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**HUMAN RIGHTS
IN AN AGE OF COUNTER-TERRORISM**

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This lecture was delivered by Conor Gearty as part of the 2006 Oxford Amnesty Lectures, which took as their topic the 'War on Terror'.

Terror and terrorism

For many years I worried with all the other so-called 'terrorism experts' about the fact that there was no proper, objective definition of terrorism. I even abandoned a law textbook I planned on the subject on account of the inadequacy of my introductory chapter. In the end I wrote a book on terrorism that was more about language and the power of labels than it was about killing and kidnapping.¹ This was because it had eventually dawned on me that the whole point of the subject of terrorism was that there was no definition. The importance of the subject, its utility to those who mattered, relied upon the impossibility of it ever being tied down. For the moment terrorism is given an objective meaning, one that can be commonly agreed, is a dangerous moment for the experts, a point in time when the term risks taking on a rational life of its own, and therefore being rendered capable of being ascribed to events beyond the experts' power of categorisation.² Take just as an example a straightforward definition, one that sees as terrorist violence, the intentional or reckless killing or injuring of non-combatants, or the doing of severe damage to their property, in order to communicate a political message. Expressed like this, it is clear that terrorism is a method of violence, and as such is one that can be used by any actor who has chosen to deploy violence in pursuit of this or that political goal. It can, it is true, be used by the kind of weak group that has few other military or political options in its locker: the Al Qaida's and ETA's of this world. But it can equally well be deployed as a method of violence by other, stronger forces, by guerrilla organisations for example that are able to muster other kinds of military action as well if the need arises, and by insurgent forces in a civil war situation where terror violence may be just one option among many. In failed states it is available, among other brutal techniques, to all the ambitious, power-hungry factions.

It is equally clearly a kind of political violence that can be deployed by state forces, either in isolation – the French action in sinking Greenpeace's *Rainbow Warrior* in 1985 is a good example as might be the American decision to bomb Tripoli in 1986 –

¹ C A Gearty, *Terror* (Faber and Faber, London, 1991).

² For an elaboration on what follows see C A Gearty, 'Terrorism and Morality' [2003] *European Human Rights Law Review* 377.

or in tandem with other kinds of violence in the context of a serious armed conflict – examples that come to mind would be the allied bombing of Dresden and other German cities towards the end of World War Two and the nuclear attacks on Hiroshima and Nagasaki in 1945. Describing terrorism as a kind of political violence in this way is not necessarily to say that it is wrong, just as to call something an aerial bombardment or an invasion or a siege is not to condemn it. The question of morality is separate from the issue of attribution. On this account to call this or that action terrorist is to prepare the ground for a discussion of its legitimacy – it sets up rather than answers that important question.

Now of course this is not at all how we use the term today. First and most importantly we have come to view terrorism not as a method of violence but rather as a category of person, a kind of militant rather than a kind of tactic, the sort of thing a person is rather than the kind of thing a person does. So we have terrorist organisations, terrorist groups, terrorist leaders and so on, and these labels do not require evidence of specific actions in order to be made to stick, to secure coherence in our discourse. Second, legal definitions of terrorism are invariably much wider than the core meaning I have just given to the term,³ incorporating violence against property, attacks on a country's infrastructure, and even on some accounts direct action and extreme forms of civil disobedience.⁴ Once a group is labelled terrorist by reference to one or other of this wide set of criteria, it is then terrorist, not only (as I earlier said) *regardless* of what it does but also sometimes *in spite of* what it does. A group might be terrorist without ever having lifted a finger in anger against anybody whatsoever. It might still be terrorist even when it is involved in specifically non-violent actions. Thus, as has happened recently in Palestine, a political party engaged in electoral politics (indeed winning an election) can nevertheless be regarded as terrorist and therefore as beyond the pale of proper political discourse. That 'therefore' is important. For thirdly, we have completely lost sight of the fact that political terror is a description of a kind of violence and not necessarily a moral condemnation of that violence. To contemporary ears, to call something terrorist is at the same time to condemn it as morally wrong: the value judgment is packed into the description, the 'is' has been elided into the 'ought' or more accurately in this case the 'ought not'. Fourthly and finally to complete this story of verbal degradation, we have so contrived matters that terrorism is now widely thought of as something of which state authorities – acting either directly or through authorised paramilitary forces – are incapable. Even if what the state does is both violent and designed to spread terror among its own people – a sadly not uncommon occurrence as is obvious from a perusal of the recent annual reports from Amnesty⁵ and Human Rights Watch⁶ – it

³ The Terrorism Act 2000, s 1 is a good case in point. See also the draft UN Comprehensive Convention on International Terrorism as recommended by the Ad Hoc Committee on Terrorism: GA Official Records, 57th Session, Supplement No 37 (A/57/37) 11 February 2002.

⁴ See for a good survey B Golder and G Williams, 'What is "Terrorism"? Problems of Legal Definition' (2004) 27 *University of New South Wales Law Journal* 270.

⁵ Amnesty International Report 2005, *The State of the World's Human Rights* (London, 2005).

nevertheless cannot be described as terror or terrorist action because those terms have now come to be invariably applied to sub-state actors. Even worse, this kind of terror by the state might find itself with luck and a bit of careful spin being reclassified as counter-terrorism, in other words as inherently good in the same way that terrorism is inherently bad.

The evolution of the term terrorism from a description of a kind of violence to a morally loaded condemnation of the actions of subversive groups regardless of the context of their actions – or even sometimes their non-violent nature – should not surprise us. It is a movement in language that operates wholly in favour of state authorities, taking their conduct out of the realm of terror, however horrible, while at the same time giving them a capacity to dump this powerfully opprobrious label on their political opponents. No wonder authoritarian leaders everywhere, the Mugabes and Burmese juntas of this world, are such counter-terrorist enthusiasts. None of this explains, however, a further twist in deployment of the language of terrorism, one that has great and direct relevance today. This is the way in which the term has shed any kind of locational exactitude and become a manifestation of a universal crisis, a violent version of the plague, something that crosses boundaries at will, swooping upon unsuspecting peoples out of the blue and bringing destruction and death in its wake. In its contemporary form terrorism is no longer a particular kind of violence that this or that gang or group in this or that country do; rather it is said to be part of a pattern of systematic international violence against which a ‘global war on terror’ now needs to be waged. This idea of a world-wide contagion of terror inspired by evil forces with designs on western civilisation – so commonly spoken of today as something new and unprecedented and uniquely terrifying – in fact originates well before 11 September 2001. Exploring its origins takes us back to the very beginnings of the modern distortion of our subject, the late 1960s.

We need now to turn to Israel and Palestine, the *fons et origo* of our subject in its modern form. Until 1968, descriptions of post World War Two sub-state political violence were largely informed by an anti-colonial narrative, one that saw the use of such force as designed to secure freedom for local people from domination by this or that western power. The term that was used to describe such insurgents was usually something like ‘guerrilla’ or (if they looked as though they might succeed) ‘freedom-fighter’. The first attempts to force Israel to concede a Palestinian state were entirely conventional, involving acts of war and guerrilla action. These foundered on the ruthless implacability of the Israeli reaction: Arab and PLO fighters were being killed too easily; it simply did not pay to try to fight Israel on equal terms: it was a kind of surrender with a simultaneous death sentence attached. So the Palestinians turned to isolated acts of political violence, by both official and renegade factions, on occasion very bloody it is true, but as not much more than a kind of consolation prize that had to be accepted because it was all that was available. It is in this sense that it

⁶ Human Rights Watch, *World Report 2006* (Human Rights Watch and Seven Stories Press, New York, 2006).

is right to say that Arafat was a reluctant terrorist and in this sense it is also absolutely right to describe terrorism as 'the weapon of the weak'.⁷

The 1970s and 1980s were marked by high levels of violence in the region, in particular by the armed forces of the state of Israel but also, albeit to a much lesser extent, by Palestinian factions and as time went on (and particularly after the Iranian revolution in 1979) by more religiously-oriented movements such as Hezbollah and Islamic Jihad, working in southern Lebanon but also increasingly in the occupied territories themselves. During this period as well, some Palestinian factions took their fight to the streets and airports of Europe with occasional forays into extremely bloody violence indeed. But in any head count of casualties or any impartial assessment of levels of terror during this period, it is obvious that the lavishly equipped, well-organised and dominant military force in the region – the Israeli army – was responsible for by far the greatest numbers of killings and acts of politically-motivated violence. If there were any doubt about this then all that needs to be recalled are the invasions of Lebanon that took place in 1978 and 1982, and in particular the two-month siege of Beirut that took place during the Summer of the latter year.⁸ This was political terror by any ordinary definition of the term. Assisted by the internationalisation of the violence by some Palestinian factions which I mentioned a moment ago, a brilliantly successful campaign was then conducted by US and Israeli strategists and their academic and intellectual allies to castigate Palestinian violence as terrorist and therefore as uniquely evil. This had two powerful effects: first it disconnected Palestinian violence from its context and turned it into a more generalised problem, one that was faced by the Western World in general, rather than something that grew out of the injustice of the Israeli occupation. What helped here was that the generally very peaceful West was indeed suffering from occasional acts of subversive violence, from leftist ideological groups in Germany and Italy (the Red Brigades and the Bader-Meinhoff gang respectively) and from irredentist nationalist groups in Corsica, Spain and Northern Ireland.⁹ Even the US had its own internal subversives, in the form of the Weathermen, afterwards the Weather Underground. All these groups became elided together under the general terrorist rubric, one within which in the 1970s the violent exponents of the Palestinian cause now also found themselves becoming helplessly enmeshed. 'Freedom-fighter' was long gone; 'guerrilla' and 'urban guerrilla' were fast becoming distant dreams. All the talk was of 'terrorists' and 'terrorism'.

Second, the same neat manoeuvre saw the Israeli defence forces identified with the counter-terrorist authorities in the West and therefore cast in the same sort of benign light – and this was regardless of the extreme, terror-inducing nature of their own

⁷ The phrase is that of Walter Laqueur. See his *The Age of Terrorism* (Weidenfeld and Nicolson, London, 1987) where he makes this point about terrorism groups generally and not just the PLO.

⁸ R Fisk, *Pity the Nation: Lebanon at War* (A Deutsch, London, 1990) is a particularly harrowing account.

⁹ The best general study of the terrorism of the period is A Guelke, *The Age of Terrorism and the International Political System* (Tauris Academic Studies, I B Tauris Publishers, London, 1995).

violence, far in excess of what the US, British, Spanish etc authorities needed to do to cope with their own subversives. One book from this period for example, *Terrorism: How the West Can Win*, contained a contribution from Israel's ambassador to the United Nations Benjamin Netanyahu which described the 'war against terror' as 'part of a much larger struggle, one between the forces of civilization and the forces of barbarism'.¹⁰ This volume – edited by Netanyahu who was also a leading 'terrorism expert' and was to become Israeli prime minister in due course – was published seven years before Samuel Huntingdon's famous article on the 'clash of civilisations'.¹¹ Taking advantage of the fact that Palestinian radicals struck outside Israel, institutes and think tanks were established to study the 'problem' of 'international terrorism': one such particularly influential organisation, the Jonathan Institute, held large conferences in Jerusalem in 1979 and in Washington in 1984, calling for the 'need for a better understanding of terrorism and for mobilizing the West against it.' It was named after the Israeli commando who had died in the raid on Entebbe in 1976. After Iran began to support anti-Israeli forces in Lebanon, new studies began of 'state-sponsored terrorism' and if countries in the region fell out with the US, they found themselves at risk of being classified as 'terrorists states' – a label that came and went as relations with Washington ebbed and flowed.¹²

The joint interest of the West and Israel in developing a common front against terrorism was consolidated in the 1980s. These were the Reagan years when pressure was being ratcheted up on the Soviet Union, or Evil Empire (as opposed to Axis of Evil) as it was then often quite unironically described. A succession of books and articles and terrorist commentaries made the link between the Soviet Union and the sponsorship of international terrorism in general and of the PLO in particular. This was the first global terrorist campaign of which, though now largely forgotten, so much was made at the time. Books with titles like *The Soviet Strategy of Terror*,¹³ *The Grand Strategy of the Soviet Union*,¹⁴ *The Soviet Union and Terrorism*,¹⁵ *The Soviet Connection: State Sponsorship of Terrorism*¹⁶ and the evocatively titled *Hydra of Carnage*¹⁷ flowed from the presses and the think-tanks. Especially influential was Clare Sterling's *The Terror Network: The Secret War of International Terrorism*,

¹⁰ B Netanyahu (ed), *Terrorism: How the West Can Win* (Weidenfeld and Nicolson, London, 1986).

See also B Netanyahu, *Fighting Terrorism. How Democracies Can Defeat Domestic and International Terrorists* (Allison and Busby Ltd, London, 1996)

¹¹ S Huntingdon, 'The Clash of Civilisations' (1993) 72 *Foreign Affairs* 22.

¹² To the frustration of serious academics striving to impose order in the field: see G Wardlaw, *Political Terrorism: Theories, Tactics and Counter-Measures* 2nd edn (Cambridge University Press, Cambridge, 1989), pp 176 – 178.

¹³ S T Francis, *The Soviet Strategy of Terror* (The Heritage Foundation, Washington DC, 1981).

¹⁴ E Luttwak, *The Grand Strategy of the Soviet Union* (Weidenfeld and Nicolson, London, 1983).

¹⁵ R Goren, *The Soviet Union and Terrorism* (Allen and Unwin, London, 1984).

¹⁶ J Becker, *The Soviet Connection: State Sponsorship of Terrorism* (Institute for European and Defence and Strategic Studies, Occasional Paper No 13, London, 1985).

¹⁷ U Ra'anana, R L Pfaltzgraff, R H Schultz, E Halperin and I Lukes, *Hydra of Carnage* (Lexington Books, Lexington, 1986).

published by Weidenfeld and Nicolson in 1981.¹⁸ The point being made by all this academic scholarship was that Soviet support for the Palestinian cause essentially made it a Godfather of international terrorism the world over. So successful was this strategy of linkage between Palestinian actions and international terrorism that the attempted murder of the Israeli Ambassador to the UK in London in 1982 (by the Abu Nidhal faction) was capable of being made into a plausible *casus belli* of the invasion of Lebanon – Operation Peace in Galilee – which was launched two days later. An eye for an eye has never been the counter-terrorist's motto in the Middle-East, more like 10,000 eyes for every eye. But the invasion, and the siege of Beirut that followed, were not terrorism; they were counter-terrorism, 'acts of peace', and this was regardless of the terror that actually happened on the ground.

This framework for seeing the Israeli-Arab conflict, embedded so brilliantly in our public discourse in the 1970s, as part of a worldwide contagion of irrational terror remains with us to this day. Of course the Soviet dimension has declined, but it has been replaced by a new pernicious superno, radical Islam. Where once it was the Kremlin it is now Al-Qaida. The Politbureau has been replaced by Osama Bin-Laden, with brief stops for Abu Nidhal and President Gadaffi along the way. The transfer began to take place much earlier than is commonly understood, during the mid-1980s as Soviet power declined and political Islam asserted itself against western and Israeli interests, first in Iran (against the American-sponsored Shah) and later in Lebanon (against Israeli, US and French military forces buttressing the Christian regime in power in that country). In a book for the Institute for the Study of Conflict, entitled *The New Terrorism* and published as early as 1986, the terrorism expert William Gutteridge, sounded the following warning note about the future:

The new wave of political violence in the Middle East and South Asia in the mid 1980s in which religious sectarianism is a potent factor has added other dangerous dimensions to the problem and at the same time focused attention sharply on the real danger to civilisation and international order which epidemic terrorism could pose.¹⁹

The point grew in substance with the increase in the 1990s both in violence within the occupied territories and in the outbreaks of political violence across the world from subversives now increasingly purporting to act in the name of Islam. This was when Hamas got properly underway. Against this kind of background, it was not surprising that the attacks on 11 September came quickly to be seen as another part of the savage terrorist 'war' being waged by political Islam against the West in general and against that honorary part of the West, Israel, in particular. The government of Ariel Sharon repeated the triumph of an earlier generation of Israeli strategists in linking its private quarrel with the Palestinians to this global epidemic of terror. Speaking to the Knesset on 16 September 2001, the then Israeli Prime Minister put it in the following way:

¹⁸ C Sterling, *The Terror Network: the Secret War of International Terrorism* (Weidenfeld and Nicolson, London, 1981).

¹⁹ W Gutteridge (ed), *The New Terrorism* (Mansell Publishers, London, 1986).

The subject of terror is unfortunately not new to us. The state of Israel has been fighting the Arab, Palestinian and Islamic fundamentalist's terror for over 120 years. Thousands of Jews have been murdered in terrorist attacks... The bereavement of the American people is known well to us.

The war against terror has to be an international war. A war of the free world coalition against the forces of terror... It is a war between the humans and the blood thirsty.

We know this as we have been in this battle for many years now.

...We weren't surprised by the evilness of the Arab, Palestinian and radical Islamic terror. Arafat chose the strategy of terror and formed a coalition of terror. The terrorist attacks against Israeli citizens aren't any different than Bin Laden's terror attack against the American citizens- terror is terror.

We must remember it was Arafat who gave the legitimacy to hijacking planes, and it was the Palestinian terror groups that started sending suicide bombers. All the radical movements got their legitimacy from Arafat...

There is no such thing as terrorist who are 'good guys' as there is no such thing as terrorists who are 'bad guys', they are all bad.

... I applaud President Bush for his decision to form a coalition against terror. This coalition must fight all terror organizations, including Arafat's...

As was the case in the 1980s, a large number of intellectuals, politicians and non-governmental bodies promptly echoed this theme of a new global war on Israel and the West, one which embraced all elements of the Palestinian resistance as well as the Al-Qaida 'terror network'.²⁰ What was true of the Palestinian Liberation Organisation in the 1970s and 1980s is also true of the militant groups to be found today in the occupied territories, in Afghanistan, in Iraq and elsewhere in the region. No attention, or no serious attention, needs to be paid to the political violence – by Israeli forces, by US forces, by other armies in the latest 'Coalition of the Willing' – which creates the conditions for this subversive violence and helps to ensure its perpetuation. There are literally no words left to describe state violence of this sort – all the truly bad words have been exclusively allocated to small, weak groups that cause a fraction of the fatalities of their more powerful opponents. But their mistake is to kill people like us.

Human rights and terrorism

The greatest violence the term 'terrorism' does to human rights is the way in which it frames public discussion in the way that I have just described. The primary effect of

²⁰ See J Burnett and D Whyte, 'Embedded Expertise and the New Terrorism' [2005] *Journal for Crime Conflict and the Media* 1.

this is that it deprives the criminal justice model of the space with which to breath. The terrorism model blows a hole in this system, rooted as it is in fair procedures, settled rules and carefully calibrated international co-operation against defined criminal mischiefs. It disregards the criminal in favour of a language rooted in generalities which has little time for individual dignity or the rule of law. UK law has certainly drifted in this direction, with administrative powers rooted in executive judgments about involvement in terrorism (very broadly defined) being used against individuals and groups without the safeguards that would be regarded as normal if the criminal justice model were being followed. Human rights law in the United Kingdom has largely accommodated these security-oriented changes, and the effect of this has been to render them seemingly compliant with rather than inherently hostile to human rights principles. This has been achieved by a combination of, on the one hand, a code of human rights law that concedes within itself the need for occasional state action to safeguard national security and, on the other, an executive branch that has been sensitive to the need to give up some of the power it wants in order to secure a satisfactory human rights outcome.²¹ So in Britain we have long periods of pre-charge detention on suspicion, albeit overseen by a judicial officer on the basis of rather general criteria sympathetic to state necessity.²² There is an executive power to ban political associations but an independent tribunal (albeit without the security of a court) to which affected organisations can appeal.²³ The anti-terrorism control orders provided for in the terrorism law enacted in 2005 by way of a response to the Belmarsh decision accepts the need for some judicial safeguards, albeit these do appear very weak when looked at from a criminal perspective. And so on. Some believe that this packaging of terrorism law in a kind of ersatz due process is merely brilliant salesmanship, a clever way of attacking human rights while seemingly to comply with them, of salving the conscience of New Labour authoritarians. I have said as much myself recently, likening such safeguards to 'confetti at a funeral'.²⁴ It is certainly right that we would be better off with an improved code of criminal law outlining specific offences and providing mainstream procedural safeguards against abuse. At another level, however, this entanglement of terrorism law in the criminal process, and in particular the use of judges and lawyers from the historically independent legal professions to make it work, may over time transform such alien codes into something which much more closely resembles ordinary criminal law than it does at present. Given that it is unlikely that the terrorism laws are going to disappear anytime soon, this is certainly a goal worth working towards.

²¹ For further details, see C A Gearty, '11 September 2001, Counter-terrorism and the Human Rights Act' (2005) 32 *Journal of Legal Studies* 18. Cf K D Ewing, 'The Futility of the Human Rights Act' [2004] *Public Law* 829.

²² Terrorism Act 2000, part V.

²³ Terrorism Act 2000, part II.

²⁴ C A Gearty, Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?' (2005) 58 *Current Legal Problems* 25, at p 31.

And where would you prefer to be a suspected terrorist, London or Washington? Before critics of the UK's determination to make terrorism law human rights compatible become too shrill in their attacks, we should look to the United States to see what happens when no such efforts are made. In that jurisdiction of course there are no human rights as such to control the security-instincts of the federal authorities, but there is supposed to be the Constitution and guaranteeing its omnipotence, and thereby the supremacy of the rule of law, is supposed to be the main task of the US Supreme Court. Aspects of the Bush administration's response to the attacks of 11 September 2001 have mimicked the British in that efforts have been made to secure legislative changes which have empowered the authorities to act in certain new – and undeniably draconian – ways. This is playing the game essentially by the old rules: you push something through Congress before you do what it will empower you to do, and you hope that the powers will not be struck down by the courts. The highly controversial Patriot Act is a good example. But it is now clear that this was only a small part of the administration's response, and that in fact the major commitment was to executive action without the authority of any law whatsoever. There are echoes here of the ominous Operation Kratos under which British police secretly agreed new terms of engagement to deal with potential suicide bombers and almost immediately ended up killing an innocent man. Since shortly after the 11 September attacks the National Security Agency in the US has been empowered by presidential order to monitor international telephone calls and e-mails of US citizens and residents without the warrant that is required by a secret foreign intelligence court. It is estimated that hundreds, perhaps thousands, of people have been under such surveillance. According to the President this is a 'limited program' aimed at those suspected of having links with terrorism and that it is 'vital and necessary' to protect the country.²⁵ These may be good arguments as to why there should be such a law, but these are not reasons in themselves for bypassing the law-making process altogether. The language of terrorism provides the justification for these egregious breaches of the right to privacy and (as far as Operation Kratos is concerned) the right to life: they could not have arisen if we had stuck to the criminal model.

Lacking the enforcement arm of a state, international law has been even easier to ignore than domestic law. In November 2005, the Pentagon conceded that the US had detained more than 80,000 people in facilities from Afghanistan to Cuba since the attacks on 11 September.²⁶ A large proportion of the 500 or so detainees being held at Guantanamo are believed to be on hunger strike and are being forcibly fed by the authorities.²⁷ Naturally enough there are lawyers who can be found who will argue that the US policy of detentions is in accord with international law, just as there are some who say that the president can do what he wants within the jurisdiction as well. Fortunately they are few and far between. Unfortunately they occupy positions

²⁵ *Washington Post* 2 January 2006, p A2.

²⁶ *Guardian* 18 November 2005.

²⁷ *Guardian* 19 November 2005

of immense power.²⁸ And their opinions dovetail nicely with the prejudices of their bosses. For it has to be acknowledged that scepticism about the rule of law goes right to the very heart of this American administration. As President Bush said in his State of the Union Address in 2004, 'It is not enough to serve our enemies with legal papers'. Ever more brutally to the point, this is how Secretary Rumsfeld put it in the 2005 *National Defence Strategy of the United States*: 'Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.'²⁹ If you took this quote, located it in the 20th rather than early 21st Century and asked an informed audience who had said it, I wonder which characters would spring first to mind? American names would not be likely to be first on the list.

And then of course there is the torture. It is an important part of the US sense of itself that the country is not a place where torture has ever been officially contemplated. This is to put it mildly – and contra the idealists like Senator John McCain – ahistorical. Torture has directly and through its proxies been integral to US foreign policy since the Vietnam War. Mechanisms of no-touch torture based on sensory deprivation and self-inflicted pain were developed as part of the Phoenix program during that conflict and were then exported to Latin America and Asia under the guise of police training programs.³⁰ The School of Americas based in Panama from 1946 until 1984 became so notorious that it was thought wiser to relocate the establishment to Fort Benning, Georgia. What was new after 11 September was the openness with which the previously covert policy was now being promulgated. Memos and legal opinions began to flow from the administration which argued that the President, in his constitutional role as commander-in-chief, had the power to order torture whatever the domestic law might say. It was also asserted that the Geneva Conventions did not apply to the unlawful combatants held by the US authorities, and that the Convention against Torture did not apply to actions against non-Americans outside the United States. It was also suggested that torture was not after all quite what everybody else believed: conduct could be described as such only where it produced pain equivalent to that from 'serious physical injury, such an organ failure, impairment of bodily function, or even death'. Anything else – no matter how awful – simply wasn't torture.³¹

The details of the various moves that the Bush White House has made away from democratic accountability, the rule of law and human dignity, all in the name of the 'Global War on Terror' that it says it has to fight, need not to detain us here. The challenge to human rights is manifest. We have already seen how the discourse of

²⁸ The definitive account is M Danner, *Torture and Truth. America, Abu Ghraib and the War on Terror* (Granta Books, London, 2005). There is a good summary by A Lewis in *The Nation*, 26 December 2005, pp 13 – 15.

²⁹ See K J Greenberg, 'Secrets and Lies' *The Nation* 26 December 2005, p39 at p 40.

³⁰ See Alfred McCoy, *A Question of Torture* (forthcoming) discussed at length by N Klein, "'Never Before!'" Our Amnesiac Torture Debate' *The Nation*, 26 December 2005, pp11 – 12.

³¹ See generally Danner, n 40 above.

terrorism challenges universality and by positing a version of the world rooted in good and evil makes possible the kinds of subversions of our subject that I have been discussing. Our interest at this juncture lies in the reaction that these attacks on our human rights – liberty, bodily integrity, life and so on – have provoked from human rights defenders. The majority of progressives and public intellectuals have been fierce in their denunciations. But this has not been a unanimous response by any means. A substantial number of lawyers, media commentators and academics, particularly in the United States, have supported, either in whole or in part, the actions of the administration. Many of these have been supposed ‘human rights experts’, professors and lawyers allegedly well-versed in the requirements of our subject. This is not to say that they all give the Bush White House carte blanche; enough differences are maintained for critical distance to continue to appear to be preserved. And they disagree among themselves as well. Some of them do not go as far as others in what they would permit: at their conferences and in each other’s edited books they argue among themselves about the morality of this or that kind of sensory deprivation and sometimes they even come down against indefinite detention without charge.³² The details matter less than the fact of the discussions: internment, torture, coercive interrogation, covert surveillance and other manifestations of lawless state power are not any longer simple wrongs to be avoided and severely punished when they occur; rather they have become a set of proposed solutions to supposed ethical dilemmas that need now to be considered and debated, as you might consider and debate any other kind of policy proposal. The unspeakable is no longer unspoken. Even the greatest of our human rights taboos – the prohibition on torture and inhuman and degrading treatment – has become just another point of view – and to some people an eccentrically absolutist one at that.

It is not hard to see how President Bush, Vice-President Cheney and Secretary Rumsfeld have taken such a position. But how have a substantial number of liberal progressives and human rights intellectuals coped with taking such a line? This is where the war on terror plays its part – it supplies the ‘ethical dilemma’ from which all else flows. Those who take the line I have just outlined tend also to accept the idea of a global campaign of terrorism that threatens us all. This leads them to see human rights not as a subject concerned with the powerless individual wherever he or she might be in the world but rather as an idea which finds its clearest expression in the West, indeed as something highly particular to the West, one of the reasons why it considers its culture to be superior to that of others. In this way the ‘human’ is taken

³² Among the books recently published on the subject are: S Levinson (ed), *Torture. A Collection* (Oxford University Press, Oxford, 2004); R A Wilson, *Human Rights in the ‘War on Terror’* (Cambridge University Press, Cambridge, 2005); K Roth and M Worden (eds), *Torture. Does It Make Us Safer? Is it Ever Ok?* (The New Press, Human Rights Watch, New York, 2005); A M Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (Yale University Press, New Haven, 2002). For a comprehensive guide to those who have supported torture or some forms of what has in the past been thought to be ill-treatment see ‘The Torture Tree’ published in *The Nation*, 26 December 2005, pp 28 – 29.

out of 'human rights', the particular is superseded by the general, and the subject becomes one that is more about values than it is about people. On this analysis respect for human rights becomes this abstract thing that we in the West have which we must defend against those who would by destroying our culture also wreck this precious but vulnerable commitment. Michael Ignatieff's recent book *The Lesser Evil* is perhaps the best example of the genre.³³ To Ignatieff, we are faced with 'evil' people and 'either we fight evil with evil or we succumb'. 'Terrorist movements like Al Qaeda or Hamas are death cults' and it 'is redemption they are after, and they seek death sure that they have attained it'. The 'we' here is unavoidable because pervasive: intellectuals like Michael Ignatieff writing about the dangers of terrorism are speaking for the decent 'West' against a horrible other; it is a conversation with friends about what to do about the neighbour from hell. And it needs to be said that in these accounts of good and evil Israel always figures in the Western family. Just as in the 1970s global war on terror against the 'Evil Empire', Israel is our friend, the bastion of our values in a hostile zone, a beacon of good in a region of evil.

Once these assumptions about terrorism and good and evil are accepted, it becomes clear that the western/Israeli democracies are indeed entitled to do some wrong in their struggle for survival. The human rights justification goes along the following lines. Unlike the terrorists, the defenders of democracy know that what they are doing (say they have to do) is wrong (or at least a bit wrong) even when they are doing it, and they have a set of democratic values to hand to stop things getting out of control. Those values commit them to respecting the moral status of human beings and to guaranteeing 'to respect the rights of those who have shown no respect for rights at all, to show mercy to those who are merciless, [and] to treat as human those who have behaved inhumanly'.³⁴ But, precisely because we democratic people are special in this way, value everybody so highly and so on, 'necessity may require us to take actions in defence of democracy which will stray from democracy's own foundational commitments to dignity'.³⁵ So if we change our rules to allow us to respond in an evil way, or our operatives stray over the boundary into evil behaviour without our explicit authorisation, it is really not so bad (fine even?) because all that is happening is that evil is being met with (lesser/theoretically accountable) evil. Indeed it is hard to be at all angry with (much less punish) 'the carnivores who disgrace the society they are charged to protect'³⁶ when what they are doing is protecting us not merely from our political opponents, nor even only from our enemies, but rather from evil itself. Our evil is better (because less bad) than theirs. If Abu Ghraib was wrong, then that wrongness consisted not in stepping across the line into evil behaviour but rather allowing a 'necessary evil' (as framed by the intellectuals) to stray into 'unnecessary evil' (as practiced by the military on the ground).

³³ *The Lesser Evil. Political Ethics in an Age of Terror* (Edinburgh University Press, Edinburgh, 2004).

See for a longer critique from which some extracts are drawn here.

³⁴ *ibid* p 34.

³⁵ *ibid* p 8.

³⁶ *ibid* p 144.

Exactly this kind of human rights language has also played a part in the invasion of Iraq. A kind of militant humanitarianism had grown up during the late 1990s which had argued for a more robust strategy of intervention to secure human rights goals in faraway lands. This had led many liberals to support the US attacks on Afghanistan which followed the 11 September attacks.³⁷ While Stephen Holmes is right when he says that the 'heady support' of 'certain sparkling intellectuals ... played little or no role in the decision to invade Iraq' he is also correct to note that 'it did diminish and isolate voices of dissent'.³⁸ Had the Iraqi occupation turned out as Washington strategists intended, there can be little doubt that the focus would now be on Syria's abysmal human rights record and its unlawful interference with Lebanon's affairs. The threat of military action would probably by now have been ratcheted up against Iran in light particularly of its apparent effort to secure nuclear weapons – a hardly surprising policy choice it must be said given what has been happening in recent years in its two neighbouring countries Iraq and Afghanistan. (How would the US react if Mexico and Canada were invaded and occupied by Iranian forces in possession of weapons of mass destruction of which it had none?) But we can be equally sure in this hypothetical future following a successful pacifying of Iraq that about Israel there would not have been a single murmur: its development of nuclear weapons capacity would have remained unpunished, its illegal occupation of Palestinian land would have gone largely unnoticed, its invasion of neighbouring countries still a thing of the past to be glossed over or forgotten. The human rights militants who would have been in the front row demanding action against Syria and Iran would have justified their silence on Israel by asserting that it is a country that subscribes to human rights values and that it is engaged in necessary evil against a global terrorist enemy, and that therefore its actions are morally better even when objectively they look a whole lot worse.

Conclusion: human rights fights back

In order to ensure its survival, the human rights idea needs to stand firmly against this kind of distortion of its essence, this move to turn it into a basis for selective aggression abroad and an alibi for brutality at home. The moment the human rights discourse moves into the realm of good and evil is the moment when it has fatally compromised its integrity. For once these grand terms are deployed in the discussion, all bets are off as far as equality of esteem is concerned. If we are good and they are bad, then of course equality of esteem as between all of us is ludicrous. Why esteem the evildoer in the same way as he or she who does good? These are not now any longer human beings *simpliciter* but different kinds of humans: one good, one bad. The latter, being evil, are not only different, but worse, worse even than animals who are, after all, incapable of evil. The wonder is not that we good guys abuse their human rights but that we continue to use such language in relation

³⁷ D Chandler, *From Kosovo to Kabul and Beyond. Human Rights and International Intervention* new edn (Pluto Press, London, 2006).

³⁸ 'The War of the Liberals' *The Nation* 14 November 2005, p 29.

to them at all, recognise that they have any residual human rights worth noticing. And who is this 'they' that fill the category of lesser (because evil) humans? In theory of course the Bush administration and the liberal advocates of necessary evil agree that it is just the members of the terrorist brigades, the few truly rotten apples intent on destroying all that we civilised, good people stand for. In the absence of a sensible code of law (boring things like the presumption of innocence, independent trials and the like – mere pedantry in the face of evil!), we have no way of telling which non-Westerners are entirely evil and which merely evil by (involuntary?) association. The easiest thing to do is to suspect the whole targeted community of being evil, and after that – because we have dispensed with procedural mechanisms for proof – it is inevitable that that suspicion, simply through repetition, should mature into a firm conviction – but it remains one without any necessary evidential base whatsoever, a conviction of the moral warrior not a court of law. It affects whole civilisations, tarring them with the stigma of an evil theoretically designed only for the baddest of the very bad within.

Again we are back with the single greatest disastrous legacy of the war on terror from a human rights point of view, the supersession of the criminal model based on justice and due process by a security model that is based on fear and suspicion. One of the great achievements of international law has been to remove the language of good and evil from the relationship between states. The 'just war' theory having the rather fatal flaw that 'justice' is in the eye of the beholder, it was thought far better to tie states down to specific rules and treaties into which morality (rival versions of good and evil) did not stray.³⁹ International humanitarian and human rights law represents the apogee of this civilizing trend in global affairs, with rules of decent conduct that took their colour from the fact of our shared humanity rather than the superiority of our particular cause being agreed and promulgated. Now, thanks primarily to the crude actions of this American administration but also to the willingness of important liberals to embrace the language, we are back in a pre-rule phase where, in effect, despite the liberals' best hopes, anything goes. What is good for one side is good for the other as well, so we have seen a bleak escalation in the inhumanity shown towards Western captives, towards aid workers and others – journalists, support staff – working in the theatre of war. Various axes of evil bestride the world, with the exact centres of evil depending entirely on where you are standing.

The war on terror has already done serious damage to the integrity of human rights, turning our subject into a kind of moral mask behind which lurk cruelty and oppression. But the signs are that the mood is turning and that resistance to this narrative is gathering momentum. The furore over extraordinary rendition that has taken up so much attention recently is in some ways good news, especially allied to the strong anti-torture assertions made by the Secretary of State Dr Rice during a visit to Europe in December 2005. It seems that under the pressure of Abu Ghraib and conceding a little in the face of international opinion, the administration has returned to the traditional US approach to torture, that of plausible deniability. In an

³⁹ G Oberleitner, 'A Just War Against Terror' (2004) 16 *Peace Review* 263.

imperfect world this realisation that it is embarrassing to admit that you torture must count as a moral advance. Even better would be a move, possibly lead by the European Union⁴⁰ or the Council of Europe, for far better enforcement of the Convention against Torture, and for the punishment of those states – allegedly some of them European – that have facilitated the US desire to ill-treat captives in a deniable way.⁴¹ Elements within the legislative, the judicial and even the executive branches of both the US and the UK have become more voluble of late, subjecting assertions of terrorist threats and claims about danger to national security to more scrutiny than has been the case in the past.⁴² Perhaps this is a consequence of the exposure of the faultiness of much of the intelligence with which the general public in both countries were persuaded to back the invasion and occupation of Iraq. These are advances that can be built on. But the subject of human rights will not be truly safe until the language of terrorism, and with it all dangerous talk of good and evil, is removed entirely from political rhetoric and from national and international law, to be replaced with (as far as the first is concerned) a more nuanced approach to international relations and (in relation to the second) a code of law that emphasises the primacy of the criminal model over that of emergency or national security driven approaches. And for either of these outcomes to be regarded even as possibilities, a just solution must first be found to the political problems in Palestine and Israel.

⁴⁰ 'EU threat to countries with secret CIA prisons': *The Guardian* 29 November 2005,

⁴¹ See M Bright, 'Rendition: the Cover-Up' *New Statesman*, 23 January 2006, pp 12 – 13.

⁴² Thus both the UK Parliament and the American Senate have recently taken liberal initiatives, on detention and torture respectively. Judicial authorities in both jurisdictions have handed down decisions that have overturned executive policy in sensitive anti-terrorism areas, most recently in Britain in relation to the use that can be made (or rather not made) of torture evidence: *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71. Even the UK executive has been slowly relenting on its steadfast refusal to allow intercept evidence to be used in court: see 'Free foreign suspects on control orders, says terror watchdog' *Guardian* 3 February 2006.