

Is International Human Rights Law Under Threat?

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Earlier this month, Britain's Prime Minister called for human rights laws to be overturned if they were to "get in the way" in the fight against terrorism. Specifically, Theresa May said there was a need "to restrict the freedom and movement of terrorist suspects when we have enough evidence to know they are a threat, but not evidence to prosecute them in full in court." For an increasingly anxious public, shaken by the recent and dreadful terrorist attacks, her remarks no doubt reflected real anger and frustration, but they also seemed intended to strike a chord with a certain sector of the electorate, and it is this expectation that truly worries me.

British Government officials would probably claim the comments should be understood in the context of a tough electoral campaign, and would presumably try and reassure us quietly that the government's support for human rights remains steadfast and unchallengeable.

Whatever the intention behind her remarks, they were highly regrettable, a gift from a major Western leader to every authoritarian figure around the world who shamelessly violates human rights under the pretext of fighting terrorism. And it is not just the leaders.

A few days ago, citing Prime Minister May, a former Sri Lankan rear admiral delivered a petition to the President of the Human Rights Council. He demanded action be taken against my Office for "forcing" Sri Lanka to undertake constitutional reforms, and for exerting pressure on them to create a hybrid court to try perpetrators of war crimes and crimes against humanity – when in reality, he claimed, all they had engaged in was fighting terrorism.

My first question: Why is international human rights law such an easy target? Why is it so misunderstood, so reviled by some, feared by others, spurned, attacked?

My second: If the Prime Minister meant what she said, which universal rights would the UK be willing to give away in order to punish people against whom there is insufficient evidence to justify prosecution? What, exactly, are the rights she considers frivolous or obstructive? The right to privacy? The right to liberty and security of person? Freedom of expression? Freedom of religion and belief? The principle of non-refoulement? The prohibition of torture? Due process?

And why are we fighting the terrorists in the first place, if not to defend both the physical well-being of people and the very human rights and values the Prime Minister now says she is willing, in part, to sacrifice - in order to fight the terrorists? And where would it stop? Foregoing some rights now may have devastating effects on other rights later on. If we follow this reasoning to its logical conclusion, the eventual complete unwinding of human rights would transform us – both states and international organizations. To quote Nietzsche: "Whoever fights monsters should see to it that in the process he does not become a monster". We would be in danger of becoming virtually indistinguishable from the terrorists we are fighting.

So why did Prime Minister May said this? At least part of the answer may lie in market conditions. Human Rights law has long been ridiculed by an influential tabloid press here in the UK, feeding with relish on what it paints as the absurd findings of the European Court of Human Rights in Strasbourg. This viewpoint has some resonance with a slice of the public unaware of the importance of

international human rights law – often seen by far too many people as too removed from everyday life, very continental, too lawyerly, too activist, ultimately too weird. How can the Court consider prisoners' voting rights, and other supposedly frivolous claims, when set against the suffering of victims? The bastards deserve punishment, full stop! This may be understandable, at some emotional level. However, one should also acknowledge that British ink, reflecting an enormously rich legal tradition, is found throughout the European Convention on Human Rights.

And for good reason. To recognise that even a criminal has rights is the basis of enlightened thought, a principle enshrined in common law. It lies at the very core of human civilization, and distinguishes us from a primeval horde wrapped only in retribution and cruelties. I believe, like so many others, that criminals, too, have fundamental rights, because whatever evil they have wrought, they remain human beings. Frequently their pathological behaviour has been influenced by trauma inflicted on them by others.

Let me take one, perhaps extreme, example. In Iraq, there are people who argue for the killing of as many child soldiers of Da'esh as possible, and would perhaps even support torturing them, given how monstrous their actions have been. But in Sierra Leone, many child followers of Foday Sankoh, who were once hacking off the limbs of other small children, have now largely been rehabilitated, in no small measure due to the efforts of the UN. They were children even while they were terrorists – and they have to be seen as children first.

I seek in the course of this short lecture to examine some of these attacks on international human rights law, on international law generally. You have honoured me with the request that I speak to the legacy of Hugo Grotius. What would Grotius say today, were he to be brought back to life for a few moments? Would he be surprised, almost 400 years after publication of his treatise *On the Law of War and Peace*, by the overall achievement? The extent of the current backlash? The struggle? Or perhaps he would not be at all surprised by any of it.

While promoting an international "society" governed by law, not by force, he well may have been surprised it took a further 300 years of treaty-making and immense bloodletting, capped by two world wars, before humanity embraced a system of international law. Or, put another way, reason alone had proven itself to be insufficient.

Only the death of some 100 million people in two world wars and the Holocaust could generate the will necessary for a profound change. Humanity had fallen off a cliff, survived, and, having frightened itself rigid, became all the wiser for it. The prospect of nuclear annihilation also sharpened post-war thinking. And soon after, States drew up the UN Charter, reinforced international law – codified international refugee law, further elaborated international humanitarian law, and created international human rights law and international criminal law.

It is precisely these bodies of international law that are now endangered.

While I ought to, in this lecture, examine all the threats to public international law, from Russia's seizure and annexation of Crimea to the almost enthusiastic derogation by European powers of their obligations under the 1951 Refugee Convention, or the seemingly deliberate bombing by major state actors of facilities protected under IHL – such as clinics and hospitals in Syria, Yemen and Afghanistan – I shall confine myself for the sake of brevity to those principal threats directed against international human rights law, and pay special attention to the absolute prohibition on the use of torture. In doing so, I hope to illustrate how they are symptomatic of a broader cynicism emerging in defiance of international law more generally.

Let me first return to the struggle against terrorism, and how it is being exploited by governments the world over to roll back the advances made in human rights. The curtailing of the freedoms of expression and association – which threatens to wipe out dissent completely in countries like Egypt, Bahrain, and Turkey – is closing what is left of a democratic space, and all under the banner of fighting terrorism. And this contagion is spreading, fast.

When I emphasise this point, and highlight the excesses of government action, I am sometimes accused of showing sympathy with the terrorists, which is outrageous. I wish to be clear. I condemn terrorism unreservedly. It can never be justified, on the basis of any grievance, real or perceived.

The Da'esh, Al Qa'eda, Al Nusra, Al Shabab, Boko Haram manifestation does have a distinct ideology, and it must be dismantled at the source. If it is to be fought from a security perspective, through intelligence networks and military force, the actions must also be extremely precise. In other words, the arbitrariness and imprecision that are the hallmarks of target selection on the part of terrorists require a diametrically opposite reaction from states. The laser-like application of the law, consistent with universal human rights standards and guarantees, is the only workable antidote if this struggle is ever to be successful.

The detention, and in some cases torture, of individuals whose association with a terrorist group is non-existent but who are nevertheless charged under a vaguely-worded counter-terrorism law – simply because they have criticized the government – is not just wrong, it is dangerous and entirely self-defeating.

It transforms not only one individual, falsely charged, into a person who hates the state, but also their families, friends, possibly even their communities. Some may even go further than simple hatred. Arbitrary detention serves the terrorists, not the state; it fuels recruitment. And yet arbitrary detentions are commonplace in those states grappling with terrorism. In fact, if you believe the rhetoric of many governments, every lawyer or journalist is almost by definition a terrorist, particularly if they are human rights-focused. Present company included!

Moreover, given that prisons often become factories for converting petty criminals into violent extremists, the lawful deprivation of liberty ordered by Courts should be reserved for the most serious offenses, and non-custodial remedies sought for lesser offenses. This is not what is happening.

Instead, we see in the United States a renewed resort to very long prison sentences for those convicted of drug offenses. And rather than focus on potentially violent individuals driven by Takfiri ideology, or any other extreme ideology, the Trump Administration is pursuing its executive orders on the travel bans all the way to the Supreme Court, despite their being struck down as unconstitutional in the lower courts.

Likewise, in the weeks following the vicious terrorist attacks in Paris, in November 2015, the French authorities took broad aim and closed down 20 mosques and Muslim associations, while also undertaking some 2,700 warrantless house searches. In the United Kingdom, the Investigatory Powers Act of 2016 constituted one of the most sweeping mass surveillance regimes in the world, permitting the interception, access, retention and hacking of communications without a requirement of reasonable suspicion. Refugees and migrants were increasingly viewed as Trojan horses for terrorists. Hysteria raged in political circles across Europe, and the terrorists must have been grinning. When it came to the management of the public's reaction, instead of adopting a common-sense approach, fever set in.

To overcome terrorism, governments must be precise in the pursuit of the terrorists. Pretending to seal off borders -- with or without walls decorated with solar panels -- is an illusion, and a nasty one.

Migrant children should not be detained. There should be no refoulement. Nor should there be collective push back, or decisions taken at borders by police officers, instead of judges. Or indeed, returns to countries that are manifestly not safe.

The EU deal with Turkey, in our view, has failed on several of these key points; most especially when it comes to the right of every asylum seeker to individual assessment. Taken together with the emergency measures being rushed through a number of European parliaments, which also derogate from the 1951 Refugee Convention, Europe – as a sentinel for the observation of refugee and human rights laws worldwide – finds itself enmeshed in gross hypocrisy.

The demagogues and populists across Europe and in many other parts of the world, as well as the tabloids in this country, have for years remorselessly stoked xenophobia and bigotry – the fuel that gave rise to these unwise policies. And this seemed to be paying off, with a windfall of popular support gathering in their favour. After the referendum here in the UK, dominated as it was by the whipped-up fear of foreigners and foreign institutions, came the outcome of the US election, and the populist bandwagon seemed to be on an unstoppable roll.

The default condition of the human mind is, after all, fear. Primordial fear. That innermost instinctive mechanism protecting us from harm, from death. An emotion every extremist, skilled populists included, seeks to tap or stimulate. By manipulating it, and obliterating deductive reasoning drawn from knowledge, they more easily mould the movements they lead, and their political ambitions are well-served – at least for a while.

The emotional mechanism in the mind of a human rights defender works rather differently. To do good in our lives, and not just to some, but to all; to defend the human rights of all – this requires a continuous investment of thought, where the natural prejudices lying deep within each of us must be watched out for and rejected every day of our lives. The default flow in the minds of humanity may be reptilian; but the internal battle to overcome it is profoundly human. To think of all, to work for all: these are the two fundamental lessons learned by those who survived the two world wars – whether we speak in relation to the behaviour of individuals or states. And they are etched into the UN Charter.

The two words “human rights” were not placed in the preamble of the UN Charter by its final author, Virginia Gildersleeve, as a literary flourish. They were written into the text – almost at the beginning, in the third line – because human rights was viewed as the only choice possible for that first beat of a new pulse. Because on 26 June 1945, the day of the Charter's signing, killing on a scale hitherto unknown to humans had only just come to an end, with cities across the world pulverized and still smoking, monuments to immense human malevolence and stupidity.

Only by accepting human rights as the cornerstone could the rest of the edifice – success in economic development, durable peace – become possible. It is a point that even today – perhaps especially today – needs to be absorbed by the numerous political actors who only see human rights as a tiresome constraint. Indeed, many people who have enjoyed their rights since birth simply do not realise what these principles really mean. Like oxygen, they lie beyond our daily sensory perception, and only when suddenly deprived of it do we fathom their enormous significance.

To advocate for the universal rights of every human being, every rights holder, is another way of saying that only by working together, do we – as humans and as states – have a hope of ridding ourselves of the scourges of violence and war.

Tragically, the nativistic reflexes once again being peddled by populists and demagogues still seem to work. They sell supremacy and not equality, sow suspicion rather than calm, and hurl enmity against defined categories of people who are vulnerable – easy scapegoats, and undeserving of their hatred.

This brand of politician seems more intent on profiting from the genuine fear of specific constituencies than promoting care for the welfare of the whole.

Thankfully, change is afoot. The populist or nationalist-chauvinistic wave in the western world, which crested in the US, has broken for now, dashed against the ballot boxes of Austria, the Netherlands and France. There may yet be other waves. Nevertheless, in Europe, the anti-populist movement, as some have called it, is now up and running.

In other parts of the world, threats to international law and the institutions upholding them are thus far unaffected by these recent, more positive developments.

The US is weighing up the degree to which it will scale back its financial support to the UN and other multilateral institutions. It is still deciding whether it should withdraw from the Human Rights Council and there was even talk at one stage of it withdrawing from the core human rights instruments to which it is party.

Last year, it was also reported that nine Arab states – the coalition led by Saudi Arabia fighting the Houthi/Saleh rebels in Yemen – made the unprecedented threat of a withdrawal from the UN if they were listed as perpetrators in the annex of the Secretary General's report on children and armed conflict.

The Inter-American Commission for Human Rights, the Inter-American Court, the Southern African Development Court, and the International Criminal Court have also not been spared such threats. Fortunately, in almost all these cases, either the threat of withdrawal has fizzled out, or, even if one or two countries did withdraw, no chain reaction ensued. But the regularity of these threats means it is increasingly probable the haemorrhaging will occur someday – a walk-out which closes the book on some part of the system of international law.

In this context, most worrisome to me is the persistent flirtation by the President of the United States, throughout his campaign and soon thereafter, with a return to torture. We are now told the US Army field manual will not be redrafted, and the US Secretary of Defence is guiding the White House on this. For now there is little danger of a return to the practice of so-called "enhanced interrogation techniques", a euphemism that dupes no-one. The mood in the US could of course change dramatically, if the country were at some stage to experience a gruesome terrorist attack. And, mindful of how the American public has, over the last ten years, become far more accepting of torture, the balance could be tipped in favour of its practice – and destroy the delicate position the Convention Against Torture is in.

It is worth recalling that the Convention against Torture, ratified by 162 countries, is the most unyielding of any existing instrument in international law. Its prohibition on torture is so absolute, it can never be lifted – not even during an emergency that "threatens the life of the nation." And yet, notwithstanding its broader recognition as *jus cogens*, and the crystal clarity of Article 2 of the Convention, the existence of so many surviving victims of torture, who remain unacknowledged, unsupported, denied justice or redress, forms a living testimony to the dreadful persistence of torture worldwide.

While only a small number of states appear to practise torture systematically, as part of state policy, 20 countries (and they are listed on our website) do not recognize the competence of the Committee Against Torture under Article 20. Accordingly, they refuse a priori any scrutiny of the alleged widespread violations.

A much larger number of states are host to isolated – or not so isolated – acts of torture and ill-treatment. Disturbingly, states in this group are simply not taking their obligations seriously enough. The levels of impunity are very high, given that most of those individuals who are found culpable face only administrative sanctions; and so-called evidence obtained under torture remains, in many states, admissible in court.

There are also a number of states – and this group may possibly be increasing – which, while having no record of practising torture, are nevertheless acquiescing to it by, for example, disregarding the principle of non-refoulement as contained in Article 3 of the Convention.

Another large majority of states parties also fully or partially disregard their obligations under Article 14 of the Convention for the redress and rehabilitation of victims, no matter where the torture occurred or by whom it was perpetrated.

Eleven years ago, noticeable progress was made with the entry into force of the Optional Protocol, which enables preventive visits to be made by the Sub-Committee for the Prevention of Torture to any place of deprivation of liberty, at any time. Some fifty national preventive mechanisms have been created, and the Sub-Committee has conducted 54 visits. However, many national preventive mechanisms are under-resourced and not empowered to deliver real results.

The fragility of the Convention is underscored by the fact that no country abides by all of its terms. No country would admit publicly that it engages in torture, but abundant evidence shows that torture is systematically practised by at least some states – that first category I referred to earlier.

It would seem all governments have been participating in a theatrical pretence of conforming with the Convention. And this may be more crucial than we initially realise, because it implies a sense of shame. Consider the alternative.

The president of the Philippines has spoken openly about extra-judicial killings. And the president of the United States of America has said that torture could be necessary in certain circumstances. There is no longer any pretence. They are breaking long-held taboos. If other leaders start to follow the same rhetorical course, undermining the Convention with their words, the practice of torture is likely to broaden, and that would be fatal. The Convention would be scuttled, and a central load-bearing pillar of international law removed.

The dangers to the entire system of international law are therefore very real.

Today, the 26th of June, is the international day in support of victims of torture, and earlier I participated in a panel at King's College organised by the International Bar Association to raise awareness about the absolute prohibition of torture, and the need for the legal profession to take a far more active role in preventing its use.

Human progress never glides; it will always stagger and sometimes even temporarily collapse. The common effort, for a common cause, within a common frame of understanding and regulation, will always be attacked by those more committed to the pursuit of narrower personal or national interests. These extreme practitioners of the assertive, thin agenda are apt to dismiss many of today's international laws and post-war institutions as anachronisms. And because, to the non-lawyer, the system of international law is so complicated, the human rights system so indecipherable to many laypersons, it is hard to rally the general public, who may not see any immediate threat to themselves.

This brings me to the central threat to human rights today: indifference. The indifference of a large part of the business community worldwide, who would still pursue profit even at the cost of great suffering done to others. The indifference of a large segment of the intelligence and security community, for whom the pursuit of information eclipses all the rights held by others, and who describe challenges to terrible, discriminatory practices as treachery.

Some politicians, for whom economic, social and cultural rights mean little, are indifferent to the consequences of economic austerity. They view human rights only as an irritating check on expediency – the currency of the political world. For others, indifference is not enough. Their rejection of the rights agenda is expressed in terms replete with utter contempt for others, a parade of meanness.

Our world is dangerously close to unmooring itself from a sense of compassion, slowly becoming not only a post-truth but also a post-empathetic world. It is so hard for us now in the UN to generate the sums needed for humanitarian action worldwide. Our appeals for funds for the most destitute are rarely met at levels over 50%; the final figure is often far less.

What is happening to us?

My hope lies not primarily with governments, but with those people who reject all forms of terrorism, reject extreme, discriminatory counter-terrorism, and reject the populisms of the ideological outer limits. My hope lies with those who choose to elect more enlightened political leaders. My hope also lies with the most courageous of us: the human rights defenders, often victims of violations themselves who, armed with nothing beyond their minds and voices, are willing to sacrifice everything, including seeing their children and families, losing their work, even their lives, to safeguard rights – not just their own, but the rights of others.

How stunningly beautiful is that? I am moved by them. We should all be. It is they who ensure we retain our equanimity, and it is they, not us, who bear the greater burden of defending this crucial part of our system of international law. It is they who will save us, and we in turn must invest every effort in protecting them.

I don't think Grotius would be surprised by any of this.

The reptilian urge of the human brain is not easily overcome, and humanity will for centuries remain untrustworthy and unreliable. Our behaviour, and the behaviour of states, will long require legal scaffolding to keep what we recognize as human civilization in place. Grotius would be grateful we are still fighting, standing up, for his international society and perhaps even crack a wry smile when thinking just how prescient he was, those four centuries ago.

I thank you for your attention.