

TRACK 14:

TRIUMPH THROUGH ADVERSITY.

In taming counter-terrorism law, human rights can forge a soul

If the modern human rights movement was born at the end of the Cold War, then it came of age on 11 September 2001.

HAPPY CHILDHOOD

Looking back, the 1990s were really rather too easy, the calm before the storm.

- After 1989, with the [end of history](#) and all the rest of it, it looked as though western power was here to stay. And with it came western ethics – in particular a commitment to a code of [universal human rights](#) which (far from being truly universal) had been designed and built in Europe and the US, first for domestic consumption and then, in the 1990s, for world-wide export
- There was even a house philosophy to underpin this new world order, a [third way](#) between capitalism and socialism that embraced globalisation while seeking to control its excesses. (One of the seminal thinkers behind this idea, [Tony Giddens](#), was an enthusiastic promoter of the idea of a centre for the study of human rights at LSE when he ran LSE: the centre was established in [Autumn 2000](#).)
- The [International Criminal Court](#) was agreed in July 1998, with no fewer than 120 states seeming to embrace a new world order in which state impunity for human rights violations would no longer be possible
- Wars were fought *for* human rights – most famously over [Kosovo](#) by NATO in 1999 but also in [Sierra Leone](#) involving Britain and the UN in May 2000. The arguments were over the wars that were *not* waged ([Rwanda in 1994](#)) rather than those that were

The promotion of human rights was an easy idea then. It had all the idealism on its side and faced few tough questions.

Then came [the attacks of 11 September 2001](#).

It is difficult for us now to remember how fiercely, how frighteningly fresh these actions were, how we were not sure whether they were the start of a war against the West or, at very least, the launch of a new kind of perpetual subversion against our liberal culture. And then there was the deed itself – being so visible, so visually intrusive on such a vast scale, it became transformative of the way in which we all saw the world.

Looking back on my [own reaction](#), published in [The Tablet](#) in the immediate aftermath of the event, I see I wrote of it as

‘not just an exceptional piece of bad news; this story has no rhythm to it, no aftermath; we do not and will not get over it or, other than in a banal sense, move on. The attacks will always be there, a huge unmovable dark cloud in every Western sky.’

I also wrote this in the same piece:

‘The real fear is of an American reaction that is futile, inflammatory and provocative.’

Has there been such a reaction?

FUTILE?

I think we need to acknowledge that the [‘war on terror’](#) initiated by President George Bush in the immediate aftermath of the attack has not necessarily been futile.

Afghanistan has been invaded, the Taleban administration which supported Al Qaida has been destroyed and the organisation itself has been forced to operate in a far more fragmented, inchoate fashion than before the 11 September attacks. It is by definition difficult to establish the success of something on the basis of its prophylactic character, and of course there have been awful attacks such as those in [Bali](#), [Madrid](#) and [London](#), but there can be little doubt that Al Qaida is not the force its leaders wanted it to be. Nor is it what Osama Bin Laden might have made it he had been left untouched in Afghanistan to scheme, plan and preach his message of politicised religious hatred.

We can confidently conclude that:

- Al Qaida is a weak, largely ineffectual body which can certainly do great damage from time to time but whose capacity to cause sustained harm is slight.
- In Global North countries at least (and probably elsewhere as well) it lacks any firm territorial base within which to operate.
- The organisation’s undisciplined, reckless violence has alienated the broader following it might otherwise have garnered among some elements within the worldwide Moslem faith communities.

If terrorism were a game of poker, I am not sure Osama Bin Laden ever came close to securing a winning hand, but what he is now for sure is a [busted flush](#).

Maybe all this would have happened anyway, even if the US had not reacted as they did. But it is clear that the ‘war on terror’ has played a part in the reduction of Al Qaida, in particular the invasion of Afghanistan. (Human rights defenders are not pacifists.)

‘INFLAMMATORY AND PROVOCATIVE’?

The Bush administration’s response may not have been futile but it has certainly proved to be both of these – perhaps even to the point of also being counter-productive, damaging the US more than the violence which it has prevented would ever have done.

(Damage can be political, cultural and diplomatic as well as physical, remember.)

So embedded did this bad behaviour become between 2001 and 2008 that the Obama administration has found itself unable to disown much of its gloomy inheritance in this field.

This story is well-known to us all and I need spend little time with it here.

- The [Guantanamo Bay](#) camp for suspects in the 'War on Terror', still open, has become a tangible symbol of America's rejection of the constraints of international law and of international human rights law specifically
- The awful facts about secret camps and torture in Afghanistan, and the allegations which continue to be made about activity at [Bagram Air Base](#), have destroyed the US's moral standing in the world, exposing its high ethical tone as a manoeuvre for position rather than a reflection of genuine moral purpose
- The invasion of Iraq has elided into the 'war on terror' and made the latter seem exactly what the former appeared to be: an opportunistic effort at increased global power under the cover of tragedy, a seizing of a moment to try to transform the world to America's advantage
- The use of Christian language has been especially damaging. Within a week of the attacks President Bush was describing his country's response as a '[crusade](#) that was 'going to take a while'. The US close alliance with Israel reminds those who know their history of a previous period of [Crusader control](#) in the Middle-East
- In terms of domestic law, President Bush developed a theory of constitutional power which put him literally above the law – as [commander in chief in a time of war](#) – able to set aside laws in the country's interest and protect others from the effects of the criminal law, for example on the prohibition of torture. Obama has certainly resiled from this despotic theory while seeking [not dissimilar powers](#) through legislation

What has all this got to do with human rights?

The attacks of 11 September led to two deep challenges to the whole human rights project.

Neither had been remotely contemplated in the heady 1990s.

THE FIRST CRISIS OF HUMAN RIGHTS

This came immediately.

Were the 11 September attacks a breach of human rights?

At one level, of course they were. Nothing could be more obviously a denial of the esteem of the person, a brutal instrumentalisation of the individual, than to spend innocent lives in the transformation of a commercial airliner into a weapon of mass destruction, designed to kill thousands of civilians in order to communicate a larger political message about the need to rise up against American power.

But on second thoughts – international human rights law is about the responsibility of states, not individuals – see the track a couple of weeks ago on [business and human rights](#). Osama Bin Laden is an individual. Al Qaida is merely an association of individuals. Nothing to do with us therefore. Now, President Bush's response, the [Patriot Act](#) and so on – that human rights people can have a view on, strongly oppose, campaign against and so on.

This second position is right in law, but wrong politically, tactically and more to the point ethically.

Human rights are not just about law.

Law is an instrument for the protection and promotion of human rights, not their master.

But in the immediate aftermath of the 11 September attacks, human rights defenders could not help but give the impression that because their *main focus* was on state action, they therefore had *no focus* at all on the violence to human rights done by sub-state actors, or (as everybody calls them) the terrorists.

I am reminded of remarks made by an Irish Taoiseach (Prime Minister) when a member of his own party Senator Billy Fox was [killed in a sectarian attack](#) in 1974 – 'what human rights did Senator Billy Fox get?' he asked, defending his government against criticism that its response to terrorism had been draconian.

So how have human rights defenders responded to this point?

It has taken a while but broadly speaking it has been effectively resolved:

- Clearly, subversive and other sub-state bodies do breach the human rights of their victims insofar as we are using this term in a philosophical, political and ethical rather than narrowly legal context. It's just the same as with business: the obligation to respect human rights is there and killing people in this way manifestly breaches it

But

- True this is not as such a legal obligation. Of course you can sue a subversive group or individuals for wrongful death, or injury or damage to property or whatever you want (and it sometimes happens, as in relation to the [Omagh bombing](#)) – but you cannot sue it or its members for a 'breach of your human rights' – this is a matter of the state's obligation to you, a remedy available against the state (if its framework of law allows it) rather than anyone else within the state.

However, that is not the end of the matter

- The state has an obligation to protect you from the breaches of your rights by third parties, especially your right to life. It must have effective criminal laws and proper frameworks for the prevention and detection of crime. For this reason, human rights defenders see the criminal law prohibitions on murder, manslaughter, offences against the person etc as *part of* rather than *in opposition to* human rights.

And (to complete the human rights picture)

- Human rights require that such laws be formulated and then enforced in a way that respects the rights of those subject to them, their right to liberty and the right they have to fair procedures so as to ensure that their right to liberty is not wrongly taken from them.

In summary:

the criminal law is part of the human rights story, it is the way in which the state balances its obligation to protect the lives of us all with its parallel duty to ensure that it does the best it can to guarantee that those who are suspected of wrongdoing under that criminal law are treated fairly.

Human rights defenders have an answer to Liam Cosgrave and those after him who have made the same point: they are enthusiasts for the criminal law and robust criminal procedures so long as these are respectful of human rights in their content and their operation.

The criminal law, buttressed by international co-operation between national forces where required, and further supported by the sharing of information between police forces, is sufficient to deal with most international criminality. It is enough to cope with Al Qaida – especially when we remember what I have said above, about its relative weakness now, ten years on from 11 September.

Of course this is not a position that is held by everyone.

We have seen in the furore over [control orders](#) in the UK how determined some are to use the fear of terrorism to expand state power in directions that take us into a kind of administrative police state and far away from the ordinary criminal law. Such trends must continue to be resisted by human rights defenders – who equally must not fall into the trap of seeming in attacking such developments to be opposed to all law. In the United Kingdom this is a debate that crosses party lines, between those like [Dominic Raab](#) and [Ken Clarke](#) on the Conservative side who are sceptical and those who buckle before the security services – usually [current](#), [past](#) and (perhaps also) [prospective](#) home secretaries

Where does the fervour and determination for the endless expansion of terrorism laws come from?

This is where the second great crisis of human rights after 11 September comes into play.

DIGNITY IS NOT FOR EVERYONE AFTER ALL

What was especially shocking about the years after the 11 September attacks – and particularly in relation to the justifications for the war on Iraq – was how the idea of human rights came to be understood by some in a way that flew in the face of its core meaning

- In place of universality came regional specificity: human rights belonged to the West, they were part of ‘our’ value system and needed to be defended against outsiders, the many ‘others’ (epitomised by but going far beyond Al Qaida) who wanted to destroy them
- In place of the concern for the individual that is at the core of human rights came a concern for human rights as a cultural idea. Human rights were part of what made our civilisation in the West good and so they needed to be defended from the bad (non) civilisations that, given the chance, would destroy them

So

- The 'War on Terror' not only was understandable, it was to be applauded as a positive good since it was defending 'human rights' (as an idea) against the forces of evil that would destroy it

and

- Needless to say, this defence of human rights would not succeed unless the warriors fighting for the idea could engage in combat without one hand tied behind their back. Human rights defence needed to be tough, needed to be done by (to use the phrase in one of the [books](#) by a protagonists of this position) 'carnivores', not meek, human-rights-respecting 'herbivores'.

I have written a great deal about this perspective, this assumption that human rights defence needs strong action against terrorism and the threat of terrorism, and in doing so I have found I have had to be critical of some leading figures in the world of [liberalism](#) and [human rights](#).

In my opinion this approach to human rights has done immense damage by seeking to transform the subject into a subset of western power.

Human rights are nothing if they are not part of an argument for universal esteem and respect for dignity that goes well beyond the interests of any particular culture or political bloc.

I think as with the argument over law, we are on the way to winning this one as well.

- The partisanship of the other side, their intent on supporting one culture over others at whatever the cost, has lost them allies, not only outside the West (of course!) but within it as well, 'no more .. Mr Nice Guy' as Laurie Taylor said about [Michael Ignatieff](#) at the height of the controversy.
- The dreadful extent of human rights abuses perpetrated by the Bush administration and its armed forces went far beyond the 'necessary evil' and the carefully calibrated, judicially authorised ill-treatment for which others like [Professor Alan Dershowitz](#) had argued – this exposed the impossibility of bringing the discipline of the first class liberal mind to the battlefield. Once this genie was out of the human rights bottle there was no way it could be pushed back in by scholars suddenly stricken by second thoughts.
- Judges in the [US](#), [Europe](#) and the [UK](#) reasserted the primacy of a rule of law based on universal principles rather than the culturally specific perspective for which the human rights partisans had argued.
- The UN, after a slow start, gradually sought to rein in the momentum of the counter-terrorism bandwagon, first re-introducing the idea of respect for human rights into the exercise of such powers and then ensuring that the term 'human rights' was in this context to be given its traditional, individual-based and universal meaning. The [UN Special Rapporteur on the promotion and protection of human rights while countering terrorism](#) (Professor Martin Scheinin) has done important work in this regard.

THE OUTLOOK

It would be foolhardy to be complacent. And of course much depends on events

- Will there be a revival in subversive political violence?
- Might Al-Qaida somehow revive itself or secure a new national alliance that will enable it to perform more effectively (ie bloodily)?
- Will democratic authoritarianism which is legitimised by a supposed fear of terrorism become the order of the day? (See my [Track Six](#) on colliding futures.)

Human rights defenders need to be perpetually vigilant. Their idea's idyllic childhood is over. Adolescence has been survived, false friends seen off. Adulthood beckons – and with it the responsibility of arguing and rearguing the human rights case, in each and every arena where the point about the value of this ethic can be effectively made.

FOR DISCUSSION

- Am I being too optimistic about human rights?
- Do I understate the threat from terrorism?
- Am I too ready to see the criminal law as the answer to the challenge of terrorism when in fact new kinds of laws are required?
- Perhaps human rights really are part of a particular culture and it's stupid of me to keep on trying to universalise them?
- If human rights really are universal, might our adherence to them in fact make our culture so weak that it is brought down by its enemies – so no one will have human rights anywhere at all?

These are just some of the objections to which my position gives rise.

Are they legitimate?

Do you have others?