

The Tension between Combating Terrorism and Protecting Civil Liberties

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INTRODUCTION

The tragic and previously unimaginable events of 9/11 have changed the United States and indeed the world in ways that are still emerging and difficult to comprehend. Leaders in many countries are struggling to find appropriate policies to deal with the new reality that this level of terrorism presents.

This is not a new problem and has been a challenge in many countries for many years. Governments combating terrorism in democracies have an additional burden. They are required to balance efficient law enforcement with respect for the civil liberties of their citizens. There is a consensus that all lawful means must be used to prevent such terrible crimes. The problem relates to the legitimacy, and sometimes the lawfulness, of those means. In particular, to what extent can civil liberties be curtailed and normal legal processes circumvented?

I do not share the pessimism of some human rights activists who suggest that the age of human rights has come and gone. Too much momentum has been gathered during the past sixty years to allow the recognition and implementation of human rights to be derailed. At the same

time there is danger in complacency, and the setbacks to the human rights movement since 9/11 must be acknowledged and recognised as a challenge.

THE DEVELOPMENT OF HUMAN RIGHTS SINCE 1945

It is as well to consider briefly the huge advances made in the area of human rights and humanitarian law since the end of World War II. I will devote disproportionate attention to the role of the United States, as it was crucial to these advances. It is ironic that the greatest threats to further advances are those emanating from this country.

Prior to World War II, the way in which citizens were treated by their respective governments was an internal affair and not the business of other governments or the international community. That changed in consequence of the horrors of the Holocaust that so shocked the conscience of all decent people worldwide.

The changes that occurred, for the most part, were inspired by leaders in the United States. The first was the decision, initially opposed by Winston Churchill, to put the Nazi leaders on trial. It was in consequence of the strong views of Henry Stimson, the Secretary for Defence, that President Truman convinced the leaders of the other three victorious powers that it would be inappropriate to summarily execute those leaders whose guilt was assumed. The consequence was the London Agreement, which set out the basis upon which the Nuremberg Trials were conducted.

International law at the end of World War II did not contemplate crimes of the magnitude of those that had been perpetrated. The result was that

new crimes were defined. One was crimes against humanity--serious offences committed against a civilian population. The idea was that such egregious crimes offended not only the people who were directly affected by them, but were truly crimes committed against the whole of humankind. The corollary was that the persons who committed such crimes were to be amenable to the jurisdiction of courts in any nation, and not only those where the crimes were committed or the victims were to be found. This effectively extended the concept of universal criminal jurisdiction which until then applied only to the crime of piracy.

In effect, universal jurisdiction was a genie released from the bottle. It found its way into the new Geneva Conventions of 1949, which recognised it for “grave breaches” of those conventions. In 1973, such jurisdiction was conferred upon all national courts of any nation in respect of the crime of Apartheid. It also declared Apartheid to be a crime against humanity. It was included in the Torture Convention of 1984. Universal jurisdiction was conferred on all courts by the series of international conventions, which began in the 1970s and were designed to combat terrorism.

The Genocide Convention of 1948 did not provide for universal jurisdiction. Instead, it explicitly assumed that genocide would be amenable to an international criminal court. That no such court was established for almost half a century would have surprised and disappointed the drafters of that Convention. It is accepted today that customary international law recognises universal jurisdiction for the crime of genocide.

In the last decade, a number of nations, especially in Western Europe, began to confer universal jurisdiction upon their domestic courts in respect of crimes such as genocide and other serious war crimes. This trend has accelerated in light of the complimentary provisions of the Rome Statute that established the International Criminal Court.

When the United Nations Security Council established the ad hoc criminal tribunals for the former Yugoslavia and Rwanda, it conferred jurisdiction on those courts on the basis that the crimes amenable to their jurisdiction were international crimes that attracted universal jurisdiction.

With regard to these developments, the United States played a contradictory role. Generally, the Congress and successive Presidents supported the recognition of universal jurisdiction for such shocking crimes. At the same time they objected to United States citizens, and especially members of the military, becoming amenable to foreign or international courts. This approach is demonstrated by the United States opposition to the International Criminal Court, the Kyoto Protocol on global warming and the Protocol to the Torture Convention which seeks to make prisons subject to international inspection.

At the same time, the United States was instrumental in persuading the Security Council to establish the ad hoc criminal tribunals. And, having been established, they would not have got off the ground without the diplomatic and financial support they received from Washington. And, again, it was the crucial support from the United States that led to the use of military force to

end the ethnic cleansing of the Albanian population of Kosovo in 1998. The United States played a key role in encouraging the Secretary-General of the United Nations to call the diplomatic conference in Rome, in June 1998, that gave birth to the International Criminal Court.¹ It is that Court that has become such anathema to the Bush Administration.

From this brief sketch of developments since 1945, it is apparent that human rights and humanitarian law have grown and developed in an impressive fashion. It is against that background that we must examine the current debate in this and many other countries with regard to the tension between respecting and protecting civil liberties and combating terrorism.

HUMAN RIGHTS DURING WAR

In secure times civil liberties, generally speaking, are not in much danger. It is in times of threat and fear that governments tend to take actions subversive of human rights. Democracies have not done too well in this area. In this country there was the shameful treatment of Japanese Americans during World War II. Some 126,000 were interned. Of those over 70,000 were American-born citizens. No single act of sabotage or espionage after Pearl Harbour was ever uncovered. A FBI Report of May 1942 stated as follows (citation needed):

We have not, however, uncovered through these searches any dangerous persons that we could not otherwise know about. We have not found among all the sticks of dynamite and gun powder any evidence that any of it was to be used in bombs. We have not

found a single machine gun nor have we found any gun in any circumstances indicating that it was to be used in a manner helpful to our enemies. We have not found a camera which we have reason to believe was for use in espionage.

Nearly three years later, in December 1944, the Supreme Court upheld the constitutionality of that mass evacuation of Japanese Americans. In the test case of *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944), the Supreme Court concluded:

Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders-as inevitably it must-determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot-by availing ourselves of the calm perspective of hindsight-now say that these actions were unjustified.

That decision of the Supreme Court is today generally recognised as a low watermark of the jurisprudence of the Court in the area of human rights. Many years later in 1988, the first President Bush apologised for that action and offered reparations to the survivors.

Overreacting to war-time danger and fears is by no means peculiar to the United States and similar actions have been taken in other major democracies. In England, the House of Lords deferred ingloriously to the Executive in *Liversage v Anderson*, [1942] A.C. 206. Defence Regulation 18B provided that the Home Secretary might order a person to be detained if “he has reasonable cause to believe [the] person to be of hostile origin or associations.” *Id.* at 207. Four of the five Law Lords held that it was sufficient for the Home Secretary to “think” he had good cause. *Id.* at 225. The decision was wholly subjective and therefore not capable of judicial review. Lord Atkin dissented holding that, on a proper interpretation of the statute, the Home Secretary was required to have reasonable grounds for detention. *Id.* at 226. He said that “amid the clash of arms the laws are not silent.” *Id.* at 244. He added that judges should not “when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive.” *Id.* In later years, Lord Atkin’s view prevailed.² The position was succinctly articulated by Lord Steyn, a member of the Judicial Committee of the House of Lords³:

The theory that courts must always defer to elected representatives on matters of security is seductive. But there is a different view,

namely that while courts must take into account the relative constitutional competence of branches of government to decide particular issues they must never, on constitutional grounds, surrender the constitutional duties placed on them.

That is the approach which the United States Supreme Court has now adopted in response to the efforts of the Bush Administration to place itself above the law and indeed the Constitution.

THE RULE OF LAW

I turn now to consider more directly the effects of combating terrorism in this and other democracies. In this debate, it has become a kind of mantra to express support for the duty on governments to take every reasonable step to protect the lives of their citizens and to prevent and punish human rights abuses both by domestic criminals and by non-state actors and especially terrorists.

The tension between protecting the state and upholding civil liberties is nothing new and this and many other states have had to grapple with it over the centuries. It is no problem for oppressive societies which, by definition, do not respect the civil rights of their citizens. They have all the machinery they might need to put down attacks from within and outside their borders. The problem is peculiarly one for democratic states.

The issue is the extent to which the rule of law is to be respected and allowed to protect people from arbitrary power. According to Professor

Archibold Cox, it was “the genius of American constitutionalism, which supports the Rule of Law” (1997:27).

One principle of the Rule of Law has become universally accepted since it was first enunciated by Professor A.V. Dicey in 1885: “A man may with us be punished for a breach of the law but he can be punished for nothing else” (p. 202).

No less controversial is the presumption of innocence in all criminal prosecutions. Guilt by association and collective guilt are inconsistent with a free and democratic society. So, too, the right of trial before an independent court. To the extent that these rights need to be limited during times of war, if at all, the limitation should be only to extent absolutely necessary to achieve a legitimate government interest.

The important provisions of the 1966 International Covenant on Civil and Political Rights came into effect in 1976. In the following year, President Carter requested the Senate to ratify the Convention. A statement by Robert Owen, the legal advisor in the State Department read in part as follows

(citation needed):

. . . the primary objective in the fostering of international commitments to erect and observe a minimum standard of rights for the individual as set forth by the treaties. This standard is met by our domestic system in practice, although not in precisely the same way that the treaties envision. By ratification we would commit ourselves to maintain the level of respect we already pay to the

human rights of our people; we would commit ourselves not to backslide, and we would be subjecting this commitment to and our human rights performance as a whole to international scrutiny.

The Senate did not agree to ratify the Convention. It was only in 1991, at the request of the Administration of the first President Bush, that the United States ratified the Convention. When he submitted the Convention for advice and consent, President Bush stated:

The end of the Cold War offers great opportunities for the forces of democracy and the rule of law throughout the world. I believe that the United States has a special responsibility to assist those in other countries who are now working to make the transition to pluralist democracies . . . United States ratification of the Covenant on Civil and Political Rights at this moment in history would underscore our natural commitment to fostering democratic values through international law . . . U.S. ratification would also strengthen our ability to influence the development of appropriate human rights principles in the international community. ([International Legal Materials, 1991: page](#))?

Another United States President said this:

America will always stand firm for the non-negotiable demands of human dignity: the rule of law; limits on the power of the state; and respect for women; private property; free speech; equal justice; and religious tolerance.

That was President George W. Bush in his 2002 State of the Union Address⁴.

The ambiguity in the policy and practice of the United States with regard to the protection of civil liberties, both in times of peace and war must be acknowledged. There is a common tendency in human rights circles to concentrate only on the negative aspect of this policy. This is neither fair nor productive.

On the other side there have been disturbing developments inconsistent with these clear expressions of principle. The most worrying developments concern the extent to which the present Administration is acting and being allowed by Congress to act in ways quite inconsistent with the Rule of Law:

- a) Keeping detainees indefinitely on Guantanamo Bay;
- b) Indefinite detention of illegal immigrants;
- c) Secret deportation hearings;
- d) Denial of legal representation to two American citizens being held on capital crimes;
- e) Special “military commissions”;
- f) Broad based wire tapping powers;
- g) Violating the privilege between attorney and client; and
- h) The serious abuse of prisoners in both Afghanistan and Iraq;
- i) “Ghost” detainees held in United States prisons abroad.

Until the recent decisions of the United States Supreme Court, the response from the Federal judiciary has been anything but reassuring. Some of

their decisions have echoes of the *Karamatsu* decision more than fifty years earlier. To all those around the world who traditionally look to the United States as the leader of the free world, it came as a great relief that the Supreme Court refused to allow the Bush Administration to proceed in the way it chose.

The despair of democrats around the world was demonstrated in the unusually strong criticism which came from Lord Steyn:

The purpose of holding the prisoners at Guantanamo Bay was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors. The procedural rules do not prohibit the use of force to coerce prisoners to confess. On the contrary, the rules expressly provide that statements made by a prisoner under physical or mental distress are admissible 'if the evidence would have value to a reasonable person', i.e. military officers trying enemy soldiers (Presidential Military Order of November 13, 2001, s. 4(3)). At present we are not meant to know what is happening at Guantanamo Bay. But history will not be neutered. What takes place there today in the name of the United States will assuredly, in due course, be judged at the bar of informed international opinion.⁵

We should also bear in mind the approach of the President of the Israeli Supreme Court, Aharon Barak, when violent interrogation was declared to be unlawful even if its use might save lives by preventing acts of terrorism. He said:

We are aware that this decision does not make it easier to deal with the reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties. (2002: 148).

THE GENEVA CONVENTIONS

It is also disturbing that the manner in which persons detained on the battlefield are being held in violation of the Third Geneva Convention. This Convention, to which the United States is a party, provides that such persons are deemed to be prisoners of war. If that status is questioned by the detaining power, the presumption continues to operate until a “competent tribunal” has determined their statuses. No such determination was made in respect of anyone held at Guantanamo Bay and all have been denied the status of prisoner of war. Notwithstanding the decision of the Supreme Court that all the detainees are entitled to question their detention before a competent court, there is doubt as to whether the tribunals chosen by the Administration are consistent with the order of the Justices.

What is of particular concern is that this violation of international law, binding on the United States, might well weaken the Geneva Conventions and be used to justify similar violations by other countries. Indeed, it might well return to haunt the United States if a *tu quoque* argument is used to justify similar treatment for captured members of the United States Army.

IS IT APPROPRIATE TO WAGE A “WAR” AGAINST TERRORISM?

The Supreme Court has also ruled that the Administration has acted in violation of the United States Constitution by holding United States citizens without trial and without access to a lawyer. In the recent past such conduct by other governments has earned the strongest condemnation from the government of the United States.

Part of the problem is the approach by the Bush Administration in using the analogy of “war” in combating terrorism. Terrorism is not new and it is not a “war” in the conventional understanding of that word. Terrorism is unlikely ever to end and regarding efforts to combat it as a “war” is calculated to allow the government to regard anyone who opposes undemocratic means as unpatriotic if not worse. If the government fails to act within the law it undermines its democratic legitimacy, forfeits public confidence, and damages respect for the criminal justice system.

THE EFFECTS OF 9/11 IN OTHER DEMOCRACIES

Repressive actions by governments have been taken in other democracies. Prior to 9/11, the United Kingdom had enacted wide-ranging measures to counter terrorism. It did so predominantly in the face of the Irish Republican Army terrorist activities in London. After 9/11, a new anti-terrorism statute was enacted. Its most controversial provision provides for the internment, without trial, of a “suspected international terrorist” if the Home Secretary reasonably believes that such person’s presence in the United Kingdom is a risk to national security, and suspects that such person is a terrorist. If the person is not a United Kingdom citizen, he or she may be detained for an unspecified period of time without charge or trial. There is no appeal to the ordinary courts but only to a government appointed commission. It was this provision that led the United Kingdom to derogate from the human rights provisions of the European Convention on Human Rights.

Similarly, the Indian legislation passed in the aftermath of 9/11 substantially invaded the rights of privacy and allowed for the detention of suspected terrorists without trial for periods of up to ninety days. When, a few months ago, a new legislature and executive were voted into power, the whole enactment was repealed by Parliament.

Post 9/11 draft South African legislation also made provision for detention without trial for periods of ninety days. After protests from leading politicians who had themselves been held under such provisions by the Apartheid authorities, the Parliamentary Committee on Justice caused these provisions to be removed.

Since 9/11, in a number of democracies, racial profiling and the detention of illegal immigrants from Muslim countries has become a common occurrence. This cannot be justified unless there is a factual basis that makes it both effective and proportionate to the perceived danger.

THE KNOCK-ON EFFECT

Disproportionate invasions of civil liberties, especially in the United States, are causing an unfortunate domino effect in other nations. It is being used to justify far more repressive actions. President Mugabe of Zimbabwe and Charles Taylor, the former head of state of Sierra Leone, both relied on the United States' classification of "unlawful combatant" to justify wholly oppressive actions against journalists critical of their leadership. Leaders in Indonesia have talked about establishing their own "Guantanamo Bay".

The United Nations Security Council was also tardy in making an appropriate effort to ensure respect for civil liberties in legislation that member states were peremptorily required by Resolution 1373 to enact. Initially the attitude of the Counter Terrorism Committee was that human rights were not the concern of the Security Council.

THE FUTURE

When he addressed the Counter Terrorism Committee, the late High Commissioner for Human Rights, Sergio Vieira de Mello said that:

[Such] measures must be taken in transparency, they must be of short duration, and must respect the fundamental non-derogable

rights embodied in our human rights norms. They must take place within the framework of the law. Without that, the terrorists will ultimately win and we will ultimately lose – as we would have allowed them to destroy the very foundation of our modern human civilization.

A United States commission of inquiry recommended, (to no avail), that a non-partisan committee of Congress should monitor the invasion of civil liberties by the executive branch of government. I would suggest that all democratic nations should take precisely that kind of initiative. Such a committee should report on violations of their own constitutional guarantees and of provisions of international conventions to which their nation is a party. That kind of public oversight would unquestionably act as an effective brake on excessive and unjustified encroachments upon civil liberties. The fact of oversight is in effect the best deterrent against disproportionate and inappropriate invasions of human rights.

Politicians, by the nature of their occupation, are concerned to be seen taking action that is likely to be popular with their electorate. In that context, it is deemed to be preferable to take inappropriate or excessive action rather than none at all. And the greater the public fear, the greater the temptation to be seen to be active in defence of the people.

If citizens are vigilant they can act as an effective brake against disproportionate and unnecessary invasions of civil liberties. A striking illustration of this is to be found with regard to the rules published in the

Presidential Military Order of November 13, 2001. They provided for secret hearings by military judges who could, by a majority vote impose the death sentence. There was no provision for independent defence counsel and no appeal to the ordinary courts. They provoked widespread criticism and especially from the leaders of the legal profession and from human rights organisations. The result was that in March 2002, the rules were drastically amended and some of the worst features were abandoned.

Those who value the protection of human rights and the dignity of all people should remain vigilant in these difficult and worrisome times. They should assist those in authority who hold a balance between the necessity of protecting the lives of citizens, on the one hand, and protecting their fundamental civil liberties on the other. They must ensure that governments and their officials do not rely on repressive measures for no reason other than to placate the fears of popular prejudice.

There is reason for optimism. It is to be found in the reaction of the Supreme Court of the United States to the unmeritorious claim of the Bush Administration that in a time of war the President's actions remain beyond the reach of the courts. It is to be found in the widespread criticisms of the military in reaction to the photographs that came out of Abu Ghraib Prison in Iraq. It is to be found in the responses from some members of Congress to those events and the refusal to allow the blame to be laid at the door only of the lower ranks who are sought to be made scapegoats. Importantly, it is to be found in the opposition to these actions from within the United States military

itself. I refer in this regard especially to the courageous and professional defences that have been pursued by military lawyers in cases against Guantanamo defendants.

There is similar reason for hope in the courageous decision of the Israel Supreme Court that found the separation wall in some parts of the Occupied Territory to be unlawful because of its devastating effects on Palestinians in the areas concerned.

There is reason for hope in the victory of the anti-Apartheid campaign that was instrumental in bringing down the unlawful white minority government in my country.

I would suggest that the post-9/11 setbacks for human rights will be seen by historians as an unfortunate detour and not a roadblock. The United States, as the sole superpower, has a special responsibility for shaping the world in the 21st Century. It can only hope to establish an international rule of law and to encourage democratic forms of government if it sets a good example at home.

The United States has traditionally been perceived as the leader of the free and democratic world. That perception has become tarnished in the days since 9/11. This country has sought to lead by dint of its power alone. My fervent hope and wish is that it will regain its position of pre-eminence in the democratic world by leading by its traditional values and not by power alone.

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Endnotes

¹ As at November 11, 2004 ninety-seven countries have ratified the Treaty.

² *Nakkuda Ali v Jayaratne* [1951] AC 66.

³ The Twenty-Seventh F. A. Mann Lecture delivered at Lincoln's Inn Old Hall on 25 November 2003.

⁴ Delivered January 29, 2002. Retrieved from <http://www.state.gov/r/pa/ei/wh/rem/7672.htm>

⁵ Cf. fn 3.