

LAW NOT WAR

Remembrance Day lecture given by Baroness Helena Kennedy QC at the Imperial War Museum, London on 11th November 2007



The invasion of Iraq in March 2003 and the ensuing occupation raises urgent legal, moral and political questions for all of us who inhabit the earth in the early twenty first century. Those questions are about the very status of war, about the motivations for war and about the effects of war in a globalised world.

I believe the Iraq war to be illegal and immoral. I have no doubt that Saddam Hussein and his oppressive regime were responsible for egregious crimes against the people

of Iraq. I signed petitions against his dictatorship, met with some of his victims who sought asylum here. I am sure many Iraqis, particularly the Kurds who suffered monstrously at his hands must feel a degree of elation that he is gone, but I reject that war was the only means to securing Iraqi freedom. In addition to not having been authorised by the United Nations, the world was opposed by world opinion and especially by the peoples of the Middle East. It was also a war based on widespread deception by government and officials here and in the USA as to the threat of weapons of mass destruction in Iraq. By its actions our government violated the right of all of us as citizens in democratic society to trust in the integrity of leaders, especially in matters of war and peace.

In 1999, I was asked with nine others by the National Portrait Gallery to choose 10 photographs to mark the passing of the twentieth century in Britain. I instinctively found myself choosing themes rather than individuals. In a century scarred with the horror of wars, genocide and monstrous testaments to man's inhumanity, other themes shone through with evidence of our better selves; the creation of the Welfare State, the anti-war movement, the concept of social justice, the efforts to end racial discrimination.

It seemed to me that the main struggles of the twentieth century had concerned rights. Just as democratic rights dominated the beginning of the twentieth century – it was not just my grandmothers who did not have a vote, it was my non-property owning grandfathers too – so human rights became the focus of our hopes at the end of the century. As 1999 closed, I had believed that the dawn of another century would mark the beginning of a new urgency around ending war. There was in fact evidence to support my optimism. We had just incorporated the European Convention on Human Rights. We had seen in the previous decade the creation of tribunals at The Hague to try Milosevic and others for crimes against humanity and the creation of an International Criminal Court. We had celebrated the House of Lord's decision to uphold the validity of warrants for the extradition of Pinochet for crimes against his people. Our constitutional arrangements are so opaque that ordinary members of the House of Lords like me had been congratulated around the world for playing a part in the judgement. But then so was Margaret Thatcher.

One of the photographs I chose for the National Portrait Gallery exhibition was from the archive here in the Imperial War Museum. It was a photograph from the First World War of a line of soldiers blinded by mustard gas, each holding the shoulder of one in front, moving slowly away from the trenches. I chose it with thoughts of my own grandfather, a young Irish soldier with the Dublin Fusiliers, who was killed five days after the start of the First World War. My then young grandmother received the news that he had been blown to pieces, body unrecovered, as she was going into labour with her first baby, my father. In an age when civilian deaths are described as collateral damage it is important to remind ourselves constantly of the real cost of wars.

In the Second World War, my father was away for the full six years, leaving behind again a young wife, two babies - my older sisters - who barely knew their father by the war's end. My mother was bombed out of her Clyde-side tenement – a single room and kitchen – and like Mother Courage salvaged what belongings she could from the bomb site and trundled them on a handcart to new lodgings that she had managed to find. O, we of a generation who has enjoyed such blessings, such comparative comfort, are we entitled to inflict war on the wretched of the world? Are we entitled to ask other mothers' sons and daughters to engage in war on our behalf in anything other than circumstances where our very own survival is in question, where disaster is on our own doorstep and we have absolutely no alternative? By what right can we visit such horror on a country that was not threatening us; by what right can we ignore the laws of war, by what right do we tear up the international conventions painstakingly under construction in the hope of creating a world ordered upon respect for humanity and a desire for peace?

The horrors of the Second World War and the attempt to exterminate the Jewish people in European gas chambers shocked people around the globe into a rethink of international law. In consequence we saw a wave of new thinking about law. And about how the world might be ordered to deal with conflict, aggression, crimes of inhumanity and territorial disputes. The UN charter in 1945 established the United Nations and the Security Council. (We saw the first glimmers of contemporary human rights in language used by Roosevelt and Churchill in the Atlantic Charter 1941 with talk about the dignity and rights of man.)

Human rights lawyers like myself see rights now in two waves. The first wave of rights thinking had taken place in the 18th century at the time of the American and French revolutions, drawing upon Enlightenment thinking and Thomas Paine's 'rights of man' and the need to protect individuals from the power of the state and the church. The post-war human rights movement is seen as the second wave in rights thinking and this was the crucial advance because it sought to blend individual rights with the concept of community.

The star in the creation of the new legal order after the Holocaust was in fact an American, Eleanor Roosevelt, who held the first drafting meeting for an international charter of the human rights in her Washington Square apartment in February 1947. The gathering was so eclectic it is hard to fathom how consensus was reached for a visionary and brave project. There was a Chinese Confucian, a Lebanese Christian, a Stalinist from the Soviet Union, a devout Catholic Brazilian, and a Canadian law professor. It is often claimed that if the meetings had taken place 5 years later it would have been impossible to reach agreement because the Cold War had taken hold and China had become Maoist. However, the group struggled to create what Nadine Gordimer has called 'the creed of humanity that sums up all other creeds directing human behaviour.' And in 1948 they produced the draft for what was to become the Universal Declaration of Human Rights. This idea was ambitious, recognising that legal systems are distinct and draw upon the cultures from which they spring, but also believing that it was possible to establish a set of binding shared values to provide a backdrop of principle for them all – a template against which all systems would be tested. The working group had to create a secular document which had all the strengths of the great religions of the world but which spoke also for those who had no religion.

No nation came with clean hands to the table when final signing took place in 1948. Everyone had their own source of shame, just as today. These were pre-civil rights times and in the USA the legacy of slavery meant black people were still segregated from whites, and racist legislation was still on the books. The Soviets were still conducting bloody purges of opponents, and for the British the effects of colonial rule were still scarring our relationships with whole tracts of the world from Ireland to India to Africa, to the Middle East.

The drafting committee was aware that the first wave of rights which had been at the heart of the French and American revolutions sought to set citizens free from state oppression but these new post-Holocaust rights were striving to do something more – to create a better world for everyone. And for that to be possible, it was not enough to guarantee liberty. Individuals require protection from tyranny but they can also contribute to it: for example persecution because of your race or religion could come from your neighbours. Tyrants do not have to wear jack boots. Abuse of your rights can come from large corporations. Tyrants can come in Armani suits and inhabit the board of Haliburtons or Texan oil companies.

It was recognised that not only should restraints be put upon states to prevent the oppression of their citizens but ways also had to be found to require states to take a lead in preventing oppression from other sources. It would never again be possible for the state to claim democratic legitimacy or majority will for behaviour that denied another person's humanity. Violations by private companies or battering by husbands or cruel behaviour by any other individual – all these had to become the business of state.

And so human rights gave us a new language for discussing our relationships with each other and with the rest of the world. It provides a grammar that belongs neither to the left or the right, because it is non-ideological, and can speak to all the peoples of the world irrespective of religious belief or world view because it is avowedly secular. Rights have to be given the force of law because that is how we link our dreams to the acts of our daily lives. Too often we speak of human rights in terms only of how they have been violated and not in terms of how they affirm and legitimise the aspirations of societies, the aspiration of all people around the world.

In parallel to the creation of the UN Declaration in 1947/8 other working parties were applying themselves to the laws of war and a reworking of some of the basic principles. The 'just war' principles rooted in the theology of Thomas Aquinas and St Augustine, lay down not just the 'jus ad bellum' – the moral laws of when war is justified (and basically it all turns on self-defence and a prohibition on wars of aggression as is made clear in the UN charter) – but also the 'jus in bello' the laws of how war should be conducted. (Most Islamic theologians would argue that these principles are echoed in their own religious texts.)

The first attempt to legislate for humanitarian law was in 1864 with the Declaration of St Petersburg prohibiting the use of exploding bullets. The Geneva Conventions drew upon those established principles of just war but rooted them in a new understanding of human rights. Hannah Arendt expressed it perfectly in 1951 in *The Origins of totalitarianism* 'When we stand naked, as nothing but a human being, it is that bare humanity that all of us share which should call upon our compassion. That is what our claim to be civilised means.' So the demand was clear that when we come to deal even with prisoners of war – indeed any prisoners – we would be required to respect their humanity and the rights that flow from it. Some rights were so fundamental they would not just be vested in someone by virtue of citizenship of a country nor should they be denied by virtue of being an enemy. They should have a right to due process, freedom of religion and right not to be tortured.

In seeking to create a world based upon law and consent, shared obligation and respect for human rights, the UN has fostered these and subsequent Conventions – dealing with torture, the plight of refugees, the status of women, the protection of children – and the struggle in the last 50 years has been to gain growing recognition of these conventions and commitment from signatory nations. And

now we have seen a catastrophic dismantling of that construct – Guantanamo Bay, Abu Graib, rendition, acceptance of investigation involving torture.

A central tenet of the law of war is that no intervention against a sovereign nation should be contemplated without an appropriate UN resolution – except in clear, immediate self defence.

As I have sought to explain in this lecture, the events of the Second World War and the holocaust set in train the positive development of two strands of law – lex specialis, humanitarian law and the law of war on the one hand and on the other, human rights law – the two strands becoming increasingly interconnected.

Events in the former Yugoslavia brought home starkly some of the contradictions. If human right law requires us to forget old ideas about the sovereignty of the marital home and allows for intervention to protect women and children from abuse, the question was asked should not the nation state also forfeit the claim to sovereignty when it comes to crimes against humanity happening within its borders. When should it be right to intervene in the sovereignty of another nation? Are we not compelled to prevent modern day holocausts? Shouldn't we intervene in such terrible crimes as were committed by the Serbs against the Bosnians and is it not our shame that we did not? Wasn't the intervention in Kosovo, albeit without UN sanction, right?

There is no doubt that our Prime Minister Tony Blair believed that humanitarian intervention in the face of terrible wrongs was morally justified. He argued for such a course in his famous Chicago speech on humanitarian intervention and made the case rightly in relation to Kosovo. Certainly I would support the view that, as in domestic law, the principles of self defence extend to persons other than oneself. If you or I see an unjustified attack taking place, we do not act unlawfully if we take steps to prevent it. Such an immediate attack on people – an ethnic cleansing – was underway in Kosovo and it was an act of moral courage to prevent it.

However, invoking self defence or altruistic defence of another when the egregious crimes (against humanity) were long in the past would not succeed in domestic courts and nor would they hold in international courts. Saddam Hussein's gassings and mass killings brought no intervention from the US or the UK when they were actually taking place back in the mid nineties.

Many of us may feel tempted to go and beat up the town bully as an act of reprisal after an event just to teach him a lesson once and for all but the law does not sanction such behaviour. And the reason for such societal rules is that it leads to anarchy. Self defence has to happen in the face of the threat. The threat has to be immediate. That of course is why we had duplicitous references to 45 minutes to create the sense of immediacy and why we had dodgy dossiers and the sexing up of intelligence because none of it squared with the law as it stood. Regime change has no basis in law and for good reasons – who would be next? Who gets to decide which tyrant's time is up? Realising that law was not on the side of intervention, President Bush argued that international law was of no consequence 'bad law' and Tony Blair ended up relying on a cobbled together legal argument which claimed that breaches of old UN resolutions provided adequate cover in law. International lawyers around the world found the argument risible but you can usually find a lawyer to argue anything if called upon to do so. Though I believe we are entitled to expect more honourable behaviour from our Attorney General whose role is not one of private counsel to the PM but is to provide independent legal advice in the interests of the nation. The office of the AG was brought into disrepute by the Peter Goldsmith's behaviour.

The Iraq was not lawful. That I am told is also the view of the majority of judges in our own 'supreme court'. But the war was also immoral. When it comes to law we should turn to professionals but I believe we are all ethicists. We should not need to be told by the Pope or Archbishop of Canterbury if something is wrong, though it is always helpful to be in their company. This was a war of choice which was sold to us as a war of necessity. It involved serious deception of the public and, as a

result, thousands of lives have been lost and the world made more dangerous. Only in the last few weeks it has been revealed that George Bush offered Mr Blair a way out by going it alone into his war but our PM felt he would look unprincipled if he backed off this commitment to the Americans in this venture. Unprincipled! It is like the old joke about the politician who says he is a man of principle and then explains that his principles are whatever your principles are.

This almighty folly screams to the heavens for its wrongheadedness. Yet, our world is so given to the short-term, so amnesiac, that not only did we as a nation fail to call to account our politicians for what they did and what they endorsed but we are now seeing a reconstruction of the past with Tony Blair and his assorted aids being repaired in public eye.

Here we are on Remembrance Sunday recalling our war dead. My grandfather and probably yours. Fathers, brothers, friends. Those long lists of carved names on town memorials, those small white crosses on French fields. The pain of it all, the terrible loss. No person should die for a war that is unlawful but the hypocrisy and blunders of our political masters should in no way deflect from the courage and decency, commitment and service to those who did.

Is war an inevitable part of the human condition, we ask? Why should it be? Wasn't a slow but incremental journey taking place with new ways to resolve conflict, with armies maintained purely to perform peace-keeping roles in resolution of localised conflicts? The causes of war have changed over time. I thought religious and ideological wars were a thing of the past – from the Thirty Years War to the anti-communist wars of Korea and Vietnam. Yet here we are with talk of clashing civilisations and the need to improve democracy. I thought we were seeing an end to dynastic and then imperial wars, those great wars of empire building from Alexander the Great, through to Napoleon through to the Ottomans and then Hitler and the empire of Japan. Yet here we are with Pax Americana. I thought we believed in a people's right to self determination yet we are so silent about the occupation of Palestine and now the occupation of Iraq.

What we should realise is that the Iraq War may augur a new motive for war – the shortage of resources. Currently for the rich world it is a rapacious greed for oil that is in the mainframe but, with global warming, water will become for many as precious a resource as oil and the consequent movement of people away from their desert regions may have dire consequences for neighbouring countries. It is anticipated that there could be as many as 200 million climate change refugees from Africa parts of Asia within thirty years. The poverty, the fear, the hostilities, the competition for resources accelerated by climate change will inflame an unquenchable rage against the rich world. The imperative, therefore, to create a more just world is all the more pressing.

The war in Iraq has eroded international law, undermined the UN, damaged British relations around the world and fed the flames of Islamic fundamentalist terrorism here and abroad. It has also created a galloping distrust of our own political processes. Most of us could have written the script for the disastrous events now playing out in Iraq.

Those who supported the war on the basis that legal niceties should be forgotten when we have the opportunity to remove a dictator should consider the precedent set and the implications for the rule of law in such a course. There is undoubtedly a need to reform the Security Council with its byzantine, undemocratic workings but it is worth remembering the impulse which created the UN which was a desire to avoid wars and at every turn to wage peace.

The old adage was 'jaw-jaw not war-war' – it urged diplomacy, interaction between parties and talk as the best method of resolving difference. It would certainly be a more effective way of engaging with Iran than that currently being displayed. But as well as jaw, jaw, I would urge law, law.

Respect for the rule of law and a workable democratic structure of international law will be a far greater guarantor of peace and security than displays of power and might. Law is one of the keys to

any new order. Otherwise in our rush to win the so called war against terrorism we will unleash an even greater terror.

I want to leave you with one last thought. All of us have a role to play if we want to see change in our world. We have to protest, we have to speak truth to power, we have to be inventive in finding new ways to deal with conflict. Last year I spoke to an audience in America on human rights and an elderly Native American told me a story. A Native American grandfather was talking to his grandson about how he felt. He said: 'I feel as if I have two wolves fighting in my heart. One wolf is vengeful, angry and violent; but the other wolf is loving and compassionate.' The grandson asked him: 'Which wolf will win the fight in your heart' and his grandfather answered, 'The one I feed.'

I believe we all have to speak to the better part of ourselves and in doing so we will be more likely to find solutions to the world's problems. The abolition of war must be a central ideal for any civilised people; peace one of the first words our children learn to speak.

I want to thank you for asking me to give this lecture. It has been an honour.

Summary of the talk as it will appear in the winter issue of *Abolish War*.

The seventh in MAW's series of annual lectures at the Imperial War Museum was given by Baroness Helena Kennedy QC. Entitled 'Law not war', it discussed some of the urgent legal, moral and political questions that the March 2003 invasion of Iraq raises for the 21st century - questions are about the motivations for war and the effects of war in a globalised world.

Helena began by stating her belief that the war was illegal and immoral. 'By its actions', she said, 'our government violated the right of all of us as citizens in a democratic society to trust in the integrity of our leaders, especially in matters of war and peace'.

She then rehearsed the historical development of human rights thinking and the role of the United Nations, coming up to date with the European Convention on Human Rights, the creation of the International Criminal Court and the tribunals to try Milosevic and others for crimes against humanity.

In 1999, she had believed that the dawn of another century would mark the beginning of new urgency around ending war. But now, she said, 'We have seen a catastrophic dismantling of that construct – Guantanamo Bay, Abu Ghraib, rendition, acceptance of investigation involving torture.

Moving on to the issue of humanitarian intervention, Helena argued that there was an international responsibility to intervene to prevent ethnic cleansing, citing the example of Kosovo. However, in the case of Iraq she said that to invoke self defence of another when the egregious crimes (against humanity) were long in the past would not succeed in international courts. Saddam Hussein's gassings and mass killings brought no response from the US or the UK when they were actually taking place back in the mid nineties. This, of course, is why we had dodgy dossiers and the sexing of intelligence and the cobbling together legal argument in the run up to the 2003 invasion. In this context, she was very critical of the behaviour of Peter Goldsmith, the Attorney General, since the war was judged illegal by the great majority of judges.

The events had also emphasised the need to reform the Security Council with its byzantine, undemocratic workings; particularly when one remembers that the impulse which created the UN which was a desire to avoid wars and at every turn to wage peace.

Ending her lecture, she said the invasion of Iraq was 'an almighty folly which screams to the heavens for its wrongheadedness'. 'It has eroded international law, undermined the UN, damaged British

relations around the world and fed the flames of Islamic fundamentalist terrorism here and abroad. Most of us could have written the script for the disastrous events now playing out in Iraq.

Then for three quarters of an hour she answered questions with immaculate clarity and, at times, with a sense of humour. She ended with moderate optimism about the creation of a better world order, believing that we have to find new ways of dealing with conflict. 'In the end', she said 'the rule of law and a workable democratic structure of international law will be a far greater guarantor of peace and security than displays of power and might.

MAW has developed a close working relationship with the Imperial War Museum and is most grateful for their support with this event. We are pleased that Sir Robert Crawford, the Director General of the Imperial War Museums gave the welcome and opening.

The lecture can be heard on the MAW website (www.abolishwar.org.uk). The text is also available on the website or can be obtained on request from the MAW address.

Tony Kempster

Note for press

This was MAW's seventh Remembrance Day lecture. Previous ones are:

- 2001 'Can we end war' by Professor Paul Rodgers
- 2002 'Can war be abolished' by Professor Robert Hinde
- 2003 'War or peace, creating a culture for peace' by Mairead Corrigan Maguire, Nobel Laureate
- 2004 'Europe's role in international relations' by Caroline Lucas MEP
- 2005 'A requiem for war' by Martin Bell OBE
- 2006 'An end to war' by Baroness Shirley Williams

Bruce Kent (vice-president of MAW), Baroness Helena Kennedy QC, Dr Tony Kempster (chair of MAW) and Sir Robert Crawford (Director General of the Imperial War Museums)

