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Magna Carta and the Development of Modern International Law

Lionel Cohen Lecture 2015, Jerusalem, 23 November 2015

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1. Introduction

It is both an honour and a pleasure to be invited to give this year's Lionel Cohen Lecture. Looking at the long list of distinguished jurists who have given this lecture, it is impossible not to feel a sense of privilege – and trepidation – at being asked to follow in their footsteps. However, it is also a real pleasure to be able to pay tribute to the late Lord Cohen here in the university which meant so much to him and in the presence of members of his family. I did not have the opportunity of knowing Lord Cohen: his last judgment, in *Boardman v Phipps* – and it was a very great judgment with which I later struggled as a law student – was delivered when I was only eleven years old, and he died just before I embarked on the study of law.[1] He stood for that tradition of integrity, inclusiveness and public service which attracted me to law as a career when I was a teenager. Though my brief attempt at playing golf was a failure, now in the distant past, I cannot help but admire a man who could combine a distinguished legal career with a golf handicap of almost professional standards. Lionel Cohen was obviously a man with what we describe today as 'a hinterland' beyond the law. In an age of narrow specialists, that is something we should admire and try to emulate, whether on the golf course or elsewhere.

I spoke of a sense of trepidation. That trepidation mounted steadily when I actually sat down to write this lecture. I chose my title several months ago. It seemed like a good idea at the time! Magna Carta appeared an obvious choice on this, its 800th, anniversary, and linking it to international law would allow me to play at home, as it were. Yes, it was an obvious choice and I noted it down with pleasure, and then forgot all about it until I started to prepare the text, several months later.

At that point I realised there were a number of problems with my choice. First, as Jonathan Sumption has pointed out,[2] so many English lawyers and historians have spoken or written about Magna Carta this year that it is almost impossible to say anything remotely original. If Jonathan Sumption – as fine a mediaeval historian as he is a jurist – thinks that, then it is hardly likely that

[*] Judge, International Court of Justice. This article is an amended version of the 2015 Lionel Cohen Lecture, delivered at the Hebrew University of Jerusalem on 23 November 2015.
[1] *Boardman v Phipps* [1967] 2 AC 46.
[2] Jonathan Sumption, 'Magna Carta: Then and Now', Address to the Friends of the British Library, 9 March 2015, 1, https://www.supremecourt.uk/docs/speech-150309.pdf.

someone who has no claim to be a mediaevalist, and whose career has been largely outside the world of English law can do so. Secondly, there is real doubt about whether Magna Carta can properly be described as having had any serious impact upon English law, let alone international law. While most of this year's books and lectures on the subject have – understandably, and perhaps pardonably – followed the lead of Lord Denning in lauding the Charter as 'the foundation of all our liberties',[3] others – including Lord Sumption in his memorable lecture to the Friends of the British Library – have dismissed it as an historical relic of little importance even in its own day, and largely misunderstood and misrepresented ever since. Lastly, even if Magna Carta *is* important to common lawyers, there is the difficulty of linking what happened between the king and a group of barons and prelates at Runnymede 800 years ago with the international law of today.

So what seemed like a good idea at the time began to seem rather less good when I sat down to write, but twenty years at the Bar defending a range of acts of various governments before different courts means that one develops a liking for challenges. Let us therefore venture forth regardless and consider, first, what Magna Carta has meant for the development of common law and the constitutional traditions of the English-speaking world, and then what impact, if any, it may have had on international law.

2. MAGNA CARTA AND THE COMMON LAW

The English like their centenaries so it was only to be expected that we have made a fuss about the 800th anniversary of Magna Carta. Indeed, since the 700th anniversary coincided with the First World War, the 600th with the Battle of Waterloo and the 500th with the first Jacobite uprising, Magna Carta could reasonably feel it has already waited a long time to be the centre of attention.

There are, however, two problems with the way in which it has been lauded during this anniversary year. The first is that most people have never read Magna Carta. That is hardly surprising. It is not one of those texts that trips off the tongue. There is nothing like the resounding words of the American Declaration of Independence:[4]

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness;

or the opening words of the Charter of the United Nations:[5]

> We, the Peoples of the United Nations, Determined to save succeeding generations from the scourge of war …

[3] Simon Lee, 'Lord Denning, Magna Carta and Magnanimity' (2015) 27 *Denning Law Journal* 106.
[4] United States Declaration of Independence, 4 July 1776.
[5] Charter of the United Nations, 24 October 1945, 1 UNTS XVI, preamble.

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Magna Carta opens with a recital of King John's impressive list of titles – not just King of England but also Duke of Normandy, Count of Anjou, and so on – and follows them with a cast list of the leading prelates and barons who had turned up at Runnymede. Those inspired by the anniversary to persevere beyond this mediaeval *Who's Who* will find such clauses as Article 25:[6]

> All shires, hundreds, wapentakes and ridings shall be at the ancient farm without any increment, except our demesne manors,

or Article 33, which proclaims:

> Henceforth all fish-weirs shall be completely removed from the Thames and the Medway and throughout all England, except on the sea coast.

Unlike the US Constitution, the UN Charter, or the Universal Declaration of Human Rights, Magna Carta is not the kind of text one carries around in one's pocket for inspiration.

The second problem is that far too many people make absurd and extravagant claims for Magna Carta. One commentator has recently claimed that Magna Carta was incorporated into international law by the European Convention on Human Rights[7] – a kind of 'Magna Carta for foreigners'. Moreover, if they have not already done so, I am sure that some of the more learned among those who campaigned for the United Kingdom (UK) to leave the European Union will urge Britons to rally round Magna Carta as an early example of the defence of English liberties against the intrusions of Europe in the form of the foreign King John. The fact that Magna Carta was annulled by the Pope only weeks after it had been sealed will only reinforce that view.

Geoffrey de Mandeville and the other barons would probably have enjoyed a hearty laugh at that idea – once, that is, someone had translated the joke for them since, so far as we can tell, none of them spoke English, even in the form in which the language then existed. Norman-French by origin, French-speaking by preference, they had just invited a French invasion in support of their claims against King John. It was not the liberties of Englishmen against foreigners that was their priority, and the idea that they were early champions of human rights would have struck them as ludicrous. Most of them wanted to be left alone by the king so they could get on with persecuting and exploiting their tenants and serfs in peace.

Most of the provisions of Magna Carta seem to have nothing to do with modern notions of human rights. They are the creature of their time, reflecting the concerns of a tiny oligarchy. Some provisions were plainly intended to be transient: for example, the opening clause of Article 59 by which King John undertook to 'treat with Alexander King of the Scots concerning the return of his sisters'. Others may have been seen as permanent but concerned issues of feudal

[6] All quotations from Magna Carta are taken from the translations which appear in Anthony Arlidge and Igor Judge, *Magna Carta Uncovered* (Hart 2015).

[7] European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222.

duties and rights, civic self-government and such pressing matters as fish weirs on the Thames and Medway, which have no resonance today. As for the liberties of the Church, which received particular prominence in Magna Carta (perhaps thanks to Stephen Langton, the Archbishop of Canterbury, who may have a claim to be regarded as the true father of the Charter), their guarantee did not stop Henry VIII and Elizabeth I nationalising Christianity in England; nor did the pledge to respect free elections in the Church prevent them from making the appointment of bishops a matter of political patronage well into my lifetime.

Even the handful of provisions which do resonate today are not so straightforward when looked at in their historical context. Take what is arguably the most important provision in the Charter, Article 39:[8]

> No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled or deprived of his standing in any other way, nor will we proceed with force against him or send others to do so except by the lawful judgment of his peers or by the law of the land.

Now we seem to be getting there. This clause (invoked, incidentally, by the US Supreme Court in relation to detention at Guantanamo Bay)[9] seems to echo through the centuries: calling for due process of law, habeas corpus and trial by jury, foreshadowing Article 5 of the European Convention on Human Rights[10] and similar provisions on liberty of the person in other contemporary treaties. Except that it was not intended to be anything of the kind. It is not about trial by jury, at least not as we know the jury today, which did not come into being in England until much later; nor did habeas corpus. The concept of 'lawful judgment of his peers' was a great deal more elastic then than we imagine hundreds of years later. Nor is it quite the bulwark against arbitrary arrest that it might appear. It says that no 'free man' (it did not apply to the serfs any more than the US Constitution originally applied to slaves[11]) shall be penalised 'except by the law of the land'. It does not place limits on what laws might be enacted or for what forms of detention or punishment they might provide.

Moreover, the king never had any intention of complying with the promises he made in Magna Carta. He probably knew that the Pope – to whom he had sworn fealty only a year earlier – would annul the Charter, much as legislators in some countries today vote for statutes in which they have no faith, knowing that the courts will save them from themselves by invalidating the measure on constitutional grounds. As for the barons – T S Eliot called their fathers 'the raw nobility, whose manners matched their fingernails',[12] and it is unlikely that either the manners or the personal hygiene had greatly improved when the sons assembled at Runnymede. They were no fools, though, and it is unlikely that they had any high expectation regarding John's likely behaviour.

[8] Arlidge and Judge (n 6) 59.
[9] *Rasul v Bush* 124 S Ct 2686 (2004); *Boumediene and Others v Bush* 128 S Ct 2229 (2008).
[10] (n 7).
[11] *Scott v Sandford* 60 US 393 (1857).
[12] TS Eliot, *Murder in the Cathedral* (Harcourt Brace & Co 2014) 45.

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Magna Carta was reissued by William the Marshal (a much better man than John) when he was regent for the young Henry III in 1216.[13] It was reissued once more, in a different and somewhat watered down form, by the adult Henry III in 1225, and was relied on before the courts during the succeeding decades,[14] although less frequently as the years went by. When one comes to the Tudor era, it is hardly mentioned: Shakespeare did not think it worth a reference in his *King John*. Only three of the 63 clauses in the original 1215 Magna Carta as reissued are still in force and references to it in the English courts (though not in the courts of the United States) are generally rhetorical flourishes rather than serious parts of the legal reasoning.

And yet, and yet! There are things there that may have been unintended – or, at least, understood differently from the way we think today – that have mattered very deeply in the development of the common law tradition.

First, there is the notion, however imperfect, that governance is a pact between governor and governed, not a matter of autocratic whim or fancy. Jonathan Sumption has rightly pointed out that this idea was not new. Henry I and other kings, even the awful King Stephen, had issued charters at their coronation or on other occasions, making promises to observe the laws and customs of the land – usually with a reference back to 'the laws of King Edward the Confessor', the 'good king' who reigned just before the Norman invasion of 1066.[15] Nor was the Charter uniquely English. This was an age of charters; they were granted by the Holy Roman Emperor and the King of Hungary at about the same time as Magna Carta. Yet, that it had been done before, and that it had been done elsewhere, should not detract from the fact that in 1215 the then leaders of England compelled a particularly dreadful and recalcitrant monarch to concede, once more, a series of liberties based on the notion that governance was not mere autocratic fancy. Nor should it prevent us from recognising the significance of the fact that, once the emergency that John had created was past, those pledges were largely re-enacted in the 1216 and 1225 Charters.

When Sir Edward Coke, dismissed as Chief Justice for his opposition to James I, raised the banner of Magna Carta 400 years after it was first adopted, and used it as the rallying point for those who argued that the powers of the monarch were already limited by law, he may have misunderstood Magna Carta, or even misrepresented it. However, he was not entirely wrong in suggesting that it embodied a concept of limited sovereignty, which was precisely what James I and Charles I believed was incompatible with their divine right to rule. Parliament's victory in the ensuing civil war was the victory of this view of Magna Carta, and the restoration of the monarchy in 1660 did not undermine that victory. The same philosophy inspired the American lawyers who invoked Magna Carta when they hurled a shipment of tea into Boston Harbour and drafted a declaration of independence, and then a constitution, based upon ideas of representative government and limited powers.

Secondly, even if they were very limited in their scope, there are early glimmerings in Magna Carta of what we now think of as human rights. I have already quoted Article 39 requiring a basis

[13] Arlidge and Judge (n 6) xiv, Ch 15.
[14] ibid xv, 103–04.
[15] Lord Sumption (n 2).

in law for arrest or punishment. Limited it might have been, but the requirement of a legal basis for arrest and imprisonment is a great improvement on a world in which detention can be decreed at whim and no kind of legal authority is required. Once you require a basis in law for the detention of a person, it becomes possible to fashion a remedy by which a court may inquire whether such a legal basis exists. That was what eventually happened with the development of habeas corpus – the writ that required a gaoler to produce the prisoner and show cause for the detention. That development came long after 1215, but it was an innovation that was the work of judges and lawyers who considered it to follow from the language of Article 39.

There is more. Article 40 provides that 'to no one will we sell, to no one deny or delay right or justice'.[16] It might indeed be, as Jonathan Sumption has argued, a bit of a stretch to say that this precludes reductions in the scope of a legal aid scheme which did not come into existence until 735 years after Magna Carta,[17] but it is surely reasonable to argue that Article 40 is incompatible with setting court fees at a level designed to make the courts a 'profit centre'. The provisions which require that punishments be proportionate to the crime also echo in the law of today. Even some of the clauses which plainly address the issues of the past can still resonate today, however faintly. Thus, the provision in Article 23 that 'no vill[ein] or man shall be forced to build bridges at river banks except those who ought to do so by custom and law' is a precursor of modern objections to forced labour. These were certainly limited beginnings but the point is that later common lawyers found inspiration here for a far more substantial development of individual rights.

In their different ways, Coke and the Parliamentarians of the early seventeenth century, and the US founding fathers in the eighteenth, invoked these provisions as the inspiration for their own ideas of civil rights. They, in turn, have been seized upon by later generations of lawyers to develop modern concepts of civil or human rights which would probably have amazed Coke or Jefferson as much as Coke or Jefferson would have surprised Geoffrey de Mandeville and Stephen Langton. Coke, Jefferson, Madison and the others thought they were building on Magna Carta – or, at least, they crossed their fingers and pretended that they were. Whether they were right, or even honest, about what they saw in Magna Carta is not really the point. There was something there on which they could, and did, build; and later generations built on their work in ways I doubt they could have imagined.

That is why it does not matter so much that Magna Carta is invoked today in defence of ideas that would have been inconceivable to the barons of 1215. No, they did not envisage that Article 39 of their Charter would one day be cited as the basis for prohibiting the arbitrary arrest and detention of anyone, irrespective of social standing and, for some commentators, irrespective of what Parliament might enact. The founding fathers who wrote the US Constitution apparently saw no contradiction between their declarations of liberty – far more eloquent than anything in Magna Carta – and the fact that many of them, and many of their countrymen, owned slaves. That does not stop us invoking the principles of the US Constitution and the Bill of Rights

[16] Arlidge and Judge (n 6) 59.
[17] Lord Sumption (n 2).

today; nor does the fact that Magna Carta was not observed in the immediate aftermath of its adoption diminish its significance today. The Declaration of the Rights of Man and the Citizen adopted in France in 1789 was followed not by a golden age of liberty but by the Terror and the guillotine. Yet it is rightly cited today as an important step in the development of ideas of human rights and civil liberties.

Ideas, if they are good enough, outlive and outgrow the circumstances of their adoption; and they develop with time. Moreover, legend is a form of reality. Coke and Jefferson may have been wrong in what they saw in Magna Carta. They may not have been honest when they told the world what they saw there, but their deductions from Magna Carta survived and eventually prospered. They created a legend based around some small grains of reality in Magna Carta, and that legend in its turn led to some of the most important developments in common law. As Erwin Griswold, then Dean of Harvard Law School, said, 'Magna Carta is not primarily significant for what it was, but rather for what it was made to be'.[18]

That is why when we ask what influence Magna Carta has had on the common law – first in England, then in the US, and later in all of the English-speaking world – we are really asking not about the one document sealed 800 years ago but about the series of charters from 1215 to 1225 and, even more importantly, the way in which they have been interpreted, misinterpreted and applied ever since. Lord Judge, the former Lord Chief Justice of England and Wales and one of my most distinguished predecessors in the Lionel Cohen Lecture series, chose his words carefully – and, if I may say so, wisely – when he described Magna Carta as 'the banner, the symbol, of our liberties'.[19] Described in this way, rather than as a foundation, we see Magna Carta's influence in its true light, and that influence has been considerable.

3. MAGNA CARTA AND INTERNATIONAL LAW

Let me turn, therefore, to the relationship between Magna Carta and the development of international law. In doing so, I want to begin with two notes of caution. First, international society is markedly different not just from that of England in the time of King John but from that of any country at any time. Its central institutions are of comparatively recent origin and, even today, hold far less power than the more powerful of the just under two hundred states. It is controlling the activities of the barons – the states – that is the principal concern for international law, rather than enabling them to control an overmighty monarch. That difference makes any attempt to transplant constitutional concepts from any country into international law a very difficult task and one which has to be undertaken very warily indeed. That is particularly true of Magna Carta. I am not saying that national constitutional traditions have had no influence on

[18] 'Introduction' in Samuel Thorne, *The Great Charter: Four Essays on Magna Carta and the History of our Liberty* (Pantheon Books 1965) viii.

[19] Igor Judge, 'Magna Carta: Luck or Judgement', Address to the Middle Temple, 19 February 2015, 12, http://www.middletemple.org.uk/sites/default/files/documents/about-us/i-judge-magna-carta.-luck-or-judgment.pdf.

international law, but that influence is oblique and never amounts to the wholesale transfer of one country's constitutional maxims into international law.

Secondly, while English lawyers are always keen to claim that we got there first with concepts of human rights, it is important to bear in mind that many countries and various legal traditions have contributed to the development of the international law of today. When I was teaching at the Hague Academy of International Law in 1989 I attended an excellent lecture by the late René-Jean Dupuy on 'The Spirit of 1789 in International Law'.[20] It is certainly not my purpose tonight to play down the influence of the French tradition, or that of any other tradition, on the development of international law. I want to consider the influence of Magna Carta in the context of an international legal system that has drawn, and continues to draw, inspiration from many different sources. One of those sources – which has been particularly influential at certain times – has been that of the common law tradition, which itself has drawn heavily on the legend of Magna Carta.

I have no hesitation, therefore, in dismissing the extravagant claims that a contemporary human rights treaty, like the European Convention on Human Rights, is no more than the incorporation into international law of the principles of Magna Carta or that, because we have Magna Carta, the United Kingdom has no need for the European Convention. The debate about whether or not the UK should remain party to the European Convention has nothing to do with Magna Carta. One of the problems with extravagant claims about the influence of Magna Carta on international law – as with the overblown claims about its impact on common law – is that not only are such claims patently false, they blind us to the more limited, yet still important, influences which can be traced back to Magna Carta. I see three respects in which those influences can be detected; others might see more.

First, there is an influence on methodology. Like other English Charters, Magna Carta was not advanced as the creation of a new order but rather as the restoration of ancient liberties believed to have existed for nearly two hundred years before the meeting at Runnymede in 1215. Those liberties were said to derive from the laws of King Edward the Confessor and the customs of the land. Custom tends to be important in most early legal systems because legislation is generally sparse and rudimentary, while courts have not yet developed much by way of case law. As time goes by, the development of a jurisprudence and the increased volume of legislation – particularly where it takes the form of something like the Napoleonic codes – tend to push custom to the margins or even exclude it altogether. Even in the common law world, where there has been some suspicion of comprehensive codes, custom now plays a peripheral part at best.

That is not at all true of international law, where custom remains of fundamental importance as a source of law. Article 38 of the Statute of the International Court of Justice[21] directs the Court to apply, inter alia, 'international custom, as evidence of a general practice accepted as

[20] Published as 'La Révolution Française et le Droit International Actuel' (1989) 214 *Recueil des cours* 9.
[21] Statute of the International Court of Justice (entered into force 24 October 1945) USTS 993, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

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law'. The Court, other tribunals and every foreign ministry legal adviser has applied customary international law.[22] What has that to do with Magna Carta? I think the answer lies in the recognition that two rather different traditions drawn from national legal systems have had an impact on international law over the years. One has tended to see the development of law in terms of bold new statements of principle – a fresh start in response to the wrongs of a recent past. The other, prominent in the common law world, has tended to respond to crisis first and foremost through a reaffirmation of core principles which – or so, at least, it is claimed – have already been established. That tradition is partly a product of Magna Carta and its attempt to deal with a crisis in mediaeval English life by insisting on respect for values which it was believed were already to be found in the laws and customs of the land. That same concept is evident in the Bill of Rights of 1689 and even the American colonists, though making a radical break with the past in one respect, went out of their way to retain as much as possible of the existing legal order and strengthen it as a reaction to what they perceived to be its breach by the government of George III.

This reaffirmation tradition has had some important ramifications for international law. You see it, for example, in the development of what we now call international humanitarian law. When a series of particularly shocking battles in the mid-nineteenth century led to attempts to ensure better protection for the victims of war, an essential part of that campaign was a series of attempts to codify and reaffirm the existing customary law on the subject. That process started with the Lieber Code[23] during the US Civil War and continued through texts such as the Oxford Manual of the Institut de Droit International and the various Hague Conventions of 1899 and 1907.[24] While the Geneva Conventions of 1949[25] and their Additional Protocols of 1977[26] contain numerous important provisions designed to change and improve upon the existing corpus of law, another important feature of those Conventions was the reaffirmation of the core principles already found in the laws and customs on the subject. Most recently, diverse bodies such as the

[22] Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 5.

[23] Francis Lieber, 'Instructions for the Government of Armies of the United States in the Field', promulgated as General Orders No 100 by President Lincoln, 24 April 1863, reprinted in Dietrich Schindler and Jiří Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (4th edn, Martinus Nijhoff 2004) 3 (Lieber Code).

[24] Christopher Greenwood, 'International Humanitarian Law (Laws of War)' in Frits Kalshoven (ed), *The Centennial of the First International Peace Conference: Reports & Conclusions* (Kluwer 2000) 161.

[25] Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287.

[26] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 609 (Additional Protocol II).

International Committee of the Red Cross[27] and the San Remo Institute of International Humanitarian Law[28] have tried to strengthen respect for humanitarian principles by emphasising and reaffirming the existing customs of war, just as Archbishop Langton and the barons sought to bring King John under control by reaffirming and compelling respect for existing customs and liberties.

One sees another echo of this reaffirmation approach which we can trace back to Magna Carta – or to the Magna Carta legend – in the fact that the International Law Commission set up just after the Second World War was given a mandate for the codification, as well as the 'progressive development', of international law.[29] One of its current projects is to improve understanding of the means by which customary international law is created and shaped.

Of course, there are many reasons for the continued importance of custom in international law that have nothing to do with traditions inspired by Magna Carta, but the fact that the Magna Carta tradition is not *the* cause of that importance does not mean it is not *a* cause. Moreover, I think it is the influence of common lawyers, drawing on a tradition of which Magna Carta forms an important part, which has been an important cause of the tendency of international law to emphasise the reaffirmation of existing customs, even when it has also attempted to bring about ambitious change.

Secondly, I believe that Magna Carta has had an influence – however indirect – on the way in which we think of the rule of law in international society. One way in which it has achieved this was by inspiring a constitutional tradition that sovereignty is not unlimited. Once it is grasped that that is so *within* a state, it is not an enormous leap to the proposition that it should also be so between states.

Moreover, Magna Carta was concluded against the backdrop of impending civil war within England and international conflict between England and France. Those who ensured its adoption considered that, even in those circumstances, a reaffirmation of the legal obligations of the different parties to one another was worthwhile. They also considered that that reaffirmation should make clear when a repudiation by the king of his obligations became so bad that it released his subjects from their duties of obedience and left them free to use force to assert their rights. That idea took a long time to take hold but Magna Carta lit a powder trail that would have important implications in establishing the rule of law in the common law world and, in turn, influence that group of states in their attitudes towards the rule of law – even in matters of war and peace – in international law.

One of the least noticed provisions of Magna Carta, Article 41, stipulates that foreign merchants are to be safe and secure in entering and leaving England and travelling therein, and

[27] The ICRC study of customary humanitarian law is by Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol I: Rules* (International Committee of the Red Cross and Cambridge University Press 2005, revised 2009).

[28] Louise Doswald-Beck (ed), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Cambridge University Press 1995).

[29] United Nations Charter (n 5) art 13(1); UNGA Res 94(I) (11 December 1946), 'Progressive Development of International Law and its Codification', UN Doc A/RES/94(I).

that if they come from an enemy country in time of war, they may be detained only until it has been established whether English merchants in the enemy country were being properly treated and kept safe; if so, reciprocity was to be applied and the enemy merchants accorded the same treatment in England. That provision – which I am sure Napoleon would have considered typical of what he decried as a 'nation of shopkeepers' – was remarkably enlightened for its time and has had echoes in developments of humanitarian law in a much later age.

Lastly, there is what I consider to be by far the most important contribution of Magna Carta to international law: its influence on the development of human rights law. Magna Carta – and the tradition it helped to create in the common law world – have influenced international human rights law in at least three ways.

First, its rejection of the idea of absolute sovereignty of the king over his people and the idea of limited powers which developed from that rejection helped to steer the common law countries towards a similar rejection of the concept of absolute sovereignty in international law. It is easy today to forget that until quite recently many states maintained that the way in which a state treated its own people was no business of international law, or indeed of any other state or institution. Overcoming that concept of absolute sovereignty has been one of the most important triumphs of international law since the end of the Second World War and it has been indispensable to the creation of an international law of human rights.

In this respect, an important provision is tucked away towards the end of Magna Carta. Article 60 provides:

> All these aforesaid customs and liberties which we have granted to be held in our realm as far as it pertains to us towards our men, shall be observed by all men of our realm, both clerk and lay, as far as it pertains to them, towards their own men.

Like much of the document, this clause can be understood only in the context of feudalism. Just as the barons were the feudal underlings of the king, other men – knights and free men – were the feudal underlings of each baron. They were his 'men'. Article 60 requires the baron to accord to his men the same customs and liberties the king was now required to show his barons. Feudalism involved a series of petty sovereignties. The significance of Article 60 – which can hardly have been a great delight to the barons – is that the existence of feudal sovereignty did not exclude the law of the wider community from the relationship between the feudal lord (the petty sovereign) and those who owed him allegiance. No form of sovereignty – whether that of the king or that of a baron – was to give carte blanche for the ill-treatment of their subjects. In many ways it is that underlying principle, rather than the specific provisions on liberties, which is the chief contribution of Magna Carta to modern human rights law.

Secondly, as we have seen, Magna Carta *did* contain some provisions which have elements, however limited, of rights which are now important elements of any human rights treaty. Still more significant was the attachment to the idea of individual rights which Magna Carta helped to inspire and which, as I have tried to show, was developed in seventeenth century England and then eighteenth century America. Those concepts of rights have come a very long way from the

provisions of Magna Carta but they became an essential feature of the attitude of generations of those trained in the common law to the relationship between the state and the individual. In the critical years just after the Second World War, many people brought up in that tradition (or, like Hersch Lauterpacht, adopted by it) played decisive roles in the development of the human rights instruments which are so important to us today. Eleanor Roosevelt – who played such an important part in the adoption of the Universal Declaration of Human Rights – expressed the hope that it might become the Magna Carta for the international community.

Thirdly, Magna Carta eventually gave rise to another element of common-law thinking about human rights which has over time influenced international law. That is the importance attached to remedies. I have already referred to the fact that the requirement of legal cause for arrest or detention led to the evolution of habeas corpus, joined in time by other remedies for the vindication of rights. That has been a particular feature of the common law contribution to international human rights law: an insistence on remedies for the vindication of rights. Without the ability to seek a remedy before the various international human rights bodies – the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Court and Commission of Human Rights, the Committee against Torture and many others – the rights enunciated in the treaties would have been mere hollow statements in many countries. Magna Carta deserves some part of the credit for the development not just of rights but of the remedies to give effect to them.

4. CONCLUSION

In conclusion, then, let us set aside the extravagant claims that have been made for Magna Carta. A pact between king and barons 800 years ago is not the chief foundation for the modern law of civil rights in England or America. Still less is it the source to which all our modern international law of human rights can be traced. Today's international law owes debts to many legal systems: to the bold declarations of principles beloved of the French tradition, the constitutional detail of the German, as well as the pragmatic focus on problems and remedies of common law. Indeed, it is probably precisely that mixture which has produced such important progress in our own time. However, if we see Magna Carta in perspective, and concentrate not so much on what it said and did at the time as on the tradition to which it gave rise, what we see is something worth celebrating. Archbishop Stephen Langton, the barons and bad King John would doubtless be amazed at what they started. We, today, have reason to be grateful to them.