

Human Rights and Humanitarian Law in Occupied Iraq: Current Problems and Future Prospects

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Speakers: Professor Christopher Greenwood QC, Professor Françoise Hampson, Professor Philippe Sands QC, Professor Ruth Wedgwood

Chair: Professor Conor Gearty

Conor Gearty

Thank you very much, Ruth. Our final speaker is a colleague of mine, Professor of Law, Director for the Centre in International Courts and Tribunals at UCL, a very distinguished author on environmental law, the Co-founder of Field and, well, he's a colleague of mine, a founder member of Matrix Chambers, very heavily involved in international law litigation and just last year was made a Queen's Counsel, so we'll ask Philippe Sands to wind up the first part of the evening.

[APPLAUSE]

Philippe Sands

Thank you very much, Conor, and thank you to your colleagues at the Centre for the invitation and for convening the panel.

I would like to talk at a different level, not about whether Rule X or Rule Y mechanically does or does not apply. I think we've had a very excellent discussion on that. I want to talk openly and frankly and put out the question: how is it that we have got ourselves into this deplorable situation? Because the situation today really is astonishingly bad.

Unknown numbers of thousands of people have died in Iraq. Our military, the American military have no idea how many people have died. We are told there are thousands of people held in detention at various parts of Iraq, we don't know where they are held, we don't know for how long they are held, we don't know why they are held. We've all seen the television pictures of families wanting to know where their loved ones and friends have gone. And of course we now have the almost comical situation of President Bush telling us last night that Iraq has become the global centre of the terrorism network. Astonishing, because just a year ago that was not the case, and of course it was rather predictable. I spent yesterday afternoon, reading the evidence of Lord Wright to the House of Commons Select Committee on Foreign Affairs. He predicted precisely what has happened. I commend you to read that.

How on earth have we got ourselves into this situation?

To begin, I agree with a point made by Chris. There is no formal legal connection between the decision to use force in Iraq and the conditions under which the occupation is to take place. There can be no disagreement with that fundamental precept of international law. But that does not mean that the two aspects have nothing to do with each other. In fact, I think they are connected because it is abundantly clear to many observers across the political spectrum (not a left/right issue, not an American issue, a British issue, a French issue, it cuts across all areas) that we have entered a new phase of contempt for law. There is a basic contempt for the rule of international law which permeates large parts of the United States and it is supported at the highest levels in the Bush Administration. It is supported also by many of the external advisors to the Administration who have, in effect, contributed to a culture of lawlessness. That culture has created the conditions in which some governments feel able to act contrary to elementary legal principles. The problem appears to be systematic, a direct connection flowing from President Bush's abandonment of various multilateral conventions, through to the so called "war on terrorism", the decision to establish a holding camp off United States territory to avoid the application of American constitutional law and international law, and straight into the front door of Abu Ghraib prison. It is seamless. It is saying "we suspend the normal rule of law". This deplorable situation has not come about by accident. It is not a situation in which we have stumbled into some legal black hole. It is systematic.

President Bush came into office with an avowed commitment to reshape the international legal order. It was called "A la carte multilateralism". You pick the bits that you like, and get rid of the rest. Kyoto, the ABM Treaty, the International Criminal Court, the list goes on. And then along came a wonderful opportunity to create a framework within which to unmake the established international legal order – September 11th. I happened to be in New York on that day with Tom Franck, we spent the morning together, it was a shocking and devastating time. But, and it's not fashionable to say this, one has to put 9/11 into context. Three thousand people died on September 11th in the World Trade Centre. That is an appalling number. But around the world there are conflicts taking place (in Congo and Uganda and elsewhere) where millions of people have died in far worse conditions and in even more abject circumstances. This has not caused us to seek to suspend the application of the rule of law internationally.

I've spent time going through news reports to identify what happened after 9/11, in terms of a commitment to international law. You can find many examples of people in the US government from Assistant Attorney General John Yoo, to Ruth's colleague on the Defence Policy Studies Board, Richard Perle, saying, "We can remake the international law. We can have a war in Iraq and we can get rid of the United Nations." This in effect is part of a structured effort to remake the international legal order. And the documents to support that are beginning to emerge. If you go onto the Newsweek website, you can find the memorandum from the White House legal counsel, Mr Gonzalez who talks about the "quaint" provisions of the Geneva Conventions. "If we were to suspend them", he seems to be saying, "we would be able to 'preserve military

flexibility". That is in the memorandum. The Secretary of State, Colin Powell, reacts sharply and is then overridden by a raft of other views. That transforms into a policy which created the detention camp at Guantanamo bay, which became a testing ground for all of these issues. I endorse entirely the points made by Françoise about the designation of individuals as unlawful combatants. It is inconsistent with the international legal order to allow people to be held in a legal black hole.

How did we get here? Well, Ruth referred to the application of the Geneva Convention "full tilt". I have a problem with what appears to be her minor semantic rearrangement. It says that with a minor quirk the law no longer applies, one looks only to the spirit of the Geneva Conventions. Through that semantic twist you take yourself into the non-law area, leading directly to Abu Ghraib. I remember watching a press conference at which President Bush, with the Prime Minister standing next to him, said in response to a question from a British journalist, "How can you hold people indefinitely at Guantanamo Bay? On what legal basis are you able to do that?" and President Bush looked at the camera and said "These are bad men, these are killers." Well, five of the bad men, five of the killers, were released back into the United Kingdom, they have not been charged, they are not subject to legal constraints. Yet they spent two years incarcerated, and the conditions of their incarceration seem not a million miles from what we have had described in relation to Abu Ghraib.

What has Britain done in relation to all of this?

Some would say that Britain is colluding. I'm yet to find any statement from a British government minister setting out clearly what that government's position is in relation to the minimum standards of treatment which are to be applied to the detainees at Guantanamo. We've heard expressions of reservation, expressions of regret, expressions of concern. But the failure to define publicly how British nationals should be treated at Guantanamo Bay sends out a clear signal: it may be appropriate to treat these people as though they are in a legal black hole.

All of this is very serious. At the end of the day it boils down to advisers who have contributed to such policy.

Let me conclude with the following words: "Let me finally say a few words about criminal responsibility of the [...] leadership. [...] A leader who orders a crime is responsible under the law just as is the operative who carries it out. [...] This idea is central to the law of armed conflict and is recognised in the statutes of the International Tribunals for the Former Yugoslavia and Rwanda. Command responsibility says that a leader is liable for failing to control the notorious conduct of his subordinates. He can be criminally liable even if there is no proof that he directly ordered an atrocity. As a superior in the chain of command he must assure that his subordinates do not run amok. He has an affirmative duty to monitor their conduct and a duty to take steps to prevent and to repress misbehaviour."¹

¹ Federal News Service, 10 April 2003.

Those words may be familiar. They are taken from Ruth's statement before the United States Senate Committee on Governmental Affairs, on 10 April 2003. But they relate to a different leadership, the Iraqi leadership, but I think the words apply equally to the leadership in the Department of Defence in the United States today. It strikes me as extraordinary that the Secretary of State can continue to serve in light of everything that has emerged recently. I hope for my part that such a thing could not happen in the United Kingdom, in the event that similar facts were to emerge.

Thank you.