

## **The Widening Gyre: Counter-terrorism, Human Rights and the Rule of Law**

There are two themes that recur in previous Sir David Williams lectures. First, that it is a considerable honour to be invited to give the lecture. Secondly, that it is a daunting task to do so in the presence of Sir David, particularly in a field in which he has expertise. Since that covers most of the law there is no escape from this dilemma. Let me then acknowledge the privilege of having been asked to give this year's lecture, and confess that it is with some trepidation that I do so. The subject, terrorism and human rights, is not exactly uncharted territory. When I looked into the internet for some guidance on what might be relevant to terrorism and human rights, the response to my Google search informed me that in .03 seconds 32,900,000 references had been found. This seemed to indicate that it was unlikely that I would be able to say anything that has not already been said. But there are some subjects that are of such importance that there is value in reminding ourselves of the issues that are at stake, and if necessary for that purpose, repeating what others have said. And it is with that in mind that I approach my chosen topic.

Before doing that I think that I should acknowledge an indebtedness that I have to Sir David that goes back some ten years and thank him belatedly for a timely intervention that saved me from considerable embarrassment. It was in Auckland in New Zealand at the time of a symposium to mark the retirement of Robin Cooke from the Court of Appeal which he had led with great distinction. There was a reception given at the home of Mr Justice Robertson, one of the New Zealand judges, for recently arrived guests. One of the visiting judges, who always has a camera with him, wanted to take a picture of some of us. He called me to join the picture group and in an expansive gesture of acknowledgement I managed to knock over a bottle of red wine which was standing on a table alongside me. The room in which we were at the time had a wall to wall pristine white carpet. It was also filled with lawyers and judges who were quick to give contradictory advice to our host as to how to deal with the situation. Sir David, however, took charge and others, considering no doubt that the Vice-Chancellor of Cambridge University probably knew more than they did, not only about the law, but also about how to deal with red wine on carpets, deferred to him. He called for white wine, was given a bottle, and with the aid of

its contents performed a magical act which he claimed would neutralise the red wine. When I enquired the next morning about the carpet my host assured me that all was well and that Sir David had saved the day. So thank you Sir David for that timely intervention. I should say, that with due acknowledgement to you, I have drawn on that advice to deal with similar incidents at which I have been an innocent bystander; but never on a white carpet.

With that acknowledgement let me turn to the subject of my lecture. Prior to the establishment of the United Nations the way in which states treated their citizens was considered to be a matter for the states themselves, and not the subject of international law. Nazism, the holocaust, and the brutality of the Second World War, changed this. In the aftermath of the war it was accepted that there could not be peace and justice in the world without a respect for human rights and fundamental freedoms. This was affirmed in 1945 with the adoption of the Charter of the United Nations, in which member states pledged themselves, in cooperation with the United Nations, to achieve the promotion of universal respect for and observance of such rights and freedoms.

Two years later the Universal Declaration of Human Rights was proclaimed. Recalling the pledge made in the Charter, it records that a common understanding of human rights and the fundamental freedoms is of the greatest importance for the full realisation of this pledge. It goes on to proclaim the Universal Declaration “as a common standard of achievement for all peoples and all nations”, calling upon “every individual and every organ of society” to “strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.” What lessons are being taught through responses to terrorism? What education is being offered by such responses? These are concerns on which I will focus in this lecture.

For a period of more than fifty years following the proclamation of the Universal Declaration, a comprehensive network of treaties and conventions spelt out the parameters of the commitment that had been made. At the core of the commitment was

respect for human dignity. The Universal Declaration begins its Preamble by recording that the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. These words are repeated at the beginning of the International Covenant of Civil and Political Rights, which goes on to say that the rights recorded in the Covenant “derive from the inherent dignity of the human person”. The importance of the inherent dignity of all human beings is also emphasised in other major modern human rights instruments – the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Covenant on Economic, Social and Cultural Rights, and it is now standard for human rights instruments to contain references to dignity as a founding value, normally referring to the UN Charter as the source for this.

Jeremy Waldron, dealing with the use of torture against suspected terrorists, emphasises the connection between law and human dignity, saying:

*“Law is not brutal in its operation. Law is not savage. Law does not rule through abject fear and terror...even when law has to operate forcefully...there will be an enduring connection between the spirit of law and respect for human dignity – respect for human dignity even in extremis, even in situations where law is at its most coercive and its subjects at their most vulnerable.”*

Terrorism treats people as objects which can be eliminated in pursuit of a cause considered to be of greater importance than the lives of those who are targeted. It seeks to achieve its ends through fear and terror, denying the humanity of its victims. It poses a threat to democracy and needs to be combated. Hence, the dilemma. Terrorism uses means that the law has rejected; that the law will not and should not use. The question then is: how should law respond to terrorism consistently with its own values? How can this be done without undermining the foundations of a democratic legal system.

As I look around the world at responses from different countries to the threat of international terrorism, and I have been doing that for the past year as a member of the panel appointed by the International Commission of Jurists to consider the impact of

terrorism and counter-terrorism on the rule of law, international human rights law and international humanitarian law, I am reminded of the past from which I have come.

I left high school at the end of 1948. That was when the Nationalist Party came to power in South Africa and introduced apartheid. Some seven years or so later I started practice at the Johannesburg Bar. By then the foundations for the police state that South Africa became had already been laid. In the years that followed new laws were enacted and existing laws were amended regularly to tighten controls that had been put in place. This was the environment in which I practised at the Bar. It prevailed until the early 1990s when, with the collapse of apartheid, the network of security laws was dismantled and a non-racial constitutional state was established.

The draconian security legislation of those times had a profound impact on our legal system and on day to day life in our country. Looking back to those times it seems to me that there are lessons to be learnt from that experience; lessons that are relevant to the present.

The events of 11 September 2001, when the World Trade Centre in New York and other targets in the United States of America were attacked by suicide pilots, killing over 3000 people, have precipitated a chain of events whose end cannot readily be foreseen. These include wars in Afghanistan and Iraq and a proliferation of anti-terrorist legislation and practices in the United States and elsewhere in the world. These laws and practices remind me of South Africa in the 1950s.

The first step towards what was to become a police state in South Africa was taken in 1950 with the passing of the Suppression of Communism Act. This was the time of the cold war and the rise of McCarthyism in the United States. It was the year in which Alger Hiss was convicted in the United States of perjury connected with espionage for the Soviet Union, the year in which Klaus Fuchs was convicted in England of spying for the Soviet Union and providing it with information from the Manhattan project for the development of the atomic bomb, the year in which the Korean war broke out. Tension was high and there were fears that we were on the brink of another world war. In that environment, the

leaders of the Western world, putting cold war concerns above principle, were not unsympathetic to the claim of the apartheid government that in the conditions existing in South Africa anti-communist legislation was necessary.

The South African Communist Party was outlawed, its assets were forfeited to the state, and a list of “communists” was drawn up and published. Listed communists could be prohibited from taking part in the activities of any organisation, or attending any meeting, and if he were of the opinion that any of the objects of communism would be furthered by the holding of a meeting or the attendance of a particular person at that meeting, the inappropriately named Minister of Justice was empowered to prohibit this. If satisfied that publications furthered the objects of communism the executive could, without notice to any person, ban the publication. Aliens deemed to be undesirable because they had been convicted of an offence under the Suppression of Communism Act could be deported. Various statutory offences relating to communism were created, including the offence of performing any act which was calculated to further the achievement of any of the objects of communism or advocating, advising, defending or encouraging the achievement of any such object, or any such act. In 1960 the Unlawful Organisations Act was passed to empower the government to declare organisations in addition to “communist organisations” to be unlawful, and to extend the criminal sanctions of the Suppression of Communism Act to such organisations. Later the scope of prohibited activities was extended to include furthering objects similar to objects of communism or an unlawful organisation.

Substitute terrorism for communism and you have the framework for much of the legislation enacted by various countries since 9/11.

The initial steps taken in South Africa in the 1950s, laid the ground for further measures including the banning of the African National Congress, the Pan African Congress and over time various other anti-apartheid organisations, and the draconian security legislation of the 1960s and later years. Political rhetoric set the scene for this and for the legislation that followed. The white voters were warned that the state was facing a total onslaught. They were told that the legislation was not directed against law abiding

citizens and would not affect them. The targets were the communists and the terrorists. The great majority of the white population remained silent and there was little opposition to the measures. Detention without trial was introduced, the police were empowered to hold detainees incommunicado, and to deny them access to their lawyers or own medical advisors. Initially detention was for 90 days, then for 180 days and then indefinitely. Courts were stripped of their jurisdiction to make habeas corpus orders in respect of detainees. The isolation of the detainees and the ousting of the jurisdiction of the courts led to torture and other abuses, which have been documented in the hearings of the Truth and Reconciliation Commission.

Apartheid, and the means adopted to enforce it, was a fundamental negation of human dignity. The South African Constitutional Court has referred to this saying:

*"We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short they were denied recognition of their inherent dignity."*

It was for this reason that apartheid was declared to be a crime against humanity.

One of the lessons from our past is that laws and practices that deny the dignity of the persons against whom they are directed lack legitimacy. They harm the victims of the laws and those whose task it is to enforce them. They infect the entire legal system. I will come back to this later but before doing that there are other matters to which I need to give attention.

Mary Robinson has drawn attention to an alternative language that has been developed in the post 9/11 era which refers to the war on terror, and has "led to Orwellian euphemisms, so that 'coercive interrogation' is used instead of torture or cruel and inhuman treatment; kidnapping becomes 'extraordinary rendition'". This is reminiscent of what happened in South Africa. The pass system was called influx control, blacks were

required to carry identity books sanctioning their presence in so called “white areas”, replacing passes which previously served this purpose, and the law doing this and extending the abhorrent system to women who had previously been excluded from it, was called the Abolition of Passes Act. The law imposing apartheid in universities and making provision for under resourced and inferior ethnic universities for students who were not white, was called the Extension of University Education Act. Even in a new environment old habits die hard and recent anti-terrorist legislation in South Africa has been given the title: “Promotion of Constitutional Democracy Against Terrorism and Related Activities Act”.

To borrow from Lord Atkin, the apartheid legislature, deciding like Humpty Dumpty that words would mean whatever they wanted them to mean, defined “communism” in the Suppression of Communism Act in a way that may possibly have included what Marx and Lenin contemplated, but also had a sting in the tail. According to the definition communism included any scheme which aimed at bringing about any political, industrial, social or economic change within South Africa by unlawful acts or omissions. The legislature made the law, and so this meant that the definition embraced whatever the legislature had decided, or might in the future decide, to be unlawful. “Communist” had a corresponding meaning and included any person deemed by the executive to be a communist on the grounds that he or she was advocating, advising, defending, or encouraging any of the objects of communism. According to these definitions the passive resistance campaigns of Mahatma Ghandi against unjust laws, campaigns to stop tours by South African sports associations, industrial action to protest against racial laws that reserved managerial positions for whites, protests against apartheid contrary to municipal bylaws requiring permission to hold such meetings, and much more could, and in some cases were, deemed to be communism and persons participating in such campaigns, to be communists. For instance, leaders of the African National Congress who had launched a passive resistance campaign to defy unjust laws to put pressure on the government to change them were in fact convicted of furthering the aims of communism for doing so.

It is of course difficult to define terrorism and an attempt to find an internationally acceptable definition has so far eluded policy makers. That is due in part to ideological

differences and the result has been that there are a number of ad hoc definitions in international instruments directed to particular ends. Ideology should not, however, be a problem for national legislation, and there is no reason why definitions of terrorism in national legal instruments should not be carefully formulated and go no further than is absolutely necessary for the purposes of combating terrorism.

In the United Kingdom as a result of debates in Parliament and interventions of civil society, a good deal of attention has rightly been paid to the definition of "terrorism", and as Sir David mentioned while speaking on the subject in Australia five years ago, anxiety has been expressed about "the vague contours of the statutory definition" in the 2001 Act. Sir David felt that in the circumstances one would have to rely on the "good sense of the police and security services, prosecutors, judges and jurors to maintain a sense of proportion when acts of terrorism are alleged". That may do in the United Kingdom, but it will be harder going in some of the countries that have been influenced by the United Kingdom legislation, and where there is even greater room for misapplication in the definitions. I must also say that I have some difficulty in understanding the scope of the 2006 legislation in the United Kingdom dealing with the glorification of terrorism and indirect incitement. If cases arise the courts will no doubt give these words a meaning consistent with the underlying values of the law in this country. But legislation in such vague terms can have a chilling effect on the behaviour of people. It is presumably intended to do so, for governments find it far better for people to silence themselves than to prosecute them. The danger is that provisions like this tend to stifle debate, and to have an impact upon the conduct of people who may be afraid to express opinions on matters of public importance such as the causes of terrorism, or to criticise the state's counter-terrorism policies, or to be seen in the company of those who do. This certainly happened in South Africa and that had a corrosive effect on our society.

There is another danger and that is the tendency to expand the scope of existing security legislation to facilitate prosecutions and to introduce new anti-terrorist measures. One of the lessons that can be learnt from the South African experience is that initial incursions into fundamental rights open the way for subsequent incursions, and absent a vigorous civil society and a strong and independent judiciary, the process can quickly lead to



fundamental changes in core values of the legal system, affecting not only security laws, but other aspects as well. If such measures are appropriate for terrorists, why not for organised crime? And if for organised crime, why not for drug lords? And if for them, why not for hardened criminals? And so on. In this context one can recall that the Star Chamber was initially a popular court which Maitland tells us was seen to serve a useful purpose before it degenerated into an infamous, tyrannical tribunal. It also influenced the adoption by common law courts of new procedures contrary to the interests of accused persons which survived the demise of the Chamber.

Now you may say that measures taken in response to the threat that terrorism poses to democracies are not to be compared with measures taken to counter resistance to apartheid, and that it is inappropriate to refer to the Star Chamber as an example of what may happen when, in order to combat terrorism, there is a departure from well established principles of law and procedure. It is, however, important that we should remind ourselves of the frailty of legal norms that protect human rights, of the threat to the rule of law that can be posed by measures taken in what is said to be the interests of the security of the state, and of how quickly fundamental principles such as the presumption of innocence and the right to a fair trial can unravel when rights are subordinated to security. Justice Stevens alluded to this in *Rumsfeld v. Padilla*, saying:

*“Unconstrained executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting citizens from official mistakes and mistreatment is the hallmark of due process.”*

The United States of America played a central role in the formulation and adoption of the United Nations Charter. It was a signatory to the Universal Declaration of Human Rights and party to the pledge to strive by teaching and education to promote respect for fundamental rights and freedoms and to secure their recognition and observance. Because of this, its power within the international community and the influence it wields there, the lessons it teaches in its response to the events of 9/11 has a significance beyond its own borders.

Language has played an important role in the messages the United States administration sends to its people and the rest of the world. The core legislation there has the title: *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001*. This was doubly emotional. It appeals for unity against terrorism and carries the acronym “USA Patriot Act”. The message is clear. Unite against terrorism. It is your patriotic duty to do so. Who would dare oppose such an Act? Few in Congress questioned any of its provisions. The Act contained 134 provisions covering 342 pages. It was rushed through both houses with little debate, virtually no public hearings, and without a conference or committee report. That was the atmosphere of the time.

I have mentioned expressions such as coercive interrogation and rendition and will say more about this later. In a different context, however, language has played an even greater part in the formulation of anti-terrorist policies in the United States. “The war against terror” has been used in two senses. Rhetorically, to drum up support for the administration’s policies, and literally to provide a legal basis for them. Within a week of September 11 the United States Congress adopted a resolution authorising the President to “use all necessary and appropriate force against those nations, organisations, or persons he determines planned, authorised, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organisations or persons”. Note the words “he determines” which vests enormous power in the President. The resolution, of breathtaking scope and implication, declared that its purpose was to give “specific authorisation within the meaning of section 5(b) of the War Powers Resolution” of 1973, thereby signifying Congress’ authority to the President to use military force. The President was thus given the power to use military force not only against nations, but also against organisations and persons if he determines them to be the enemy. Two wars were contemplated. One against nations, and the other against terrorists. No countries or territories are specified. The whole world is a potential battlefield.

Having secured these powers the President proceeded to use them. The two “wars” have been conflated. On 7 October, the President announced that he had ordered the military to

strike against Al Qaeda terrorist training camps and military installations of the Taliban in Afghanistan. Thus began the war in Afghanistan. Then, a month later the President, claiming the power to do so by virtue of the congressional resolution, issued a military order empowering himself to determine that an individual, not being a United States citizen, and whom he had reason to believe was a member of the Al Qaeda who had participated in terrorist activities, should be dealt with in accordance with the provisions of the order. Thus, the war against terrorism, and the disputed claim that the law of war, and not the criminal law, applies to action against terrorists.

The military order made provision for such persons to be detained outside or within the United States, and to be tried by military commissions which would have the power to impose penalties including life imprisonment and death. The military commissions would be established by order of the Secretary of Defence, who was empowered to prescribe rules for the conduct of their proceedings including modes of proof and the admissibility of evidence. The record of the trial, including any conviction or sentence, would have to be submitted to the President or the Secretary of Defence for review and final decision.

Although the United States administration has claimed the authority to hold both citizens and non-citizens incommunicado as enemy combatants, without having to bring them to trial, a distinction has been made between citizens and non-citizens participating in these "wars". Citizens have been held in the United States whilst non-citizens have been held in detention centres outside of the United States.

It was for this reason that Guantanamo Bay was designated in a military order issued by the President as a holding centre for aliens. The attitude of the administration was that if non-citizens were determined by the President to be enemy combatants and were held outside of the United States, neither United States law nor the Geneva Conventions would apply to the conditions of their detention. This was the advice given by the Department of Justice in two notorious memoranda that are included in The Torture Papers published by Cambridge University Press. According to this advice the administration would be immune from habeas corpus applications and US courts would have no jurisdiction to

enquire into the conditions of detention. The administration adopted this position in the litigation that ensued on these issues, and has persisted in it despite setbacks in the courts.

When majorities of the Supreme Court in *Hamdi* and *Rasul* held that detainees (including non-citizens being held at Guantanamo Bay) were entitled to a fair hearing to determine whether or not they were enemy combatants, and that the courts had jurisdiction to entertain habeas corpus applications brought on behalf of those who disputed that they were combatants, the administration's response was to convene Combat Status Review Tribunals, presided over by military officers, to determine the status of detainees. This was followed by the Detainee Treatment Act of 2005 which stripped the ordinary courts of jurisdiction to hear or consider habeas corpus applications brought on behalf of aliens detained in Guantanamo Bay, or to consider any other action against the United States relating to any aspect of the detention of aliens there by the Department of Defence. The military would thus determine the status of detainees and courts would not have the power to interfere with such determinations.

Subsequently, in *Hamdan*, a majority of the Supreme Court held that the jurisdiction stripping provisions of the Detainee Treatment Act did not have retrospective effect. They upheld a challenge to the validity of a military commission that had been established before the passing of the Detainees Treatment Act to try Hamdan, who was a Guantanamo Bay detainee. The judgement was highly critical of the rules that governed the functioning of the Military Commission, holding them to be inconsistent with the Uniform Code of Military Justice, and for that reason invalid. Justice Stevens, writing for a plurality of the Court, also held that the procedures applicable to the trial facing Hamdan violated common article 3 of the Geneva Conventions, which prescribes as a minimum standard for the trial of prisoners taken in armed conflicts, that the trial be before "regularly constituted courts affording all the judicial guarantees which are recognised as indispensable by civilised peoples". According to Justice Stevens the military commissions were neither regularly constituted nor did they meet the judicial guarantees required by common article 3.

The response of the administration was to promote new legislation. The Military Commissions Act of 2006 was introduced into Congress by the President saying that it demonstrated the United States' "commitment to the rule of law". I wonder what Lord Bingham whose Sir David Williams lecture last year was on the rule of law, would have thought about this characterisation of the Bill. It was designed to overcome the decision in *Hamden* and was passed after some resistance from Congress, which led to changes being made to certain of the proposals in the Bill submitted to Congress. The Act as passed makes provision for the convening of military commissions to deal with trials of so called "alien unlawful enemy combatants", retaining the distinction between aliens and citizens. Citizens considered to be complicit in terrorism will be tried before the ordinary courts; aliens will, however, be subject to trial by military commissions composed of commissioned officers of the armed forces.

All members of the Taliban, Al Qaeda and "associated forces", and persons engaged in "hostilities" against the United States are deemed to be unlawful combatants, as well as persons declared to be so by a Combat Status Review Tribunal, whether such determination was made before or after the passing of the Act. Most Guantanamo Bay detainees had by then been held in detention for several years. Their status may have been determined by Combatant Status Review Tribunals prior to the passing of the Detainee Treatment Act and the Military Commissions Act in proceedings, which as Justice Stevens rightly pointed out in *Hamdan*, did not meet the judicial guarantees recognised as indispensable by civilised peoples.

As a result of amendments to the draft Bill by Congress the Act excludes all statements obtained by torture. It also excludes statements obtained through cruel, inhuman or degrading treatment after the passing of the Detainee Treatment Act. However, statements obtained as a result of such treatment prior to the passing of that Act are admissible if they have sufficient 'probative value'. Most of the Guantanamo detainees may be affected by this provision. This means that the information on which their status will be or would have been determined may well be tainted by methods of interrogation contrary to international law and US domestic law, and which are now prohibited for the future by the Military Commissions Act.

Courts are stripped of their jurisdiction to make habeas corpus orders. A limited right of appeal may be brought on questions of law to the United States Court of Appeals for the District of Columbia Circuit, and from there to the Supreme Court on certiorari. No appeal is, however, allowed against a decision of a military commission on the facts of a case. The Act also contains provisions to the effect that a military commission established under the Act is a regularly constituted court affording all the judicial guarantees recognised as indispensable by civilised persons, and goes on to provide that no person may invoke the Geneva Conventions in habeas corpus or other proceedings.

What the Military Commissions Act in effect does, is make provision for two systems of law. One for US citizens and the other for aliens, the former to be tried before the ordinary courts in accordance with US criminal law and thus entitled to more protection than the latter, who are to be tried by Military Commission in accordance with the rules of procedure and evidence prescribed by that Act. All this is a far cry from any substantive component of the rule of law. I pause here for a moment and turn to rendition and intensive interrogation.

What is referred to by the United States administration as extraordinary rendition has been an integral part of its counter-terrorism policy. Though it has no precise legal meaning, this practice has involved seizing suspects beyond the borders of the USA and either holding them incommunicado in CIA prisons outside the USA, or handing them over to foreign governments for purposes of interrogation. Bearing in mind that bounty payments are made by the United States for the delivery of suspected terrorists, that there have been widespread allegations that the rendition of suspected terrorists has been accompanied by torture, and that rendition without legal sanction amounts to kidnapping, it is not surprising that this practice has attracted widespread censure. Both the location of the prisons and the arrest of the suspects are kept secret and this has placed the suspects in an extremely vulnerable position. They have simply disappeared and their friends and relatives could only speculate whether they were alive or dead, and if alive, where they might be. They have had no access to the International Red Cross or any outside observers. They were at the mercy of their captors.

Accounts of how rendition is carried out in practice have found their way into the media and there is now a considerable body of evidence to show what is involved. Two of the better known cases are those of Mr El Masri and Mr Arar.

El Masri, a German citizen says that he was on his way to Macedonia where he was to holiday. When he entered Macedonia he was detained by Macedonian law enforcement officials, and later handed over to CIA operatives who took him to a CIA operated detention centre near Kabul where he was held incommunicado for some months. Whilst in detention he was beaten, drugged and mistreated in other ways. He was subsequently transported to Albania and released in a remote area, from where he was able to find his way back to Germany. Later, he launched an action in the United States claiming damages for the kidnapping and mistreatment, but his action was defeated at the pleading stage by the government raising the state secrets doctrine as a defence. According to this doctrine the US government may prevent the disclosure in judicial proceedings of any information if "there is a reasonable danger that such disclosure will expose military matters which, in the interest of national security, should not be divulged". Where military secrets are so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of privileged matters courts have held that the case must be dismissed at the pleading stage. The existence of the rendition programme, and the details of El Masri's allegation that he had been the subject of rendition and mistreatment, had attracted considerable media publicity in the United States. This, however, did not save his claim. The court held that the central facts - the means and methods of the CIA - that formed the subject matter of his claim, were state secrets that blocked his claim.

Mr Arar is a Canadian citizen who lives and works in Canada. He is a wireless technology consultant who was born in Syria. Unbeknown to him the Canadian police suspected him of having links with terrorists and passed on that information to the US authorities. In September 2002 he interrupted a family holiday in Tunisia to attend to work for which he was required in Canada. On his way back to Canada he passed through John F Kennedy Airport, where, because of the Canadian information, he was arrested by US authorities who held him for 12 days and then rendered him to Jordan from where he was rendered

to Syria. On his release by the Syrian authorities after almost a year in detention he returned to Canada. He subsequently attempted to sue the US authorities for his rendition alleging that he had been tortured in Syria, but his action was also defeated at the pleading stage. The judge dealing with the matter in the District Court accepted the government's argument that the claim raised important foreign policy and security considerations which under the United States Constitution were exclusively entrusted to the political branches of government. He held that Courts should not undertake the task of balancing individual rights against national security concerns without the guidance or authority of the political branches of government saying:

*"Judges should not, in the absence of explicit directions by Congress, hold officials who carry out such policies liable for damages even if such conduct violates our treaty obligations or customary international law."*

In marked contrast to the attitude of the United States government, the Canadian government, responding to public concern arising from media coverage of Mr Arar's treatment, appointed a Judicial Commission to enquire into the actions of Canadian officials in relation to Mr Arar. The Commissioner was Mr Justice O'Connor, the Associate Chief Justice of Ontario. He conducted a detailed enquiry, hearing from over 70 Canadian officials and having access to over 21,000 documents. All the information that the Canadian police had concerning Mr Arar was made available to him (nothing was withheld on security grounds) and his report covering 364 pages deals in detail with the relevant events. His conclusions were as follows. There was nothing to suggest that Mr Arar had committed any offence or posed a threat to Canada. In fact, he was not considered a suspect by the Canadian police or a target of their investigations. They wished to interview him as a witness because of his association with other individuals, and this information was passed on to United States officials, who placed him on their "watch list". The information was, however, inaccurate, portrayed him in an unfairly negative fashion and overstated his importance to the Canadian investigations. He and his wife were described as Islamic extremists suspected of being linked to the Al Qaeda terrorist movement. According to Mr Justice O'Connor the Canadian police had no basis for this description which had the potential to create serious consequences for Mr Arar.



This led to his arrest at John F Kennedy airport and subsequent rendition to Syria. In Syria he was detained, tortured, held in degrading and inhuman conditions and forced to make a false confession. The Commission's report draws attention to the devastating physical, emotional and financial consequences of these events on Mr Arrar and his family and recommended that he be compensated by the Canadian government. The report was accepted by the government and by the Canadian police. The Prime Minister apologised publicly to Mr Arrar and his family for what had happened and so did the head of the police. Compensation of Canadian \$10million was paid to him.

The Arrar case demonstrates the potential harm inherent in taking punitive administrative action against suspects on the basis of untested intelligence. It is of course easier to do this than to launch a successful prosecution where evidence is required. But there are dangers in doing so. We know that intelligence is less reliable than evidence and may well be incorrect, as happened when a decision was taken to go to war against Iraq. The fact that El Masri and Arrar were both arrested at the border shows how the exchange of information and watch lists which have become features of counter-terrorism measures extend the implications of incorrect intelligence. The widespread circulation of intelligence between countries and the dubious methods associated in many cases with its collection, demand that great care be exercised before relying on intelligence to take punitive action against individuals.

It has, however, become the practice in many countries for punitive action to be taken against individuals on the basis of secret intelligence which is not disclosed to them. A statutory provision sanctioning such action in immigration proceedings has been set aside by the Canadian Supreme Court as being inconsistent with the Charter of Rights. The Canadian legislation did not make provision for a special counsel to be appointed to test the secret evidence which is required in proceedings before the Special Immigration Appeal Commission of the United Kingdom. Weight is attached to this in the Canadian judgement. But the appointment of special counsel for this purpose is not an all embracing panacea. Persons against whom accusations have been made are told that evidence material to the decision to take action against them may not be disclosed to them. Instead, the government that has taken the action will appoint lawyers with security

clearances to represent their interests. The lawyers may see the evidence but may not tell them what it is. They must just do the best that they can in the circumstances without being able to get detailed instructions from the affected persons on the information that has been withheld. I am not sure how an English family with a child detained in some foreign country would feel about such a system; or indeed an English family with a child detained in England.

Administrative measures such as deportation, control orders, and financial sanctions can cause considerable harm to those affected by them. The harm goes beyond the immediate impact of such orders on them, and includes the consequences of being tagged as a supporter of terrorism. This could be devastating for individuals and their families. Control orders may be much worse than they sound. They can require the victim of the order to remain at his or her home for up to 18 hours a day, with constraints upon receiving visitors, attending gatherings, meeting people or going to particular places during the 6 hours of "freedom". We had measures like that in South Africa. We called them house arrest, distinguishing between 12 hours house arrest and 24 hours house arrest. The people affected by such orders found it almost impossible to comply with their terms, resulting in their breaking their orders, which in turn led to their often being prosecuted for doing so.

I appreciate that the European Court of Human Rights and the House of Lords have held that the special advocate procedure might in the circumstances of particular cases not be incompatible with the requirements for a fair trial, but I must confess to having considerable reservations about the fairness of this procedure. It may be that where the closed material relied upon corroborates other evidence that can be tested, or where it can be summarised in a way that affords the subject of the order sufficient information to respond, it offers assurance against the possibility of mistake. But if it goes to the heart of the decision, and without it a control order could not legitimately be made, or if affected persons are unable to know what evidence to lead or what arguments to address to the court, to meet the case against them, it seems to me that it would be unsafe to rely on such material. There is a difference between keeping some information secret, and keeping information which may be decisive, secret. The English courts have rightly shown a

concern to ensure that the procedure is not abused. The judge and special counsel are, however, placed in a position in which they are required to perform their duties in circumstances far removed from those which obtain in normal court proceedings.

As punitive as these measures may be, administrative detention at the behest of security authorities as practiced in the USA is far worse. Detainees are held secretly, and incommunicado, often in solitary confinement for long periods. They have no access to courts during their detention, no access to lawyers, the International Red Cross, or persons other than their captors. If released, they cannot sue, for their action will be barred in light of the decisions in *El Masri* and *Arrar*. In effect they have been placed beyond the protection of the law.

The President of the United States has stated publicly that he has never sanctioned torture and never would. But what does his administration understand to be the meaning of torture? In August 2002 Jay Bybee, then Assistant Attorney General, now a judge of the Federal Appeals Court for the 9<sup>th</sup> Circuit, prepared a memorandum, which has become notorious, for Alberto Gonzales, then counsel to the President and now the Attorney General for the United States, addressing this issue. Approximately two years later after the memorandum had become public it was said that it was no longer relevant and had been withdrawn. It reflects, however, the Department of Justice's attitude at the time it was issued. There is also evidence to show that it was relied upon by the military for some of the interrogation techniques used on detainees.

Sever pain is the criterion for torture under the Convention Against Torture and also under the US Code 2340A which gives effect to the Convention by making torture a criminal offence. According to the Bybee memorandum severe pain is:

*“generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity, akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like post traumatic stress disorder...”*

The Bybee memorandum also advanced the view that the President is not subject to control by the courts or Congress in the exercise of his powers as commander in chief in the “war against terror”. It says:

*“Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.”*

This led to the following conclusion:

*“We conclude that under the circumstances of the current war against Al Qaeda and its allies, application of section 2340A to interrogations undertaken pursuant to the President’s Commander in Chief power may be unconstitutional. Finally, even if an interrogation method might violate section 2340A, necessity or self defence could provide justification that would eliminate any criminal liability.”*

In other words the President as Commander in Chief of the war against terror could even order that prisoners be tortured to secure intelligence, and if the courts should hold otherwise, those who torture might nonetheless have a legitimate defence to a criminal charge against them.

No regard seems to have been paid to the holding of the Nuremberg International Military Tribunal that:

*“He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law.”*

Contrast the Bybee memorandum with the language used by the House of Lords in *A v Secretary of State for the Home Department* where it was held that the use of evidence that

had been obtained by torture was not consistent with UK law. All the Law lords rejected the use of torture in strong language. Lord Hoffmann said:

*“The use of torture is dishonourable. It corrupts and degrades the state which uses it and the legal system which accepts it.”*

And Lord Hope described torture as “one of the most evil practices known to man” and went on to say:

*“The lesson of history is that, when the law is not there to keep watch over it, the practice is always at risk of being resorted to in one form or another by the executive branch of government.”*

There are indeed examples of this.

After the leaking of the Bybee memorandum and media attention to its contents it was withdrawn and replaced by a Department of Justice memorandum of 30 December 2004. According to this memorandum it supersedes the Bybee memorandum “in its entirety”. It begins by stating that torture is abhorrent both to American law and values and international norms, and affirms that torture can never be justified.

Irrespective of where the line has to be drawn before maltreatment becomes torture, the Convention Against Torture, and most human rights instruments, including the United States Constitution, also prohibit resort to the use of cruel, inhuman and degrading treatment in order to secure information from a detainee. Yet it was only in December 2005, when the United States Congress intervened at the insistence of Senator McCain, but over objection from the administration, that the use of cruel, inhuman or degrading treatment in the interrogation of detainees outside of the United States, was specifically prohibited. The United States Constitution does not apply beyond its borders and it seems that until the McCain amendment it was the administration’s position that detainees held and interrogated at Guantanamo Bay were not legally entitled to that protection. Significantly, the 2005 legislation prohibiting cruel, inhuman or degrading treatment of detainees contains a provision exempting members of the armed forces or other agents of

the US government, involved in the interrogation of aliens believed to be engaged in terrorist activities, from civil action or criminal prosecution for actions which they did not know were unlawful.

Vesting arbitrary power in the President, sanctioning detention without trial, holding detainees incommunicado for long periods of time in detention centres, including secret prisons, ousting the jurisdiction of the courts, allegations of kidnapping, torture and cruel and degrading treatment, trying detainees before military tribunals which do not adhere to the fair trial procedures of the normal courts, and a host of other intrusive, sometimes secret, measures too numerous to address in this lecture, including allegations that the Muslim community feel threatened and marginalised by the measures that are taken, are the messages that are being communicated through these counter-terrorism policies.

A different message comes from the Council of Europe. In a preface to its guidelines on human rights and the fight against terrorism, the following is said:

The temptation for governments and parliaments in countries suffering from terrorist action is to fight fire with fire, setting aside the legal safeguards that exist in a democratic state. But let us be clear about this: while the State has the right to employ to the full its arsenal of legal weapons to repress and prevent terrorist activities, it may not use indiscriminate measures which would only undermine the fundamental values they seek to protect. For a State to react in such a way would be to fall into the trap set by the terrorism for democracy and the rule of law.

Which message will other governments follow? The message from the United States, or the message from Europe?

In the title I chose for this lecture I took words from the opening verse of Yeats' famous poem, *The Second Coming*:

*Turning and turning in the widening gyre  
The falcon cannot hear the falconer;*

*Things fall apart; the centre cannot hold;  
Mere anarchy is loosed upon the world,  
The blood-dimmed tide is loosed, and everywhere  
The ceremony of innocence is drowned;  
The best lack all conviction, while the worst  
Are full of passionate intensity...*

Yeats was writing at a different time and was concerned with an entirely different situation. His words capture, however, the dilemma we face today. Terrorism and counter-terrorism are threatening the fabric of our societies, and place the international commitment to human right and fundamental freedoms in jeopardy.

Earlier I referred to a passage from Waldron addressing the prohibition of torture and emphasising the connection between the spirit of law and human dignity. Respect for human dignity goes beyond the prohibition of torture. It is a founding value of the modern international human rights order. It is an essential component of an open and democratic society. One of the possible consequences of tampering with this principle is that the rule of law will be eroded, and that the network of human rights protection built up painstakingly since the Second World War will unravel. Courts have an important role to play in ensuring that this does not happen. The Courts of the United Kingdom have been firm in their commitment to uphold human rights and the rule of law. But courts cannot be expected to carry the full burden of what may be required. In a democracy parliament and civil society are also defenders of the rule of law and it is essential that they should play their part in its protection; that the centre should hold, that the best should not lack all conviction; and that things should not fall apart.

Arthur Chaskalson

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