

# Righting the World: Freedoms and Obligations in a Regulated Society

St Anne's College, Oxford, England

10<sup>th</sup> – 13<sup>th</sup> August 2006

*Report on the JSI: The 2006 Oxford Joint Study Institute in the shadow of terrorism*

The NZLLA / LexisNexis International Scholarship was established in 2004 with the generous support of LexisNexis New Zealand.

The scholarship is intended to foster international communication and education through activities involving an aspect of legal information management or law librarianship. It provides an opportunity for a member to represent and network on behalf of the NZLLA, as well as enhance their knowledge and understanding of issues and trends facing the legal information sector.

In 2006, I was privileged to be offered this scholarship to attend the fifth Joint Study Institute at St Anne's College, Oxford. Some background to the history of the JSIs may be found on the BIALL site, at: <http://www.biall.org.uk/home.asp?id=fjsibackground>. In brief, the Institutes are hosted every second year in one of the common law jurisdictions by the local Law Librarian association. The object has been to explore one another's legal system and sources of legal information, and also to consider common threads and the international context.

The fifth Institute focused mainly on international law in its various aspects, and the themes of freedom and regulation within the international community were thrown into sharp relief by a major series of arrests of suspected terrorists in Britain on the very eve of the conference. Speakers adjusted their papers on the fly to reflect these events as they unfolded.

I have endeavoured to summarise the papers, but in fact, it really was one of those occasions when "you just had to be there". For a shorter, and more coherent summary of the papers, see: <http://www.biall.org.uk/home.asp?id=fjsiprogramme>

The really great thing about the Institutes is that generally they are attended by relatively smaller numbers than the national conferences, and a real spirit of camaraderie emerges very quickly. Our shared heritage and contrasting divergences unfold throughout

the period we are together, and become the foundation for helpful and stimulating discussions at the time, and for sustainable professional friendships with colleagues from other jurisdictions that last well into future years. Networking is definitely a key element of the JSI movement.

It was my task at this JSI to represent the case for New Zealand to become a full member of the co-sponsorship group (BIALL, AALL, CALL, ALLG), and my representations were warmly approved by all, with the single caveat from an Australian, who was concerned lest the existence of two southern hemisphere destinations on the circuit might diminish attendance numbers for both. This may be something that needs to be negotiated between the Australasians.

If there were to be one single improvement that I could recommend, it would be that some enterprising legal publisher would take the initiative and ensure that the papers are preserved either in print or online.

I cannot recommend the JSI experience strongly enough. It is my very real hope that this scholarship will assist many other New Zealand law librarians to share the experience in the future.

Margaret Greville

Law Librarian, University of Canterbury

# Righting the World: Freedoms and Obligations in a Regulated Society

St Anne's College, Oxford, England

10<sup>th</sup> – 13<sup>th</sup> August 2006

*Report on the JSI: The 2006 Oxford Joint Study Institute in the shadow of terrorism*

## **Thursday 10 August**

This was the day for registration, and also the day when the news broke about the overnight arrests of over 20 people suspected of involvement in a plot to set off near simultaneous blasts on flights, probably bound for the US, using explosives smuggled into passenger cabins inside hand luggage. Without radio or TV for most of us, the news trickled around the delegates at the BBQ that evening. The Americans among us were especially traumatised.

Earlier in the day, I visited both the **Bodleian Library** and the **Bodleian Law Library**.



**The Bodleian Library** is the main research library of the University of Oxford. It is also a copyright deposit library and its collections are used by scholars from around the world. The buildings within the central site include Duke Humfrey's Library above the Divinity School, the Old Schools Quadrangle with its Great Gate and Tower, the Radcliffe Camera, Britain's first circular library, and the Clarendon Building. One of the most startling things about visiting the Bodleian was to realise that it is at the same time a major tourist destination (complete with tourist shop for purchasing souvenirs) and a major research library. Somehow, both these functions are managed very well indeed, combining an interesting experience for the biblio-tourist with minimum disruption to the serious scholar.

I was delighted to note how customer-focused and user-friendly the Bodleian is, studded as are its walls with the welcoming sign:

## Silence Please

My favourite discovery was the huge area beneath the Library developed for compact storage, based on an original design scribbled in draft form on a napkin by Gladstone at a dinner party. It represented a very economical use of space, offering ease of use by remaining very human in scale. They are, however, fast running out of space...

In addition, the Bodleian consists of nine other libraries, in separate locations in Oxford: the Bodleian Japanese Library, the Bodleian Law Library, the Hooke Library, the Indian Institute Library, the Oriental Institute Library, the Philosophy Library, the Radcliffe Science Library, the Bodleian Library of Commonwealth and African Studies at Rhodes House and the Vere Harmsworth Library.

**The Bodleian Law Library** opened in 1964 and holds all the law collection for the University Libraries. It holds over 400,000 volumes, and is based in the St Cross Building, which is also the home of the Law Faculty offices. Despite its relative youth, this is still a heritage listed building, which restricts aspects of modernisation. There is seating for over 400 students, and a dedicated teaching IT room. The Bodleian Law Librarian is Australian Ruth Bird, while the Foreign and International Law Librarian is Vicki Endean, a New Zealander with whom I worked at Russell McVeagh.



Interesting, little attention is paid to the discourse on learning commons, or the contemporary theories about Generations X, Y and the Millennials in relation to student learning which tends to colour much of tertiary library planning in the new world. Students using the Bodleian Law Library are seating in rows of five, facing five students opposite, and sharing a central line of desk lighting. Signs in all the Bodleian Libraries are baldly instructive: "Silence Please" is the motto.



The Bodleian Law Library uses a very strange home-baked classification system which I really could not fathom. It also contained little isolated shelves and cupboards where one might hope to find books which had defeated cataloguers in their attempts to classify them...

**The BBQ** was a highly successful event, offering a good opportunity to meet up with people we hadn't already met during the afternoon. It was also a good evening out for a couple of daring thieves who scarpered with a handbag belonging to an American delegate – only to be photographed whilst making a daring escape leaping over a wall. As it happened, so spectacular was the leap that it was photographed by a passing academic....

### **Friday 11 August**

This morning the breakfast gathering was buzzing with the news about the arrests of the alleged terrorists and the unfolding details of the alleged plots. I became so forgetful as a result that my plate overfilled itself ... The programme for this day could have been made to order: first up was:

**Human Rights and the UK Constitution**, by Roger Smith, Director of JUSTICE, an all-party UK-based human rights and law reform organisation that seeks to advance human rights, access to justice and the rule of law. JUSTICE is also the British section of the International Commission of Jurists.

This was a paper about the interaction between human rights and the UK constitution. The Human Rights Act 1998 incorporated the European Convention of Human Rights into UK domestic law. It did so in a way that was intended to preserve the Supremacy of Parliament. However, judges have, in a number of high profile cases, expressly taken issue with legislation that the government has taken through Parliament and declared provisions incompatible with the Convention. It still has political opponents: considerable Conservative opposition, but also some rumblings in the Labour camp as well, largely as a result of the glare of publicity surrounding unsuccessful cases against asylum seekers. Much hostility stems from the fact that this Act derives from the European Convention, but the UK is bound by the European Convention, and the decisions of European judges upon it. Most contentious is Article 3 (which came into being following World War 2) relating to inhuman and degrading punishment, and its application to the treatment of asylum seekers. The UK Parliament cannot legislate to overthrow the Convention, though it may fetter the discretion of its judges somewhat. Hard for British to comprehend that its Parliament is no longer "sovereign", and the

Act is still subject to vehement attacks by “red-top” newspapers. The truth is that any British Bill of Rights would have to have the European Convention as its base, despite David Cameron’s assertions to the contrary.

A newer approach is to look for positive rights rather than the old common law concept of negative rights that prevent excessive use of power. These rights would be defined and structured in such a way that the judges would have to impose them, and this is seen to be a more effective way to the rights are not eroded. Under this regime, a bill must be certified as compatible with the Convention by the Secretary of State. The Executive has not found it easy to adapt. But at least the government cannot legislate against the Human Rights Act by stealth: the Secretary of State has to declare the bill under scrutiny to be incompatible, and then justify it – and in such a case, the scrutiny of Parliament would be intense.

The whole debate around the Human Rights Act and the constitution has opened up historical thinking for reconsideration. Coke saw it as a doctrine of the common law that its ultimate power was to overthrow an illegitimate act of the Parliament. Lord Steyn has expressed the concept of the sovereignty of Parliament as a construct of the common law, and reasons that if it can construct it, so can it be overthrown.

It could be argued (in response to the British public’s poor view of the Human Rights Act) that it is unnecessary, because even without it, there would always be recourse to Strasbourg in the event of abuse. But it is important politically, as a step towards a written constitution – along with the creation of a Supreme Court physically separated from the Parliament.

**The Law of the Sea: from freedom to regulation**, by Dr Stefan Tallman, St Anne’s College, Oxford.

In what was widely thought to be a fascinating presentation, Dr Talmon took us on a whistle stop tour of the law of the Sea. His opening sentence reminding us that 72% of our planet’s surface is covered by water well justifies the subject’s importance to lawyers and non-lawyers alike. This, according to Dr Tallman, is a strange area of the law. (He confessed that he would have preferred to talk about something more defined and specific, but that he had been urged by the organising committee to offer an overview of the Law of the Sea in a broad-brush approach.)

Curiously Oxford is one of the few remaining universities to teach a course on the Law of the Sea, encompassing as it does everything from fish to transport and communication and international terrorism. The International law of the sea is a sub-set of the wider area of public law. Its ambit includes laws relating to the sea, the seabed, sub-soil and to some extent, the air and space above. It does NOT concern itself with maritime law – this is an area within commercial law. So what is likely to be taught will relate to revolve around such subjects as resource allocation, navigation rights, boundaries, and terrorism, to name but a few.

From Grotius's *Mare Liberum* to Conventions adopted as recently as the nineties we were told in brief about the rules which make up the Law of the Sea. In particular we heard about those which are attempting to steer a course through increasingly complex interstate relationships and demands for our ocean's finite resources. Things have certainly moved on since the days when a state's territorial limits were determined by the distance it could fire a cannon ball from the shore!

Sources of the LOS: these are mostly the UN Convention on the LOS and a number of other related international conventions. This area of law is still largely governed by convention. For the EU, there is a more regulated regime, governed by EC law, although the EU has become party to the conventions.

In 1609, Hugo Grotius published his treatise *Mare Liberum* (the freedom of the Sea). He argued for the Dutch East India Company that the sea cannot be recognised as property in the same way as land, and hence it was free to be used by anyone. This thesis was qualified in the 18<sup>th</sup> Century to acknowledge that waters adjoining the coast became part of the coastal state – the so-called "cannon-shot" rule. These two concepts became the major themes in the International Law of the Sea for around 400 years. Subsequently some major modifications were made by the UN, largely as a result of a series of conferences organised by that body. The first was held in Geneva in 1958. This produced four Geneva Conventions, on the territorial sea, the continental shelf, fisheries, and living resources. There was an optional protocol dealing with the settling of disputes. States were enabled to sign up to the substantive part without necessarily accepting the settlement protocols. The Optional Settlement Protocols only reached 38 states. This work largely codified the law as it stood at the time. One major issue could not be agreed: that relating to coastal territory. The 3 nautical mile limit was by now no longer widely acceptable, and several states argued for a wider – ie, 12 nautical mile – limit.

A further UN LOS Conference in the 1960s focused mainly on the extension of the sovereignty of the coastal state into the sea. This was highly controversial, since it affected the hitherto open rights of navigation, fishing, and under-water activities, and sought to place these under the control of the coastal state. All the major maritime nations were affected. No agreement could be reached.

The difficulties encountered in the course of these two conferences illustrated two main problems: the old presumption of a distinction between the free high seas on the one hand, and the narrower territorial sea was no longer ubiquitous, and there was now no longer any commonly accepted law or rule relating to the breadth of the territorial sea. As a consequence of this failure to reach agreement, states simply began to claim what they liked. Other problems that were surfacing related to the sovereign rights to control and regulate fisheries zones and economic zones. States were by now interested not only in the surface of the sea, but also in the seabed including the continental shelf, and in particular, the rights to retrieve the rich harvest of polymetallic nodules which could be used for aircraft and other industries. It was strategic access to these

materials that was at the heart of the Cold War. Developments in seabed mining that it was now difficult but not impossible to extract these materials, and hence there was a strong incentive for a state to grab as much territory as possible. This extension of territory benefited the industrial states, but disadvantaged developing nations, who argued for a fair share of these nodules for all nations. In 1967, on the initiative of Malta, the idea was floated that a concept of the "common heritage of mankind" should be applied – that resources such as these should belong to all nations, and not just grabbed by the more powerful states. This was brought to the UN, and happened to coincide with a growing desire for a new international order, in part as a result of newly independent as a result of decolonisation, but developing, nations gaining a voice for the first time. These developing nations having gained a majority in the UN, carried the concept to a resolution that territorial waters should not be extended to engulf all these materials which should be the common heritage of all mankind.

These resolutions led to the third UN Conference on the LOS. In 1973, the UN entrusted the Third Conference to adopt the resolution. It met in New York, and over the next 9 years, in Geneva, Kiribati, and Montego Bay. This was the most ambitious conference ever in the history of international diplomacy. There were over 500 delegates. Henry Kissinger called it the "most important, ambitious and complex" in history. This time the task was not just the codification but the development of the LOS. Instead of the agenda being prepared by the International Law Commission, the states went straight into the conference, and duly set out their positions. A combination of two modes of operation was adopted:

- (1) a unanimity approach – in which there was no voting, but by which delegates negotiated to a final consensus, and
- (2) a package deal (or give-and-take) approach

The only voting was at the very end, on the form of the final document. 119 voted for, 4 against, 26 abstained. Not surprisingly, the developing countries opposed the concept of the "common heritage of mankind" – they stood to lose. When the convention was signed in 1982, most industrialised states did not sign. Negotiations continued. In the end, the industrialised states largely realised their aims – in fact, seabed mining rights favoured these states even more than before.

An umbrella implementation agreement allowed the convention to come into force by 1994. There were 320 articles, 9 large annexes, and 4 substantive resolutions. This was an umbrella convention only, requiring further treaties and conventions to fill the gaps where agreement could not be reached. It was a very broad general framework of intentions. It did, however, introduce certain maritime zones: a territorial sea of 12 nautical miles, a contiguous zone of 12 nautical miles, an exclusive economic zone of 200 nautical miles – and finally, the high seas. Straight "base lines" were used to cope with indented coastlines – eg, Norway – and to eliminate jagged lines at the edge of the high sea. Some states have been observed to cheat a little, by extending the baseline beyond what might be regarded as strictly necessary to correct the problems

raised by the otherwise jagged edge – eg, Pakistan. There are no “rights of innocent passage” permissible within the baseline – or above it, as argued in a case involving a U.S. plane above Chinese territorial waters – or was it above the high seas.....?

Maritime zones determine what happens in various areas of the sea: in general, the further away from the baseline, the fewer rights may be exercised by the coastal state.

More recently, the adoption of the 1982 Convention and the 1994 Implementation have not been the end of the process. The Rio Declaration on Environment and Development of 1992 called for the protection of highly migratory fish. There are exclusive fishing rights within the EEZ, where in fact most fishing takes place – but other states’ vessels can hover just outside the zone, and by over-fishing, prevent fish from returning to reproduce. The Rio Declaration sought to encourage regional fisheries organisations to protect and manage fish stocks – eg, NAFO, which was entered into in 2001 by some 60 parties. The Declaration foresaw a Review conference, and this took place in 2006. It established a catalogue of things to make the Convention operate more efficiently. A review process was built up, establishing checks after 5 years to see if amendments were needed, or if greater efficiencies could be gained.

Biodiversity at great depth or beneath the seabed is often the subject in seabed negotiations, because of industrial interests. Once again, the advantages all lie with the industrialised nations, while developing states continue to argue for the “common heritage of all mankind”. This line is particularly strongly opposed by Japan and the USA, while the EU favours a middle path: yes, there is a common heritage, but the industrialised states get to harvest it. Three institutions have been established:

1. The International Seabed Authority: Germany applied to the ISA to harvest polymetallic nodules, and gained a huge chunk of the high seas for its exclusive use. The regime allows a state to explore and subsequently apply to harvest an area, but then requires the state to make a payment to the Authority, which is used to benefit the developing world.
2. The Commission for Limits to the Continental Shelf: this has an increasing workload. It decides on matters disputed outside the 200 mile limit. If geological conditions are right, a state can claim a greater area – up to 300 nautical miles. So far, 7 states have made submissions, and up to 45 potentially could. The time limit for making such claims is 2009, so there is a huge problem ahead in getting all claims heard in time. It may be extended by a further 10 years.
3. The international Tribunal for LOS, Hamburg, was created as a compulsory means for the settlement of disputes. But to make it more palatable, alternatives were offered. Unfortunately the first case heard resulted in 15 separate opinions, with the result that states were left unable to analyse the actual result. Consequently, states tend to use international arbitration or the

ICJ. In 10 years there has been only one substantive case heard.

**Righting the World Through Treaties: the changing nature and role of international agreements in the global order**, by Michael Bowman, University of Nottingham School of Law.

This was an absorbing summary of the origins of Public International Law and the rationale for its development. The regret felt by many was the limited time available for discussion in the Q & A session that followed. Having regard to the range of nationalities represented, international treaties proved to be a subject of great interest to the delegates.

In 1648 the Treaty of Westphalia ended the 40 Years War, ended the Holy Roman Empire, and consolidated the nation-state as the building block of the international community and of treaty-making activity. During the 16<sup>th</sup> century, Spanish theorists and theologians wrote of the sanctity of agreements and the justifications for the use of force. Grotius was particularly influential. Imprisoned by the Calvinists, he escaped to Paris, where he wrote on war and peace. Although personally devout, he emphasised the role of reason in international relations, and drew on the common practice of states in constructing his treatises. His work is a blend of theory (based on natural law) and practice (positivism). On the whole, the positivists tended to prevail – their thinking chimed with the spirit of the age, and the concept of the sovereignty of the state.

Since the state was perceived as the prime actor, emphasis came to be placed on the meaning of statehood. Territory came to be equated with statehood, so that disputes and their resolution became the focus of attention. States were seen as having a free hand in the management of their own nationals, and no external state had the right to intervene. But there were elaborate rules governing diplomatic relations and the law of treaties. Treaties were binding, and must be complied with. There were principles of liability in the context of disputes, and even rules on the manner in which rules were permitted to emerge – all contained within the notion of a system of common principles of law.

Most rules were customary in origin, deriving from the practice of states. The role of treaties in this period was a minor, subsidiary one, dealing with tidying up in the wake off disputes. Treaties were merely supplementary to practice.

Limitations:

1. the early mechanisms were custom and a sense of legal obligation. In the absence of legislation within an international order, there was little else to rely on. Hence, increasing reliance came to be placed on treaties – especially by the 19<sup>th</sup> century, when there came to be a trend towards “law-making” treaties. These were multinational standard-setting treaties, and included methods of warfare, treatment of prisoners, and the navigation of international waters, navigable

rivers and so on. Rules relating to tariffs, copyright etc started to creep in, so that by the 20<sup>th</sup> century – and especially the late 20<sup>th</sup> century – treaty-making had become common-place. By this time, the treaty had become more centre-stage in the context of the international order. Troubles began to emerge in relation to multi-lingual texts – commonly in 6 languages – sometimes 12. Compliance is always an issue: no state can be compelled to be bound, unlike the individual within a state.

2. limitations of focus: early treaty-making was founded in positivism and the sovereign nation-state. This did not really change until the UN Convention on Human Rights, and the derivative European Convention. Environmental issues had scarcely figured before the 1972 Stockholm convention – now, there is an array of treaties on environmental matters – though firming up on implementation is still a task to be tackled. The old split between national and international affairs is no longer valid, illustrated by degrees completed across a range of jurisdictions (educational tourism). National boundaries are largely meaningless in relation to the natural world – bats, fish, birds et al don't obey the rules.
3. structure: this is sometimes a problem, especially for newly emerging states that are wary of ceding any sovereignty.
4. participation: the state-controlled view is still a problem. States still call the tune. However, some protections can operate on a personal level. NGOs have become increasingly important as players on the international stage. The SPCA, for example, has a larger membership than any political party, and when these groups join up internationally, they become a force to be reckoned with. They often have a pivotal role in the treaty-making process, yet have to rely on the support of states which take the front-line role.

The real remaining clash now is not between states but between the state and the individual. Grotius's dying words: "by understanding many things, I have accomplished nothing."

**Application of International Law by Domestic Courts**, by Dapo Akande, Lecturer in Public International Law in the University of Oxford and a Fellow of St. Peter's College.

This talk examined the extent to which domestic courts apply rules of international law in cases in which such rules might be relevant. The focus was on the application of treaties and customary international law by English courts, considering the principle that customary international law forms part of English law but treaties do not. The reasons for this principle were considered as well as the extent to which it remains accurate. There were considerations of the methods by which English courts utilize treaties as well as of a number of doctrines which prevent courts from giving full effect to rules of customary international law even in cases in which it might be relevant. He then compared the approach of English courts with those of other common law countries as well of other countries. Much international law regulates how private individuals and entities relate to states, so that the relationship between international law and domestic law is very important. There are two theories used to explain the extent

to which judges are bound to take international law into account when deciding domestic cases:

Monism: international law + national law = one whole system; each being part of the whole, governing the same things. In the event of conflict, international law prevails.

Dualism: international law and national law are two separate systems, and although each may deal with the same matter, each will do so on a different plane or sphere.

The first implies that international law needs no instrument to bring it automatically into domestic law, while the second implies the opposite. But even in the monist theory, it is the domestic law, or some rule of it that determines that international law applies – so in effect, it does not really differ from the dualist theory. In English law, the debate is between incorporation (monist) and transformation (dualist) – though the situation is more complex – but no jurisdiction is wholly one or the other. In the UK, it depends on what form of international law is being considered: treaty or custom. In relation to treaties, the doctrine of transformation is applied (2005) 2 WLR 1. Treaties are concluded by the Executive, and Parliament has no real part to play, although they are conventionally presented to Parliament. So for a treaty to be incorporated would be to deny the sovereignty of Parliament. How are treaties relevant? How do courts take non-incorporated treaties into account? – Through the common law rules of statutory interpretation. For an example of the interpretation of a statute enacted to give effect to a treaty, see *R (Eur. Roma Rights Centre) v Immigration Officer at Prague Airport* (2005) 1 WLR 1. For the presumption that legislation is to be interpreted in line with the UK's international obligations, see *Fothergill* 1967.

Treaties may be taken into account even where there is no explicit common law rule [1992] 3 WLR 28. This was mostly used before the passing of the Human Rights Act to get the courts to apply the European Convention on Human Rights – ie, used in the development of the common law.

Treaties and the principle of legitimate expectation: this concept was developed in relation to an Australian case, *Teoh*, 104 ILR 460 (HCA). The UN Convention on the Rights of the child had been signed and ratified by Australia, but not adopted into Australian law. The High Court decided that ratification gave rise to a legitimate expectation that they intended to comply. This offered no specific entitlement to a remedy, but did give certain procedural rights: the government must give notice, and observe certain procedural steps.

UK law and customary international law: the doctrine of incorporation applies here – customary international law is deemed to be part of English law without enactment: *Triquet v Bath* (1764) – but a statute will prevail.

Doctrines of restraint: when courts will stay their hand – eg, for reasons of foreign policy etc.

In the USA, traditionally treaties were part of the law of the land and co-equal with statutes (Art. VI, Section 2, Constitution), but the US courts have gradually eroded the rule. Distinctions have been introduced between self-executing and non-self-executing treaties – the latter requiring to be decided by the courts. Treaties require the advice and consent of 2/3 of the Senate, and distinctions have also developed around a distinction made between a treaty and an executive agreement. Customary international law is also part of US law – but again, the courts have developed strategies to narrow this.

**Freedom of Information**, by Heather Brooke, author of *'Your Right to Know'* (Pluto Press), a guide to using the Freedom of Information Act (UK).

This paper gave a broad introduction to Freedom of Information laws focusing specifically on comparing the US and UK legislation and enforcement. In a tale familiar to all New Zealand law librarians, Ms Brooke pointed out that in the UK, the development of a statute law database has been hindered by the government's reluctance to share raw data with the public. The lack of a statute law database highlights one of the ironies of British public life. We are all deemed to know the law and can be arrested for breaking it, yet nowhere is there a freely available copy of the laws in force at any given time. Local councils, police officers, and various professionals are all required to keep abreast of the latest changes in the law, but doing so is difficult and expensive. By contrast the American federal and Supreme courts have released this data. [note: since the JSI, of course the new Statute Law Database has been launched: <http://www.statutelaw.gov.uk/>]

The UK was one of the last European countries to have a freedom of information law. It was passed in 2000 after a 5 year lead-up. The US legislation was passed in 1997. In the UK, 100,000 bodies are covered by the Act: in the USA, it depends entirely on how much funding an entity gets that determines if it is a public body for the purposes of the legislation. In the UK, some bodies that should be covered are not, while some that should not, are. The list is well-nigh impossible to keep up to date. New bodies require to be individually designated. The Act is 180 pages long, and is turgid and legalistic. By contrast, the US law is expressed in 3 pages, in plain English. In the UK, there are 25 exceptions covering mostly everything, under the guise of being "prejudicial to the conduct of public affairs". In the USA Act, there are only 9 exceptions (this is in the Federal Act: the states have their own.) Throughout the English law, there is an impression that decisions are best made in secrecy. Yet policy should be made openly, in public view, and be transparent in order to take people along with it. There are slightly different appeal processes in Scotland, otherwise the Scots law is similar to that for England, Wales, and Northern Ireland.

The Commissioner is meant to be independent, but is part of the government department that funds him. This means he cannot be seen to be free to take the government on. Delays and a lack of boldness are the results. When the Commissioner makes a decision, he lacks the powers of a judge, and it can always be appealed. The courts are excluded from scrutiny by the Commissioner – the doctrine of separation of powers means that this is for the judges to do – but has never yet happened in Britain. It is still a very closed system. Court records are not readily available to reporters, and questions under the Freedom of Information Act can only be made of the court administration. Yet court records are public records, and should be freely available to the public. However, there have been some good decisions: *Alistair Mitchell v Information Commissioner* 2005 was a decision on whether transcripts prepared for the courts were court records (documents created by the judge or by court order). In this case, the documents were created by a private company, so they were made available.

### **Friday evening**

A drinks reception was offered by the OUP to the JSI. Apart from the goodies sampled, the highlight of the evening was the opportunity to explore the OUP museum: a collection of memorabilia relating to the history of Oxford publishing from the 15<sup>th</sup> century on. In particular, there was a collection of the paraphernalia used by Dr Murray in the production of the first OED. Following this we all split up into foraging bands to seek out further supplies of food and liquor and to enjoy one another's company (and of course erudite conversation) in the fleshpots of Oxford.

### **Saturday 12 August**

Once again an accidentally overlarge breakfast slid down all too easily in preparation for a gruelling day of listening intently and scribbling furiously.

#### **International law: an outdated tool for managing modern conflict?**

by Professor Gillian Triggs, who holds a chair in law at the University of Melbourne and is currently the Director of the British Institute of International and Comparative Law in London.

This paper explored the contemporary role of long accepted norms regulating international conflict. Core principles, set out in the United Nations Charter of 1945, such as the prohibition on the use of force and intervention in the domestic affairs of states and the right to self-defence in response to an armed attack may no longer be adequate to deal with the threats posed by modern conflicts.

Players on the world stage are not confined to nation states; whether NGOs, freedom fighters or terrorists, non-state actors have a significant role in today's conflicts. Coming directly on the heels of the arrests, this was particularly apposite, and Professor Triggs left her prepared paper briefly to consider the implications of this perceived threat. She also considered the implications of the fact that humanitarian disasters now

usually occur within, rather than between, states, and asserted that this has stimulated the political will within the United Nations to develop the idea of a 'responsibility to protect', backed by collective action, moderating the hitherto inviolability of state sovereignty over its territory and citizens. The international order is having to focus on balancing the rights of the so-called sovereign state against humanitarian rights, and the rights of detainees and prisoners of war.

She argued that traditional principles do not fit with current events. In fact, it is surprising that the international legal system is effective at all – despite unrealistic expectations. In fact, it is complied with most of the time (despite the impressions left by the media). The UN has 18 peacekeeping forces going about their work with very little publicity – including within the middle-east. There are major UN organisations working in the areas of food, health and so on, and the WTO with its binding disputes regime. The reason for the continuing success of the various organs of the UN is that it is in the interests of states to comply – there is a mutuality of benefits. So why does it appear impotent in the face of armed conflict? Is there any point in the UN if it cannot manage conflicts and protect human rights? The draft charter intended just this. The expectation was that it would contain conflict and protect human rights. Because it is perceived to have failed in these fundamental areas, critics are unlikely to be impressed by other successes. It is judged by its ability to contain the use of force. Yet Israel and the Hezbollah are both in breach; then there is Guantanamo Bay, the "Security Wall", Sudan, Congo – all in despite of UN resolutions – and then there are the nuclear programmes of Iran and North Korea. The emphasis has been on failure rather than the successes.

The Security Council is a political body whose problem does not lie in dealing with laws and rules, but in its lack of good fact-finding: eg, the case of Iraq and WOMD. The major powers have failed to agree on the relevant facts.

A new challenge has been change in the role and capacity of the traditional nation-state. In reality, there has been an increasing role for non-state players on the international stage, including NGOs, international criminals, corporate criminals, and terrorists. Many threats are posed by entities beyond the reach of the international legal system. Multilateral responses are frequently required – eg, the WTO, climate change, nuclear capacity, bio-chemical threats – and the danger that these can be activated by terrorists. Other problems are posed by failing states, such as Somalia and Zimbabwe. The non-international nature of many of today's problems – civil and domestic unrest – challenges the non-interventionist traditional view of international law.

Use of the veto has far surpassed the original vision behind its creation, with the result that actions in defence of peace have repeatedly been thwarted. Uncertainty has prevented other interventions: how does one intervene against a non-state actor? What is an armed attack? Does it have to be a persistent prolonged attack? The ICJ has made it clear that the attack must be intentional, grave, and large-scale, but not all

commentators agree. Then there is the problem of “preventive force” or “anticipatory self-defence” euphemisms for pre-emptive attack used to deflect a (supposed) armed attack. Much depends on what the facts are to determine what preventive action is reasonable – and often the facts are not clear, or they are deliberately misrepresented. If terrorism arises from within a state, is there an automatic right to attack the host state? There did seem to be reasonable evidence in the case of Afghanistan. But, by analogy, does Britain have the right to attack Pakistan in response to the rise of terrorists within it? Some say that the state itself has to be culpable before force can be justified. In the case of the kidnap of two Israelis, if this is seen in isolation, it would be hard to justify the responding invasion of Lebanon. But if that action is perceived as part of a prolonged series of actions, then the response could appear proportionate and justifiable.

In relation to humanitarian intervention, it has always been the convention that no state may intervene in the domestic affairs of another. But there have been such appalling actions in civil war situations that this traditional view is being revised. The bombing in relation to the situation in Kosovo although on the face of it disproportionate, was in the end carried out for the real desire to protect Albanian Muslims from further attack, and not for strategic reasons. And there does seem to be a growing willingness to intervene in such cases. Chapter 7 concedes that collective action should take place when there is a real responsibility to protect human rights. There has been historical reluctance to approve unilateral actions.

The technical rules of international law – i.e., the Red Cross Conventions – constitute a very complex area of law. The unlawful detention of prisoners in Guantanamo Bay stretched the rules to breaking point.

There are tensions and stresses across all areas of international law. Altogether, the regime is not working very well – especially where large world powers choose to interpret the rules in novel and unhelpful ways. The use of the veto should be replaced by majority voting; the voting structure of the Security Council is badly in need of reform – but is unlikely to eventuate soon. But there are proposals for reform, and some moves forward.

International law will retain its contemporary influence and credibility only if it responds dynamically to the challenges posed by globalization, terrorism, energy security, UN peacekeeping, global warming and the mass movement of peoples. Reform of the UN is currently underway. Such institutional reforms should be matched with renewed efforts to ensure that international law better reflects contemporary needs for peace and justice.

**UK Terrorism Bill**, by Colin Walker, External Affairs Officer at the British Library.

Colin has played a key role in establishing the Library's first in-house public affairs strategy. This paper represented an example of library activism in defence of civil rights, and in particular, in defence of librarians who might find themselves accused of aiding terrorism by the simple act of issuing a book, or pointing to a map. Using the recent experience of their work on the Terrorism Bill, which has now passed through Parliament, the speaker showed how the British Library was able to recognise the significant impact that the legislation was to have on its operation, and the means by which the potentially negative consequences were overcome by a concerted three month influencing campaign. It gave an insight into the process by which the British Library, as part of a consortium of UK organisations, articulated its concerns, established the means by which these concerns needed to be resolved, and ultimately ensured a successful outcome. It was great as a first-hand account of machinations in the night, jostling for position in the queue to influence policy-making, and finding champions in the House of Lords.

**The International Bill of Rights and the European Convention on Human Rights**, by Professor Sandy Gandhi, Professor of Law at The University of Reading.

This paper focused on the development of a Bill of Rights at both the international and European regional levels. The origins of the modern development of the international protection of human rights can be traced back to the so-called 'human rights clauses' of the U.N. Charter 1945, followed swiftly by the landmark Universal Declaration of Human Rights in 1948.

The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

Before 1945, human rights fell within the domestic jurisdiction, and not within international law. Exceptions to the doctrine had developed gradually – especially in the 19<sup>th</sup> century, and specifically in relation to the rights of aliens. In customary international law, a minimum set of standards was owed to the alien individual's state. But this could only be enforced by powerful states. There had also been measures against slavery: this was condemned at the Congress of Vienna 1815. There were measures for sick and wounded soldiers under "humanitarian law" administered by the Red Cross. There was an agreement that field hospitals should be free from attack. There is now a huge body of humanitarian law deriving from these beginnings. Finally, if a state acted so outrageously against its own citizens so as to shock the entire international community, action could be taken. This was particularly called to aid in relation to the persecution of religious minorities in the 19<sup>th</sup> century. But any such intervention could itself be a breach of international law. Recent interventions – such as in the case of Kosovo – may be legally justified under this principle, but this may be controversial.

The Covenant of the League of Nations provided for a multi-national approach to protecting specific classes of people, but the beginnings of a new lease of life was breathed into the movement following World War 1, at Versailles. President Wilson wanted reference to Human rights, but this was dropped in favour of references to such specifics as freedom of religion, freedom from slavery etc. Member states also agreed to maintain fair and humane labour conditions in their own states and elsewhere where they operated. There were also protections for women and children, but no general statement of human rights per se.

By the time the UN Charter was formulated, this incremental approach to human rights had been abandoned, and instead, it was elevated into a generalised statement of human rights. This was a giant step forward. One major difference between the Covenant of the League of Nations and the Charter was the prominence of human rights. A variety of attempts to include a Bill of Rights were all torpedoed – no state represented at the conference was willing to cede sovereignty. But they did agree to set up a Bill of Rights charter. The efforts of some 42 non-government organisations were strongly influential. This was sufficient to convince the US and then the UN of the need for strong human rights provisions.

The Charter suffered two defects: there was no definition of human rights apart from the general one of non-discrimination, and there were no measures for non-implementations. But it did anticipate an international Bill of Rights. There is a presumption that a nation that becomes a member of the UN agrees to the Charter. The Charter was the first step on the road to an International Bill of Rights. The Charter clearly speaks of "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion" (Art. 1, para. 3). The idea of promulgating an "international bill of rights" was also considered by many as basically implicit in the Charter.

By its resolution 217 A (III) of 10 December 1948, the General Assembly adopted the Universal Declaration of Human Rights as the first of the projected instruments that eventually became the International Bill of Rights. The question has been: has it become part of international law – as custom? – or what else? The consensus seems to be that it is not altogether a matter of customary law, Although there has been little argument that some provisions – such as those against torture – do reflect customary law.

The Declaration was followed by the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols, but in fact, it was not until 1966 that all were adopted.

The human rights provisions adopted by the UN form the basis of the European Convention on Human Rights, and in turn, of the UK Human Rights Act. Although the Tories advocate a sort of indigenous Bill of

Rights for the UK, it would still not enable the UK to escape its commitment to the European Convention.

The body of jurisprudence on human rights precedes the current global terror regime, and it will be interesting (to say the least) to see how such norms as the prohibition against deportation of people to countries where torture is practiced will play out in the future.

The proximity in time of the arrests of the alleged terrorists lent a startling immediacy to this paper: if we know that international human rights agreements are breached by, say, Pakistan in methods of questioning an alleged fugitive terrorist linked to those arrested, in the course of which torture may have featured, should that evidence be accepted in a UK domestic court?

**A Panel Session on Copyright: Janis Johnson, Vanessa O'Meara, David Gee, Janine Miller (AALL/ALLG/BIALL/CALL-ACBD)**

The representative from each jurisdiction highlighted "hot spots" in their copyright laws. Particularly pertinent were: issues surrounding digital media, which have outstripped copyright regulation in all jurisdictions, and for those seeking free trade agreements with the USA, there were issues relating to the "Disney" extension to the copyright term. The CTEA extended the term of protection by 20 years for works copyrighted after January 1, 1923. Works copyrighted by individuals since 1978 got "life plus 70" rather than the existing "life plus 50". Works made by or for corporations (referred to as "works made for hire") got 95 years. Works copyrighted before 1978 were shielded for 95 years, regardless of how they were produced.

The extension of copyright in the USA and its trading partners also exacerbates the problems for libraries with "orphan" works: those works for which no author can be located. A s.108 Committee (of which 2 members are librarians) is working in the US to try to meet all interests.

All of this was delicately alluded to by all delegates without once mentioning the word "Disney" or pointing bones at the Americans.

**The new Supreme Court and other changes in the justice system,**  
by The Rt Hon. Lord Walker of Gestingthorpe.

Far-reaching constitutional changes in the UK Justice System were announced – "unexpectedly and ineptly" (sic) - in the summer of 2003, and eventually passed into law by The Constitutional Reform Act 2005. Lord Walker described the three most important changes, concentrating on the establishment of a new Supreme Court in the United Kingdom.

The new Supreme Court is likely to sit for the first time in October 2009. Lord Walker addressed it under five headings: Jurisdiction, Personnel, Premises, Library and Prospects. He suggested that although the new Court will not have any general power to strike down primary legislation

as unconstitutional, a process of significant constitutional change is already underway.

The jurisdiction of the new court is as for the House of Lords, except that matters of legislative competence in Scotland, Wales, and Northern Ireland will be excluded. It will be in a new building. The Privy Council still exists – but only just! The new Caribbean Court of Justice may well put an end to the last appeals to the Privy Council.

He also commented on changes in the role of the Lord Chancellor and the establishment of a new Judicial Appointments Commission (mandated to promote diversity in the judiciary).

Finally: the formal dinner. This was sponsored by LexisNexis Butterworths, and held at Exeter College. The Dining Hall, which dates back to 1618, is said to be one of the most attractive in the University:

