



IN OUR NAME AND ON OUR BEHALF

Speech by Louise Arbour

UN High Commissioner for Human Rights
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Mr. Chairman,

Ladies and Gentlemen,

In July 2001, a few years after my first encounter with the intersection of criminal law and international law at the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR), I asked the following question at a lecture at Melbourne University:

“While the political will to pursue war criminals was first lacking, is there, as some seem to fear, a danger that it will become relentless? If so, what effect will that have on the integrity of the complex aspirations and methodologies of criminal law as an instrument of social control in a democracy?”

After September 11 of the same year, the question acquired added acuity as I assumed that it would be not just war criminals but also international terrorists that the criminal law

framework, domestic and international, would now be pursuing. I obviously was gravely mistaken in my concerns. The pursuit of terrorist suspects seems to have little to do with criminal or international law as we know it. Hence the real questions: what is it then about? Under what legal framework, if any, does it purport to operate and who is accountable to whom?

All law enforcement systems operating under the rule of law rely on a few fundamental assumptions. One of them is that there are limits to the power of governments to investigate, apprehend, prosecute and convict persons suspected of crimes. Rules govern the legality of arrest, detention, interrogation and of investigative methods such as wiretapping, DNA testing, etc. These rules, amongst many others, are a bar to the absolute efficiency of a system that, if absolutely efficient, would be absolutely tyrannical. Transposed into the international realm where true tyrants (war criminals, terrorists) are targeted for prosecution, the national norms of restraint may sometimes appear less necessary, less appropriate, less attractive.

I will indeed be the first to argue that rules that have served us well even in the most challenging times in the past may need to be adapted to a different environment. I would therefore like to examine briefly the environment described by some as “the new normal” to explore whether indeed we have entered a different legal landscape. But first a quick word about the “old normal”.

The Old Normal

Ibrahim, a natural-born subject of the Ameer of Afghanistan, was enlisted in an Indian native Regiment of the British army and was posted to Canton. On 14 September 1912,

he was charged with the murder of a native officer in his regiment, tried before the Supreme Court of Hong Kong, convicted and sentenced to death.

His appeal to the Judicial Committee of the Privy Council gave rise to the pronouncement of what became known as the rule in the Ibrahim case, a celebrated rule upon which refinements but no departures were ever expressed throughout most of the common law world. I expect that most students of criminal law to this day could recite it by heart:

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale.¹

The rule is one of policy. The Privy Council continues:

"A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it". (Warwickshall's case, 1 Leach 263.) It is not that the law presumes such statements to be untrue, but from the danger of receiving such evidence judges have thought it better to reject it for the due administration of justice. (R. v. Baldry, 2 Den. C.C. Res. 430.) (para. 20)

¹ *Ibrahim v. The King*, Privy Council Appeal No. 112 of 1913, 6 March 1914 (from the Supreme Court of Hong Kong), para. 18

This left no ambiguity about the desirability of avoiding the use of oppression and inducement – let alone of torture, inhumane or degrading treatment - in the official interrogation of suspects. As long as confessions were sought to obtain convictions, torture was therefore, if nothing else, inefficient.

In the old normal, there was, however, considerably more ambiguity in the law regarding the legality of arrests and the consequences of illegal arrest.

Where a person was brought into the jurisdiction of a trial court as a result of an international abduction or some state sponsored act of deception, the traditional approach for most common law countries was to follow the *male captus bene detentus* rule, which in essence provides that the illegality of an arrest does not affect a court's jurisdiction over the accused. However, the rule was gradually eroded by decisions throughout the Commonwealth, beginning in the 1970's, with the first major departure coming from the New Zealand Court of Appeal in *R. v. Hartley*.² The Court of Appeal held that a fugitive who had been arrested in Australia and forcibly placed on a flight back to New Zealand, without regard to the formal extradition process, was the victim of an illegal arrest, which, as an abuse of process, gave the court the discretion to order a stay of proceedings.³ *Hartley* was subsequently approved and applied, in varied degrees, by courts in Australia,⁴ South Africa,⁵ Canada⁶ and the United Kingdom.⁷

² [1978] 2 N.Z.L.R. 199 (C.A.).

³ The court cited Lord Devlin from *Connelly v. Director of Public Prosecutions*, [1964] 2 All E.R. 401 where he questioned, “[A]re the courts to rely on the Executive to protect their processes from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them?” (at 442).

⁴ *Levinge v. Director of Custodial Services and others* (1987), 9 N.S.W.L.R. 546

⁵ In *State v. Ebrahim*, [1991] 2 S.A. 553 (S. Afr. App. Div.)

The position developing in the Commonwealth remained in stark contrast to the American approach, which, to this day, largely recognizes the *male captus bene detentus* doctrine as good law. The US Supreme Court has repeatedly and consistently held that a forcible, extra-territorial abduction constituting an illegal arrest will not injure a court's jurisdiction to prosecute. This principle has come to be known as the *Ker-Frisbie* doctrine⁸ and was reaffirmed in the 1990s in the decision of *Alvarez-Machain*⁹. It should be noted that U.S. courts, however, have been more reluctant to accept jurisdiction where extrajudicial transfers were accompanied by torture by or with the acquiescence of the United States.¹⁰

Nevertheless, despite its strong foothold in American courts, global erosion of the *male captus bene detentus* rule continues throughout the Commonwealth. In England,

⁶ See for e.g. *R v. Jewitt* [1985] 2 S.C.R. 128; *O'Connor v. The Queen*, [1995] 4 S.C.R. 411

⁷ *R. v. Horseferry Road Magistrates' Court, Ex parte Bennett*, [1993] 3 All E.R. 138 (H.L.)

⁸ The American origins for *male captus bene detentus* go back to the late 19th Century in a case called *Ker v. Illinois*, 119 U.S. 436 (1836), where a fraudulent banker had taken refuge in Peru. His victim, a Chicago bank, hired a detective agency to bring Mr. Ker to justice. After being abducted and forcibly transferred to the US, Ker argued that his arrest violated due process of law, which would strip any US court of jurisdiction over him. The Supreme Court disagreed and held that no matter how a defendant came before the court, so long as no US laws were broken, the court would have jurisdiction over that defendant. Sixty years later the rule was expanded in *Frisbie v. Collins*, 342 U.S. 519 (1952), where an accused was arrested, beaten, and forcibly transferred from Illinois to Michigan (the entire affair took place within the United States). Despite that a number of US laws had been broken in the process of the arrest, the Supreme Court said, "This Court has never departed from the rule announced in *Ker v. Illinois*... that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a "forcible abduction"." (at 522).

⁹ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), where the Court found it had jurisdiction to prosecute for violation of US criminal laws a fugitive kidnapped by American agents in Mexican territory, notwithstanding adamant protest from the State of Mexico. The majority of the Court held that the abduction was not in violation of an extradition treaty between the US and Mexico and thus *Ker* applied. Also see *United States v. Matta-Ballesteros*, 71 F.3d 754 (9th Cir. 1995), where the Court accepted jurisdiction over a fugitive abducted from Honduras by United States Marshalls with the help of Honduran Special Troops. The fugitive alleged he was subjected to torture and other serious due process violations before arriving in the US.

¹⁰ *United States v Toscanino* 500 F 2d 267 (1974)

departure from the old rule started in the 1980's, but was most notably affirmed by the House of Lords in the celebrated *Bennett* decision,¹¹ which explicitly rejected the US *Alvarez* approach, and ruled that a circumvention of formal extradition procedures could constitute an abuse of process such that a court could enter a stay of proceedings. Lord Griffiths put down the principle as follows: "...the 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"(at pp 61-62).

Reasonable people may disagree about the appropriate framework that should govern the apprehension and transfer to trial of an international terrorist suspect, war criminal or torturer. Eichmann was illegally kidnapped from Argentina, brought to Israel, tried, convicted and executed. Pinochet was legally transferred from the UK to Chile where he is unlikely ever to have to serve any sentence for the charges against him despite the continuation of judicial proceedings in that country.

But what all these cases have in common, Ibrahim, Eichmann, Pinochet, and many others, is that they were ultimately aimed at bringing alleged criminals to justice.

The New Normal

We now enter the "new normal". I would like to examine some of the features of this era as I search not so much for answers but, rather, for an appropriate basis upon which to phrase the relevant questions.

¹¹ *R. v. Horseferry Road Magistrates' Court, Ex parte Bennett*, [1993] 3 All E.R. 138 (H.L.)

The responses of governments to terrorist activity, particularly democratic governments bound by law, raise a very wide range of human rights issues. I have already mentioned the constraints that regulate arrests and interrogations. Other issues include the role of national courts in supervising counter-terrorism measures, including fair trial rights and the use of special and military courts; the definition of terrorism and related offences in national legislation, including the question of criminalizing the legitimate exercise of rights and freedoms; the principle of non-discrimination, including the issue of the techniques used to screen terrorist suspects; the protection of vulnerable groups, including human rights defenders, non-citizens and journalists; the determination of a state of emergency and/or of the existence of an armed conflict; the deprivation of liberty, including judicial and administrative detention, incommunicado detention and secret detention; the right to privacy, including the questions of methods of investigation, and information collection and sharing; the right to property, including compiling lists and freezing assets of persons suspected of terrorism; etc.

Allow me to focus today on two of such issues that have led to considerable debate here in the UK and Europe, and elsewhere. The first is the alleged use of secret detention centers and of irregular transfers of persons suspected of engagement in terrorist activities, which would allow governments to detain these persons without any legal process and presumably obtain information from them using interrogation methods that would be impermissible under national or international law. The second and related issue is the use of diplomatic assurances to justify the return and transfer of suspects to countries where they face a risk of torture.

These features of the 'new normal' are characterized by the fact that it would appear that terrorist suspects are being arrested, detained and interrogated with no apparent intention of bringing them to trial. I say "it would appear" because the unprecedented level of secrecy that surrounds what democratic governments are doing in our name and on our behalf severely curtails examination and debate.

And I say "with no apparent intention of bringing them to trial" because the circumstance of their arrest, detention and interrogation -take only the length of their detention- would in any credible jurisdiction amount to such an abuse of process that trial jurisdiction, if it ever existed, could never be exercised.

Secret Transfers and Secret Detentions

The issue of clandestine prisons is receiving a lot of attention recently. The Committee on Legal Affairs and Human Rights of the Council of Europe recently issued an information memorandum on "Alleged Secret Detentions in Council of Europe Member States" and concluded that though it had not found, at this stage of the investigations, any formal, irrefutable evidence of the existence of secret detention centres in Europe, there were nevertheless many indications from various reliable sources that justified the continuation of the investigation in this regard. Troubling also is the conclusion that "there is a great deal of coherent, convergent evidence pointing to the existence of a system of "relocation" or "outsourcing" of torture. Acts of torture, or severe violations of detainees' dignity through the administration of inhuman or degrading treatment, are carried out outside national territory and beyond the authority of the national intelligence services." The report refers to various cases of 'abduction' of persons subsequently

transferred to detention centers abroad. Judicial investigations have begun in some member states.

The investigations of the Council of Europe and of the European Union, of the All Party Parliamentary Group on Extraordinary Rendition here in the UK, the Canadian Government's public inquiry into the circumstances surrounding Maher Arar's case, the lawsuit launched in December of last year in the United States challenging the alleged CIA's abduction of a foreign national, Mr. El-Masri, for detention and interrogation in a secret overseas prison¹², and other examples, will be followed closely as they are likely to be the best vehicles for accessing vital information about the scope and the nature of this alleged practice.

It is indeed difficult to engage in an examination of this issue where the factual basis for a public democratic debate is largely withheld.

On the existence of secret detention centres, I believe the electorate is entitled, indeed is required, to ask of its government at least the following questions: are you operating or assisting in the operation of secret (undisclosed) places of detention either at home or abroad? If so, how many people are detained in these centres, and under what general circumstances? Are they detained incommunicado? Does the ICRC have access to all of

¹² The lawsuit was filed against former CIA director George Tenet on behalf of Khaled El-Masri, a German citizen of Lebanese descent allegedly kidnapped by the CIA and detained in a secret detention center. The lawsuit alleges that El-Masri was forcibly abducted while on holiday in Macedonia, detained incommunicado, handed over to United States agents, then beaten, drugged, and transported to a secret prison in Afghanistan, where he was subjected to inhumane conditions and coercive interrogation and was detained without charge or public disclosure for several months. Five months after his abduction, Mr. El-Masri was deposited at night, without explanation, on a hill in Albania. The corporations that owned and operated the airplanes used to transport Mr. El-Masri are also named in the case.

them? How long have they been detained? Have charges been brought against them? Will there be? Why are they detained and what is planned for them?

Absent forthcoming answers to these and similar questions by those who know, one can only turn to the efforts of others who are attempting to expose the factual foundation for the important debate that we must have about the methods of repression used by our governments.¹³

Simple denials of the use of these practices by States are just not good enough. In fact, international law requires that the prohibition of torture be ensured by active measures. In addition to not engaging themselves in acts of torture, States have a positive obligation to protect individuals from exposure to torture. This implies an obligation to investigate alleged breaches of the absolute prohibition contained in the Convention against Torture,¹⁴ which means that if there is credible information that individuals are being transported by or through a State to detention facilities where they face a real risk of torture, that State must investigate the allegations.

We know that countries are using various laws at their disposal – asylum, immigration, extradition and so on – to remove persons alleged to constitute national security threats from their territories. In particular one sees an attempt to avoid the heavy due process requirements of the criminal system by turning instead to the administrative law

¹³ For instance, the various forms of ‘renditions’ and transfers in the United States and their legality in US and international law were extensively documented in: Association of the Bar of the City of New York, Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (October 2004), Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush* (New York: NYU School of Law, 2005)

¹⁴ See for e.g. CAT *PE v France*, 19 December 2003, CAT/C/29/D/193/2001, para. 5.3, 6.3; *GK v. Switzerland*, 12 May 2003, CAT/C/30/D/219/2002, para. 6.10

framework. The debate in the UK about the acceptable length of administrative detention is symptomatic of this shift in the approach taken to tackle crime in the context of counter terrorism. Administrative measures are used to effect the detention of an individual much earlier in an investigation than would be required under criminal law principles such as the presumption of innocence. In my view, the onus should be squarely on governments to establish that the procedures used in 'standard' criminal investigations - surveillance, use of informers, searches, forensic expertise, etc – which allow the arrest to be made close to the charge, are unsuitable to their counter-terrorism efforts.

Any extradition, expulsion, deportation, or other transfer of foreigners suspected of terrorism to their country of origin or to other countries where they face a real risk¹⁵ of torture or ill-treatment violates the principle of non-refoulement which prohibits absolutely that a person be surrendered to a country where he or she faces a real risk of torture.¹⁶ The Committee against Torture (CAT) has often confirmed this principle contained in article 3 of the Torture Convention and also indicated that: "The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention."¹⁷ Several regional human rights bodies¹⁸ have expressed similar views concerning the prohibition of torture in the context of expulsions in their case law and/or reports. This principle is absolute, non-derogable, even in times of emergency.

¹⁵ The standard of the risk of torture is subject of considerable debate. The United States have taken the stance that torture must be 'more likely than not'. This standard does not reflect the UK's position: there the standard is a 'real risk' of torture, like in international law.

¹⁶ The HRC confirmed this principle in its general comment No. 31 (para. 12)

¹⁷ *Tapia Paez v. Sweden*, communication No. 39/1996, Views adopted on 28 April 1997, para. 6; see *Arkauz v. France*, communication No. 63/1997, para. 11.5, Views adopted on 9 November 1999.

¹⁸ See ECHR, *Chahal v. The United Kingdom*, application No. 22414/93, judgement of 15 November 1996, Reports 1996-V, para. 80; ECHR, *Soering v. The United Kingdom*, application No. 24038/88, judgement of 7 July 1989, Series A No. 161, paras. 88, 113.

The obligation of non-refoulement encompasses all types of transfers. Formal processes of extradition, expulsion or deportation, as well as administrative schemes and 'extra-legal transfers', are equally bound to comply with this absolute prohibition.

Some Governments claim that the threat of international terrorism requires a change in the rules and that exceptions should be applied to the principle of non-refoulement.¹⁹ As the law stands, threats to national security, including the challenge posed by international or domestic terrorism, cannot affect the absolute nature of the principle of non-refoulement. The CAT reaffirmed this principle recently in *Agiza v. Sweden* in which it stated that "the Convention's protections are absolute, even in the context of national security concerns".²⁰ Of course I see no objection for governments to argue, in good faith, that the constraints imposed upon them by the law should be relaxed. What they cannot do is blatantly disregard them. Whether any law should be changed gives rise to an appropriate debate at the legislative level and to judicial oversight. This is as it should be. On the merits, no case has been made for recourse to the use of torture. Indeed few credible voices have argued for the necessity of removing the total bar on the use of torture and no justification has been advanced for relaxing the required vigilance in ensuring protection against torture and related mistreatments.

As I referred to earlier, whereas transfers of individuals outside any legal process have been used for years by States, it would appear that their main purpose was to obtain a suspect's presence so that he may stand trial. The tendency has apparently shifted in the context of the "war on terror" as both suspects as well as sources are apparently transferred to secret detention facilities or to places where it is known or should be

¹⁹ See observations of the Governments of Lithuania, Portugal, Slovakia and the UK in *Ramzy v. the Netherlands*, ECHR, application no 25424/05.

²⁰ CAT, *Agiza v. Sweden* (2005, para. 13.8)

known that the person may be tortured. If my working hypothesis is correct that persons transferred to secret detention facilities are not intended to be brought to trial, then only two reasons could indeed explain their plight. They must be detained either for interrogation, or for warehousing, or both.

Transfers for this purpose stand in opposition to transfers aimed at bringing individuals to face justice in domestic courts. This is so in two fundamental ways: first, the prospect of judicial scrutiny of pre-trial practices in the course of a trial provides strong incentive to avoid illegality. This disappears when no subsequent judicial scrutiny is contemplated. Second, if the purpose of the extra-legal transfer is interrogation, how credible is it that governments intend the interrogation methods to comply with the rule in the Ibrahim case, i.e. that there should be no “fear of prejudice or hope of advantage held out by a person in authority”? The rule itself loses all its pertinence when it becomes apparent that the purpose of interrogation is only to gather intelligence, not evidence.

The use of abductions and extra-legal ‘transfers’ for interrogation, particularly in secret detention centers, leads to a vicious circle of illegality. Subsequent recourse to legal process is precluded as courts will continue to apply sound rules designed, in part, to protect their own integrity. These rules established in the ‘old normal’, from Ibrahim to Bennett, will be fully applied by courts in the ‘new normal’, so that abductions and incommunicado detentions in the pursuit of persons suspected of involvement in terrorism will likely be viewed as abuse of process, and evidence obtained by torture will be considered, in the words of the House of Lords in December 2005²¹, as “unreliable,

²¹ *A (FC) and others v. Secretary of State for the Home Department (2004); A and others (FC) and others v. Secretary of State for the Home Department (Conjoined Appeals)*, [2005] UKHL 71, 8 December 2005.

unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice”.

The entire system of abductions, extra-legal transfers and secret detentions is thus a complete repudiation of the law and of the justice system. No State resting its very identity on the rule of law should have recourse or even be a passive accomplice to such practices.

It is helpful to recall that applicable human rights protections require that any deprivation of liberty be based upon grounds and procedures established by law, that detainees be informed of the reasons for the detention and promptly notified of the charges against them, and that they be provided with access to legal counsel.²² In addition, prompt and effective oversight of detention by a judicial officer must be ensured to verify the legality of the detention and to protect other fundamental rights of the detainee.²³ Even in states of emergency, minimum access to legal counsel and prescribed reasonable limits upon the length of preventative detention remain mandatory.²⁴ The HRC has held that denying individuals contact with family and friends violates the states’ obligation under the ICCPR to treat prisoners with humanity.²⁵ It has also stressed the importance of provisions requiring that detainees should be held in places that are publicly recognized

²² General comment No. 8. Also see Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, principle 17.

²³ General comment No. 8, para. 2. See similarly ECHR, *Brogan v. United Kingdom*, application No. 11209/84, judgement of 29 November 1988, Series A No. 145-B, p. 33, para. 62. See also *A and Others v. Secretary of State for the Home Department*, [2004] UKHL 56 (2004), op.cit. note 1, in which nine law lords on 16 December 2004 voted 8 to 1 against parts of the United Kingdom’s 2001 Anti-Terrorism, Crime and Security Act under which appellants, all foreign terrorist suspects, had been detained indefinitely without charge or trial since they could not be safely removed to another country

²⁴ General comment No. 29, para. 16. See also for e.g. IACtHR, *Advisory Opinion OC-9/87, Judicial Guarantees in States of Emergency* (articles 27 (2), 25 and 8 of the American Convention on Human Rights), 6 October 1987, Series A No. 9, para. 31.

²⁵ *Angel Estrella v. Uruguay* Communication No. 74/1980, U.N. Doc. CCPR/C/OP/2 at 93 (1990); *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, U.N. Doc. CPR/C/50/D/440/1990 (1994)

and that there must be proper registration of the names of detainees and places of detention. The prohibition against unacknowledged detention, taking of hostages or abductions is absolute.²⁶

In addition, transfers into secret detention centers contravene the protection against disappearances or “enforced disappearances”. Various international legal instruments condemn the act of disappearance as a serious violation of human rights and, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, it constitutes a crime against humanity.²⁷

According to international human rights tribunals and other bodies, “disappearance” not only creates the conditions for torture, but amounts itself to torture or ill-treatment of the “disappeared” person, as well as ill-treatment of their family members – deliberately deprived of any information and desperate for news.²⁸ A Draft International Convention for the protection of all persons from enforced disappearances was also adopted recently by the working group established for this purpose. The creation of a new human rights convention is a sign of the importance the international community affords to the issue. Disappearances have often been used by ruthless regimes as an unlawful but convenient way of dealing with those seen as “undesirable”. ‘Disappearing’ alleged terrorists, regardless of how dangerous they may be presumed to be, amounts to

²⁶ The Human Rights Committee, in its general comment No. 29, indicates that the prohibition of unacknowledged detention is absolute due to its status as a norm of general international law (para. 13 (b)).

²⁷ See for instance Rome Statute, Art. 7 (1) (i) and the Declaration on the Protection of all Persons from Enforced Disappearances, United Nations, G. A. res. 47/133, U.N.Doc. A/RES/47/133, December 18, 1992, preamble. The 1994 Inter-American Convention on Forced Disappearances of Persons was the first legally binding instrument in this field.

²⁸ *Quinteros v Uruguay*, (107/1981, para.14); also *El-Megreisi v Libya* (Report of the Human Rights Committee, Vol.II, GAOR, 49th Session, Supplement 40 (1994) , Annex IX T, paras 2.1-2.5); *Mojica v. Dominican Republic* (449/1991, para 5.7). See also European Court of Human Rights (*Kurt v. Turkey*, Eur.Ct.Hum.Rts, Case No.15/1997/799/1002, 25 May 1998, para.134); The Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of July 29, 1988. Series C N° 4, para.187); Working Group on Enforced Disappearances, UN doc. E/CN.4/1983/14, para 131. Also Declaration on the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly in 1992, preamble.

officials taking the law into their own hands, asserting themselves at once as secret accusers, adjudicators, and, in the worst cases, torturers, accountable to no one. In these circumstances, is there anything left of the Rule of Law?

To my knowledge, no argument has been advanced to justify the need to act outside the law. It must be acknowledged that the investigation of terrorist offences undoubtedly presents the authorities with acute challenges.²⁹ But they also present commensurate risks, including the risk of mistreating the innocent. As Justice O'Connor stated in her plurality opinion in the *Hamdi* case, "as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat."³⁰

Legal processes can be adapted, but not eliminated altogether. 'Unconventional methods' cannot displace the fundamental guarantees enacted for our own protection under the rule of law. Those certainly include the prohibition of torture and the protection against disappearances and incommunicado detentions.

Let me now turn to the emerging practice of seeking diplomatic assurances that transferred detainees will not be subjected to torture.

Diplomatic Assurances

²⁹ The EctHR is well aware of the exigencies of terrorism investigations but nonetheless has set limits, see *Öcalan v. Turkey*, (Application no. 46221/99), 12 May 2005, *Brogan and Others v. the United Kingdom*, 29 November 1988, Series A no. 145-B, p. 33, § 61

³⁰ *Hamdi v. Rumsfeld*, 542 U.S. ___, 124 S. Ct. 2633, 2655 (2004)

Fully aware of their obligation of non-refoulement, some states have sought to obtain diplomatic assurances that torture and cruel, degrading or inhuman treatment will not be inflicted by the proposed receiving state. Assurances by no means nullify the obligation of non-refoulement, nor, in my view, based on the information available to us, do they provide adequate protection against torture and ill-treatment. The 'extraordinary rendition' case of *Agiza v. Sweden* concerned the decision of the Swedish Government to remove Mr. Agiza, an Egyptian national convicted in absentia for belonging to a terrorist group, to Egypt, based upon diplomatic assurances that he would not be tortured and would be given a fair trial. The CAT found that it was known, or should have been known, to the Swedish authorities that Mr. Agiza was at real risk of torture if removed to Egypt. It found that 'the State party's expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.'

Counsel for the complainant drew the Committee's attention to an earlier judgement of the European Court of Human Rights, *Chahal v. the United Kingdom*, in which the Court rejected the UK's reliance on assurances from the receiving State on grounds that it was not convinced that such assurances would provide the person with an adequate guarantee of safety based on human rights violations in the receiving State.

Some have postulated that diplomatic assurances could work if effective post-return monitoring mechanisms were put in place. Based on the long experience of international monitoring bodies and experts, it is unlikely that a post-return monitoring mechanism set up explicitly to prevent torture and ill-treatment in a specific case would

have the desired effect. These practices often occur in secret, with the perpetrators skilled at keeping such abuses from detection. The victims, fearing reprisal, often are reluctant to speak about their suffering, or are not believed if they do.

Although efforts could be made to improve on the practice of seeking these assurances, in my view it is fundamentally flawed in several ways. First, we must acknowledge that diplomatic assurances would presumably only be sought after an assessment has been made that there is a risk of torture in the receiving state. Otherwise the demarche would be both useless and insulting.

Second, in most cases, assurances are concluded between States who are already parties to binding international and regional treaties which prohibit torture and cruel, inhuman or degrading treatment or punishment and refolement to such practices. This system was devised by the community of States and they agreed to be bound by it. Ad-hoc arrangements, such as assurances, concluded outside the system threaten to weaken its foundations and retard the progress that has been achieved over more than half a century to extend its ambit and protection to all.

Of course, while receiving States are under binding legal obligations to respect and protect human rights including the prohibition of torture, they often are far from fully implementing their obligations, resulting in widespread violations. It is difficult to make a case that if a Government does not comply with binding law it will respect legally non-binding bilateral agreements that are concluded on the basis of trust only, without enforcement or sanctions if violated.

Third, even though all persons are entitled to the equal protection of existing treaties, assurances basically create a two-class system amongst those transferred, attempting to provide special bilateral protection and monitoring for a selected few while ignoring the plight of many others in detention. By seeking assurances for a chosen few, sending Governments could in fact be seen as condoning torture and cruel, inhuman or degrading treatment by acknowledging that these practices exist in the receiving State but conveniently ignoring their systemic nature.

In the end we are back to the same fundamental question: why are these people sent to countries where they face the risk of torture? They may be sent to face trial, or simply to be held in custody, possibly indefinitely, or to be interrogated with the hope that that the interrogation abroad will yield more information than the methods that could be used at home.

The last two scenarios involve, at best, legal avoidance: suspects will be transferred because what will be done to them abroad could not legally be done at home. I fail to see any justification for any state to be a party to such practice.

If they are transferred to face trial, prudence would dictate that their transfer should not be tainted with illegality since in many countries this could lead to the courts declining to exercise jurisdiction.

If they are transferred to countries where very few due process requirements are likely to stand in the way of prolonged detention, illegal interrogations or unfair trials, then we should be clear about our endorsement of such double standards: we are not willing, or not able, to dilute our domestic legal protections in the name of counter-terrorism, but we

will happily have resort to the methods used by others that we otherwise overtly denounce and deplore.

Conclusion

What then is the most striking difference between the old and the new normal? I suggest that it is both the magnitude of the perceived threat posed by international terrorism and the response that some governments appear to be employing to address it, a response tainted by secrecy and a tendency to avoid judicial scrutiny.

In looking at this issue overall, we must never lose sight of the legitimate expectations of the victims of terrorism: to compensation, to justice and to protection from further assault. The roll call of terrorist victims is a heavy one, from New York, to Bali, to Baghdad, to Beslan. No-one who witnessed the destruction and loss of life inflicted in this city last July can be in any doubt as to the nature of the challenge posed by terrorism. Equally, no-one who witnessed the bravery and humanity of the people of London in the aftermath of the bombings can be in any doubt as to the simply priceless value of that which terrorism seeks to destroy.

This is a vital point to bear in mind.

The seriousness of the challenge posed by the need to combat terrorism must not be underestimated. In fact, its most unique aspect is that it calls for what traditional criminal law is least best equipped to address, that is the prevention of specific criminal activity. Nor should be underestimated the critical obligation of governments to provide for the safety and security of all those who fall under their authority.

But in discharging that obligation governments must show a heightened awareness and concern for the fundamental values of the society they are seeking to protect. To undermine that would be to serve, in effect, as the Trojan Horse of the terrorists.

In this regard, of paramount importance is the obligation on governments that they not by-pass the judicial process, as some often appear determined to do. In reality, they will not be able to avoid judicial scrutiny for a very long time. The courts will be called to play their role one way or the other, sooner rather than later. Abusive legislation will be challenged in courts, some individuals released after prolonged or illegal detention, or who have been tortured, abroad or at home, will sue governments, and soon short-term advantages will yield to appropriate exposure and liability.³¹

As a branch of governance, the judiciary has a critical role to play in ensuring that all are secure under the law. As Justice Souter said in the most important case of *Hamdi v. Rumsfeld*³²:

[D]eciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises.

³¹ Many lawsuits were filed in the US, and elsewhere. The ECtHR also awarded considerable damages recently for torture against Russia in CASE OF MIKHEYEV v. RUSSIA (Application no. 77617/01), 26 January 2006.

³² *Hamdi v. Rumsfeld*, op.cit., (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

Courts thus have a particularly important role to play in that regard. There are always heightened risks of abuse and misjudgement, even in democracies, when emergency powers are exceptionally concentrated in the executive branch.³³ The independent supervisory power of the civilian judiciary is then even more critical.

“An important objective of criminal law enforcement under the Rule of Law is the promotion of the exercise of power under legal constraints. Judicial control of the law enforcement arm of the executive pursues that objective, which is at times equally or even more important than the universal application of criminal sanctions against offenders. And while it exercises that supervisory power, the judiciary speaks the language of peace, clarity and authority through debate. The role of the judiciary vis-a-vis law enforcement is thus a multifaceted expression of the Rule of Law. Judges play a part in the application of norms of prohibited conduct. They do so while keeping law enforcers in check against their own possible unlawful practices and, ultimately, they vindicate the judicial role as the supreme expression of the true meaning of rights.”³⁴

Judges are well aware of the danger of erosion of the rule of law and the importance of upholding the fundamental principles upon which our societies are built. Major recent decisions by the highest courts in many countries have also reaffirmed the critical role of the judiciary in reviewing counter-terrorism measures.

³³ See reports of such occurrences since the mid-1970s documented by Robert K. Goldman, independent expert on the protection of human rights and fundamental freedoms while countering terrorism, in his report to the 61st session of the Commission on Human Rights, E/CN.4/2005/103. p. 8.

³⁴ L. Arbour, “The Rule of Law & the Reach of Accountability”, The Rule of Law Series, Melbourne University, 5 July 2001, p. 2

In the *Hamdi* case, the US Supreme Court held that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's assertions before a neutral decision-maker. As the Court resoundingly declared, "[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

In another important U.S. decision known as *Rasul*, the Supreme Court took the view that detainees must be given access to the courts, despite the fact that their place of detention is situated outside of the United States and that the petitioners were non-citizens.

As you are well aware, in December 2004, the House of Lords ruled that though there is a terrorist threat to the UK, indefinite detention of foreign terrorist suspects is disproportionate and discriminatory. The ruling confirms that even in exceptional circumstances and even if supervised by courts, it is not acceptable to hold anyone in open-ended detention without trial.³⁵ In a follow-up judgment issued very recently to which I referred earlier, the House of Lords declared unambiguously that evidence obtained by torture was not admissible in a court of law.³⁶ The Supreme Court of Canada has accepted to hear the case of Mr. Charkaoui concerning his detention on the basis of a security certificate, a detention policy about which the United Nations Working Group on Arbitrary Detention expressed grave concern.³⁷ Courts the world over are

³⁵ *A and Others v. Secretary of State for the Home Department*, (2004), op. cit.

³⁶ *A (FC) and others v. Secretary of State for the Home Department*, op. cit. 8 December 2005

³⁷ In its report of 5 December 2005 (E/CN.4/2006/7/Add.2) to the Commission on Human Rights, the WG stated that it was "gravely concerned about the following elements, which undermine the security certificate detainees' rights to a fair hearing, to challenge the evidence used against them, not to incriminate themselves, and to judicial review of detention:

-The security certificate procedure applies only to suspects who are not Canadian citizens; in fact, all four men currently detained under security certificates are Arab Muslims;

rightly asked to exercise their duty of oversight of the very difficult decisions Governments have to make in the face of the serious threat caused by terrorism.

In discharging their functions, judges should be free of disparaging remarks by public officials to which they are not in a position to respond adequately. Vague threats of the apocalyptic consequences of their ill-informed decisions, made out of court, should not be resorted to in the hope of influencing judicial conduct. Ironically, these used to be called “in terrorem” arguments.

Only political expediency or an impoverished concept of the judicial function would explain the attempt to intimidate judges into compliance.

The strength of our rule of law and human rights norms can only be measured by whether they can resist the temptations to surrender to fear in times of crisis. On this point I can do no better than refer to the eloquence of Justice William J. Brennan, Jr., Justice of the Supreme Court of the United States from 1956 to 1990, who gave a

-If the person certified is not a permanent resident, detention is mandatory;
-The length of this detention without charges is indeterminate; the duration of the detention of the four persons currently detained under a security certificate ranges from four to six years;
-The only way out of detention appears to be deportation to the country of origin; all four men currently detained argue - not without plausibility - that they would be exposed to a substantial risk of torture in case of deportation;
-The evidence on which the security certificate is based is kept secret from the detainee and his lawyer, who are only provided with a summary of the information concerning them. They are thus not in a position to effectively question the allegations brought against him;
-The Federal Court judge tasked with confirming the certificate has no jurisdiction to review, on the merits, whether the certificate is justified. His jurisdiction is limited to assessing the “reasonableness” of the Government’s allegations;
-When the Federal Court considers that a security certificate is reasonable its decision is final and cannot be appealed, removal is ordered and the person is detained pending execution of the order “without the necessity of holding or continuing an examination or an admissibility hearing”. The person named in it may not apply for refugee protection. On the other hand, if the Federal Court considers the security certificate not reasonable, the two Ministers can at any time issue a new certificate. According to the information gathered by the Working Group, such new certificate can be based on a new interpretation of the same facts underlying the quashed certificate.
One of the most troubling aspects of the security certificate process is the delay with which non-citizens under a security certificate can challenge their detention.”

thought-provoking speech in 1987 at the Law School of Hebrew University in Jerusalem, entitled 'The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises'. Justice Brennan ended his speech as follows:

. . .The struggle to establish civil liberties against the backdrop of these security threats, while difficult, promises to build bulwarks of liberty that can endure the fears and frenzy of sudden danger—bulwarks to help guarantee that a nation fighting for its survival does not sacrifice those national values that make the fight worthwhile . . . For in this crucible of danger lies the opportunity to forge a worldwide jurisprudence of civil liberties that can withstand the turbulences of war and crisis. In this way, adversity may yet be the handmaiden of liberty.

Are we not living in such a time of opportunity? With the continuing threat of terrorism, and indeed with persistent armed conflicts and the ever more perverse effects of extreme poverty, as we experience this prolonged exposure to real and perceived threats to our security, we are also faced with an extraordinary opportunity to forge a worldwide jurisprudence capable of protecting fundamental human rights when it matters most.

Thank you.