PROTECTING HUMAN RIGHTS IN A TIME OF TERROR: THE ROLE OF NATIONAL AND INTERNATIONAL LAW

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What is the role of law and legal principle in the face of terrorist attacks and threats? Are human rights expendable if national security is to be protected? I will consider those broad questions by reference to relevant facts and national and international legal requirements, with some attention to the particular rights of personal liberty, freedom of association and protection against torture. The article will discuss the role of international and national processes, legislatures, executives and courts and conclude with some general reflections about the role of law and lawyers. But first a little history.

I begin 2500 years ago in the aftermath of the War of the Seven against Thebes. Antigone, the daughter of Oedipus, learns that her two brothers, forced onto the two sides of the battle, have killed each other. She defies the order of Creon, King of Thebes, forbidding burial of her 'treacherous' brother, Polyneices.

According to a marvellous new translation by Seamus Heaney,[1] King Creon decrees as follows:

> Eteocles, who fell in our defence,
> Eteocles will be buried with full honours
> As a hero of his country.
> But his brother
> Polyneices, an exile who came back
> To visit us with fire and sword, a traitor
> …
> He is forbidden
> Any ceremonial whatsoever.
> No keening, no interment, no observance
> Of any of the rites. Hereby he is adjudged
> A carcass for the dogs and birds to feed on.
> And nobody, let it be understood,

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1 *The Burial at Thebes: A Version of Sophocles' Antigone* (2004) 17.

> Nobody is to treat him otherwise
> Than as the obscenity he was and is.
>
> This is where I stand when it comes to Thebes:
> Never to grant traitors and subversives
> Equal footing with loyal citizens,
> But to honour patriots in life and death.

This discrimination, degradation and breach of humanitarian principle the King justified by reference to patriotic duty and solidarity:

> For the patriot,
> Personal loyalty always must give way
> To patriotic duty.
> Solidarity, friends,
> Is what we need. The whole crew must close ranks.
> The safety of our state depends upon it.
> Our trust. Our friendships. Our security.
> Good order in the city. And our greatness.[2]

I. Some Facts

Figures are not all. There must also be qualitative judgment. The attacks of September 2001, December 2001, October 2002, May 2003 and many others going back over centuries were evil and criminal. Because of their random character and their motivation, such attacks may challenge the very essence of democratic societies. But quantitative measures are also significant. International Red Cross figures show that from the end of the Cold War, throughout the next ten years, on average over 4,000 people were killed in armed conflict week by deadly week, three quarters of them in Africa.[3] United States State Department figures show that through the same decade the average number of deaths from international terrorism was under ten a week.[4] To make another comparison, deaths from malaria averaged over 20,000 a week – almost all in sub-Saharan Africa.

Apart from the qualitative element there are also the possible threats, especially those presented by non-state armed groups. The International Institute of Strategic Studies in its *Military Balance 2003-2004* lists 165 non-state armed groups. They are to be found in 54 countries from Tunisia to Namibia in Africa, Colombia to Peru in the Americas, Japan to Afghanistan in Asia and the United Kingdom to Turkey in Europe, and they range in size from 20,000 to 30,000 members (in the Sudan) to just ten (in Spain). Almost all operate only locally but some, of course, as the world knows to its cost, do have wider agendas and targets, notably al-Qaeda and Jemaah Islamiah. Some have been in existence for several decades, reminding us that terrorism is nothing new, with many writings taking its beginnings back to Jewish struggles to throw off the Roman yoke in first century Palestine.

The IISS provides comment as well as facts. While in 2003 there were positive developments in longstanding conflicts involving terrorism in Sri Lanka and Nepal, in others there was little or no progress. They provide this sober assessment of al-Qaeda:

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2 Heaney, above n 1, 16.

3 International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2001* (2001) Table 15.

4 Eg Cronin 'Rethinking Sovereignty: American Strategy v the Age of Terror' (2002) 44(2) *Survival* 119, 128.

> As of June 2003, US assertions made in the wake of the Iraq war that al-Qaeda was 'on the run' and that the global counter-terrorism coalition had 'turned the corner' in the 'War on Terror' appeared over-confident. To the contrary, attacks linked to al-Qaeda – whose targets included US residents and corporations in Riyadh, Saudi Arabia, on 12 May, and Europeans and Jews in Casablanca, Morocco, on 16 May – suggested that it is still a potent and formidable terrorist organisation. They further indicated that US aggression in Iraq might have impelled the group to refocus its efforts on the Persian Gulf and the larger Arab World. That said, the post-11 September incarnation of al-Qaeda is qualitatively different from the entity that existed pre-11 September.
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> …
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> On the plus side, war in Iraq has denied al-Qaeda a potential supplier of weapons of mass destruction (WMD) and discouraged state sponsors of terrorism (eg Iran and Syria) from continuing to support it. In opening the way to demonstrating the merits of political pluralism and participation in a reconstructed Iraq, the war may also have improved the West's ability to address the root causes of Islamic terrorism through democratisation – although any such gains are as yet unrealised and by no means assured. On the minus side, war in Iraq has probably inflamed radical passions among Muslims and thus increased al-Qaeda's recruiting power and morale and, at least marginally, its operational capability. Any conclusive failure to find WMD in Iraq could only exacerbate these effects. On the balance, therefore, the immediate effect of the war may have been to isolate further al-Qaeda from any potential state supporters while also swelling its ranks and galvanising its will.[5]

II. The Rule of Law and its Essential Stability

Those facts and threats – notably the outrages of 11 September 2001 – have led to major changes in international and national law. Before considering some of those changes, I identify the competing principles. On the one side is the famous statement by Cicero, *inter arma silent leges*. After 11 September there were contentions to similar effect by American officials and commentators: the existing law regulating the use of force had to be altered in a basic way.

But compare Aharon Barak, the President of the Supreme Court of Israel. In a judgment ruling that a military commander had distributed gas masks unequally on the West Bank during the 1991 Gulf War when Iraq fired missiles at Israel, he said

> even when the cannons speak, the military commander must uphold the law. The power of society to stand up against its enemies is based on the recognition that it is fighting for values that deserve protection. The rule of law is one of these values.[6]

We are warned against succumbing to the expediency or the politics of the moment. Our history, our tradition, our profession have established principles to which as citizens and as lawyers we must strive to adhere, while meeting the challenges presented by terrorist acts.

Jacob Kellenberger, the President of the International Committee of the Red Cross, made the point in the context of international humanitarian law in 2002:

> Another question that has been raised is whether international law in general, and international humanitarian law specifically, are adequate tools for dealing with the post-September 11th reality. My answer to this is that international law, if correctly applied, is one of the strongest tools that the community of nations has at its disposal in the effort to reestablish international order and stability.[7]

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5 International Institute of Strategic Studies, *Military Balance 2003-2004*, 54, 356-357.

6 *Marcus v Minister of Defense* 45 PD(1) 467, 470-471. See also his splendid 'The [US] Supreme Court 2001 Term: Foreword: A Judge on Judging: the Role of a Supreme Court in a Democracy' (2002) 116 Harv L Rev 16, especially 148-160.

Even if international obligations are not perfect, it is not for any State to unilaterally abrogate them where they find them inconvenient. The President continued:

> Our belief in the continued validity of existing law should not be taken to mean that international humanitarian law is perfect, for no body of law can lay claim to perfection. What we are suggesting is that any attempt to reevaluate its appropriateness can only take place after it has been determined that it is the law that is lacking, and not the political will to apply it. Pacta sunt servanda is an age-old and basic tenet of international law which means that existing international obligations must be fulfilled in good faith. This principle requires that attempts to resolve ongoing challenges within an existing legal framework be made before calls for change are issued. Any other course of action would risk depriving the law of its very raison d'être – which is to facilitate the predictable and orderly conduct of international relations. Care should especially be taken not to amend rules designed to protect individuals in times of crises, because individuals have no other protection from arbitrariness and abuse except implementation of the law.

It is very significant and encouraging that the 28th International Conference of the Red Cross and Red Crescent in December 2003 and consisting of representatives of the 192 States Parties to the Conventions and 181 National Societies unanimously stated its conviction that 'the existing provisions of international humanitarian law form an adequate basis to meet challenges raised by modern armed conflicts'.[8] That declaration followed an extensive array of meetings and seminars held throughout 2002 and 2003 on the adequacy of the law. That adequacy was in the end not questioned in any essential way. What was vital was better compliance.

III. Rights and Permissible Limits on Them

Notwithstanding those general declarations, campaigns against terrorism may and in fact do put in question fundamental rights, including the rights to personal liberty, the right not to be tortured, freedom of association and the right to due process – to mention just the rights considered in this paper.

It is commonly said that no rights are absolute. It would appear to follow that limits on each and every one of them might be justified by the public interest in forestalling terrorism. To take the rights listed, administrative detention has been justified as a response to terrorism in many parts of the world and over much of recorded history;[9] a distinguished American academic lawyer has recently argued that torture should be available under judicial warrant in extreme situations, such as the ticking bomb scenario, to obtain information which would save many lives;[10] membership of proscribed organisations may be made an offence as may the provision of funds or other support to them; and rights of access to legal advice, to the courts, to habeas corpus and to the protection of due process generally might be denied or limited.

In addition to broad rule of law arguments and tests elaborated by professional bodies for assessing such denials or limitations on fundamental rights[11] we have a set of international treaty obligations against which such actions are to be tested. They appear in particular in the

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7 Dr Jakob Kellenberger Statement to the 58th Annual Session of the United Nations Commission on Human Rights, available < www.icrc.org>.

8 For further reflections on the continuity of international law after 11 September, see Campbell McLachlan 'After Baghdad: Conflict or Coherence in International Law?' (2003) 1 NZJPIL 25.

9 See eg Lord Bingham 'Personal Freedom and the Dilemma of Democracies' (2003) 52 ICLQ 841.

10 Alan M Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (2002).

International Covenant on Civil and Political Rights, where relevant, the 1949 Geneva Conventions and their 1977 Protocols and regional human rights treaties. The world community has over a lengthy period reached very broad agreement on the permissibility of limits on or denials of particular human rights and civil liberties. Almost all the States of the world are parties to those treaties[12] which may now be seen as largely declaratory of customary international law.

Those treaties provide for limits on rights in three different contexts – in the general case, when a state of emergency has been declared, and when war rages.

In the first, the general case, the statement of the particular right may articulate limits on the right, in two different ways. The right may incorporate a limit in itself. Thus the right to the liberty of the person, under article 9(1) of the Covenant, includes the right not to be subjected to *arbitrary* arrest or detentions. Next, the statement of the right may recognise that limits *may* (not must) be imposed. Thus, under article 22, the right to freedom of association may be subject to restrictions which are prescribed by law and which are necessary in the interests of national security or of public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedom of others. The assessment of what is arbitrary and what may be required to protect national security may well take account of the character of the terrorist activity if the justification for the particular detention regime or restraint on association is being justified on that ground.

Those two types of limits tend to support the proposition that no rights are absolute and that all are subject to limits even in peacetime, when there is no emergency. But the Covenant and, to anticipate, the Geneva Conventions and Protocols show that some rights are not subject to limits of either kinds. For instance, the prohibition on torture and cruel, inhuman or degrading treatment or punishment as stated in article 7 of the Covenant, has neither an inherent limit nor a permitted limit. That is also the case with the prohibition on slavery and on retrospective criminal liability (articles 8 and 15).

The limits just discussed are not tied to a specific situation such as terrorism. They are generally available to a State if it can satisfy their terms. The Covenant does however particularly address limits which may be imposed in public emergencies, which would include armed conflicts and may include terrorist situations. This is the second context. Public emergencies are the subject of article 4 of the Covenant which permits derogations from obligations in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed. The measures may derogate only to the extent strictly required by the exigencies of the situation. The measures are not to be inconsistent with other obligations under international law and are not to involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Those preconditions are stated in strict terms. On their face they can be and are in fact the subject of judicial examination by international courts as well as national ones. This is however an area where courts may well defer to executive judgment, as appears later.

Article 4 of the Covenant also makes it clear that, even if an emergency is declared, some of the rights are not derogable and cannot be limited. Those rights include the right to life (article 6), the right not to be subject to torture (article 7), the right not to be held in slavery or in servitude (article 8(1) and (2)) and the right not to be subject to retrospective criminal liability (article 15).

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11 Eg International Commission of Jurists, Frederico Andreu Guzmán, *Terrorism and Human Rights* (April 2002) and International Bar Association Task Force Report, *Global Principles on Suppressing Terrorism within International Law Framework* (October 2003).

12 154 parties to the ICCPR, 192 to the Geneva Conventions and 163 and 159 to the 1977 Protocols.

The rights under three of those articles (articles 7, 8 and 15) have the further feature noticed earlier; they are stated absolutely and contemplate no inherent or permissible limits in the general case.

I move to armed conflict – the third situation in which human rights may be limited. The Geneva Conventions state rights vital for the protection of humanity. They begin with this absolute statement: The High Contracting Parties undertake to respect and to ensure respect for this Convention *in all circumstances*. The Geneva Conventions distinguish between international and non-international conflicts. In both victims of conflict have fundamental rights. One notable provision is common article 3 of the 1949 Conventions, applicable in internal armed conflict. It provides in part as follows:

> The following acts are and shall remain prohibited at any time and in any place whatsoever with respect to persons taking no active part in the hostilities:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The first additional Protocol of 1977 on international armed conflicts states fundamental guarantees of persons who are in the power of a Party to the conflict. Those rights too are formulated in absolute terms, for instance, in article 75(2) which lists substantive rights similar to those in article 3 and which is considered to be declaratory of customary international law. Paragraph (3) of the article elaborates para (d) of article 3. Similar guarantees are stated in the additional Protocol relating to the protection of non-international armed conflicts (articles 4-6). Also important are the substantive and process protections included in the third and fourth Conventions of 1949.

The absolute character of the rights in this third category is emphasised by the prohibition on the renunciation of rights in each of the Conventions, the general prohibition on reprisals and the bar in the general law of treaties on setting aside humanitarian treaties by reason of breach.[13]

Standard sets of due process protections also appear in the antiterrorism conventions. So, the terrorist financing convention guarantees to those against whom proceedings are brought fair treatment, including rights under national law and applicable provisions of international law, including international human rights law.

It is striking that in 1977 as in 1949 the world community was willing to provide for greater protection for human rights in armed conflicts than it was in the 1950s and 1960s when it prepared general human rights instruments and allowed for possible derogations from those rights (notably due process rights) during public emergencies. Article 4(1) of course does prohibit derogations were they to breach *other* obligations under international law, which would include the Geneva Conventions.[14]

The protection and implementation of these rights presents a range of challenging and vital issues. The fact that I consider only some of the means of implementation and only some of the

13 Article 60(5) of the Vienna Convention on the Law of Treaties 1969.

14 See e.g. para 9 of the Human Rights Committee's general comment of 2001 on article 4, CCPR/C/21/Rev. 1/Add 11.

rights does not mean that I consider the other means and rights to be unimportant. Current shocking breaches in all regions of the world are compelling evidence to the contrary.

IV. The Role of the Executive and the Legislature in Protecting Liberties when Preparing Anti-Terrorism Legislation and International Monitoring

Executives and legislators increasingly recognise their responsibilities in preparing and administering legislation to test actions against human rights obligations. The testing may occur under national processes (such as a Bill of Rights), and international ones.

The international processes will generally include an obligation to report periodically to a monitoring committee, in the case of the ICCPR, the Human Rights Committee. Those processes, first, require the government authorities to prepare a report which among other things may provide justification for derogations from human rights effected in emergencies, second, may permit non-governmental organisations to prepare parallel reports for the monitoring committee and, third, provide for exchanges between the government and the committee and for the committee to make suggestions and recommendations to the government for changes in the law, suggestions and recommendations which will be the subject of the next round of reporting and exchanges. The increasing significance of this international monitoring process for national policy making and law reform is not always appreciated. In the case of international labour law such a monitoring process has existed for more than eighty years. The process may also be created *ad hoc* as with the Counter Terrorism Committee set up under Security Council resolution 1373 in September 2001.

National vetting may be provided for in legislation, as in Canada, New Zealand, the United Kingdom and the Australian Capital Territory. The original Canadian Bill of Rights 1959, the New Zealand Bill of Rights Act 1990, the United Kingdom Human Rights Act 1998 and the ACT Human Rights Act 2004 all require an appropriate Minister to advise Parliament about the consistency of proposed legislation with the national Bill. Underlying that public process are internal government processes which may be emphasised, as in New Zealand, by requirements laid down in the *Cabinet Manual*.

The parliamentary committee process may also include the examination of a government's instrument of derogation when an emergency situation is relied on to justify derogations from human rights. That happened for instance in the United Kingdom in November 2001 and later.

Such national processes may be complemented by international ones. For instance, in August 2002 the Commissioner for Human Rights of the Council of Europe issued an opinion critical of the justification for the British derogation and the arrangements for its review and renewal.[15] While recognising that states have an essential obligation to protect their institutions and their citizens against terrorist attack, he emphasised that the threat of terror be combated with due respect for the rule of law. And, while states had been afforded a large measure of discretion in their assessment of the existence of a public emergency, the Commissioner's opinion was that the general increased risk of terrorist activity post 11 September 2001 could not, on its own, justify derogation from the Convention. A number of European states long faced with recurring terrorist activity had not found it necessary to derogate from the Convention. And, even assuming the

15 Opinion 1/2002, Comm DH (2002) 7.

existence of a public emergency, it was questionable whether the British measures were strictly required. Other measures might have been equally effective without requiring derogation. As well,

> The proportionality of the derogating measures is further brought into question by the definition of international terrorist organisations provided by section 21(3) of the Act. The section would appear to permit the indefinite detention of an individual suspected of having links with an international terrorist organisation irrespective of its presenting a direct threat to public security in the United Kingdom and perhaps, therefore, of no relation to the emergency originally requiring the legislation under which his Convention rights may be prejudiced.

The United Kingdom also gave notice to the Secretary-General of the UN of derogation from article 9 (personal liberty), under article 4 of the Covenant. The Human Rights Committee, in a general comment on article 4, adopted on 24 July 2001, recalled that it had expressed its concern over States parties that appeared to have derogated from rights in situations not covered by article 4 and said this:

> Measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature. Before a State moves to invoke article 4, two fundamental conditions must be met: the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency. The latter requirement is essential for the maintenance of the principles of legality and rule of law at times when they are most needed. When proclaiming a state of emergency with consequences that could entail derogation from any provision of the Covenant, States must act within their constitutional and other provisions of law that govern such proclamation and the exercise of emergency powers; it is the task of the Committee to monitor the laws in question with respect to whether they enable and secure compliance with article 4. In order that the Committee can perform its task, States parties to the Covenant should include in their reports submitted under article 40 sufficient and precise information about their law and practice in the field of emergency powers. [16]

That emphasis on the processes of national decision-making and explanation was prominent in an early case when in 1981 the Committee upheld challenges by Uruguayan citizens to their being banned for 15 years from engaging in any activity of a political nature including the right to vote. The State party could not, the Committee said, evade its obligations under the Covenant by merely invoking the existence of exceptional circumstances. The State party was duty bound to give a sufficiently detailed account of the relevant facts to enable the Human Right Committee to fulfil its function of ensuring that the State party lived up to its commitments under the Covenant:

> If the respondent Government does not furnish the required Justification itself, as it is required to do under article 4 (2) of the Optional Protocol and article 4 (3) of the Covenant, the Human Rights Committee cannot conclude that valid reasons exist to legitimize a departure from the normal legal regime prescribed by the Covenant. [17]

Even on the assumption that there existed a situation of emergency in Uruguay, the Human Rights Committee expressed doubt that any ground could be adduced to support the measures enacted. The Government of Uruguay had failed to show that the measure was required in order to deal with the alleged emergency situation and pave the way back to political freedom.

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16 General Comment No. 29, CCPR/C/21/Rev. 1/ Add 11. Those propositions, along with the opinion of the Council of Europe Commissioner, were cited in a recent decision of the United Kingdom House of Lords, considered later in this article.

17 *Jorge Landinelli Silva v Uruguay*, Communication No. R8/34 (30 May 1978) UN Doc Supp No. 40 (A/36/40) 130 (1981).

V. The Role of Courts in Protecting Human Rights in the Context of Measures Taken for Reasons of National Security against Terrorism

That determination provides a link to the role of national and international courts in this area. Relevant to that role for national courts is the place of international law in national legal systems. Customary international law, it is generally said, forms part of the law of common law countries. But treaties, concluded by the executive in exercise of its prerogative, are generally seen in the Commonwealth as not becoming part of the law of the land. While the State is bound in international law by virtue of the various executive actions of signature, ratification or other acceptance, if a change in rights and duties under the law is required, then there must be appropriate legislative action.[18]

It does not follow, however, that national courts in these countries cannot have regard to treaties which are not incorporated into law. They may in particular see the treaty as relevant to the interpretation of a statute or as a contribution or to the clarification and development of the common law.[19] The likelihood of such actions has been promoted by a decade of meetings of judges, mainly from the Commonwealth, organised by Interights and the Commonwealth Secretariat. In 1988, at the first Colloquium held at Bangalore, they adopted a statement on the role of international human rights law in national law including these statement. It read in part:

> 2. … international human rights instruments provide important guidance in cases concerning fundamental human rights and freedoms.
> 3. There is an impressive body of jurisprudence, both international and national, concerning the interpretation of particular human rights and freedoms and their application. This body of jurisprudence is of practical relevance and value to judges and lawyers generally.
> 4. In most countries whose legal systems are based upon common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law. However, there is a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law – whether constitutional, statute or common law – is uncertain or incomplete.
> …
> 6. While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.
> …
> 7. … where national law is clear and inconsistent with the international obligations of the State concerned in common law countries the national court is obliged to give effect to national law. In such cases the courts should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of international legal obligation, which is undertaken by a country.

Justice Michael Kirby of Australia, commenting on the 10 years following the formulation of the Bangalore Principles, notes that some Australian lawyers (and not a few judges) were at first inclined to view the Bangalore Principles as completely heretical. His Honour observes, however, that in the following 10 years 'something of a sea change has come over the approach of courts in

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18 See, for example, The Parlement Belge (1878-79) 4 PD 129; *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA).

19 See eg New Zealand Law Commission *A New Zealand Guide to International Law and its Sources* (R34, 1996) 23 which lists ways in which treaties may be relevant.

England, Australia, New Zealand and other countries of the common law.'[20] That sea change is reflected in judgments, both in references to the Bangalore Principles and more widely in increased resort to international human rights instruments, and also in the striking alteration in the language of the Principles in their 1998 re-statement at the 8th Colloquium, again in Bangalore. The Principles now state that:

> 2. The universality of human rights derives from the moral principle of each individual's personal and equal autonomy and human dignity. That principle transcends national political systems and is in the keeping of the judiciary.
> 3. It is the vital duty of an independent, impartial and well-qualified judiciary, assisted by an independent, well-trained legal profession, to interpret and apply national constitutions and ordinary legislation in harmony with international human rights codes and customary international law, and to develop the common law in the light of the values and principles enshrined in international human rights law.
> 4. Fundamental human rights form part of the public law of every nation, protecting individuals and minorities against the misuse of power by every public authority and any person discharging public functions. It is the special province of judges to see to it that the law's undertakings are realised in the daily life of the people.[21]

The 1998 re-statement in particular removes the need for ambiguity (expressed as uncertainty or incompleteness in the 1988 principles) in the law before such norms become relevant.[22] It is still the case however that important limits remain. This is particularly so in the absence of a supreme constitution, as in New Zealand and the United Kingdom, or in the absence of an entrenched Bill of Rights, or in situations where the legislature has without doubt overridden the internationally required right.

In practice, three different situations involving interpretation by reference to international obligations can be distinguished:

1. the legislation in question aligns exactly or in substance with the relevant treaty provisions;
2. the legislation is intended in a general way to give effect to the treaty, but departs from its wording;
3. the legislation is not concerned in its main provisions and purposes with the treaty (which might indeed have been accepted by the government after the legislation was enacted) but the treaty is nevertheless claimed to be relevant to its operation.

One rationale for using international materials, in all those situations but especially the first, is the presence of a binding obligation on the State in international law. This is so whether the matter is put as one of Parliamentary purpose, that is that Parliament is assumed to have acted consistently with the State's international obligations, or as a broader presumption or approach to interpretation, that is the courts will attempt to read legislation so as not to place the State in breach of its international obligations. This necessarily requires a court to consider what those

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20 Michael Kirby 'The First Ten Years of the *Bangalore Principles* on the Domestic Application of International Human Rights Norms' (address to the Conference on the 10th Anniversary of the Bangalore Principles, 28 December 1998). For an account by the organiser of the series, Anthony Lester, see 'The Challenge of Bangalore: Making Human Rights a Practical Reality' [1999] EHRLR 273.

21 Developing Human Rights Jurisprudence, Vol 8: Eighth Judicial Colloquium on The Domestic Application of International Human Rights Norms (2001).

22 But see for a restatement of this traditional view, Lord Hoffmann in *Boyce v R* [2005] 1 AC 400 (PC), para 25. Compare *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44, *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 WLR 1, paras 36-38, 46-47 and 98-103 (HL) and *Attorney-General v Zaoui* (2005) 7 HRNZ 860 (SCNZ).

obligations actually are. This process has long been recognised. For instance in the 1820s Chancellor James Kent began his lectures to the law students at Columbia College with the law of nations, on the basis that the law of the United States or of New York would not be properly appreciated without that background.[23]

State responses to heightened security concerns are almost invariably carried out through legislation. In States with the shared common law heritage, this may in part be traced back to the common law's traditional antipathy towards executive action justified by national security, as in the great case of *Entick v Carrington*,[24] condemning search and seizure of documents without a statutory mandate. Powers of detention too must be justified by reference to statutory authority. In many Commonwealth countries, the definition of criminal offences is also statutory. In the aftermath of 11 September 2001, many states have passed legislation to deal with the 'new' threat posed by multinational terrorist organisations as required in part at least by Security Council resolution 1373. They include New Zealand, Australia the United Kingdom and other Pacific states.[25] Some of that legislation implements the anti-terrorism conventions mentioned earlier. How are courts likely to interpret such legislation?

I earlier suggested that courts may defer to executive judgment in areas of national security. The New Zealand Law Commission provided this summary of national court responses in 1991:

> Challenges to the legality of declarations of states of emergency have, in general failed. The Malaysian Constitution empowered the Head of State to proclaim a state of emergency if 'satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened' (Constitution of Malaysia Article 150). As a consequence of difficulties arising from the dismissal of the Chief Minister of Sarawak, the Head of State made such a Proclamation. The Privy Council rejected the challenge to its validity. It was not, the Judicial Committee said, for it to criticise or comment on the wisdom or expediency of the steps taken by the Government to deal with the constitutional situation. The questions of gravity of the emergency and the existence of a threat to the security of Sarawak 'were essentially matters to be determined according to the judgment of the responsible Ministers in the light of their knowledge and experience.' (*Ningkan v Government of Malaysia* [1970] AC 379, 391) The Privy Council left open the question (on which the Court below had divided) whether the validity of the Proclamation was even justiciable: in its view, that question of far-reaching importance remained 'unsettled and debatable' on the present state of the authorities (391-392).
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> Challenges to the validity of Proclamations or declarations of emergency made in New Zealand, India and Australia have also failed, with similar comments being made about the very broad, or even absolute, discretion of the Government. See, for example, *Hewett v Fielder* [1951] NZLR 755, 760 (Ftt Ct)); *Bhagat Singh v King Emperor* (1931) LR 58IA 169 (JC) (the Governor-General 'alone' could decide whether there was an emergency and had 'absolute power' in making Ordinances); *King-Emperor v Benoari Lal Sarma* [1945] AC 14, 22 (JC); and *Dean v Attorney-General of Queensland* [1971] Qd R 391 (SC).[26]

In one of its earliest decisions, the European Court of Human Rights held that Ireland was justified in 1957 in declaring a public emergency in terms of article 15 of the European Convention and that the imposition of administrative detention was 'strictly required by the

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23 *Commentaries on American Law* (1826) Part I: Of the Law of Nations.

24 (1765) 19 Howell's State Trials 1029; 95 ER 807.

25 Terrorism Suppression Act 2002 (New Zealand); Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Australia); Terrorism Act 2000 (UK) and Anti-Terrorism, Crime and Security Act 2001, and the Prevention and Suppression of Terrorism Act 2002 (Samoa).

26 Law Commission, *Final Report on Emergencies* (1991 NZLC R22) 364-365.

exigencies of the situation'.[27] The Court in this context has developed 'the margin of appreciation'.

It may be that that assessment is dated and that courts now may be more willing to review executive decisions taken in emergency situations. A mass of more recent material is now available, some of it indicating a less deferential attitude.[28]

The House of Lords in December 2004 ruled that a derogation by the United Kingdom under the European Convention on Human Rights to allow long-term or indefinite executive detention of foreign nationals suspected of terrorist activities was not lawfully made.[29] The first matter that their Lordships had to consider was whether a public emergency threatening the life of the nation existed. On this question their Lordships divided. A majority were prepared to accept that deference to the executive on this question was appropriate. Lord Bingham, delivering the principal speech, put the matter in terms of the institutional capacities of the courts:

> The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be an appropriate matter for judicial decision. The smaller, therefore will be the potential role of the court. … Conversely, the greater the legal content of any issue, the greater the potential role of the court …[30]

The determination of whether a public emergency existed was a pre-eminently political judgment.

A consideration of the second question, whether the measures were 'strictly required by the exigencies of the situation', was not however precluded by any doctrine of deference. In this the Lords rejected the argument of the Attorney-General that it was not for un-elected judges to review the decisions of the legislature on questions of national security:

> the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic.[31]

Questions concerning limitations on fundamental rights were of a legal character suited to judicial scrutiny – even close scrutiny.[32] This was particularly so in the case of fair trial rights and detention; courts were specialists in the protection of liberty.[33] By a majority of seven to one, their Lordships held that the measures adopted by Parliament were not strictly required; that was demonstrated by the fact that suspected UK-national terrorists, who were admitted to pose the same risk as non-national suspects, were not subject to the same detention provisions.

One Law Lord was prepared to go further and hold that no public emergency existed. Suggesting that a national court might more closely scrutinise a derogation than an international court,[34] Lord Hoffmann declared that the United Kingdom was not so fragile or fissiparous as to

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27 *Lawless v Ireland* (No 3) (1961) 1 EHRR 15.

28 For one notable commentary see Johan Steyn 'Guantanamo Bay: The Legal Black Hole' (2004) 53 ICLQ 1. See also the furious responses it generated in *The International Herald Tribune*, from Professor Ruth Wedgwood who has served as an adviser to the Pentagon on implementing rules for war crimes trials in military commissions and from the United States Ambassador to the United Nations in Geneva (2 and 16 December 2003).

29 *A v Secretary of State for the Home Department* [2005] 2 AC 68 (HL).

30 Ibid, para 26 Lord Bingham.

31 Ibid, para 42 Lord Bingham.

32 Ibid, para 116 Lord Hope.

33 *RJR-MacDonald Inc v Attorney-General of Canada* [1995] 3 SCR 199, para 68 La Forest J.

be unable to withstand a serious act of violence. While not underestimating the ability of fanatical groups of terrorists to kill and destroy, they did not threaten the life of the nation.

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve.[35]

A. Personal Liberty: Detention

The House of Lords was not there concerned with applications by the plaintiffs for direct relief in respect of their detention. By contrast in three recent American cases the courts were. The plaintiffs were detained in military facilities as part of the ongoing campaign against terror. I also mention a New Zealand case from the Second World War.

In the first American case, *Rasul v Bush*, the Supreme Court held in June 2004 that the Federal Courts had jurisdiction in habeas corpus proceedings brought on behalf of Australian and Kuwaiti citizens detained at Guantanamo naval base in Cuba.[36] While the reasons for the majority do not depend on the position of prisoners of war under international law, strong echoes of the concerns raised by many commentators can be seen in the grounds given by the Court for distinguishing an earlier decision[37] which had held that Federal Courts lacked jurisdiction to issue a writ of habeas corpus to 21 German citizens who had been captured during World War II in China, convicted by a military commission and incarcerated in occupied Germany:

> Petitioners in these cases differ from [those] detainees in important respects: They are not nationals of countries at war with the United States, and they deny they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

The reasons given by the Court suggest a real unwillingness to allow detainees to disappear into a legal black hole, and a sense of discomfort with the continuing denial of access to a tribunal to determine the status of the detainees as required by the (third) Geneva Convention for the protection of prisoners of war. The American approach had been to declare Taliban and Al Qaeda captured personnel to be illegal or 'enemy' combatants and not prisoners of war under the third Geneva Convention.[38] However, under the third Convention if there is doubt whether persons who have committed a belligerent act and have fallen into the hands of the enemy are POWs within the protected categories, they are to enjoy the protection of the Convention until their status has been defined by a competent tribunal. The United States authorities are now taking action on that matter.

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34 A view shared by Lord Hope: *A v Secretary of State for the Home Department* [2005] 2 AC 68 (HL), para 131.

35 Ibid, para 97. Compare the position he had taken just three years earlier in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, para 50. Generally see Lord Steyn 'Deference: a Tangled Story' [2005] Public Law 346.

36 *Rasul v Bush* 542 US 466 (2004). For contemporary discussions of the treatment of detainees see International Institute of Strategic Studies, *Strategic Survey 2004/05* (2005) 63-68 and Philippe Sands *Lawless World: America and the Making and Breaking of Global Rules* (2005) chs 7 and 9.

37 *Johnson v Eisentrager* 339 US 763 (1950).

38 Ari Fleischer, 'Special White House Announcement Re: Application of Geneva Conventions in Afghanistan' (7 February 2002) available < www.whitehouse.gov>.

Earlier, in October 2002, a very experienced United States international lawyer had called attention to the apparent American avoidance of that provision. On the substance he said this:

> I believe that it would be much easier and more convincing for the United States to conclude that the members of the armed forces of the effective government of most of Afghanistan should, upon capture, be treated as POWs. This is what we did in Vietnam, where we found it desirable to give virtually all enemy prisoners POW status.[39]

He continued,

> When I prepared the first draft of these comments, I assumed that the rejection of POW status for Taliban soldiers must have resulted from some unexplained central purpose, probably one related to the intention ultimately to prosecute some of them. The longer I ponder the reasons that might have inspired this decision by the President, the more I am inclined to suspect that there may well have been no such unexplained purpose. Might it not be the case that the present administration in Washington believes precisely what the White House press secretary said, that is, that the failure of the Taliban soldiers to wear uniforms of the sort worn by the members of modern armies and the support by the Taliban government of the unlawful terrorist objectives of Al Qaeda suffice to justify, or even require, denial of POW status to all members of the Taliban armed forces? While such a determination seems baseless, one can imagine its being urged by those who, in the Reagan administration, grotesquely described the Geneva Protocol I as law in the services of terrorism.[40]

In a second decision, *Hamdi v Rumsfeld*,[41] delivered on the same day as its judgment in *Rasul*, the Supreme Court considered an application for habeas corpus filed on behalf of an American citizen captured in Afghanistan and detained as an 'enemy combatant' in a naval brig in South Carolina. The Court of Appeals had concluded that Hamdi's detention could be justified by reference to the Joint Resolution of Congress passed soon after 11 September authorizing the President to 'use all necessary and appropriate force against those nations, organisations, or persons he determines planned, authorized, committed or aided the terrorist attacks' or 'harboured such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons' (the AUMF). While a plurality of the Supreme Court agreed on this point with the Court of Appeals, its opinion signals some role for traditional parts of the law of armed conflict, with the judges referring to the Hague and Geneva Conventions and their limit of detention to the time of active hostilities. The judges noted, however, that 'the national security underpinnings of the "war on terror", although crucially important, are broad and malleable.' Were the Administration's full position to be adopted, Hamdi's detention could last for the rest of his life. They continued as follows:

> Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. See, e.g., Constable, *U. S. Launches New Operation in Afghanistan*, Washington Post, Mar. 14, 2004, p. A22 (reporting that 13,500 United States troops remain in Afghanistan, including several

39 George H Aldrich 'The Taliban, Al Queda and the Declaration of Illegal Combatants' (2002) 96 AJIL 891, 896.

40 Aldrich, ibid, 896.

41 542 US 507 (2004).

> thousand new arrivals); J. Abizaid, Dept. of Defense, Gen. Abizaid Central *Command Operations Update Briefing*, Apr. 30, 2004, http://www.defenselink.mil/transcripts/2004/tr20040430-1402.html (as visited June 8, 2004, and available in the Clerk of Court's case file) (media briefing describing ongoing operations in Afghanistan involving 20,000 United States troops). The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.' If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF.

That passage does not recognise that the armed conflict may have moved from an international one to a national one, and that any justification for the detention under the Geneva Convention had arguably ended.

The third American decision was given by Judge James Robertson on 8 November 2004 in the District of Columbia District Court against the background of the June decisions.[42] The petitioner was in part successful in his habeas corpus application, because he had not been determined by a competent tribunal to be an offender triable under the law of war and because the procedures established for the Military Commission set up by the President were contrary to or inconsistent with those applicable to courts martial. The petitioner had been captured in Afghanistan in late 2001 during hostilities after the 11 September attacks, he asserted his entitlement to POW status under the Third Geneva Convention and the Government had not convened a competent tribunal to determine whether he was entitled to that status. The Court's ruling on the 'competent tribunal' issue is based on a direct application of the relevant provisions of the Third Convention, as part of the law of the United States. The finding that the Military Commission's procedures were flawed was mainly based on United States law, but the Judge also found support in international humanitarian and human rights law for the right to be present at one's trial. The direct invoking of international law is most encouraging and is in the tradition of American courts from the earliest days of the Republic.[43]

The World War II New Zealand judgment concerning personal liberty was not reported until after the end of the war, well over a year after it was delivered.[44] In this case, the Court of Appeal, consisting of five judges, was persuaded by Mr G G G Watson that the members of the returning furlough draft, who had refused to parade at Trentham Military Camp in January 1944 for embarkation to return to the Middle East, had not committed the offence of military desertion.

The judgment ruled that the action of the soldiers who, to quote the charge sheet, 'after having been warned to proceed for overseas with intent to avoid so proceeding collectively failed to parade for embarkation with the returning furlough draft when ordered to do so thereby avoiding proceeding on service overseas', did not amount to an act of desertion. In a sense, the finding is a straightforward one of interpreting the word 'desertion'. That offence is constituted by persons absenting themselves physically from the control of duly constituted military authority with the

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42 *Hamdan v Rumsfeld* 344 F. Supp. 2d 152 (2004).

43 Eg *The Charming Betsy* 6 US (2 Cranch) 64. After the delivery of the address on which this article is based the Court of Appeals for the District of Columbia (the panel including now Chief Justice Roberts) reversed the District Court decision, holding among other things that Hamdan could not directly invoke the Convention in court; *Hamdan v Rumsfeld* 15 July 2005 No 14-3593. 415 F. 3d 33 (2005). The Supreme Court has granted certiorari and the appeal is due to be heard in March 2006; 126 S Ct 622 (2005).

44 *Close v Maxwell* [1945] NZLR 688. The Law Reports have a footnote reading 'the report of this case was delayed owing to the operation of the Censorship and Publicity Emergency Regulations 1939'.

intention either of not returning or of avoiding some important service or duty. The soldiers' actions did not constitute desertion in those terms.

But, while that might be thought to be a straightforward, even literal, finding based on the ordinary meaning of the words, it is possible to think of purposive arguments that might well have led a court, in time of great peril to the nation, to say that the actions were in effect desertion and fell plainly within the purpose of the legislation. Moreover, the decision of the court-martial to convict the soldiers was protected by a strong privative clause. Might not the Court have said that, even if the ruling by the court-martial that the actions did constitute desertion was inaccurate as a matter of law, it was nevertheless a ruling that fell within the court-martial's jurisdiction? An associated argument was that the offence of desertion plainly fell within the jurisdiction of the court-martial and the detail of the charge is something of lesser significance. The Crown also argued very strongly that the common law had never interfered with the army *flagrante bello*. Great caution must be observed not to interfere with military discipline. And there must be a flagrant abuse of military authority before the civil courts should interfere.

The court was not willing to go down any of those paths. It unanimously overturned the convictions.

B. Freedom of Association

The right to freedom of association is often limited in times of emergency including terrorism and war. That is to be seen in resolution 1373 and associated national legislation. The placing of limits on it raises very difficult issues as appears from two decisions from two further jurisdictions.

In 1969 the House of Lords (by three judges to two) on appeal from the Court of Appeal of Northern Ireland upheld the appellant's conviction for being a member of a republican club in breach of regulations prohibiting such membership or membership of 'any like organisation howsoever described'.[45] Michael Francis Forde was a member of a 'republican club' and accordingly came within the terms of the offence created by the regulation. No evidence was given that he or the club were at any time a threat to peace, law and order, and so far as the police were aware there was nothing seditious in its pursuits or those of its members. The relevant Minister had power to make regulations 'for making further provision for the preservation of the peace and the maintenance of order'. The majority judges read that phrase very broadly, referring to war time and emergency cases. They asked whether the regulation was 'capable of being related to the prescribed purpose' and said if there was no question of bad faith the courts will be slow to interfere with the exercise of wide powers to make regulations. But the dissenters thought that the duty of surveillance entrusted to the courts for the protection of the citizen goes deeper than that. Further, the regulation was too vague and ambiguous. 'A man must not be put in peril on an ambiguity under the criminal law.'[46]

The Nuremberg Tribunal was also faced with offences involving the membership of proscribed organisations. Article 10 of the Nuremberg Charter made it an offence to be a member of an organisation declared criminal by the Tribunal. 'In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.' The Tribunal said this:

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45 *McEldowney v Forde* [1971] AC 632.

46 For another membership case under the apparently very broad terms of s 11 of the United Kingdom Terrorism Act 2000 see *AG's Reference (No 4 of 2002)* [2003] EWCA Crim 762.

> In effect, therefore, a member of an organisation which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.

The Tribunal however had a judicial discretion whether it would declare any organisation criminal, a discretion to be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. Accordingly since the declaration with respect to the organisations and groups would fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organisation and those who were drafted by the State for membership, unless they were personally implicated in the commission of acts declared criminal by the Charter as members of the organisation.[47] To repeat, criminal liability was to be based on individual responsibility and individual fault. Collective punishments could not be tolerated.[48]

C. Torture

My final area is torture. The prohibitions in the International Covenant, regional conventions, the Convention against Torture and the Geneva Conventions and Protocols are all in absolute terms and probably have the force of ius cogens.[49] The prohibition, uniquely among human rights instruments, brings with it a prohibition on the admissibility of a confession obtained by torture. And yet there is the Dershowitz position and the undoubted practices of many states over many ages.

I take just one case, the judgment of the Supreme Court of Israel given on 6 September 1999,[50] in which all nine judges agreed with the judgment prepared by President Barak holding unlawful certain methods of interrogation of suspected terrorists. The justification for such methods was that they were deemed immediately necessary for saving human lives.

Shortly before the end of the judgment the President said this:

> This decision opens with a description of the difficult reality in which Israel finds herself security wise. We shall conclude this judgment by re-addressing that harsh reality. We are aware that this decision does not ease dealing with that reality. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual's liberty constitutes an important component in its understanding of security. At the end of the day, they strengthen its spirit and its strength and allow it to overcome its difficulties. This having been said, there are those who argue that Israel's security problems are too numerous thereby requiring the authorization to use physical means. If it will nonetheless be decided that it is appropriate for Israel, in light of its security difficulties to sanction physical means in interrogations (and the scope of these means which deviate from the ordinary investigation rules), this is an issue that must be decided by

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47 The International Military Tribunal, Nuremberg, Judgment of 30 September 1946.

48 The issue of collective punishments was a live one in the preparation of the Charter, eg Telford Taylor *The Anatomy of the Nuremberg Trials* (1993) ch 2 and the triumph of the Stimson position over Morgenthau's within the United States administration.

49 See eg *Attorney-General v Zaoui* (2005) 7 HRNZ 860 (SCNZ) para 51 and n 42 and the authorities mentioned there.

50 *Public Committee against Torture in Israel and others v The State of Israel and others* HC 5100/94, judgment of 6 September 1995.

> the legislative branch which represents the people. We do not take any stand on this matter at this time. It is there that various considerations must be weighed. The pointed debate must occur there. It is there that the required legislation may be passed, provided, of course, that a law infringing upon a suspect's liberty 'befitting the values of the State of Israel', is enacted for a proper purpose, and to an extent no greater than is required. (Article 8 to the Basic Law: Human Dignity and Liberty.)
>
> Deciding these applications weighed heavy on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country. We are aware of the harsh reality of terrorism in which we are, at times, immersed. Our apprehension is that this decision will hamper the ability to properly deal with terrorists and terrorism, disturbs us. We are, however, judges. Our brethren require us to act according to the law. This is equally the standard that we set for ourselves. When we sit to judge, we are being judged. Therefore, we must act according to our purest conscience when we decide the law.

Against that security background, the Court concluded that certain methods of interrogation used by the GSS were unlawful because they were not a reasonable form of investigation. For that purpose the Court drew on Israel's international obligations and absolute character:

> First, a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment, and free of any degrading conduct whatsoever. There is a prohibition on the use of 'brutal or inhuman means' in the course of an investigation. F.H. 3081/91 *Kozli v. The State of Israel*, at 446. Human dignity also includes the dignity of the suspect being interrogated. Compare HCJ 355/59 *Catlan v. Prison Security Services*, at 298 and C.A.4463/94 *Golan v. Prison Security Services*. This conclusion is in accord with international treaties, to which Israel is a signatory, which prohibit the use of torture, 'cruel, inhuman treatment' and 'degrading treatment.' See M. Evans & R. Morgan, *Preventing Torture* 61 (1998); N.S. Rodley, *The Treatment of Prisoners under International Law* 63 (1987). These prohibitions are 'absolute.' There are no exceptions to them and there is no room for balancing. Indeed, violence directed at a suspect's body or spirit does not constitute a reasonable investigation practice. The use of violence during investigations can lead to the investigator being held criminally liable. See, e.g., the Penal Law: § 277. Cr. A. 64/86 *Ashash v. The State of Israel* (unreported decision).

VI. Concluding Comments

I conclude with three broader thoughts.

The first is to be careful in our use of words. All can understand the rhetorical force of the use of the word 'war' in expressions such as the 'war against poverty' or the 'war against drugs'. But 'war against terror' can move us too quickly to thoughts of the lawful use of armed force in self defence in the context of that 'war', particularly with the controversial restatement by the United States of the right of preemptive self defence in its September 2002 Security Policy. Francis Bacon in his essay *Of Judicature* had something wise to say about all this four centuries ago:

> Above all things integrity is their position and proper virtue. Cursed (saith the law) is he that removeth the landmark.

I return to *Antigone*. Creon is brought down by his recklessness and his pride. 'The blow,' he says, 'came quick'. The Chorus concludes the play in this way:

> Wise conduct is the key to happiness.
> Always rule by the gods and reverence them.
> Those who overbear will be brought to grief.
> Fate will flail them on its winnowing floor.
> And in due season teach them to be wise. [51]

The second broader matter is about the danger of specialisation in the law. The issues of law raised by campaigns against terrorism concern matters traditionally considered by criminal lawyers, constitutional lawyers, human rights lawyers, military lawyers and international lawyers among others. The legal issues run into an array of issues engaging the knowledge and skills of experts in many other areas – foreign policy, strategy, defence, police, internal security, science, medicine, history, theology … . It is very important that lawyers in considering this complex of issues have regard to their full range. They will serve their clients and the public much better if, while keeping the detail clearly in mind, they lift their eyes and, like Matthew Arnold, see things steadily and see them whole.

My final point extends that visual metaphor in the final paragraphs of *War and Peace* (1869), Leo Tolstoy compares the understanding of the physical sciences after the Copernican revolution with the understanding of history:

> As with astronomy the difficulty of recognizing the motion of the earth lay in abandoning the immediate sensation of the earth's fixity and of the motion of the planets, so in history the difficulty of recognizing the subjection of personality to the laws of space, time, and cause, lies in renouncing the direct feeling of the independence of one's own personality. But as in astronomy the new view said: 'It is true that we do not feel the movement of the earth, but by admitting its immobility we arrive at absurdity, while by admitting its motion (which we do not feel) we arrive at laws,' so also in history the new view says: 'It is true that we are not conscious of our dependence, but by admitting our freewill we arrive at absurdity, while admitting our dependence on the external world, on time, and on cause, we arrive at laws.'
> In the first case it was necessary to renounce the consciousness of an unreal immobility in space and to recognize a motion we did not feel; in the present case it is similarly necessary to renounce a freedom that does not exist, and to recognize a dependence of which we are not conscious.

The 'laws' to which Tolstoy refers take us back to the rule of law and to President Barak. By admitting our dependence on one another and on the external world, we recognise essential limits on our freewill. While our independence is recognised and sustained by the law so too it is limited by the law. The same is true of each of the States making up the world community and indeed of the world community itself, as it increasingly organises itself through the law. This is a critical time for the *international* rule of law.

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51 Dato' Param Cumuraswamy at the Melbourne Conference in April 2003 found it shocking how shallow a commitment some Governments had to the basic principles that underlie their societies and how willingly they deny basic protections to others. A former senior US Justice Department official has recently written at length about the danger of using the 'war against terrorism' as a metaphor: Phillip B Heymann *Terrorism, Freedom and Security* (2003) reviewed by Lee and Schwartz (2005) 103 Mich L Rev 1446.