TO DISCOUNT HUMAN RIGHTS
AND INSCRIBE THEM WITH FAKENESS
AND UNRELIABILITY, OR TO UPHOLD THEM
AND ENGRAVE THEM WITH INTEGRITY AND RELIABILITY? –
UK EXPERIENCES IN THE AGE OF INTERNATIONAL TERRORISM

By Ben Chigara*

Human beings owe to each other help to distinguish the better from the worse, and
encouragement to choose the former and avoid the latter. They should be forever stimu-
lating each other to increased exercise of their higher faculties and increased direction
of their feelings and aims towards wise instead of foolish; elevating instead of degra-
ding objects and contemplations.

John Stuart Mill

Abstract: The article tests the validity of the argument that the increasing of threat of inter-
national terrorism that is managed and dispensed by non-State actors authorises States to
backtrack on their human rights commitments in order to ensure national security - the
human rights/ national security dichotomy. The article weighs this argument against the logic
that underpins the human rights project. The article argues that human rights have become
both the DNA of human dignity and index for the rule of law in democratic States. Therefore,
whatever strategies States adopt to combat international terrorism ought always to comply
with States’ international human rights obligations. Considerations of national security that
seek to undermine the dignity inherent in individuals qua human beings are misguided and
inconsistent with the rule of law upon which democratic States are premised. Consequently,
they are not logically sustainable.

Keywords: human rights, rule of law, national security, international terrorism

A. INTRODUCTION

The growing threat of international terrorism has consumed local and international attention
like no other subject in recent times. Consequently, the attention of human rights lawyers and

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others has been forced onto two things. One is the relationship between the individual and the
State. The other is the function if any of international law in the management of that relation-
ship. The debate in the UK appears to be hanging on the inconsistency of the New Labour
government’s approach to human rights in spite of having previously made human rights a
fundamental pillar of its foreign policies over a very long period of time.

Linked to this inconsistency is the difficulty created for human rights by the New Labour
government’s choice to go to war with a State that actively opposes the International Criminal
Court1 (ICC) – the US, when in fact the UK’s principled position as a founding member of the
ICC is that all international criminal offences must be prosecuted.2 The complimentary juris-
diction of the ICC is meant to kick in only after the State with primary responsibility to pro-
secute those offences has demonstrated either reluctance or a genuine inability to prosecute
those crimes. If the purpose of the war on terror is to safeguard human rights and the rule of
law particularly in Western States,3 it is difficult to comprehend why the UK would hurry off
to war for that cause with a State that refuses to subject the conduct of its agents in the prose-
cution of that war to the scrutiny of human rights and the rule of law. This is puzzling particu-
larly because the international arrangement for prosecution of international crimes defers the
jurisdiction of the International Criminal Court to the primary jurisdiction over any such
cases to the State whose agents are concerned. The jurisdiction of the ICC kicks in only after
a State has demonstrated an unwillingness or incapacity to do so.4

Nonetheless, it is the promulgation of counter-terrorism legislation by the Labour
government that has leapfrogged the issue of the national security and human rights5 to the
top of current legal, social and political debates in the UK. A number of human rights cases
have been brought against the government by terrorist suspects that have challenged the con-
sistency of the legislation under which they had been held, with the UK’s human rights obli-
gations under national and international law.

Proclamation of the human rights/national security dichotomy as a binary opposition that
justifies the wave of legislative minimization of individual human rights has undermined
human rights by defining them as a “fair-weather friend” to be abandoned immediately it beco-

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1 Established by the Statute of Rome (1998), Article 5 of the Statute authorises the Court to prose-
cute the most serious crimes of concern to the international community as a whole. The Court has
complimentary jurisdiction with respect to the following crimes: the crime of genocide, crimes

2 Discussing fault lines created by these inconsistencies in international law, see Chigara, B.
191–214

3 President George W. Bush Discusses War on Terror, http://www.whitehouse.gov/news/relea-
ses/2005/03/20050308-3.html. (visited 01/12/06)

4 See Article 17 of the Rome Statute establishing the ICC,

p. 604.
mes inconvenient. It has served also to institute and emphasize a hierarchy of values that privileges national security paradigms over those other paradigms that seek the recognition, promotion and protection of human rights. However, it is when human rights appear to be most inconvenient that States must strictly observe them because of their purpose, which is to recognize, promote and ensure respect for the dignity inherent in individuals qua human beings.

Discounting human rights, whether it be by restricting the number of rights that will always be honoured (discounting the content of human rights guarantees), or by honouring human rights some of the time and not all of the time (discounting the frequency that human rights will be honoured), or by denying only a certain class, terrorist suspects for example (discounting human rights by population class); and by whatever percentage – fifty per cent, thirty per cent, twenty per cent – or whatever other margin from what States had previously signed up to and for whatever reason, inscribes those previous undertakings of States to recognize, promote and protect the dignity inherent in individuals with the signature of fakeness and unreliability.

Upholding human rights, on the other hand, authenticates States’ promises to recognize, promote, respect and ensure the human rights of individuals on their territories. It inscribes human rights with the signature of reliability, endurance and validity. Assuming that the binary opposition of national security and human rights is sustainable, it raises the question whether it is possible to achieve a balance between the needs to discount human rights on the one hand and the need to authenticate them in difficult situations such as those authored by the growing threat of international terrorism.

Professor Kirgis\(^6\) has recommended the “sliding scale approach” as a means for dealing with such tensions in international law. According to Kirgis, the value of any determination in such instances, in his case, determination of the question whether or not a norm of customary international law had been formed; and in our case, determination of whether human rights could be discounted in order to impede potential terrorist activity but without actually inscribing them with the imprimatur of fakeness and unreliability – is relative to the targeted outcomes. Therefore, where the consequences of such a determination are critical to international life, a norm of customary international law (CIL) could be inferred from the evidence of only one and not both of the elements of custom required under Article 38(1)(b) of the Statute of the International Court of Justice.\(^7\)

Professor Kirgis argues that this variation in the formal requirements of custom is justified by what appears reasonable in each case because of the exigencies of international life. But the sliding scale explanation of CIL does not appear to have helped or clarified our understanding of the doctrine of custom. It has not cured custom’s problems of indeterminacy, incoherence and inconsistency that make it difficult to recognize when a norm of CIL might have been either formed or abandoned.\(^8\) On the contrary, more recent analyses have called for the

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\(^7\) Statute of International Court of Justice, 26 June 1945, San Francisco, UKTS 67 (1946) Cmd. 7015; UNTS 993, 59 Stat. 1031

abandonment of custom one of the sources of international law. It is doubtful that “human rights on a sliding scale” would achieve the balance necessary between, on the one hand, discounting human rights in order to serve national security interests better and authenticating human rights with the seal of reliability and endurance on the other.

1. BACKGROUND

On 5 August 2005 British Prime Minister Tony Blair gave a press conference in response to the terrorist attacks on London on 7 July 2005 (7/7). That press conference has become well known for the Prime Minister’s declaration that “the rules of the game” have changed. However, the changes had begun to occur well before 7/7 and certainly before the terrorist attacks on New York on 11 September 2001 (9/11). These changes show no sign of abating while the threat of international terrorism abides. Therefore, 9/11 and 7/7 in particular served only to confirm the appropriateness of the legislative changes that were already under way in the UK in relation to the growing threat of international terrorism. But are these changes consistent with the immutable logic of the human rights movement that they seek to minimize?

According to Lord Nicholls, “The subject matter of the legislation is the needs of national security”. The changes referred to by the Prime Minister deliberately seek to reposition human rights in the constitution of twenty-first century Britain by minimizing the civil liberties and the judicial safeguards of persons, especially foreign nationals that are merely alleged to have committed acts of a terrorist nature, or that are alleged to be associated with international terrorism. If this is correct, then the human rights project has surely been nothing more than a “mere game” to be lost and won; or worse, a game to be sacrificed on the altar of national security.

But the international human rights project was never a “mere game”. Rather it has always been a deliberate programme, strategically intended to achieve a permanent culture change that privileges above all else the recognition, promotion and protection of the dignity inherent in individuals qua human beings. Its institutionalization through the international bill of

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10 A series of coordinated suicide attacks on the public transport system were activated during the rush hour around 8:50 within fifty seconds of each other at three different locations on the London underground. A fourth bomb went off on a bus in Tavistock Square at 9:47. At least 57 people lost their lives and a further 700 were injured in the attack.

11 See Prime Minister’s 5 August 2005 Press Conference @ http://www.number-10.gov.uk/output/Page8041.asp (visited 01/12/05)

12 At least 2,600 people are reported to have lost their lives when hijacked planes crashed into the North Tower of the World Trade Center in Lower Manhattan at 8:46 and the South Tower at 9:03. Another 125 people lost their lives when another hijacked plane crashed into the Western face of the Pentagon at 9:37. A further 256 people lost their lives on the hijacked planes. See the 9/11 Commission Report, @ http://www.gpoaccess.gov/911/pdf/execsummary.pdf (visited 09/06/06).

13 A v. Secretary of State for the Home Department, [2005] 2 W.L.R. 87 para 81.
rights that has inspired development of the regional human rights systems of Europe, Africa and the Americas. It represents the international community’s response to something infinitely worse than, and incomparable to the horrors of 9/11 and 7/7, i.e., the Second World War, which is infamous for genocidal acts, crimes against all of humanity, the crime of aggression, war crimes and fascism.\(^\text{14}\)

Following on from the horrors of the Second World War States placed their hope for a more peaceful and secure world in the recognition, promotion and protection of the dignity inherent in individuals \textit{qua} human beings that is evidenced by an international legislative campaign started by the Universal Declaration of Human Rights (1948)\(^\text{15}\) and followed by numerous international, regional and bilateral conventions, declarations, resolutions and other agreements.\(^\text{16}\) The investment of both energy and time and other resources into the setting up of these international and regional human rights regimes, and their enforcement is plain to see. They make curious the British government’s decision suddenly to characterize human rights as being antithetical to national security.

The Universal Declaration of Human Rights\(^\text{17}\) (UDHR) that was adopted in the immediate aftermath of the Second World War succinctly captures the logic behind the institutionalization of the human rights project. The preamble to the UDHR describes the project rationale \textit{inter alia} as:

\begin{itemize}
  \item To promote the \textit{recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family} in order to achieve freedom, justice and peace in the world
  \item To prevent disregard and \textit{contempt for human rights} in order to prevent the \textit{barbarous} acts which have outraged the conscience of mankind, and create a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want
  \item To \textit{ensure that human rights are protected by the rule of law} …
  \item To reaffirm the peoples of the United Nations’ faith in \textit{fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women}
\end{itemize}

This logic appears immutable. Professor Legomsky writes that this was law at its noblest.

\(^{14}\) For a record of the judgements of the Nuremberg trials after the Second World War, 1 October 1946 see “Judicial Decisions Involving Questions of International Law - International Military Tribunal (Nurembug), Judgment and Sentences”, \textit{American Journal of International Law}, vol. 41 pp. 172–333.

\(^{15}\) Universal Declaration of Human Rights, 10 December 1948, UN Doc. A/811.

\(^{16}\) For a comprehensive chronological listing list see Ghandhi, P.R. (5th ed. 2006) \textit{International Human Rights Documents}, OUP.

\(^{17}\) 10 December 1948, UN Doc. A/811
For one remarkable moment in history, the representatives of the world’s nations, led by Eleanor Roosevelt and other heroes, pledged to end the madness. They set out to do nothing than create a new world order.... There would be respect for the essential dignity of all persons and the human rights of all individuals and all peoples.18

2. THE ISSUE

The question this raises is whether the unjustifiable horrors of 9/11 and 7/7 respectively are sufficient to displace this logic. As a justification for eroding or limiting human rights of individuals, analyses that characterise human rights in a binary opposition of national security and terrorism are deficient for several reasons.

First, the human rights project has become both the anchor and hope for peace and security and the possibility of self-actualised individuals worldwide.19 Human Rights are the highest moral rights.20 They regulate the fundamental structures and practices of political life.21 They are growing and not diminishing in scope and influence. Fielding22 writes that there is an emerging right under customary international law, of humanitarian assistance to restore democracy in order to ensure better protection of human rights. This right is triggered by the overthrow of a democratic government, resulting in a threat to peace under Article 39 of the UN Charter.

The right consists largely “of the support of democracy by measures not involving use of force such as condemnation, withdrawal of aid, and suspension of diplomatic relations or perhaps, if the exigency of the circumstances demand, harsher measures such as economic sanctions”. Human rights even take priority over other moral, legal and political claims. They are also universally acknowledged as ideal standards. According to Franck,23

19 Contesting this view, see especially Bozeman, A.B. “Human Rights and National Security”, Yale Journal of World Public Order, vol. 9 p. 40. However, it is State interdependence especially in economic activity and not sovereign independence that appears to have carried the day, so that the way states conduct themselves within their own territories especially in relation to human rights of individuals is now also a matter of interest to the rest of the outside world and not only the State itself as previously held.
this recognition has led to the emergence of a community expectation: that those who seek the validation of their empowerment patently govern with the consent of the governed. Democracy, thus, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.

No State has ever responded to allegations of human rights abuses with a “Yes we do that! And what is wrong with that? Moreover, we are a sovereign independent State!” On the contrary, States always protest their innocence.

Secondly, analyses that characterise human rights in a binary opposition dynamic between national security interests and human rights are deficient and themselves unsustainable also because since the Second World War, human rights have become civilised States’ convergent factor. Since that time the idea of a universal, inalienable set of individual and group rights has assumed prominence through the development of international treaties that characterise those rights and bind State signatories to observe them.

Although compliance is important, mere commitment to respect the human rights of individuals established under the international bill of rights has served to distinguish civilised States from other States.

Thirdly, it is arguable that in a world obsessed with definitions and declarations, human rights are the best indicator of the nature of individuals qua human beings. Because recognition, promotion and respect of human rights by States creates the best possible environment for the self-actualisation of individuals and the peaceful co-existence of individuals, villages, tribes and nations with one another, human rights are the matrix on which constitutional arrangements of civilised States rest. Human rights are therefore the DNA of human dignity and of the civility of States.

Support for this view is ample. The United Kingdom’s highest Court – the House of Lords – in relation to the UK’s emergent counter terrorism legislation A v. Secretary of State for the Home Department[26] that

The power which the Home Secretary seeks is a power to detain people indefinitely without charge or trial. Nothing could be more antithetical to the instincts and traditions of the people of the United Kingdom…. a power of detention confined to foreigners is irrational and discriminatory … such a power in any form is not compatible with our constitution.

Similarly, Ex parte Bennett,[27] which has been upheld in recent appeal cases,[28] states that “the

25 Comprising the Universal Declaration of Human Rights (1948) and the two International Covenants (1966).
26 [2005] 2 W.L.R. 87 per Lord Hoffman, paras. 86 and 97.
28 See for instance A and others (Appellants) (FC) and others v. Secretary of State for the Home Department (Respondent) [2005] UKHL 71 para. 19.
judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law”. Further, “By the Human Rights Act 1998, Parliament had expressly conferred on the courts a very specific, and wholly democratic mandate to delineate the boundaries of a rights-based democracy [in order to] protect Convention rights”.29

The centrality of human rights to the UK’s constitutional arrangements is clear. What is unclear or difficult to grasp or even to reconcile with the UK constitution is the ratio of the legislature in characterising human rights as being antithetical to national security concerns when the heroes of the Second World War unanimously placed their hope for a safe and secure world in the recognition, promotion and protection of the dignity inherent in all individuals as human beings. The deafening absence of clarity in the reversal of this logic produces an unhelpful distortion of human rights by portraying them as the terrorist’s refuge and sanctuary, without even the slightest justification for it. Consequently, human rights become the victim of both the terrorist element that is seeking to change our way of life and the State that, without any explanation, is seeking ferociously to minimise the effects of its previous commitments to recognise, promote and protect the dignity inherent in individuals as human beings.

But once enthroned on the minds of the public, this distortion has the power to persuade us to accept that human rights can be justifiable collateral in the crucial battle against terrorist activity. Professor Bozeman30 writes that all political systems have been concerned with security in their public orders.

The annals of history tell us that ‘security’ is an elusive goal everywhere, in great empires and commonwealth as well as in small folk societies, city-states and nation states. Throughout time, ‘security’ has been in short supply for generations of human beings, whatever their political habitat and status in society.

Even the British Independent Reviewer of Anti-Terror Legislation, Lord Carlile, who was appointed by government to monitor and ensure that the right balance was struck and maintained between protection of human rights on the one hand and legislative effort to counter terrorism on the other, appears to have let the distortion fester in spite of the House of Lords’ insistence that the legislature should not seek to unpick the constitution in the name of the war on terror. In A v. Secretary of State for the Home Department31 the House of Lords ruled that the emerging counter-terrorism legislation was “mistaken” to the extent that it did not pay sufficient attention to the UK’s human rights obligations. However, on 15 December 2005 Lord Carlile appeared to affirm government policy that minimises human rights protections32 of

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29 A v Secretary of State for the Home Department, [2005] W.L.R. 87 para.44.
31 Ibid. Per Lord Nicholls, para. 84.
those merely suspected of terrorist activity when he declared the advent in the UK of “pro-
portional human rights”.33

B. PROPORTIONAL HUMAN RIGHTS AND THE RULE OF LAW

In particular, UK anti-terror legislation, especially just before 9/11 and thereafter, has sought
to equate the defiance of the non-State political actors with that of the government, perhaps
to try and level the playing field in an Einstein quantum physics-like approach of “To every
action is a corresponding equal and opposite reaction to maintain a state of equilibrium”, tur-
ning what was previously a pro-universal into a relativist State with regards its orientation to
human rights.

The Terrorism Act 2000 was intended to “overhaul, modernise and strengthen the law
relating to the growing problem of terrorism”.34 Immediately after the atrocities of 9/11, Par-
liament enacted what became Part 4 of the Anti-terrorism, Crime and Security Act 2001. It is
Part 4 of the Anti-terrorism, Crime and Security Act 2001 which has been superseded by
equally Draconian control orders35 contained in The Prevention of Terrorism Act 2005, that
exercised the Courts the most36 because of its anti-human rights values.

Section 21 of the Anti-terrorism, Crime and Security Act 2001 empowered the Secretary
of State to issue a certificate of indefinite detention against a foreign national if he (1) reaso-
nably suspected them of being a terrorist or of belonging to, or having links with internatio-
nal terrorist groups, and (2) reasonably believed that their presence in the UK posed a risk to
national security. Under Section 22, a certified person was subject of a deportation order.
Under Section 23, a certified person could be detained under immigration legislation pending
his deportation even if such removal was a practical impossibility because of the UK’s other
international law obligations.

Chahal v United Kingdom37 is authority for the proposition that the UK would incur legal
responsibility if it deported a foreign national to country x if the deportee was likely to suffer
at their destination either torture or inhuman or degrading treatment. Nonetheless, certified
persons could secure release by voluntarily departing from the UK. Conspicuously, Part 4 of
the Anti-terrorism, Crime and Security Act 2001 was inapplicable to British nationals whom
the Secretary of State reasonably suspected of involvement in similar activities, and whom he
regarded as posing a threat to national security.

Parliament complemented the Anti-terrorism, Crime and Security Act 2001 with the cre-
ation of the Human Rights Act 1998 (Designated Derogation) Order 2001 subsequent to
which, on 18 December 2001, the UK advised the Secretary General of the Council of Euro-

34 Supra. fn. 27 para.1 per Lord Bingham.
36 Per Lord Bingham, supra. fn. 27 para 1.
that it had taken measures in exercise of Article 5(1) of the European Convention on Human Rights (ECHR). Article 5(1) allows States parties to derogate from certain Convention rights in time of war or other public emergencies threatening the life of the nation. It requires proof that the derogating State was facing an *overwhelming difficulty* that required such derogation. The same provision requires States to adopt only those measures that were proportionate to the challenge or which went no further than was “strictly required by the exigencies of the situation”. It requires also application of the *strict necessity test* and the *consistency and coherence test*. The latter requires that the measures adopted should not be inconsistent with the State’s “other obligations under international law” while the former requires that the occasion does not result in excess arbitrariness of the State.

In practice, both the European Court of Justice (ECJ) and the European Court of Human Rights allow States a wide margin of appreciation in both the determination of what suffices as “a public emergency threatening the life of the nation”, and the “nature and scope of derogations necessary to avert it”. The threshold of public emergency was set in the *Greek Case*.

This requires that the public emergency be actual or imminent, and that its effects must involve the whole nation, and that they threaten the organised life of the community.

However, in spite of allowing for this generous test, the House Lords in *A v. Secretary of State for the Home Department*, rejected government claims that the government could indefinitely detain without charge or trial those foreign nationals that the Secretary of State had certified as terrorist suspects or persons linked with international terrorism and whose presence in the UK posed a danger to national security because the issue is one of the right to liberty and not of immigration control. The latter would entitle the UK to treat foreign nationals differently from its own, but not the former. This decision is consistent with well-established jurisprudence of the European Court of Human Rights.

In *Aydin v. Turkey* the ECHR held that

Article 3 of the Convention enshrines one of the fundamental values of democratic societies and as such it prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Article 3 admits of no exceptions to this fundamental value and no derogation from it is permissible under Article 15 even having regard to the imperatives of a public emergency threatening the life of the nation or to any suspicion, however well founded, that a person may be involved in terrorist or other criminal activities.

While acknowledging also that the judiciary was extremely aware that government alone had the responsibility to decide on the important question of the UK’s counter-terrorism strategies, the House of Lords embraced its constitutional responsibility which it defined as to check and ensure that

Legislation and ministerial decisions do not overlook the human rights of persons adversely affected. In enacting legislation and reaching decisions Parliament and ministers

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38 *Greek Case*, 1969 12 YB 1, 72 para. 153.
39 Supra. fn. 27.
must give due weight to fundamental rights and freedoms. For their part, when carrying out their assigned task the courts will accord to Parliament and ministers, as the primary decision-makers, an appropriate degree of latitude. The latitude will vary according to the subject matter under consideration, the importance of the human right in question, and the extent of the encroachment upon that right. The courts will intervene only when it is apparent that, in balancing the various considerations involved, the primary decision-maker must have given insufficient weight to the human rights factor.

In the present case … Parliament must be regarded as having attached insufficient weight to the human rights of non-nationals. The subject matter of the legislation is the needs of national security. … But the human right in question, the right to individual liberty, is one of the most fundamental of human rights. Indefinite detention without trial wholly negates that right for an indefinite period.41

Lord Nicholls emphasised that Part 4 of the Anti-terrorism, Crime and Security Act 2001 was wrong because of the mischief that it created while trying to placate a possible danger to national security. That mischief was twofold. Firstly, “It deprives the detained person of the protection that a criminal trial is intended to afford”.42 For that reason, it “is anathema in any country which observes the rule of law”.43 Secondly, its effects discriminated between nationals and non-nationals that might pose a similar risk to the UK’s security interests. It is arguable that the legislation’s non-compliance with the requirement of equal treatment of persons under international human rights law was its strongest weakness.44

Part 4 of the Anti-terrorism, Crime and Security Act 2001 also raised constitutional dilemmas because of its inherent “irrationality and discriminatory function”. According to Lord Hoffman, “such a power in any form is not compatible with our constitution”.45 This makes it curious why the UK Parliament had adopted it in the first place; and why the UK’s Independent Reviewer of Anti-Terror Legislation appeared to have countenanced it.

Besides failing to clear the requirement of non-discrimination among the legislation’s target constituency, Part 4 of the Anti-terrorism, Crime and Security Act 2001 failed generally because of the unthinkable position it took regarding the assumption of innocence46 and guilt contrary to Article 5(1) of the ECHR which insists that everyone has the right to liberty and security of the person which they shall not be deprived of except in a limited number of cases, and then only in accordance with a procedure prescribed by law. These are:

41 Supra. fn. 27 per Lord Nicholls, paras. 80–81.
42 Ibid. para.74.
43 Ibid.
44 Discussing obligations arising from the Universal Declaration of Human Rights (1948); The International Covenant on Civil and Political Rights (1966); The International Convention on the Elimination of All Forms of Racial Discrimination (1966) see ibid. paras 58–65.
45 Ibid. para 97.
(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; …

[However,]

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

[And]

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

In Öclan v. Turkey the European Court of Human Rights identified the purpose of Article 5 as the protection of individuals from arbitrariness. “What is at stake here is not only the ‘right to liberty’ but also the ‘right to security of person’.”47 The lure of the critique that human rights are the refuge and sanctuary of terrorist suspects, which does not justify that linkage, lies in its promise of a false dawn of a world free from terrorism. It simply states that the lowering of the human rights protection of terrorist suspects and of their constitutional and procedural judicial guarantees will either wipe out terrorism or substantially reduce its threat. That temptation leads us to the next step of actually taking measures such as those previously contemplated under Part 4 of the Anti-terrorism, Crime and Security Act 2001.

These particular measures removed the legal assumption of innocence from foreign nationals that the Home Secretary had certified as terrorist suspects that posed a threat to national security. The leap from presumption of innocence to guilty, and therefore subject to indefinite detention, is achieved in the total absence of a legal charge, and with no opportunity given to the suspect to rebut or test the strength of the Home Secretary’s case against him/her; and without an impartial court to consider the fairness of the accusations. But the Anglo-American legal system’s tradition has developed and been anchored on the principle that “in the eye of the law every man is honest and innocent, unless it be proved legally to the contrary”.48 Therefore, “A mere accusation could not amount to a presumption of guilt”.49 This makes both the rational and effect of emergent counter terrorism legislation inconsistent with this basic premise of the rule of law.

It also presumed that foreign nationals suspected of terrorist activity were not subject of the ECHR guarantee to “liberty and security of the person” – Article 5(1). However, contracting States have undertaken to secure liberty and security of the person for “everyone within

48 General Court of Massachusetts (1657) Records of Massachusetts, iii, 434–5.
their jurisdiction” – Article 1. The only exceptions to this guarantee are the following: (1) lawful arrest or detention with a view to deportation; (2) during the process of deportation; and (3) both 1 and 2 above in accordance with a procedure prescribed by law.

To do that would also undermine the well-engraved principles of natural justice which require that justice must not only be done, but must be seen to be done.\(^\text{50}\) The House of Lords stated in *Ridge v Baldwin* that “Regulations are drafted so that the principles of natural justice must be complied with and they are imperative and obligatory”.\(^\text{51}\) Ultimately, it would amount to a change in our *grund-norm*. A change, or re-orienting of the *basic norm* always carries with it all the risks that are associated with embarkation on a new beginning. Previous certitudes are abandoned. This may result in the State losing its standing as a leading nation in the development of the human rights project, and with that also perhaps its status as a civilized nation. But the fact remains that the human rights project seeks to recognize, promote, protect and ensure the dignity inherent in individuals *qua* human beings. For this reason, human rights are the refuge and sanctuary of *human dignity*. It is to that dignity that the House of Lords appropriately looked to even while exercising judicial deference to Parliament in its consideration of the legality of the Home Secretary’s powers of arbitrary arrest of foreign nationals suspected of terrorist offences.

### C. Exploding the Human Rights/National Security Dichotomy

Increasingly States appear to be developing a habit of creating convenient linkages between their treasured values and equivocal threats to those values as a means to justify policies that would otherwise not pass the scrutiny of their sophisticated electorate. Linkages have been alleged between human rights and international terrorism; and between 2003 Iraq and Weapons of Mass Destruction; and between 2003 Iraq and Al Qaeda; and policies effected by allied States based on those claims. The passage of time has revealed the falsity of those claims in spite of irreversible change having been authored on their pretext.

The shooting on 22 July of Jean Charles de Menezes, 27, by police officers at Stockwell tube station, South London, after being mistaken for a suicide bomber, has come to symbolise everything wrong with the attempt to limit the human rights project in the name of the war on terror. The victim was never charged with anything; never convicted of any crime; yet he was shot dead by law enforcement agents of a country that prides itself on being the mother of democracy.

But the English criminal justice system (CJS) is anchored on the presumption of innocence until proven guilty. It maintains the view that “it is far worse to convict an innocent man than to let a guilty man go free”.\(^\text{52}\) It requires the due process of the law, which imposes on the

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\(^\text{50}\) Per Lord Bingham in *Davidson v Scottish Ministers* [2004] UKHL 34.


\(^\text{52}\) *In re Winship*, 397 U.S. 372.
State the burden to prove “beyond reasonable doubt” that the presumption of innocence should be withdrawn against the defendant.

The requirement of due process “protects the accused against conviction except upon proof of beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”.53 Other procedural safeguards that underpin the presumption of legal innocence in the CJS include

- the privilege against self-incrimination and the right to remain silent while in police custody and during trial; the duty of the State to disclose exculpatory evidence; the right to compulsory evidence; the right to confront adverse witnesses; and the right to effective assistance of counsel.54

This is because the international human rights project “enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty”.55

Consequently, State officials could not claim or enjoy the privilege of immunity from prosecution for those of their acts that international law regards as crimes. The issuing, by the Home Secretary, of certificates that strip foreign nationals of one of the fundamental rights of individuals under international law in the name of “the war on terror” is problematic because it potentially could fail the “function of a State test” developed by the House of Lords in the *Pinochet Case*.56

According to this test, acts such as torture, or inhuman or degrading treatment, or murder, could not avail themselves of the privilege of State immunity for perpetrators because “It is not the function of a State to do something which international law itself prohibits and criminalises”.57 Arbitrary detention of foreign nationals or discriminatory treatment of terrorist suspects according to their nationality is contrary to international law’s prohibition against all forms of discrimination.58

Certification by the Home Secretary that a foreign national was a threat to national security triggered arbitrary powers that resulted in:

- Indefinite loss of liberty for the suspect;
- Loss for the suspect of the presumption of innocence until proven guilty;
- Removal of the burden on the State to prove that the suspect was no longer entitled to the presumption of innocence;

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53 Ibid. p. 364.
55 Supra. fn.27 Per Lord Bingham para. 41.
56 Infra. fn. 59
57 *Ex parte Pinochet Ugarte No.3* [2000] 1 A.C. 147 para. 205.
• Placement of the suspect in the zone of proportional human rights where their fundamental human rights as a human being are subject to the Home Secretary’s determination:
• Violation of the UK’s international human rights obligations.

This development raises serious questions about UK policy on human rights. It threatens to hasten our rendezvous with chaos, not merely because of our intransigence, but mainly because of the recklessness that is apparent in this development.59 The social and political reality that had inspired Martin Luther King Jr. towards this observation was racist, discriminatory, segregationist, oppressive and unjust America. If we recklessly institute in our midst a similar social and political context today, then King’s warning becomes equally relevant to us too.

D. CONCLUSION

In the end, the judiciary’s deference to the legislature is conditional on the latter’s sufficient regard for the human rights interests of all persons under UK jurisdiction. This conditional deference is dictated upon the judiciary by the constitutional prerogative that requires them to ensure protection of the inherent dignity of individuals under UK jurisdiction, which according to the *Pinochet Case*60 is the proper function of a State.

However, in the current poisoned policymaking climate of the post 9/11 and 7/7 era, where politicians appear to be keen to secure quick short-term victories over non-State political actors, there is no shortage of novel measures intended to reduce the risk of another terrorist attack. Without even linking human rights to facilitation of terrorist activity, politicians have made the claim that there is one, and begun to tweak the corpus of human rights through policy changes and new legislation.

Recent decisions of the House of Lords that have been prompted by challenges of the legality of such policy and legislative acrobatics that are aimed at reducing the human rights protections of terrorist suspects, reintroduce the fruits of torture into UK courts, deny due process, curtail well-established principles of natural justice, and to rebut the presumption of innocence until proven guilty, point to what the UK reviewer of anti-terror legislation has defined as the era of “proportional human rights”.

The era of proportional human rights is averse to the human rights project in that it imprints human rights with the signature of unreliability and fakeness. Yet to achieve their purpose, human rights ought to evidence reliability, endurance and authenticity. Although recent decisions of the House of Lords are encouraging in that they oppose the discounting of human rights sought by the legislature through its counter terrorism legislation, the consequences of those decisions are minimal.61 These include the unequal treatment of persons, discrimination, the sanctioning of the fruits of torture through the backdoor and undermining of both the

60 Supra. fn. 59.
61 The remedies are not the focus of this essay. For a though examination of these see Arden, M. (2005) “Human Rights in the age of terrorism”, *Law Quarterly Review*, vol. 121 pp. 609–10.
principles of natural justice long engrained in British life and the rule of law – the soul and the light of British society.

In the UK at least, the judiciary has become therefore the last bastion in the defence of the human rights project against politicians that appear to be focused on nothing more than winning the war on terror. According to Lord Bingham,

Judicial control of interferences by the executive with the individual’s right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimize the risk of arbitrariness and to ensure the rule of law.62

Any reasonable person would agree with Lady Justice of Appeal Mary Arden that there is great need for effective national security, and that we need counter-terrorism laws.63 The question is what kind of counter terrorism laws. This article examined the question of whether the threat of international terrorism to national security could offset the logic of universal human rights that has characterized British constitutional thinking especially since the last war. It showed that such a development would be inconsistent with the UK constitution; legally irrational; incompatible with the logic that underpins the human rights project and unsustainable because of its apparent attack on received notions of human dignity in a civilized and democratic State.

Therefore, human rights could not be tweaked in order to facilitate the war on terror without actually distorting the immutable logic that inspired the international human rights movement from the very beginning. Human rights are the highest moral rights. They regulate the fundamental structures and practices of political life. They even take priority over other moral, legal and political claims. They are also universally acknowledged as ideal standards. This is because they are the best indicator of the nature of individuals qua human beings. They provide a guide and yardstick for distinguishing between civilised and uncivilised States, between politically developed and under-developed States. They are indeed the DNA of human dignity. Therefore, those that agitate or legislate for their adjustment as a means to facilitate the war on terror ignore the dehumanisation of individuals that find themselves at the end of their effort.

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