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Prior to the establishment of the United Nations, the way in which states treated their citizens was considered, for the most part, to be a matter for the states themselves and not the subject of international law. Nazism, the Holocaust, and the brutality of the Second World War changed this. In the aftermath of the war, respect for human rights and fundamental freedoms was seen as the crucial component of the goal of establishing peace and justice in the world. In the Charter of the United Nations, member states pledged themselves, in cooperation with the United Nations, to the attainment of a world order in which the observance of fundamental rights and freedoms would be promoted and respected, and where there would be freedom from fear and want. Pursuant to this commitment, the Universal Declaration of Human Rights set as an aspiration for all member states the attainment of this world order.

For a period of more than fifty years following the proclamation of the Universal Declaration, the ratification of a comprehensive network of treaties and conventions, drafted by organs of the United Nations and adopted by its General Assembly, have spelt out the parameters of the commitment thus made. Though the treaties and conventions have not been ratified by all states, and are subject to reservations by some, they have provided a legal framework for

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I have explored some of the ideas expressed in this article in *The Widening Gyre: Counter-terrorism, Human Rights and the Rule of Law*, 67 CAMBRIDGE L.J. 69 (2008).

international human rights law. A core value of these human rights instruments is respect for human dignity, which is emphasised in the preamble to the Universal Declaration and in the other instruments.

Consistent with the emphasis on human dignity, Article 25 of the Universal Declaration provides that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[1]

Article 26, which makes provision for a right to education, emphasizes the important place of human rights in the United Nations legal order, declaring that:

> Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.[2]

During the second half of the last century, we saw the establishment of human rights orders in the democracies of Europe, Canada, and India; the embrace of constitutionalism and respect for fundamental rights and freedoms in various countries emerging from repression in Europe, Asia, Africa, and South America; and a growing respect in established democracies for the importance of human rights and fundamental freedoms. These changes were strengthened by regional conventions upholding human rights in Europe, America, and Africa, the most effective of which has been the European Convention on Human Rights and Fundamental Freedoms. The influence of the Charter and the Universal Declaration is apparent in these developments.

By the end of the century, there was an increasing momentum within the international community to promote respect for fundamental rights and to address the scourge of poverty. There was an

1. Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 25(1), U.N. Doc A/810 (Dec. 10, 1948) [hereinafter UDHR].

2. *Id.* art. 26(2).

acknowledgment of the relationship between these goals, and a consensus was beginning to develop within the international community that human rights and democracy were essential preconditions for development.

The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights[3] and endorsed by the United Nations General Assembly,[4] stated that "democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing."[5] In 1998, marking the 50th anniversary of the Universal Declaration, the World Bank declared that creating the conditions for the attainment of human rights was a central and irreducible goal of development.[6] And in 2000, heads of state and government, meeting in the General Assembly of the United Nations, adopted the Millennium Declaration, pledging to "spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty."[7] This was a moral, not a legal commitment, but included a resolution "to respect fully and uphold the Universal Declaration of Human Rights."[8]

But that is only part of the story; there were countervailing pressures. The international instruments lack effective enforcement mechanisms, and depend to a large extent on the incorporation of their provisions into national law. Where that has not happened, these instruments depend on the weight accorded by the international community to international law, and on diplomatic pressure by some countries on those that fail to honor their international obligations.

This was not sufficient to prevent gross abuses of fundamental rights and freedoms being committed in many different parts of the world. There is no lack of examples to illustrate this. To mention but a few, South Africa under apartheid, Chile under Pinochet, Argentina during the Dirty War, Peru under Fujimori, Greece under the Colonels, Russia and Eastern Europe under communism, Uganda

3. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*].

4. G.A. Res. 48/121, U.N. Doc. A/RES/48/121 (Dec. 20, 1993).

5. *Vienna Declaration*, *supra* note 3, para. 8.

6. World Bank, *Development and Human Rights: the Role of the World Bank*, at 2 (1998), *available at* http://www.worldbank.org/html/extdr/rights/hrtext.pdf.

7. United Nations Millennium Declaration, G.A. Res. 55/2, ¶ 11, U.N. Doc. A/RES/55/2 (Sept. 8, 2000).

8. *Id.* ¶ 25.

under Amin, Zimbabwe under Mugabe, Burma under the Generals, the cultural revolution in China, the terror in Cambodia, the ethnic cleansing that marked the break-up of the former Yugoslavia, and repression enforced by a multitude of other authoritarian regimes. There were also reports by respected human rights organizations drawing our attention to torture and disappearances, to children removed from their parents and homes and forced to take up arms, and to the plight of refugees driven from their homes and countries as a consequence of war or oppression in different parts of the world and left homeless in strange and foreign countries. These are but some of the stories that we were told. And all of them involve accounts of oppression and of victims being subjected to degrading and abusive treatment.

There was also a failure to meet the goal of a world in which there would be freedom from want. Some twelve years ago, almost fifty years after the adoption of the Universal Declaration, the United Nations Development Programme recorded that "a fifth of the developing world's population goes hungry every night, a quarter lacks access to even a basic necessity like safe drinking water, and a third lives in a state of abject poverty—at such a margin of human existence that words simply fail to describe it."[9] All over the world, hundreds of millions of people continue to live in abject conditions in which it is well nigh impossible to sustain life and dignity.

The Millennium Development Goals Report of 2008 has a foreword by the Secretary-General of the United Nations, Ban Ki-Moon, in which he acknowledges that although important progress had been made, the international community was not on track to fulfill the commitments made in the Millennium Declaration.[10] He draws attention to the global economic slowdown, to the food security crisis, and the consequences of global warming, saying, "The economic slowdown will diminish the incomes of the poor; the food crisis will raise the number of hungry people in the world and push millions more into poverty; [and] climate change will have a disproportionate impact on the poor."[11] The President of the World

9. U.N. Development Programme, *Human Development Report 1994*, at 2 (1994), *available at* http://hdr.undp.org/en/reports/global/hdr1994.

10. United Nations, *The Millennium Development Goals Report 2008*, at 5 (2008), *available at* http://mdgs.un.org/unsd/mdg/Resources/Static/Products/Progress2008/MDG_Report_2008_En.pdf.

11. *Id.* at 3.

Bank recently noted that over 100 million people had been driven into poverty during the past year;[12] this, before the recent meltdown of the banking and housing sectors of the world's richest countries which has pushed most of them into recession.

In the short life of the present century, human rights have come under pressure from another source. Following the attack on the World Trade Center on September 11, 2001, the United Nations Security Council passed various resolutions calling on all states to take action against terrorist threats. The Security Council and the General Assembly have stressed that this must be done within a framework for the protection of human rights and fundamental freedoms, and that states must ensure that their own measures comply with their obligations under international law, including, in particular, human rights law, refugee law, and international humanitarian law.[13] It soon became apparent, however, that these constraints were not being observed, and that international law was not strong enough to secure compliance with them.

In August 2004, the International Commission of Jurists convened a conference of 160 jurists from all regions of the world in Berlin to discuss the impact of counter-terrorism on human rights and the rule of law. Delegates from various countries spoke about serious breaches of human rights and the rule of law that had been committed in different parts of the world in the course of measures taken ostensibly to counter terrorism. The conference, whilst affirming that all states have an obligation to protect persons within their jurisdiction against acts of terrorism, expressed concern about the cumulative impact of the emerging counter-terrorism measures, and the risk that the painstaking construction of international human rights standards developed during the second half of the last century could unravel.

The conference adopted the "Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism,"[14]

12. Robert B. Zoellick, President, World Bank Group, Remarks at the Development Committee Spring Meetings Press Conference (Apr. 13, 2008), *available at* http://go.worldbank.org/MTCXHO29A0.

13. *See, e.g.*, S.C. Res. 1456, U.N. Doc. S/RES/1456 (Jan. 20, 2003); G.A. Res. 60/158, U.N. Doc. A/RES/60/158 (Feb. 28, 2006).

14. International Commission of Jurists, Aug. 24, 2004, *Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism*, U.N. Doc. E/CN.4/2005/NGO/122 (Aug. 28, 2004), *available at* http://www.icj.org (follow "Berlin

which identifies the core principles of international human rights law, criminal law, humanitarian law, and refugee law that should guide states in their counter-terrorism policies. The Berlin Declaration stresses that "the odious nature of terrorist acts cannot serve as a basis or pretext for states to disregard their international obligations, in particular in the protection of fundamental human rights."[15]

This led the International Commission of Jurists to establish the Eminent Jurists Panel, of which Mary Robinson and I are both members, to examine "the compatibility of laws, policies and practices, which are justified expressly or implicitly as necessary to counter terrorism, with international human rights law and, where applicable, with international humanitarian law."[16] Over a period of more than two years, the panel undertook an extensive process of consultation through sixteen national and sub-regional hearings in different parts of the world, covering some forty countries. These countries had all experienced a significant threat of terrorism either in the past or in the present.

In many countries we heard evidence of new anti-terrorism laws being enacted with overbroad definitions of terrorism that risk penalizing legitimate political opinions; of forced disappearances, systematic torture and ill-treatment, arbitrary arrests and detention without charge or trial, including indefinite incommunicado detention; reports that the jurisdiction of the ordinary courts to deal with such matters had been curtailed, that persons suspected of terrorism had been put beyond the protection of the law; reports of unfair trials by military tribunals, of other breaches of fundamental human rights committed by security services against persons characterized as terrorists; and of unlawful actions of security forces being condoned. Legal actions seeking to hold security functionaries accountable for such conduct are blocked by indemnities or reliance upon special defenses, as happens here in the United States through indemnity under the Detainee Treatment Act of 2005[17] and the

Declaration" hyperlink) [hereinafter *Berlin Declaration*].

15. *Id.* pmbl.

16. International Commission of Jurists, Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, *Mandate* (2006), *available at* http://ejp.icj.org/article.php3?id_article=7. The final report of the Eminent Jurists Panel has recently been published. International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel of Terrorism, Counter-Terrorism and Human Rights* (Feb. 16, 2009), *available at* http://ejp.icj.org/IMG/EJP-Report.pdf.

17. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1004.

defense of the state secrets privilege,[18] resulting in impunity.

In countries where these practices are sanctioned, many come to believe that "suspected terrorists" placed under surveillance, detained, questioned, tortured, subjected to administrative controls, or harassed by the state security services are guilty and do not deserve the benefit of fundamental rights and the presumption of innocence. This belief often is fostered by the rhetoric of political leaders.

Judges, prosecutors, defense counsel, the security services, and all other participants in the justice system function within a climate in which well established rights count for less than the security of the state. Punitive action is taken against suspects on the basis of untested intelligence which is withheld from them more often than not. Communities from which suspected terrorists are thought to have come or to receive support are isolated, and subjected to surveillance and other indignities. This can seep into and influence the legal culture and the judicial process. We who come from South Africa have seen all this and know from bitter experience what the dangers are for the societies in which such practices are sanctioned.

What is of particular concern is that the Eminent Jurists Panel heard reports about some or all of such practices here in the United States of America. The United States was a driving force in the adoption of the U.N. Charter and the Universal Declaration of Human Rights. Because of the influence it has internationally, U.S. counter-terrorism polices have an influence beyond its own borders. We should not underestimate the impact of this on countries with less or no commitment to the protection of human rights. They see it as a green light to go ahead with repressive measures.

Those seeking to justify the use of such extreme measures claim that they are necessary because of the seriousness of the threat posed by terrorism and the changing nature of modern technology, which enables terrorists to cause widespread harm. The old rules are not adequate, they say, to deal with this. In these circumstances, decisions as to what is legitimate in the interests of the security of the state should be left to the executive and not the courts. The argument that well established principles of the existing law, such as freedom from cruel and degrading treatment, or the right to a fair trial and all inherent in that, are not adequate to deal with threats to security is an

18. *See* El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).

argument that is always raised when repressive measures are adopted to address what is seen to be a threat to the security of the state, or the hegemony of an unjust regime.

Let me take a South African example as an illustration. In 1914, in response to a damaging strike by white miners and civil unrest that ensued, extralegal action was taken by the security forces in an effort to quell the strike and unrest. The South African government secured the enactment of an Indemnity Act to indemnify those who had been party to the extralegal action. The strike was characterized as "industrial warfare." General Smuts, then the Minister of Defence, took up this theme in addressing Parliament in the debate on the Act, saying that the common law did not fit today's

> novel and extraordinary conditions . . . . I do not think that in matters of this kind the question is really one for the ordinary courts. The question . . . is rather one for the public authority and Government to decide whether these people are political undesirables. . . . [They are the best] judges of the public interest . . . far better judges than any judge or jury in a court of law could possibly be.[19]

History shows that such responses are almost always wrong, and that it is left to later generations to undo the harm that was done by repressive policies and unjust laws. This is what happened in the Southern Cone of South America during the 1970s and 1980s, where grave violations of human rights, including arbitrary detentions, torture, surveillance, and censorship were carried out in the name of the security of the state. It is what happened in the Soviet Union and Eastern European countries during the cold war, what happened in Algeria and many other colonies of imperial powers in different parts of the world during struggles against colonialism, and what has happened at different times in different places throughout the course of history. It is also what happened in South Africa, and some of us here today lived through that for almost fifty years.

It may be that the potential for harm is greater now than it was in the second half of the last century, but the lessons from those times cannot be ignored. Repressive measures, arbitrary laws, torture, and cruel and degrading treatment do not deter those who are engaged in

19. Jan Smuts, Remarks at Parliamentary Floor Debates (May 2, 1914), *in* MARTIN CHANOCK, THE MAKING OF SOUTH AFRICAN LEGAL CULTURE 1902–1933: FEAR, FAVOUR AND PREJUDICE 137 (2001).

struggles which they believe to be just. On the contrary, the lesson of history is that repression not only harms the legal culture of countries that practice it, but also serves as an inducement to those who may sympathize with a cause, if not the methods used to pursue it, to join those who use violence as a means to advance their goals, or to support them in other ways, such as refusing to cooperate with the security establishment in their investigations. As it was put to the panel in Northern Ireland when we conducted hearings there, repressive counter-terrorism methods of the British government of previous times did not deter the IRA; to the contrary, they served as a recruiting sergeant for it.

On December 10, 2008, we mark the 60th anniversary of the adoption of the Universal Declaration of Human Rights. It is an appropriate time to take stock. Looking back over these sixty years, we can see limited but important advances made during the second half of the last century towards the goal of a world in which the observance of fundamental rights and freedoms would be promoted and respected, and where there would be freedom from fear and want. Despite the deplorable conditions in which hundreds of millions of people in underdeveloped countries live, and despite the failure of many of the member states of the United Nations to live up to their pledge in the Charter that fundamental rights and freedoms would be promoted and respected, there was a momentum within the international community towards the attainment of the goals of the Charter that offered hope for the future. In the present century that momentum has been lost as a result of terrorism and the so-called "war against terror." This is alluded to in the Council of Europe's Guidelines on human rights and the fight against terrorism, where it is said:

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

rule of law.[20]

The International Court of Justice's Berlin Declaration is to the same effect.[21] It stresses that both contemporary human rights and humanitarian law allow States a reasonably wide margin of flexibility to combat terrorism without contravening human rights and humanitarian legal obligations, and states:

> There is no conflict between the duties of states to protect the rights of persons threatened by terrorism and their responsibility to ensure that protecting security does not undermine other rights. On the contrary, safeguarding persons from terrorist acts and respecting human rights both form part of a seamless web of protection incumbent upon the State.[22]

The time has surely come to reflect on the harm that is being done to our legal systems and moral values by counter-terrorism measures that seek to place suspects beyond the protection of the law, to deny their humanity and dignity, and to treat them as objects to be used and manipulated in furtherance of the State's counter-terrorism policy. The 60th anniversary of the Universal Declaration of Human Rights is an appropriate time to do so, to renew the commitment made in the Universal Declaration to promote respect for fundamental human rights and freedoms, and to secure their effective recognition and observance by all nations.

20. Council of Europe, Committee of Ministers, *Guidelines on Human Rights and the Fight Against Terrorism*, at 5 (July 11, 2002), *cited in* Arthur Chaskalson, *The Widening Gyre: Counter-terrorism, Human Rights and the Rule of Law*, 67 CAMBRIDGE L.J. 90 (2008).

21. *Berlin Declaration*, *supra* note 14.

22. *Id.* pmbl.