jurists from all regions and legal traditions. The Panel is chaired by Arthur Chaskalson, Former Chief Justice of South Africa and the first President of South Africa’s new Constitutional Court. It has been mandated to consider the nature of today’s human rights threats and the impact of new and old counter-terrorism measures on human rights. Another member, Professor Vitit Mutarbhorn, set out its approach, saying

‘No one can doubt that States have a duty to protect people from terrorist acts. It is important to understand the justifications for new laws and policies to counter terrorism. At the same time any measure to counter terrorism must be proportionate to the exigencies of the situation and respect in law and practice the rights of people under international human rights and humanitarian law.’

The Panel is holding hearings around the world this year to explore how considered counter-terrorism measures and policies can produce effective results while also assuring the necessary respect for human rights and the rule of law. Earlier this month, the Panel held a public hearing in Nairobi for the East Africa region. The aim was to study the impact of special laws, policies and practices adopted to fight terrorism in Tanzania, Uganda and Kenya. Hearings have also been held in Colombia, where



political violence has a long history, and in Australia where counter terrorism measures have been enacted since the Bali bombing. In early September we conduct a hearing in the US, which, as it happens, will be on the eve of the 5th anniversary of 9/11.

These initiatives seek to re-establish the primacy of the rule of law and to create an accurate record of the steps – whether positive or negative – being taken in different countries. But some of the most fundamental restoration work must take place in national courts and legislatures.

In this context, we must recognize – and regret – the degree to which the US has surrendered its moral authority. We must also acknowledge that it is not good for the world that the largest, most powerful country is seen to be out of line on human rights, and that this leaves an uncomfortable void. Although China, for example, is becoming a global economic giant and US competitor, there is no way in which it can replace the US as a human rights leader. The leadership role of the US began with Eleanor Roosevelt's work in the drafting of the Universal Declaration of Human Rights in 1947, and developed with the powerful body of Supreme Court jurisprudence generated by the US Bill of Rights, and with Jimmy Carter's policy – later adopted by the UK, the EU, and others – of integrating human rights into foreign policy. I can speak from personal experience of the profound impact which the US civil rights case law I studied at Harvard Law School in the late 1960s had on my own thinking. Let us recall that in the UK, the first race relations legislation took direct inspiration from the US.

How sad, then that last week in the General Assembly, the US voted, almost alone, against the new UN Human Rights Council. Fracturing a political consensus, which had been painstakingly built between those favouring and those resisting more effective oversight, to create a radically improved body, the US rejected the improvements as 'insufficient'. I have been given this account:

'the General Assembly adopted the resolution ...and then - what never happens in the General Assembly - there was a spontaneous and roaring applause that simply would not die down. Like an opera audience after a splendid aria. It was an expression of relief for delegates that had battled to



create this Council for nearly a year and perhaps also of frustration with the US which had made everyone's life in recent weeks so exceedingly difficult.'

We should remember that these delegates were diplomats representing governments, not activists. This situation goes beyond even the isolation in which the US found itself when it voted in principle against the International Criminal Court statute in Rome in 1998. It illustrates the seismic shift which has taken place in the relation of the US to global rule of law issues. Today, the US no longer leads, but is too often seen merely to march out of step with the rest of the world.

This is, I hope, a temporary loss of moral compass. Certainly it is one which is recognized and strenuously resisted by many individual Americans I meet when I travel around the US and by NGOs such as Human Rights First and Human Rights Watch. Notably, the ABA has already held high level sessions on the rule of law during its annual meetings. Now it plans to hold a special session together with the IBA in Chicago in mid-September, which will be a good opportunity to take stock of the serious undermining of core standards in just five years, and to plan a more effective response.

Against this backdrop, I believe national courts in all democratic countries, and particularly those in the UK, have a crucial role to play, by applying international legal principles in cases which deal with broad questions of human rights and security. In 1984, Anthony Lester published an article entitled 'Fundamental Rights: the UK isolated'. He argued for incorporation of the European Convention, saying that it was 'wrong' and

'unhealthy that our judges are denied the power and responsibility of safeguarding the fundamental rights and freedoms of the Convention'⁴

He noted that

'(o)ne practical effect of the absence of fundamental rights in this country is that courts of other Commonwealth countries increasingly refer to Commonwealth case law when interpreting their own code of fundamental rights.'

⁴ *Public Law*, Spring 1984. pp. 46-72.



Since then the tables have turned, and it is UK rather than US courts which are taking a lead as interpreters of fundamental human rights, on the basis of the European Convention and – by extension – the body of international human rights treaty law.

This new situation is well illustrated by recent House of Lords decisions, most notably their ruling that evidence obtained through torture is inadmissible in any proceedings before UK courts⁵ The Lords unanimously rejected the notion that courts can condemn torture while using evidence obtained through torture, noting that such use encourages these abhorrent practices.

The judgment sends a clear signal that the use of torture is universally forbidden under all circumstances, and that states have positive duties to give effect to that prohibition. The case represents an important reassertion of the rule of law, and highlights the critical role of the judiciary in ensuring that states meet the challenge of countering terrorism within the boundaries of law, including fundamental principles of international law prohibiting torture and ill-treatment.

The importance of the judgment in these terms is the compass course it offers to other societies, including stable democracies in which the 'war on terrorism' has revived discussion of the legitimacy of state torture, a topic which many had thought was of no more than historical interest. It is important also because the judgment does not rest on English law alone. In Lord Bingham's words [paragraph 51]:

'(t)he principles of the common law, standing alone.....compel the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice. But the principles of the common law do not stand alone. Effect must be given to the European

⁵ A & Ors v Secretary of State for the Home Department.



Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention.’

Today, and especially since the Human Rights Act, international law is an increasingly important source of English law. The laws which U.K.courts apply protect rights whose source is to be found in international as well as in English laws. As such these laws and these rights are shared in common with other countries, many of whom are outside the institutions of Europe – 141 states in the case of the CAT. And international human rights law has become a common source of law for almost all states.

But unlike the European Convention on Human Rights, international human rights law has no higher court in Strasbourg to develop its jurisprudence. This means that the decisions of the highest English courts will inevitably have an influence which runs far beyond this jurisdiction. Indeed, it is difficult to exaggerate the international impact of the Pinochet case. When the House of Lords applied the Convention against Torture - in the words of one NGO - ‘(s)uddenly and dramatically world attention focused on an obscure and little known provision of international law – universal jurisdiction’.⁶ Since then, the Lords’ decision has had the effect of opening the way to the use of the CAT by courts in other jurisdictions.

Similarly, now that the International Criminal Court Act 2002 has made the commission of crimes against humanity an offence in English criminal law, the decisions of English courts – in the unhappy event that these cases arise – will be followed with close attention by courts around the world. Environmental law, with its strong relationship to human rights, is another area in which the decisions of UK courts will influence courts in other countries - and other continents - when they come to apply the same law. This is not a new experience for English judges: there are long standing legal links between the UK and other Commonwealth countries. But today international judicial exchange on human rights concerns international law, with its universal reach.

⁶ ICHRP Report, Universal Jurisdiction, CITE



There is of course another, and more negative, side to globalised norms. Political decisions which are taken by the UK - about pre trial detention, or restrictions on demonstrations under the Serious Organised Crime and Police Act - will be scrutinised in other, and perhaps less democratic countries, for their adherence to international law, and where they fail, they will become authority and precedent for the laws of those other states. This means that where the UK intervenes – as it has done in a case now before the European Court of Human Rights - to challenge the absolute nature of the European Convention prohibition against return where there is a risk of torture, it sends a powerful and negative signal to other states.

I believe the challenge for all countries is to ensure that action to protect the security of citizens and the state is taken in a way that restores, rather than further undermines, the rule of law.

‘Promoting respect for international law is essential to ensuring that the ‘war on terror’ does not score a devastating own goal by eroding permanently the rule of law and the international standards that protect us all.’⁷

Otherwise, as Kofi Annan has noted, ‘we deliver a victory to terrorists that no act of theirs could achieve’.

Mary Robinson, the first female President of Ireland (1990-1997) and more recently United Nations High Commissioner for Human Rights (1997-2002), has spent most of her life as a human rights advocate. For full biography, see www.realizingrights.org

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⁷ Helen Duffy, of cit, p.451.

