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USING INTERNATIONAL LAW IN THE DOMESTIC LEGAL SYSTEM; ITS IMPERATIVES AND WISDOM

LAW & SOCIETY TRUST

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Editor's Note.....

The Review is pleased to publish in this Issue, a comprehensively analytical paper by *Sir Kenneth Keith* on "Liberty and Security: Using International Law through National Law to protect Human Rights in the face of an Increased Emphasis on Security."

This paper was among a series of papers on "Access to Justice in a Changing World" delivered at a Judicial Colloquium in Fiji, 6-8 August 2004. The Colloquium was organised by INTERIGHTS (The International Centre for the Legal Protection of Human Rights Lancaster House, 33 Islington High Street, London N1 9LH, UK, www.interights.org) in collaboration with the Fiji Human Rights Commission and the Fiji Judiciary.

The Colloquium adopted the Suva Statement on the Principles of Judicial Independence and Access to Justice while re-affirming the UN Basic Principles on the Independence of the Judiciary, the Harare Declaration of the Commonwealth, the Beijing Statement on the Principles of the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct and the Latimer House Guidelines,

Principles Three, Four and Ten of the Suva Statement, which the Review publishes for the benefit of its readers, underscore the importance of an independent and impartial judiciary and accord special significance to the use of international human rights law in the interpretation and application of domestic law.

The discussions at the Colloquium are immediately relevant to us in a context where this country has been struggling with fundamental dilemmas arising between the protection of civil liberties and the preservation of the State during more than two decades of conflict.

Insofar as the paper published in this Review is concerned, Sir Keith argues persuasively – and indeed urgently, given the overriding importance of his case and the terrifying consequences if the contrary were to result - for the continuing relevance of the principles of international human rights and humanitarian law in a world dominated by the dictates of a phenomenon commonly known as international terrorism.

Towards this end, he explores the existing framework of the modern law of the community of nations and then goes on, (importantly for the purposes of its relevance to Sri Lanka) to examine the means of carrying that law into national law.

Some of the conventional and well recognised means in this respect are listed by him, including the incorporation of treaties into domestic law, the recogising of international law as a foundation of the constitution, as relevant to the determination of the common law, as a declaratory statement of customary international law which is itself part of the law of the land, as evidence of public policy; and as relevant to the interpretation of a statute as well as the rather less conventional argument, (as affirmed by the High Court of Australia in 1995), that the positive act of ratifying a treaty obligation may found a legitimate expectation that government officials will act in accordance with it.

Three rights are analysed in particular; *viz*; rights of personal liberty (detention), freedom of association and right to be free from torture. His focus on the recent US Supreme Court decisions in cases relating to persons detained in military facilities as part of the ongoing 'campaign against terror' is of special interest. Of the decision in *Rasul v Bush* (28 June 2004, No 03-334), in particular, where the jurisdiction of the United State's Federal Courts over Australian and British nationals detained at the Guantanamo naval base in Cuba was unequivocally affirmed, he points out that;

> "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 Geneva Convention."

His paper offers a deliberate and dispassionate analysis that is useful in the building up of that essential "constituency of resistance", as contrasted to the rhetoric and anger that so often governs our responses when rights are trampled in the name of the security of the state. It is fitting therein that he should end on a remembrance of the "recognizance of dependance" articulated by Leo Tolstoy in "War and Peace" (1869) as applied in modern day terms to the dependancy of States on the continuance of the international rule of law.

The Review also publishes a Book Review by former Supreme Court judge, *Dr ARB Amerasinghe* who reviews the narration by Rienzie Weeraratne of the life and times of one of Sri Lanka's great judges, Sir Thomas Edward de Sampayo.

Kishali Pinto-Jayawardena

LIBERTY AND SECURITY: USING INTERNATIONAL LAW THROUGH NATIONAL LAW TO PROTECT HUMAN RIGHTS IN THE FACE OF AN INCREASED EMPHASIS ON SECURITY

by The Rt. Hon. Sir Kenneth Keith
Supreme Court of New Zealand

Much has been said and written on this topic in recent years. King Solomon three millennia ago provided a valuable warning:

> 'Not everything that man thinks must he say; not everything he says must he write, but most important, not everything that he has written must he publish.[1]'

THE GOVERNING PRINCIPLE – THE RULE OF LAW

I begin with quotations identifying the tensions between law and security, the first and second from the great Roman lawyer, politician and writer, Cicero:

> 'When the cannons roar the law falls silent
> *Inter arma silent leges*
> The greatest law is the safety of the people
> *Salus populi suprema lex.*'

Against those statements, I begin with one drafted a little over a century ago by another great lawyer, a Russian diplomat, Frederick de Martens. In 1899, the international peace conference, which in the end, prepared the Hague Conventions faced an impasse. Among other things, the diplomats gathered there recognised that the texts on the law of war they were preparing would not be complete. De Martens came up with the answer:

> 'Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.'

My second statement is from the Chief Justice of Israel, Aharon Barak. 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:

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* The paper draws heavily on papers given to the Commonwealth Law Conference, Melbourne, March 2003, and to the Australian Supreme Court and Federal Courts Judges Conference, Auckland 25-29 January 2004. I am very grateful to my clerk, Tim Smith, for his research and other contributions to this paper.

[1] Quoted by Lasson in his excellent 'Scholarship Amok: Excesses in the Pursuit of Truth and Tenure' (1990) 103 Harvard LR 926. And recall what Solomon said in *Ecclesiastes* 3:1, 7: There is a time for everything ... a time to be silent and a time to speak.

> '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.[2].'

The third is contemporary, by the President of the International Committee of the Red Cross, Dr Jacob Kellenberger:

> '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 11 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 re-establish international order and stability.[3]'

Even if international obligations are not perfect, it is not for any state to unilaterally abrogate them where they find them inconvenient.[4] 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 revaluate 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.'

Against that background of principle, I consider

- some facts and forebodings
- protections of human rights provided for in international law particularly in emergencies and even in wars
- the means of carrying that law into national law legislation

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[2] *Marcus v The Minister of Defence*, 45 PD (1) 467, at 470–1.

[3] Dr Jakob Kellenberger's statement to the 58th Annual Session of the UN Commission on Human Rights *available at* <www.icrc.org>.

[4] For further reflections on the continuity of international law post-September 11, see McLachlan, C., 'After Baghdad: Conflict or Coherence in International Law?', *NZJPIL* 1, 2003, p25.

I make some concluding comments. You will see that in large part I am not adding to the bulk of published words. Rather, I offer you an anthology from a range of sources.[5]

SOME FACTS AND FOREBODINGS

On the facts, I stress that figures are not all. There must also be qualitative judgment. The attacks of September 2001, December 2001, October 2002 and many others were evil and criminal. Such attacks may challenge the very essence of democratic societies. But quantitative measures are relevant and significant. International Red Cross figures show that from the end of the Cold War, over the next 500 weeks, on average over 4,000 people were killed in armed conflict, week by deadly week, three quarters of them in Africa.[6] State Department figures show that through the same period – that is the 1990s – the average number of deaths from international terrorism was under ten a week.[7] Deaths from malaria average over 20,000 a week – almost all in sub-Saharan Africa.

While we must have regard to the potential for violent terrorist acts, we should not neglect other risks to human survival. Sir Martin Rees, the great British astronomer, has titled his new book *Our Final Century* – without a question mark. He does, to be fair, add one to his subtitle – Will the human race survive the twenty-first century? His chapter headings include 'Technology Shock, The Doomsday Clock: Have we been lucky to survive this long? Post 2000 Threats and Human Threats to Earth.'

He begins with these three paragraphs:

> 'The twentieth century brought us the bomb, and the nuclear threat will never leave us; the short-term threat from terrorism is high on the public and political agenda; inequalities in wealth and welfare get ever wider. My primary aim is not to add to the burgeoning literature on these challenging themes, but to focus on twenty-first century hazards, currently less familiar, that could threaten humanity and the global environment still more.
>
> Some of these new threats are already upon us; others are still conjectural. Populations could be wiped out by lethal "engineered" airborne viruses; human character may be changed by new techniques far more targeted and effective than the nostrums and drugs familiar today; we may even one day be threatened by rogue nanomachines that replicate catastrophically, or by superintelligent computers.

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[5] For relevant Australian and New Zealand writing see Head, M., '"Counter-Terrorism" Laws: a Threat to Political Freedom, Civil Liberties and Constitutional Rights', *Melb ULR* 26, 2002, p666; Michaelsen, C., 'International Human Rights on Trial – the UK's and Australia's Legal Response to 9/11', *Sydney L Rev* 25, 2003, p275, and the papers given to the recent seminar on the legislation at the University of New South Wales, including Williams, G., 'New Anti-Terrorist Laws for Australia? Balancing Democratic Rights against National Security'; Palmer, M., 'Counter-Terrorism Law', *NZLJ*, 2002, p456; Conte, A., 'A Clash of Wills: Counter-Terrorism and Human Rights', *NZULR* 20, 2003, p338 and Smith, J. E., (2003) *New Zealand's AntiTerrorism Campaign: Balancing Civil Liberties, National Security and International Responsibilities*. I have refrained from commenting on the legislation. For a valuable collection and analysis of the international law material, see van Krieken, P. J., (ed), (2002) *Terrorism and the International Legal Order*.

[6] International Federation of Red Cross and Red Crescent Societies, *World Disasters Report 2001*, Table 15.

[7] E.g. Cronin, 'Rethinking Sovereignty: American Strategy v the Age of Terror', *Survival* 44(2) 119, p128. The statistical difficulties in this area are illustrated by the State Department's substantial adjustments to the 2003 figures.

> Other novel risks cannot be completely excluded. Experiments that crash atoms together with immense force could start a chain reaction that erodes everything on Earth; the experiments could even tear the fabric of space itself, an ultimate "Doomsday" catastrophe whose fallout spreads at the speed of light to engulf the entire universe. These latter scenarios may be exceedingly unlikely, but they raise in extreme form the issue of who should decide, and how, whether to proceed with experiments that have a genuine scientific purpose and could conceivably offer practical benefits, but that pose a very tiny risk of an utterly calamitous outcome. (1-2)'

That last sentence raises particular challenges for the precautionary principle developed and applied in many areas of human activity.

The Post 2000 Threats chapter is subtitled Terror and Error and considers nuclear mega terror, biothreats, engineered viruses and laboratory errors. On the first, he quotes Charles Wolsey, the former director of the CIA speaking in 1998: 'we have slain the dragon [the Soviet Union], but are now living in a jungle full of poisonous snakes'; and he fears that it may already be too late to safeguard the plutonium and enriched uranium in the republics of the former Soviet Union. In respect of biothreats, Fred Ikle is reported as saying:

> 'The knowledge and techniques for making biological superweapons will become dispersed among hospital laboratories, agricultural research institutes, and peaceful factories everywhere. Only an oppressive police state could assure total government control over such novel tools for mass destruction. (48)'

Rees mentions the effect of the 'dread factor' at work after the sending, in September 2001, of the envelopes containing anthrax spores to US Senators and media organisations, a factor which appears to be disproportionate to the consequences actually suffered. He then turns to consider whether even a completely transparent society would be safe enough in the face of the ability of a few technically adept individuals who can threaten human society.

Another eminent British scientist, a neurologist, Baroness Susan Greenfield, in her new book *Tomorrow's People* addresses some of the same questions, in particular in a chapter Terrorism: Shall We Still Have Free Will? She mentions nanotechnology, the use of the plague, nerve gas and anthrax, the possibility of 'stealth viruses' being covertly introduced into the genome along with designer diseases (something being examined by the International Committee of the Red Cross), cyber crime (for instance in respect of banks, financial systems and air traffic control) ... We could go on, particularly to her discussion of fanaticism, 'the non-material element of will, of purpose and patience' (George Ball speaking of the Vietcong), tribal orders, cult-like perspectives, feel good factors, and grasps of reality – and her suggestions about the possible 'solutions' offered by science – her science. But we recommend that you read her words yourselves and the conclusions she reaches about what she refers to as the stark alternatives.

We return to further current facts, this time about non-state armed groups, and related assessments about the threats they and the response to them pose. 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, Colombia to Peru, Japan to Cambodia, Bangladesh to Afghanistan and the UK to Turkey and they range in size from 20 to 30,000 (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 first century Palestine and Jewish struggles to throw off the Roman yoke.

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:

> 'None of these geographically circumscribed problems, however, has the strategic import of the transnational Islamic terrorist movement guided by al-Qaeda and its elusive leader, Osama bin Laden, who is presumed to be alive and at large. 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-September 11 incarnation of al-Qaeda is qualitatively different from the entity that existed pre-September 11.
>
> ...
>
> 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. (354, 356-357)'

In *The World in 2004*, published by *The Economist,* Anwar Ibrahim, the jailed former Deputy Prime Minister of Malaysia, provides a related comment and warning:

> 'This new optimism [in Asia around 2000] was shattered when New York's twin towers crumbled. In that act of utter barbarism, the ground shook beneath the democratic foundation that South-East Asian activists have been building with their investment of courage and sacrifice. Ironically, the epicentre of this tremor is not terrorism itself, but the war against terrorism, which is being waged in the name of freedom and democracy. Instead of harnessing democratic energy in the region, it has strengthened the hand of authoritarianism.
>
> Re-energised authoritarian regimes gloat over the so-called wisdom of repressive laws and acts. Under the pressure from the US, they have since tightened the screws on dissent by describing the dissenters as terrorists or Taliban. (79)'

The terrorism threat exists. It is growing. It takes on a frightening reality all too often in many parts of the world which through the Security Council, in resolution 1373 of 28 September 2001 requires states, among other things, to criminalise the wilful provision or collection of funds by their nationals or in their territories intending or knowing that the funds are to be used in terrorist acts, and to freeze funds associated with terrorists acts; to suppress recruitment and arms supplies; to deny safe havens; and to provide for mutual assistance. The resolution also set up a monitoring committee and called on states to report to it within ninety days and thereafter on the Committee's timetable.[8]

That resolution is binding on all member states of the UN including all independent states of the Pacific. The Members of the Pacific Island Forum in 2002 in the Nasonini Declaration on Regional Security underlined their commitment to the importance of global efforts to combat terrorism and to implement internationally agreed anti-terrorism measures, such as the UN Security Council Resolution 1373 and the Financial Action Task Force Special Recommendations, including associated reporting requirements.

They also tasked the Forum Regional Security Committee to review regional implementation of UNSCR 1373, the FATF Special Recommendations and the Honiara Declaration and report back to the Forum the following meeting on these subjects. In 2003 at the Auckland forum the leaders endorsed the declaration.

RELEVANT HUMAN RIGHTS – POSSIBLE LIMITS

Although it had important precursors, the Charter of the UN provides the basis for the modern law of international human rights. Its preamble and articles 1(3), 55 and 56, state very important guarantees of human rights and fundamental freedoms. Building on those general propositions and the Universal Declaration of Human Rights are the great general treaties, the Internation al Covenant on Civil and Political Rights (and its optional protocols) and the International Covenant on Economic, Social and Cultural Rights. Next are the UN treaties concerned with more particular matters, of discrimination in respect of race and against women (building on the earlier conventions relating to the political rights and nationality of married women, and marriage), the Children's Convention, the Torture Convention, and Conventions concerned with refugees and citizenship. With important exceptions, these Conventions affirm rights of the individual against the state.

That body of law is also complemented, during times of armed conflict, by the body of law known as international humanitarian law.[9] The resort of some states, in particular the US, to 'war' doctrines in their campaign against terror may appear to increase the relevance of the humanitarian law.[10] It too is discussed largely in terms of great treaties, in this case the Conventions arising out of the Diplomatic Conferences at Geneva of, first, 1864 and most recently 1949, with the 1977 Protocols to those Conventions. Supplementing these conventions are a number of significant conventions relating to the criminal liability of individuals, including thirteen general treaties on terrorism[11] and on other matters such as genocide and slavery. There is also the Rome Statute on the International Criminal Court. While at first they do not

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[8] See e.g. the reports by the New Zealand government provided on 24 December 2001 (the 87th day) and 10 July 2002, S/2001/1269 and 6/2002/795.

[9] But does not supplant it: UN Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, 24 July 2001, CCPR/C/21/Rev1/Add11.

[10] For criticism of this usage, see Greenwood, C., 'War, Terrorism and International Law', *Current Legal Problems* 56, 2003, p505.

[11] They cover hijacking and related attacks on civil aviation, attacks on maritime transport (to which could be added piracy, now the subject of the UN Convention on the Law of the Sea), attacks against internationally protected persons, nuclear terrorism, terrorist bombing and the financing of terrorism. A comprehensive convention against terrorism has yet to be completed, the definitional problems still being unresolved.

appear to fall easily under the present heading since they are concerned with the obligations of individuals (rather than their rights), those obligations are of course imposed to protect the human rights of others. The important role of those obligations in protecting human rights may be seen in the reports of the Secretary General to the UN Commission on Human Rights.[12]

Both the ICCPR and Geneva Conventions are widely ratified and, accordingly, it is common to speak only of the treaty obligations that they create. In the case of the Geneva Conventions, 192 states are party to the Conventions and, of the member states of the UN, only Nauru is not party. Of 11 Pacific Island states, six (including Samoa) have and five (including Fiji and Papua New Guinea) have not acceded to the 1977 Protocols. While the ICCPR has 152 state parties none of the Pacific Island states are parties.

That lack of ratification does not mean that the provisions of those treaties are irrelevant for the courts of those countries. Such courts in interpreting constitutions and statutes and in developing the common law should also be aware of customary international law, binding on the states of which they are institutions. For the courts of Fiji that is made explicit by s 43(2) of the constitution, and that constitution like many others in the Pacific contains in its bill of rights provisions paralleling those in international human rights instruments.

Many of the particular rights in the ICCPR are widely considered to reflect norms of customary international law. The right not to be arbitrarily deprived of life (article 6) or to be subjected to torture or cruel, inhuman or degrading treatment or punishment (article 7) and other 'non-derogable' rights are generally considered to reflect customary norms.[13] The Human Rights Committee of the UN has further stated that it considers that arbitrary deprivations of liberty or deviations from fundamental principles of fair trial also violate customary international law.[14] In addition, all persons deprived of their liberty must be treated with humanity and with respect for the inherent dignity of the human person (reflected in article 10 of the ICCPR).[15] The Appeals Chamber of the International Criminal Tribunal for Former Yugoslavia has also stated that it considers that article 14, which provides for various fair trial rights in the criminal process, 'reflects an imperative norm of international law'.[16]

Turning to humanitarian law, the Geneva Conventions and the Additional Protocols are generally understood to be declaratory of customary international law, although certain provisions more clearly have that status.[17] Significant further clarity will be brought to this area by the publication of the study of customary rules of international humanitarian law commissioned by the International Committee of the Red Cross in 1995.[18] That development has been described as 'of central importance to the process of [developing] fundamental standards of humanity' by the Secretary General of the UN.[19]

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[12] E.g. *Promotion and Protection of Human Rights*, 20 December 2001, E/CN.4/2002/103.

[13] Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 11. See also e.g. the emergency provision of the Fiji Constitution – s197(3).

[14] Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 11.

[15] Human Rights Committee, *supra* note 179, para. 13. See also e.g. the emergency provision of the Fiji Constitution – s197(3).

[16] *Prosecutor v Tadic*, 27 February 2001, quoted in *Promotion and Protection of Human Rights*, E/CN.4/2002/103.

[17] For example, Articles 3 and 75 of the First Additional Protocol. See Meron, 'The Humanization of Humanitarian Law', *AJIL* 94(239), 2000, p252.

[18] To be published as Henckaerts, J. M. and Doswald-Beck, L., *Customary International Humanitarian Law*.

[19] Report of the Secretary-General to the Commission on Human Rights, *Promotion and Protection of Human Rights*, 12 January 2001, E/CN.4/2001/91.

Among the rights which are or may be put in question by campaigns against terrorism are the rights to personal liberty, the right not to be tortured, freedom of speech, freedom of association, the right to due process, the right to be protected against unreasonable search and seizure, and the right to privacy.

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. For instance, administrative detention has been justified as a response to terrorism in many parts of the world and over much of recorded history;[20] 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;[21] censorship or wider definitions of sedition are common responses in emergencies and terrorist situations; membership of proscribed organizations may be made an offence as may the provision of funds or other support to them; rights of access to legal advice, to the courts, to *habeas corpus* and to the protection of the laws of evidence might be denied or limited; and wider powers of surveillance may be conferred, limiting privacy.

In addition to broad rule of law arguments and tests elaborated by professional bodies for assessing such denials or limitations,[22] we now have a set of international treaty obligations against which such actions can be tested. They appear in particular in the ICCPR (and, where relevant, regional human rights treaties) and the 1949 Geneva Conventions and their 1977 protocols. 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 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 detention; and the right not to be deprived of liberty may be denied on grounds and in accordance with processes established by the law. Next, the statement of the right may separately recognise that limits *may* (not must) be imposed. Thus, under article 19, freedom of speech may be subject to restrictions imposed by law which are necessary for respect of the rights and reputations of others and for the protection of national security or of public order (*ordre public*), or of public health or morals. 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 censorship system is disputed.

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. To quote a distinguished British Committee's report on terrorism and civil liberties in Northern Ireland:

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[20] See e.g. Lord Bingham, 'Personal Freedom and the Dilemma of Democracies', *ICLQ* 52, 2003, p841.

[21] Dershowitz, A. M., (2002) *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*. Some of the extraordinary positions on torture adopted or proposed by officials of the US administration are discussed by Anthony Lewis in *NYRB*, 15 July 2004.

[22] E.g. International Commission of Jurists, Guzmán, F. A., *Terrorism and Human Rights*, April 2002, and International Bar Association Task Force Report, *Global Principles on Suppressing Terrorism within International Law Framework*, October 2003.

'While the liberty of the subject is a human right to be preserved under all possible conditions, it is not, and cannot be, an absolute right, because one man may use his liberty to take away the liberty of another and must be restrained from doing so. Where freedoms conflict, the state has a duty to protect those in need of protection.[23]'

But the Covenant and, to anticipate, the Geneva Conventions and Protocols show that some rights are not subject to limits. To be fair to the British Committee, their focus was not on the full range of rights but rather on administrative detention and personal liberty. By contrast to that right, the prohibition of torture and slavery and the prohibition on retrospective criminal liability, as stated in the Covenant (articles 7, 8 and 15), have neither an inherent limit nor a permitted limit.

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:

1. 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any state party to the present Covenant availing itself of the right of derogation shall immediately inform the other states parties to the present Covenant, through the intermediary of the Secretary-General of the UN, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.'

The preconditions in article 4(1) 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 is discussed later.

Paragraph (2) of article 4 of the Covenant 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 or to cruel, inhuman or degrading treatment or punishment and, without free consent, to medical or scientific experimentation (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). 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.

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[23] Chairman Lord Gardiner in *Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland*, 1975, para. 15.

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 areas victims of conflict have fundamental rights, spelled out some in detail. One notable provision is common article 3 of the 1949 Conventions, applicable in internal armed conflict. Given the number of internal armed conflicts, this provision is of major practical importance in the day to day application of international humanitarian law:

> 'ARTICLE 3
>
> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (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 recognised as indispensable by civilized peoples.
>
> (2) The wounded and sick shall be collected and cared for.
>
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.'

The first additional protocol of 1977 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 states substantive rights and which is considered to be declaratory of customary international law:

'ARTICLE 75 - Fundamental guarantees

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

   (a) violence to the life, health, or physical or mental well-being of persons, in particular:

      (i) murder;

      (ii) torture of all kinds, whether physical or mental;

      (iii) corporal punishment; and

      (iv) mutilation;

   (b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

   (c) the taking of hostages;

   (d) collective punishments; and

   (e) threats to commit any of the foregoing acts.'

Due process rights are also spelled out:

3. 'Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognised principles of regular judicial procedure, which include the following:

   (a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

   (b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

   (c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

   (d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt;

(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgment acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly; and

(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.'

Similar guarantees are stated in the additional protocol relating to the protection of non-international armed conflicts (articles 4-6). Reference is also to be made to the substantive and process protections included in the third and fourth Conventions of 1949. The absolute character of the rights also appears from 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.[24]

The due process protections are also specifically included in the antiterrorism conventions. So, the terrorist financing convention, in a standard provision, guarantees to those in respect of whom proceedings are brought fair treatment, including rights under national law and applicable provisions of international law, including international human rights law. Those with prisoner of war status, notably Saddam Hussein at least in the first part of 2004, had, as the International Committee of Red Cross made clear on 13 January 2004, by reference to his case, the particular fair trial rights spelled out in the third 1949 Convention.

It is interesting, even paradoxical, 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 during public emergencies. Article 4(1) of the ICCPR of course does limit derogations under it by reference to *other* obligations under international law which would include the Geneva Conventions.[25]

The implementation of these rights and protections presents a range of challenging and vital issues. The fact that I consider only some of the rights and only some of the means of implementation in this paper does not mean that I do not consider the other rights and means to be unimportant. Current shocking breaches in all regions of the world provide strong evidence to the contrary.

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[24] Article 60(5) of the Vienna Convention on the Law of Treaties 1969.

[25] 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.

THE MEANS OF CARRYING THAT LAW INTO NATIONAL LAW

Executives and legislators increasingly recognise that the preparation and indeed the administration of legislation should involve it being tested against human rights obligations. Those processes may be found in a national Bill of Rights, or an international one or both.

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 UK and the Australian Capital Territory. The original Canadian Bill of Rights 1963 and the New Zealand Bill of Rights Act 1990, the UK 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 experience of the developing practices in those countries and others can be and is shared.

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 UK in November 2001 and later.

That national process may be complemented by an international one. For instance, on 28 August 2002, the Commissioner for Human Rights of the Council of Europe issued an opinion on certain aspects of the UK derogation.[26] The Commissioner was critical of the arrangements for the review and renewal of the derogation and said this about the justification of the derogation:

> 29. 'Sections 21-23 of the Anti-terrorism, Crime and Security Act 2001 provide indefinite detention of foreign nationals the Home Secretary suspects of involvement in international terrorism and whom he is unable to deport owing to a well-founded fear of persecution in the country of origin and the inability to secure a third country of destination.[27]
>
> 30. In his report on his visit to Spain and the Basque Country,[28] the Commissioner recognised the threat of terrorism as "... [affecting] not only the fundamental rights of individuals but also the free exercise of certain civil and political rights

[26] Opinion 1/2002, Comm DH (2002) 7.

[27] The lengthy detention of persons who cannot be deported owing to a real risk of violation of Article 3 in a receiving country was found, in *Chahal v United Kingdom* (judgment of 26 May 1993, Series A/No.258-B) to constitute a violation of Article 5(1).

[28] February 2001, Comm DH (2001) 2.

which are the basis and foundation of every democracy". States have, as a result, an essential obligation to protect both their institutions and their citizens against terrorist actions. It is important, however, that the threat of terrorism is combated with due respect for the rule of law and without prejudice to the European human rights *acquis*, which constitutes the cornerstone on which our democratic societies are based.

31. The Court has recognised terrorism as a "threat to the organised life of the community of which the state is composed"[29] as capable of constituting grounds for derogating and has, as indicated above, given states a large measure of discretion in their assessment regarding the existence of a public emergency and the necessity of the measures taken to deal with it.

32. In the instance case, the Commission has not had access to any additional classified information on which the decision to derogate might have been based and is consequently unable to express a firm opinion on the existence of a public emergency within the meaning of Article 15 of the Convention. The Commission would, however, like to raise the following considerations.

33. Whilst acknowledging the obligation of governments to protect their citizens against the threat of terrorism, the Commissioner is of the opinion that general appeals to an increased risk of terrorist activity post September 11 2001 cannot, on their own, be sufficient to justify derogating from the Convention. Several European states long faced with recurring terrorist activity have not considered it necessary to derogate from Convention rights. Nor have any found it necessary to do so under the presented circumstances. Detailed information pointing to a real imminent danger to public safety in the UK will, therefore, have to be shown.

34. Even assuming the existence of a public emergency, it is questionable whether the measures enacted by the UK are strictly required by the exigencies of the situation.

35. In interpreting the strict necessity requirement, the Court has so far declined to examine the relative effectiveness of competing measures, preferring instead to allow such an assessment to fall within the margin of appreciation enjoyed by national authorities.[30] This does not exclude the possibility, however, that demonstrable availability of more or equally effective non-derogating alternatives will not cast doubt on the necessity of the derogating measures. This might especially be the case where so important right as the right to liberty and security is at stake. It is, at any rate, not clear that the indefinite detention of certain persons suspected of involvement with international terrorism would be more effective than the monitoring of their activity in accordance with standard surveillance procedures.

36. 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

[29] *Lawless v Ireland* A3 para. 28 (1961). See also *Ireland v United Kingdom* A25 (1978) and *Brannigan and McBride v United Kingdom* A258-B (1993).

[30] See *Ireland v United Kingdom, ibid.*

UK and perhaps, therefore, of no relation to the emergency originally requiring the legislation under which his Convention rights may be prejudiced.'

The European processes are more elaborate, but those within the UN also require states to justify their emergency actions. In addition to giving the notice of derogation under the European Convention, just considered, the UK also gave notice to the Secretary-General of the UN of derogation from article 9 (personal liberty), under article 4 of the covenant, set out above.

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:

2. '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.

...

4. A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant. Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party. When considering States parties' reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality.' [31]

[31] General Comment No. 29, CCPR/C/21/Rev. 1/ Add 11, para. 4.

That emphasis on the processes of national decision-making and explanation was prominent in an early case when in 1981 it 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:

> 8.3 'Although the sovereign right of a State party to declare a state of emergency is not questioned, yet, in the specific context of the present communications the Human Rights Committee is of the opinion that a State, by merely invoking the existence of exceptional circumstances, cannot evade the obligations which it has undertaken by ratifying the Covenant. Although the substantive right to the derogatory measures may not depend on a formal notification being made pursuant to article 4 (3) of the Covenants the State party concerned is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes article 4 (1) of the Covenant in proceedings under the Optional Protocol. It is the function of the Human Rights Committees acting under the Optional Protocols to see to it that States Parties live up to their commitments under the Covenant. In order to discharge this function and to assess whether a situation of the kind described in article 4 (1) of the Covenant exists in the country concerned, it needs full and comprehensive information. 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 legitimise a departure from the normal legal regime prescribed by the Covenant.
>
> 8.4 In addition, even on the assumption that there exists a situation of emergency in Uruguay, the Human Rights Committee does not see what ground could be adduced to support the contention that, in order to restore peace and order, it was necessary to deprive all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political right for a period as long as 15 years. This measure applies to everyone, without distinction as to whether he sought to promote his political opinions by peaceful means or by resorting to, or advocating the use of, violent means. The Government of Uruguay has failed to show that the interdiction of any kind of political dissent is required in order to deal with the alleged emergency situation and pave the way back to political freedom.'[32]

That opinion provides a link to the role of the courts and other monitoring bodies, both national and international, in this area. As the opinion indicates, they may have a role in reviewing the validity of the declaration of emergency itself as well as the validity of actions taken under it. Relevant to that role for national courts is the place of international law in our national legal systems. Customary international law, it is generally said, forms part of national law in common law countries. (We do not enter into the controversies about the basis for, and possible qualifications to, that proposition.) But treaties, concluded by the executive in exercise of its prerogative, are generally seen differently in many parts of the Commonwealth: that treaties do not become part of the law of the land in the sense of changing rights and duties under the law simply as a consequence of the executive action of the State becoming party. While the State is bound in international law by virtue of the various executive actions of signature, ratification

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

or other acceptance, if a change in rights and duties under the law is required, then there must be appropriate legislative action.[33]

It does not follow, however, that national courts cannot have regard to treaties if they are not incorporated into law. The New Zealand Law Commission, in its 1996 study of *International Law and its Sources*, lists at least five ways in which that may happen:

> (a) 'as a foundation of the constitution;
>
> (b) as relevant to the determination of the common law;
>
> (c) as a declaratory statement of customary international law which is itself part of the law of the land;
>
> (d) as evidence of public policy; and
>
> (e) as relevant to the interpretation of a statute.'[34]

To this list might be added, more controversially, the positive act of ratifying a treaty obligation may found a legitimate expectation that government officials will act in accordance with it as proposed by the High Court of Australia in 1995: *Minister of Immigration v Teoh*.[35]

This paper focuses on the fifth role of international law on the Law Commission's list.[36] State responses to heightened security concerns are almost invariably carried out under the ambit of legislation. In states with the shared common law heritage, this may be traced back to the common law's traditional antipathy towards executive action as in the great case of *Entick v Carrington*,[37] the result of which is that powers of search and seizure require 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 September 11, 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. In 2001 the Congress of the US passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act). New Zealand, Australia and the UK have similarly enacted new legislation to provide broader powers to security services,[38] and define further offending, as have other Pacific states.[39] Some of that legislation implements the anti-terrorism conventions mentioned earlier.

From the late 1980s into the 1990s, meetings of Commonwealth judges organised by INTERIGHTS and the Commonwealth Secretariat, considered the role of international human rights law in national law. In 1988, at the first Colloquium held at Bangalore, they adopted a text including these statements:

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

[34] New Zealand Law Commission, *A New Zealand Guide to International Law and its Sources*, R34, 1996, p23.

[35] (1995) 183 CLR 273. See now *Re Minister for Immigration and Multicultural Affairs, ex parte Lam* [2003] HCA 6.

[36] See, for a broader discussion of the impact of international human rights law on domestic law, Keith, K., 'Application of International Human Rights Law in New Zealand', *Texas International Law Journal* 32, 1997, p401.

[37] (1765) 19 Howell's State Trials 1029; 95 ER 807.

[38] 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 (UK).

[39] See e.g. the Prevention and Suppression of Terrorism Act 2002 (Samoa).

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.'

The Hon. Justice Michael Kirby, commenting on the ten 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 England, Australia, New Zealand and other countries of the common law'.[40]

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 Eighth 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

[40] Kirby, M. D., *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.

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.'[41]

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.[42] 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 UK, or in the absence of an entrenched Bill of Rights, or in situations where the legislature has without doubt overridden the internationally required right.

Section 43(2) of the Fiji Constitution bears directly on this matter:

> '(2) In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.'

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, whether the legislative or constitutional provision does or does not give effect to a specific treaty obligations, 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 default of its international obligations. This necessarily requires a court to consider what those 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 US or of New York would not be properly appreciated without that background.[43]

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[41] INTERIGHTS, (2001) *Developing Human Rights Jurisprudence, Volume 8: Eighth Judicial Colloquium on the Domestic Application of International Human Rights Norms.*

[42] But see for a restatement of this traditional view, Lord Hoffmann in *Boyce & Joseph v R* [2004] UKPC 32, para. 25. Compare *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44.

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

I earlier suggested that this is an area in which the courts may well defer to executive judgment. 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).
>
> '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 (F 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).[44]'

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 exigencies of the situation'.[45] The Court in this context has developed 'the margin of appreciation'.

PERSONAL LIBERTY: DETENTION

It may be that, that 1991 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. I now consider some instances of court reviews of limits placed on human rights in the context of emergencies including wars. This is a very selective and brief account. I could simply defer to the courageous F A Mann lecture given by Lord Steyn on 25 November 2003. Its title gives a clear indication of his message: 'Guantanamo Bay: The Legal Black Hole'.[46] The strength of the message appears from the furious responses it generated in *The International Herald Tribune* in following days from Professor Ruth Wedgwood who (as she mentions in her comment) has served as an adviser to the Pentagon on implementing rules for war crimes trials in military commissions and from the US Ambassador to the UN in Geneva (2 and 16 December 2003).

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[44] Law Commission, 'Final Report on Emergencies' , *NZLC* R22, 1991, pp.364–5.

[45] *Lawless v Ireland (No.3)* (1961).

[46] (2004) 53 ICLQ 1.

But instead of simply deferring in that way, I refer you to the subsequent US Supreme Court decisions in three cases relating to persons detained in military facilities as part of the ongoing 'campaign against terror'. The first case concerned whether the United State's Federal Courts have jurisdiction over Australian and British nationals detained at the Guantanamo naval base in Cuba.[47] The Supreme Court (6-3) reversed the Court of Appeals and held that the Federal Courts had jurisdiction over Guantanamo. The decision is perhaps remarkable for the complete absence of any reference to the position at international law. However, strong echoes of the concerns raised by Lord Steyn and others can be seen in the grounds given by the majority for distinguishing the Court's earlier decision in *Johnson v Eisentrager*,[48] which had held that Federal Courts lacked jurisdiction to issue a writ of habeas corpus to 21 German citizens who has been captured during World War II in China, convicted by a military commission and incarcerated in occupied Germany. Justice Stevens, for the majority, said:

> 'Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the US, and they deny they have engaged in or plotted acts of aggression against the US; they have never been afforded access to any tribunal, much less charged with an convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the US 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 Geneva Convention. Until very recently the American approach has been to declare that Taliban and al-Qaeda personnel captured are illegal or 'enemy' combatants and are not prisoners of war under the third Geneva Convention.[49] However, the third Geneva Convention provides in its article 5 that 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 categories set out in article 4, they are to enjoy the protection of the Convention until their status has been defined by a competent tribunal. The US authorities are now taking action on that matter.

In October 2002 a very experienced US international lawyer had earlier 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 US 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.[50]'

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.

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[47] *Rasul v Bush* (28 June 2004) No 03-334.

[48] 339 US 763 (1950).

[49] Fleischer, A., 'Special White House Announcement Re: Application of Geneva Conventions in Afghanistan', 7 February 2002, *available at* <www.whitehouse.gov/news/releases/2002/02/>.

[50] Aldrich, G. H., 'The Taliban, Al Qaeda and the Declaration of Illegal Combatants', *AJIL* 96, 2002, 891, 896.

> 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.'[51]

The unwillingness on the part of the Supreme Court to move away from traditional conceptions of the law of warfare, and consequentially humanitarian law, may also be seen in its judgment in the case of *Hamdi v Rumsfeld*,[52] delivered on the same day as its judgment in *Rasul*. In that case the 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 September 11 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 US by such nations, organizations or persons' (the AUMF).[53]

While the Supreme Court agreed on this point with the Court of Appeals, it should be recognised that the plurality's opinion signals an unwillingness – or at least a hesitancy - to depart from the traditional concept of the law of war. Hamdi's detention was justified on the basis that enemy belligerents could be removed from the battlefield and detained for the duration of active hostilities. Four of the majority 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. Justice O'Connor, for those Judges, based her judgment on significantly narrower grounds:

> '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 US troops remain in Afghanistan, including several 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

[51] *Ibid*, p896.

[52] 28 June 2004, No. 03-6696.

[53] 115 Stat 224.

> ongoing operations in Afghanistan involving 20,000 US troops). The US may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the US." If the record establishes that US 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.'

A further case that would have, given its facts, tested the majority's ability to hold the detentions justified on traditional conceptions of warfare was dismissed on procedural grounds.[54]

Could I, without sounding too parochial, also refer to a New Zealand case concerning personal liberty from the Second World War: the judgment in the case, given on 5 April 1944,[55] was not reported until just after the end of the war, well over a year after it was delivered. 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'. In this case, the Court of Appeal, consisting of five judges, was persuaded by Mr 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 straight forward 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 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 the ruling by the court-martial that the actions did constitute desertion was a ruling which might perhaps be inaccurate as a matter of law but which, nevertheless, fell within 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 has 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.

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. It raises very difficult issues as appears from two decisions from two further jurisdictions.

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[54] *Rumsfeld v Padilla*, 28 June 2004, No. 03-1027.

[55] *Close v Maxwell* [1945] NZLR 688.

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'.[56] Michael Francis Forde was a member of a 'republican club' and accordingly came within the terms of the offence created by the regulation, but no evidence was given that he or the club were at any time a threat to peace, law and order and that 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'.[57]

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:

> '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.
>
> 'Article 9 ... uses the words 'The Tribunal may declare' so that the Tribunal is vested with discretion as to whether it will declare any organisation criminal. This discretion is a judicial one and does not permit arbitrary action, but should 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. If satisfied of the criminal guilt of any organisation or group, this Tribunal should not hesitate to declare it to be criminal because the theory of 'group criminality' is new, or because it might be unjustly applied by some subsequent tribunals. On the other hand, the Tribunal should make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.
>
> 'A criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organised for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter. Since the declaration with respect to the organisations and groups will ... 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

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

[57] For another membership case under the apparently very broad terms of s11 of the UK Terrorism Act 2000 see *AG's Reference (No 4 of 2002)* [2003] EWCA Crim 762.

Article 6 of the Charter as members of the organisation. Membership alone is not enough to come within the scope of these declarations.[58]'

Criminal liability was to be based on individual responsibility and individual fault. Collective punishments could not be tolerated.

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. 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,[59] in which all nine judges agreed with the judgment prepared by President Barak in which methods of interrogation of suspected terrorists were held unlawful. The President stated these questions at the outset:

> 'The General Security Service (hereinafter, the GSS) investigates individuals suspected of committing crimes against Israel's security. Is the GSS authorized to conduct these interrogations? The interrogations are conducted on the basis of directives regulating interrogation methods. These directives equally authorize investigators to apply physical means against those undergoing interrogation (for instance, shaking the suspect and the "Shabach" position). The basis for permitting such methods is that they deemed immediately necessary for saving human lives. Is the sanctioning of these interrogation practices legal? These are the principal issues presented by the applicants before us.'

Essentially the Court answered the final question in the negative:

> 'We declare that the GSS does not have the authority to "shake" a man, hold him in the "Shabach" position ... force him into a "frog crouch" position and deprive him of sleep in a manner other than that which is inherently required by the interrogation. Likewise, we declare that the "necessity" defence, found in the Penal Law, cannot serve as a basis of authority for the use of these interrogation practices, or for the existence of directives pertaining to GSS investigators, allowing them to employ interrogation practices of this kind. Our decision does not negate the possibility that the "necessity" defence will be available to GSS investigators, be within the discretion of the Attorney-General, if he decides to prosecute, or if criminal charges are brought against them, as per the Court's discretion.'

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

> 39. '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.

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[58] The International Military Tribunal, Nuremberg, Judgment of 30 September 1946.

[59] *Public Committee against Torture in Israel and others v The State of Israel and others,* HC 5100/94, Judgment of 6 September 1995.

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 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.)

40 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:

'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).'

CONCLUSION

I conclude with three broader thoughts.

The first is to be careful with our use of words. We can all 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 the expression '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 US of the right of pre-emptive 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.'

While Bacon was speaking of judges, his statement should apply generally to lawyers, including those advising governments. We are all to be deliberate, to be professional and not to be panicked by the moment. The landmarks we are concerned with are written in ink, but as Shakespeare reminds us in his 65th sonnet (speaking, it is true, of love) such landmarks may outlast those made of stone or brass.[60]

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 and is about the point of view we should adopt 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

[60] Dato' Param Cumuraswamy at the Commonwealth Law Conference in Melbourne 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. See further Advisory Committee of Jurists of the Asia Pacific Forum of National Human Rights Institutions, *Reference on the Rule of Law in Combating Terrorism Final Report*, May 20045.

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 recognise a motion we did not feel; in the present case it is similarly necessary to renounce a freedom that does not exist, and to recognise a dependence of which we are not conscious.'

The 'laws' to which Leo 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.

SUVA STATEMENT ON THE PRINCIPLES OF JUDICIAL INDEPENDENCE AND ACCESS TO JUSTICE

Preamble

Whereas the *Universal Declaration of Human Rights* enshrines the principles of equality before the law and of the right to a fair and public hearing by an independent and impartial tribunal,

Whereas these principles are vital to ensuring that no-one is arbitrarily deprived of their fundamental human rights and freedoms, in particular the rights to life, liberty and security of the person and not to be subjected to torture or cruel, inhuman or degrading treatment or punishment,

Whereas maintenance of the rule of law and protection of fundamental rights and freedoms are the hallmarks of any democratic society,

Whereas these principles are guaranteed by the *International Covenant on Civil and Political Rights* and numerous other international, regional and national human rights instruments and norms,

Whereas judges play a crucial role in elaborating and applying these principles and therefore the rules governing the administration of justice in every country should enable judges to do this without fear of adverse consequences,

Reaffirming the UN Basic Principles on the Independence of the Judiciary, the Harare Declaration of the Commonwealth, the Beijing Statement on the Principles of the Independence of the Judiciary, the Bangalore Principles of Judicial Conduct and the Latimer House Guidelines,

The participants of the Judicial Colloquium on Access to Justice in a Changing World held in Suva, Fiji from 6th – 8th August 2004 adopt this statement.

Statement

1. Every individual and group should be guaranteed equal access to justice, free from discrimination, regardless of status.

2. A society is respected for its fair treatment of all individuals within its jurisdiction regardless of their opinions, actions or status. All individuals should be free to enjoy equally their human rights, regardless of race, religion and belief, gender, sexual orientation, disability or other status.

3. Human rights can only be protected through an independent and impartial judiciary free from any form of pressure and supported by an autonomous and well-resourced justice system.

4. All state and non-state institutions and actors are under an obligation to respect and observe the independence of the judiciary and not subject it to threats, intimidation or any other form of interference or harassment.

5. Whilst it is recognised that all governments are faced with the difficult task of protecting the security of their citizens, this should not be achieved at the expense of human rights and equal access to justice. It is the duty of judges to ensure equality of access.

6. Access to justice requires a full understanding of the language and procedures of the court and it is the duty of all judges to ensure this is provided.

7. Effective access to justice cannot be achieved without provision to the public of sufficient and reasonably accessible information of their rights under the law.

8. All detainees, whatever their status and the nature of the offences they have been charged with, should be treated humanely in accordance with international human rights standards, and any evidence obtained directly or indirectly as a result of torture, cruel or inhuman treatment must be disregarded.

9. Emergency powers resulting in derogations from human rights protections should be always limited in time and subject to judicial scrutiny.

10. Recognising the increasing significance of international human rights law in all jurisdictions, judges should use such law in the interpretation and application of domestic law.

11. All legal education and training should include international and comparative human rights law and its practical application.

Book Review - **A HUMANE JUDGE; SIR THOMAS EDWARD DE SAMPAYO**
By Rienzie Weereratne, Published by Typeforce, Melbourne, 2004.
148 Pages.

History is the essence of innumerable biographies – Thomas Carlyle.
There is no history: only biography – Emerson.
Blow on a dead man's embers
And a live flame will start – Robert Graves

The millions die and sink into oblivion and their deeds die with them. But some few master-minds remain, Shakespeare, Leonardo da Vinci, Isaac Newton, Albert Einstein are examples. A few hundreds so far conquer death as to leave their names to those with special, limited interests. These include great Statesmen, Scholars, Philosophers, and Scientists. In general, men and women, in all walks of life, play their part, and some even contribute significantly to the communities they serve before they move on. An 'Appreciation' or two may sometimes recall their good deeds, but little else is conveyed to posterity. As far as the legal profession is concerned, there are few who are remembered. Although in some countries – particularly the United States and the United Kingdom – there are some excellent biographies of lawyers and judges, Sri Lanka has made little contribution. The only biography is Grenier's *Leaves From My Life*. In my book on the Supreme Court, I attempted to provide biographical sketches of judges and lawyers who served the Supreme Court of Sri Lanka in its first 185 years. Little else exists, except the occasional tribute or sketch on some special occasion. In that context, Rienzie Weereratne's work on Sir Thomas de Sampayo is most welcome, and it is hoped, that it will start 'a live flame' and mark the beginning of a new era.

De Sampayo is an eminently suitable starting point, for as Judge Weeramantry says in the Foreword, "His depth of legal learning and clarity of legal analysis combined with his sensitivity to the problems of litigants placed him by common accord among the wisest and most humane of judges." At the ceremonial sitting of the Supreme Court to bid Justice de Sampayo farewell, Sir Henry Gollan said: "His profound erudition has been strengthened by a virile common sense and all these qualities have created that intellectual distinction which marks all the work his Lordship has done as a member of the Supreme Court. My Lord, you are retiring honoured by his Majesty the King, acclaimed by the community as a whole and carrying with you the reverent and affectionate regard of your profession." At the unveiling of his portrait in the Law Library, Justice Garvin expressed the hope that the portrait would "keep fresh and green the memory of one who was an eminent and wise judge, a great and good man, loved by his friends, held in affection by all those who knew him, respected by all."

What a singular destiny has been that of this remarkable man! To be regarded in his own age as a classic and in our own as a model. To receive from his contemporaries, both in and out of the Courts, that full homage which extraordinary men usually received only from posterity!

The book comprises a Foreword, Preface, ten chapters, three appendices and an index.
The author commences his biography with a chapter describing the colonial setting in which Sir Thomas lived and worked. It sets out the very limited opportunities for advancement open to

'natives', and official positions in the hierarchy of colonial administration, and the moderate means of lesser chiefs like Sir Thomas' father, Maha Vidane Mudaliar Gabriel de Sampayo.

Weereratne then describes Sir Thomas' early years. Thomas began his education at St. Benedict's Institution. Thomas lost his father soon after. They were difficult times. He had to walk unshod for quite some distance, from his home in Silversmith Street to Kotahena. His clothes were often frayed and he had to study by the light of a bottle lamp. He won a Queen's scholarship, which enabled him to continue his studies at the Colombo Academy, as Royal College was then known. He excelled in school, winning the Form Prize and Prizes for Latin and Maths, and the Turnour Prize. Having won the English University Scholarship, he went up to Cambridge and joined Clare College where he obtained his LL.B degree in 1881. (Later, when he built his mansion at Silversmith Street, he named it "Clareden.") He was called to the Bar from the Middle Temple in the same year and started practice in Colombo.

Young Thomas had no connections at the Bar, and for some time, he was in difficult circumstances. In fact, at one stage he attempted to join the teaching staff at Royal College, or join the Education Department in an administrative capacity. Both attempts were unsuccessful. As a means of securing some income, he gave private tuition to law students at his house, and became a lecturer and examiner at the newly established law college. During that time he was a co-editor of the Ceylon Law Reports and translated Johannes Voet's title on Donations into English. These activities played some part in drawing attention to him. He impressed the leader of the Bar, Frederick Dornhorst, when his draft pleadings in a matter were given to Dornhorst by the proctor in the case. Gradually, the good news spread and well-known proctors – F.J. de Saram in particular – began to brief him. His appearances increased rapidly. There was no sphere of work to which he limited himself. He declined appointment as a District Judge as well the offer of a senior position in the Crown. By 1903, he had reached the zenith and he was sworn in as a King's Counsel with Ponnambalam Ramanathan and Frederick Dornhorst – the firat "silks" of the Bar of Sri Lanka. In 1903, he accepted appointment as a Commissioner of Assize. He was appointed a Puisne Justice in 1915 and was appointed Senior Puisne Justice in 1922. He functioned as Acting Chief Justice on several occasions, and in 1924 was conferred with the rank of Knight Bachelor by the King.

The book contains a list of references in the *New Law Reports* to some of Sir Thomas' cases. There are also excerpts from judgments. There is no analysis of the cases or excerpts and what their significance is to the development of the law or Sir Thomas' role as a "humane judge". This is disappointing; but then, the author is not a lawyer.

During his work at the Bar, Sir Thomas amassed a great fortune and came to own several tea and coconut estates. His favourite place was his coconut estate "Heneratgoda", to which he regularly went with the members of his extended family for relaxation. He built himself a large mansion – "Clareden" – at Silversmith Street. The author, Rienzie Weereratne, was born nine months after Sir Thomas died, but he lived at "Clareden" with his mother – Sir Thomas' sister's daughter - who ran the great house for Sir Thomas. Weeraratne heard anecdotes of the great man's life, spent holidays at Heneratgoda, and eventually came to own some of his silverware and glassware, his satinwood dining table, and his leather-bound Douay Bible. Incidentally, his

satinwood furniture was made of the, dismantled, famous satinwood bridge over the Mahaweli at Peradeniya.

The personal connection adds warmth to the narration in a unique kind of way.

Sir Thomas did not marry. He devoted his life to accommodating and looking after his large, extended family at "Clareden".

Apart from his deep concern for the welfare of his family, Sir Thomas was a committed Christian. He once remarked: "If I am not a catholic, I am nothing." He was the first President of the Catholic Union of Ceylon. The Pope conferred on him the rank of Knight Commander in the Holy Order of St. Gregory the Great.

Weereratne called on me when he was about to commence his work. I encouraged him; and I am happy that, despite great odds, he has done so well. The book deserves to be read by those who are interested in the development of the law. It would be read by profit by those who might be inspired by the life and work of a man who convincingly demonstrated that, despite the fact that a profession or occupation is commonly regarded as 'closed', or over-crowded, yet, by dint of dedication and hard work, one could unlock the bolts, hurdle the bars, and enter the sacred area appropriated to the elite, and find room at the top.

Dr. A.R.B. Amerasinghe

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