

TERRORISM AND HUMAN RIGHTS*

by

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THE PURPOSE OF THIS ESSAY IS TO CONSIDER THE IMPACT ON HUMAN rights of the recent rise in the importance attached to, and the perceived danger arising from, violent acts of terrorism. By 'human rights' is meant the law, practice and scholarship that has grown up around a subject that has enjoyed huge attention over the past 60 years, beginning with the new international order that was put in place at the end of the Second World War and exploded into public view even more dramatically with the end of the Cold War in 1989. If the half-century that followed the signing of the Universal Declaration of Human Rights by the vast majority of the nations of the world in 1948 can without exaggeration be described as an 'age of human rights' then it may well be the case that the next 50 years (and beyond) will in due course with equal validity be capable of being described as an 'age of terrorism' or – if one is sceptical of the empirical foundations of the claim – at very least an 'age of counter-terrorism'.

The first part of this article concerns the global challenge to human rights that is posed by the plethora of anti-terrorism laws that are being put in place both in international law and at the national level in many countries around the world. To a certain extent these changes entail the emergence of new exceptions to and derogations from the law of human rights, with the effect of these being to undermine human rights protection, both in theory and in practice. At another and deeper level, these developments are about the harnessing of the human rights ideal itself to legitimize action that in any other context would clearly be condemned as in violation of basic rights. The resulting external and internal challenges to the integrity of the language of human rights, and how to resist them, are the concern of the first section. The focus of the article then shifts to the interaction of human rights and terrorism in the United Kingdom, an application in a particular context of the foregoing general discussion on terrorism and human rights. The administration of Tony Blair famously enacted the Human Rights Act 1998 in its first term, as a tangible and early indication of New Labour's commitment to the post-1948 global human rights movement. Its ministers have also subsequently defended the Human Rights Act¹ and fairly rigorously implemented court judgments on national security, even those with which they have heartily disagreed.²

¹ Department of Constitutional Affairs, *Review of the Implementation of the Human Rights Act*, London, Lord Chancellor's Department, 2006.

² Most famously *A v Secretary of State for the Home Department* [2004] UKHL 56, which led to the Prevention of Terrorism Act 2005.

The government story is not all one-way, however. Even before the events of 11 September 2001, the Labour administration had insisted on the need for terrorism laws to an extent never before seen in Britain, refusing to regard a cessation of mainstream IRA subversive activity as a reason to dispense with the terrorism laws altogether³ and enacting the Terrorism Act 2000 as the UK's first, permanent antiterrorism legislation. The country was therefore well placed to develop its armoury of terrorism legislation when the 11 September attacks were thought to make such further legislative intervention essential. The Anti-Terrorism, Crime and Security Act 2001 has been followed by the Prevention of Terrorism Act 2005 and (after the 7 July 2005 bombings in London) the Terrorism Act 2006. More initiatives in the same vein are promised, with yet further proposals for new anti-terrorism laws likely during the 2006/7 legislative session, these having been anticipated in the week leading up to the November 2006 Queen's Speech by very public interventions about the need for action from the heads of the security service and the metropolitan police.⁴ The second part of the article then assesses the way in which those who believe in human rights can and should respond to the challenges set out in this section, and in particular how best to maintain the integrity of the subject in the face of what is, as we shall see, quite strong pressure from those more committed to a robust anti-terrorism perspective.

GOVERNMENT AND OPPOSITION

A particular focus of what follows is with what might loosely (for want of a better formulation) be called the 'human rights community'.⁵ Where should human rights lawyers, practitioners and most importantly of all for the purposes of this article human rights scholars stand in the debate about human rights and terrorism? This is a more difficult and important question than it appears. It is important because the conclusions that are eventually produced will go a long way towards defining the kind of society we are, the form that liberalism takes in the post-socialist future that is likely to lie ahead (for some decades at least). But it is also difficult because many of the pat answers so frequently asserted by the protagonists of human rights, even those on the scholarly end of the market, do not convince; in thereby failing to persuade

³ For the general background see C. A. Gearty and J. A. Kimbell, *Terrorism and the Rule of Law*, London, Civil Liberties Research Unit, King's College London, 1995.

⁴ Stella Rimington and Ian Blair respectively. The Treasurer Gordon Brown also engaged with the subject at the same time: see 'Brown Backs Call to Extend 28-Day Limit on Detention', *Guardian*, 13 November 2006, p. 1, where there are also reports on the other interventions.

⁵ For a general review of the law and practice in the area, see C. A. Gearty, '11 September 2001, Counter-Terrorism and the Human Rights Act', *Journal of Law and Society*, 32 (2005), p. 18.

they manage only to leave their subject vulnerable to further attack. It will be argued that a series of new responses is required if the idea of human rights is to continue its upwards trajectory. These responses will need to be less dogmatic and more pragmatic than in the past, less arrogant and more humble than has often seemed to be the case, less inclined to see human/national security and human rights in inevitable collision – but despite showing sensible flexibility they will also need to preserve absolutely and confidently the essence of the subject’s commitment to human dignity. Having indicated some of the preferred answers along the way, the article will end with some thoughts on how best to map out the future of human rights in the age of (counter-)terrorism that we may well have already entered.

THE INTERNATIONAL BACKGROUND

The subject of human rights can often appear to be above politics and international relations, a kind of supreme moral code immune to the vagaries of the moment, made up of a set of ethical commands to which all are required to swear allegiance. Part of the fault for such a misleading projection lies in language: the term ‘human rights’ seems to carry within itself a claim to a set of universal truths that many find seductive.⁶ Of course this is partly true. Pared down to its essence, the idea of human rights is about three essential beliefs.⁷ The over-arching commitment is to equality of the person. The believer in human rights is committed to the dignity of all, regardless of their ethnic, gender, national or any other kind of background. This has a well-known prohibitory dimension: the human rights advocate is determinedly opposed to torture, to genocide, to all forms of ethnic cleansing, and (it therefore follows) to terrorism, or at least to the kind of violent criminality that turns ordinary persons into corpses through which to communicate a message to a third party.

But human rights also has a positive side, one that emphasizes that a promiscuous commitment to human dignity is about human flourishing, about the growth and personal development of us all. This is the side to human rights that is reflected in ambitious programmes such as those represented in the range of rights set out in the International Convention on the Rights of the Child⁸ and in the aspirations laid out for human kind in the Universal

⁶ For two excellent studies of the tensions caused by this assumption see U. Baxi, *The Future of Human Rights*, New Delhi, Oxford University Press, 2002, and C. Douzinas, *The End of Human Rights*, Oxford, Hart Publishing, 2000.

⁷ See further C. A. Gearty, *Can Human Rights Survive?*, Cambridge, Cambridge University Press, 2006.

⁸ 1577 UNTS 3 (1989).

Declaration on Human Rights.⁹ Because protagonists of equality and human dignity judge that the best routes to their realisation lie via an independent system of law (to prevent gross violations) and a representative system of government (to secure the flourishing), such people also commit themselves to democracy and legality. A commitment to dignity, democracy and legality marks the human rights believer out as neither dogmatic nor domineering but as universalist and absolutist on what he or she claims to be the fundamental building blocks of an ethical society. This is the core to our subject and one to which I shall return in the course of this article while seeking answers to the problems thrown up by counter-terrorism law that I have already identified in my introductory remarks. It is impossible to avoid the fact that there is another reality to the human rights story, however – one that is as embedded in history and the power relations of the past (and present) as any other term.¹⁰ This solidly realistic dimension to the narrative explains the great success of the term, why the idea of ‘human rights’ has made it when so many other phrases have also been jostling for audience attention in the theatre of ethical dreams. Interestingly for the purposes of this special issue, the relationship between human rights and subversive violence is closer than many human rights protagonists today like to admit: the first leg-up on the ladder of success was provided by insurrectionists lucky enough to be successful. The natural rights emphasized by one of the progenitors of the subject, John Locke, came to provide the intellectual basis for the ‘glorious revolution’ of 1688.¹¹ A century later, the development of a fresh perspective on the rights of man, fostered by writers like Jean-Jacques Rousseau and Tom Paine, did a similar job for French and American revolutionaries intent on overthrowing the established order in their respective countries. Even the preamble to the Universal Declaration on Human Rights speaks of the need for such rights so that ‘man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression’. There are echoes of this subversive dimension to human rights in the development as part of the human rights story of the notion of a right to self-determination.¹² The anti-terrorist specialists are less wrong than the human rights people like to think when they condemn human rights as giving succour to the politically violent: this is exactly the murky ethical world from which the subject has so triumphantly emerged.

⁹ UN Doc A/811 (10 December 1948).

¹⁰ See A. W. B. Simpson, *Human Rights and the End of Empire. Britain and the Genesis of the European Convention*, Oxford, Oxford University Press, 2001, and K. Sellars, *The Rise and Rise of Human Rights*, Stroud: Sutton Publishing, 2002.

¹¹ J. Dunn, *Locke: A Very Short Introduction*, Oxford, Oxford University Press, 2003, is a good summary.

¹² See Article 1.1 of both the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (1966) and the International Covenant on Civil and Political Rights 999 UNTS 171 (1966).

In the immediate aftermath of the Second World War, respect for human dignity formed one of the three foundations (together with the other two elements in our human rights triad, democracy and the rule of law) with which a triumphant United States sought to create a new international human rights culture, rebuilding the world for the better by entrenching anti-fascist and anti-Stalinist constitutional structures in nation-states like Germany, Italy and Japan while at the same time encouraging the development of universal codes of human rights at the international (e.g. UNDHR) and regional (e.g. ECHR) levels.¹³ Backed by strong financial investment in the form of the Marshall Plan, and with the subsequent total failure of Stalinist democratic centralism still vivid in our memories, these post-war policy initiatives by the USA are now seen as a great success, at least in those states primarily exposed to them. The polarizing effect of the Cold War, in which the subject of human rights at the international level quickly became ensnared, led to a decades-long bifurcation into two apparently separate and conflicting zones, the civil and political (the US version) and the social and economic (the Soviet). It was the success of the United States in seizing the language of human rights and persuading the world that the subject was pretty well exclusively concerned with the civil and political (Dr Sakharov; the freedom of movement of Soviet Jews; Charter 77; etc) that in the late 1970s began to put intense moral as well as political pressure on a communist system that was already feeling the economic strain. The result was a set of Soviet initiatives that embraced the US version of human rights (*glasnost* in order to achieve *perestroika*), but at the price of the eventual destruction of the whole system and, not so long after, the Soviet bloc and then the Soviet state itself.¹⁴

As indicated at the outset of this article, with the fall of the Berlin Wall the idea of human rights has achieved a near-total dominance as *the* ethical idea of the contemporary global age.¹⁵ The United States and its allies, particularly in the ‘old Europe’ of the original members of the European Economic Community, applaud themselves for having been on the right side of history, issuing human rights reports like exam results and imposing ‘human rights’ conditions on their trade with other states.¹⁶ The countries of the old Soviet

¹³ Fascinating on this is M. Mandel, ‘A Brief History of the New Constitutionalism, or “How We Changed Everything so that Everything Would Remain the Same”’. *Israel Law Review*, 32 (1998), p. 250.

¹⁴ Noting immediately that the collapse of the Soviet Union was due to many factors, this being only one of them.

¹⁵ N. Bobbio, *The Age of Rights*, Cambridge, Polity Press, 1996.

¹⁶ For a good example of the genre, see Foreign and Commonwealth Office, Human Rights Report 2005 (Cm 6606), London, Stationery Office, 2005.

bloc, including Russia, have formally embraced the language of human rights through their membership of the Council of Europe, an organization separate from the European Union whose primary *raison d'être* is the protection of human rights, achieved mainly (but not exclusively) through the pan-European judicial oversight of the European Court of Human Rights. For those of the old Soviet nations who desire European Union membership, various other human rights tests and practical exercises are required.¹⁷ But the hegemony of human rights extends beyond the old Cold War antagonists. Islamic countries have agreed not one but two human rights charters,¹⁸ while Turkey has gone so far as to accept the jurisdiction of the European Court of Human Rights, a fact graphically underlined by the large number of judgments hostile to its armed forces and police service that its political leadership has had to endure in recent years. Of the leaders of the developing nations, India has had a code of constitutional rights since its establishment in 1948 and even China now has the protection of human rights written into its basic law.¹⁹ Africa has its charter and court,²⁰ as do the various nations on the continent of America.²¹

Inevitably, the breadth of such international success raises questions as to its depth. Learning that Russia, China and Turkey are all committed to human rights and that India – with its appalling poverty and caste system – has had such rights for decades rightly puts the reader on guard. The United States itself has been very coy about signing up to (and ratifying) international human rights treaties even while it has at the same time been presenting itself as the primary guardian of human rights around the world. The gap between rich and poor in the USA, the absence of basic entitlements to social security, health care and other economic and social rights, and the huge dominance of money in the political arena, all reflect an ambiguity towards the practice of human rights at the very heart of the country whose foreign policies are most identified with their promotion.²² There is a kind of perverse integrity to the US refusal even to pretend to commit to certain international agreements of which its political class disapproves. Making a paper commitment to this or that human rights convention or agreement is the easy part; forcing through

¹⁷ See A. Williams, *EU Human Rights Policies: A Study in Irony*, Oxford: Oxford University Press, 2004.

¹⁸ Cairo Declaration on Human Rights in Islam, 1990; Arab Charter on Human Rights, 1994.

¹⁹ Since 1994, the Constitution states: 'The State respects and protects human rights'.

²⁰ The African Charter on Human and Peoples' Rights 1981, and the African Court on Human and Peoples' Rights 1998, respectively.

²¹ Notably the American Convention on Human Rights 1969.

²² A point the Chinese make much of in their annual review of the human rights record of the United States: see the report for 2004 published by the Information Office of the State Council of the People's Republic of China, 3 March 2005.

the realization of such ideals via determined political graft, involving tough choices and unpopular decisions, is much harder – and it needs to be acknowledged that political slog is not something for which the proponents of human rights are renowned. It is not germane to this article to speculate why this should be the case: perhaps too many of those committed to human rights are either campaigners or lawyers, these being the two types of activists who are most mistrustful of the pragmatism required of democratic consensus-building. Whatever the reason, it is surely incontestable that there is in many countries a structural gap in human rights protection between theory and practice, between a state's claim to guarantee human rights and what happens on the ground.

This is the space that the discourse of counter-terrorism has managed to widen greatly. It was there before 11 September 2001, of course, but the law and practice of counter-terrorism has been gleefully seized upon by those forces within any society that are not strong (or foolish?) enough to dispense with the language of human rights altogether, but who are capable of working effectively to undermine its practical effect. What might spring immediately to mind is the way in which Russia and Turkey defend their actions against the Chechnya rebels and the Kurds respectively as necessary counter-terrorist operations. Also sadly predicable is the Zimbabwe government's condemning as 'terrorist' all those who oppose its incompetent rule. But the problem goes beyond the obvious targets. The International Commission of Jurists produces a valuable 'E-Bulletin on Counter-Terrorism and Human Rights'.²³ Its survey for June 2006 reports on new anti-terrorism proposals or laws in Kenya, Bahrain, the Maldives, Turkey, the Netherlands and Denmark. The survey it released two months earlier had noted Egypt's renewal of emergency legislation, the extension of anti-terrorism legislation in the Philippines, and new wiretap laws in Australia.

The scale and breadth of laws such as these is beyond the scope of this article, as is a detailed assessment of what each involves: the necessary, descriptive treatises are gradually coming on stream as academic lawyers and other scholars catch up with all the changes that are being pushed through under the anti-terrorism agenda.²⁴ Such laws do, however, characteristically involve a great increase in the power of the state vis-à-vis the individual, a commensurate movement away from legal and ethnic or religious groups –

²³ www.icj.org.

²⁴ It is too early for a comprehensive comparative treatment. Two excellent books with a broader range are R. A. Wilson (ed.), *Human Rights in the 'War on Terror'*, Cambridge, Cambridge University Press, 2005, and H. Duffy, *The 'War on Terror' and the Framework of International Law*, Cambridge, Cambridge University Press, 2005.

some of whose members are involved in terrorist political accountability for the exercise of that power, and a drift in the direction of the partisan exercise of discretion against members of particular or other subversive activity. The challenge for many of the writers tracking these new laws will be the relatively straightforward one of textual exegesis. Some with more liberal instincts might criticize this or that provision without questioning the central thrust of the law they are scrutinizing. Yet this last task is surely an obligation for the human rights scholar. He or she must be prepared to assess critically the impact on his or her subject of the anti-terrorism law that he or she is scrutinizing, the way in which it departs from principles of legality or of equal treatment or the manner in which it flouts the requirements of legal or democratic accountability. The human rights scholar is necessarily not neutral on whether or not his or her subject should exist, and exist not merely as an ethical camouflage for the safe promotion of other state interests but as a true set of guarantees, delivering a better life for all and protecting individuals and minorities from horrific assaults on their dignity. Judgement, a feel for the context of a law, sense of right and wrong, a capacity to get stuck in, to praise this court opinion while condemning that parliamentary decree: these are the marks of the human rights lawyer and scholar as much as the human rights campaigner or NGO spokesperson. These are unfashionable notions for an academy frequently tempted by the intelligence of its members into levels of detachment that make them watchers rather than forgers of the world in which they live. But if human rights scholarship is not activist in this sense, it is in truth a branch of something else (law or international relations or political science) and not a separate academic engagement worthy of the name.²⁵

Understood in this sense, human rights scholarship is not easy. As indicated in the opening remarks in this article, it faces pressures from within as well as from without. As far as the first of these is concerned, human rights practitioners (academic and activist) need to be alive to the risk of their subject being captured and irredeemably tarnished by the anti-terrorism agenda. It is both inevitable and right that all legally enforceable human rights instruments in a democracy should allow for exceptions and derogations in the interests of national survival: the values that give rise to such legal human rights may be absolute but their expression in legal form cannot be held to be such without descending into incoherence. It does not follow from this, though, that undemocratic regimes or governments with the flimsiest of democratic facades can renege on their human rights obligations under cover of an asserted state of emergency for which they are neither legally nor

²⁵ An outstanding example of engaged scholarship with a human rights dimension, albeit also with a broader remit, is J. Rehman, *Islamic State Practices, International Law and the Threat from Terrorism*, Oxford, Hart Publishing, 2005.

politically accountable. Nor ought even a democratically legitimate executive be able to claim ‘national security’ as a trump with which to defeat without further discussion all other interests. It is the job of human rights scholars and others in the human rights community to say all this, even when the various branches of the state are looking the other way. A ‘human-rights respecting’ government may declare that everything is now all right in China, or Algeria or wherever it might be. It might enact its own anti-terrorism laws, declaring them to be justified by rather than subversive of relevant human rights instruments, and then be supported in this view by both the legislative and judicial branches of the state. In neither of these cases, the international or the national, ought human rights practitioners simply to accept the version of events that they are being offered. To the scholar of human rights falls the responsibility of analysing such changes not only for consistency with the relevant human rights charter but also for compatibility with the trio of core values – respect for human dignity, legality and democratic accountability – which are at the centre of truly universal human rights.

The external pressure on human rights presents an even greater challenge to the human rights academic and practitioner. Here no effort is made to fit the violations of human rights within their own frame of reference, to justify them by reference to this narrow exception or that technical derogation. Rather human rights is said to stand for something different, a set of values that transcend the particular case and reflect the strength of a civilization rather than a way of treating human kind. In Israel recently, the high court upheld a law, presented as a measure to prevent terrorist attacks, the effect of which is to forbid Israeli citizens and their spouses from the occupied territories from living together in Israel.²⁶ The parliament of the same country (the Knesset) has also just approved a law allowing security forces to detain persons suspected of ‘security’ offences for up to 96 hours before being brought before a judge and for up to 21 days without access to a lawyer.²⁷ These are just two randomly chosen recent examples among many. The counter-terrorism operations in southern Lebanon, which involved the mass use of cluster bombs in the final days of the conflict, would be another. The point of mentioning Israel here – and not this or that regime uncontroversially perceived as authoritarian or despotic in the West – is the way the country

²⁶ The law restricting spouses is the Nationality and Entry into Israel Law (Temporary Order) (Amendment) 2005. For the controversy over the detention legislation, see International Commission of Jurists, ‘E-Bulletin on Terrorism and Human Rights’, 12 (June 2006), p. 3, available at www.icj.org.

²⁷ See www.icj.org.

both sees itself and is seen. Despite these judicial, legislative and military actions, Israel is still regarded by its government and the many who defend its actions at home and abroad as a place where human rights values make it different from (better/more Western than?) the countries contiguous to it.²⁸

In a similar vein, the way in which the USA administration of George W. Bush has promulgated its declared 'war on terror' has involved what are described by many as obvious violations of basic human rights principle: the rejection or unilateral redefinition of international human rights law; the refusal to abide by international humanitarian law; the extension of the powers of the president in a way that explicitly involves supremacy over both the legislative and judicial branches; the detention of 'unlawful combatants' at Guantanamo and elsewhere, and of course, notoriously, the prisoner abuse at Abu Ghraib and elsewhere, and the rendition of suspected terrorists to friendly countries where torture as a means of interrogation is routine. The point is not to go into any detail on these well-known actions by either the USA or Israel, nor to obscure the fact that when the worst excesses of the military are uncovered in either country they are condemned by the authorities (albeit invariably as mistakes or as one-off departures from otherwise good standards of behaviour, with punishment perhaps following, perhaps not). Our interest lies rather in observing that, these extremes apart, in neither country do the persons engaged in such actions perceive themselves to be violators of human rights standards. Rather they see themselves as the true defenders of human rights. This is even when they are engaged in breaches of national and/or international human rights law. How can this be so and what are the implications for our subject?

The answer is supplied not from within human rights law as such but from within a more general discourse of human rights, one that emphasizes a morality of the lesser evil.²⁹ In its clearest and most coherent form, this approach asserts that the danger facing our democracies and our culture of human rights is so great, so evil that we are entitled, indeed morally obliged, to fight back. In defending ourselves in this way it may well be that we ourselves have to commit evil acts, to commit harms that run counter to our fundamental principles, but that these actions are nevertheless justified, both

²⁸ See for a general flavour of this kind of literature B. Netanyahu, *Terrorism: How the West Can Win*, London, Weidenfeld and Nicolson, 1986. The point is dealt with at length in C. A. Gearty, 'Human Rights in an Age of Counter-Terrorism', Oxford Amnesty Lecture held on 23 February 2006, text available at www.lse.ac.uk/Depts/human-rights/ under index of documents.

²⁹ See, for example, M. Ignatieff, *The Lesser Evil. Political Ethics in an Age of Terror*, Edinburgh, Edinburgh University Press, 2004.

as necessary (to save ourselves) and as less evil than what our opponents do (both because we try to ensure our actions are less bad and because we still believe in accountability and legality while our opponents do not). This goes for Israel as much as it does for the United States: the West together with its honorary member Israel must hold together or it will lose all that is precious about its civilization. The evil we all confront is of course the terrorism against which this new but necessary war is being waged. To the extent that some Western nations do not see that terrorism is this serious, and are as a result less inclined to be enthusiastic about the war on terror – and about the need to do some necessary evil – then they are effectively culpable for the destructive violence that is made possible by their laxity.³⁰

There are many things worryingly wrong about this perspective when viewed through the kind of human rights lens that this article has constructed. It is the job of human rights scholars not only to observe but also to fight back, to rescue their discourse from the virus of justified wrongdoing. First, the concept of ‘necessary evil’ reintroduces into international affairs the language of evil, when one of the primary achievements of the international legal order has been to remove such tendentious and highly inflammatory absolutist talk from the conduct of nation-states.³¹ We do not need to live in postmodernist times to know that ‘evil’ is in the eye of the beholder, and that unleashing ‘necessary’ evils on the world is a recipe for moral anarchy. Secondly, the notion subverts the core of the human rights message, since it effectively reintroduces the principle of national utility in place of that of individual dignity. True, the argument requires that the evils not be gloried in but rather done reluctantly for the greater good, but how real is this distinction? Is a sadistic act really less bad if prefaced by the remark, ‘this is going to hurt me more than it is you’? The point is hardly an important one, however, because, thirdly, as a matter of practice on the ground, necessary (limited) evils quickly give way to greater ones; roughing up becomes torture, beatings become killings, deliberate humiliation becomes sadistic perversion. We now know enough sociology to understand that the road to egregious human rights abuses invariably starts with a few limited and purportedly efficacious darts into qualified barbarity, that an Abu Ghraib is bound to follow once you talk about the evil of your opponents and suspend international law in your dealings with them, from whatever motive and for however laudable a shortterm goal.³² The efficacy of a ‘necessary evil’ relies on the notion of a

³⁰ A. M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, New Haven, CT, Yale University Press, 2002.

³¹ G. Oberleitner, ‘A Just War Against Terror’, *Peace Review*, 16 (2004), p. 263.

³² C. A. Gearty, ‘With a Little Help from Our Friends’, *Index on Censorship*, 34 (2005), p. 36.

'clash of civilizations'³³ to give it strength, and this in turn positively invites an approach to the world that is selective as to the merit it accords particular people(s). The effect of an approach to human rights rooted in Western values is to deny the subject the universality on which it depends.

THE BRITISH EXPERIENCE

Turning now to the United Kingdom, the first and important point to make is that the political and academic community in this country has not developed a legal or moral argument rooted in the apocalyptic language of a war between good and evil. While there can be little doubt from the speeches of the prime minister that he shares this perspective on world affairs,³⁴ it has not worked its way through into the mainstream of law and practice. The United Kingdom authorities on the whole still eschew the notion of a 'war on terror' and balk at explicit violations of international human rights law rooted in vague talk of necessity.³⁵ On the other hand, the changes outlined at the start of this essay that have been brought about via the parliamentary process, and the pressures being put on the judiciary by the executive to make them (and other anti-terrorist initiatives) work, do speak of a hardening of attitudes on the part of the authorities. This amounts to a shift in sensibility from anxiety about the repressive nature of such proposals to proud justification of them, an assertive transformation that has been laced with contempt for those who in the words of Home Secretary Dr John Reid just 'don't get' how little the old rules matter anymore.³⁶ One of the groups the present home secretary has explicitly castigated as out of touch in this way are the defenders of human rights law; there are challenges here for human rights practitioners that are of the utmost seriousness.³⁷

The threat to human rights is to each of its defining parts. As far as respect for human dignity is concerned, the main battleground has been over the implications of the universality of human rights. The government has entirely accepted the domestic duties that flow from the Human Rights Act, namely

³³ S. Huntington, 'The Clash of Civilizations', *Foreign Affairs*, 72 (1993), p. 22.

³⁴ See T. Blair, 'Not a Clash between Civilizations but a Clash about Civilization', speech to the Foreign Policy Centre and Reuters, 21 March 2006.

³⁵ See the speech by the Lord Chancellor Lord Falconer of Thornton in Sydney on 13 September 2006, on 'The Role of Judges in a Modern Democracy' in which he condemned the detentions in Guantanamo as a 'shocking . . . affront to the principles of democracy'. available at www.dca.gov.au/speeches/2006/sp060913.htm.

³⁶ See the speech by the Secretary of State for the Home Department Dr J. Reid at Demos in September 2006, 'Security, Freedom and the Protection of our Values', available at www.labour.org.uk.

³⁷ Ibid.

that there should be no torture or inhuman or degrading treatment or punishment meted out to those who happen to be within the jurisdiction and that there should be no wrongful taking of life. What the executive resolutely refuses to accept, however, is that these obligations should have any international dimension. In feeling compelled by law to insist that this is indeed the case, members of the judicial branch have been the subject of withering critiques from senior government ministers; some of the comments have been unprecedented in their fierceness in the British political context.³⁸ The tension has arisen on three fronts in particular. First there is the running sore of the *Chahal* judgment,³⁹ a decision of the European Court of Human Rights in 1994 that confirmed earlier case law⁴⁰ to the effect that a person could not be deported from Britain if the only country willing to receive him or her was a place where he or she was likely to be tortured or killed. This was irrespective of why the UK was seeking to expel the person: he or she might have been considered a security risk, or committed serious crimes, or be an illegal entrant, or even have committed serious terrorist crimes in order to get here. None of this trumped their overriding entitlement to remain if such a person could persuade a judge that expulsion meant a gross breach of their basic rights. At a time of great global uncertainty, when there are regrettably many places where a credible argument about the torturing-tendencies of the authorities can be made, the government – and many members of the general public – have come to view this safeguard as a backdoor route to permanent residence in the UK. The *Chahal* case is under review in the European Court of Human Rights with judgment expected in 2007.⁴¹ If the ruling is upheld, human rights practitioners must gird themselves robustly to defend it in the face of the possibility of a hostile UK reaction.⁴²

Secondly, there have been the successful efforts of human rights lawyers to extend the jurisdiction of the Human Rights Act to the actions of the executive with regard to the invasion and occupation of Iraq. Most remarkable of all, but still at a very early and uncertain stage in the litigation process, is *R(Gentile) v Prime Minister*,⁴³ in which the Court of Appeal has accepted the possibility of a human-rights-law-mandated inquiry into the legality of the invasion of that country. More routine but even more controversial from a military point of

³⁸ For one among many examples see the comments reportedly made about the likelihood that judicial proceedings would be ignored in relation to the deportation of persons to Iraq: *Guardian*, 5 September 2006, p. 1.

³⁹ *Chahal v United Kingdom* (1996) 23 EHRR 413.

⁴⁰ *Soering v United Kingdom* (1989) 11 EHRR 439.

⁴¹ *Ramzy v Netherlands*.

⁴² Now assisted by an excellent report, Human Rights Watch, *Dangerous Ambivalence. UK Policy on Torture since 9/11*, London, Human Rights Watch, 2006.

⁴³ [2006] EWCA Civ 1078.

view have been those cases in which the armed forces in Iraq (and by extension elsewhere) have been required to adhere to basic human rights law when interacting with those who have for whatever reason come under their control. While not going the whole way to impose the Human Rights Act on military personnel, the courts have insisted that it applies where Iraqis are effectively under British control, being subject to arrest or held in detention, for example.⁴⁴ Allied to the incendiary nature of the substantive abuse that is usually being alleged (murder, torture, inhuman and degrading treatment), these cases have had a very negative effect on public perception of the legitimacy of British operations in the whole region. They have also opened up a debate within government and the military about the inadvisability of subjecting the state's forces to this jurisdiction that closely resembles what occurred when the United Kingdom was first considering subjecting itself to the then nascent European Convention on Human Rights in the early 1950s: the Colonial Office was very strongly opposed for reasons that will be more apparent now than in the less militarily active 1970s and 1980s.⁴⁵

The third area in which extra-jurisdictional breaches of human dignity have been to the fore has been in relation to a matter fundamental to human rights: the absolute prohibition of relying on 'evidence' generated by the use of torture and inhuman and degrading treatment. In an important recent case, the appellate committee of the House of Lords, sitting as a court of seven rather than the usual five, was unequivocal in its condemnation of the practice and clear that the supposed information procured by such means should never be taken into account by a judicial body or administrative tribunal in the United Kingdom.⁴⁶ Where the court was less clear was on the nature of the burden that rested on those alleging torture to establish that such maltreatment might have occurred. The dissents of Lords Bingham and Nicholls from the standard adopted by the majority were couched in sufficiently strong terms to raise the suspicion that the overall effect of the decision might have been to condemn all torture unequivocally whilst making proof of its occurrence (or possible occurrence) impossible as a matter of practice. Only time will tell if the judgment is in fact a mere camouflage for reliance on the brutality of other

⁴⁴ *R(AI-Skeini) v Secretary of State for Defence* [2005] EWCA Civ 1609.

⁴⁵ Apart from in Northern Ireland, of course, but the colonial analogy never worked there, the six counties that made up the British section of the province of Ulster being part of the UK as a matter of constitutional law.

⁴⁶ *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71. Their lordships considered that immediate administrative actions to divert catastrophe could be legitimately undertaken, even where the source of the information that underpinned the action might have been contaminated by suspicions of torture.

states: clearly this is something on which the academic human rights community cannot afford to be neutral.

We turn now from human dignity to the second of the key areas of human rights. This is respect for democratic rights, in particular for civil and political rights. These have been traditionally described in the British constitutional context as our civil liberties. The breadth of the definition of terrorism has an important effect here, rendering vulnerable political perspectives that in the absence of terrorism laws might be considered at best justifiable, at worst tolerable in any society committed to the free exchange of views that marks out a democratic society.⁴⁷ Thus the Terrorism Act 2000 criminalizes the incitement of terrorist acts overseas.⁴⁸ Uncontroversial so far as violent subversive action in democracies is concerned, such provisions become more suffocating when aimed at speech and/or action designed to destroy tyrannical regimes. It is regrettable that the Terrorism Act makes no distinction of this nature: seeking to topple the Burmese/Myanmar junta is on an (immoral) par with opposing the Swedish government by force. So far as political speech aimed at domestic consumption is concerned, one of the most important changes that has occurred in recent years has been the marked growth in the acceptance of banning organizations and associations.⁴⁹ Not so long ago this was thought to be such a draconian and repressive action that the IRA were permitted to remain a lawful association in Britain until as late as 1974, notwithstanding the campaign of systematic violence against soft targets in London and other British cities that the organization had been enthusiastically promulgating to bloody effect for over two years. Even after the Birmingham and Guildford pub bombings of late 1974, the ban was a subject of much anxious consideration.⁵⁰

In marked contrast to those times, the power of proscription, now embedded in an expanded form in the UK's permanent anti-terrorism laws, is used with great regularity and without (or so it seems) the kind of ministerial conscience-wracking that marked its deployment in the past. At the last count 54 groups were banned, 40 connected to 'international terrorism', the rest related to Northern Ireland. The effect of these orders is to curb organizations as such without the need to bring substantive charges of any sort against their members or against the body that is being banned. This used to be regarded as a serious infringement of the right to freedom of association, now enshrined in Article 11 of the European Convention on Human Rights. In deference to that

⁴⁷ Terrorism Act 2000, section 1.

⁴⁸ Sections 59–61.

⁴⁹ Terrorism Act 2000, part 2.

⁵⁰ See Gearty and Kimbell, *Terrorism and the Rule of Law* for a flavour of the discussion in the 1980s and early 1990s.

provision, and to avoid falling foul of it, the Terrorism Act, procedure does provide for an appellate body to which banned organizations can appeal.⁵¹ Despite this, it is surely still right for human rights scholars to be strongly opposed to such banning orders. Even where correctly targeted, their effect is to drive underground (thereby making harder to penetrate) a membership that is committed to a programme that involves criminal acts. Where wrongly applied, the orders choke off political discussion that should be allowed in a liberal democracy as a matter of principle. It needs to be remembered as well that such bans often reach well beyond the bodies subject to them, being both over-broadly interpreted by the authorities and misconstrued by the general public as prohibitions on whole categories of speech. This was the lesson of attempts to control political speech in Northern Ireland, not only via proscription but also through the notorious UK-wide ‘media ban’ on Sinn Féin and others introduced by the Thatcher government in 1988.⁵² The latter initiative in particular had a large chilling effect on discussion of Irish affairs in Britain. It may well be that the combined effect of the current proscription laws with the new offence of glorifying terrorism introduced in the Terrorism Act 2006⁵³ will have the same effect on the expression of Islamic-based political opinion in Britain today.

The third threat to human rights thinking posed by the discourse of anti-terrorism lies in its potential impact on liberty and the rule of law. We saw earlier that a commitment to legality is one of the key indicators of human rights: requiring that all state actions be justified by law and that the punishment of individuals for wrongs done should only follow an independent process of adjudication are two of the benchmarks of a human-rights-respecting society. The two, and particularly the second, are now under challenge. The legislative response to the attacks of 11 September 2001 included a power of executive detention for ‘suspected international terrorists’, a category of foreign persons who, while not vulnerable to criminal prosecution, were sufficiently suspicious to warrant removal from the country yet whose expulsion could not take place because the only places willing to receive them were states with a record of serious ill-treatment of just such persons. The new regime put in place by the Anti-Terrorism, Crime and Security Act 2001⁵⁴ contained many legal and political safeguards, making the constant comparison made by critics with the legal ‘black hole’ of

⁵¹ Terrorism Act 2000, section 5, schedule 3.

⁵² K. D. Ewing and C. A. Gearty, *Freedom under Thatcher. Civil Liberties in Modern Britain*, Oxford, Oxford University Press, 1990, pp. 241–50.

⁵³ Section 1.

⁵⁴ Part 4.

Guantanamo inappropriate, but it was enormously controversial throughout its short life, attracting the opprobrium of various parliamentary and other committees before being effectively destroyed by the near-unanimous ruling of the House of Lords that it infringed the European Convention's liberty and non-discrimination rights and that no public emergency justified these particular actions.⁵⁵

What did for the detention powers in the 2001 Act was the irrational distinction between foreigners and others, with its apparent assumption that only the former could be terrorist: foolish even at the time, it was conclusively exposed as such with the attacks by four British men on the London transport system on 7 July 2005. By then and in response to the lords' ruling, a new system of anti-terrorism control orders had been put in place.⁵⁶ Operating outside the criminal law and with much less judicial involvement than that process would require, such orders can be made against all persons within the jurisdiction and can impose restrictions on movement, on social interaction, on contact with family members, on business dealings and much else besides. At their extreme, where departure from the right to liberty in Article 5 of the European Convention is required, such orders can involve the imposition of what is effectively house arrest. It is early days and the new system has yet to bed down. Challenges to their substance and to their procedural form are currently going through the courts, and it remains to be seen whether they will emerge unscathed from this judicial scrutiny.⁵⁷ The probability surely is that they will, with the senior judiciary being likely to be reluctant to pick a fight over legislation that was explicitly designed to meet their objections to the earlier, foreigners-only regime. The further probability is that, as with the government's anti-social behaviour orders (ASBOs), the procedure will take awhile to get off the ground but will come over time to be used against not just suspected terrorists in the popular meaning of the term but against others, involved in forms of civil libertarian protest, who are at the margins of but within the broad legal definition of the term.⁵⁸ The spectre this raises for the health of political freedom in the United Kingdom is not an attractive one, especially when allied to the growing power of money in traditional politics with the consequent reduction of opportunities for political change within the traditional democratic sector.

⁵⁵ *A v Secretary of State for the Home Department* [2004] UKHL 56. For more details see C. A. Gearty, 'Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?', *Current Legal Problems*, 58 (2005), p. 25.

⁵⁶ Prevention of Terrorism Act 2005.

⁵⁷ See *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140; *Secretary of State for the Home Department v JJ* [2006] EWCA Civ 1141.

⁵⁸ Compare *R (Singh) v Chief Constable of the West Midlands* [2006] EWCA Civ 1118.

CONCLUSION

It is time now to review the challenges the anti-terrorism narrative poses for human rights. The first of these is perhaps the most important as well as the most difficult: what are the foundations of the subject? Where do human rights come from? What is their basis? Why believe in human rights? Even after the growth of postmodern scepticism should have subverted it, the subject of human rights was able to maintain its coherency by pointing not to its religious or rational justifications but rather to the fact of its existence in international law; the declarations and conventions and treaties and so on were what gave it an essence. This was always a doubtful manoeuvre: things are not true merely because they have once been agreed and written down. But the surge of anti-terrorist anxiety across the world has led to a fundamental questioning of this basic law: why are we against torture? What is wrong with killing terrorists? Is not internment of suspects justified in these high-risk times? The human rights community needs to do more than revert to the international human rights standards or to the learned speeches of this or that acclaimed human rights guru. The argument needs to be at the level of first principles, but stressing the pragmatic as well as ethical value of a community organized on the representative principle, governed by law and dedicated to the flourishing of all its individual members. The ideal is to produce a universalist explanation for why human rights exist, but the scholar-protagonists of such rights should also carry some instrumentalist arrows in their quiver.⁵⁹

All this requires confidence in the rightness of the cause, a committed kind of scholarship, but also a willingness to listen and to hear other points of view. If the ethical power of the term 'human rights' has sometimes led their protagonists to believe that the discussion of first principles argued for above does not need to be made, then the structure of the subject has mislead others into believing that it is only about state actors and never about the conduct of individuals, no matter how grotesque or shocking. The individual-versus-state divide is in the very grain of human rights; it grows out of the liberal tradition and has been nurtured by the United States' traditional sympathy for the individual and antipathy to government, but it is now doing real damage to the subject. The point was brought home graphically in the immediate aftermath of 11 September: were the attacks that then took place not violations of fundamental human rights merely because a state had not done them? But if this was the case, it seemed hopelessly lop-sided to devote all one's human

⁵⁹ These points are further developed in Gearty, *Can Human Rights Survive?*.

rights energy to opposing the Patriot Act while being silent on Osama bin Laden. Exactly the same dilemma faced the human rights community in the UK after the London attacks on 7 July 2005: were these a breach of human rights or was the term to be reserved only for what the government did by way of response?

There is plenty of recent thinking on human rights, much of it fostered by the feminist critique, which provides the answer, namely that the subject is about the private actor as well as the state and that it covers the ground of individual as well as government-inspired wrongs. This does not mean that our subject should lose its state centred focus, which is the key to its attractive solidity. Rather it suggests a wider focus, one that engages positive obligations in a coherent and over-arching way. The human rights scholar should argue for the criminal process as the right way of securing the protection of all in the face of the threat of criminal aggression in general and terrorist violence in particular. The offences of murder, manslaughter, criminal damage and the like are, we can now see, parts of the human rights system: through prohibiting such attacks on the person and then acting to punish those who flout these rules, the state is discharging its positive duty to protect those under its protection from violation of their rights by third parties. With its guarantee of a fair trial, and its various evidential rules and burdens of proof and the like, the criminal trial is the place where guilt is attributed in a way that respects the rights of the suspect and thereby ensures (so far as any system can) that the punishment is being meted out to the right person. Essential to this process is that it is conducted independently of the branch of the state concerned with detection, that it takes place in public, and that the general public are involved as far as they can be. It becomes apparent from this that trial by jury is an essential feature of human rights, a way of protecting the community without being party to violations of individual rights in doing so. The language of terrorism, with its vague definitions and overbroad discretionary powers, and its dangerous invitation to depart from the rule of law, should have no role to play in such a human-rights-based system.

The key way in which the human rights approach differs from one that prioritizes the counter-terrorism perspective is that it is driven by *human* rather than by *homeland* security. Where others see land (or political systems) that must be defended, the human rights advocate sees a collection of individuals, cultures and peoples that must be protected. To the proponent of human rights, there is simply no 'we' that is separate from (better than?) 'them'; the West, dedicated to democracy and human rights, is overflowing with plenty of 'them' as well as 'us', so it makes no sense to divide the world into blocks of good and evil as at least some of the counter-terrorism enthusiasts implicitly do. The threat of indiscriminate killing of innocent

people to commit a political message is faced by all peoples the world over, and it can come from governments as well as from subversives and insurgents. The human rights advocate accepts that states are indeed entitled to do something about it. But where the counter-terrorist talks of rooting out evil, the human rights perspective insists on legality and proportionality, the dull talk of rules continuing to do its invaluable historic work as a substitute for the dangerously inflated language of good and bad, terrorists and counter-terrorists.

The End