Detention in the 'War on Terror'

Can Human Rights Fight Back?

Fiona de Londras

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DETENTION IN THE ‘WAR ON TERROR’

Fiona de Londras presents an overview of counter-terrorist detention in the US and the UK and the attempts by both states to achieve a downward recalibration of international human rights standards as they apply in an emergency. Arguing that the design and implementation of this policy have been greatly influenced by both popular and manufactured panic, *Detention in the ‘War on Terror’* addresses counter-terrorist detention through an original analytic framework. De Londras argues that, in contrast to domestic law in the US and UK, international human rights law has generally resisted the challenge to the right to be free from arbitrary detention, largely because of its relative insulation from counter-terrorist panic. She argues that this resilience gradually emboldened superior courts in the US and UK to resist repressive detention laws and policies and insist upon greater rights-protection for suspected terrorists.

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Can Human Rights Fight Back?

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Do mo thuismitheoirí, Siobhán agus Tommy

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Introduction

> *It is when the cannons roar that we especially need the laws . . . Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and law. There is always law which the state must comply with. There are no 'black holes'.*[1]

Since the attacks of 11 September 2001, international terrorism[2] has emerged as a dominant concern in both domestic and international law and politics. The scale of the difficult questions that face democracies simultaneously trying to achieve security and maintain the principles of liberal democracy in the light of a significant terrorist attack is reflected not only in the emergence of the concept of the 'War on Terror' but also in the amount of law, literature and reflection that it has espoused. The attacks also ushered in an important change to the American psyche: they made Americans feel vulnerable, and they made American politicians strongly conscious of a popular demand for security to soothe that

[1] *Public Committee against Torture in Israel et. al. v Israel* (2006) HCJ 769/02, *per* Barak CJ, para. 61.

[2] Although there is a great deal of scholarship concerning the meaning and power of the word 'terrorism' and of the use of the term 'War on Terror', I do not engage with that debate here. Instead I take the word 'terrorism' on its own terms, as understood within the 'War on Terror' as violence emanating primarily from Al Qaeda and associated forces. For the scholarship on the concept and label of 'terrorism', see, e.g., R. Higgins, 'The General International Law of Terrorism' in Higgins, R. and Flory, M. (eds.), *Terrorism and International Law* (1997, London; Routledge), p. 14; B. Saul, *Defining Terrorism in International Law* (2006, Oxford; Oxford University Press), esp. Ch. 3; C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Trans. Schwab), (1985, Cambridge, MA; MIT Press); C. Schmitt, *The Concept of the Political* (Trans. Schwab), (1996, Chicago; University of Chicago Press); J. Friedrichs, 'Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism' (2006) 19 *Leiden Journal of International Law* 69; W. Lasser, 'Fighting Terrorism in a Free Society' in Slann, M. and Schechterman, B. (eds.), *Multidimensional Terrorism* (1987, Boulder, CO; Lynne Reiner Publications), p. 111; G. Andréani, 'The "War on Terror": Good Cause, Wrong Concept' (2004–05) 46 *Survival* 31.

vulnerability.[3] Americans were not alone in this: we *all* felt vulnerable in the wake of these attacks. Any of us observing the events of that day unfold would be hard pressed to forget the slow dawn of realisation that nothing would ever be the same again. The US had been attacked on its own soil. It had been rocked to its core and anyone who saw the towers of the World Trade Center fall must surely have been struck by the sheer audacity of the attack; of hijacking civilian aircraft and deliberately flying them into buildings in which people were beginning their working day. How could we possibly protect ourselves from such violence? What divided us from those passengers, those office workers and cleaners, those police and fire officers? Nothing did – nothing more than pure luck.

There is a tendency sometimes for us now, ten years after the event, to subscribe this kind of retelling to a file marked 'gullible melodrama' and instead to focus critically on the nature of the response. But regardless of what has happened since – of which more presently – we should recall the frailty and vulnerability that those events made us feel. This was true whether we resided in the US or not; it was perhaps particularly true for people such as Tony Blair who was Prime Minister of a country that not only had a close relationship with the US but was itself emerging from a long period of terrorist violence. The stage for some kind of action was set. That this action would end up lasting for a decade or more might not have been foreseeable, but that it would involve some kind of counter-terrorist detention perhaps was. After all, internment or preventive detention of suspected terrorists has long been a feature of counter-terrorism and responses to other kinds of violent threat.[4] It is this element of the 'War on Terror' that I am concerned with in this book and, in particular, the models of preventive and interrogative detention

[3] Vulnerability is, of course, a constant and universal state but can be exacerbated by social conditions and events that cause a 'spike'. See M. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008–09) 20 *Yale Journal of Law and Feminism* 1.

[4] D. Cesarani and T. Kushern (eds.), *The Internment of Aliens in Twentieth Century Britain* (1993, London; Frank Cass & Company Ltd.); R. Dove (ed.), *Totally un-English? Britain's Internment of 'Enemy Aliens' in Two World Wars* (2005, Amsterdam; Rodopi); C. Elkner, I. Martinuzzi O'Brien, G. Rando and A. Cappello, *Enemy Aliens: The Internment of Italian Migrants in Australia during the Second World War* (2005, Bacchus Marsh; Connor Court Publishing); K. McEvoy, *Paramilitary Imprisonment in Northern Ireland: Resistance, Management and Release* (2001, Oxford; Oxford University Press), Ch. 8; F. Iacovetta, R. Perin, and A. Principe, *Enemies Within: Italians and Other Internees in Canada and Abroad* (2000, Toronto; University of Toronto Press); R. Cohen-Almagor, 'Administrative Detention in Israel and Its Employment as a Means of Combating Political Extremism' (1996) 9 *New York International Law Review* 1.

introduced in the US and the UK primarily – although not exclusively – under the leadership of George W. Bush and Tony Blair. But if counter-terrorist detention is nothing 'new', what makes the story of its use in the 'War on Terror' worth considering here?

There are a number of factors that distinguish this scenario and make it a worthy locus of study. First is the context in which it has taken place: a context of internationalised security in an age of human rights. The US and the UK embarked upon their counter-terrorist detention policies while bound as a matter of international law by a system of human rights protection more detailed, more sophisticated and (at least rhetorically) more accepted on a normative basis than had existed the last time either state engaged in detention on this scale and of this nature (namely the Japanese-American internment in the US during World War II[5] and internment in Northern Ireland during 'the Troubles'[6]). Second, the world in 2001 was essentially unipolar: the Cold War had ended, the US had achieved a position of great prominence and the 'new' super powers such as India and China had not yet fully emerged. In addition, enormous emerging economies such as India and Brazil did not then (and still do not) hold a permanent seat carrying a veto in the UN Security Council. In this unipolar world the US enjoyed significant prominence and, indeed, would have considered itself able to act in an essentially imperialistic manner as conceived by Hans Morgenthau (i.e. power increasing)[7] with little or no resistance from other states or, indeed, from international human rights law. Third, the coalition of the US and the UK in the context of the 'War on Terror' constituted a powerful hegemon in the highly securitised world. In this context Gramsci's idea of hegemony as a consent-producing process, capable of shaping governing norms such as international laws and standards, explains the nature of this hegemon.[8] As Byers has noted, attempts to

[5] N. Taylor Saito, *From Chinese Exclusion to Guantánamo Bay: Plenary Power and the Prerogative State* (2007, Boulder, CO; University Press of Colorado).

[6] T.P. Coogan, *The Troubles: Ireland's Ordeal 1966–1996 and the Search for Peace* (1997, Boulder, CO; Roberts Reinhart Publishers).

[7] H. Morgenthau, *Politics among Nations: the Struggle for Power and Peace*, 5th edn., (1978, New York; Knopf).

[8] This model has been transposed to the international legal sphere by C. Bell, C. Campbell, and F. Ní Aoláin in 'The Battle for Transitional Justice: Hegemony, Iraq, and International Law' in Morison, J., McEvoy, K., and Anthony, G. (eds.), *Judges, Transition and Human Rights* (2007, Oxford; Oxford University Press), p. 147 at p. 153. Gramsci's original concept of hegemony is perhaps most clearly developed in his Prison Notebooks (1929–35). For a detailed consideration of Gramsci's concept of hegemony see, e.g., D. Litowitz, 'Gramsci, Hegemony, and the Law' (2000) *Brigham Young University Law Review* 515.

change generally applicable rules and norms in order to further state interests is typical behaviour on the part of a hegemon.[9] We will see in this book how the US and the UK have attempted to project their understandings of risk and appropriate state action to transform international human rights law's conceptions of both its applicability and the integrity of its content in relation to the right to challenge the lawfulness of one's detention.

At the beginning of the 'War on Terror' these three factors suggested to one familiar with neo-realist international theory and, perhaps, to the somewhat pessimistic or pragmatic student of international human rights law, that a number of things would happen in respect of counter-terrorist detention. One might have predicted that the US and the UK would either ignore or undermine the rights impacted, especially the right to be free from arbitrary detention and its safeguard right to challenge the lawfulness of one's detention; that they would attempt to project power in a manner that led to the downward recalibration of these rights; and that they would succeed in doing so because of international human rights law's susceptibility to power. One of the main questions I attempt to explore in this book is whether that hypothesis has been borne out in relation to the right to be free from arbitrary detention and, if not, why not.

My starting suspicion was that exploring this hypothesis would reveal a depressing picture of international human rights law bending to hegemonic will. This was not only because of the theoretical predictions that suggested this would happen, but also because of the potency of panic in (counter-) terrorist crises. In times of crisis and fear, panic can play an important and corrosive role in our levels of commitment to liberty and human rights, especially the rights of those considered to be 'other'. On its face, the aftermath of 11 September 2001 had all of the 'vital ingredients' for panic-related repression: a serious but unquantifiable risk, widespread and deeply felt fear, an impulse towards 'security', an 'othered' enemy, a security-conscious populace and a cadre of moral entrepreneurs ready to make the case that increasing their powers would also increase 'our' security. The executive and legislative approaches to counter-terrorist detention in the US and the UK generally displayed a panic-related character. The domestic legal system – or at least what we might term the 'political branches' thereof – had acted more or less as

9 M. Byers, 'Pre-Emptive Self-Defence: Hegemony, Equality and Strategies of Legal Change' (2003) 11 *Journal of Political Philosophy* 171.

anyone familiar with patterns of counter-terrorist law-making would have predicted. Although there are of course constitutional and political differences between the internal operation of the politico-legal systems in the US and the UK, and indeed these are taken into account throughout this book, there are identifiable commonalities in the ways in which these domestic systems reacted to the perceived or actual terrorist threat that materialised on 11 September 2001. Thus, we will see in Chapters 3 and 4 that extremely repressive counter-terrorist detention measures were demanded by the executive and facilitated by the legislature in both the US and the UK.

Reflecting their hegemonic coalition, the US and the UK attempted to project panic on the international sphere through their representations that Al Qaeda represented a new and uniquely dangerous kind of threat and that international human rights law did not apply at all or, where it did apply, ought to have recalibrated its standards downwards in order to reflect more properly the 'new realities' of global terrorism. Not only, then, was international human rights law to be subjected to exertions of power (as is arguably always the case), but also to exertions of panic intended to achieve a transformative mission of reducing the protection of the right to be free from arbitrary detention and, correlatively, the rights-based limits on the kinds of repressive actions states may engage in under the moniker of 'national security'. The stage was set; but the play that was acted out upon it seems to have been the performance of a different script.

International human rights law did not give in to power or panic when it came to the right to be free from arbitrary detention; it insisted upon maintaining the integrity of this norm and holding states to the pre-existing limits of emergency action (which were in any case already very broad, as outlined in Chapter 2). That is not to say that international human rights law has escaped unscathed; in fact, there are worrisome aspects of international law's reaction to the attacks from a rights-based perspective, but there has been a relatively good recovery and, as we will see in Chapter 5, the norm in question has exerted a great deal of resilience.

For someone who had expected to find the right to be free from arbitrary detention lying in tatters on the floor, this was a pleasant surprise. But it was also puzzling. It seemed to confound the capacity of power and panic to shape international human rights law. It did not disprove the general hypotheses around power and panic – and I do not mean in this book to suggest that it did – but it suggested their shakiness in this particular context; and that required some explanation.

We can begin to shape that explanation by embracing a textured understanding of panic that sees it as a phenomenon that has two dimensions: top-down manufactured (often 'moral') panic and bottom-up popular (genuinely felt) panic. I argue in Chapter 1 that thinking about panic as two-dimensional in this way, and the aftermath of a traumatic attack as a time in which the desires of both the state and the people coalesce to create a politico-legal space within which repression is possible, helps us distinguish between the domestic and international spheres. In contrast to domestic politico-legal systems, the international legal system is relatively insulated from the full brunt of panic. As outlined in Chapter 5, international human rights law enjoys more distance from the people and from panic, along the lines of structure, situation, constituency and constitutionalism, than domestic branches of government. As a result, international human rights law can protect its normative core more successfully than domestic law can, at least in the context of executive and legislative action. The story of international human rights law, then, reveals itself as one of normative resilience to power and panic that, while not absolute, is promising.

Normative resilience does not, however, do much for those individuals who are actually detained under the laws and policies of the US and the UK. Those individuals are essentially reliant on courts to help them secure their liberty from arbitrary detention, usually by means of challenging the lawfulness of that detention. Anyone familiar with the record of courts in protecting personal liberty during a crisis or emergency will know that the levels of optimism on this front would not have been particularly high at the outset. Domestic apex courts in the US and the UK do not have what one might call a glowing record of protecting the right to be free from arbitrary detention in times of violent emergency; rather, they have historically been extremely deferential to executive assertions of necessity. As I outline in Chapter 6, the record of these courts in the 'War on Terror' has, however, been unexpectedly positive. This is not to suggest that it has been perfect – for it has not – but there has been a noticeable reduction in deference that has forced the respective states to rethink and redesign their approach to counter-terrorist detention in a more rights-compliant way. There is at least an argument that this reduction in deference and increase in rights-protection might be a reflection of international human rights law's normative resilience.

That story of normative resilience and judicial resistance, directed towards protecting the right to be free from arbitrary detention and

the important safeguard right to challenge the lawfulness of detention through *habeas corpus* or its equivalent, is the story of detention in the 'War on Terror' that this book aims to tell. It does not purport to be the only possible reading of what has transpired over the past ten years, or to deny the repressive and brutal nature of the counter-terrorist detention that thousands of suspected terrorists have experienced since 2001, but I do think that it is an important and potentially promising one. It is a story of power, panic, resilience and resistance; a story of normative strength.

1

Panic, fear and counter-terrorist law-making

Domestic law-making processes tend not to cope particularly well in times of crisis. Panic, fear and populist impulses can conspire to create an atmosphere where the imperative turns towards combating a risk, and where that risk is presented and/or conceived of as being particularly grave or dangerous. The attacks of 11 September 2001 were without question events of such a magnitude as to strike fear into most people observing, not to mention the political leaders who found themselves faced with an enormous challenge. The immediate response to this challenge was, in some ways, unsurprising given our knowledge of law's lack of coping mechanisms in the context of crisis: the weight of both military and legal force was brought to bear on those considered to be responsible, the world (or at least most of it) rallied in support of the US, and there was a sense of having to communicate in strong and unequivocal terms that such acts of terrorism were entirely intolerable. The more long-term and systematic response, however, was not merely reactive; it also took an offensive and allegedly preventive form with the introduction of laws and policies (domestically and internationally) designed, we were told, to prevent a reoccurrence of such attacks. This book is concerned with one of the central planks of that response: the decision to detain suspected terrorists not only (or even primarily) with a view to preparing criminal charges against them but also as a preventive measure.

The use of detention, or internment, as a counter-terrorist measure was not, of course, an innovation. Internment has long been an important (although not necessarily successful) counter-terrorist tool.[1] That fact does not rid the use of detention in the 'War on Terror' of its importance as a locus of study, for here we had a situation where the

[1] A. Harding and J. Hatchard (eds.), *Preventive Detention and Security Law: A Comparative Survey* (1993, Dordrecht; Martinus Nijhoff); F. Frankowski and D. Shelton (eds.), *Preventive Detention: A Comparative and International Law Perspective* (1992, Dordrecht; Martinus Nijhoff).

governments of the US and the UK were introducing internment and arguing its necessity and legality not only as a matter of domestic law but also as a matter of international law. Where international law – and particularly international human rights law – did not permit of such counter-terrorist action it was, we were told, out of step with the 'new' realities of contemporary terrorism and the requirements of international security. The detention of suspected terrorists in the 'War on Terror', then, not only poses a challenge to the domestic politico-legal structures of the US and the UK but also to the normative fabric of the international human rights regime. Both are considered throughout this book. In this chapter, however, I want to outline the theoretical context within which policies, laws and representations around the detention of suspected terrorists have been advanced by the US and the UK and, especially, to reflect on the important role of panic within this process.

Throughout this book I will argue that in many ways the introduction and design of counter-terrorist detention in the 'War on Terror' reflects characteristics of panic-related law-making in which domestic rights protections, including normal political rigour, can become vulnerable to panic and fear. I argue that in order to understand properly the role that panic played in the creation and introduction of the detention policies of both the US and the UK, and the subsequent resilience of international human rights law against arguments that attempted to legitimate those policies, we need to embrace a thicker conception of panic than what legal theoretical analyses often embrace. While there is a wealth of literature on 'moral panic' – a type of manufactured panic whose effect is to create a swell of *support* for repressive measures – there is more to the story of panic than the manipulation of the people by a confluence of moral entrepreneurs. Rather, it seems to me that there is likely to be a real and genuinely felt panic that exists in the wake of serious terrorist attacks and which creates a *demand* for repressive action such as the detention of suspected terrorists. It is only through developing this thicker conception of panic that we can assess the panic-related characteristics of executive and legislative action on detention in the 'War on Terror' and the serious challenge posed to the well-developed structures of human rights law as these structures apply in emergencies.

Theorising panic

In times of panic or crisis there is a well-documented pattern of the expansion of state powers in order to 'protect' the populace against the

source of this panic.[2] Such patterns have been extensively theorised, particularly in criminology ('moral panic') and risk management scholarship ('risk society') and, when taken together, these theories have the potential to offer an interesting and insightful perspective on our understanding of counter-terrorist law-making. Much writing on panic and counter-terrorism has a tendency to see panic as being 'top-down' or primarily manufactured; a tool of state expansionism and popular manipulation. However, by contextualising 'moral panic' within a 'risk society', we can see that terrorism-related panic is more properly understood as both a bottom-up and top-down phenomenon, i.e. it is both a genuine social experience resulting in political pressure to 'protect' *and* a politically manufactured *milieu* that habitually enables expansions of state power under the banner of 'national security'. The significance of this confluence of interests is that the desires for extensive security measures from both the public and the government are in concert, thus creating a significant political space within which to introduce laws and policies that result in an expansion of state power. While panic theorists working primarily in criminology have long argued that panic-generation is part of a *Culture of Control*[3] in which states wish to introduce repressive measures, on their own these theories 'fail to explain why these politicians customarily get away with it'.[4] It is by embracing this fuller understanding of panic that we can more comprehensively analyse the introduction and execution of detention policies in the 'War on Terror'.

'Bottom-up' popular panic

It seems to me that, in the context of the 'War on Terror', the two states whose behaviour is the focus of this book – the US and the UK – have routinely 'gotten away with it' because their desire for expanded state power is (or, at least, was at one point) compatible with the public's desire for greater security. In this context, of course, we must get to grips

[2] See, e.g., L. Keith and S. Poe, 'Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration' (2004) 26 *Human Rights Quarterly* 1071; K. Mahoney-Norris, 'Political Repression: Threat Perception and Transnational Solidarity Groups', in Davenport, C. (ed.), *Paths to State Repression: Human Rights Violations and Contentious Politics* (2000, Lanham, MD; Rowman & Littlefield), p. 71.

[3] D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001, Oxford; Oxford University Press).

[4] M. Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (2005, Edinburgh; Edinburgh University Press), p. 59.

with who 'the public' are and whose security they are concerned with. In the context of the 'War on Terror' there has been a sharp redrawing of the lines between 'us' and 'them' in the political discourses in the US and the UK and, indeed, more broadly.[5] In the US the dominance of an almost caricatured patriotism offers some insight into where these lines are drawn, while in the UK the emergence of campaigns for 'British' values and dominance of debates around 'Britishness' have played a similar role.[6] The security desired by the public is a security for 'us'; for the 'folk saints',[7] the 'ordinary people', the 'victims'. Where that desire results in a lack of security and a lack of rights for the perceived 'folk devils'[8] – the perceived terrorist aggressors – this appears to be of minimal significance to the 'public'. This is even more so when those 'others' are, or are thought to be, usually non-citizens whose civic voice is either mute or dull, as is the case with many suspected terrorists in the 'War on Terror'. In this context, the division between 'us' and 'them' and the desire for 'security' – or at least for the feeling of safety – can create a popular (and populist) discourse that greases the wheels for state power to be expanded. That expanded power can then be exercised against those in relation to whom a limitation of rights does not have a visceral popular effect.[9]

Drawing on criminological theory, laws and policies that undermine or exclude suspected terrorists' means of challenging the lawfulness of their detention (i.e. *habeas corpus* or an adequate alternative) can be understood as types of what David Garland calls 'punitive segregation',[10] which are motivated by and resultant from both public and manufactured panic. According to Garland, punitive segregation is a 'reliance upon measures, above all incapacitative imprisonment, designed to

[5] See, e.g., S. Razack, *Casting Out: The Eviction of Muslims from Western Law and Politics* (2008, Toronto; University of Toronto Press).

[6] This has been evident both in political campaigns for a re-embrace of so-called British values and in the instalment of 'British values' in citizenship education. See, e.g., R. Andrews and A. Mycock, 'Dilemmas of Devolution: The "Politics of Britishness" and Citizenship Education' (2008) 3(2) *British Politics* 139 and the proposal for the development of a Statement of British Values in the *Governance of Britain: Green Paper* (2007) (2007; Cabinet Office).

[7] S. Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (1972, London; MacGibbon & Kee).

[8] *Ibid.*

[9] D. Cole, 'Their Liberties, Our Securities: Democracy and Double Standards' (2003) 31 *International Journal of Legal Information* 290, 292.

[10] Garland, *The Culture of Control*, p. 141. For a full analysis of the social and cultural support required, see *ibid.*, Ch. 5.

punish and exclude'[11] which attracts both 'cultural and social support'.[12] Preventive detention of suspected terrorists in the 'War on Terror' fits well within this model: it is represented as protecting society from individuals who are incapable of 'rehabilitation' and who are said to pose a threat to others. By such detention the government claims to be either pre-empting further terroristic assaults or protecting society from those it 'knows' to be involved in terrorism but who, for whatever reason, cannot currently (or sometimes ever) be subjected to a trial. Governments also do something tangible and visible to serve the public's demand for increased security: they take 'bad guys' off the streets and prevent them from plotting and commissioning further terrorist attacks. Or at least they appear to do so. Whether the detainees actually *are* 'bad guys' whose detention is both necessary and legally permissible, and whether the detention policy actually *does* increase security, are likely to be seen as tangential questions for a large portion of the panicked and frightened public. Thus public support for a detention policy of this kind can be connected to the sense of collective victimhood – together with perpetual, internationalised and perhaps unmanageable risk – that influences popular panic.

In his analysis of punitive segregation, Garland identifies 'collective victimhood' as an important element of the public support needed for governments to be able to engage in this kind of penalism. Building on the ever-more central role that victims play in the criminal justice system, Garland contends, is the concept of the victim as 'a representative character whose experience is assumed to be common and collective, rather than individual and atypical'.[13] In any situation, this new collective meaning of victimhood would play an important role in the amplification of one's feeling of being 'at risk' from crime that is vital to the privileging of people's demands for 'justice', 'protection' and 'prevention' and has been fundamental to the development of punitive segregation within the criminal justice system. In the wake of the 11 September 2001 attacks this must be even more the case, offering an interesting and important insight into popular support for counter-terrorist detention in the 'War on Terror' (or, at the very least, insufficient disagreement therewith to determine conclusively political accountability mechanisms such as elections[14]).

[11] *Ibid.*, p. 140. [12] *Ibid.*, p. 141. [13] *Ibid.*, p. 144.

[14] George W. Bush was re-elected President of the US in 2006, having commanded a popular majority. Terrorism, counter-terrorism and the war in Iraq were major issues in this election, with voters indicating significant support for the Bush Administration's

Garland explains the emergence of punitive segregation and collective victimhood primarily by reference to 'an historically distinctive experience of crime that began to take shape in the 1960s and 1970s'.[15] This experience comprised rising crime rates and the ensuing crime control crisis faced by government. While it cannot justifiably be said that the attacks of the 11 September 2001 and the subsequent attacks on the London transport network in July 2005 ushered in higher terrorism-related crime rates (not only because the events were aberrations but also because of the creation of new 'terrorism-related offences' in both the US and the UK after these events that would grossly skew any attempted crime rate analysis), the attacks can nevertheless be said to be 'an historically distinctive experience of crime' (or, more specifically, of a particular type of crime)[16] and, by extension, a distinctive experience of 'our' feeling of victimhood and of being at risk.

Although both the US and the UK had experienced terrorist-related violence prior to this, in some ways the attacks of 11 September 2001 and 7 July 2005 had a different and distinguishing character. The US's previous experiences of terrorism had largely happened in the distant past or overseas, although the reality of 'domestic' terrorism was starkly demonstrated by the Oklahoma City bombings in 1995, which were followed by, *inter alia*, the restriction of *habeas corpus* for individuals convicted of terrorism-related offences.[17] Distant attacks, while tragic

response to the 11 September 2001 attacks. Recent research suggests that national security, defence spending and foreign affairs remained an important consideration in the 2008 Presidential election, although the electorate was at that point less convinced of the merits of continuing the approach commenced by President Bush. Of course, other factors, including the economic crisis, played an important role in the 2008 election but foreign affairs and counter-terrorism remained a significant independent consideration: C. Brooks, K. Dodson, and N. Hotchkiss, 'National Security Issues and US Presidential Elections, 1992–2008' (2010) 39 *Social Science Research* 518. Tony Blair and the Labour Government succeeded in securing re-election in the UK in 2005, although the Labour majority was cut dramatically from 160 to 66 seats and the party lost 8 per cent of its popular support (down to 31 per cent). It was quite clear that involvement in the 'War on Terror' caused a reduction in support for Blair and the Labour Party. See, e.g., Gallup poll conducted by telephone 5–18 April 2005 showing significant dissatisfaction with Tony Blair: Gallup, 'Low Foreign Affairs Rating Dampens Blair Victory', 10 May 2005, available at: www.gallup.com/poll/16231/Low-Foreign-Affairs-Rating-Dampens-Blair-Victory.aspx (accessed 22 August 2010). At that point, however, the UK had not been directly targeted in the 'War on Terror'; that did not happen until the attacks on the London transport system on 7 July 2005.

[15] Garland, *The Culture of Control*, p. 147. [16] *Ibid.*

[17] Anti-terrorism and Effective Death Penalty Act of 1996, §301, 18 U.S.C. §2339B. For more on the American experience of terrorism prior to 2001, see, e.g., P. Heymann,

and condemned, offered a certain cognitive distance from the feeling of risk; a sense of risk that, while serious, was far away and certainly not suggestive of actors audacious enough to strike on US soil. That soil could be conceptualised as impenetrable, vulnerable only to random and isolated acts of violence (such as the Oklahoma City bombings) but generally 'safe' and 'secure'. The 'homeland' – as it has become known since 2001 – was sacrosanct.[18] '9/11' changed that.

The UK's past experiences were somewhat different, having dealt with decades of terrorism-related violence as a consequence of the Irish Republican Army's (IRA) campaign for Irish reunification, which in turn resulted in numerous limitations on liberty for suspected terrorists (including internment[19]) but in which *habeas corpus* remained available (although in a form so limited that some claim it was essentially worthless).[20] In contrast to the IRA, however, attacks led by Al Qaeda seem to have been felt and represented as historically unique events. Not only were Al Qaeda 'terrorists' but they were a different kind of terrorist: more organised, more fanatical, less discriminating, more ruthless, more ideological and (crucially) willing to give their lives in suicide attacks. Thus, even for communities and populations that were in some ways attuned to 'coping' with terrorist violence, the attacks led by Al Qaeda were – we were told – more dangerous and, by implication, more difficult to counter than the kinds of threats that had previously existed. This new risk was a risk that reached into the depths of mundanity and that applied to each of us as individuals going about our daily business. Furthermore, it was a risk that could not easily be managed. We were all potential direct victims of this violence; our way of life was, we were told, at risk.

Not only were Al Qaeda said to be a 'different' and 'more dangerous' kind of threat than, for example, the IRA, but the 'collective cultural experience'[21] of the attacks and their aftermath was also different.

Terrorism and America: A Commonsense Strategy for a Democratic Society (1998, Cambridge, MA; MIT Press).

[18] J.P. Dobel, 'The Rhetorical Possibilities of "Home" in Homeland Security' (2010) 42 *Administration & Society* 479.

[19] For a full account of internment in Northern Ireland see, e.g., B. Dickson, *The European Convention and the Northern Ireland Conflict* (2010, Oxford; Oxford University Press), Ch. 4.

[20] See, e.g., C. Walker, 'Clamping Down on Terrorism in the UK' (2006) 4 *Journal of International Criminal Justice* 1137; B. Dickson, 'The Detention of Suspected Terrorists in Northern Ireland and Great Britain' (2009) 43 *University of Richmond Law Review* 927.

[21] Garland, *The Culture of Control*, p. 147.

On 11 September 2001 millions of people around the world watched the planes being flown into the World Trade Center on 24-hour news channels and the internet; thousands were stranded in airports in the US and further a-field in the aftermath of the attacks; the attacks resulted in the deaths of people from over ninety different countries and, since then, we have all become accustomed to increased delays and security procedures not only at our airports and other transport infrastructures but also when visiting tourist sites, court houses, libraries, schools and so on. Terrorism, and particularly so-called 'Islamist' terrorism, has become a recurrent theme in popular culture such as movies and television shows, where we are shown not only the danger posed by terrorism but also the kinds of measures (many of which are clearly illegal) that security forces apparently 'must' engage in to counter this danger.[22] Security concerns and terrorist risk have been wired into our grammar and the experience of terrorist crime, although confined to a relatively small number of people in first degree terms, has weaved 'its threads of meaning into every individual encounter, and is, in turn, inflected and revised by the thousands of such encounters that take place every day'.[23] Not only that, but the language and concept of doing 'whatever it takes' to counter this threat has become normalised in political, cultural and sometimes academic[24] discourse. This normalisation takes place against the background of what Aogán Mulcahy terms 'signal events' that interlink the experience of the individual to that of the collective and further collectivise the feeling of victimhood.[25] In this context fear is understandable, but so too is panic; panic that emerges not only from this personal fear but also from the sense that the cause of this fear – the risk – is of enormous, perhaps even uncontrollable, proportions.

In this sense, placing collective victimhood in the context of the, by now, well-documented feeling of perpetual risk in a globalised society seems to establish the conditions for genuinely felt public fear and panic.

[22] Perhaps the most well-known example is the Fox series, *24*, in which the main protagonist, Jack Bauer, engages in techniques, including torture, in order to prevent an apparently imminent attack without, it seems, grappling to any extent with the moral or legal questions surrounding his decision to use such methods. See J. Brikenstein, A. Froula and K. Randell (eds.), *Reframing 9/11: Film, Popular Culture and the 'War on Terror'* (2010, London; Continuum).

[23] Garland, *The Culture of Control*, p. 147.

[24] For an analysis see, e.g., C. Gearty, 'Legitimising Torture – With a Little Help' *Index on Censorship* 1 (2005).

[25] A. Mulcahy, *Policing Northern Ireland: Conflict, Legitimacy and Reform* (2006, Cullompton; Willan).

The feeling of perpetual risk that accompanies (and in a way characterises) an ever-developing and globalising world was theorised by Ulrich Beck in his *Risk Society: Towards a New Modernity*.[26] Beck's 'risk society' refers to an age of post-modernity in which catastrophic risk is incalculable. Although applied rationality can continue to govern risk in closed systems, the number of social interactions that can be described as taking place in closed systems is shrinking. Rather, the contemporary globalised world is dominated by openness and with this openness comes the incalculable risk of the distribution of 'bads'. For Beck '[t]he axial principle of industrial society is the production and distribution of goods, while that of the risk society is the distribution of bads'.[27] In other words, industrialisation produces 'bads' as a by-product and those 'bads', which are incalculable risks, have the capacity to affect everyone equally; social class, status and so on have no protective force. These 'bads', which Berry divides into 'hazards of creation' (e.g. earthquakes) and 'hazards from human agency' (e.g. the use of chemical weapons)[28] create perpetual risk from which we cannot escape and which we cannot successfully manage (or at least not by application of conventional concepts of rationality). Of course, in many ways, it is the global and globalised nature of these risks that suggests their uncontrollability and unmanageability:

> At the centre lie the risks and consequences of modernization, which are revealed as irreversible threats to the life of plants, animals and human beings. Unlike the factory-related or occupational hazards of the nineteenth and the first half of the twentieth centuries, these can no longer be limited to certain localities or groups, but rather exhibit a tendency to globalization which spans production and reproduction as much as national borders, and in this sense brings into being supranational and non-class-specific global hazards with new types of social and political dynamism.[29]

Although terrorism does not fall easily into Beck's category of risks produced by the industrial system, the contemporary risk from terrorism (or at least the popular perception of it) can be constructed within this framework. Politicians and lawmakers tell us that the modern

[26] U. Beck, *Risk Society: Towards a New Modernity* (Trans. M. Ritter), (1992, London; Sage Publications).
[27] *Ibid.*, p. 3.
[28] A.J. Berry, 'Leadership in a New Millennium: The Challenge of the "Risk Society"' (2000) 21 *The Leadership and Organization Development Journal* 5, 6.
[29] Beck, *Risk Society*, pp. 12–13.

'Islamist' terrorist is unscrupulous and quite prepared to make use of some products of industrialisation, such as nuclear and chemical weapons. While the risk of the use of nuclear and chemical weapons has prevailed for some time, their construction as something within the gift of states alone has allowed for their risk management through, for example, the exercise of preventive diplomacy in the Cold War.[30] States operate within an international system that at least tries to minimise risk by the construction of rules and the balancing of power.[31] Terrorists and terrorist organisations, however, do not operate within any such structure and are represented as transacting only with states that do not engage in international relations in a full or *bona fide* manner, i.e. the so-called 'rogue states'. As a result, the likelihood of them using tactics like the use of nuclear or chemical weapons cannot easily be predicted, minimised and managed.[32] Quite apart from the use of chemical and nuclear weapons, terrorist actions now have a global reach through ease of travel and the globalisation of networks and infrastructure, while the assumed irrationality of terrorist activity (and especially the lack of regard for the safety of oneself or of others) makes managing this risk appear virtually impossible. We know there is a risk, we feel victimised by it, and we demand a security or risk-management strategy from our leaders. The fact that we are all potential victims of terrorist violence, the realisation (spoken or unspoken) that we cannot reasonably manage out all risk, and the cognitive practice of distinguishing 'us' from 'them', set important and demanding conditions for action to calm us.

Thus, when one combines the feeling of collective victimhood identified and theorised by Garland with the trauma of the attacks of 11 September 2001, and one locates them within the context of a risk society as developed by Beck, the public's apparent propensity towards reactive and allegedly 'protective' policies – such as punitive segregation by means, in this context, of 'internment' without effective

[30] See, e.g., L. Jentleson,'Preventive Diplomacy: A Conceptual and Analytic Framework' in Jentleson, L. (ed.), *Opportunities Missed, Opportunities Seized: Preventive Diplomacy in the Post Cold War World* (2000, New York; Carnegie Commission on Preventing Deadly Conflict), p. 3.

[31] On the 'balance of power' and deterrence within the international community see further K. Waltz, 'Nuclear Myths and Political Realities' (1990) 84 *American Political Science Review* 731.

[32] For more contemporary literature on nuclear and chemical risks associated with 'modern' terrorism see, e.g., W. Laquer, 'Review Essay: Clashing Perspectives on Terrorism: The New Terrorism, Fanaticism and the Arms of Mass Destruction' (2000) 94 *American Journal of International Law* 434.

review – becomes comprehensible. People feel afraid and panicked because they are traumatised, feel victimised and appear to be unable to manage the risk of further and perhaps more destructive terrorist attacks. As Ignatieff notes, the popular instinct at a time of risk is primarily towards security and 'the majority of citizens are likely to believe that risk trumps rights, while only a civil libertarian majority is ever likely to believe that rights should trump risks'.[33] The close relationship between the populace and the law and policymakers – most notably through the electoral process – may then communicate this panic and preference for security to those in a position to 'manage' the risk by (appearing to) enhance security, namely the executive and the legislature. Not only that, but the processes by which we might normally expect some resistance within the legislative process to repressive executive policies can be severely dampened where 'national security' is said to be at issue and there appears to be a popular (or at least populist) urge towards the same. So in a fused Executive-Legislature[34] such as that found in the UK, the government's general capacity to command a majority can be bolstered by the imposition of a three-line whip (to prevent backbencher 'revolt') as well as by the change in political imperatives for opposition politicians, who must now be seen to respond to popular concerns and support measures that the executive represents as protecting national security. Even in systems such as that found in the US, where the party-political system does not generally produce voting patterns that are rigidly whipped and party-dependent (although such patterns do certainly occasionally arise), the representation of measures as 'required' in the face of a serious threat to the Union can result in the coalescence of voices across parties in support of the executive's proposed policies and, indeed, in the transfer of extensive discretionary powers to the executive in the name of national security.[35] Indeed, as we will see in Chapter 4, this is what has happened in relation to national security in the US in particular since the 11 September 2001 attacks. Thus, I argue that

[33] Ignatieff, *The Lesser Evil*, p. 59. Ronald Dworkin considers this question in the context of the American attitude to the 'War on Terror' and, in particular, to the use of detention and coercive interrogative methods including torture, shaping it as an essentially moral question: R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (2006, Princeton and Oxford; Princeton University Press), Ch. 2.

[34] By this I mean a system in which the executive sits in and usually holds a majority of the legislative body.

[35] I previously made this argument in my contribution to F. de Londras and F.F. Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight' (2010) 30 *Oxford Journal of Legal Studies* 19.

political actors are clearly influenced by the fears, panics and desires of the public. That fear and panic can be shaped by a number of factors and can be genuinely felt. It can, in other words, represent a real and pressing 'bottom-up' panic and pressure for repressive measures that will enhance security or, at the least, give the impression of doing so.

'Top-down' manufactured panic

As well as being influenced by these bottom-up impulses, political actors (especially those currently in power) may have an interest in perpetuating and, some argue, generating panic because of the potential that it offers to implement laws and policies that expand state power to the detriment of individual liberties (and often to the disproportionate detriment of marginalities).[36] Where, as in the case of detention policies and laws introduced in the 'War on Terror', the individuals whose liberties are most affected are perceived or represented as being 'other' than those in whom panic is primarily generated, the political exercise of manufacturing and acting upon panic is most likely to be successful if people succumb to a skewed representation that we must trade some liberty for security, but which actually licenses the state to 'do unto the rights of others whatever it takes to make me feel more secure'.[37] Through the moral exercise of naming acts and actors as 'terrorist' this 'othering' is perpetuated.[38] This is then added to the prevailing discourse of 'necessity' that Leonard Feldman has characterised as having three meanings (all of which are connected): (1) crisis or urgency,

[36] See, e.g., M. Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4, esp. 31–2; Cole, 'Their Liberties, Our Security'; J. Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *Journal of Political Philosophy* 191. Some scholars do not deny the potential for expanded state powers in times of crisis or emergency but deny that they are likely to be abused – or at least that the benefits of expanding state powers outweigh any potential losses associated with their misuse. For the strongest expression of this view, see E. Posner and A. Vermeule, *Terror in the Balance: Security, Liberty and Courts* (2007, New York; Oxford University Press); E. Posner and A. Vermeule, 'Emergencies and Democratic Failure' (2006) 92 *Virginia Law Review* 1091; E. Posner and A. Vermeule, 'Accommodating Emergencies' (2003) 56 *Stanford Law Review* 605. For a detailed consideration of these competing views see F. Ní Aoláin and O. Gross, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2007, Cambridge; Cambridge University Press), pp. 79–85.

[37] D. Luban, 'Eight Fallacies about Liberty and Security' in Wilson, R. (ed.), *Human Rights in the 'War on Terror'* (2005, Cambridge; Cambridge University Press), p. 242 at p. 243.

[38] For more on the moral power of the label of 'terrorist' see, e.g., F. Gareau, *The United Nations and Other International Institutions: A Critical Analysis* (2003, Chicago, IL; Burnham), pp. 244–50 (on the political act of fashioning agendas and labels in order

(2) indispensability of the proposed action, and (3) inevitability of the proposed action (in the sense of the state representing itself as doing whatever is required for the good of the nation).[39]

At this point it is worth acknowledging that there may, in fact, be perfectly good reasons to detain suspected terrorists, especially in the immediate aftermath of an attack when the scale and scope of the threat is not yet clear. However, short-term detention of that kind is quite different – and raises different challenges – to the type of protracted detention, often without any effective review, that has been used in the course of the 'War on Terror'. Since 2001, we have seen 'suspected terrorists' being identified by various actors (military, intelligence, police, bounty hunters, etc) and detained or subjected to measures analogous to 'house arrest', their status determined either arbitrarily or by a tribunal of some nature whose decision is subject to only limited review, given restricted access to counsel, not guaranteed a trial or to be informed of the basis for their detention, deprived of visits from their family, and uncertain as to when – or how – they will ever be released from detention. On a political level, such a state of affairs can be justified only if it can be shown to be objectively required; that there is no other appropriate course of action whereby security is protected and liberties are infringed upon to the least possible degree. In legal systems in which inchoate and terrorist offences (including conspiracy) are recognised, all actions carried out by 'terrorists' are already prohibited by the criminal law, high security prisons exist and there is the potential to amend the legal system in order to take into account the exigencies of particularly security-sensitive areas (as has already happened in various areas of law in the US and the UK),[40] it is

to facilitate political agendas); R. Leeman, *The Rhetoric of Terrorism and Counter-Terrorism* (1991, New York; Greenwood Press), p. 2; J. Friedrichs, 'Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism' (2006) 19 *Leiden Journal of International Law* 69, 70 (drawing in particular on the work of Carl Schmidt); W. Lasser, 'Fighting Terrorism in a Free Society' in Slann, M. and Schechterman, B. (eds.), *Multidimensional Terrorism* (1987, Boulder, CO; Lynne Reiner Publications), p. 111 at p. 113; H. Hess, 'Like Zealots and Romans: Terrorism and Empire in the 21st Century' (2003) 39 *Crime, Law and Social Change* 339, 339.

[39] L. Feldman, 'The Banality of Emergency: On the Time and Space of "Political Necessity"' in Sarat, A. (ed.), *Sovereignty, Emergency, Legality* (2010, Cambridge; Cambridge University Press), p. 136 at p. 136.

[40] In the US the Foreign Intelligence Surveillance Court was established to consider sensitive information while safeguarding liberties (this court was established under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801 *et seq.*) and oversees the granting and implementation of warrants for surveillance of suspected foreign intelligence officers

difficult to understand why suspected terrorist detainees have been denied *habeas corpus* or have had their capacity to subject their detention to review severely limited. Legal justification for widespread detention of this character seems possible only if both domestic rights protections and the limits on national security action laid down in international human rights law are adhered to. As outlined in full in Chapter 2, in 2001 international human rights law in fact offered a quite sophisticated and flexible emergency paradigm to the US and the UK upon which their actions could have been modelled. As I have argued elsewhere, that system offered 'sufficient inbuilt flexibility that, coupled with appropriate derogations where necessary, would allow for an effective system of detention in which detainees could challenge the lawfulness of their detention to be constructed'.[41] The decision to reject this model and the lessons learned in the process of its design is telling. It is also important to recognise that the decisions of law- and policymakers relating to detention-review display panic-related characteristics. The decision to elect not only for detention but, to the extent (thought) possible, detention that was *unreviewable* in any meaningful sense ought, I argue, to be read as a decision reached on the basis of *both* publicly felt popular panic and anxiety about terrorism *and* politically manufactured panic about terrorism (and suspected terrorists) that allows for the expansion of state powers in this manner.

The concept of manufactured panic has long been prominent in the criminal law academy, with particular emphasis on Stanley Cohen's theorisation of what he terms 'moral panic'.[42] Cohen argues that moral panic is a reaction by the media, the public, law enforcement, politicians and legislators to a 'condition, episode, person or group of persons'[43] whose behaviour is identified as deviant and therefore a risk to society. In his classical statement of the phenomenon, Cohen wrote:

within the US. In the directly relevant example of review of the detention of suspected terrorists in the UK, Special Advocates are made available in order to make pleadings on behalf of suspected terrorists subject to control orders under the Prevention of Terrorism Act 2005 (and previously detained under the Anti-terrorism, Crime and Security Act 2001) in situations where evidence is of a particularly sensitive nature from a security perspective. The Special Advocate is considered in Chapter 4 below.

[41] F. de Londras, 'The Right to Challenge the Lawfulness of Detention: An International Perspective on US Detention of Suspected Terrorists' (2007) 12(2) *Journal of Conflict and Security Law* 223, 258.

[42] Cohen, *Folk Devils.* [43] *Ibid.*, p. 9.

> Societies appear to be subject, every now and then, to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians, and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted; the condition then disappears, submerges or deteriorates and becomes invisible.[44]

The emergence of a moral panic is dependent on the reactions of a variety of actors to the perceived threat in question. The public ought to experience some element of concern in relation to the subject of the panic, which, as considered above, is present in the context of contemporary terrorism. Very often this concern is exacerbated (or even caused) by the media's coverage of events. The combination of media sensationalism and public concern typically results in law enforcement agencies identifying themselves as central to the protective battle against the perceived wrongdoers. In particular, police services and sometimes the military may represent themselves as the 'thin blue line' between order and disorder. These agencies typically then engage in what Cohen calls diffusion, or the formation of networks at local, national and potentially international levels in order to respond better to the threat. In this they are frequently facilitated by political actors and lawmakers who introduce new legislation or policies to deal with the perceived wrongdoers.[45] This political and legislative reaction is, in many cases, shaped by the proposals and actions of 'moral entrepreneurs': actors who assert that pre-existing policy and legislative devices are insufficient to guard society against the current threat and advocate new, very often draconian, measures in their stead.

The combined force of these actors is then applied, through repressive laws and policies, to the subjects of the panic. These subjects are usually individuals or groups of individuals who share some discernible common characteristic and are socially constructed as incontrovertibly 'bad' 'folk devils'. As documented in Chapter 3, for example, for some time the push in the UK for the further expansion of pre-charge detention in terrorism-related cases appeared to emanate largely from the

[44] *Ibid.*, p. 9.

[45] Ann Marie Slaughter has identified a similar pattern of diffusion, which she calls disaggregation, by states on the international sphere, suggesting that diffusion of panic might occur on both domestic and international levels; see A.M. Slaughter, *A New World Order* (2004, Princeton; Princeton University Press).

higher echelons of the police – a significant moral entrepreneur within the model of moral panic. Whether or not certain policy and legislative measures have been motivated by moral panic can be assessed by reference to five indicators outlined by Goode and Ben-Yehuda:[46] concern, hostility, consensus, disproportionality and volatility.

Various polling data suggest that public concern about terrorism in both the US and the UK was significant in the immediate aftermath of the attacks. Numerous public polls taken in recent years suggest that this requirement is satisfied. Almost one month after the attacks, a poll conducted by the *New York Times* and CBS News showed that 78 per cent of Americans believed that it was very likely or somewhat likely that there would be another terrorist attack on the US. In the same poll, 79 per cent of respondents thought that 'Americans will have to give up some of their personal freedoms in order to make the country safe from terrorist attacks'. This result was further reflected in the fact that 69 per cent of respondents said they would be willing to arrive at least three hours early for domestic flights for security reasons, 87 per cent favoured more security checkpoints at public events and buildings, 45 per cent would be willing to allow government agencies to monitor the telephone calls and e-mail of 'ordinary Americans' on a regular basis, 56 per cent would be prepared to support mandatory 'smart' national identity cards, and 90 per cent of respondents thought it was very likely or somewhat likely that Arab Americans, Muslims and people from the Middle East would be singled out unfairly by Americans.[47] Although these results were influenced by the temporal proximity of the poll to the attacks themselves, the general sentiment of anxiety around terrorism remains relatively constant in recent polls on terrorism in the US.

A Gallup poll conducted in August 2006 found that 45 per cent of respondents were very worried or somewhat worried that someone in their family would become a victim of terrorism (compared with 58 per cent in the Gallup poll taken on 11 September 2001), 50 per cent of respondents felt that it was very likely or somewhat likely that there

[46] E. Goode and N. Ben-Yehuda, *Moral Panic: The Social Constructions of Deviance* (1994, Oxford; Blackwell). According to Claire Hamilton, this work was an attempt to bridge the growing gap between American and British writing on moral panic and to identify a unified theory with five central characteristics; see C. Hamilton, 'Moral Panic Revisited: Part One' (2005) 15 *Irish Criminal Law Journal* 8.

[47] The poll was based on telephone interviews carried out with 983 adult respondents across New York City between 6 and 9 October 2001. The full results of the poll can be accessed at: www.nytimes.com/2001/10/13/nyregion/13POLL.html?ex=1180670400anden=d8798adfc5c47203andei=5070 (last accessed 30 May 2007).

would be further acts of terrorism in the US over the several weeks following the poll, 53 per cent felt that Americans had permanently changed their way of life as a result of the attacks, 53 per cent of respondents favoured requiring 'Arabs, including those who are U.S. citizens' to undergo special security checks before boarding airplanes, 72 per cent of respondents felt that the actions of government agencies responsible for preventing terrorism in the US had made the country a lot safer or a little safer, and 66 per cent of respondents felt that Congressional reactions to terrorism had made the country a lot safer or a little safer (although only 30 per cent of respondents felt that the presidency of George W. Bush prevented further terrorist attacks).[48] Even more recently – some nine years after the 11 September 2001 attacks – concern around terrorism remained high in the US. Although a Gallup poll taken at the end of August 2010 found that only 1 per cent of Americans now consider terrorism to be the *most* important challenge facing the country,[49] 75 per cent of Americans polled ranked terrorism as either extremely important (47 per cent) or very important (28 per cent) in their decisions on who to vote for in the 2010 mid-term elections.[50] Of course, since 2001 a number of factors have intervened to explain why terrorism is no longer considered the most important challenge to the US, not least among them a protracted and extreme economic crisis as well as wars in Iraq and Afghanistan. Nonetheless, in voting behaviour – the kind of behaviour that politicians can most easily measure – anxiety around terrorism seems to remain high and how a politician would deal with the terrorist challenge is still a very important consideration for three-quarters of the electorate. In the same poll, 55 per cent of those asked considered that Republicans would 'do a better job of dealing with'

[48] Gallup's 'Pulse of Democracy' poll on terrorism in the US consists of the same questions being asked on a periodic basis in order to track public opinion and responses to the terrorist threat to the US. The results were formerly available at: www.galluppoll.com/content/default.aspx?ci=4909 (last accessed 30 May 2007).

[49] F. Newport, 'Nine Years after 9/11, Few See Terrorism as Top U.S. Problem', presentation of poll results available at: www.gallup.com/poll/142961/Nine-Years-Few-Terrorism-Top-Problem.aspx (last accessed 22 September 2010). The poll was based on telephone interviews conducted from the 27–30 August 2010, with a random sample of 1,021 adults, aged 18 and older, living in the continental US, selected using random-digit-dial sampling.

[50] J. Jones, 'Americans Give GOP Edge on Most Election Issues', presentation of poll results available at: www.gallup.com/poll/142730/Americans-Give-GOP-Edge-Election-Issues.aspx (last accessed 22 September 2010). The poll was based on telephone interviews conducted from 27–30 August 2010, with a random sample of 1,021 adults, aged 18 and older, living in the continental US, selected using random-digit-dial sampling.

terrorism. While the sentiment really expressed by this figure is difficult to assess (what constitutes 'do[ing] a better job'?), the implication is certainly of an endorsement of the counter-terrorist approach championed by the Republican Party and the Bush Administration; an approach that included an aggressive and process-phobic detention policy as one of its central planks.

Polling data from the UK show similar results in the light of the 7/7 attacks, with relatively high anxiety related to terrorism. In contrast to the polling data suggesting support for congressional activity in the US, however, an ICM/Guardian poll taken during the debates on the Terrorism Act 2006 found that only a slim majority of people supported the Prime Minister's proposals for 90-day detention, with 46 per cent feeling either that 28 days – the detention period agreed by Members of Parliament – was about right, or that even 28 days was too long to hold anyone without charge.[51] That public concern about the scale of the threat from terrorism remains high is reinforced by the Harris Interactive poll from January 2007, in which it was found that adults in both the US and the UK regard terrorism as 'the greatest challenge facing the planet today'.[52] Nine years after the attacks of 11 September, and five years after the attacks on the London transport system, polling data suggests that anxiety around terrorism remains very high in the UK, with 59 per cent of people polled in July 2010 opining that a terrorist attack on the UK was either very likely or moderately likely within the next twelve months.[53] Although the timing of that poll was important (it took place in the same month as the five year anniversary of the 7/7 attacks), it nevertheless suggests significant anxiety or at least awareness of the terrorist threat.

The second element identified by Goode and Ben-Yehuda is hostility, i.e. there must be an element of increased hostility towards a group or category of persons perceived to engage in unfavourable behaviour. In other words, a clearly identifiable element of society must be seen as

[51] T. Branigan, 'Blair wrong to push for 90 days say voters' *The Guardian* 12 November 2005.

[52] Results of a Harris Interactive study for France 24 and *The International Herald Tribune* conducted in France, Germany, Italy, Spain, the UK and the USA, among adults ages 16 and over, available at: www.marketresearchworld.net/index.php?option=com_content&task=view&id=1068&Itemid=77 (last accessed 21 February 2011).

[53] Angus Reid Global Monitor, 'Most Britons Fear a Terrorist Attack in the Next Year', results presented on www.angus-reid.com/polls/view/most_britons_fear_a_terrorist_attack_in_the_next_year/ (last accessed 22 September 2010). The poll was based on online interviews with 1,980 British people, conducted 15–16 July 2010.

responsible for the threat. In the context of the contemporary terrorist threat it appears that this hostility operates on two separate levels. On the one hand, there is an almost unanimous feeling that terrorist violence is unjustified and that 'terrorists' are the group responsible for the social anxiety being experienced. The label of 'terrorist', as well as the nature of terrorist activity, makes this level of hostility problematic, for not only is there no clear and unambiguous definition of a 'terrorist'[54] but people who engage in terrorism do not generally clothe themselves in uniforms or make themselves visually distinctive from others. As a result, the social group perceived to hold the majority of 'terrorists' appears to become the target of hostility: in this case that social group seems to consist of Arab Muslims, particularly those who comply with religious dress codes. By means of example, an online poll conducted in July 2010 revealed that 58 per cent of people surveyed said they associated Islam with extremism and 50 per cent associated Islam with terrorism.[55]

Widely reported increases in Islamophobic abuse seems to testify to this increased hostility. The European Monitoring Centre on Racism and Xenophobia reported in February 2003 that there had been an increase in violence against Muslims and an increasingly negative portrayal of Muslims in the media since the attacks on the World Trade Center.[56] In addition, legislation has been introduced in various countries forbidding the wearing of manifestations of religious belief in public spaces that is perceived as disproportionately affecting Muslims. Although such legislation has not been introduced in either of the case study nations, it has been seriously mooted in the UK where the wearing of the *niqab* in particular has been said to make 'better, positive relations between the two communities [Muslim and non-Muslim] more difficult' (Jack Straw MP).[57] In addition, much of the legislation introduced to 'fight

[54] International law notoriously lacks an agreed definition of terrorism and, while the UK and the US have statutory definitions of 'terrorism', they both include ambiguous definitional aspects (such as 'links with' or 'support of' terrorism) and extend beyond the vernacular conception of terrorism.

[55] "Islam Associated with Terrorism, Poll Shows", *Telegraph Online*, 7 June 2010. Available at: www.telegraph.co.uk/news/newstopics/religion/7808309/Islam-associated-with-terrorism-by-public-poll-shows.html (last accessed 22 September 2010).

[56] C. Allen and J. Nielson, 'Summary report on Islamophobia in the EU after 11 September 2001' (2002; European Union Monitoring Centre on Racism and Xenophobia).

[57] For more on the 'niqab debate' in the UK see, e.g., J. Sturke, 'Straw: I'd rather no one wore veils', *The Guardian*, 6 October 2006; on clothing codes in the UK generally, see, e.g., R. Lewis, *Gendering Orientalism: Race, Femininity and Representation* (1996, London; Routledge).

terrorism' has a disproportionate impact on the everyday lives of Muslims, particularly in carrying out religious practice. By means of example, stop and search powers are disproportionately used against Muslims (or people who 'appear Muslim'), Muslim clerics are routinely monitored for 'radicalism' in their sermons and other religious addresses, mosques are frequently placed under surveillance, and racial profiling has become a routine and accepted policing tactic.[58] This increased hostility and its manifestation (and, indeed, bolstering) through legislative and other measures seems to create a social division in which one group of people – 'radical' Muslims or 'Islamists' in popular parlance – is identified as the clear threat to society, made responsible for the perceived danger, and represented as incontrovertibly 'bad'.[59] This representation of 'good' and 'bad' is carried over into political speech; the language of 'good' and 'evil', 'civilised' and 'barbaric' was frequently used by both George W. Bush and Tony Blair.[60]

Not only must there be hostility, but Goode and Ben-Yehuda maintain that there must be some level of consensus around the proposition that there is a real and serious threat that is caused by the demonised group and their behaviour. The accuracy of such a belief is essentially irrelevant; its prominence and currency in popular culture,[61] and popular electoral discourse,[62] is what is significant, for it reflects the consensus required to assign blame to the demonised group and support policies – such as detention without review – introduced on the basis of this belief. In the case of security-related panics that occur in

[58] For more on the disproportionate impact of these laws on Muslims see, e.g., J. Rehman, 'Religion, Minority Rights and Muslims of the United Kingdom' in Rehman, J. and Breau, S. (eds.), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (2007, The Hague; Martinus Nijhoff), p. 521.

[59] For more on the representation of Muslims as a threat by the media, politicians, public, interest groups, and foreign-policy elites, see further F. Gerges, 'Islam and Muslims in the Mind of America' (2003) 588 *Annals of the American Academy of Political and Social Science* 73.

[60] On the use of rhetoric in the 'War on Terror' generally, including the use of good v. evil motifs, see J. Meierhenrich, 'Analogies at War' (2006) 11 *Journal of Conflict and Security Law* 1, esp. 17–20.

[61] For considerations of the representations of Al Qaeda in popular culture, see, e.g., M. Mamdani, 'Good Muslim, Bad Muslim: A Political Perspective on Culture and Terrorism' (2002) 104 *American Anthropologist* 766; L. Spigel, 'Entertainment Wars: Television Culture after 9/11' (2004) 56 *American Quarterly* 235.

[62] For more on the role and representation of Al Qaeda in political discourse see, e.g., F. Cohen, D. Ogilvie, S. Solomon, J. Greenberg and T. Pyszczynski, 'American Roulette: The Effect of Reminders of Death on Support for George W. Bush in the 2004 Presidential Election' (2005) 5 *Analyses of Social Issues and Public Policy* 177.

the aftermath of a major terrorist attack, it is arguably easier to create public consensus than is the case during domestic panics such as those relating to organised crime. The reasons for this are two-fold – firstly, the public are already experiencing fear, trauma and panic emanating from their sense of 'collective victimhood' and the visceral nature of the perceived risk. Secondly, much of the 'proof' of the risk-level remains undisclosed and is therefore incapable of independent verification – information may be withheld by a government on the basis of national security concerns and, in cases where a popular panic is already under-way, Opposition politics changes its nature from one in which the imperative is to oppose to one in which there is a *Realpolitik* imperative to support the government in 'protecting' the populace. Terrorism, and particularly keeping people safe, is a prominent theme in electoral discourse.

Perhaps the most important element of moral panic, in Goode and Ben-Yehuda's construction of Cohen's theory, is 'disproportionality', i.e. people must feel that the threat is greater and involves more people than is actually the case.[63] According to Goode and Ben-Yehuda this requirement can be met by exaggerated or fabricated figures, by giving more attention to one issue than to others that are of equal threat, or by vastly increasing the attention given to something at one time or another without a corresponding increase in the objective seriousness of the threat.[64] When it comes to a terrorist threat it is somewhat difficult to assess proportionality in numerical terms because, by necessity, many of the operations are confidential and figures are not released. Where they are released, it may not be possible to test those figures against an objective assessment of the threat. For example, is it realistic to say that 11 September 2001 signified an increased threat to the US, or is it the case that it constituted an occasion on which the ever-present threat from terrorism was 'successful'? Because intelligence is sensitive and, by its nature, often incomplete, erroneous or acquired from dubious sources, the numbers game (in terms of probabilities of attacks, numbers of terrorists threatening an entity, etc) is a particularly difficult one to play. However, disproportionality can still be asserted by reference to the third part of Goode and Ben-Yehuda's suggested indices of disproportionality – the granting of more attention to one

[63] This element of moral panic was alluded to in Cohen's book but greatly substantiated in S. Hall, C. Critcher, H. Jefferson, J. Clarke and B. Robert, *Policing the Crisis: Mugging, the State and Law and Order* (1978, London; Macmillan), esp. p. 16.

[64] Goode and Ben-Yehuda, *Moral Panic*, pp. 43–4.

issue than to others that are of equal threat. Since 2001 the global political atmosphere has been saturated by terrorism-related concerns and the 'War on Terror', while climate change, poverty, developing-world debt, AIDs, and resurgent tuberculosis have to some extent been sidelined as the international media continues to be consumed by the 'War on Terror'. In some cases, indeed, the reporting and discussion of serious humanitarian crises have become infected by counter-terrorist rhetoric and terrorism-related fears. Following the devastating floods in Pakistan in the summer of 2010, for example, discussions around the provision of international humanitarian aid to Pakistan took place against a backdrop of constant references to the potential for aid to find its way into the hands of the Taliban or Al Qaeda, reportedly causing a serious unwillingness on the part of people of the Global North to donate.[65]

Finally, Goode and Ben-Yehuda claim that the moral panic ought to be volatile because moral panics frequently erupt suddenly and subside as suddenly again. However, volatility is not an absolute requirement of moral panic. Some panics can become institutionalised, i.e. moral concern about the behaviour remains because of social movements, legal changes and so on. In the case of the 'War on Terror' its institutionalisation appears complete. Not only has the phrase become ubiquitous, but its enshrinement in law, culture, politics and global discourse appears unshakable. Certainly there was a peak of law- and policy-making in the immediate aftermath of the attacks of 11 September 2001 in the US and, subsequently, 7 July 2005 in the UK. However, the discourse and rhetoric of the 'War on Terror' has remained a constant companion to politico-legal discourse in both countries (and, indeed, at regional and international levels) since September 2001.

Panic as the path to expanding state power

If we accept, as I argue, that there is both a genuinely felt public panic about terrorism and a relatively embedded manufactured panic about it, we must still consider the impact of this on processes of designing, introducing and implementing counter-terrorist law and policy. I argue that in this context the desires of the public and the

[65] See, e.g., N. Gronewold, 'Western Donations Lag for Pakistan Flood Victims' *New York Times*, 17 August 2010.

government (for security, on the one hand, and an expansion of power on the other) coincide in times of panic to allow for governmental action that would be unlikely to be accepted in 'normal' circumstances and is tolerated (if not always fully supported) because of the 'extraordinary circumstances' that prevail. That is not, however, a universally accepted view. Some theorists, most notably Eric Posner and Adrian Vermeule,[66] argue that panic or fear does not necessarily result in repressive decision-making. Instead they contend that even if panic does have an impact on decision-making this impact is (1) not uniformly negative and (2) as likely to result in a favouring of liberty as it is in a favouring of security.[67]

This argument is based on a rejection of the school of thought that claims that the 'availability heuristic' has a negative cognitive impact on decision-making in times of crisis.[68] Heuristics are cognitive shortcuts used by people who do not have the time (or perhaps the inclination) to engage in sustained risk assessment.[69] These 'mental shortcuts' are said to be perfectly normal and generally result in reasonably accurate decision-making; however they are susceptible to 'biases' and 'system errors' when people overestimate the likelihood of something occurring.[70] The availability heuristic holds that people assess the likelihood of something coming to pass by reference to 'the ease with which instances or occurrences can be brought to mind'.[71] As Wells states, 'the easier it is to bring something to mind, the more "available" it is, and the more available an incident is, the more likely one is to overestimate its occurrence'.[72] Thus, the more salient an event or eventuality, the more likely one is to overestimate the risk of its reoccurrence and therefore to overestimate the measures required to prepare for and safeguard against

[66] Posner, and Vermeule, *Terror in the Balance*, esp. Ch. 2. [67] *Ibid.*

[68] A. Esgate and D. Groome, *An Introduction to Cognitive Psychology* (2004, New York; Psychology Press); V.S. Folkes, 'The Availability Heuristic and Perceived Risk' (1988) 15 *Journal of Consumer Research* 13; R. Agans and L. Shafer, 'The Hindsight Bias: The Role of the Availability Heuristic and Perceived Risk' (1994) 15 *Basic and Applied Social Psychology* 439.

[69] A. Tversky and D. Kahneman, 'Judgment under Uncertainty: Heuristics and Biases' in Kahneman, D., Slovic, P. and Tversky, A. (eds.), *Judgment under Uncertainty: Heuristics and Biases* (1982, Cambridge; Cambridge University Press), p. 3.

[70] According to Tversky and Kahneman 'people rely on a limited number of heuristic principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations. In general, these heuristics are quite useful, but sometimes they lead to severe and systematic errors'; *ibid.*, p. 3.

[71] *Ibid.*, p. 11.

[72] C. Wells, 'Questioning Deference' (2004) 69 *Missouri Law Review* 903, 922.

it. Salience is a product of familiarity,[73] intense media coverage,[74] vividness,[75] currency,[76] and imaginability.[77] Terrorist attacks were clearly exceptionally salient in the light of the events of 11 September 2001, therefore decision-making seems likely to have been distorted (or at least affected) by these events. Added to this is the operation of what is known as the 'confirmation trap bias' by which biases associated with the availability heuristic (in this case, biases identifying 'Muslims' as the threat) tend to be exacerbated by actors seeking out evidence that confirms their biases and therefore merely finalises a decision.[78] Combined with the fact that people tend to be overconfident in their judgements, particularly in situations where judgements are especially difficult to make,[79] such as in the context of counter-terrorism, the availability heuristic with exacerbated biases certainly substantiates the claim that panic emanating from fear and anxiety as well as manufactured panic has a real impact on decision-making processes.

Posner and Vermeule, however, claim that there is an alternative way of considering the role of fear or panic in decision-making:

> First, fear enhances the senses: the person who feels fear is attuned to the threat and alert to every nuance of the environment. Second, fear provides motivation. Where a fully rational person spends time deliberating, the fearful person acts quickly. Both of these factors suggest that fear can play a constructive role during emergencies.[80]

Although Posner and Vermeule accept that fearful people's 'awareness' of threats can result in 'the characteristic mistake of seeing a tiger in a shadow',[81] their claim is that more attention is paid to information in a time of fear and that, therefore, there is a better chance of picking up on legitimate threats. Once action is taken in response to a legitimate threat, their argument appears to attach legitimacy to it. What the authors do not consider, however, is whether the potential to identify more risks more accurately is sufficiently enhanced by the laws and policies

[73] P. Slovic, B. Fischoff and S. Lichtenstein, 'Facts versus Fears: Understanding Perceived Risk' in Kahneman, D., Slovic, P. and Tversky, A. (eds.), *Judgment under Uncertainty: Heuristics and Biases* (1982, Cambridge; Cambridge University Press), p. 465.

[74] *Ibid.* [75] Tversky and Kahneman, 'Judgment under Uncertainty', p. 3 at p. 11.

[76] P. Slovic, *The Perception of Risk* (2000, London; Earthscan Publications Ltd.), p. 14.

[77] Tversky and Kahneman, 'Judgment under Uncertainty', p. 3 at p. 13.

[78] M. Bazerman, *Judgment in Managerial Decision Making*, 4th edn., (1998, New York; Wiley), p. 35.

[79] S. Plous, *The Psychology of Judgment and Decision Making* (1993, New York; McGraw Hill), p. 219.

[80] Posner and Vermeule, *Terror in the Balance*, p. 62. [81] *Ibid.*

introduced to justify the acknowledged risk of making more errors more often. Nor do they consider the difficulties associated with 'information overload'.[82] The main difficulty with this claim, however, is the authors' failure to acknowledge that the rapidity of decision-making they identify within a time of crisis may carry with it a risk to rights-protection that is amplified by the fear or panic the decision-maker feels; the authors deal inadequately with the availability heuristic and accompanying confirmation bias considered above. They claim that the availability heuristic will not result in liberty-deprivation in the aftermath of a terrorist attack because 'the government's violation of civil liberties . . . are just as salient as terrorist attacks that provoke them'.[83]

This proposition simply does not stand up to serious scrutiny. Not only are the elements affecting salience not present in relation to violations of liberties in the same way as they are in relation to terrorist attacks, but the process of 'othering' perceived terrorists has a clear impact on salience. The imaginability of a liberties-violation is greatly reduced by the public's perception that, because the danger emanates from a particular group of deviants of which (in general) they are not a part, the deprivation of liberties will not affect them in the same way. Put another way, while most people may be willing to withstand delays in airports in the name of security, few would be willing to withstand protracted detention without effective review in Guantánamo Bay to the same end. Posner and Vermeule's conclusion that '[t]he problem here is that the availability heuristic is poorly understood'[84] and therefore provides only 'flimsy'[85] argumentation is severely undermined by their failure to refute its relevance, engage fully with its assumptions and applicability, and accept the importance of the process of 'othering' in assessing salience.

However, even if Posner and Vermeule's argument that fear does not have an unambiguously bad impact on decision-making and can sometimes result in sharper decision-making capacities holds, it does not refute the established pattern of expansion of state power through counter-terrorist operations, laws and policies. While fear and/or panic may not *inevitably* result in a default 'security' position and disproportionate rights violations, the history of state responses to terrorism suggests that this is the case in relation to terrorism-related

[82] On this point see further Luban, 'Eight Fallacies about Liberty and Security', p. 242, pp. 242–57.

[83] Posner and Vermeule, *Terror in the Balance*, p. 68. [84] *Ibid.* [85] *Ibid.*

crises.[86] Posner and Vermeule seem to understate the centrality of security to the *raison d'être* of states when they argue that if panic had a real impact on decision-making then this impact would be as likely to result in what they term 'libertarian panics' (i.e. ones in which there is a preference towards liberties) as it would be to result in a preference towards security. States have onerous moral responsibilities to protect their people; indeed to a significant extent the very concept of a society is based on the notion that we socialise in order to protect ourselves and our humanity, which function is delegated to the state upon formalisation of the socialisation process.[87] Therefore it is logical – in structural terms at least – that the impulse towards protection will be strong. It is also likely that the duty to protect will be conceived of and carried out in a manner that privileges security concerns and overbuys into the security v. liberty trade-off by introducing 'security measures' that unnecessarily undermine liberty (such as protracted detention without effective review). As Michael Ignatieff notes, the impulse towards protection by means of enhanced security measures is perfectly logical as 'the political costs of under-reaction are always going to be higher than the costs of over-reaction . . . Since no one can know in advance what strategy is best calibrated to deter an attack, the political leader who hits hard – with security roundups and preventive detention – is making a safer bet, in relation to his own political future, than one who adopts the precautionary strategy of "first do no harm".'[88] Bearing in mind the reality of genuinely felt popular panic among 'the people', the political imperative towards

[86] See, in particular, P. Hillyard, *Suspect Communities: People's Experience of the Prevention of Terrorism Acts in Britain* (1993, London; Pluto Books); D. Cole, 'The New McCarthyism: Repeating History in the War on Terrorism' (2003) 38 *Harvard Civil Rights and Civil Liberties Law Review* 1; E. Rostow, 'The Japanese American Cases – A Disaster' (1945) 54 *Yale Law Journal* 489; A. Lewis, 'Civil Liberties in a Time of Terror' (2003) *Wisconsin Law Review* 257; N. Murray and S. Wunsch, 'Civil Liberties in Times of Crisis: Lessons From History' (2002) 87 *Massachusetts Law Review* 72.

[87] T. Hobbes, *Leviathan* (1651), (edited with introd. by C.B. Macpherson), (1981, London; Penguin Books), Ch. XVII: 'The final cause, end, or design of men (who naturally love liberty, and dominion over others) in the introduction of that restraint upon themselves, in which we see them live in Commonwealths, is the foresight of their own preservation, and of a more contented life thereby; that is to say, of getting themselves out from that miserable condition of war which is necessarily consequent, as hath been shown, to the natural passions of men when there is no visible power to keep them in awe, and tie them by fear of punishment to the performance of their covenants, and observation of those laws of nature set down in the fourteenth and fifteenth chapters.'

[88] Ignatieff, *The Lesser Evil*, p. 58.

'hard line' security, and the reduction of human rights concerns to a sideshow of some kind, the likelihood of a so-called 'libertarian panic' is slim, to say the least.

Conclusion

So where does law come into this? This book argues that domestic law and policy measures introduced in relation to the detention of suspected terrorists are panic-related and do not comply with the case study nations' obligations under international human rights law. Nevertheless, those measures were largely introduced through the normal democratic processes, and those that were introduced at an exclusively executive level were represented as lawful on the basis of detailed and scholarly legal briefs and opinions.[89] At every stage of the process, law and lawyers have been involved, if not in shaping these laws and policies then in legitimating them.

These laws, considered in full in Chapters 3 and 4, represent significant assertions of state power against the individual and often breach international human rights law norms, which, although allowing for counter-terrorist action, recognise the right to challenge the lawfulness of one's detention as a non-derogable right that acts as a protective shield for other individual rights (including *jus cogens* rights). Despite that, however, the US and the UK did not turn away from law or even accept that their actions were unlawful; rather they attempted to reshape legal standards within a panicked politico-legal environment. As outlined in Chapter 3, these attempts were replicated on the international stage; one in which power is, according to neo-realist theory, the defining tool by which the legal environment is shaped. Even in the face of these extremely powerful attempts to reshape international human rights law, however, human rights law's position on its relevance and applicability, and on the content and applicability of the right to challenge the lawfulness of one's detention, does not appear to have shifted. In fact, as outlined in Chapter 5, it has arguably strengthened. This presents an interesting and important counterpoint to theories that

[89] See, for example, the memorandum of 14 March 2003 prepared by John Yoo in which it was argued that 'coercive interrogation' methods, such as water-boarding, were not torture; see J. Yoo, Memorandum re Military Interrogation of Alien Unlawful Combatants Held Outside the US, 14 March 2003. The memorandum, which runs to 81 pages, is available at: www.aclu.org/pdfs/safefree/yoo_army_torture_memo.pdf (last accessed 19 February 2011).

dismiss international human rights law as soft and overly susceptible to state power, and identifies international human rights law as a more resilient rights-protecting force than was previously thought, with potentially positive effects for individual rights in domestic legal systems. These theories will be considered in detail in Chapter 5, once the patterns of executive and legislative activity on detention have been outlined. First, however, it is important to familiarise ourselves with the protection for the right to liberty that existed as of 11 September 2001 and, in particular, the flexibility that existed within international human rights law for the security-related detention of suspected terrorists.

2

The right to be free from arbitrary detention

In introducing a wide-ranging and repressive system of counter-terrorist detention, the US and the UK argued variously that they needed to do so and that it was permitted as a matter of law or, if not so permitted, that the prevailing legal standards failed to take into account the nature and scope of the threat posed to national and international security by Al Qaeda. In fact, the international (and domestic) legal systems did not generally permit a counter-terrorist detention system as wide-ranging and repressive as the one proposed and enacted. That is not to suggest that international human rights law did not allow any repressive action at all on the part of states engaged in countering terrorism. Critics of international human rights law from a security-perspective tend to assert an incompatibility between rights and security, but such dichotomous thinking ignores the fact that international human rights law was designed with exceptions to its general application for exigencies such as emergencies expressly in mind.[1] So too is it designed in a manner that recognises the usefulness and necessity of occasional detention. Rather than protecting a right to liberty in its broad and general sense, international human rights law protects a right to be free from *arbitrariness* in the deprivation of one's liberty. No legal system could insist on an absolute right to liberty; after all we accept that one may be subject to detention of varying kinds on the basis of, for example, criminal conviction, public order, public health and so on. What we expect instead of absolute liberty is liberty that is infringed upon only in accordance with rights-protecting limits. In particular, we expect that

[1] See in particular C. Gearty, 'Reflections on Civil Liberties in an Age of Counter-Terrorism' (2003) 41 *Osgoode Hall Law Journal* 185, esp. pp. 200–1; F. Ní Aoláin and O. Gross, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2007, Cambridge; Cambridge University Press), Pt. II; D. Luban, 'Eight Fallacies About Liberty and Security', in Wilson, R., (ed.), *Human Rights in the 'War on Terror'* (2005, Cambridge; Cambridge University Press), p. 242, esp. pp. 245–6.

when we are deprived of our liberty it will only be in a limited number of circumstances (i.e. that there are defined bases for detention) and in a challengeable manner (i.e. that the basis for detention can be adjudicated upon by a competent authority whose decisions will be respected by the detaining authority). As outlined in this chapter, those two features of the right to be free from arbitrary detention existed within the US, the UK and international human rights law at the time of the attacks on 11 September 2001. In addition, all three bodies of law recognise that at times states need to be able to act in a more muscular (or repressive) manner than is normally the case; in other words, we recognise the necessity of what Ní Aoláin and Gross have described as accommodation for crisis or emergency.[2] The models of accommodation offered by all three systems allow for some leeway or flexibility in terms of both factors (limited bases for detention and review of detention). Crucially, however, they do not permit of absolutely unlimited power; at their core, all three models share a constitutionalist vision of limited and accountable power that the 'War on Terror' counter-terrorist detention strategy of the US and the UK sought to reject, or at least disable.

Part of the discourse around this attempt to disable or reject the constitutionalist limitations on the power to detain was centred on the claim that international human rights law either did not apply to the 'War on Terror' (in the case of the US) or did not take properly into account the realities of the terrorist threat (in the case of the UK). This is notwithstanding the fact that in reality the system of emergencies as exists within international human rights law has been widely condemned by human rights scholars as being too permissive; as allowing for too much limitation of rights on the basis of executive assertions of power. The purpose of outlining the *status quo ante* in respect of the right to be free from arbitrary detention in this chapter is to highlight the fallacious nature of those claims and begin to identify them as attempts to project the kind of panic discourses around security that we considered in Chapter 1 onto the international sphere. The first task, however, is to outline both the domestic protections of the right to be free from arbitrary detention in the US and the UK and to consider the relevance of international human rights law to the 'War on Terror'.

[2] Ní Aoláin and Gross, *Law in Times of Crisis*.

The right to be free from arbitrary detention in the US and the UK

It is not necessary in this section to undertake an exhaustive review of the right to be free from arbitrary detention – or the right to liberty – as it exists in the US and the UK. The purpose instead is simply to demonstrate that both systems have deeply entrenched commitments to the right to liberty, the prohibition on the arbitrary deprivation thereof, and the constitutionalist principle of protecting this freedom by means of a judicial review process such as *habeas corpus*. In this sense, the international human rights law framework, with which the majority of this chapter is concerned, is in no way alien to these systems; rather it reflects their basic commitments to liberty and judicial protection of fundamental rights.

The US's relationship to the concept of a right to liberty is a complex one: at the time that the US Constitution was introduced, slavery was still legal in many parts of the country and a general constitutional right to liberty baldly expressed is not included in the Constitution. That is not to say that there is no right to liberty or to be free from arbitrary detention. Not only does the Fourteenth Amendment encompass a right to liberty,[3] but the Suspension Clause of the US Constitution provides that 'The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it'.[4] In spite of the lack of an affirmative clause in the Suspension Clause, there appears to have been a general consensus that it protected or declared *habeas corpus* during the debates around the drafting of the Constitution. Alexander Hamilton, writing under the pseudonym *Publius*, assured the people of New York state that 'trial by jury in criminal cases, aided by the habeas corpus act . . . [is] provided for, in the most ample manner . . . '.[5] The famous words of the US Supreme Court in *Ex parte Milligan* testify to the importance of protecting the writ for the purposes of preserving liberty:

> By the protection of the law, human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamors of an excited people.[6]

[3] In relevant part the Fourteenth Amendment prohibits any state from 'depriv[ing] any person of life, liberty, or property, without due process of law'.

[4] Article 1(9)(2), US Constitution.

[5] *Federalist Papers*, No. 83.

[6] *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 118–19, 18 L.Ed. 281 (1866).

The protection of *habeas corpus* was subsequently supplemented by the inclusion in the Fourteenth Amendment of a prohibition on any state 'depriv[ing] any person of life, liberty, or property, without due process of law'[7] and by statutory *habeas corpus* provisions.[8]

The right to liberty without arbitrary interference found expression in Magna Carta's promise that 'No free man shall be seized or imprisoned . . . except by the lawful judgment of his equals or by the law of the land'.[9] In the UK there is a long-established right to be free from detention that is arbitrary or capricious.[10] It is, as Conor Gearty has noted, one of the presumptions that lies at the heart of the common law.[11] In *Juncal*, Wyn Williams J held that 'In my judgment the citizens of this country do enjoy a fundamental or constitutional right not to be detained arbitrarily at common law. That conclusion is not capable of much elaboration. It seems to me, however, that the opposite conclusion is simply not tenable.'[12] He went on to elaborate on the notion of arbitrariness in a way that reflects many of the features we find within the international human rights law standard considered later in this chapter. For Wyn Williams J arbitrary can 'mean capricious; it also means despotic and it can also be properly used to describe an action which is based upon or derived from uninformed opinion or random choice'.[13] This perhaps reflects the somewhat intuitive nature of the right to be free from arbitrary detention in the UK, which is supplemented by the protection of the right as derived from Article 5 of the European Convention on Human Rights (considered fully below) under the Human Rights Act 1998. The right to liberty has, of course, traditionally been supplemented and safeguarded in the UK by the writ of *habeas corpus*, which has existed in English law since before its codification in Magna Carta of 1215. Although *habeas corpus* finds its origins in the royal prerogative and the right of the monarch to know where his subjects were at all times, it developed into an important liberty-enhancing principle taken so seriously that courts would at times

[7] Fourteenth Amendment, Section 1, US Constitution.

[8] Judiciary Act 1789; *Habeas Corpus* Act 1867. For a full overview of the history of *habeas corpus* in the US, see W. Duker, *A Constitutional History of Habeas Corpus* (1980, Westport, CT; Greenwood Press).

[9] Magna Carta 1215, Clause 39.

[10] *Wheeler v Leicester City Council* [1985] AC 1054.

[11] C. Gearty, *Civil Liberties* (2007, Oxford; Oxford University Press), p. 96.

[12] *R (on the application of Juncal) v Secretary of State for the Home Department* [2007] EWHC 3024 (Admin); [2008] ACD 28; [2008] MHLR 7, at para. 47.

[13] *Ibid.*, at para. 48.

imprison jailors who refused to abide by writs of *habeas corpus*.[14] That traditional writ of *habeas corpus* has not much been used in recent times in the UK,[15] but it continues to exist and indeed to be supplemented by the provisions of Article 5(4) of the European Convention on Human Rights as applied through the Human Rights Act 1998.

Although neither the US nor the UK have what might be called an emergency constitution,[16] they do both encompass some level of accommodation. As we have seen, the writ of *habeas corpus* can be suspended in the US in limited circumstances.[17] In the UK there has always been the potential to use the royal prerogative in order to deal with military or violent crises[18] and the Human Rights Act 1998 allows for derogations under the same structure as in the European Convention on Human Rights.[19]

The relevance of international human rights law

To argue that international human rights law protects the right to be free from arbitrary detention is not, in itself, to establish its applicability to the 'War on Terror' or, indeed, to the law- and policy-making processes within the domestic politico-legal systems of the US and the UK. This is particularly so because of the fact that neither the US nor the UK is a monist jurisdiction (although it would be slightly inaccurate to describe the US as strictly dualist) and because of the claim, emanating from the US, that international human rights law is of limited (if any) application in the context of armed conflict and extra-territorial activity. Both of these matters are addressed here.

The role of international human rights law in the US and the UK

I have already mentioned that neither the US nor the UK is a monist jurisdiction. While the UK is what might be described as a 'traditionally' dualist jurisdiction, the US has a more mixed approach to international

[14] For a full history of *habeas corpus*, see P. Halliday, *Habeas Corpus: From England to Empire* (2010, Cambridge, MA; Harvard University Press).

[15] D. Feldman, *English Public Law* (2004, Oxford; Oxford University Press), para. [18–75].

[16] B. Ackerman, 'The Emergency Constitution' (2004) 113 *Yale Law Journal* 1029.

[17] See, e.g., D. Shapiro, 'Habeas Corpus, Suspension, and Detention: Another View' (2006) 81 *Notre Dame Law Review* 59; B. Langford, 'Suspension of Habeas Corpus' (2003) 3 *Journal of the Institute of Justice and International Studies* 233.

[18] See, e.g., M. Drake, *Problematics of Military Power: Government, Discipline and the Subject of Violence* (2002, London; Frank Cass Publishing).

[19] s. 14, Human Rights Act 1998.

law.[20] International treaties that are deemed 'non-self-executing' are binding on the US domestically only where they have been incorporated by legislation.[21] While the law relating to distinguishing between self-executing and non-self-executing treaties is both complex and the subject of a substantial body of scholarship,[22] it is sufficient for our purposes to note that as a matter of course all international human rights law treaties to which the US becomes a party are deemed 'non-self-executing' by the Senate.[23] As a result they cannot be relied upon in domestic proceedings – or called upon as limiting authorities in the process of making law or policy – in the absence of incorporation. Even if such a treaty is incorporated, Congress is not strictly bound by it as the 'last in time' doctrine allows it to pass an incompatible law that will overtake the binding effect of the incorporated treaty provided it was passed 'last in time'.[24] Where a principle of international human rights law can be said to be customary law – as I will argue below is particularly the case with the right to challenge the lawfulness of one's detention – it forms part of federal common law.[25] Again, this is not without controversy and has been the subject of extensive commentary within the US academy,[26]

[20] J.F. Murphy, *The United States and the Rule of Law in International Affairs* (2004, Cambridge; Cambridge University Press).

[21] *Foster v Neil* 27 U.S. 253 (1829). The distinction between self-executing and non-self-executing treaties is expressly accepted in the Restatement (Third) of Foreign Relations Law, § 111.3 (1986): 'Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation.'

[22] D. Golove, 'Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power' (2000) 98 *Michigan Law Review* 1075; L. Henkin, *Foreign Affairs and the United States Constitution*, 2nd edn., (1996, Oxford; Clarendon Press), Ch. VII; J. Paust, 'Self-Executing Treaties' (1988) 82 *American Journal of International Law* 760; C. Vazquez, 'Treaty-Based Rights and Remedies of Individuals' (1992) 92 *Columbia Law Review* 1082; C. Bradley, 'The Treaty Power and American Federalism' (1998) 97 *Michigan Law Review* 1075; C. Bradley, 'The Treaty Power and American Federalism, Part II' (2000) 99 *Michigan Law Review* 98; J. Yoo, 'Rejoinder: Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self Execution' (1999) 99 *Columbia Law Review* 2218; C. Vazquez, 'Response: Laughing at Treaties' (1999) 99 *Columbia Law Review* 2184; M.S. Flaherty, 'History Right? Historical Scholarship, Original Understanding and Treaties as "Supreme Law of the Land"' (1999) 99 *Columbia Law Review* 2095.

[23] L. Henkin, 'U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker' (1995) 89 *American Journal of International Law* 341.

[24] *Taylor v Morton* 23 F. Cas. 784 (C.C.D. Mass. 1855); *Head Money Cases* 112 U.S. 580 (1884).

[25] *The Paquette Habana* 175 U.S. 677 (1900).

[26] H. Sprout, 'Theories as to the Applicability of International Law in the Federal Courts of the United States' (1932) 26 *American Journal of International Law* 280; L. Henkin,

but those controversies are not of enormous relevance here. What is more important is that the 'last in time' doctrine applies to federal common law so that the effect of customary international law can be undone by legislative activity.[27] It would be fair, I think, to say that international human rights law does not enjoy a position of great security within the municipal federal law of the US; indeed, it continues to come under attack from those who believe that 'foreign law' ought not to be domestically binding because of its alleged 'anti-democratic' nature.[28] However, even if international human rights law is not *binding* as a matter of domestic law this does not mean that it is *irrelevant*. US law includes a doctrine of constitutional interpretation requiring that 'an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains'.[29] In addition, the principles of international human rights law have the capacity to offer effective and helpful persuasive authority to the federal courts in interpreting the provisions of the US Constitution.[30] In addition, international human rights law is of course binding on the US as a matter of international law itself. Thus, whether the US could be held accountable for breaches of international law in US courts is a separate question to whether it can be held to account for breaches thereof within the international community.

The UK is a more traditionally dualist jurisdiction. Hence, well-established principles of international law are applicable by the courts as a matter of public policy.[31] In addition, customary international law has domestic effect and, indeed, takes on the character of domestic law.[32] That said, customary international law is subject to being overridden by

'International Law as Law in the United States' (1984) 82 *Michigan Law Review* 1555; L. Henkin, 'The Constitution and United States Sovereignty: A Century of *Chinese Exclusion* and Its Progeny' (1987) 100 *Harvard Law Review* 853; C. Bradley and J. Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110 *Harvard Law Review* 815.

[27] *Taylor v Morton* 23 F. Cas. 784 (C.C.D. Mass. 1855); *Head Money Cases* 112 U.S. 580 (1884). For commentary, see, e.g., J. Ku, 'Treaties as Laws: A Defense of the Last-in-Time Rule for Treaties and Federal Statutes' 80 *Indiana Law Journal* 319.

[28] I. Somin and J. McGuinness, 'Should International Law be Part of Our Law?' (2007) 59 *Stanford Law Review* 1175.

[29] *Murray v Schooner Charming Betsy* 6 U.S. 64 (1804) *per* Marshall CJ, p. 118.

[30] F. de Londras, 'International Human Rights Law and Constitutional Rights: In Favour of Synergy' (2009) 9 *International Review of Constitutionalism* 307.

[31] *In re Claim by Herbert Wragg & Co Ltd* [1956] Ch. 323; *Oppenheimer v Cattermole* [1976] AC 249.

[32] *Buvot v Barbuit* (1737) Cases t. Talbot 281.

Acts of Parliament.[33] Treaties – whether concerned with human rights or not – do not have domestic effect unless they have been given such domestic effect by Parliament.[34] Whether or not a treaty has been incorporated into domestic law, the presumption that legislation is to be interpreted in a manner compatible with the UK's international legal obligations (including unincorporated treaties) applies,[35] although unambiguous statutory provisions will be applied notwithstanding incompatibility with international law.[36] From the perspective of international human rights law in the UK, the passage of the Human Rights Act 1998 is especially important. A central pillar of the Labour government's election campaign promise to 'bring rights home',[37] the 1998 Act brought many of the provisions of the European Convention on Human Rights into domestic law. Although the provisions of the Convention referred to within the 1998 Act are now part of *domestic* law,[38] the meaning of these provisions and of the Act is determined by reference to (although without being strictly bound by) the decisions of the European Court of Human Rights.[39]

The applicability of international human rights law to armed conflict

The US's insistence that international human rights law is not applicable to the 'War on Terror'[40] is based on the premise that international

[33] *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 WLR 356. It had been thought that customary international law could also be overridden by the principle of *stare decisis* but after both *Trendtex* and the judgment of Lord Slynn in *Ex parte Pinochet (No. 1)* [2000] 1 AC 61 (at 77) it is questionable that this remains the case.

[34] See, e.g., *Maclaine Watson v Department of Trade and Industry* [1989] 3 All ER 523, esp. *per* Templeman LJ at p. 526.

[35] See, e.g., *Ex parte Brind* [1991] 1 AC 696.

[36] *Ellerman Lines v Murray* [1931] AC 126.

[37] Home Office, 'Rights Brought Home: The Human Rights Bill' (Cm. 3782, 1997).

[38] See generally A. Kavanagh, *Constitutional Review under the UK Human Rights Act* (2009, Cambridge; Cambridge University Press), esp. Ch. 10.

[39] *R v Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury Developments Ltd* [2001] UKHL 23; *R (Anderson) v Secretary of State for the Home Department* [2002] 3 WLR 1800; *R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26; *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484; *M v Secretary of State for Work and Pensions* [2006] UKHL 11; *Huang v Secretary of State for the Home Department* [2007] 2 AC 167; Kavanagh, *Constitutional Review*, p. 146; R. Masterman, 'Aspiration or Foundation? The Status of Strasbourg Jurisprudence in Domestic Law' in Fenwick, H., Phillipson, G. and Masterman, R. (eds.) *Judicial Reasoning under the UK Human Rights Act* (2007, Cambridge; Cambridge University Press), p. 57.

[40] This position is considered in more detail in Chapter 3 below.

humanitarian law entirely displaces international human rights law in times of armed conflict as a result of the *lex specialis* rule. This position – advanced quite expressly by the US[41] – mirrors the earlier conception of the relationship (or lack thereof) between international human rights law and international humanitarian law. In the 1940s, major international institutions including the International Law Commission and the International Committee of the Red Cross and Red Crescent rejected any proposal that the two bodies of law ought to be seen as operating in concert; rather they stressed the incompatibility of the two given international humanitarian law's objective of regulating conflict and international human rights law's objective of preventing it. Although the tension between the two bodies of law in their underlying philosophies still exists,[42] there is now an acceptance that international humanitarian law and international human rights law *both* apply in times of armed conflict. Thus, the International Court of Justice has long insisted that although international humanitarian law is the *lex specialis* in times of armed conflict, international human rights law continues to apply. This is classically stated by the Court in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*[43] in the following terms:

> The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[44]

[41] See, e.g., *John B. Bellinger III Delivers Opening Remarks at the U.N. Committee Against Torture*, 5 May 2006, eMediaMillworks Political Transcripts (published 10 May 2006), *available in* Westlaw, allnewsplus database.

[42] For more on this and on the competing views of the ILC and ICRC see, esp., W. Schabas, 'Lex Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of *Jus ad Bellum*' (2007) 40 *Israel Law Review* 592.

[43] [1996] ICJ Rep 226. [44] *Ibid.*, p. 240.

This *lex specialis* approach to the interaction between international human rights law and international humanitarian law has been restated since 2001 by the International Court of Justice.[45] Thus the conception of *lex specialis* promoted by the US in the 'War on Terror,' by virtue of which it is claimed that international human rights law is not at all applicable in the current context, does not fit well with the *lex specialis* approach of the International Court of Justice. This formulation of *lex specialis* clearly established, prior to 11 September 2001, that international human rights law has a role to play in times of armed conflict.

The applicability of international human rights law to extra-territorial activity

The second basis upon which the US has claimed the inapplicability of international human rights law is essentially geographic: because the majority of suspected terrorist detainees held by the US are detained outside its territorial jurisdiction (particularly in Guantánamo Bay and the Bagram Air Base in Afghanistan, as well as in 'black sites'), the US has argued that any human rights law obligations that might be relevant in times of conflict do not apply to extra-territorial activity. The well-established position prior to the 11 September 2001 attacks, however, stood in sharp contrast. While international legal institutions accepted that treaty obligations were *generally* territorially limited, it was clear that there were extraordinary circumstances in which such obligations could apply extra-territorially. These circumstances include cases where individuals or areas are under the effective control and authority of the state and when the object and purpose of the human rights treaty (i.e. the protection of individual rights against disproportionate and unnecessary exercises of state power) requires such extra-territorial application.

Article 2(1) of the International Covenant on Civil and Political Rights defines the scope of the Convention in the following terms:

> Each State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction*

[45] *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Territory* 43 I.L.M. 1009 (2004); *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)* 2005 ICJ 116 (19 December). See also, M. McGuinness, 'Case Concerning Armed Activities on the Territory of the Congo: The ICJ Finds Uganda Acted Unlawfully and Orders Reparations', *ASIL Insight*, 9 January 2006.

> the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (emphasis added)

The terms of Article 1 of the First Optional Protocol to the International Covenant on Civil and Political Rights are also noteworthy. Under this provision, signatory parties recognise the competence of the Human Rights Committee to consider communications 'from individuals subject to [the state's] jurisdiction who claim to be victims of a violation' of the International Covenant on Civil and Political Rights by that state. The express terms of Article 2(1) thus provide that individuals subject to a state's jurisdiction are rights-bearers under the Convention. This is of particular significance in the context of Guantánamo Bay given the US's 'exclusive jurisdiction' over the base.[46] At the level of positive law, therefore, there seems little scope for dispute that Guantánamo Bay detainees are 'subject to [the US's] jurisdiction' under the International Covenant on Civil and Political Rights, although this does not completely answer the question of people in US custody outside the US and Guantánamo Bay.[47] International human rights law does, however, go beyond positivistic or treaty-based notions of jurisdiction in considering the extra-territorial extent of human rights obligations, recognising instead a relational conception of jurisdiction that ensures that human rights obligations flow from the nexus between state and individual in real terms. The UN Human Rights Committee, which determines questions relating to the International Covenant on Civil and Political Rights, has found that Article 2(1) 'means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party' and that '[t]his principle

[46] Lease of Lands for Coaling and Naval Stations, 23 February 1903, US–Cuba, Article III T.S. No. 418; Treaty Defining Relations with Cuba, 29 May 1934, US–Cuba, Article III, 48 Stat. 1683, T.S., No. 866.

[47] Although the US Supreme Court in *Boumediene v Bush* 553 U.S. 723 (2008) held that the US Constitution extends to those detained in areas where the US has *de facto* sovereignty, defined along lines similar to the 'power and effective control' of human rights law, the exact bounds of *de facto* sovereignty within US constitutional law have not yet been clearly defined. On the differences between *de facto* sovereignty and international human rights law's conception of power and control, see F. de Londras, 'What Human Rights Law Could Do: Lamenting the Lack of an International Human Rights Law Approach in Boumediene and Al Odah' (2008) 41 *Israel Law Review* 562. The decision in *Boumediene* is considered in some detail in Chapter 6.

also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained'.[48] This stated principle in General Comment No. 31 (2004) reflects established authority in the jurisprudence of the Committee itself.[49]

Article II of the American Declaration of the Rights and Duties of Man does not include any express jurisdictional scope, primarily because it is not a treaty and was not originally intended to be applied to the member states of the Organization of American States; rather, it was intended to be a non-binding document expressing aspirational standards for achievement in the region.[50] It was not until 1965, when the Inter-American Commission on Human Rights was given authority to hear individual complaints alleging human rights violations, that the Declaration was applied to the member states.[51] The American Convention on Human Rights contains a jurisdictional clause in Article 1(1):

> The States Parties to the Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . .

Article 1(1) of the Convention is clearly distinguishable from Article 2(1) of the International Covenant on Civil and Political Rights because it makes no mention whatsoever of 'territory' in setting out the jurisdictional scope of the treaty. Not only does the Convention itself not mention 'territory' within its jurisdictional clause, but the jurisprudence of the Inter-American Court of Human Rights clearly demonstrates that the Convention has an extra-territorial scope. In the first place, the Court has established that state actors can be liable under the Inter-American

[48] General Comment 31, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 10.

[49] See *Masslotti and Baritussio v Uruguay*, No. 25/1978, UN Doc. Supp. No. 40 (A/37/40) at 187 (1982); *Viana Acosta v Uruguay*, Communication No. 110/1981, UN Doc. CCPR/C/OP/2 at 148 (1990); *Montero v Uruguay*, Communication No. 106/1981, UN Doc. CCPR/C/OP/2 at 136 (1990); *Lopez Burgos v Uruguay*, Communication No. 52/1979, UN Doc. CCPR/C/OP/1 at 88 (1984); *Celeberti de Casariego v Uruguay*, Communication No. 56/1979, UN Doc. Supp. No. 40 (A/36/40) at 185 (1981).

[50] See generally D. Harris and S. Livingstone (eds.), *The Inter-American System of Human Rights* (1998, Oxford; Oxford University Press).

[51] Res. XXII, Second Special Inter-American Conference, Rio de Janeiro, November 1965, Final Act. OEA/Ser.C/I.13, 32–34 (1965). For the evolution of the individual petition process in the Commission, see, e.g., C. Cerna, 'The Inter-American Commission on Human Rights: Its Organisation and Examination of Petitions and Communications' in Harris, D. and Livingstone, S. (eds.), *The Inter-American System of Human Rights* (1998, Oxford; Oxford University Press), p. 65 at p. 76.

human rights regime for the effect on people outside their territorial jurisdiction of actions done inside that territorial jurisdiction.[52] In addition, all those who come within the effective control of a member state are protected by the Inter-American regime even if the events or behaviours complained of take place outside a state's territorial jurisdiction.[53]

Article 1 of the European Convention on Human Rights obliges contracting states to 'secure to everyone within their jurisdiction the rights and freedoms' contained within the Convention. The European Court of Human Rights has espoused a particularly rich jurisprudence on the extra-territorial scope of the Convention. While it has long been accepted that Article 1 lays down the principle that the Convention's application is primarily territorially limited,[54] early jurisprudence from the European Commission on Human Rights provided that states have an obligation under the Convention to secure the rights of all those under their actual authority and control including those outside the respondent state's territory.[55] Article 1 jurisprudence now suggests that there are three categories of circumstance in which the Convention might have extra-territorial effect:[56] situations engaging the principle of *non-refoulement*; cases in which a state has effective control over a territory outside its own territorial jurisdiction;[57] and situations where individuals come under the somewhat incidental control of a state – very often in an administrative manner – although that state may not have control over the territory in question.[58] Although there is some unwelcome inconsistency in the European Convention on Human Rights jurisprudence on the question, the basic principle that Convention rights are not *necessarily* or *exclusively* territorially limited remains.[59]

[52] *The Haitian Centre for Human Rights et al. v US*, Case 10.675, Report No. 51/96, IACHR, OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997).

[53] See, e.g., IACHR, *Coard et al. v US*, Case 10.951, Report No. 109/99, 29 September 1999; IACHR, *Armando Alejandre Jr et al. v Cuba*, Case 11.589, Report No. 86/99, Cuba, 29 September 1999.

[54] *Soering v UK* [1989] 11 EHRR 439.

[55] See, e.g., *X v Federal Republic of Germany* (1965) 8 HRYB 158; *Hess v UK* (1975) 2 DR 72; *Cyprus v Turkey* (1975) 2 DR 125; *X & Y v Switzerland* (1977) 9 DR 57.

[56] The categorisation of these cases reflects that used by M. Gondek in 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?' (2005) 52 *Netherlands International Law Review* 349.

[57] *Loizidou v Turkey* [1996] ECHR 15318/89; *Cyprus v Turkey* (2001) 11 BHRC 45.

[58] See, e.g., *Stocké v Germany* [1991] ECHR 25 at 166.

[59] For analysis see, e.g., S. Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2009) 20 *European Journal of International Law* 1223.

The extraordinary extra-territorial application of international human rights law by these international institutions is closely related to the protective object and purpose of human rights law treaties. Taking into account the object and purpose of a treaty in the course of interpreting its provisions is an elementary aspect of the law of treaties as reflected in the Vienna Convention on the Law of Treaties.[60] When it comes to human rights treaties, there can be little question that *effectiveness* of rights-protection is within, if not, in fact, central to, their object and purpose. Thus, a purposive approach to the question of jurisdiction and territoriality is appropriate and is, indeed, evident in the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights.[61]

Thus, the concept that a state would be bound where it is in effective control of an area – even if that area is not within the state's territorial jurisdiction – is now well established in international human rights law and was so established by the time of the 11 September 2001 attacks. The US's insistence that international human rights obligations are not enforceable against it in relation to activities undertaken outside of its own territory is a clear rejection of this principle and an attempt to force a row-back of the international legal position prior to the commencement of the 'War on Terror'.

The right to be free from arbitrary detention in international law

International human rights law protects the right to be free from arbitrary detention through both broad and general statements of the 'right to liberty'[62] and more specific and detailed sets of protections that 'define the concept [of liberty] into distinct elements, all of which are designed to protect the individual against arbitrary arrest or detention'.[63]

[60] Article 31(1), Vienna Convention on the Law of Treaties 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* 27 January 1980.

[61] *Soering v United Kingdom* [1989] 11 EHRR 439, at 87; *Banković and Others v Belgium and 16 Other Contracting States* (2001) 11 BHRC 435, at para. 51; IACHR, *Coard et al. v US*, Case 10.951, Report No. 109/99, 29 September 1999; IACHR, *Armando Alejandre Jr et al. v Cuba*, Case 11.589, Report No. 86/99, Cuba, 29 September 1999.

[62] Article 3, Universal Declaration of Human Rights; Article 5, Arab Charter on Human Rights; Article 6, African Charter on Human and People's Rights.

[63] N. Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Approaches* (2002, Cambridge; Cambridge University Press), p. 373. Article 9, International Covenant on Civil and Political Rights; Article 5, European Convention on Human Rights.

Both of these elements are to be found in virtually all the general international legal instruments dealing with the right to liberty.

In relevant part, Article 9 of the International Covenant on Civil and Political Rights provides:

> 1 Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2 Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
>
> 3 Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release . . .
>
> 4 Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 5 of the European Convention on Human Rights not only states the general right to be free from arbitrary detention, but also includes an exhaustive list of the permissible grounds for detention and a clear statement of the safeguarding procedures to which a detainee is entitled.[64] In relevant part, Article 5 provides:

> 1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> . . .
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> . . .
>
> 2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3 Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention

[64] Article 5(1), European Convention on Human Rights.

shall be decided speedily by a court and his release ordered if the detention is not lawful.

...

Both the American Convention on Human Rights[65] and the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States[66] follow this model of highly specified provision of the right to be free from arbitrary detention. The American Declaration

[65] Article 7, American Convention on Human Rights provides:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person on his behalf is entitled to seek these remedies.
7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

[66] Article 5, Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States provides:

1. Everyone shall have the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure established by national legislation:
   (a) the lawful detention of a person after conviction by a competent court;
   (b) the lawful arrest or detention of a person;
   (c) the lawful detention of a minor for the purpose of referring his case for investigation, sentencing or trial.
2. Everyone who is arrested shall be informed, at the time of his arrest, in a language which he understands, of the reasons for his arrest.
3. Everyone who is deprived of his liberty by arrest or detention, in accordance with national legislation, shall be entitled to have the lawfulness of his arrest or detention examined by a court.
4. Everyone who is deprived of his liberty shall be entitled to humane treatment and to respect for his dignity as a human being. Persons who have been subjected to unlawful arrest or detention shall be entitled, in accordance with national legislation, to compensation for the damage caused.

of the Rights and Duties of Man[67] finds a middle ground between the general and specific provisions and provides a right to liberty and security of person in Article I and a right to be free from arbitrary detention, including the right to challenge the lawfulness of detention, in Article XXV.[68]

In addition to the treaty provisions outlined above, the right to be free from arbitrary detention forms part of customary international law by analysis under the two relevant considerations: 'the material facts, that is, the actual behaviour of states, and the psychological or subjective belief that such behaviour is "law"'.[69] This is further evidenced by the establishment of the UN Working Group on Arbitrary Detention,[70] the production of the Body of Principles for the Protection of All Those in Any Form of Detention or Imprisonment[71] and the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance in 2006.

Permissible bases for detention

Although international human rights law is concerned with preventing detention that is unjust or incompatible with the principles of justice and human dignity,[72] it is not blind to the practical necessities of statehood and the reality that detention is occasionally required for the purposes of punishment or protection. Thus, international human rights

[67] American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 17 (1992).

[68] *Ibid.*, Article XXV: 'No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. No person may be deprived of liberty for non-fulfilment of obligations of a purely civil character. Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody.'

[69] M. Shaw, *International Law*, 5th edn., (2003, Cambridge; Cambridge University Press), p. 70.

[70] Established by Resolution 1991/42 of the Commission on Human Rights, UN Doc E/CN.4/1991/22.

[71] Adopted by GA Res. 43/173 of 9 December 1988.

[72] See, e.g., *A v Australia*, UN HRC, Complaint 560/1993, Views Adopted 30 April 1997, UN Doc. CCPR/C/59/D/560/1993; *Gangaram Padray Case*, Order of the Court of 27 November 1998, *reprinted in* 1998 Annual Report of the Inter-American Court of Human Rights [531], OEA/Ser.L/V/III.43, doc. 11 (1999).

law acknowledges particular circumstances in which detention is to be *prima facie* regarded as not being arbitrary;[73] in other words, it recognises a number of generally permissible bases for detention. In this respect, the UN Human Rights Committee has found that Article 9 of the International Covenant on Civil and Political Rights allows for criminal detention, medical detention and preventive detention subject to overview mechanisms being in place.[74] In addition, it is broadly accepted in international human rights law that detention is permissible by reason of a conviction by a competent court,[75] for non-compliance with a court order,[76] to bring an individual before a competent authority as a result of a reasonable suspicion of having committed an offence[77] or, if it is reasonably necessary, to prevent the detainee from commissioning an offence,[78] for educational purposes or to bring a child before the relevant legal authority,[79] for medical reasons[80] and to prevent unauthorised entry into a country or effect a deportation.[81]

In each case the detention must be 'lawful', meaning that it must not only be done on the basis of enacted law, but also that this law itself ought to be 'lawful' by reference to two questions: (1) is the detention based on a law that has been promulgated in accordance with the laws of the material state and in accordance with the principles of the rule of law;[82] and (2) is the detention based on a law that has been promulgated

73 For detentions that are deemed *prima facie* to be arbitrary, see Jayawickrama, *The Judicial Application of Human Rights Law*, p. 377; H. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd edn., (2000, Oxford; Oxford University Press), p. 643.

74 UN Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI\GEN\1\Rev.1 at 8 (1994).

75 Article 5(1)(a), European Convention on Human Rights; Article 5(1)(a), Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States.

76 Article 5(1)(b), European Convention on Human Rights.

77 Article 5(1)(c), European Convention on Human Rights; Article 5(1)(b), Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States.

78 Article 5(1)(c), European Convention on Human Rights.

79 Article 5(1)(d), European Convention on Human Rights; Article 5(1)(c), Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States.

80 Article 5(1)(e), European Convention on Human Rights.

81 Article 5(1)(f), European Convention on Human Rights.

82 Within the European Convention on Human Rights system this requires, in particular, that '[f]or domestic law to meet [this requirement] it must afford a measure of legal protection against arbitrary interference by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights, it would be contrary to the

in accordance with the international obligations of the material state?[83] Failure to answer the first question in the affirmative will result in a detention that is 'unlawful' in both domestic and international law, whereas failure to answer the second question in the affirmative results in a detention that is unlawful in international law. In the latter case, the detention's lawfulness in domestic law will depend on the status of the particular treaty within the relevant domestic legal system. In spite of the dangers that it poses to individual liberty, international human rights law does recognise the permissibility of administrative detention in limited circumstances.

In 1993 the UN Working Group on Arbitrary Detention considered the permissibility of detention based on 'an administrative measure whose duration is specified, but not at the time of the decision'.[84] The Working Group suggested that where someone has been detained by virtue of an administrative measure (which can include an executive direction) the detention is arbitrary if its duration is not subtracted from any sentence subsequently served.[85] Thus, a 'case of an administrative measure of indefinite duration'[86] gives rise to a detention that is *prima facie* arbitrary, but that can be saved from such classification by the provision of safeguards and the deduction of its duration from subsequent time to be served.[87] In order for such administrative detention to

rule of law . . . for a legal discretion granted to the executive to be expressed in terms of an unfettered power'. *Maestri v Italy* [2004] ECHR 76 (17 February 2004), para. 30. According to Colin Warbrick '[t]his is a reinforcement of the "no-Alsatia" principle of the rule of law: not only must there be no law-free areas *de jure*, there must be none created *de facto* by the writing of formal laws of such generality that they provide no constraint or none for which accountability may be made'; C. Warbrick, 'The European Response to Terrorism in an Age of Human Rights' (2004) 15 *European Journal of International Law* 989, 1000.

[83] According to the UN Working Group on Arbitrary Detention 'a case of deprivation of liberty ceases to be arbitrary if it is consistent both with domestic legislation and with the relevant international standards set forth in the [UDHR] and in other relevant international instruments accepted by the State concerned. It is only necessary for it to be inconsistent with one of those criteria . . . for the deprivation of liberty to be deemed arbitrary.' UN Doc. E/CN.4/1999/63, para. 60.

[84] Report of the UN Working Group on Arbitrary Detention (1993), UN Doc. E/CN.4/1993/24, p. 20.

[85] *Ibid.* [86] *Ibid.*, p. 20.

[87] This is particularly so within the Inter-American system, where the Inter-American Court of Human Rights has held that preventive detention can be used only to guarantee trial or the integrity of legal proceedings: 'Since guarantee of the trial is the only purpose of pretrial imprisonment, any other objective sought with deprivation of liberty, such as prevention of new crimes, is part of the imposition of the sentence.' *Pinheiro & dos Santos v Paraguay*, Case 11.506, Report No. 87/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 252 (1999).

prevent classification as 'arbitrary' it appears that there must be some reasonably well-defined 'criteria, express or implied, which govern the exercise of discretion',[88] and an oversight/review mechanism must be available to the detainee. The Working Group also suggested, however, that administrative detention can only be saved from arbitrariness where it is followed by a process that results in the imposition of a custodial sentence from which the period of administrative detention can be deducted (or, presumably, the granting of compensation if it transpires that a person has been detained in the absence of a reasonable basis).

Many individuals have been detained or continue to be detained, ostensibly for the purpose of preventing the commission of future acts of terrorism, since 11 September 2001 and, indeed, internment has long been used as a counter-terrorist measure. Although there can be no question that internment is a difficult and problem-laden counter-terrorist policy that has frequently been used to detain individuals against whom there is not even a reasonable suspicion of any kind of involvement in terroristic violence, the general illegitimacy of internment and counter-terrorist detention, as it has tended to be used, does not detract from the *possibility* within international human rights law of the lawful use of preventive detention.

International law does not prohibit preventive detention *per se*; rather it prohibits *arbitrary* preventive detention. The germane question then becomes whether these kinds of counter-terrorist, administrative detentions can be said to be arbitrary, especially where they do not result in a process that leads to the imposition of a custodial sentence from which the period of administrative detention can be deducted. Notwithstanding the report of the UN Working Group on Arbitrary Detention considered above, which suggests that this is a requirement, general international human rights law instruments arguably leave space for more 'classical' types of preventive detention subject to minimum safeguards. Article 9 of the International Covenant on Civil and Political Rights appears to allow for preventive detention. While it provides, in Article 9(1), that 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law', it does not, in those terms, preclude the creation and implementation of an internment/preventive detention system by law. Of course, as mentioned above, that law would have to comply with international human rights law itself in order to satisfy Article 9, including ensuring that the detained individual is 'entitled to take

[88] Jayawickrama, *The Judicial Application of Human Rights Law*, p. 380.

proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful'.[89] A textual and historical analysis of Article 5(1) (c) of the European Convention on Human Rights, which allows for detention of an individual 'for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so', suggests the permissibility of preventive detention within the European Convention on Human Rights system. It can certainly be argued that this clause was intended to allow for arrest and detention when an offence is in train, i.e. to prevent the completion of the commission of an offence.[90] Although that restrictive view has been referred to in a number of judgments of the European Court of Human Rights,[91] a deeper analysis of the provision suggests that it may have a wider remit, bearing in mind, in particular, that the preventively detained individual must still enjoy safeguards, including the capacity to challenge the lawfulness of detention under the remaining elements of Article 9 of the International Covenant on Civil and Political Rights.[92]

The notion of non-arbitrary preventive detention may appear to be somewhat paradoxical: is it not by definition arbitrary to detain someone who has not committed any offence on the suspicion that they may do so in the future? The answer is that such detention is arbitrary only where appropriate safeguards are not available to the detainee. A fundamental element of these safeguards – and one which has been made particularly vulnerable in counter-terrorist detention in the 'War on Terror' – is the capacity to challenge the lawfulness of one's detention.

The right to challenge the lawfulness of one's detention

Most international human rights law instruments require that individuals who are subjected to detention are informed of the basis of their detention and have the capacity to challenge its lawfulness.[93] So

[89] Article 9(4), International Covenant on Civil and Political Rights.

[90] J. Fawcett, *The Application of the European Convention on Human Rights* (1987, Oxford; Clarendon Press), para. 89.

[91] See, e.g., *Guzzardi v Italy* (1980) 3 EHRR 333; *Ciulla v Italy* (1989) 13 EHRR 346.

[92] See further, C. Macken, 'Preventive Detention and the Right to Personal Liberty and Security under Article 5 ECHR' (2006) 10 *International Journal of Human Rights* 195.

[93] Article 9(2) and (4), International Covenant on Civil and Political Rights; Article 5(2) and (4), European Convention on Human Rights; Article 7(4) and (6), American Convention on Human Rights; Article 5(2) and (3), Convention on Human Rights

important is this right that not even a situation of national crisis will justify detention without due cause in the absence of a derogation.[94] As considered already in this chapter, lawfulness is determined by reference to both national and international law; thus, the international right to challenge the lawfulness of detention necessarily includes a right to challenge compatibility with both bodies of law. Review of lawfulness cannot be limited to an assessment of compliance with domestic law alone.[95]

The right to challenge the lawfulness of detention applies even where the right to be free from arbitrary detention is expressed in broad and general terms. Thus, while Article 3 of the Universal Declaration of Human Rights protects the right to liberty, Article 9 of the Declaration protects individuals from 'arbitrary arrest, detention or exile'. As a natural corollary of the Article 9 right and the provisions of Article 8 of the Declaration, providing a right to 'an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law', there must be a mechanism for identifying breach and providing an appropriate remedy. The right to be free from arbitrary detention and the right to a remedy also interact in two other instruments, which express the right to liberty in general terms (the Arab Charter on Human Rights and the African Charter on Human and People's Rights) and are further bolstered by Principle No. 32(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which provides:

> A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.

The more specific protections against arbitrary detention tend to provide expressly for a right to challenge the lawfulness of detention. Thus,

and Fundamental Freedoms of the Commonwealth of Independent States; Principles 10, 11 and 32, Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment.

[94] *Ilombe & Shandwe v Democratic Republic of the Congo* Complaint No. 1177/2003, Views adopted 16 May 2006, UN Doc. CCPR/C/86/D/1177/2003: it is not acceptable to detain someone for breach of national security without substantiating the complaint against them.

[95] *A v Australia*, UN HRC, Complaint 560/1993, Views Adopted 30 April 1997, UN Doc. CCPR/C/59/D/560/1993; *Van Alphen v Netherlands* Complaint No. 305/1988, Views adopted 23 July 1990, UN Doc. CCPR/C/39/D/305/1988; *Campbell v Jamaica* Complaint No. 618/1995, Views adopted 20 October 1998, UN Doc. CCPR/C/64/D/618/1995.

Article 5(4) of the European Convention on Human Rights provides that a detainee 'shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'. Article 9(4) of the International Covenant on Civil and Political Rights and Article 7(6) of the American Convention on Human Rights are expressed in almost identical terms, while Article 5(3) of the Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States requires that a detainee 'shall be entitled to have the lawfulness of his arrest or detention examined by a court'. This suggests that a judge or court ought to be able to assess compliance with procedural requirements in domestic law, the reasonableness of the suspicion that forms the basis for the detention and the legitimacy of the purpose of detention. In common law jurisdictions, such as the US and the UK, *habeas corpus* petitions normally allow for these three levels of assessment.[96]

In order to satisfy international legal obligations, detainees must have the opportunity not merely to lodge a petition but to have the lawfulness (in domestic and international law[97]) of their detention *substantively* reviewed.[98] This is equally the case in respect of administrative detention.[99] Although *habeas corpus* is the mechanism by which detainees in common law countries have traditionally been empowered to challenge the lawfulness of their detention before a neutral arbiter, such proceedings ought not to automatically be taken to vindicate the international right to challenge the lawfulness of detention; the practical operation of the writ in a particular case will be taken into account in assessing whether an individual's right to challenge the lawfulness of his or her detention has been satisfied.[100]

96 See, e.g., *Brogan & Ors v UK* [1988] ECHR 24. Earlier drafts of the International Covenant on Civil and Political Rights expressly refer to *habeas corpus* but these references were removed out of deference to non-common-law legal systems (UN Doc. A/2629).

97 *Baban v Australia* Communication No. 1014/2001, Views adopted 18 September 2003, UN Doc. CCPR/C/78/D/1014/2001.

98 *Smirnova v Russian Federation* Complaint No. 712/1996, Views adopted 18 August 2004, UN Doc. CCPR/C/81/D/712/1996.

99 *Ahani v Canada* Complaint No. 1051/2002, Views adopted 15 June 2004, UN Doc. CCPR/C/80/D/1051/2002.

100 See, e.g. *Chahal v UK* (1996) 23 EHRR 413 where procedural shortfalls, including lack of complete information, resulted in a finding that neither the domestic courts nor the special advisory panel in security cases were 'courts' within the meaning of Article 5(4), despite being capable of hearing *habeas corpus* petitions.

International courts and treaty bodies have developed a number of principles regarding the right to challenge the lawfulness of one's detention. Firstly, it is clear that what this right requires will very much depend on the circumstances of the particular case.[101] As outlined below, there is a necessary degree of flexibility built in to the guarantee for the sake of practicability. Thus, where detention results from an administrative decision, the detainee must have recourse to a court but where the detention results from a court procedure then the opportunity to challenge its legality can be rolled into the court decision, provided the court procedure observes and respects the rights of the individual.[102] Although international law requires that a detainee has the opportunity to mount a challenge before a 'court', what is really required is that the challenge is heard by a tribunal where 'the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question'.[103] The authority hearing the challenge must be capable of ordering the release of the detainee[104] and should be 'independent, objective and impartial in relation to the issues dealt with'.[105]

The 'guarantees appropriate' to the detention and detainee in question will be entirely dependent on the particular circumstances of the case; as the European Court of Human Rights has noted 'the scope of the obligation . . . is not identical in all circumstances or for every kind of deprivation of liberty'.[106] Thus, while international law requires that detainees are provided with an adversarial procedure[107] in which they can participate (or be represented by an advocate),[108] the exact format of that procedure will depend on the circumstances of the case. Where, as

[101] See, e.g., *Winterwerp v The Netherlands* [1981] ECHR 7; *Boumar v Belgium* (1988) 11 EHRR 1.

[102] *De Wilde, Ooms & Versyp v Belgium* (1971) 1 EHRR 30, para. 73.

[103] *Boumar v Belgium* (1988) 11 EHRR 1, para. 57.

[104] *Shafiq v Australia* Communication No. 1324/2004, Views adopted 13 November 2006, UN Doc. CCPR/C/88/D/1324/2004.

[105] *Saimijon & Bazaro v Uzbekistan* Communication No. 959/2000, Views adopted 8 August 2006, UN Doc. CCPR/C/87/959/2000, para. 8.3; see also *Kulomin v Hungary* Communication No. 321/1992, Views adopted 22 March 1996, UN Doc. CCPR/C/50/D/521/1992, para. 11.3.

[106] *Boumar v Belgium* (1988) 11 EHRR 1, para. 60.

[107] *Sanchez-Reisse v Switzerland* (1986) 9 EHRR 71.

[108] *Toth v Austria* (1991) 14 EHRR 551; *Bousroual v Algeria* Communication No. 992/2001, Views adopted 24 April 2006, UN Doc. CCPR/C/86/D/992/2001; *de Morais v Angola* Communication No. 1128/2002, Views adopted 18 April 2005, UN Doc. CCPR/C/83/D/2002.

in the 'War on Terror', there are particular concerns relating to protecting information and evidence etc . . . states enjoy some flexibility. However, as I consider in more detail below, states may not completely preclude challenges to the lawfulness of detention. This flexibility will also be applied to the definition of 'speedy' review of the lawfulness of detention, although the positive obligation to arrange the legal system in order to ensure that petitions are considered promptly once they have been lodged remains in force[109] and, arguably, takes on a greater significance in times of crisis where preventive detention becomes a part of a national security strategy.

The right to be free from arbitrary detention in a time of crisis

We have already mentioned that international human rights law is cognisant of the reality that states will sometimes find themselves in a time of crisis where they perceive some limitation on rights to be required in order to secure the state. In these circumstances the system of international human rights law provides a number of options to a state: rights can be applied as normal, but with the international legal system affording the state a degree of flexibility as required by the situation, *or* rights can be derogated from as allowable under the applicable international legal regime,[110] *or* an armed conflict could be said to exist in which, as outlined above, international human rights obligations would be assessed and applied through the prism of international humanitarian law. In line with this approach, the right to be free from arbitrary detention and the accompanying safeguard right to challenge the lawfulness of one's detention are subject to some variation in times of emergency, particularly since international law recognises that detention may be a security requirement in such situations. That said, in times of emergency international law continues to require that the detention only continues for as long as there is adequate justification and where less invasive measures are insufficient to achieve the objectives sought. The objectives themselves must also be lawful.[111]

[109] See, e.g., *E v Norway* (1990) 17 EHRR 30.

[110] Article 15, European Convention on Human Rights; Article 4(1), International Covenant on Civil and Political Rights; Article 27(1), American Convention on Human Rights; Article 4(b), Arab Charter on Human Rights.

[111] See, e.g., *Baban v Australia*, UN HRC, Communication No. 1014/2001, Views adopted 18 September 2003, UN Doc. CCPR/C/78/D/1014/2001; *A v Australia*, UN HRC, Complaint 560/1993, Views Adopted 30 April 1997, UN Doc. CCPR/C/59/D/560/

The first option is to apply the rights without derogation, in which case their requirements will be tailored to take into account the particular challenges facing the state and the appropriate level of protection for the individual in the circumstances. As already noted, the requirements of the right to challenge the lawfulness of one's detention will not be exactly the same in every circumstance; rather the level of information to which the detainee may be privy, the amount of time he may be detained before mounting the challenge, and the degree of reasonable suspicion grounding the detention will all be somewhat relaxed in times of emergency. International legal standards are not inflexible binds; rather they expand and contract to some degree depending on the exigencies of the situation. This is not, of course, to say that they lose their protective force in times of crisis. While the European Convention on Human Rights system has occasionally been criticised because the margin of appreciation and flexibility of Convention provisions may 'allow scope for recourse to abnormal measures without violating the Convention',[112] the European Court of Human Rights has made it clear that there is a limit to its flexibility. In *Brogan v UK* the Court held that, even against a background of extensive terrorist activity and the UK government's security-centric arguments, Article 5 did not allow for detention for up to seven days before a detainee should be brought before a magistrate.[113]

In relation to the right to be free from arbitrary detention, international law recognises some level of exception to its general application by means of derogation but, wary of the potential for the use of political 'disappearances',[114] it does not allow for the absolute suspension of the

1993; *Jailton Neri Da Fonseca v Brazil*, Inter-American Court of Human Rights, Case 11.6.34, Report No. 33/04, Judgment 11 March 2004.

[112] C. Warbrick, 'The European Response to Terrorism in an Age of Human Rights', 1003; see also J. Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights during States of Emergency* (1994, Philadelphia; University of Philadelphia Press), p. 197: 'The tendency of national judiciaries to shrink from the task of second-guessing government decisions in emergencies frequently has been noted as a contributing factor to unchecked human rights abuses. The Commission's "margin of appreciation" doctrine expresses a judicial reticence that arises not from fear but from a perceived disparity in institutional competence to make the fact-specific determinations necessary to determine whether a crisis truly threatens the life of the nation and whether particular measures are strictly required by the exigencies of the crisis' (footnote omitted).

[113] *Brogan v UK* [1988] ECHR 24.

[114] See (Draft) International Convention for the Protection of All Persons from Enforced Disappearance, 23 September 2005, UN Doc. E/CN.4/2005/WG.22/WP.1/REV.4.

right to challenge the lawfulness of one's detention. Derogations may only be entered in exceptional situations, such as war or emergency. The concept of an emergency is, at this point, almost notoriously vague.[115] This notwithstanding, the fact is that this is an important threshold question that states must address before they can interfere with rights by means of a derogation. Certainly, this vagueness emerges at least partially from international courts' reluctance to reject governmental determinations of emergency. That said, as of 11 September 2001 there were certainly some solid indications of an 'emergency' that could be relied on were a state to engage *bona fide* in the derogations process.

The International Law Association has asserted that the existence of an emergency can be assessed by reference to four basic elements: (1) territorial scope, (2) magnitude of threat, (3) provisional or temporary nature, and (4) official proclamation.[116] These basic elements have been mirrored in the jurisprudence of the international institutions which have made it clear that an emergency will only exist where there is an actual and imminent threat to the existence of the nation that involves the whole population either directly or indirectly.[117] The threat can be limited to a specific geographic part of a state,[118] but in that case the response to the threat must also be so geographically limited.[119] The circumstances that are said to constitute an emergency must not be a permanent state of affairs, for the whole concept of emergency legislation (including derogations in international law) is that the situation being combated is extraordinary.[120] While the International Law Association requires that an emergency must be proclaimed in order for

[115] O. Gross, '"Once More Unto the Breach": The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 *Yale International Law Journal* 437; L.C. Keith and S.C. Poe, 'Are Constitutional States of Emergency Clauses Effective? An Empirical Exploration' (2004) 26 *Human Rights Quarterly* 1071; M. Neocleous, 'The Problem with Normality: Taking Exception to Permanent Emergency' (2006) 31 *Alternatives* 191.

[116] Paris Minimum Standards of Human Rights Norms during States of Emergency 1984; See, e.g., R. Lillich, 'The Paris Minimum Standards of Human Rights Norms during States of Emergency' (1985) 79 *American Journal of International Law* 1072.

[117] See, e.g., *Lawless v Republic of Ireland (No. 3)* [1961] ECHR 2, para. 28; UN HRC, General Comment No. 29, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 3.

[118] In *Ireland v UK* [1978] ECHR 1, for example, it was held that 'the crisis experienced at the time by the six counties . . . came within the Ambit of Article 15'.

[119] See, e.g., General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001).

[120] But compare the discussion of *A v United Kingdom* [2009] ECHR 301 in Chapter 5 below, pp. 195–7.

derogations to human rights obligations to be entered,[121] it is important to note that neither the International Law Association nor the other international institutions conceive of a declaration of emergency as sufficient evidence of its existence. Rather, objective evidence as to the other three basic elements of an emergency listed above must be adduced as the justification for the declaration[122] and, while rarely exercised in practice,[123] these international institutions have the capacity to disagree with the state's analysis and hold that there is no emergency on the basis of the evidence.

Where a state is satisfied that an emergency necessitating suspension of certain rights exists, it may enter a derogation to this effect. Derogations are not *cartes blanche*s however; rather they must be limited to the extent strictly required by the exigencies of the situation, and the provisions introduced by reason of them must be lawful and proportionate to the threat faced.[124] Again, lawfulness will be assessed by reference to both national law and the state's other international legal obligations; the dominant principle is that '[t]he lawfulness of the measures taken to deal with . . . [such situations] . . . will depend . . . upon the character, intensity, pervasiveness, and particular context of the emergency and upon the corresponding proportionality and reasonableness of the measures'.[125] Although the European Court of Human Rights, for instance, retains the capacity to disagree with a state as to whether any particular situation constitutes an emergency, it tends to leave a significant margin of appreciation to states on this issue.[126] Where states are perceived as being 'undemocratic', however, the institutions of the Council of Europe appear to have taken a more rigorous approach to assessing the evidence of an alleged emergency.[127] In some cases the European Court of Human Rights' assessment of objective evidence can

[121] While Article 15, European Convention on Human Rights does not expressly require a formal declaration of emergency it is thought that such a declaration is an implied requirement. Article 15 does not require a 'formal proclamation' however; it simply requires some kind of public act; see *Brannigan & McBride v UK* [1993] ECHR 21; *Lawless v Republic of Ireland (No. 3)* [1961] ECHR 2.

[122] General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 5.

[123] Some have gone as far as to suggest that the European system at least applies 'an exceptionally undemanding standard of review . . . where derogations are concerned': S. Marks, 'Civil Liberties at the Margin: the UK Derogation and the European Court of Human Rights' (1995) 15 *Oxford Journal of Legal Studies* 69, 70.

[124] See General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001).

[125] *Advisory Opinion on Habeas Corpus in Emergency Situations*, Inter-American Court of Human Rights, (1987) 11 EHRR 33, para. 22.

[126] *Ireland v UK* [1978] ECHR 1, para. 207.

[127] See *The Greek Case* (1969) 12 YB 1.

appear somewhat abstract. In *Brannigan & McBride*,[128] for example, the Court cited government statistics on the number of terrorist attacks in Northern Ireland in the 1970s *en route* to concluding that an emergency existed there at the material time. This appears to suggest that emergencies are capable of empirical definition; however, an analysis of cumulative statistics might call into question the requirement that an emergency ought to be 'temporary' in some way. This example illustrates the fact that the European Court of Human Rights 'departs in this regard from UN and ILA studies, in which concern has been raised over the phenomenon of the permanent emergency and doubt expressed as to whether such an emergency should qualify as a basis for derogation'.[129]

In addition, certain rights (including but not limited to *jus cogens* rights) are incapable of derogation. Although no international covenant expressly deems the right to challenge the lawfulness of detention to be non-derogable, and the right does not appear to have reached the standard of *jus cogens* as of 11 September 2001, international institutions have developed a position whereby the right to *habeas corpus* or its equivalent appears to have become accepted as an impliedly non-derogable right as a result of its role both in ensuring the rule of law and principle of legality and in protecting individuals from the violation of their other expressly non-derogable freedoms. Thus, emergencies may justify the introduction of legislation allowing for a longer period of detention without charge, but cannot – as a matter of international human rights law – result in the absolute prohibition of a means to challenge the lawfulness of that detention.

This principle is evident from the jurisprudence of the UN Human Rights Committee with regard to the International Covenant on Civil and Political Rights. In *Alegre v Peru*,[130] for example, the UN Human Rights Committee found that Peru's Decree Law No. 25659 violated Article 9(4) of the Covenant. This law deals with 'terrorist' offences including high treason and severely restricts the possibility of people held on suspicion of such offences challenging the lawfulness of their detention through *habeas corpus* petitions. While the Peruvian government argued that this was necessary in order to ensure national security, the UN Human Rights Committee found that emergencies cannot

128 *Brannigan & McBride v UK* [1993] ECHR 21.

129 Marks, 'Civil Liberties at the Margin', 78 (internal citation omitted). See also *A v United Kingdom* [2009] ECHR 301 and the discussion therein of 'perpetual emergencies'.

130 Communication No. 1126/2002, Views adopted 17 November 2005, UN Doc. CCPR/C/85/D/1126/2002.

justify the deprivation of the right to challenge the lawfulness of detention.[131] This case reflects the Committee's view as to the fundamentality of judicial controls of detention; they are the recognised means of both avoiding abuses and providing an effective remedy to human rights violations as required by Article 2 of the International Covenant on Civil and Political Rights.[132]

The clearest statement has come, however, from the Inter-American Court of Human Rights in response to a request, in October 1986, from the Inter-American Commission on Human Rights for an advisory opinion as to whether the judicial protection afforded by *habeas corpus* can be suspended in times of emergency. The Court held that *habeas corpus* (and *amparo*[133]) cannot be suspended in times of emergency as these judicial protections are essential guarantees of the protection of individual rights (including non-derogable rights such as the right to be free from torture) and of the 'effective exercise of representative democracy'.[134] While an emergency situation may necessitate a suspension of certain guarantees, the Court stressed that the rule of law or the principle

[131] The UN Working Group on Arbitrary Detention reached the same conclusion on this law in *Eleuterio Zarate Luján v Peru*, UN Doc. E/CN.4/2001/14/Add.1 at 75 (2000).

[132] See, generally, General Comment No. 29, UN Doc. CCPR/C/21/Rev.1/Add.11 (2001). See also the Committee's concluding observations on Israel (1998), UN Doc. CCPR/C/79/Add.93, para. 21: '. . . The Committee considers the present application of administrative detention to be incompatible with articles 7 and 16 of the Covenant, neither of which allows for derogation in times of public emergency . . . The Committee stresses, however, that a State party may not depart from the requirement of effective judicial review of detention.' See also the recommendation by the Committee to the Sub-Commission on Prevention of Discrimination and Protection of Minorities concerning a draft third optional protocol to the Covenant: 'The Committee is satisfied that States parties generally understand that the right to habeas corpus and amparo should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided in article 9, paragraphs 3 and 4, read in conjunction with article 2 are inherent to the Covenant as a whole.' Official Records of the General Assembly, Forty-ninth session, Supplement No. 40 (A/49/40), vol. I, annex XI, para. 2.

[133] *Amparo* is a constitutional action common in Latin American countries by which an injunction can be acquired for the purposes of protecting constitutional rights.

[134] *Advisory Opinion on Habeas Corpus in Emergency Situations*, Inter-American Court of Human Rights, (1987) 11 EHRR 33, para. 20; See also Article 3, Charter of the Organization of American States, 119 U.N.T.S. 3, *entered into force* 13 December 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* 27 February 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, *entered into force* 16 November 1988; amended by Protocol of Washington, 1-E Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* 25 September 1997; amended by Protocol of Managua, 1-F Rev. OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* 29 January 1996.

of legality are never suspended; these continue to be the guiding principles for governance even in times of strain.[135] Judicial protections are an essential guarantee of the application and respect for these principles, and *habeas corpus* is the means of guaranteeing protection from what international law recognises as the most egregious human rights violations (as defined by *jus cogens* and non-derogable rights).[136] These protections have a particular importance in cases of emergency when some rights and freedoms might be suspended[137] and may not, therefore, be suspended themselves.

By contrast, the European Court of Human Rights has never held that the right to challenge the lawfulness of one's detention is non-derogable. That said, the provision of effective review mechanisms such as *habeas corpus* has been high on the Court's list of considerations when assessing whether emergency detention measures comply with Article 5 of the European Convention on Human Rights. Even where a contracting party derogates from Article 5, the European system does not allow for indefinite and/or incommunicado detention. Rather it allows for the period of time before one is charged or released to be extended to the level required by the exigencies of the situation, giving the states parties a margin of appreciation in these matters. In assessing whether the pre-charge detention period is excessive in terms of the right to be free from arbitrary detention the Court will take into account the detainee's access to *habeas corpus* or equivalent proceedings: *habeas corpus* is seen as an 'effective safeguard[] . . . which provided an important protection against arbitrary behaviour and incommunicado detention'.[138] Given the importance that the Court appears to attach to the unimpeded availability of *habeas corpus*, Janis, Kay and Bradley's claim that 'one assertion that may be drawn from [the Inter-American Court's advisory opinion on *habeas corpus* in times of emergency] is that no European state should be permitted to derogate from its duties under Article 5(4) of the European Convention, even though this is not expressly excluded by Article 15(2)' appears reasonable.[139]

135 *Advisory Opinion on Habeas Corpus in Emergency Situations*, Inter-American Court of Human Rights, (1987) 11 EHRR 33, para. 24.

136 *Ibid*., paras. 29, 35. 137 *Ibid*., para. 40.

138 *Aksoy v Turkey* [1996] ECHR 68, para. 82, referring to *Brannigan & McBride v UK* [1993] ECHR 21. But see also the dissenting judgment of Walsh J in *Brannigan & McBride* where he cast significant doubt on the effectiveness of *habeas corpus* in emergency situations if compliance with international law could not successfully ground an application for release (para. 7, dissent of Walsh J).

139 M. Janis, R. Kay and A. Bradley, *European Human Rights Law: Text and Materials*, 2nd edn., (2000, Oxford; Oxford University Press), p. 401.

The mere fact that international law appears to ascribe a non-suspendiary character to *habeas corpus* should not be taken to mean that international institutions always engage states effectively to ensure that this right is meaningfully provided. Rather, it appears that some international institutions have, at times, engaged in an unfortunately shallow analysis of whether *habeas corpus* proceedings, as provided for in law, actually satisfy the requirements of the right to challenge the lawfulness of detention, including in particular the right to a meaningful substantive review of the basis for detention as discussed above. The European Court of Human Rights has, in particular, tended to assert satisfaction of Article 5(4) as a result of the mere provision of *habeas corpus* in domestic law without considering whether, in a particular case or a particular circumstance, the available proceedings provide substantive review before a neutral arbiter as required by international law. This was particularly so in relation to a number of cases dealing with suspected terrorist detainees in Northern Ireland.

In *Ireland v UK*[140] the European Court of Human Rights considered whether *habeas corpus* review as provided for in the applicable law was consistent with the requirements of Article 5(4) of the European Convention on Human Rights. The case concerned internees who could be subject to internment on the recommendation of an individual police officer. The internment was subject to review by an advisory committee, which did not have the power to order release, but internees could enter *habeas corpus* petitions. The law only allowed for the internment to be challenged by an assertion of *mala fides* on the part of the individual police officer whose recommendation resulted in the internment, but there was no potential to challenge lawfulness on the basis that the officer's suspicion was not a reasonable one. Although this standard of review clearly appears to contravene the requirement for effective and substantive review of detention, the European Court found that there had been no violation of Article 5(4): *habeas corpus* petitions were facilitated and thus the internees' right to challenge the lawfulness of detention was said to be vindicated.

Other Northern Ireland cases showed a similarly shallow review of the satisfaction of Article 5(4) rights on the part of the Strasbourg Court. In *Brogan v UK*[141] the Court held that detention for just over four days violated Article 5 of the Convention, but it did not find a violation of Article 5(4) as a result of the formal availability of *habeas corpus* to

[140] [1978] ECHR 1. [141] [1988] ECHR 24.

detainees. This was notwithstanding the fact that under the Prevention of Terrorism Act 1984 detainees could be held virtually incommunicado for the first 48 hours,[142] had only limited access to counsel after that time,[143] and, even where a *habeas corpus* petition was mounted, precedent suggested that the potential for success was minimal in the circumstances.[144] Instead of focusing on the real-life workings of *habeas corpus* petitions for suspected terrorist detainees, the European Court considered the operation of the writ in the abstract and found that detainees' Article 5(4) rights were not violated, because *habeas corpus* review could encompass review of both procedural compliance with domestic law and substantive compliance with domestic and international legal standards. The fact that UK precedent clearly stated that '[t]he scope of this review is not uniform and depends on the context of the particular case and, where appropriate, the terms of the relevant statute under which the power of detention is exercised'[145] suggested that an *in abstracto* consideration of *habeas corpus* in the context of suspected terrorist detainees was too shallow a review to ensure effective rights-protection. In short, the European Court of Human Rights appeared to be concerned with the availability of some level of *habeas corpus* review, as opposed to the depth and substance of the review itself.[146]

There was an exception to this pattern when the Court considered the importance of substantive review of the reasonableness of suspicion resulting in detention in the case of *Fox, Campbell & Hartley v UK*.[147] In this case, the Court stressed that Article 5(4) required that detainees would be able to meaningfully challenge the lawfulness of their detention. Where detention was based on suspicion, this required a capacity to challenge the reasonableness of that suspicion. *Fox et al.* is an important break from the other Northern Ireland cases, particularly since it reaffirms the international standard (as outlined above) of substantive as opposed to formal challenges to the lawfulness of detention. However, the overwhelming pattern from the Northern Ireland cases prior to 2001

[142] s. 56(11)(6), Police and Criminal Evidence Act 1984; s. 44(6), Northern Ireland (Emergency Provisions) Act 1991.

[143] s. 58, Police and Criminal Evidence Act 1984; s. 45, Northern Ireland (Emergency Provisions) Act 1991.

[144] *Ex parte Lynch* [1980] NILR 126; *Hanna v Chief Justice of the RUC* (1986) 13 NIJB 71; see also W. Finnie, 'Rights of Persons Detained under the Anti-Terrorist Legislation' (1982) 45 *Modern Law Review* 215.

[145] *Brogan v UK* [1988] ECHR 24, para. 40, summarising the principles of *habeas* review in UK law.

[146] See *Brannigan & McBride v UK* [1993] ECHR 21.

[147] [1990] ECHR 18.

(and particularly prior to the Good Friday Agreement of 10 April 1998) is one of deference towards the detaining authority in times of terrorist-related emergency.[148]

Although it appears to be unique to the European system and does not appear in the decisions and considerations of the UN Human Rights Committee, the UN Working Group on Arbitrary Detention or the Inter-American Court of Human Rights, the deference shown to contracting states in these European Convention on Human Rights cases reflects the traditional judicial deference shown towards the executive in domestic legal proceedings in times of war or emergency, and highlights the potential for some rights-endangering phenomena to reproduce themselves in international judicial scenarios, often to the detriment of individual rights.

As of September 2001, the international legal standards appeared to suggest, therefore, that in emergency situations, and certainly in those accompanied by derogations to the right to be free from arbitrary detention, challenges to the lawfulness of detention might be postponed to some extent and slightly different degrees of reasonableness of suspicion might be allowed for. That said, in the main it was clear that the basic requirement of an opportunity to launch a meaningful challenge to the lawfulness of one's detention could not be denied to detainees, regardless of the emergency situation or their status as suspected terrorists.

Conclusion

The material presented in this chapter shows that, at the time of the attacks of 11 September 2001, the standards of international human rights law and their applicability in times of emergency and times of conflict were quite clearly established. Within these standards, the right to challenge the lawfulness of one's detention – a fundamental safeguard of the right to be free from arbitrary detention – had reached the point of near-universal implied non-derogability and its essential ingredients (i.e. an adversarial process before a neutral arbiter with the power to order release following a substantive review of the lawfulness of

[148] For an in-depth consideration of the reduction in deference in more recent cases relating to Northern Ireland and a theorisation of this, see C. Campbell, 'Northern Ireland: Violent Conflict and the Resilience of International Law' in Brysk, A. and Shafir, G. (eds.), *National Insecurity and Human Rights: Democracies Debate Counter-terrorism* (2007, Berkeley, CA and London; University of California Press), p. 56.

detention) were clearly established. It had become generally accepted that international human rights law did not lose its significance by virtue of the existence of an armed conflict, and that states were extraordinarily bound by their obligations under international law for extra-territorial activity, including when a geographical area or an individual were under the acting state's effective control and authority. Even if – as a matter of their own constitutional arrangements – the US and the UK were not always bound by international human rights law as a *domestic* matter, these standards were binding on them internationally. The standards did not, however, place unreasonable demands on these states or fail to acknowledge the need in limited situations of crisis, including terroristic crisis, to restrict rights to some extent.

Both international human rights law generally, and the right to challenge the lawfulness of one's detention in particular, had developed in a manner that was accommodationist, i.e. a manner that allowed for some expansion of state power in times of emergency that would not otherwise be permissible. In this respect, however, the state's muscle could only be flexed to a certain degree. *Jus cogens*, absolute rights, and non-derogable rights still had to be respected and any measures introduced by reason of a derogation had to pass the dual tests of proportionality and strict necessity. In addition any limitations on rights that were imposed without derogation had to be strictly required, minimal, and applied in a non-discriminatory manner. International human rights law, therefore, tempered the Faustian pact of derogations with the requirements of proportionate and necessary response that fell within the well-established limitations of acceptable state action.

These standards had been tested in Northern Ireland, Turkey, Uruguay, Peru and other nations and, while imperfect and sometimes unevenly applied, had shown themselves to be appropriate and achievable standards in times of terrorism-related threat and violence. The US and the UK, however, insisted on promoting the alleged 'difference' of the 'War on Terror' and Al Qaeda, to argue that international human rights law either did not apply at all or, while applicable, required recalibration to increase the level of permissible state action. This was a clear attempt to project a conception of international human rights law as some kind of 'suicide pact' for the state that unreasonably stymied desires for repressive action represented as being justifiable and necessary. The most powerful representations of this kind came from the executive in both states, with those representations frequently being translated into legislation or a legislative licence to pursue repressive

policies. The executive projection of panic-related characterisations of international human rights law had both domestic and international audiences; it aimed to open up a politico-legal space where repressive law and policy could be introduced domestically and given an imprimatur of legitimacy internationally by reference to lowered international standards. How this executive projection manifested itself is the subject of the next chapter.

3

Counter-terrorist detention: the executive approach

Although the US and the UK have taken markedly different executive approaches to the conduct of counter-terrorism operations in the wake of the 11 September 2001 attacks, both have pursued policies that pose profound challenges to the pre-established standards of international human rights law. For both the Bush and Blair Administrations, the detention of suspected terrorists was a central element of their counter-terrorist policies. In both cases there was a commitment not only to a counter-terrorist detention policy but also to a very restrictive system by which this detention could be reviewed. Both administrations represented suspected terrorists as dangerous enough to be detained without charge or trial and too dangerous to be given access to the normal systems and processes of review. As we saw in the previous chapter, limited bases for detention and a substantive review of the lawfulness of detention are the bulwarks protecting liberty against arbitrary deprivation. Although the paradigms within which the US and the UK approached the matter of detention differed significantly (primarily military v. primarily criminal justice), they both posed a severe challenge to these protective mechanisms of human rights law. The approaches of the executive in both states to introducing detention and limiting review can be framed as panic-related by reference to the arguments that were presented in Chapter 1. Not only were panic-related techniques evident in the executives' attempts to introduce desired detention systems domestically but also in their representations to the international community. In Chapter 5 we will examine the response of the international human rights law institutions to these panic-related arguments, but for now it is sufficient to note that they formed part of a transformative effort by the US (in particular) and the UK to influence a downward recalibration of rights-protecting standards in the context of terroristic crisis or emergency. However, there are important distinctions between the approaches that we must acknowledge at the outset.

The US's approach has been decidedly militaristic: the attacks of 11 September 2001 were almost immediately characterised as military operations that initiated a state of war between the US, the Taliban, Al Qaeda and associated organisations. In contrast, the UK's approach has been primarily based in criminal justice structures; although UK forces participate in the wars in Afghanistan and Iraq, the detention of suspected terrorists not found 'on the battlefield' has been pursued through legislative means and is not rooted in the military prerogative of 'enemy capture'. In both cases, however, the policies proposed, pursued, and (largely) endorsed by legislative measures fail to comply with international legal standards in numerous ways.

In the case of the US the relevance of international human rights law to the detention of suspected terrorists has been entirely denied. Instead of accepting the pre-established complementarity of international humanitarian law and international human rights law, the Bush Administration insisted on the exclusive application of international humanitarian law to suspected terrorist detainees. In applying international humanitarian law, however, the US stressed the difference between Al Qaeda and 'regular' armed forces to justify departing from some of the essential rights-protecting elements of that body of law, including, in particular, the right to an individual determination of combatant status and of whether, as a combatant, one is entitled to be treated as a Prisoner of War. Thus the US's approach sidesteps not only the methods for protection from arbitrary detention in international human rights law, but also those extant in international humanitarian law. Following a number of Supreme Court decisions unfavourable to the executive's position,[1] the US introduced a review procedure in Guantánamo Bay. However, as outlined below, this procedure fell far short of the essential characteristics of a challenge to the lawfulness of detention set down in international human rights law. Thus, the US's approach is one that poses what I categorise as an *external challenge* to international human rights law, i.e. a challenge to its very relevance and applicability.

In contrast, the UK's approach constitutes an *internal challenge* to international human rights law. Instead of denying the relevance and

[1] Particularly *Hamdi v Rumsfeld* 542 U.S. 507 (2004) (holding that 'enemy combatants' who are US citizens and detained inside the US are entitled to constitutional and statutory *habeas corpus*); *Rasul v Bush* 542 U.S. 466 (2004) (holding that statutory *habeas corpus* is available to Guantánamo Bay detainees); *Hamdan v Rumsfeld* 548 U.S. 557 (2006) (holding that Al Qaeda fighters were entitled to the protections of Common Article 3 of the Geneva Conventions). These cases are considered in full in Chapter 6 below.

applicability of human rights standards to counter-terrorist measures taken since the 11 September 2001 attacks, the UK engaged in actions that violated international human rights law but passed them off as permissible on the basis either of derogations to international human rights treaties or of the alleged nature of the contemporary terrorist threat. This has arisen in a number of circumstances: firstly, in the declaration of an emergency and entry of a subsequent derogation without, it seems, the conditions of emergency, as defined in international human rights law, having been present. Secondly, in the introduction of indefinite detention absent effective review mechanisms on the basis of this derogation, in spite of clear standards requiring maximum detention periods even in situations of terrorist threat. Thirdly, and following the lifting of the UK's derogation to the International Covenant on Civil and Political Rights and the European Convention on Human Rights, in the introduction of extremely protracted detention for up to twenty-eight days without charge and the continuing attempts to extend this period to forty-two or ninety days in spite of the clear limits of pre-charge detention laid down in international (and especially European) human rights law. The judicial oversight proposed for this scheme was represented as making it compliant with the UK's international obligations, notwithstanding the fact that it did not comply with the essential characteristics of the right to challenge the lawfulness of one's detention that we considered in Chapter 2. At the heart of these proposals was the UK's core argument: that the contemporary threat from terrorism was *so* different to that which existed before, and so dangerous, that international human rights standards had to be recalibrated to take account of it. In other words, that international human rights law must allow for greater degrees of rights-restricting action by the state in order to effectively protect against modern terrorism.

In the case of both the US and the UK, the policies pursued are largely without objective justification and bear the hallmarks of panic-related law-making. These policies and laws have been introduced and pursued on the basis of slender justificatory materials, and are heavily dependent for their popular acceptance on assertions of extreme risk, the 'othering' of the targets and the demands of moral entrepreneurs such as intelligence and police services. By constructing their approach to Al Qaeda as a 'war', the US was both reflecting the genuinely felt fears and anxieties of the people (popular panic) and creating conditions in which the state – and more particularly the executive – could engage in repressive, rights-limiting action with minimal political resistance

(manufactured panic). Although the UK did not adopt a 'war' construction, it did echo the US conception of Al Qaeda as particularly and perhaps uniquely dangerous terrorists whose methods were especially hazardous, difficult to manage and brutal, and against whom, as a result, repressive measures were required. This is notwithstanding the fact that, as of 11 September 2001, the UK had not itself experienced a direct attack from Al Qaeda.

In both cases the executive authorities focused on framing their rhetoric and, to at least some extent, their policies and approaches in the language of international law including international human rights law. Although in the main this framing exercise appears to have been designed to highlight perceived inadequacies or allegedly anachronistic features of international law, or to argue that international legal standards fail to take fully into account the 'grave realities' of Al Qaeda, engagement with international standards can be understood as an attempt to project panic-related considerations onto international law's management of human rights and counter-terrorism in what might be described as a typically hegemonic manoeuvre intended to achieve a recalibration of international law.[2] As will be seen in Chapter 5, international human rights law seems largely to have resisted that surge somewhat in contradistinction to a theoretical prediction based on neo-realist conceptions of international law as 'power politics'. Neo-realist theoretical analysis is more fully engaged with in Chapter 5, but it is worth bearing in mind as we progress through this chapter.

Making 'folk devils': defining and 'othering' the 'enemy'

We have already seen that the making of 'folk devils' – or 'othering' of the perceived source of risk – is integral to the creation of a moral, manufactured panic. In the case of both the US and the UK, a concerted effort has been made to identify Al Qaeda and its associates as a particularly 'deviant' kind of risk to society; a risk that is essentially unmanageable through conventional means and, thus, epitomises the risk society in which we live. This effort is directed with both domestic and international audiences in mind, with the dual objectives of 'capturing' genuinely held fear and anxiety *and* creating a space in which

[2] N. Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *European Journal of International Law* 369.

repressive measures are presented as the only viable, security-enhancing risk-management strategy available. In addition, the process of making 'folk devils' allows for the drawing of clear cognitive lines between the folk saints (represented as being at high risk from terrorism but low risk from repressive counter-terrorist measures) and the 'folk devils' (represented as posing a high risk of terrorism and therefore justifiably at high risk of being subjected to repressive measures for national security reasons). As long as most of the population perceives itself as being folk saints and fears 'folk devils', this process of 'othering' can create important political opportunities for the introduction of measures such as protracted counter-terrorist detention with extremely limited or, in some cases, no means of effective review.

Although there has been widespread criticism of the US's decision to declare a 'war' on 'terror' on the basis that it is an adjective or a technique,[3] beneath this problematic level of political rhetoric lies a more closely defined concept of the war and enemy pursued by the US and upon which it defines the legal circumference of its military counter-terrorist measures. This was clearly demonstrated by John Bellinger, then State Department Legal Adviser, during an online symposium hosted by the international law blog *Opinio Juris*:[4]

> The phrase 'the global war on terror' – to which some have objected – is not intended to be a legal statement. The US does not believe that it is engaged in a legal state of armed conflict at all times with every terrorist group in the world, regardless of the group's reach or its aims, or even with all of the groups on the State Department's list of Foreign Terrorist Organisations. Nor is military force the appropriate response in every situation across the globe. When we state that there is a 'global war on terror' we primarily mean that the scourge of terrorism is a global problem that the international community must recognise and work together to eliminate. Having said that, the US does believe that it is in an armed conflict with Al Qaida, the Taliban, and associated forces.[5]

[3] Of course, we commonly use the concept of 'war' to frame the rhetoric around different perceived ills such as drugs, crime or cancer. For an analysis, including an exposition of how this relates to the 'War on Terror' see J. Simon, *Governing Through Crime: How the War on Crime Transformed America* (2007, New York; Oxford University Press).

[4] http://opiniojuris.org.

[5] J. Bellinger, 'Armed conflict with Al Qaida?', *Opinio Juris*, 15 January 2007, available at: http://opiniojuris.org/2007/01/15/armed-conflict-with-al-qaida/ (last accessed 21 February 2011). See also J. Bellinger, 'Legal Issues in the War on Terrorism', London School of Economics, 31 October 2006, available at: http://www2.1se.ac.uk/PublicEvents/pdf/20061031_JohnBellinger.pdf (last accessed 21 February 2011).

Thus the war that the US has engaged in since 2001, and which it claims is governed by the laws of war, is a war against 'Al Qaida, the Taliban, and associated forces'; not against terrorism generally. The need to go to 'war' with these terrorists, and indeed to use techniques such as detention in the course thereof, was also represented in terms that clearly 'othered' Al Qaeda from other terrorist organisations or other risks to the US. Responding to a press question on the detention of suspected terrorist detainees at Guantánamo Bay, White House Spokesperson Scott McClellan displayed many of the elements of 'othering' and representing repressive measures as security requirements when he stated:

> [W]e are a nation that is at war. The individuals that we are talking about when it comes to the detainees at Guantánamo Bay, they are dangerous individuals. They are enemy combatants for a reason, because they seek to do harm to the American people. And these are people that were picked up on the battlefield in the war on terrorism. This is part of winning the war on terrorism, going after and capturing and bringing to justice those who seek to do us harm.[6]

By adopting a 'war' paradigm, however, the executive ran the risk of locking itself into the complex set of rules – including rules relating to detention – that apply in cases of armed conflict. In the attempt to escape from these confines, the US proceeded to 'other' Al Qaeda further; this time by distinguishing the organisation from 'traditional' belligerents. Al Qaeda do not generally distinguish themselves through traditional means or comply with the laws of war; in this respect they *are* different to traditional armies (although not necessarily to other terrorist organisations). The US has latched onto that difference in the attempt to carve out exceptions to international humanitarian law and justify a range of repressive measures, including the use of 'black sites' and coercive interrogation as well as protracted detention without effective review.

According to the executive, the lack of traditional military structures and rules in Al Qaeda results in the need to interrogate suspected terrorist detainees in order to ascertain future plans and targets and to 'fight terrorism' effectively. For this reason suspected terrorists have been detained in secret prisons run by the CIA where they are completely hidden from the legal system in order to secure unimpeded

[6] Press Briefing by Scott McClellan, 8 June 2005, available at: www.presidency.ucsb.edu/ws/index.php?pid=66212 (last accessed 21 February 2011).

interrogative access to 'high value detainees':[7] access that we are told has resulted in the acquisition of valuable intelligence and the prevention of further attacks, although it seems impossible to test the accuracy of such assertions. Thus, the US stresses the apparent novelty and difference of its enemy within this war in order to justify controversial techniques employed, while at the same time insisting upon the right to capture and detain suspected terrorist detainees without ceremony or process and (at least until forced to review this by the US Supreme Court[8]) to deny those detainees the opportunity to challenge the lawfulness of their detention through *habeas corpus* or adequate alternative, claiming that the right to detain 'the enemy' is an age-old and well-established prerogative of a nation at war. This is notwithstanding the fact that Article 5 of the Third Geneva Convention[9] requires an individual determination of status in every case where doubt as to whether someone is a combatant arises. The reality is that, precisely because of their failure to distinguish themselves from civilians, individuals identified as terrorist fighters (particularly those captured outside a physical battlefield) ought to be afforded an Article 5 review *as a matter of course* at the time of capture, rather than an illusory review by means of a Combatant Status Review Tribunal (for those detained in Guantánamo Bay) or a purely administrative yearly review conducted by the Administrative Review Board, as were used until 2009 when President Obama ordered a review of the detention process including the review mechanisms within it.[10] Notwithstanding the decision to place the entire process under review, the Obama Administration has continued to vigorously defend all *habeas corpus* petitions in federal courts and has argued that courts are not empowered to order the release of a detainee because of the 'special' circumstances that such detainees

[7] S. Stolburg, 'President Moves 14 Held in Secret to Guantánamo', *New York Times*, 6 September 2006, 1.

[8] *Hamdi v Rumsfeld* 542 U.S. 507 (2004); *Rasul v Bush* 542 U.S. 466 (2004); *Hamdan v Rumsfeld* 548 U.S. 557 (2006); *Boumediene v Bush* 553 U.S. 723 (2008). I traced the development of this case law in F. de Londras, 'Guantánamo Bay: Towards Legality?' (2008) 71 *Modern Law Review* 36 and F. de Londras, 'What Human Rights Law Could Do: Lamenting the Lack of an International Human Rights Law Approach in Boumediene and Al Odah' (2008) 41 *Israel Law Review* 562.

[9] Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* 21 October 1950.

[10] 'Executive Order – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities', 22 January 2009.

present, even where the detainees are deemed to be of insufficient risk to justify detention.[11]

Generally speaking, the UK has not engaged in a military approach to post-2001 counter-terrorism.[12] Rather the UK has focused on defining Al Qaeda in contradistinction to other terrorist organisations. This builds upon the process – long undertaken in the UK – of distinguishing terrorism from other kinds of crime. The UK had a large body of counter-terrorism law in place at the time of the 11 September 2001 attacks, and had established a multi-faceted definition of 'terrorism' in section 1 of the Terrorism Act 2000:

> (1) In this Act 'terrorism' means the use or threat of action where —
> (a) the action falls within subsection (2),
> (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
> (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.
>
> (2) Action falls within this subsection if it —
> (a) involves serious violence against a person,
> (b) involves serious damage to property,
> (c) endangers a person's life, other than that of the person committing the action,
> (d) creates a serious risk to the health or safety of the public or a section of the public, or
> (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
>
> (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1) (b) is satisfied.

Since the introduction of the 2000 Act there have been only minor amendments to this section 1 definition and it continues to apply.[13] In spite of its long history of combating terrorism, and notwithstanding the significant amount of latitude offered by the definitions in the 2000 Act, the UK saw the post-11 September 2001 terrorist threat as radically different to that which had come before it. According to the

[11] *Kiyemba v Obama* 555 F.3d 1022 (D.C. Cir. 2009); see also Government Brief in Opposition to Petition for *Certiorari* in *Kiyemba v Obama*, 29 May 2009.

[12] Of course, the UK continues to participate in the wars in Afghanistan and Iraq but it does not adopt a military paradigm to its counter-terrorism activities, which are considered separate (although parallel) to these military campaigns.

[13] For a thorough analysis see J. Blackbourn, 'The Evolving Definition of Terrorism in UK Law' (2010) *Behavioral Sciences of Terrorism and Political Aggression* 1.

UK, there were four characteristics of Al Qaeda that made it sufficiently 'different' to require a novel response: transnationalism, technological advancement, willingness to give their own lives in pursuit of their objectives, and the depth of the ideological drive motivating Al Qaeda. The allegedly different nature of the contemporary terrorist threat was expressed by Home Secretary Jacqui Smith when introducing proposals for pre-charge detention of up to forty-two days on 1 April 2008:

> The threat we face from terrorism today is very different in scale and nature from any that we have faced in the past. It is more ruthless, very often aiming to cause mass civilian casualties, without warning, using suicide attacks and even chemical, biological or radiological weapons. It is international, drawing upon loosely affiliated networks across the globe that share not only an ideology, but also personnel, training and funds. It is more complex, exploiting new technology to plan and to perpetrate attacks; and it is of an unprecedented scale, with more than 200 groupings or networks and about 2,000 individuals being monitored by the police and the Security Service in the UK alone. That figure is the highest it has been, and represents a new and sustained level of activity by those who wish to kill and maim and to undermine the values that we all share in this country. The threat we face is serious and urgent. As my right hon. Friend the Prime Minister set out in his statement on the national security strategy, the new threats we face demand new responses from us.[14]

Thus the UK's executive policy has been not only that combating terrorism requires recourse to extraordinary legal measures in general, but that Al Qaeda is a different kind of terrorist organisation that requires even more extraordinary legal measures than those in place in the UK's pre-2001 counter-terrorist laws. Central to this policy was the UK's argument that suspected international terrorists ought to be detained without charge because they pose a threat to national security. As outlined below, this policy was firstly enacted through the indefinite detention provisions of Part 4 of the Anti-terrorism, Crime and Security Act 2001. However, once the House of Lords had deemed these measures incompatible with the European Convention on Human Rights on the

[14] Speech on the Second Reading of the Counter-Terrorism Bill, 1 April 2008, available at: *Hansard*, House of Commons Debates, 1 April 2008, Column 647. See also T. Blair, 'A Battle for Global Values' (2007) 86 January/February, *Foreign Affairs* 79; See also, generally, Home Office, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society* (2004), para. 6.

basis of disproportionality and discrimination based on nationality,[15] the policy of protracted preventative detention was approached on twin tracks: firstly, through executive attempts to introduce detention without charge for up to 90 days for suspected terrorists, and secondly through the introduction and (mostly-executive) imposition of 'control orders'. Both of these measures involve some level of judicial oversight but, as considered in Chapter 4, these oversight mechanisms have been largely illusory and insufficient to satisfy the requirements of the right to challenge the lawfulness of one's detention.

In the somewhat immediate aftermath of the 11 September 2001 attacks, the UK concentrated not only on the difference between Al Qaeda and other terrorist organisations, but also on the non-citizen status of those the executive presented as the primary threats. Thus the Anti-terrorism, Crime and Security Act 2001, which allowed for the indefinite detention of suspected terrorists, applied only to non-citizen suspected terrorists.[16] Citizens were to be charged and tried; they could not be held indefinitely under this legislation. Thus the 'othering' of those suspected of involvement in terrorist-related activity and primarily subjected to counter-terrorist laws and policies introduced was multi-faceted: not only were these individuals 'different' to 'normal' terrorists, but they were also different to their alleged targets on the basis of their non-citizenship. As we have already seen, the process of 'othering' in this manner can distance the populace from repressive measures in a manner that reduces salience and makes their application to the electorate somewhat unimaginable: citizenship becomes a qualification for the full panoply of civil liberties and (perceived or actual) non-citizenship becomes a cause for suspicion.[17] However, by distinguishing between citizens and non-citizens in the area of detention and review, the UK was undermining a vital principle of international human rights law: its universal application on the basis of human dignity. Human rights apply to all human beings irrespective of their citizenship or behaviour; to undermine so grossly the foundational right to liberty and the impliedly non-derogable guardian right to review the lawfulness of one's detention

[15] *A (FC) and others; (X) FC and another v Secretary of State for the Home Department* [2005] 2 AC 68.

[16] Part 4, Anti-terrorism, Crime and Security Act 2001.

[17] It should be noted that, in respect of citizens who were considered to be involved in Al Qaeda and held in Guantánamo Bay in particular, the UK was not active in trying to protect their human rights. For a critical account, see C. Murray, 'In the Shadow of Lord Haw Haw: Guantánamo Bay, Diplomatic Protection, and Allegiance' [2011] *Public Law* 114.

on the basis of citizenship was to fundamentally challenge a philosophical bedrock of international human rights law. In addition, the definition of 'terrorist' under the Terrorism Act 2000 was functionally expanded, thus casting the net of counter-terrorism law even more widely than was previously the case. The Act's detention provisions were to be applied to all those the Secretary of State 'suspected' to be terrorists.[18] In this respect, 'terrorist' was to mean anyone who was or had been involved in the commission, preparation or instigation of acts of international terrorism, who was a member of or belonged to an international terrorist group, or who had links with an international terrorist group.[19]

Both the US and the UK, then, engaged in extreme 'othering' processes in the definition of 'the enemy' in this context. For the US, defining the enemy was important in order to define the military target in the 'War on Terror' and, through this definition and identification, to proceed to make an argument of entitlement to capture and detain 'enemy combatants'. Although the UK's approach was different, it was also problematic. For the UK suspected terrorists were 'othered' both by their alleged affiliation with Al Qaeda and, originally at least, by their non-citizenship. While the US went on to mount what I term an external challenge to international human rights law, and the UK an internal challenge, both are premised on this 'othering' process and assertion, and both represented a significant effort to have the rights protections of international human rights law recalibrated downwards on this basis. This is notwithstanding the fact that international human rights law already provided for significant flexibility and repression but subject to limitations including the right to challenge the lawfulness of one's detention.

The external challenge

The US's approach to counter-terrorist detention was firstly premised on the 'othering' of Al Qaeda that we have just considered, and, secondly, on three main decisions: to engage in a military campaign against Al Qaeda and to term this a 'war', to deny that international human

[18] s. 21(1)(b), Anti-terrorism, Crime and Security Act 2001.

[19] s. 21(2), Anti-terrorism, Crime and Security Act 2001. A terrorist group is considered 'international' if it is subject to the control or influence of persons outside the UK (s. 21(3)(a)) and the Secretary of State suspects its involvement in international terrorism (s. 21(3)(b)).

rights law had any relevance or applicability to this war, and to introduce inadequate review mechanisms for those detained in Guantánamo Bay when it became clear that some kind of review was needed. These three decisions in combination represent the US's external challenge to international human rights law.

Making war

In crafting and implementing counter-terrorist detention, the US has posed an external challenge to international human rights law. By this I mean that it has, in effect, rejected its applicability to the 'War on Terror' even though the settled legal position as of 11 September 2001 was that international human rights law continues to apply in times of armed conflict and has exceptional extra-territorial scope. By rejecting the applicability of international human rights law and, at the same time, arguing that there are gaps in international humanitarian law, the US was attempting to create a space in international law in which detention of suspected terrorists without charge or effective opportunity to challenge its lawfulness was permissible when represented as being necessary. Where law intervened to limit that view, it was considered 'quaint' and out of touch with the reality of modern risk; it was, in short, in need of change, especially if it wanted compliance from the US as the only remaining super-power in a unipolar world. The decision to characterise the post-11 September 2001 policies of the US as 'war' also played an important role in creating the domestic space for the introduction of repressive laws represented as 'security enhancing' and primarily directed towards 'folk devils' whose voices are dull, if not mute, within domestic political structures. In addition, it created the opportunity to argue not only that the US could act unshackled by international human rights law but also that those rules it accepted were applicable (i.e. international humanitarian law) ought to be recalibrated to adequately deal with the realities of contemporary terrorism. Eric Posner has characterised the US's very limited approach to international law in the 'War on Terror' as 'a hair's breadth away from the null interpretation'[20] (i.e. the interpretation that international law does not apply at all). Posner questions why the executive chose a narrow, rather than null,

[20] E. Posner, 'Armed Conflict with Al Qaeda: A Reply', *Opinio Juris*, 15 January 2007, available at: http://opiniojuris.org/2007/01/15/armed-conflict-with-al-qaida-a-reply/ (last accessed 31 August 2010).

interpretation of international law and concludes that it may have been because '[i]n return for this self-constraint the world cooperates with the US more than it would otherwise – but correlatively, only a little bit'.[21] The US's transformative mission in relation to international law may offer a further explanation: by engaging with international law, even a little bit, the US seems to me to have been attempting to maintain a relationship through which its panic-related position on the applicability and substance of international human rights law could be transmitted to recalibrate international legal standards by means of amending state practice.

Although the international legal order is decidedly oriented towards the avoidance of the use of armed force,[22] it nevertheless accepts the reality of military confrontation in limited circumstances.[23] Traditionally such military confrontation has been seen as a condition of inter-state belligerence or as an internal conflict between state and non-state forces acting within the state's borders. The concept of a 'war' between a state and a transnational non-state actor did not comply with the dominant conception of armed conflict in international law as of September 2001. Although Hugo Grotius famously claimed that 'Private Men may certainly make War again[s]t private Men, as a Travel[l]er against a Robber, and Sovereign Princes again[s]t Sovereign Princes, as David again[s]t the King of the Ammonites; and [s]o may private men against Princes, but not their own, as Abraham did again[s]t the King of Babylon, and his A[ss]ociates. So may Sovereign Princes against private men, whether their own Subjects . . . or Strangers, as the Romans against Pirates',[24] the structure of international law did not seem to envisage conflict between a state and a transnational non-state actor as of 2001.[25] That notwithstanding, however, the US quickly communicated its position

[21] *Ibid.*

[22] Article 2, Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* 24 October 1945.

[23] Article 51, Charter of the United Nations, 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* 24 October 1945.

[24] Hugo Grotius, *Rights of War and Peace* (1625), Book I, 178.

[25] Notably, however, the 'scale and effect' test for 'armed attack' laid down by the International Court of Justice in the *Nicaragua* Case might suggest a broader notion of armed conflict than merely inter-state, internal and occupation. In that case the Court held that 'the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such operation, because of its scale and effects, would have been classified as an armed attack rather than a mere frontier accident had it been carried out by regular armed forces'; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US of America)(Merits)* [1986] ICJ Rep 16, para. 230.

that the attacks on the Pentagon and World Trade Center were acts of war and, as a result, framed their counter-terrorist policy within a militaristic paradigm. Indeed, journalistic reports suggest an immediate presidential understanding of the attack of 11 September 2001 as an act of war[26] and this became clear in the presidential address made by President Bush on 11 September 2001:

> Today, our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist attacks . . . America was targeted for attack because we're the brightest beacon for freedom and opportunity in the world.[27]

Jens Meierhenrich has remarked that the construction of rhetoric in this television speech 'was motivational in function. It induced implicit analogies [of war] and was constitutive of – and constructed by – the decision-making in the White House.'[28] It was not long before this relatively subtle language became explicit 'war talk'; on 12 September 2001, President Bush interrupted his Communications Director mid-briefing to say 'Let's get the big picture. A faceless enemy has declared war on the US of America. So we are at war.'[29] The attacks were thus considered a declaration of war, notwithstanding their commission by a non-state actor. The US's approach to the matter is well communicated by John Yoo who has noted that an attack of this scale would have constituted an act of war if it were perpetrated by another state, so why ought the result to have been different simply because the perpetrator was a non-state actor?[30] This became explicit in the President's address to a Joint Session of Congress and the American People on 20 September 2001, during which he said:

> On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars – but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war – but not at the center of a great city on a peaceful morning. Americans have known surprise

[26] B. Woodward, *Bush at War* (2002, New York; Simon & Schuster), p. 17.

[27] President Bush, 'Statement by the President in his Address to the Nation', 11 September 2001, available at, http://en.wikisource.org/wiki/Statement_by_the_President_in_his_Address_to_the_Nation,_September_11,_2001 (last accessed 21 February 2011).

[28] J. Meierhenrich, 'Analogies at War' (2006) 11 *Journal of Conflict and Security Law* 1, 14.

[29] B. Woodward and D. Balz, 'We Will Rally the World', *Washington Post*, 12 September 2001.

[30] J. Yoo, *War by Other Means: An Insider's Account of the War on Terror* (2006, New York; Atlantic Books Monthly), Ch. 1.

> attacks – but never before on thousands of civilians. All of this was brought upon us in a single day – and night fell on a different world, a world where freedom itself is under attack . . . . Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated . . . Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists.[31]

This rather short account of the rhetorical reaction to the attack of 11 September 2001 illustrates that by 20 September 2001 it was quite clear that the US was inclined to shape its response in a military, rather than criminal justice, form. International humanitarian law's rules are generally designed to deal with three situations none of which fit particularly well with the idea of a 'War on Terror': international armed conflicts (i.e. between states),[32] non-international armed conflicts (i.e. between a state and a non-state actor that had military characteristics and where the conflict took place on the territory of the state),[33] and occupation.[34] An armed conflict against a transnational non-state actor

[31] President Bush, Joint Session of Congress and the American People, 20 September 2001, available at, http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html (last accessed 21 February 2011).

[32] Third Geneva Convention on the Protection of Prisoners of War 75 U.N.T.S. 135, *entered into force* 21 October 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, *entered into force* 7 December 1978.

[33] Third Geneva Convention on the Protection of Prisoners of War 75 U.N.T.S. 135, *entered into force* 21 October 1950; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* 7 December 1978.

[34] Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War 75 U.N.T.S. 287, *entered into force* 21 October 1950. But see also the 'muddying' of these distinctions by the International Criminal Tribunal for the Former Yugoslavia in *Tadic*, where the court held 'On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.' *Prosecutor v*

that would take place almost exclusively outside the territorial boundaries of the state itself was an enormous challenge to international law.[35] The novelty of this was acknowledged by the then State Department Legal Adviser, John Bellinger, who wrote that 'most past wars were between states, or existed within the territorial limits of a single state' but claimed 'this is an historical fact, not a legal limitation on the concept of armed conflict'.[36]

These difficulties notwithstanding, the executive moved quickly to put in place the domestic legal requirements for the use of force: a congressional authorisation. This consisted of the adoption by Congress of an Authorization for the Use of Military Force on 18 September 2001,[37] which provides the President with the authority:

> [T]o use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the US by such nations, organizations or persons.

Adopting the war paradigm enabled the US to capture public support, which tends towards the executive in a time of war. As a result, measures proposed by the executive are generally taken on faith (at least for the early period of a conflict) and, in any case, governmental power tends to flow towards the executive as parliaments become facilitative rather than combative and courts are delayed in whatever involvement they will have by the sluggishness of legal proceedings.[38] By choosing the 'war' paradigm, the US executive was creating a politico-legal space in which repressive measures could be introduced in the name of 'security', and in which the populace's scepticism of repressive action would be tempered by their panic-related desire for 'absolute security'. The concept of the 'War on Terror' thus facilitated the

Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Appeals Chamber, Case No: IT-94–1-AR72 (2 October 1995), para. 70.

35 See further J. Paust, 'War and Responses to Terrorism', *ASIL Insights*, September 2001.

36 J. Bellinger, 'Armed conflict with Al Qaida?'

37 Pub. L. 107–40, 115 Stat. 224. Article I(8)(11) of the US Constitution ('the War Powers Clause') vests the sole power to declare war in the US Congress, as a result of which the War Powers Act was passed by Congress in 1973 requiring the President to seek an Authorization for the Use of Military Force within 60 days of commencing hostilities: Pub. L. 93–148.

38 F. de Londras and F.F. Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight' (2010) 30 *Oxford Journal of Legal Studies* 19.

introduction and pursuance of repressive measures within the domestic political sphere. The fact that the majority of the most repressive of these measures, including protracted detention without *habeas corpus* or an adequate alternative review mechanism, would be directed only towards 'folk devils' further added to their general popular acceptability.

The decision to engage in a military approach and acquire this broadly worded Authorization for the Use of Military Force, leaving wide executive discretion as to whom force was to be applied to, has been central to the executive policy of counter-terrorist detention over the past nine years. At the time that it was introduced, it was thought that one of the wartime measures within the power of the executive under the Authorisation for the Use of Military Force was the capture and detention of 'enemy combatants'.[39] Indeed, as President Bush asserted '[t]o win the war on terror, we must be able to detain, question, and, when appropriate, prosecute terrorists captured here in America and in the battlefield around the world . . . We have a right under the laws of war, and we have an obligation to the American people, to detain these enemies and stop them from rejoining the battle.'[40] Of course, this largely ignored a major difficulty in the 'War on Terror': identifying who or what the enemy actually was.

It is trite to observe that the concepts of 'terrorism' and 'terrorist' have long eluded clear and precise definition in international law[41] and habitually attract extremely broad and nebulous definitions in domestic law. In the US 'terrorism' is defined as 'premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience'.[42] Through the creation of the concept of the 'War on Terror', intended as both a legal and a rhetorical construct, the US executive arguably entered into an area of executive prerogative in which the definition of 'terrorist' essentially becomes 'those identified as terrorists' in the course of counter-terrorist operations, thus casting the net

[39] *Hamdi v Rumsfeld* 542 U.S. 507 (2004); reaffirmed in *Boumediene v Bush* 553 U.S. 723 (2008).

[40] President Discusses Creation of Military Commissions to Try Suspected Terrorists, 6 September 2006 (White House Press Office), available at: http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html (last accessed 21 February 2011).

[41] See, e.g., J. Friedrichs, 'Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism' (2006) 19 *Leiden Journal of International Law* 69.

[42] Title 22 of the U.S. Code, Ch. 38, s. 2656f(d).

particularly widely.[43] Not only does this cast the net for arrest and detention almost as broadly as might be imagined, but it also identifies a relatively low and quite ambiguous standard against which to review (where review is possible) the lawfulness of someone's detention as a terrorist.

In addition, representing contemporary counter-terrorist measures as 'war' in the legal sense was intended to engage the looser and less restricting rules that apply in times of war. The US has never claimed that choosing war was the only option available to it in response to the attacks,[44] thus marking this as a deliberate policy choice. In making this policy choice, the US elected to conduct counter-terrorist operations within a paradigm in which it was satisfied that 'the Taliban fail to meet the requirements of Article 4 of the [Third Geneva] Convention and so are not entitled to the status of prisoners of war. With regard to the al-Qaeda detainees, the President determined that the Geneva Convention did not apply because al-Qaeda is not a party to the Convention.'[45] Thus the protective elements of the laws applicable to the paradigm chosen by the US did not, in its estimation, in fact operate in relation to detainees. In addition, however, to reaching out to these more permissive standards of behaviour, the US argued consistently that these standards must themselves be further loosened and broadened to deal adequately with the challenge of Al Qaeda and associated forces. Thus, while certain elements of the laws of war were embraced by the US (such as the right to detain 'enemy combatants' until the cessation of hostilities) others were rejected as 'quaint'[46] (such as the protective rights under the Geneva Conventions and the right to have one's combatant status individually assessed). In addition, the applicability of international human rights law was entirely denied.

[43] This bears striking similarity to Schmitt's theory of the partisan: C. Schmitt, *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political* (Trans. A.C. Goodson), (2004, East Lansing, MI; Michigan State University Press). For commentary, see W. Scheuerman, 'Carl Schmitt and the Road to Abu Ghraib' (2006) 13 *Constellations* 108.

[44] J. Bellinger, 'Armed conflict with Al Qaida?'

[45] J. Bellinger, US Delegation Oral Responses to CAT Committee Questions, 8 May 2006, available at: www.state.gov/g/drl/rls/68562.htm (last accessed 21 February 2011).

[46] This term was reportedly used by Alberto Gonzales in a Memorandum prepared while he was White House Counsel. On the contents of the Memorandum, see further J. Dean, 'The Torture Memo by Judge Jay S. Bybee That Haunted Alberto Gonzales' Confirmation Hearings', 14 January 2005, FindLaw, available at: http://writ.news.findlaw.com/dean/20050114.html (last accessed 2 April 2006).

The rejection of international human rights law

We have already seen that international human rights law, the *lex generalis* in a time of armed conflict, had well-established principles of detention and review thereof as of 11 September 2001. The US, however, determined that the conduct of the 'War on Terror' should be governed by international humanitarian law without reference to international human rights law and, furthermore, that detained suspected terrorists were not entitled to basic review processes provided by international humanitarian law itself. This resulted from a somewhat strained reading of international humanitarian law but, even if it were the case, the international human rights law principles applicable to detention would then become relevant to fill the *lacuna* in the *lex specialis*. Those principles, including the right to challenge the lawfulness of one's detention were, however, absolutely rejected by the US in the aftermath of 11 September 2001.

Because of the military objectives served by troop and morale depletion, the law has always recognised the right of a party to an armed conflict to capture and detain enemy fighters until the cessation of hostilities. The US internalised this norm during World War II[47] and it is this traditional wartime doctrine that the executive has cited as authority for the detention of suspected terrorists in the 'War on Terror'. The risk of being subject to capture and detention without ceremony or special procedures applies to all those who take an active role in hostilities, whether their belligerency is privileged or not. Hence, individuals who do actually engage in hostilities on behalf of Al Qaeda, the Taliban, or associated forces are said to be susceptible to capture and detention without ceremony or review, if one accepts the executive's characterisation that this is a war and that those engaged therein are subject to the President's Commander in Chief authority and powers. What this perspective neglects, however, is the very 'difference' of

[47] See *Ex Parte Quirin*, 317 U.S. 1 (1942). In pages 30–1 the Supreme Court defines the five captured 'enemies' as 'enemy combatant', 'illegal combatant' and 'unlawful combatant' without clarifying what difference, if any, there was between these three terms. Stone CJ held (at pp. 30–1) that '[b]y universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.'

Al Qaeda prayed to in aid by the US in the decision to choose the war paradigm in the first place. The concern in this respect is that the significant difference which lies between Al Qaeda and traditional parties to an armed conflict, and the problems of reliable identification that this gives rise to, appear to be forgotten in the context of the asserted prerogative to capture and detain 'enemy' fighters.

As the US executive has repeatedly stated, terrorists do not generally carry arms openly, wear distinctive insignia, or comply with the laws of war. As a result, the risk that 'false positives' would be captured and detained is arguably higher than in traditional armed conflicts where only unprivileged belligerents such as spies or saboteurs are likely to fail to distinguish themselves from the civilian population.[48] Thus, within the US's counter-terrorist policy the stress placed on the 'difference' in the scale and capacity of Al Qaeda as a justification for war, jars with the US's insistence that the traditional rules of capture and detention ought to apply without amendment to those suspected of involvement in these hostilities. Wartime powers of capture and detention are mechanisms of troop and morale depletion, thus they must be applied only to actual combatants if they are to be legitimately and effectively deployed. In a conflict where combatant status is routinely concealed, effective review procedures seem in keeping with the spirit of the laws of war. If the US insists that this is war, then international law demands that the laws of war would be applied in good faith and with the applicable standards of international human rights law in mind. As the right to challenge the lawfulness of one's detention is an impliedly non-derogable right in international human rights law[49] it clearly applies in this context. Through its application in conjunction with international humanitarian law, the US would have to satisfy a neutral arbiter in a substantive adversarial process that an individual is engaged in terrorist activity within the 'War on Terror' in order to rid the individual's detention as 'enemy combatant' of its arbitrary nature. It may then be appropriate and justifiable to detain the individual until the cessation of hostilities or, in the appropriate case, to charge him with a criminal offence; but without review the detention is arbitrary.

The US's refusal to recognise the applicability of international human rights law in the 'War on Terror' is particularly troublesome as a result of

[48] Spies and saboteurs are separately considered as 'protected persons' within international humanitarian law. See R. Baxter, 'So-Called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs' (1951) 28 *British Yearbook of International Law* 340.

[49] See Chapter 2, pp. 64–6.

the apparent 'gaps' that might be said to exist within international humanitarian law.[50] If one accepts the US's classification of the 'War on Terror' as an armed conflict to which the laws of war apply, one must then look to the content of international humanitarian law in order to assess the degree to which those captured in this 'war' are protected. As an initial matter it is helpful to note that the US's use of the term 'combatant' appears to relate back to the Hague Regulations of 1907, Article 3 of which provided that '[t]he armed forces of the belligerent parties may consist of combatants and non-combatants'.[51] Under those Regulations, belligerency was determined by reference to status and one's conduct determined combatant status. While significant elements of Hague law have been incorporated into the modern regime by means of the Additional Protocols done in 1977,[52] it appears to be this concept of 'combatant' that the US relies upon in the 'War on Terror'. The US's analysis then seems to move to the Geneva Conventions, which the executive now accepts apply to the 'War on Terror'. Geneva law is based on a fundamental distinction between combatant and civilian, but not all combatants are entitled to privileged status. Members of irregular forces must comply with the requirements of Article 4 of the Third Geneva Convention[53] in order to acquire combatant privilege; failure to comply with these requirements, as is certainly the case in relation to Al Qaeda, strips one of privilege but, in factual terms, does not strip one of combatant status. Article 4 provides that members of militias and other volunteer corps can be considered Prisoners of War if they are under a command structure, wear a fixed distinctive sign that is recognisable from a distance, carry arms openly, and conduct their operations in a manner that accords with the laws and customs of war.[54] It appears

[50] For an early identification of possible 'gaps' that may arise where international human rights law and/or international humanitarian law might be said not to apply, see T. Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument' (1983) 77 *American Journal of International Law* 589.

[51] Regulations Respecting the Laws and Customs of War on Land, *annex to* Hague Convention IV Respecting the Laws and Customs of War on Land, 18 October 1907, *entered into force* 26 January 1910. See also Article 11, Project of an International Declaration Concerning the Laws and Customs of War, 27 August 1874, 4 *Martens Nouveau Recueil* (ser. 2) 219, (1873–74) 65 *British Foreign and State Papers* 1005.

[52] See R. Murphy, 'Prisoner of War Status and the Question of the Guantánamo Bay Detainees' (2003) 3 *Human Rights Law Review* 257, p. 259.

[53] Third Geneva Convention on the Protection of Prisoners of War 75 U.N.T.S. 135, *entered into force* 21 October 1950.

[54] Article 4(2), Third Geneva Convention on the Protection of Prisoners of War 75 U.N.T.S. 135, *entered into force* 21 October 1950.

to be on this basis (which rather selectively mixes concepts from Hague and Geneva law) that the US concluded that all Al Qaeda members would be deemed unlawful combatants.

Under this analysis there may seem to be a 'gap' in international humanitarian law whereby such combatants are neither privileged nor civilian, however this 'gap', asserted by the US executive, is an imaginary one. In the first place the Martens Clause applies to fill it,[55] as do the requirements of *jus cogens* and the applicable standards of international human rights law as *lex generalis*. The US Supreme Court has attempted to plug this gap by means of Common Article 3 and the rights-protecting standards that are read into that provision,[56] but the important thing at this point is that we identify the fallacy of the alleged gap. Not only did this gap effectively not exist in doctrinal terms but it was *purposefully created* by the executive in order to create a type of legal 'black hole'[57] into which these detainees could be placed without review of the lawfulness of their detention. It was in this alleged gap that the US attempted to promote its conception of appropriate legal standards and, consequently, to reshape international law.

The decision to detain most non-citizen suspected terrorists outside the territorial US is another aspect of the executive rejection of

[55] According to the translation provided in J. Scott (ed.), *The Hague Conventions and Declarations of 1899 and 1907* (1915, New York; Oxford University Press), pp. 101–2, the clause reads: 'Until a more complete code of the laws of war has been issued, the High Contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. They declare that it is in this sense especially that Articles 1 and 2 of the Regulations must be understood.' The exact meaning of the Martens Clause is the subject of some controversy; for an overview and suggested meaning, see A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 *European Journal of International Law* 187.

[56] *Hamdan v Rumsfeld* 548 U.S. 557 (2006). For more on the capacity of the law as it existed prior to 11 September 2001 to 'close the gaps' that are claimed to exist in the context of the 'War on Terror' see F. Ní Aoláin, 'The No-Gaps Approach to Parallel Application in the Context of the War on Terror' (2007) 40 *Israel Law Review* 563 (arguing, at p. 565, that 'existing legal norms provide sufficient coverage to respond to the conflicts experienced in the contemporary moment, as well as to the state and non-state entities participating in them').

[57] This term was used by Lord Phillips to describe Guantánamo Bay in *Abassi v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598, para. 22. See also J. Steyn, 'Guantanámo Bay: The Legal Black Hole' (2004) 53 *International and Comparative Law Quarterly* 1.

rights-based limitations on the detention programme.[58] In addition to the domestic legal reasons for the detention of suspected terrorists abroad,[59] the US has consistently argued that the physical location of detainees is determinative of the extent to which international human rights obligations of the US apply and (quite in contrast with the pre-established standards of international human rights law) that such treaty obligations can never be applied to a state's extra-territorial operations.[60]

The introduction of inadequate review mechanisms

Not only has the US executive insisted on its right to detain suspected terrorists in the 'War on Terror', but also that this detention can be without review. The exclusion of judicial review in the US was, in fact, a central plank of the detention system as originally designed.[61] The detention of individuals outside the US, we now know, was designed in order to avoid review of that detention by means of federal *habeas corpus*. This has been justified not only on the basis of an executive prerogative to detain, which we considered in the previous section, but also on the claim that substantive review would result in a threat to national security and, in any case, that battleground review processes were sufficient without the need for further review. In spite of this argument, however, the need for some kind of review became clear as time went on and the US Supreme Court made increasingly strong pronouncements on the matter.[62] Even then the executive continued to insist that review must be both limited and deferential to executive

[58] See Scalia J dissenting in *Rasul v Bush* 542 U.S. 466, 498–499 (2004) ('[t]oday, the Court springs a trap on the Executive, subjecting Guantánamo Bay to the oversight of the federal courts even though it has never before been thought to have been within their jurisdiction – and thus making it a foolish place to have housed alien wartime detainees'); See also P. Sands, *Lawless World: America and the Making and Breaking of Global Rules – from FDR's Atlantic Charter to George W. Bush's Illegal War* (2005, New York; Viking Penguin, 1st American edn.), p. 144 ('[Detainees] were being held at Guantánamo because it was outside the sovereign territory of the US, and the administration believed that this geographic fact would remove all legal protections – of both American constitutional law and international law').

[59] Based on *Johnson v Eisentrager* 339 U.S. 763 (1950) it was thought that US law did not apply to Guantánamo Bay. This is considered in more detail in Chapter 6.

[60] See, e.g., the US's Response to the Questions asked by the Committee against Torture, 8 May 2006, available at: www.state.gov/g/drl/rls/68562.htm (last accessed 21 February 2011).

[61] Yoo, *War by Other Means*.

[62] de Londras, 'Guantánamo Bay: Towards Legality?'; de Londras, 'What Human Rights Law Could Do'. See also the account of this case law in Chapter 6.

determinations of risk for reasons of national security. Until the Detainee Treatment Act 2005, the review process was designed by the executive branch; in fact, even after congressional involvement the actual operation of these review processes remained largely determined by the executive. The processes themselves also remained unquestionably inadequate from a human rights law perspective. Not only that, but there was little or no acceptance before then that the review process was *required*; rather it was represented as a concession showing the benevolence of the US. When announcing the workings of the Combatant Status Review Tribunals, a Senior Defense Counsel expressly stated that such review 'is not legally required. The status of these detainees has been determined . . . As a matter of policy the department has adopted these procedures so as to not keep any detainee – basically any detainee for whom the war is over, who is no longer a threat to the US.'[63]

The initial review process engaged in when an alleged enemy fighter is captured or brought to US forces on the battleground was described by the US government in review briefs in the early case of *Hamdi v Rumsfeld*[64] in order to argue that there was no need for an 'enemy combatant' to have access to judicial review of the lawfulness of their detention because an adequate review had already taken place. According to the government in this case:

> Those taken into U.S. control are subjected to a multi-step screening process to determine if their continued detention is necessary. When an individual is captured, commanders in the field, using all available information, make a determination as to whether the individual is an enemy combatant, *i.e.*, whether the individual 'was part of or supporting forces hostile to the US or coalition partners, and engaged in an armed conflict against the US.' [Internal citation omitted] Individuals who are not enemy combatants are released. Individuals who are determined to be enemy combatants are sent to a centralized facility in the area of operations where a military screening team reviews all available information with respect to the detainees, including information derived from interviews with the detainee. That screening team looks at the circumstances of capture, assesses the threat that the individual poses and his potential intelligence value, and determines whether continued detention is warranted. Detainees whom the U.S. military determines have a high potential intelligence value or pose a particular threat may be transferred to the U.S. Naval Base at Guantánamo Bay, Cuba, or to another facility.

[63] Final Administrative Review Procedures for Guantánamo Detainees, 18 May 2004, available at, www.globalsecurity.org/security/library/news/2004/05/sec-040518-dod02.htm (last accessed 21 February 2011).

[64] 542 U.S. 507 (2004).

> A general officer reviews the screening team's recommendations. Any recommendations for transfer for continued detention are further reviewed by a Department of Defense review panel. Approximately 10,000 individuals have been screened in Afghanistan and *released* from U.S. custody.[65]

While a battleground review of this nature is both welcome and important it is also inadequate for a number of reasons. First of all, not all intelligence on the basis of which someone is identified, captured and detained is gathered by the US itself and therefore it may not be completely reliable or credible. The prominent role played by 'bounty hunters' in the 'War on Terror' has been well documented.[66] Individuals have been captured and handed over to the US as Al Qaeda fighters for reasons as diverse as political survival, fund-raising, territorial dispute settlement, and petty personal grievances. Those apprehending these individuals in return for enormous financial rewards offered by the US do not have to present rigorous evidence that the captured individuals are in fact 'combatants' within the 'War on Terror' and, due to the lack of safeguards at the point of identification and capture and the necessarily swift battlefield review processes in operation, the risk of mis-identification is high. Secondly, not all suspected terrorists have been captured on the 'battleground' in Afghanistan and Iraq and, therefore, have not been assessed according to this model; rather people have been captured and detained by the US in diverse locations including the Gulf States, Bosnia Herzegovina, Germany and Italy, and transferred into US custody, oftentimes incommunicado. It does not appear that any such battleground review occurs in such circumstances. In spite of the executive's early claim that the determination that an individual is an enemy combatant is deserving of 'the utmost deference by a court',[67] the federal courts have insisted on some kind of review mechanism being put in place. In response to various rights-enforcing judgments, particularly relating to detainees held in Guantánamo Bay, Combatant Status Review Tribunals, subsequently primarily regulated by the Detainee Treatment Act 2005,[68] were

[65] See Brief for the Respondent, *Hamdi v Rumsfeld*, March 2004, pp. 3–4.

[66] See, e.g., C. Stafford Smith, 'How Guantánamo's Prisoners Were Sold', *New Statesman*, 9 October 2006, available at: www.newstatesman.com/200610090029 (last accessed 21 February 2011); K. Sengupta, P. Lashmar and N. Meo, 'Bad Company: "Jack" Idema and the Bounty Hunters of Kabul', *The Independent*, 11 July 2004, available at: www.independent.co.uk/news/world/asia/bad-company-jack-idema-and-the-bounty-hunters-of-kabul-552747.html (last accessed 21 February 2011).

[67] See Brief for the Respondent, *Hamdi v Rumsfeld*, March 2004, pp. 25–7.

[68] Pub. L. No. 109–148, 119 Stat. 2739, 2740 (codified at 10 U.S.C. § 801).

established[69] together with Administrative Review Boards. The Detainee Treatment Act 2005 provided that the procedures of the Combatant Status Review Tribunal were to be determined by the executive,[70] leaving the extent to which this review would be meaningful and substantive entirely within the gift of the executive branch.

For as long as the dual processes of Combatant Status Review Tribunal and Administrative Review Board operated, all Guantánamo Bay detainees had their detention reviewed by them. Although arguably better than nothing at all, these processes had clear deficiencies. Under that system, every Guantánamo Bay detainee was presumptively classified as an 'enemy combatant' (and therefore subject to detention) before the Combatant Status Review Tribunal.[71] The function of the review was not substantive; rather it was to establish whether that presumptive classification remained appropriate. The reviews were non-adversarial and administrative in nature, with determinations being made by a panel of three commissioned officers who were said to be 'neutral'[72] although they were not military judges and only one of them had to be a lawyer.[73] The standard by which the determination was made was whether 'the preponderance of evidence' supported the enemy combatant designation. In addition to this relatively low standard of proof, evidence adduced by the government enjoyed a rebuttable presumption of being genuine and accurate.[74] The Combatant Status Review Tribunal was not bound by standard rules of evidence[75] but could rather consider any evidence deemed to be both relevant and helpful to the matter under

[69] Order Establishing Combatant Status Review Tribunals, 7 July 2004, available at, www.defense.gov/news/Jul2004/d20040707review.pdf (last accessed 21 February 2011).

[70] Details of these procedures are subsequently to be provided *to the* Committee on Armed Services and the Committee on the Judiciary of the Senate and the Committee on Armed Services and the Committee on the Judiciary of the House of Representatives; s. 1005(a)(1), Detainee Treatment Act 2005.

[71] Memorandum from Gordon England, Secretary of the Navy, Enc. (1), § B, 29 July 2004 (regarding 'Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantánamo Bay Naval Base, Cuba') (on file with author).

[72] Memorandum from Paul Wolzowitz, Deputy Secretary of Defense, to the Secretary of the Navy, 7 July 2004 (regarding 'Order Establishing Combatant Status Review Tribunal') (on file with author).

[73] Memorandum from Gordon England, Secretary of the Navy, Enc. (1), § B, 29 July 2004 (regarding 'Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantánamo Bay Naval Base, Cuba') (on file with author).

[74] *Ibid.*

[75] Memorandum from Paul Wolzowitz, Deputy Secretary of Defense, to the Secretary of the Navy, 7 July 2004 (regarding 'Order Establishing Combatant Status Review Tribunal') (on file with author).

consideration.[76] There was no disclosure requirement as to evidence between the parties, and although detainees could call witnesses their appearance was limited to those who were 'reasonably available'[77] to appear. The illusory nature of the right to call witnesses has been well documented[78] and was compounded by the fact that the detainee was without counsel in the conventional sense of the term.[79] Detainees had only limited notice of the review date[80] and, it is reported, frequently did not understand that this was a review as opposed to another form of interrogation.[81] All of these factors, which stacked the deck against detainees, show that the Combatant Status Review Tribunal process clearly fell short of the human rights law standards on the right to review the lawfulness of detention.

Combatant Status Review Tribunal decisions were subject to limited review in US federal courts, at which point the detainee would have access to counsel. The Detainee Treatment Act 2005 confers jurisdiction on the Court of Appeals for the District of Columbia 'to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant'.[82] This did not allow for a substantive hearing on the merits, however. Rather, the Court of Appeals was limited to considering whether the Combatant Status Review Tribunal in question made its determination in a manner 'consistent with the standards and procedures' specified for Combatant Status Review Tribunals and whether the application of these standards was consistent with 'the Constitution and laws of the US' to the extent to which those laws were deemed applicable.[83] The Military Commissions

[76] *Ibid.* [77] *Ibid.*

[78] In their study of the Combatant Status Review Tribunal process, Denbeaux and Denbeaux found that only 26 per cent of the detainees who requested witnesses were successful in having any of their requested witnesses produced by the Tribunal and that all requests for witnesses who were not themselves detainees in Guantánamo Bay had been unsuccessful. M. Denbeaux and J. Denbeaux, 'No-Hearing Hearings – CSRT: The Modern Habeas Corpus?' *Seton Hall Public Law Research Paper* No. 951245 (2006), pp. 27–8.

[79] Detainees were provided with a 'Personal Representative' whose chief role was to 'assist[] the detainee in connection with the review process': Memorandum from Paul Wolzowitz, Deputy Secretary of Defense, to the Secretary of the Navy, 7 July 2004 (regarding 'Order Establishing Combatant Status Review Tribunal').

[80] The review must take place within 30 days of the detainee being given notice: Order Establishing Combatant Status Review Tribunals, 7 July 2004, available at, www.defense.gov/news/Jul2004/d20040707review.pdf (last accessed 21 February 2011).

[81] See T. Johnson, 'Combatant Status Review Tribunals: An Ordeal Through the Eyes of One "Enemy Combatant"' (2007) 11 *Lewis and Clark Law Review* 943; Denbeaux and Denbeaux, 'No-Hearing Hearings'.

[82] s. 1005 (e)(2)(c), Detainee Treatment Act 2005. [83] *Ibid.*

Act 2006 attempted also to preclude reliance on international law as a source of rights in these reviews, making the inadequacy of the review mechanism even more evident.[84] In *Boumediene v Bush*, which we will consider in detail in Chapter 6, the US Supreme Court found that these review processes did not display the basic characteristics of, and were therefore not an adequate alternative to, traditional *habeas corpus* in constitutional terms.[85]

In addition to the Combatant Status Review Tribunal, detainees held in Guantánamo Bay were reviewed on an annual basis by an Administrative Review Board whose role was to assess whether the individual presented an ongoing threat to the US and, therefore, ought to continue to be held. According to the US, these review mechanisms were more rigorous than had ever been offered to combatants detained in the course of an armed conflict by the US before, and adequately safeguarded the liberty of suspected terrorist detainees. Indeed, the US argued (unsuccessfully[86]) before the Supreme Court that the combination of the Combatant Status Review Tribunal and Administrative Review Board review procedures for Guantánamo Bay detainees constituted an 'adequate alternative' to constitutional *habeas corpus* and therefore vindicated detainees' rights.[87]

Even after the executive finally endorsed some form of limited judicial involvement in the review of Combatant Status Review Tribunal determinations and the lawfulness of an individual's detention, executive practice was still to try to make that review illusory, especially by arguing that classified information which grounded a decision to designate an individual as an unlawful enemy combatant subject to continued detention ought not to be released to the appellate court. This was well demonstrated by the approach taken in *Bismullah v Gates* before the US Court of Appeals for the District of Columbia.[88]

[84] Pub. L. No. 109–366, § 7(a), 120 Stat. 2600, 2635–6. Section 5 of the Act provides that 'No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the US, or a current or former officer, employee, member of the Armed Forces, or other agent of the US is a party as a source of rights in any court of the US or its States or territories.'

[85] *Boumediene v Bush* 553 U.S. 723 (2008). [86] *Ibid.*

[87] See Oral Transcript, *Boumediene v Bush* No. 06–1195; *Al Odah v US* No. 06–1196, 5 December 2007, pp. 9–14. See also Brief for Respondents, *Boumediene v Bush* No. 06–1195; *Al Odah v US* No. 06–1196, esp. pp. 40–53.

[88] No. 06–1197; Judgment of 3 October 2007, available at www.asil.org/pdfs/ilib080208_bismullah3.pdf (last accessed 1 May 2008).

In *Bismullah*, the petitioners argued that, in order to review the Combatant Status Review Tribunal decision in respect of the detainees' status, the court ought to be in a position to view all evidence presented to the Combatant Status Review Tribunal including classified information that was used in the original review. In addition, they argued that any other information available to the government ought to be admitted to the reviewing court, even if that information had not been submitted for consideration to the Combatant Status Review Tribunal, and that any other relevant information that came to light ought to be admitted to the reviewing court. The government, on the other hand, argued that the information available to the reviewing court ought merely to be the record of proceedings as prepared by the Recorder in the Combatant Status Review Tribunal because, in establishing the review process, Congress intended only to 'evoke[] this Court's familiar function of reviewing a final administrative decision based upon the record before the agency'.[89] In other words, the government argued that review in the Court of Appeals was an administrative review rather than a substantive one; that it was to be a review of process rather than a review of the decision itself. Under this interpretation, this court-level review would not, in fact constitute a substantive review of the lawfulness of the petitioner's detention in any way, meaning that this question would be limited to proceedings before the Combatant Status Review Tribunal and Administrative Review Board which, as outlined above, are flawed from a liberty-perspective.

Ginsburg CJ, delivering the opinion of the Court, held that '[i]n order to review a Tribunal's determination that, based upon a preponderance of the evidence, a detainee is an enemy combatant, the court must have access to all the information available to the Tribunal'.[90] He concluded that the record to be reviewed by the Court comprises 'all reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant'.[91] It is presumed that all of this information is 'need to know' for the petitioner, although highly sensitive pieces of information can be kept from counsel for the petitioner but not from the reviewing court itself. Unhappy with the Court's conclusions the government sought, but was denied, a rehearing *en banc*.[92] Although the

[89] Respondent's Brief cited in judgment, *ibid.*, p. 12.
[90] No. 06–1197; Judgment of 3 October 2007, pp. 2–3.
[91] *Ibid.*, p. 25.
[92] *Bismullah v Gates*, No. 06–1197, 1 February 2008.

Supreme Court sent the case back to the Circuit Court for reconsideration in light of *Boumediene*, following which the petition (and all others under the Detainee Treatment Act 2005) was struck out, the government's argument in the petition for *certiorari* is revelatory:

> [The lower court's] conception of the record on review is not only unprecedented in any administrative or judicial context, but it exceeds the constitutional requirements recognized by this Court in the ordinary criminal context. It disregards the DTA's explicit definition of the record on review, it is contrary to Congress's clear intent in providing limited judicial review of Combatant Status Review Tribunal determinations, *and it ignores the unique wartime context in which the proceedings at issue were conducted*. Moreover, as the heads of the Nation's intelligence agencies explained in the sworn affidavits filed in support of rehearing en banc in the court of appeals, *the District of Columbia Circuit's decision in this case imposes extraordinary burdens on the intelligence community and, if followed, would present a grave risk to national security.*[93] (emphasis added)

The internal challenge

As already mentioned, the UK has taken a markedly different approach to the applicability and relevance of international human rights law to that adopted by the US. Rather than reject international human rights law as inapplicable and irrelevant, the UK has represented the current terrorist threat as being so grave as to allow for its detention policy under international human rights law and to require that certain absolute standards (especially the principle of *non-refoulement*) ought to be recalibrated. Thus, the UK's approach has posed a significant challenge to the pre-existing standards of international human rights law. International human rights law can be classified as a model of accommodation as a result of both the general flexibility it displays in cases of strain and its allowance for derogations. In both of these areas, however, state action remains limited by the essential characteristics of human rights law itself: universality, non-discrimination and the rule of law. The measures introduced by the UK, however, rub up against these characteristics to a significant degree. Of course, the constitutional arrangements within the UK played a significant role in the decision to engage in a certain level of human rights discourse. The Human Rights Act 1998, which came into effect in 2000 and was a central pillar of the

[93] *Ibid.*, p. 15.

Labour government's agenda of 'bringing rights home', could not justifiably have been abandoned at that juncture. Moreover the UK is a member of the Council of Europe and subject to the jurisdiction of the European Court of Human Rights, as well as being a member of the European Union. A complete extraction from human rights principles would have had devastating effects for the UK's standing within the European community; they could not abandon human rights and had, instead, to try to work within the standards as they existed even if that work was directed towards encouraging a downward recalibration of them to some extent.

Mala fides *derogations*

The first step for the UK was to engage in international human rights law processes of derogation; the process by which the full application of certain rights can be suspended in periods of war or during public emergencies of sufficient gravity. Accordingly, the UK entered derogations to Article 5(4) of the European Convention on Human Rights and Article 9(1) of the International Covenant on Civil and Political Rights. As is always the case, these derogations flowed from an executive analysis of risk, i.e. from the determination that an emergency requiring derogation actually existed. Entering derogations at that time thus impliedly bought into the liberty v. security dichotomy that is in some ways the Faustian bargain of international human rights law.[94] Part of the Faustian nature of the derogations' 'bargain' in international human rights law, is that the assessment of whether or not an emergency actually exists is primarily an executive decision. In reaching that decision a number of factors can become relevant, including the desired powers of moral entrepreneurs, such as the police, and the public desire for strong security-related law and policy-making. This is compounded by the fact that the decision as to whether or not an emergency actually exists is rarely subjected to any meaningful review at either the domestic or the international level.[95] This can result in the declaration of an emergency

[94] For more on the dangers of a derogation regime see, e.g., C. Gearty, 'Reflections on Civil Liberties in an Age of Counterterrorism' (2003) 41 *Osgoode Hall Law Journal* 185; A. Chong and W. Kadous, 'Freedom for Security: Necessary Evil or Faustian Pact?' (2005) 28 *University of New South Wales Law Journal* 887.

[95] F. Ní Aoláin and O. Gross, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 *Human Rights Quarterly* 625.

and ensuing derogation from certain fundamental rights being carried out with relative ease, and without its factual basis being expressly outlined. In times of trauma or panic the convergence of the state desire for expanded state power and the public desire for security, which we considered in Chapter 1, can operate to further ease the path towards derogation and the introduction of repressive laws, particularly where those laws primarily target the 'other' or 'folk devil', as was the case in the UK following the 11 September 2001 attacks.

The derogations entered by the UK in 2001 to both Article 5(1) of the European Convention on Human Rights and Article 9(1) of the International Covenant on Civil and Political Rights, protecting the right to be free from arbitrary detention, were rooted in the following claim:

> There exists a terrorist threat to the UK from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the UK who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the UK.
>
> As a result, a public emergency, within the meaning of . . . the [treaty], exists in the UK.[96]

Nowhere in this derogation does the UK substantiate its claims relating to the existence of such a threat or the existence within the UK of non-citizens with terrorist involvements who could not be dealt with by the pre-existing criminal law. Admittedly, there were security concerns surrounding the intelligence upon which the assessment of risk was carried out – certainly intelligence of a security-sensitive nature might not be suitable for public release – however the complete lack of transparency about the basis for this risk assessment raised questions of good faith and of the accuracy of the risk assessment. Because there had not, at the time of the derogation, been any attacks on the UK by Al Qaeda or associated forces, the asserted emergency was based entirely on a necessarily speculative assessment – carried out in part on the basis of the views of moral entrepreneurs such as the police – of the threat posed by 'international terrorists' who were operating within the UK.[97]

[96] See The Human Rights Act 1998 (Designated Derogation) Order 2001, S.I. 2001 No. 3644 outlining the derogation from the European Convention on Human Rights under the Human Rights Act 1998.

[97] Indeed, when the UK was targeted by the 7 July 2005 attacks the perpetrators were themselves British citizens.

Not only were these terrorists said to pose a threat *per se*, but the UK government consistently stressed the difference between Al Qaeda and the Irish Republican Army (in relation to whom the UK had been engaged in counter-terrorist measures for some thirty or more years at the time of the 11 September 2001 attacks) in order to substantiate the claim of emergency in this context. As outlined above, the UK particularly stressed the transnational nature of Al Qaeda and the fact that, while Irish Republican violence was directly linked to the activities of the British government, this was not necessarily the case in relation to Al Qaeda. Because there had not been any attacks on the UK and because of the security-related secrecy surrounding the factual basis for the determination of emergency, it would appear that a very high level of threat indeed – high enough for the ordinary criminal law not to be sufficient to deal with it – would have to have been established for a valid and good faith derogation to be entered.[98] The then Home Secretary, David Blunkett, however, repeatedly stated that there was 'no immediate intelligence pointing to a specific threat to the UK'[99] thus calling into question the *bona fides* of the decision to derogate and the compatibility of that derogation with international human rights law. It suggests, at the very least, that the derogations were instrumentally employed to facilitate the introduction of repressive measures if not, to at least some extent, to provide some kind of circular 'proof' of the scale of the threat said to justify such measures.

This is not an insignificant point in the thesis that I advance here: although the UK has largely worked within the language and structures of international human rights law and, unlike the US, has not rejected international human rights law as irrelevant in the current climate, the instrumentalist – perhaps even cynical – deployment of derogations constitutes a serious threat to fundamental principles of international human rights law. These derogations are intended as an acknowledgement of the truly tragic choices faced by democratic states in attempting to manage genuine crises. Their use in unnecessary circumstances essentially abuses that good faith pact; it undermines the 'existence of an emergency' requirement that forms part of the counter-balance to the apology of derogations in the first place. Unless derogations are entered only where there is a demonstrable emergency with democratic oversight of the assessment of emergency, human rights law is endangered by its

[98] See C. Michaelson, 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11' (2003) 25 *Sydney Law Review* 275.
[99] P. Wintour, 'Blunkett Dismisses "Airy Fairy" Fears', *The Guardian*, 12 November 2001, p. 2.

own accommodation model.[100] By derogating in the light of the 11 September 2001 attacks, the UK was arguably urging a reconsideration of the concept of emergency in international human rights law and, by implication, a reconsideration of the situations in which certain rights might be suspended. Indeed, in this respect they seem to have had some success in the European Court of Human Rights, as I consider in Chapter 5.[101] The potency of the availability heuristic which, as outlined in Chapter 1, has a tendency to encourage a 'security default' in risk assessment (rather than a 'liberty default') also plays a role in this context. Where a populace and a state feels threatened by the emergence of a powerful force, such as the demonstration of substantial power by Al Qaeda on 11 September 2001, the likelihood of an approach that overestimates risk in order to create the space for the introduction of repressive laws increases. The declaration of emergency and introduction of laws that allowed for the indefinite detention of non-citizens in the UK certainly appears to have been influenced by factors relevant to the creation of a moral panic, including, in particular, the process of 'othering' and the creation of 'folk devils' and the public desire for a 'strong' response to security.

This was not the first time that a derogation had been entered in somewhat questionable circumstances and it is true to say that, by and large, international treaty enforcement mechanisms such as the European Court of Human Rights have afforded a broad margin of appreciation to states in assessing the existence or otherwise of an emergency as a matter of fact, while contemporaneously developing clear requirements for emergency as a matter of law.[102] The traditional deference of courts towards states in the assessment of whether an emergency exists or not might be seen as a further element of the Faustian nature of the existence of emergencies and its problematic nature should not be understated: the European Court of Human Rights in particular has been nowhere near rigorous enough in its assessments of declarations either before or after 11 September 2001.[103]

[100] See further Gearty 'Reflections on Civil Liberties in an Age of Counterterrorism'.

[101] *A v United Kingdom* [2009] ECHR 301.

[102] On the use of the margin of appreciation by the European Court of Human Rights in assessments of derogations see M. O'Boyle, 'The Margin of Appreciation and Derogation under Article 15: Ritual Incantation or Principle?' (1998) 19 *Human Rights Law Journal* 23.

[103] For an analysis of the Court's approach to counter-terrorism in Northern Ireland, for example, see B. Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (2010, Oxford; Oxford University Press).

Not only is a valid derogation dependent on the existence in fact of an actual emergency threatening the life of the nation, but it also requires that the derogating measures introduced are proportionate to the desired objective, strictly necessary in the circumstances, and consistent with the other international obligations of the derogating state. In this respect human rights bodies have been more rigorous in their analyses. The measures introduced by the UK were contained in the Anti-terrorism, Crime and Security Act 2001. This Act allowed for the detention of 'international terrorists' without charge or trial, pursuant to a certificate issued by the Home Secretary. According to the terms of the Act, such a certificate was to be issued where the following three requirements were fulfilled:

(1) The individual is not a citizen of the UK.
(2) The Home Secretary suspects that the individual is a risk to the national security of the UK and is involved in or has links to terrorist activity.
(3) It is intended to deport or remove the individual, but this deportation or removal cannot proceed for the time being as a result of the principle of *non-refoulement*.[104]

The provisions of the Anti-terrorism, Crime and Security Act 2001 raised questions of proportionality and consistency with other international obligations in a number of ways, including in relation to whether they satisfied the individual detainees' right to challenge the lawfulness of their detention as provided for by, *inter alia*, Article 5(4) of the European Convention on Human Rights and Article 9(4) of the International Covenant on Civil and Political Rights. As we will see in the next chapter, the limited review available for detainees under the Act was particularly problematic and fell short of the applicable international human rights law standards.

By introducing this derogation and the accompanying provisions of the Anti-terrorism, Crime and Security Act 2001 the UK was posing a particular challenge to international human rights law through the manipulation of its own accommodation mechanism. Not only was the UK taking advantage of the derogations regime in circumstances that were not objectively shown to require its exercise, but it was also representing indefinite detention as an allowable security-measure further to a derogation. And all of this in a situation where, as has been

[104] s. 21, Anti-terrorism, Crime and Security Act 2001.

already noted, the Home Secretary himself did not perceive an immediate terrorist threat as a matter of fact.

Inadequate review mechanisms

Rather than allow individuals identified and detained under the Anti-terrorism, Crime and Security Act 2001 to challenge the lawfulness of their detention through traditional *habeas corpus*,[105] the Anti-terrorism, Crime and Security Act 2001 stipulated that reviews were to take place by means of a challenge in the Special Immigration Appeals Commission (SIAC) in a process that fell far short of international human rights law standards. Of particular concern was the fact that, even if one succeeded in a SIAC review, the Home Secretary could reissue the certificate that formed the basis of the detention. The SIAC was thus denied the capacity to effectively order release of a successful petitioner; a vital ingredient in any review mechanism designed to protect individual liberty under international human rights law. Although the system as introduced in the immediate aftermath of the 11 September 2001 attacks was constructed within the language of human rights – derogation, liberty, *non-refoulement*, review – it did not in fact bear out the principles of this body of law. Rather, the derogation was entered without a substantive case for emergency having been made out, the period of detention was indefinite without any effective system of challenging that detention and securing individual liberty, the decision as to an individual's liability to detention was made at an executive level and could be reaffirmed at that executive level without effective review on a rolling basis. It was quite clear at the time that the system as introduced pushed the boundaries of acceptable behaviour as established by international human rights law. The government of the UK, however, argued that the prevailing threat was of such gravity and novelty that the *status quo ante* was no longer appropriate; rather international human rights law would have to reorient its boundaries in order to take the novelty of the Al Qaeda threat into account. The UK's argument was not merely that 'terrorism' required different rules and a broadening of states' capacity to act in the name of security in a way that threatened individual rights, but that Al Qaeda terrorists were *more* dangerous than other terrorists and therefore the pre-existing standards were no longer appropriate.

[105] See H. Fenwick, 'The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?' (2002) 65 *Modern Law Review* 724.

Following the decision of the House of Lords in the *Belmarsh* case (finding that Part 4 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with the Human Rights Act 1998),[106] the derogations were lifted, control orders (potentially themselves a form of detention) were introduced,[107] and the government proposed the introduction of pre-charge detention for up to ninety days in the light of the attacks of 7 July 2005.[108] The exact terms of the proposal are considered in Chapter 4 below, but at this point it is important to consider the motivation and justification proposed for this change to the law. The UK executive claimed that the police had made it clear that a period of up to ninety days was in fact required in order to counter terrorist activity in the UK effectively.[109] In evidence submitted *ex post facto* to the Home Affairs Committee, senior police officers reiterated their position that pre-charge detention for up to ninety days was both necessary and appropriate in the context of the particular challenges they felt Al Qaeda posed to the UK and its interests abroad.[110] This claim was substantively based on the alleged nature of the terrorist threat: because of the technological savvy of Al Qaeda and its commitment to causing mass casualties including by means of suicide attacks, the police claimed that waiting for sufficient evidence to prove or charge with conspiracy to commit a criminal offence would be inappropriate. In addition, it was argued that this period of pre-charge detention would be necessary in some cases in order to investigate properly whether charges ought to be brought because of the volume of information, the right to silence, resource implications of the need to translate multiple documents, shortages of interpreters, and logistical implications of the religious practices of devout Muslims. Thus, the police argued that their request for detention for up to ninety days was largely a logistical one directed towards preventing further attacks within the UK. In introducing section 22 of the Terrorism Bill 2005, the government stressed the importance of

[106] *A (FC) and others; (X) FC and another v Secretary of State for the Home Department ('Belmarsh')* [2005] 2 AC 68.

[107] Prevention of Terrorism Act 2005; control orders are discussed in detail in Chapter 4.

[108] s. 23, Terrorism Bill 2005.

[109] See, e.g., Evidence of Secretary of State, Charles Clarke to the Home Affairs Committee, 11 October 2005, available at: www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/515/5101101.htm (last accessed 21 February 2011).

[110] See evidence of Assistant Commissioner Andy Hayman (Metropolitan Police Service) and Deputy Assistant Commissioner Peter Clarke to the Home Affairs Committee of 28 February 2006, available at, www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/910/6022806.htm (last accessed 21 February 2011).

supporting the police in their role of detecting and preventing terrorist activity and urged Parliament to support the proposed extension of pre-charge detention up to a ninety day maximum. The express link between the state and the moral entrepreneurs was established. In Tony Blair's words:

> Let me emphasise again to the House: this proposal did not originate with the Government; it originated with the police and those responsible for anti-terrorist operations in our country . . . That is the police saying to us that they need these powers to prevent terrorism in this country . . . We are not living in a police state, but we are living in a country that faces a real and serious threat of terrorism – terrorism that wants to destroy our way of life, terrorism that wants to inflict casualties on us without limit – and when those charged with protecting our country provide, as they have, a compelling case for action, I know what my duty is: my duty is to support them, and so is the duty, in my view, of every Member.[111]

According to the then Home Secretary, Charles Clarke, this proposal was not only necessary and wise, but also consistent with the UK's obligations under international law even without a derogation from Article 5 of the European Convention on Human Rights and Article 9 of the International Covenant on Civil and Political Rights.[112] Charles Clarke argued that the threat currently faced by the UK was so grave as to require and justify protracted detention of this nature. In support of this position he stressed the involvement of the judiciary in the process of extension of pre-charge detention up to a maximum of ninety days.[113] As considered in full in Chapter 4 below, the proposed pre-charge detention was to be continuously extended by means of an Order of a High Court judge who would be presented with evidence by the police and was required to assess whether or not there was a reasonable suspicion of involvement in terrorism related activity that required and justified continued detention. If so satisfied, an order for extended detention was to be granted. Human rights advocates largely argued that the proposed judicial role constituted a 'rubber stamp' of the police and Home Office position that the individual ought to be detained because this process was not truly adversarial: counsel for the detainee did not have the opportunity to dispute the evidence presented to the judge and the individual was not represented. Thus a vital component of the right

111 *Hansard*, 9 November 2005, Column 297.

112 Statement of Compatibility with the European Convention on Human Rights, part of the Terrorism Bill 2005.

113 Explanatory Note to the Terrorism Bill 2005, para. 181.

to challenge the lawfulness of one's detention under international law, i.e. an adversarial process in which the detainee can represent himself or be represented by an advocate, was lacking. However, the government and the police argued strongly that the protracted detention proposed was compatible with the European Convention on Human Rights *because of* the extent to which it was subject to judicial oversight, implying that a non-adversarial process of review was sufficient to satisfy Article 5(4) and to rid the detention of any arbitrary nature.

This implication constituted a serious challenge to the *status quo ante* where, although there was often a somewhat shallow consideration of the review mechanisms available in times of emergency, the European Court of Human Rights had established the need for adversarial processes, which had been firmly insisted upon in times where there was no derogation whatsoever.[114] By implying that the judicial oversight proposed as part of a ninety-day detention period was sufficient to safeguard the individual liberties of suspected terrorists in spite of not conforming to the pre-established standards, the UK was arguing not only that emergencies during which there is a derogation can require and justify reduced individual rights but that the naming of someone as 'terrorist' can result in a differentiated and lower standard of rights-protection even where there is no state of emergency within the meaning of the Convention; the 'folk devil' was to be afforded lesser protections than the folk saint. Although the original proposal to extend the period of pre-charge detention to a maximum of ninety days was defeated in Parliament in November 2005, a twenty-eight-day period of pre-charge detention was then introduced having been proposed as an amendment by Labour MP Michael Winnick.[115] This twenty-eight-day detention period is subject to judicial oversight of the type originally proposed in relation to the ninety-day detention.

A twenty-eight-day period of detention without derogation seriously challenges the European Convention on Human Rights. The European Court of Human Rights had previously held that a period of ten days pre-charge detention was unacceptable without effective judicial oversight and it appears arguable that a non-adversarial oversight procedure does not satisfy the requirements of effectiveness that must be met in order to ensure Article 5(4) compatibility. That notwithstanding,

[114] *Ireland v United Kingdom* [1978] ECHR 1; *Brogan v United Kingdom* [1988] ECHR 24; *Brannigan & McBride v UK* [1993] ECHR 21. See the discussion at pp. 67–9 in Chapter 2.

[115] ss. 23–5, Terrorism Act 2006.

however, and in spite of the fact that no terrorist suspect had actually been detained for the maximum period of twenty-eight days, the question of increasing the maximum period of pre-charge detention once more arose for consideration in 2007 and 2008 with the Labour government attempting to increase detention periods to ninety, and subsequently forty-two, days again with limited judicial oversight.

At this time work was ongoing on the consolidation of counter-terrorist legislation which culminated in the presentation of the Counter-Terrorism Bill 2007–2008 to Parliament. One of the proposals in this Bill was to increase the maximum period of pre-charge detention to forty-two days.[116] This proposal appears again to have been a response to police representations that there may come a time or a case in which a twenty-eight-day time limit is unacceptably short.[117] In evidence to the Home Affairs Committee in November 2007, Sir Ian Blair (then Commissioner of Police of the Metropolis) accepted that twenty-eight days had not yet proved to be too short, but that '[a]t some stage 28 days is not going to be sufficient, and the worst time to debate whether an extension is needed would be in the aftermath of an atrocity . . . The prospect we need more than 28 days in the not too distant future is so real that parliament needs to consider it.'[118] This translated into the proposal for forty-two-day detention in the Counter-Terrorism Bill 2007–2008 – to apply in cases of grave and exceptional terrorist threat – which was proposed without any derogation to provisions of the European Convention on Human Rights or the International Covenant on Civil and Political Rights. That notwithstanding, the Home Secretary, Jacqui Smith, made a Human Rights Act 1998 declaration[119] in the Bill stating: 'In my view the provisions of the Counter-Terrorism Bill are compatible with the Convention rights.'[120] As is considered in some detail in Chapter 4, this increased detention period was not introduced – in fact, it was the House of Lords that put an end to the proposal – but

[116] s. 22, Counter-Terrorism Bill 2007–2008.

[117] See, e.g., evidence of Sir Ian Blair to the Public Bill Committee of the Counter-Terrorism Bill 2007–2008, 22 April 2008, available at: www.publications.parliament.uk/pa/cm200708/cmpublic/counter/080422/am/80422s01.htm (last accessed 21 February 2011).

[118] Quoted in A. Travis, 'Met Chief Wants Terror Suspects Held up to 90 Days', *The Guardian*, 10 October 2007.

[119] s. 19, Human Rights Act 1998, requires a proposing Minister to make a statement that he considers the provisions of a Bill to be compatible with the ECHR or, if not so compatible, that the government nevertheless wishes the House to proceed with the Bill.

[120] Counter-Terrorism Bill 2007–2008.

the executive, still fixated on extended detention periods, then progressed to prepare an 'emergency' Bill allowing for longer detention that could be introduced if and when a 'grave' terrorist threat emerged.[121]

According to the UK, the new responses that the apparently 'new' nature of the contemporary terrorist threat requires of the nation state are replicated on the international level: the allowable boundaries of human rights compliant state action must be expanded because, according to the UK, the allowable periods of pre-charge detention approved of by international human rights enforcing bodies are simply not sufficient to help a government carry out what is perceived to be its primary duty, i.e. to secure the safety of all its citizens. As well as arguing that international law allows, in exceptional circumstances, for pre-charge detention of a maximum of forty-two days, the UK argued that the kinds of safeguard mechanisms proposed in the Counter-Terrorism Bill 2007–2008, and in the emergency Counter-Terrorism (Temporary Provisions) Bill, were sufficient to protect individual rights against invidious, disproportionate, or unnecessary exercise of these exceptional powers of detention. In doing this, however, the executive refused to acknowledge that the safeguards which were built in were primarily executive and legislative and that there were very few opportunities for effective judicial intervention and oversight.

In the defeated proposals in the 2007–2008 Bill, and subsequently in the emergency Bill that was prepared, the initial decision to trigger the extended period of pre-charge detention is made by an executive officer (i.e. the Home Secretary) on the advice of the police and the prosecution; two parties with an understandable interest in extending the detention period. While it is conceivable that the Home Secretary might have refused to trigger the reserve power, the reality is that the difficulties elected government officers face in political terms in refusing to allow police activity represented as required in the name of security would have made it practically impossible for a Home Secretary to refuse to trigger the more repressive measures where they were requested. As the Home Secretary herself said in the debate on the provisions: 'We must take seriously the threat from terrorism and respond to the calls of those whom we task with protecting us from it to provide them with the tools that they need.'[122] Thus, if the police and prosecution were to claim to

[121] Counter-Terrorism (Temporary Provisions) Bill; this is considered in more detail in Chapter 4.

[122] *Hansard*, 1 April 2008, Column 650.

need an additional detention period prior to charge it is highly unlikely that a political executive officer would refuse to accede to the request.

The second level of scrutiny proposed was parliamentary: the commencement order was to be laid before Parliament as soon as practicable and would lapse if not approved within seven days of the point at which it was laid before the House – although this requirement would not invalidate anything done by virtue of the commencement order or preclude the making of a new order, but lapse would require the release of those detained under the order.[123] The original time period proposed was thirty days; an extremely long time to allow such an order to stand without being subjected to parliamentary scrutiny. Notwithstanding the reduction in the time limit, however, the assertion that this process would constitute effective parliamentary oversight is deeply problematic because of the likelihood that refusing to support such a measure would be practically impossible in real terms. Should a commencement order be put in place in the aftermath of an actual attack, the trauma and panic, both popular and manufactured, that would ensue are likely to combine into a potent political elixir that would make parliamentary resistance to the commencement order unlikely in the extreme. As Alistair Carmichael MP (Liberal Democrats) noted: 'I consider myself to be exceptionally ill-equipped, as an elected politician, to play that role that the Government seek to give, particularly if we were in the highly febrile atmosphere following a terrorist outrage. People who hope to be due for re-election in two years' time are not the best people to trust with the liberty of the individual.'[124] Although the government was willing to reduce the time period to seven days, there was a lack of serious engagement with the concerns about the impact of politics on Parliament's capacity to act as an effective safeguard against arbitrariness and over-reaching of state powers.

The third level of scrutiny envisaged within the Bill was judicial, however there were no proposals to improve the judicial scrutiny from that which already existed in relation to the twenty-eight-day period: the process would continue to be largely non-adversarial and one in which significant amounts of information would, because of their classification, not be open to dispute. Thus, while the government argued that international law recognised the different challenge posed to liberal democracies in a time of Al Qaeda-related-terrorism and therefore allowed for

[123] s. 28, Counter Terrorism Bill 2007–2008, as approved by House of Lords, 11 June 2008.
[124] *Hansard*, 1 April 2008, Column 711.

the pre-charge detention of suspected terrorists for up to forty-two days *provided* adequate safeguards were put in place, the safeguards actually proposed were inadequate by reference to international law and did not effectively allow for an individual detainee to challenge the lawfulness of his detention. In addition, the structural or institutional safeguards proposed to ensure that the power to detain for up to forty-two days is triggered only where necessary were insufficient and certainly did not constitute mechanisms for an adequate scrutiny of a decision that a situation of emergency existed requiring such a long period of pre-charge detention in at least one case.

Conclusion

Although, as demonstrated by this chapter, the executive approaches of the US and the UK to the applicability and requirements of international law differed in the post-11 September 2001 security paradigm, each state presented a strong challenge to the *status quo ante*. For the US, the relevance and applicability of international human rights law is called into question in relation both to times of extreme security-related exigency and to times of armed conflict. In addition, the capacity of international human rights law treaties to achieve their object and purpose of protecting individuals from excessive state action is jeopardised by the US's claim that these treaties are exclusively territorial in their scope; that the location of repressive action outside a state can absolve that state from liability under international law. Somewhat paradoxically, the US has occasionally referred to the object and purpose approach to justify its claim that the International Covenant on Civil and Political Rights does not apply extra-territorially. Take, for example, the following statement of John Bellinger:

> As a matter of longstanding treaty law, as reflected in the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Resort to this fundamental rule of interpretation led the U.S. government over an extended period of time to conclude that the obligations assumed by a State Party to the International Covenant on Civil and Political Rights (ICCPR) apply only within the territory of a State Party.[125]

[125] J. Bellinger, 'Wrap Up Discussion II', *Opinio Juris*, 25 January 2007, available at http://opiniojuris.org/2007/01/25/wrap-up-discussion-ii/ (last accessed 21 February 2011). See also Annex I to the Second and Third Periodic Report of the US of America to

This sentiment clearly reflects the US's refusal to take into account the interpretations of treaty obligations as outlined by the treaty-enforcement bodies themselves. The approach of the US has thus been one of external attack on human rights law; of a failure to engage meaningfully with the discipline on the basis of its asserted inappropriateness to a situation of extreme violent activity, while continuing to engage with international human rights law on non-'War on Terror' issues. The UK, on the other hand, has attempted to reshape international human rights law 'from the inside'. This internal campaign is one in which the structures and language of international human rights law have routinely been deployed, but in which the substantive requirements of these standards have been undermined.

Although these nations' approaches differ, together they constitute an enormously powerful attempt to project panic-related assessments of risk, legal obligation, and permissible state action onto the international sphere, sometimes through express representations to international institutions and sometimes through the echo of domestic executive interpretations of international legal standards. In both states, the executive's approach was also projected quite strongly onto their own domestic legislatures: Congress (in the US) and Parliament (in the UK). This was important because, in both cases, some legislative support for desired executive action was required in order to operationalise those policies.

In the next chapter we examine the legislative measures adopted relating to detention in both states. In the US legislative measures have largely been used to ratify and perfect executive policy in situations where the domestic courts have resisted executive assertions of power; in the UK, in contrast, legislative measures have been the primary mechanism for the creation and implementation of desired governmental policy in this respect. In both countries, however, the permeation of panic into the law-making process is clearly demonstrated, illustrating the susceptibility of domestic legal systems to repressive law-making in times of emergency.

the UN Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, 21 October 2005, available at, www.state.gov/g/drl/rls/55504.htm#annex1 (last accessed 21 February 2011).

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Legislating for counter-terrorist detention

We have already seen how the executives in both the US and the UK committed themselves quickly to the detention of suspected terrorists with limited or no review. In both of these cases, the policies pursued by the executive were, in many respects, incompatible with clearly applicable and well-established principles of international human rights law. This was so even though international human rights law itself contains a model of accommodation that allows for extensive (perhaps even too much) flexibility by states, together with derogations. However, there was only so far that the executives could go without legislative support; in both countries the legislature would have to involve itself to some extent at some point. At that stage, one might think, overly repressive executive urges could be tempered, review of detention strengthened, and the 'balance' between rights and security struck. While there are scholars who maintain not only that legislatures are capable of carrying out this kind of dampening function in a time of crisis – and even that courts should leave difficult questions of this kind to the political sphere – the reality is that legislative reactions in the US and the UK have largely been facilitative. Rather than brake executive urges they have lubricated the wheels to allow for their realisation.

To this extent we will see in this chapter that both Congress (in the US) and Parliament (in the UK) have played a significant role in empowering detention and restricting judicial oversight of decisions to detain. Counter-terrorist detention policy in the US was largely driven and implemented by the executive branch pursuant to the Authorization for the Use of Military Force done by Congress on 18 September 2001.[1] When the courts asserted jurisdiction to oversee detention-related matters by means of *habeas corpus* review,[2] Congress stepped in for the

[1] Pub. L. 107–40, 115 Stat. 224.

[2] Particularly *Hamdi v Rumsfeld* 542 U.S. 507 (2004) (holding that 'enemy combatants' who are US citizens and detained inside the US are entitled to constitutional and statutory *habeas corpus*); *Rasul v Bush* 542 U.S. 466 (2004) (holding that statutory *habeas corpus* is

purpose of enshrining desired executive policy in legislation, particularly by means of repeated attempts to strip federal courts of *habeas corpus* jurisdiction over 'enemy combatants' and, more recently, 'enemy belligerents'.[3] In the UK, by contrast, executive policy relating to the restriction of liberty has been primarily implemented by means of legislative measures from the outset.

This chapter outlines the liberty-restricting measures introduced by both Congress and the Houses of Parliament in Westminster, with the purpose of demonstrating the extent to which executive assessments of risk, influenced by both popular and manufactured panic, have been largely acceded to by the legislature. This is not to suggest absolute uniformity in legislative approaches in the two jurisdictions; indeed, there are important differences between them that must be taken into account. In the US, Congress has primarily implemented executive policy without amendment and with a clear concern for the omission of the judiciary from detention-related matters. In the UK, in contrast, Parliament has acceded to executive claims that liberty ought to be restricted and that the measures desired by moral entrepreneurs such as the police ought to be implemented, but has insisted upon at least some involvement on the part of the judiciary. In both states, legislative desire to serve asserted security needs by means of the deprivation of liberty has been evident. In addition, rights-based assessments in both states have not always been particularly thorough. Notably, temporal proximity to a major attack has been a significant factor in the degree of ease with which desired executive policy has been implemented by means of legislation in the UK. In addition, the extent to which the state's obligations under international human rights law are taken into account in Parliament and Congress differs significantly between the two case study nations.

In the US, where international human rights law treaties are not incorporated into domestic law[4] and where there is a long-standing resistance to the domestic implementation of these measures,[5]

available to Guantánamo Bay detainees); *Hamdan v Rumsfeld* 548 U.S. 557 (2006) (holding that Al Qaeda fighters were entitled to the protections of Common Article 3 of the Geneva Conventions). These cases are considered in full in Chapter 6 below.

[3] 10 U.S.C. § 948 c (a).

[4] In the US all ratified human rights treaties are classified as 'non-self-executing' and therefore require express incorporation by Congress to form part of the domestic law of the US. See L. Henkin, 'U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker' (1995) 89 *American Journal of International Law* 341.

[5] Henkin traces this resistance well in Henkin, 'U.S. Ratification of Human Rights Conventions'. Resistance to the implementation of human rights treaties and human rights

international human rights law has played little or no part in legislative deliberations. To the extent that rights-related assessments have been at all engaged in, they have focused on domestic law (particularly on constitutional rights) and have largely been rejected as inappropriate restrictions on state action in times of emergency or crisis. In the UK, in contrast, the European Convention on Human Rights has been a significant consideration in legislative deliberation, largely because of its incorporation into domestic law by means of the Human Rights Act 1998. It is notable that, although the measures introduced in the UK have frequently been inconsistent with the requirements of the Convention, they have largely been toned-down versions of the executive's desired enactments as a result of at least some parliamentary rights-based assessments. Thus, although both legislatures have acted in a manner that can be described as panic-related, the internalisation of international human rights law standards in the domestic law of the UK has been a restraining force and has helped to temper panic-related passions to a degree.

In general terms, post-11 September 2001 counter-terrorist legislation introduced in both the US and the UK shares the same core objective: to ensure that detention or other means of liberty-deprivation can be used to reduce the likelihood of terrorist attack, thereby protecting the physical security of the nation. As Walker notes, law of this kind 'represents a part of a fundamental switch away from reactive policing of incidents to proactive policing and management of risk',[6] but when the risk to be managed is assessed in a panicked atmosphere the potential for its overestimation and for the introduction of disproportionate responses thereto is high. The desire to exclude judicial review – or at least to minimise it – reduces the protection against such overestimation of risk for individuals caught in the counter-terrorist *milieu.* A survey of legislation introduced and proposed in both jurisdictions identifies a number of common repressive themes: (1) increased bases for detention, (2) attempted minimisation of judicial involvement and (3) the substitution of process for rights. In this chapter I consider all of these. In the

provisions of customary international law remain popular in the US – two of the more prominent examples of what Spiro describes as 'new sovereigntist' scholarship (P. Spiro, 'The New Sovereigntists: American Exceptionalism and Its False Prophets' (2000) 79 *Foreign Affairs* 9) are E. Posner and J. Goldsmith, *The Limits of International Law* (2005, New York; Oxford University Press) and I. Somin and J. McGuinness, 'Should International Law be Part of Our Law?' (2007) 59 *Stanford Law Review* 1175.

[6] C. Walker, 'Terrorism in Criminal Justice: Past, Present and Future' [2004] *Criminal Law Review* 311, 314.

UK the commitment to a criminal justice approach has resulted in repeated attempts to extend the period of pre-charge detention. We considered this to some extent in Chapter 3 and in this chapter will look at the legislative response thereto.

Ongoing legislative processes in both jurisdictions show that the project of moral entrepreneurship continues to be directed towards extending the period of pre-trial detention in terrorism-related investigations. There appears to be a turn away from such an approach by the Conservative–Liberal Democrat government elected in the UK in 2010,[7] but such attempts continue apace in the US. These trends thus persist in manifesting themselves in liberty-depriving legislation that is not generally subjected to judicial oversight of the kind required by international human rights law. This is notwithstanding the fact that, as we already saw in Chapter 2, the standards of international human rights law are sufficiently accommodating to allow for the introduction of law and policy that is directed towards security but which does not disproportionately and unnecessarily infringe upon individual rights. Before considering the specifics of the legislative treatment of counter-terrorist detention, we will consider the appropriate role of the legislature in times of national strain or emergency in order to highlight the pattern of abdication of the legislature's oversight obligations in a situation where both popular and manufactured panic demand that the bonds of law be loosened in order to allow for 'security enhancing' measures to be introduced, regardless of their repressive nature.

The legislative role in times of crisis

Before considering the performance of Congress and Parliament in relation to detention and review since 2001, it is important to consider to some extent what we expect legislators to do in times of crisis. One prominent view holds that the legislature is required to 'toe the line' of the executive's security policy. In this view security and risk-assessment

[7] In June 2010 the new Home Secretary Theresa May stated her intention to carry out a review of twenty-eight-day detention and other counter-terrorist measures, including control orders. While these measures will remain in force for six months (and were renewed in order to allow the continuation of twenty-eight-day detention for this six-month period), this was represented as being the period of time during which the review will take place. The coalition government has expressed a desire to reduce the period of detention without charge below the current twenty-eight-day limit. See, e.g., R. Norton-Taylor, 'Theresa May averts fight over 28-day detention with call for renewal' *The Guardian*, 25 June 2010.

are essentially executive actions that require nothing more than facilitation on the part of the legislature.[8] By means of example, John Yoo has argued that it is the responsibility of Congress in the 'War on Terror' to delegate power to the executive[9] and keep an eye on creeping judicial interference;[10] he does not identify a role for Congress in rights-protection or consider whether the constitutional obligation on Congress to pass only laws that are 'necessary and proper'[11] includes an obligation to ensure compliance with international legal standards. Rather, Yoo commends Congress for intervening to strip courts of *habeas corpus* jurisdiction over 'enemy combatants'.[12] While, as we will consider below, the USA Patriot Act made some allowance for the detention of particular aliens, in general US counter-terrorist detention policy – and especially as it related to interrogative detention, which we are primarily concerned with – was initially implemented without express legislative provisions. It was the executive's contention that when Congress promulgated the Authorization for the Use of Military Force[13] it granted the executive the capacity to do whatever it deemed was reasonably necessary in the course of a military operation, including the detention of 'enemy combatants'.[14] The Bush Administration therefore applied the well-established wartime prerogative of detention of enemy fighters in the apparently vastly different context of the 'War on Terror'.

We have already seen that, as a result of the conflict's alleged 'difference', this prerogative was applied without a great deal of consideration for the other well-established principles of detention in international humanitarian law, or for the applicable international human rights standards, including the right to challenge the lawfulness of detention. It was not until the US Supreme Court began to assert jurisdiction over

[8] See particularly E. Posner and A. Vermeule, *Terror in the Balance: Security, Liberty and the Courts* (2007, New York; Oxford University Press).

[9] J. Yoo, *War by Other Means: An Insider's View of the War on Terror* (2006, New York; Atlantic Books Monthly Press) pp. 117–18.

[10] *Ibid.*, p. 164.

[11] Article I(8)(18), US Constitution.

[12] See, e.g., J. Yoo, 'Sending A Message', *Wall Street Journal, Editorial*, 19 October 2006, where Yoo wrote of the Military Commissions Act 2006: '. . . Congress and the President did not take the court's power grab lying down. They told the courts, in effect, to get out of the war on terror, stripped them of habeas jurisdiction over alien enemy combatants, and said there was nothing wrong with the military commissions. It is the first time since the New Deal that Congress has so completely divested courts of power over a category of cases. It is also the first time since the Civil War that Congress saw fit to narrow the court's habeas powers in wartime because it disagreed with its decisions.'

[13] Pub. L. 107–40, 115 Stat. 224.

[14] See, e.g., *Rasul v Bush* 542 U.S. 466 (2004), Brief for the Respondents.

habeas corpus petitions from individuals held as part of the 'War on Terror'[15] that Congress intervened in detention policy. At this stage, and up until the Supreme Court essentially called a halt to legislature jurisdiction stripping in 2008,[16] congressional involvement had concentrated on stripping federal courts of jurisdiction to hear *habeas corpus* petitions while establishing an alternative procedure by which individuals could have their status determined and challenge the lawfulness of their detention. This was in essence the kind of legislative activity that the facilitative view of Congress considered appropriate, but it was not clear to me that it was compatible with the basic constitutional structure of the US. Congress is clearly identified as the 'first among equals'[17] within the Separation of Powers in the US Constitution. In the context of war or emergency, that same Constitution carefully separates the powers between Congress and the President. Congress has the power to declare war,[18] while the President has the power to conduct it;[19] Congress funds military campaigns,[20] but the President directs them.[21] Within this structure congressional support is a basic prerequisite of military actions and the deprivation of support is a sure-fire way of terminating it.[22] The constitutional division of wartime powers between Congress and the executive suggests that an onerous oversight responsibility lies on Congress in times of war: if Congress were required merely to 'rubber-stamp' executive policy then this constitutional division of labour would not be necessary. In reality, however, congressional practice has largely been to

[15] *Hamdi v Rumsfeld* 542 U.S. 507 (2004); *Rasul v Bush* 542 U.S. 466 (2004); *Hamdan v Rumsfeld* 548 U.S. 557 (2006).

[16] *Boumediene v Bush* 553 U.S. 723 (2008).

[17] A.R. Amar, *America's Constitution: A Biography* (2005, New York; Random House), p. 111.

[18] Article I(8), US Constitution.

[19] Article II(2), US Constitution. There is also a long-recognised inherent executive power to conduct military operations where national security requires it; see N. Taylor Saito, *From Chinese Exclusion to Guantánamo Bay: Plenary Power and the Prerogative State* (2007, Boulder, CO; University Press of Colorado) for a comprehensive consideration of the evolution and contemporary deployment of this 'plenary power'.

[20] Article I(8), US Constitution.

[21] Article II(2), US Constitution.

[22] The 'power of the purse' has previously been used to stop controversial military policies, including in the Iran–Contra affair and by the Foreign Assistance Act 1974, which cut off funding to the South Vietnam Government and effectively ended the Vietnam War. See L. Henkin, 'Foreign Affairs and the Constitution' (1987/88) 66 *Foreign Affairs* 284; L. Fisher (ed.), *The Politics of Shared Power: Congress and the Executive*, 4th edn., (1998, College Station; Texas A&M University Press), Ch. 6; W. Banks and P. Raven-Hansen, *National Security Law and the Power of the Purse* (1994, New York; Oxford University Press).

legitimate executive policy in times of conflict and to show particular deference to security related assertions. The legislative measures introduced in the 'War on Terror' and considered below, demonstrate that this facilitative role has largely been maintained since 2001.

Given the structure of the US's constitutional system and the proposed role of Congress as the 'first among equals' or overseer of the other branches,[23] it appears counter-intuitive that Congress's role in the 'War on Terror' should be as minimal as Yoo suggests. In spite of Richard Posner's assertion that Congress has played a strong role in the 'War on Terror',[24] this chapter presents a picture of a largely subservient legislature. In the immediate aftermath of the 11 September 2001 attacks, Congress issued a broadly-worded and extremely permissive Authorization for the Use of Military Force.[25] Then Congress perfected the executive argument that it would be inappropriate to allow Guantánamo Bay detainees to challenge the lawfulness of their detention before federal courts through *habeas corpus* by introducing jurisdiction-stripping provisions.[26] Furthermore Congress attempted to leave the interpretation of the US's international legal obligations entirely to the executive and remove these matters from consideration by the courts.[27] All of these objectives were represented as being required in the name of national security: courts were said not to have the competence to assess the lawfulness of suspected terrorists' detention for reasons of military logistics and institutional competence. Although review mechanisms were ultimately required by Congress, their actual operation was largely left within the gift of the executive, whose assessment of risk was accepted almost without question by legislators. The real story, quite in contrast to Posner's assertion, is that congressional action in the 'War on Terror' has facilitated the flow of power towards the executive, on the one hand, and the attempted removal of jurisdiction from the courts on the other. It has also been predicated almost entirely upon an acceptance

[23] Amar, *America's Constitution: A Biography*, p. 111.

[24] Richard Posner writes: 'Recalling the hornet's nest stirred up in Congress by revelations of the Bush administration's warrantless interceptions of foreign communications of US citizens . . . and the flap over the mistreatment of detainees seized in the struggle against terrorism, one realizes that Congress is not a patsy even when, as in these instances, it is controlled by members of the same political party as the presidency and even when it is the Republican party, the more disciplined of the two major parties.' R. Posner, *Not A Suicide Pact: The Constitution in a Time of National Emergency* (2006, New York; Oxford University Press), p. 37.

[25] Pub. L. 107–40, 115 Stat. 224.

[26] s.1005(e)(1), Detainee Treatment Act 2005.

[27] Particularly in s. 6, Military Commissions Act 2006, Public Law No. 109–366.

that Al Qaeda poses a serious and significantly novel risk to the US, the combating of which requires the protracted detention of suspected terrorists in Guantánamo Bay and elsewhere.

While there are those who argue that this is the appropriate legislative role, others believe that Congress should hold executive power to account[28] and, furthermore, that it is capable of doing so.[29] While I accept the first of these premises, I find myself confounded by the second, not only because of the historical record but also because of the nature of crisis-related panic as both top-down and bottom-up, which seems to make such activity effectively impossible for legislatures. Indeed, this is bolstered by the fact that the legislative record of the US Congress during the 'War on Terror' displays distinct characteristics of panic-related law-making. Legislating by Congress around detention and review in the 'War on Terror' has been characterised by the quick passage of laws and the almost complete adoption of executive policy during the Bush Administration; it has been heavily influenced by the views of moral entrepreneurs who have represented the 'War on Terror' not only as a military battle but also as a 'clash of civilisations';[30] and it has based its assessments of what is required and appropriate on an almost unquestioning acceptance of executive assertions of risk. It is, in other words, heavily influenced by both manufactured and popular panic.

Manufactured panic, emanating from the executive, is powerfully transmitted to Congress by the repeated calls for legislation that effectively excludes the courts from the 'War on Terror' on the basis of security concerns and the alleged need to 'protect' and 'support the troops'. This top-down panic in turn is used to carve out a more expansive space in which state action can occur, thus serving the desires of moral entrepreneurs in Cohen's conception of moral panic.[31] Panic is also, however, a bottom-up phenomenon for Congress. To the US electorate the attacks of 11 September 2001 are particularly salient not only in their imaginability but also in the everyday differences that have

[28] See, e.g., C. Powell, 'The Role of Transnational Norm Entrepreneurs in the US "War on Terrorism"' (2004) 5 *Theoretical Inquiries in Law* 47 and H. Koh, 'The "Haiti Paradigm" in US Human Rights Policy' (1994) 103 *Yale Law Journal* 2391.

[29] See, e.g., the argument of Fergal Davis in F. de Londras and F.F. Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight' (2010) 30 *Oxford Journal of Legal Studies* 19.

[30] This phrase is generally traced back to S. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1998, New York; Simon & Schuster).

[31] S. Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (1972, London, MacGibbon & Kee); considered in Chapter 1.

been introduced to experiences of security measures. The electorate in the US shares a sense of collective victimhood in the light of these attacks, and that victimhood is transformed into a demand for absolute security from terrorism that lawmakers must attempt to provide if they are to succeed in maintaining public support at the ballot box. The extreme proximity between Congress and the electorate means that the popular panic that demands security coalesces with the manufactured panic that represents repressive actions as providing security, placing Congress in a situation where it is particularly difficult for legislators to avoid abdicating their constitutional oversight duties if they wish to secure their political survival. Within this paradigm detention of suspected terrorists is conceived of as a means of feeling safe; as long as the 'bad guys' are incarcerated they cannot harm us. Of course, this is in many ways an extension of how we feel about incarceration in general; of the urge towards punitive segregation as theorised by Garland[32] combined with a popular demand for security in a situation of seemingly unmanageable risk.[33]

The continued congressional support for Guantánamo Bay serves as an instructive example of the panic-related nature of Congress's support. In April 2007 Senator Diane Feinstein (D-CA) introduced an amendment to the Defense Authorization Bill[34] that proposed the closure of Guantánamo Bay and the transfer of detainees to facilities within the US. Senator Tim Harkin (D-IA) also proposed an amendment that would block further congressional appropriations for Guantánamo until the closure process began.[35] At the time it seemed likely that President Bush would veto any Bill that attempted to force the closure of Guantánamo Bay,[36] and polls showed that a considerable amount of public support

[32] D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001, Oxford; Oxford University Press), p. 140.

[33] U. Beck, *Risk Society: Towards a New Modernity* (Trans. M. Ritter), (1992, London; Sage Publications).

[34] John Warner National Defense Authorization Act for Fiscal Year 2007 S. 2766 (as originally introduced).

[35] See M. Raju and E. Schor, 'Feinstein, Harkin aim to shut Guantánamo through Defense Authorisation Bill' *The Hill*, 21 June 2007; available at: http://thehill.com/leading-the-news/feinstein-harkin-aim-to-shut-guantnamo-through-defense-authorization-bill-process-2007–06–21.html (last accessed 28 April 2008); Editorial, "An Exit Strategy for Guantánamo", *The New York Times*, 3 May 2007.

[36] The power of presidential veto has been implied from Article I(7), US Constitution which requires that Bills are presented to the President for signing into law. For the evolution of the veto power see, e.g., R. Spitzer, *The Presidential Veto; Touchstone of the American Presidency* (1988, Albany; SUNY Press), Ch. 2.

still existed for the Guantánamo Bay facility.[37] In spite of Congress's constitutionally mandated oversight obligations, the proposals for the closure of Guantánamo Bay were unsuccessful: they were combined into the proposed Guantánamo Bay Detention Facility Closure Act 2007 (S. 1469) which was sent to Committee instead of being considered as part of the Defense Appropriations Bill. Shortly after his inauguration, President Obama issued an Executive Order requiring processes to be put in place in order to close Guantánamo Bay within a year.[38] However, since that time all efforts to secure the finance required to achieve that goal have been unsuccessful because of congressional intervention. In 2009 provisions were inserted into four spending bills in order to prevent the acquisition of the Thomson Correctional Centre in Illinois (where it was intended to house detainees transferred from Guantánamo Bay) or any expenditures required to close the base.[39] Without any prospect of more success in 2010, the Obama Administration placed a new timeline on the closure process (2013 being the new objective) and seemed to accept that political impediments to closure were practically insurmountable as things stood.[40] This has been attended by attempts to create legislative obstacles to the transfer of individuals out of Guantánamo Bay as a preliminary step to closing the base. As well as preventing the acquisition of a detention facility for Guantánamo Bay detainees in the mainland US (or, indeed, modifying existing facilities for this purpose[41]), there have been attempts to ensure that any proposed transfer of an individual from Guantánamo Bay to the US would be subject to a 120-day clearing period during which Congress would be furnished with a report on security risks, which it would then review. The proposal was to apply even in cases where a detainee had been

[37] In June 2006 57 per cent of American adults surveyed supported the continuing operation of Guantánamo Bay – down from 65 per cent in September 2003 – *Washington Post*/ABC News Poll; full results available at: www.angus-reid.com/wp-content/uploads/archived-pdf/TNS_Gitmo_June2K6.pdf (last accessed 21 February 2011).

[38] Executive Order – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 22 January 2009, available at, www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/ (last accessed 21 February 2011).

[39] These provisions were inserted into spending and appropriations bills for Homeland Security, Defense, the State Department, and Commerce, Justice and Science. See W. Alarkon, 'Congress Uses Spending Bills to Halt Closing of Guantánamo Bay', *The Hill*, 4 October 2009.

[40] C. Savage, 'Closing Guantánamo Fades as a Priority', *New York Times*, 26 June 2010.

[41] Section 1034, H.R. 6523, the 'Ike Skelton National Defense Authorization Act for Fiscal Year 2011'.

granted *habeas corpus* by a federal court. Although that proposal did not make its way into the final version of the Defense Authorization Act for Fiscal Year 2011, that Act does include restrictions on the transfer of detainees from Guantánamo Bay to another jurisdiction. Where a detainee is to be transferred to another jurisdiction, a certification process must be undertaken at least thirty days prior to the transfer.[42] The certificate, which is to be done by the Secretary of Defense with the concurrence of the Secretary of State, should state that the country to which the individual is to be transferred is not a designated state sponsor of terrorism, maintains effective control over the detention facilities in which the individual is to be housed (if he is to be detained), does not face a threat that is likely to impact substantially upon its capacity to exercise control over the transferee, has agreed to take 'effective steps' to make sure that the transferee cannot undertake activity that would threaten the US (or its allies) in the future, has taken satisfactory steps to prevent involvement in terrorist activities, and has agreed to share certain information with the US.[43] Rather than introducing the originally proposed notification process for transfer of individuals into the US, the Defense Authorization Act for Fiscal Year 2011 provides that no funds authorised may be used to transfer Guantánamo Bay detainees to the US at all.[44] Discussion on these proposals took place in the context of extremely emotive statements from members of Congress, framing their attempts to prevent the closure of Guantánamo Bay in terms of popular security and risk, sometimes in situations where they claim that the information that grounds their concern cannot be disclosed.[45] Indeed, there were even cases of members of Congress making reference

[42] Section 1033 (a)(1), H.R. 6523, the 'Ike Skelton National Defense Authorization Act for Fiscal Year 2011'.

[43] Section 1033 (b), H.R. 6523, the 'Ike Skelton National Defense Authorization Act for Fiscal Year 2011'.

[44] Section 1032, H.R. 6523, the 'Ike Skelton National Defense Authorization Act for Fiscal Year 2011'. There is a limited exception for US citizens and members of the US armed forces who may be detained at Guantánamo Bay (s. 1032).

[45] The ranking member of the House Intelligence Committee, Congressman Pete Hoekstra, made comments that exemplify this trend very well in his statement to the Permanent Select Committee on Intelligence pre-conference meeting on National Defense Authorization Act for Financial Year 2010 on 24 September 2009. Speaking to the Committee, Congressman Hoekstra said 'I am aware of highly relevant facts that strongly suggest a significant potential impact on the communities and families of any area that holds these detainees. While I cannot disclose these facts, I can express my strong view that the people deserve to know them before the al Qaeda terrorist network is brought to their small town.'

to economic arguments against transferring detainees to the mainland US, locating their opposition not only within the risk society when viewed from a security-perspective, but also tapping into increasingly widespread economic concerns during this time of crisis.[46]

Unlike the US, the UK continued to pursue counter-terrorism within a criminal justice model in the light of the 11 September 2001 attacks. As a result, Parliament has consistently been involved in the formation and implementation of detention-related policies. The parliamentary structure in the UK differs in two significant respects to that of the US that we must take into account. Firstly, the executive and legislative branches are fused: rather than being an entirely separate branch of government the executive branch also sits in Parliament and normally enjoys a legislative majority. This, combined with the use of whipped voting, tends to make Parliament a particularly receptive arena for executive policy.[47] Secondly, Acts of Parliament in the UK enjoy the benefit of parliamentary sovereignty and cannot be struck down by the courts. The introduction of the 'Declaration of Incompatibility' in the Human Rights Act 1998[48] provided the courts with a powerful tool by which parliamentary action could be censored, but it does not constitute a judicial veto.[49] As a result of the fusion of the executive and legislative branches in Parliament, combined with a number of structural elements connected to the party-political structure in the UK system, executive assertions of risk and of required action are easily transmitted to the legislative sphere. Thus, when the executive is heavily receptive to the desires of moral entrepreneurs such as the police – as the materials presented in Chapter 3 show has been the case in the UK since 11 September 2001 – these desires can often be translated into legislation with relative ease. As I have written elsewhere, the UK's parliamentary system suffers from two serious difficulties in attempting to 'check' executive power: 'systemic disincentives to dissent and contrarianism within party political systems' and 'the shift from liberalism and towards

[46] At a town hall meeting in Standish, Michigan Congressman Pete Hoekstra said: 'As a former business marketing executive for a Fortune 500 company, experience tells me that making Michigan home to the world's most dangerous terrorists will not make it more attractive for tourists, families or potential job providers' (20 August 2009).

[47] For a more lengthy exposition of this argument see my contribution to de Londras and Davis, 'Controlling the Executive in Times of Terrorism'.

[48] s. 4, Human Rights Act 1998.

[49] But see *Rights Brought Home: The Human Rights Bill* (1997; Stationary Office) in which it was noted that a declaration of incompatibility 'will almost certainly prompt the Government and parliament to change the law' (para. 2.10).

repression that arises when a state feels itself to be under a terrorist threat'.[50] The materials presented below show that, in many cases, the executive's desired deprivations of liberty have been endorsed by Parliament. Interestingly, however, these materials also demonstrate that where Parliament has resisted the executive's calls for extremely repressive measures, this resistance has been closely related to both the lack of temporal proximity to a major attack and a reliance on international human rights law.

A reduction in deference in times of temporal distance is consistent with patterns of panic-related law-making. Once a substantial period of time has passed from an attack, its salience is somewhat reduced. In the UK there was, in fact, no Al Qaeda-related terrorist attack until July 2005: the first three and a half years of the post-2001 counter-terrorist policy was based on speculative assessments of the likelihood of attack emanating primarily from the judgements of agencies engaged in moral entrepreneurship. Although the attacks of 11 September 2001 were salient in the UK, their lack of physical proximity to the state resulted in scepticism as to the necessity of disproportionately repressive measures arising within a number of years. When scepticism was expressed in the legislative process it was often linked in Parliament and by the Joint Committee on Human Rights to the requirements of international human rights law and the European Convention on Human Rights, with the executive's desired measures sometimes being subjected to greater degrees of judicial oversight in the final legislation than originally proposed in the attempt to ensure compliance with the Convention.[51] Notably, much of the resistance to overly repressive counter-terrorist laws has originated in the House of Lords, rather than the House of Commons. This is particularly significant because the influence of the executive is reduced in the House of Lords due to the lack of whipped voting and minimal involvement of executive officers. In addition, voting peers are not reliant on the populace to secure their position in the House, thus reducing the extent to which electoral concerns operate to transmit public panic to members.[52]

[50] de Londras and Davis, 'Controlling the Executive in Times of Terrorism', 34.

[51] On the role of the Joint Committee on Human Rights, in particular, in helping to develop a 'culture of rights' in parliamentary law-making in the UK, see J. Hiebert, 'Parliamentary Review of Terrorism Measures' (2005) 68 *Modern Law Review* 676; J. Hiebert, 'Parliament and the Human Rights Act: Can the JCHR Help Facilitate A Culture of Rights?' (2006) 4 *International Journal of Constitutional Law* 1.

[52] G. Phillipson, 'Deference, Discretion and Democracy in the Human Rights Act Era' (2007) 60 *Current Legal Problems* 40.

Thus, although there is a basis for sceptical, executive-limiting (or at least checking) behaviour at legislative level in both the US and the UK, these legislatures have not generally engaged in such patterns to prevent repressive measures. Rather, as will be outlined in detail below, Congress and the Houses of Parliament (and particularly the House of Commons) have facilitated both manufactured (top-down) and popular (bottom-up) panic, both of which are transmitted to the legislature through parliamentary and party structures as well as through the electoral process. As already mentioned, there are a number of common themes between the US and the UK that need consideration now: increased bases for detention, minimisation of judicial oversight, and the substitution of process for rights.

Increased bases for detention

Shortly after the 11 September 2001 attacks, legislation in both the US and the UK began to extend the bases upon which people could be detained without trial. As we saw in Chapter 2, international human rights law insists that the bases upon which one may be detained must fall within the exhaustive lists provided in detailed provisions on liberty of the person, such as Article 5 of the European Convention on Human Rights and Article 9 of the International Covenant on Civil and Political Rights.

Within weeks of the 11 September 2001 attacks, the US Congress passed the USA Patriot Act,[53] which President Bush signed into law on 26 October 2001. In addition to reorganising how domestic intelligence organisations operated and introducing extensive and controversial

[53] The USA Patriot Act began as H.R. 2975 in the House of Representatives and S. 1519 in the Senate. The Senate Bill passed on 11 October, 2001 and the House passed an amended version of H.R. 2975 on 12 October. Differences between the two bills were resolved in H.R. 3162. The passage of the Act was so swift that the lack of time and opportunity to engage in full debate on the various different versions of the Bill and to offer amendments attracted significant dissent in the final debates as exemplified by the comment from Congressman Barney Frank (MA) (*Congressional Record*, H7206, 23 October 2001): 'We now, for the second time, are debating on the floor a bill of very profound significance for the constitutional structure and security of our country. In neither case has any Member been allowed to offer a single amendment. At no point in the debate in this very profound set of issues have we had a procedure whereby the most democratic institution in our government, the House of Representatives, engages in democracy.'

For detailed analysis of the seven-week legislative history of the USA Patriot Act, see B. Howell, 'Seven Weeks: The Making of the USA-PATRIOT Act' (2004) 72 *George Washington Law Review* 1145.

domestic intelligence gathering provisions, the Act, in section 412, increased the bases upon which one can be detained without trial and introduced mandatory detention for some kinds of aliens. Prior to the USA Patriot Act the Secretary of State could designate foreign organisations engaged in terrorism that posed a threat to US nationals or national security as 'foreign terrorist organisations' and anyone found to be a member could be refused entry to or removed from the US.[54] This process remained intact, but the USA Patriot Act added two other categories of group, involvement with which resulted in immigration implications. Firstly, the Secretary of State could designate any organisation, including domestic organisations, as a terrorist group if, in consultation with the Attorney General, it was determined that it committed, incited, prepared, planned, gathered information for or prepared material support to terrorist activities.[55] Secondly, the Act penalised non-citizens for involvement with undesignated organisations comprising two or more individuals that committed, incited or planned terrorist activity.[56] Any alien who has raised funds, solicited members or provided material support to any of these categories of designated or undesignated groups, could suffer inadmissibility or deportation. In the case of the latter, there were clear detention-related implications as deportation normally involves an element of detention for the purpose thereof. As we will see, section 412 of the USA Patriot Act reduced the reviewability of this detention, which adversely affected the liberty rights of aliens who fell within section 411.

This was, quite clearly, an administrative procedure inasmuch as detention follows an administrative decision as to both the nature of particular groups and the likelihood that an individual was involved in these groups. Detention that results from the exercise of discretion is likely to be deemed arbitrary '[i]f there are no criteria, express or implied, which govern the exercise of discretion'.[57] Even if an arrest is lawful under domestic and international law, the ensuing detention may be deemed arbitrary if the reasons for it or the procedures that follow it are unreasonable, unforeseeable and lacking in proportionality.[58]

54 s. 219, Immigration and Nationality Act (codified as amended 8 U.S.C. 1189 (2001)).

55 USA Patriot Act 411, 8 U.S.C. 1182(a)(3) (2001).

56 *Ibid.*, 411(a)(1)(G), 8 U.S.C. 1182(a)(3)(B)(vi)(III).

57 N. Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Approaches* (2002, Cambridge; Cambridge University Press), p. 380.

58 *Gangaram Panday Case*, Order of the Court of 27 November 1998, *reprinted in* 1998 Annual Report of the Inter-American Court of Human Rights [531], OEA/Ser.L/V/III.43, doc. 11 (1999).

Detention under the USA Patriot Act is clearly based on express criteria, i.e. membership of or involvement in a designated organisation, however there is some question as to whether the detention is unreasonable. This is particularly the case where the decision to detain is based, for example, on fund-raising for a group where the individual is unaware of the illegitimate objectives of the group and illegitimate ends to which the funds raised might be applied.[59]

Section 412 of the USA Patriot Act amends section 236 of the Immigration and Nationality Act of 1956[60] by requiring the Attorney General to detain any alien that he has 'reasonable grounds to believe' is 'engaged in any other activity that endangers the national security of the US'.[61] Such aliens are certified by the Attorney General and, while the certification involves the Attorney's discretion, these aliens must be either released, charged or have removal proceedings initiated in relation to them within seven days of their detention.[62] Thus, the provision effectively requires the Attorney General to engage in mandatory detention on the basis of a discretionary process. This provision raises clear questions of compliance with international human rights law because the detention is mandatory: there is no discretion involved aside from the Attorney General's initial determination of whether there are reasonable grounds to believe that an individual is engaged in activity that has national security implications. The legitimacy of such provisions under international law will be very much determined by whether there is a substantive review procedure by which the reasonableness of the Attorney General's grounds can be challenged and as a result of which a court or equivalent body can order release. While this provision appears to be *prima facie* unlawful in international law, therefore, it may be saved by the review procedures introduced and which are considered in full below.

In the UK, the Anti-terrorism, Crime and Security Act 2001 allowed for the indefinite detention of non-citizens if they were certified by the Home Secretary as being suspected international terrorists whose presence within the UK constituted a risk[63] to

[59] See, e.g., P. Radden Keefe, 'State Secrets: A Government Misstep in a Wiretapping Case', *The New Yorker*, 28 April 2008, p. 28.

[60] 8 U.S.C. 1101.

[61] s. 411, USA Patriot Act amending s. 236A(a)(1), Immigration and Nationality Act [8 U.S.C. 1101 *et seq.*], *as inserted by* s. 412, USA Patriot Act.

[62] S. 236A(a)(5), Immigration and Nationality Act [8 U.S.C. 1101 *et seq.*], *as inserted by* s. 412, USA Patriot Act.

[63] In this context 'risk' is interpreted in line with *Secretary of State for the Home Department v Rehman* [2001] 3 WLR 877, in which Lord Slynn defined risk as engaging in activities aimed

national security.[64] Within this system, certification acted as a 'substitute for a trial' and was based on a belief of risk, which 'may be taken as denoting a lower standard than suspicion'.[65] As outlined below, these detainees could avail of a review procedure in the Special Immigration Appeals Commission; however, even where these detainees succeeded in the Commission they would not necessarily be released from detention because the Home Secretary could reissue the certificate. Anyone who was certified in this manner could be removed from the UK or have their permission to enter revoked;[66] however, some detainees were essentially forced to remain in indefinite detention on the basis of the assertion that international law required it.[67] This occurred in situations where certified suspected terrorists could not be removed as a result of the principle of *non-refoulement*,[68] which is non-derogable under European Convention law.[69] This appears to have created a new category of detainee: one that is too dangerous to be released in the UK but too vulnerable to be returned to their country of origin. The individual might be subjected to this continued detention even if the Special Immigration Appeals Commission deemed his certification invalid. As will be seen in Chapter 6 this detention system was ultimately deemed incompatible with the Convention by the House of Lords,[70] resulting

at the overthrow of the government of the national concerned by illegal means, or activities directed at a foreign government that may result in a serious threat of intervention against the government concerned (para. 16, citing A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol. I: Refugee Character (1966, Sijthoff; Leyden)).

[64] s. 21(1), Anti-terrorism, Crime and Security Act 2001.

[65] H. Fenwick, 'The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?' (2006) 65 *Modern Law Review* 724, 733; H. Fenwick and G. Phillipson, 'Legislative Over-Breadth, Democratic Failure, and the Judicial Response: Fundamental Rights and the UK's Anti-Terrorist Legal Policy', in Ramraj, V., Hor, M., and Roach, K. (eds.), *Global Anti-Terrorism Law and Policy* (2005, Cambridge; Cambridge University Press), p. 455 at p. 465.

[66] s. 22, Anti-Terrorism, Crime and Security Act 2001.

[67] s. 23, Anti-Terrorism, Crime and Security Act 2001.

[68] See, e.g., J. Allain, 'The Jus Cogens Nature of Non-Refoulement' (2001) 13 *International Journal of Refugee Law* 533; R. Bruin and K. Wouters, 'Terrorism and the Non-Derogability of Non-Refoulement' (2003) 15 *International Journal of Refugee Law* 5.

[69] *Non-refoulement* is considered part of the guarantee against torture, cruel and inhuman treatment and punishment of Article 3, the entirety of which is non-derogable under Article 15(2). *Chahal v UK* (1996) 23 EHRR 413; *Soering v UK* [1989] 11 EHRR 439; *Saadi v Italy*, Application No. 37201/06, judgment of 28 February 2008 (Grand Chamber).

[70] *A (FC) and others; (X) FC and another v Secretary of State for the Home Department* [2005] 2 AC 68; considered in full in Chapter 6 below.

in the introduction of a new kind of detention, or *quasi*-detention, in the UK by control order.[71]

Following the House of Lords' decision deeming these provisions incompatible with the European Convention on Human Rights, the Prevention of Terrorism Act 2005 was introduced. This Act applies to all those within the UK, 'irrespective of nationality or terrorist cause'.[72] In this manner it clearly differs from the Anti-terrorism, Crime and Security Act 2001 and takes into account the Law Lords' concern with the discriminatory nature of legislation that only targeted non-citizens. Secondly, the 2005 Act introduced an alternative to detention without trial in the form of control orders. Simply put, a control order is an order that can be used to impose restrictions on movement, use of communication technologies, association with particular people and so on,[73] even to the extent of house arrest.[74] These orders are imposed 'for purposes connected with protecting members of the public from a risk of terrorism'.[75] For the purposes of the Act 'involvement in terrorism-related activity' is expansively defined as committing, preparing or instigating terrorist acts,[76] engaging in conduct that facilitates or is intended to facilitate, or encourages, supports or assists the commission, preparation or instigation of terrorist acts.[77]

The 2005 Act provides for two different types of control orders: derogating control orders (i.e. those requiring derogations from Article 5 of the European Convention on Human Rights in order to be compatible with the Human Rights Act 1998 and international obligations) and non-derogating orders. As a preliminary note, the mere existence of two different levels of control order is important, for it signifies recognition that the levels of control exercised upon someone by such an order will differ depending on the exigencies of a particular case; not every order would require the same level of restrictions of movement or last for the same amount of time.[78] Rather, the party issuing the control order (i.e. the Secretary of State or the court on the application of the Secretary of

[71] Prevention of Terrorism Act 2005.

[72] M. Zander, 'The Prevention of Terrorism Act 2005' (2005) 155 *New Law Journal* 438.

[73] The full list of potential obligations is contained in s. 1(4) of the Act.

[74] s. 1(5), Prevention of Terrorism Act 2005.

[75] s. 1(1), Prevention of Terrorism Act 2005.

[76] s. 1(9)(a), Prevention of Terrorism Act 2005.

[77] s. 1(9)(b), (c) and (d), Prevention of Terrorism Act 2005.

[78] Non-derogating control orders would last for 12 months, but could be renewed on multiple occasions (s. 2(4), Prevention of Terrorism Act 2005) if the Secretary of State felt it necessary to do so (s. 2(6)).

State[79]) would have to decide not only whether an individual was an appropriate candidate for such an order, but also the extent of the restrictions required[80] and whether those restrictions were so extensive as to warrant derogation from Article 5 of the European Convention on Human Rights. As it happened, the pre-existing derogation from Article 5 of the European Convention on Human Rights and Article 9 of the International Covenant on Civil and Political Rights was lifted soon after passage of the Act as the government did not envisage that derogating control orders would be required at that time.[81]

The control orders introduced by the 2005 Act raise a number of important rights-related questions, the first of which is whether such orders actually result in a deprivation of liberty attracting the right to challenge the lawfulness of one's detention at all. Generally speaking, international law takes a physical approach to liberty; in other words it conceives of liberty in the sense of physical freedom. Whether something constitutes a deprivation of liberty will be very much dependent on the extent to which one's physical liberty is restrained in the particular circumstances of the case.[82]

In the first place, it is abundantly clear that deprivation of liberty is not confined to cases of traditional detention; rather '[t]he concept includes any element of compulsion restricting a person to a particular location'.[83] This is borne out by the decision of the European Court of Human Rights in *Guzzardi v Italy*,[84] in which the applicant was subject

[79] The Secretary of State could issue control orders if he or she had reasonable grounds for suspecting involvement in terrorism-related activity and considered a control order necessary to protect the public (s. 2, Prevention of Terrorism Act 2005); however, if the control order was going to require derogation from Article 5 of the European Convention on Human Rights then that would be issued by the court on the application of the Secretary (s. 1(2)(b)).

[80] The 2005 Act specifically vests the issuing party with responsibility to decide 'the obligations that may be imposed' by reference to what is considered 'necessary for purposes connected with preventing or restricting involvement by that individual in a terrorism-related activity' (s. 1(3)).

[81] Human Rights Act (Amendment) Order 2005.

[82] For the circumstantial nature of the analysis in the European Court of Human Rights see, e.g., *Amur v France* (Appl. No.17/1995/523/609), Judgment of 26 June 1999; *Riera-Blume & Others v Spain* [1999] ECHR 90; *Engel v The Netherlands* [1976] ECHR 3 (holding, at paras. 58–9, that when deciding whether someone has suffered a deprivation of liberty the starting point must be the actual situation in which the applicant finds himself, including the type, duration and manner of implementation of the impugned provision).

[83] A. Brown, *Law Basics: Human Rights* (2000, Edinburgh; Sweet & Maxwell), p. 31.

[84] [1980] ECHR 5.

to a residence order to reside in an area of 2.5 square kilometres on the island of Asinara, near Sicily. The government claimed *inter alia* that this did not constitute a deprivation of liberty and was, at best, a restriction of liberty as considered in Protocol No. 4[85] to which Italy was not a party. The Court, however, considered whether the various 'factors considered cumulatively and in combination raise an issue of categorisation from the viewpoint of Article 5'[86] and concluded that they did. Guzzardi was restricted in his movement to an area populated mostly by supervision staff and other individuals subject to residence orders, he was confined to his home between 10 p.m. and 7 a.m. except with prior notice to the authorities, he could not use the telephone without first informing the authorities of whom he would be calling, he required the consent of the authorities for any trips outside the area and he was liable to arrest for breach of a provision of his residence order. Although none of these factors alone would engage Article 5 of the European Convention on Human Rights, the Court held that taken in combination 'the treatment complained of resembles detention in an "open prison" or committal to a disciplinary unit'.[87] Despite the security concerns that motivated the use of this residence order (Guzzardi was a suspected *mafiosa*), the Court held that there had been a violation of Article 5(1).

Guzzardi therefore confirms that deprivation of liberty is a circumstantial consideration and, depending on the terms of a particular control order, a person subject to such an order could be said to have had their liberty deprived or to be in *de facto* detention under such an order. The Joint Committee on Human Rights was of the opinion that control orders, as constituted under the 2005 Act and issued by the Home Secretary, can be 'so restrictive of liberty as to amount to a deprivation of liberty for the purposes of Article 5(1) of the ECHR'.[88] The result of such a finding is that the individuals subject to such control orders ought to be entitled to challenge the lawfulness of this *quasi*-detention before a court or adequate alternative.

[85] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. No. 46, *entered into force* 2 May 1968.

[86] [1980] ECHR 5, para. 95. [87] *Ibid.*

[88] Joint Committee on Human Rights, Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006 (2006, London; The Stationery Office), p. 15.

Minimisation of judicial oversight

Introducing new means of challenging the lawfulness of detention was an early feature of UK legislation but (with the exception of the provisions of the USA Patriot Act, which were applied within the US itself) appeared in US legislation only when Congress attempted to prohibit *habeas corpus* petitions and decided instead to introduce an alternative review procedure. While international human rights law does not require that one would have to challenge the lawfulness of their detention before a court or judge in its traditional formulation, we saw in Chapter 2 that it does require that the arbiter would be objective, have the capacity to order release, and that the individual would be entitled to engage in a substantive review of his detention.

The character of the arbiter

In the UK, the Anti-terrorism, Crime and Security Act 2001 granted the Special Immigration Appeals Commission the exclusive right to entertain challenges to the certificates on the basis of which individuals were detained.[89] The Special Immigration Appeals Commission is a superior court of record in the UK and, as a result, might be assumed to have the independence and neutrality characteristic of a court or judge in satisfaction of international legal norms. While it is empowered to engage in normal court proceedings, including ordering release on the basis of the invalidity of the certificate, its release powers under the 2001 Act were patently ineffective. Although the Special Immigration Appeals Commission could cancel a certificate, the Home Secretary could simply reissue that certificate and the process would have to be recommenced.[90] The Special Immigration Appeals Commission was mandated to review the decision to detain 'as soon as is reasonably practicable after the expiry of the period of six months beginning with the date on which the certificate is issued'[91] and every three months thereafter,[92] although a detainee could instigate a review procedure prior to the passage of the initial six month period.[93] While the review procedure under the 2001 Act may appear to satisfy international legal requirements on the face of it,

[89] s. 25, Anti-terrorism, Crime and Security Act 2001.
[90] s. 27(9), Anti-terrorism, Crime and Security Act 2001.
[91] s. 26(1), Anti-terrorism, Crime and Security Act 2001.
[92] s. 26(4), Anti-terrorism, Crime and Security Act 2001.
[93] s. 25, Anti-terrorism, Crime and Security Act 2001.

therefore, its operation in practice shows that its decisions were to some extent ineffectual as the executive branch retained the capacity to engage in administrative detention in situations of conflicting determinations by the Special Immigration Appeals Commission and the Home Secretary.

Following the decision of the US Supreme Court in *Hamdi*[94] and *Rasul*[95] (that detainees were statutorily entitled to have their status as enemy combatants reviewed) the executive established Combatant Status Review Tribunals to assess the detention of Guantánamo Bay detainees.[96] These comprised three military officers who determined whether a detainee was rightly designated an 'unlawful' or 'enemy' combatant on the basis of what in practice appears to have been almost exclusively classified evidence,[97] which enjoyed the presumption of validity in the proceedings.[98] This process was ratified and placed on a statutory basis by Congress in the Detainee Treatment Act 2005.[99] By section 1005(a)(1)(A) Congress gave legislative support to the Combatant Status Review Tribunal and the Administrative Review Board. The Administrative Review Board was a civilian officer within the Department of Defense whose appointment was made by the President with the advice and consent of the Senate[100] and whose function in this respect was to review the continued detention of Guantánamo Bay detainees supplementary to the Combatant Status Review Tribunal. In relation to both, the Detainee Treatment Act 2005 allowed for evidence acquired through coercion to be admitted, although particular regard was to be had as to its probative effect.[101]

The procedures established for the Combatant Status Review Tribunal under the Detainee Treatment Act fell far short of international standards: the Tribunal was not adversarial in reality as the majority of the evidence adduced was classified and therefore could not be contested by the detainee;[102] the detainee was not entitled to a lawyer but rather to a

[94] *Hamdi v Rumsfeld* 542 U.S. 507 (2004).
[95] *Rasul v Bush* 542 U.S. 466 (2004).
[96] Order Establishing Combatant Status Review Tribunal, 7 July 2004, available at www.defenselink.mil/news/Jul2004/d20040707review.pdf (accessed 25 January 2007).
[97] M. Denbeaux and J. Denbeaux, 'No-Hearing Hearings – CSRT: The Modern Habeas Corpus?' *Seton Hall Public Law Research Paper* No. 951245 (2006).
[98] Memorandum from Gordon England, Secretary of the Navy, Enc. (1), § B, 29 July 2004 (regarding 'Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantánamo Bay Naval Base, Cuba') (on file with author).
[99] s. 1005(a), Detainee Treatment Act 2005.
[100] s. 1005(a)(2), Detainee Treatment Act 2005.
[101] s. 1005(b)(1), Detainee Treatment Act 2005.
[102] Denbeaux and Denbeaux, 'No-Hearing Hearings', 5.

legal representative who enjoyed no client confidentiality in respect of the detainee; the personal representative tended to have little or no contact with the detainee whom he was aiding[103] – in practice detainees could only call witnesses from within Guantánamo Bay itself[104] and could only produce letters from family and friends as documentary evidence.[105] Although there was a limited appeal from the decision of the Combatant Status Review Tribunal, the executive policy in establishing these review mechanisms – which was subsequently endorsed by Congress – was clearly to minimise the extent to which the reviewing court would be in a position to review all of the relevant evidence and engage in a substantive analysis of the lawfulness of the detention.[106] In spite of this, the US government claimed that this was an 'adequate alternative' to constitutional *habeas corpus,*[107] although the US Supreme Court subsequently disagreed with that analysis.[108]

In both cases then, the original detention-related provisions introduced by the legislature tended to provide a kind of review that seemed in reality to be hardly more than illusory. Detainees could make some kind of a claim to some kind of arbiter but, ultimately, the state could override that arbiter's decision. This continues to be the case in the US where the executive has successfully argued that federal courts can find a detainee's detention to be unlawful but cannot order the release of that detainee; rather the court must in effect urge the executive to act swiftly in order to secure release.[109] As already considered in this chapter, even that seems likely to be subjected to extreme congressional limitation by the introduction of a 'reporting and review' period within which Congress would have the power to approve (and, presumably, refuse to approve) the transfer of an individual from detention to the US or,

[103] According to Denbeaux and Denbeaux's study on the practical operation of the Combatant Status Review Tribunal 'in 78% of cases the personal representative met with the detainee only once. The meetings were as short as 10 minutes, and this includes translation. Some 13% of the meetings were 20 minutes or less, and more than half of the meetings lasted no more than an hour'. *Ibid.*, 4.

[104] *Ibid.*, 6. [105] *Ibid.*, 6.

[106] See the executive's claims in *Bismullah v Gates* No. 06–1197; Judgment of 3 October 2007. Available at www.asil.org/pdfs/ilib080208_bismullah3.pdf (last accessed 1 May 2008) – considered in Chapter 3 above.

[107] See Oral Transcript, *Boumediene v Bush* No. 06–1195; *Al Odah v US* No. 06–1196, 5 December 2007, pp. 9–14. See also Brief for Respondents, *Boumediene v Bush* No. 06–1195; *Al Odah v US* No. 06–1196.

[108] *Boumediene v Bush* 553 U.S. 723 (2008).

[109] *Kiyemba v Obama* 555 F.3d 1022 (D.C. Cir. 2009); See also Government Brief in Opposition to Petition for *Certiorari* in *Kiyemba v Obama*, 29 May 2009.

indeed, anywhere else in the world. This later development has followed the decision in *Boumediene* that detainees in Guantánamo Bay have a constitutional right to make a *habeas corpus* claim,[110] which appears to preclude Congress from insisting upon inadequate alternatives such as the Combatant Status Review Tribunal, but does not preclude them from engaging in law-making that frustrates the benefits of substantive review before a neutral arbiter such as a federal court.

Availability of substantive review

The extent to which the legislation introduced in both the US and the UK attempts to limit what might be termed 'traditional judicial oversight of detention' is striking. It is common to the legal systems in both countries that judicial oversight of this kind would usually take the form of *habeas corpus* proceedings. In the US, in particular, removing *habeas corpus* jurisdiction of federal courts appears to be a primary legislative objective, although this is less so in the UK. In both jurisdictions, however, efforts have been made to provide shallow review or to create structures that would undermine the effectiveness of review where it exists or is introduced. Thus, the approach has been two-pronged: to limit or prevent review *per se* and to limit the substantiveness (and effectiveness) of review where it is available.

Detention under the USA Patriot Act can be reviewed by means of *habeas corpus* proceedings. Those proceedings can be taken in a number of venues,[111] but relief is strictly limited to that provided for by the Act itself.[112] It appears that a detainee's challenge must be based on the factual basis for the Attorney General's certification. Although the standard was changed from that originally proposed to ensure that the Attorney General must have 'reasonable grounds to believe' that an individual falls within section 412, the vague nature of a 'reasonable belief' coupled with the sensitivity of evidentiary materials and the inevitable grey areas that arise in counter-terrorism operations make challenging the reasonability of belief exceptionally difficult. Section 412

[110] 553 U.S. 723 (2008).

[111] The Act limits judicial review to *habeas corpus* proceedings in the US Supreme Court, the US Court of Appeals for the District of Columbia, or any district court with jurisdiction to entertain a *habeas corpus* petition. It further restricts to the US Court of Appeals for the District of Columbia the right of appeal of any final order by a circuit or district judge.

[112] s. 236A(b), Immigration and Nationality Act [8 U.S.C. 1101 *et seq.*], *as inserted by* s. 412, USA Patriot Act.

is particularly significant because it specifically targets non-citizen aliens who are already inside the territory of the US. Such individuals have long been recognised as constitutional rights-bearers, particularly in relation to the right of *habeas corpus*.[113] Not long before the 11 September 2001 attacks, the US Supreme Court found indefinite detention pending deportation unconstitutional in *Zadvydas v Davis*.[114] According to the Court, such indefinite detention is allowable only in relation to those who are dangerous, where there are special circumstances, and where strong procedural safeguards are in place. While suspected terrorists could be said to be (at least potentially dangerous) and the 11 September 2001 attacks could be said to have created 'special circumstances', it does not appear likely that section 412 of the USA Patriot Act satisfies the third prong of *Zadvydas*.[115] Perhaps as a result of fears about constitutional challenges this provision was rarely if ever used by the Bush Administration. As Wald and Onek note:

> [T]he government was able to detain aliens without charges for far longer periods by simply imprisoning them secretly and denying them access to hearings or counsel. A small subset of detainees . . . were held under the criminal law as material witnesses.[116]

In addition to appearing to contravene domestic constitutional standards, the *habeas corpus* review available to detainees under the Patriot Act scheme is unlikely to be found to comply with international legal standards. As we have already seen, international legal obligations will not be satisfied by the mere provision of an opportunity to take a *habeas corpus* petition; rather the *habeas corpus* review must be substantive and effective, including allowing the petitioner to challenge the detention on the basis of international legal standards. On the face of it, the *habeas corpus* review provided for by the USA Patriot Act does not appear to preclude the petitioner from availing of international legal standards, however those standards are only justiciable in domestic courts if the treaty in question

[113] *INS v St. Cyr* 533 U.S. 289 (2001); reaffirmed in *Boumediene v Bush* 553 U.S. 723 (2008).
[114] 533 U.S. 678 (2001).
[115] This view is shared by the American Civil Liberties Union (ACLU, "How the Anti-Terrorism Bill Permits Indefinite Detention of Immigrants", 23 October 2001, available at www.aclu.org/immigrants-rights/how-anti-terrorism-bill-permits-indefinite-detention-immigrants (last accessed 21 February 2011). See also S. Sinnar, 'Patriotic or Unconstitutional? The Mandatory Detention of Aliens under the USA Patriot Act' (2003) 55 *Stanford Law Review* 1419.
[116] P. Wald and J. Onek, 'Go Slow on Expanding Detention Authority', in Baker, S. (ed.), *Patriot Debates: Experts Debate the USA Patriot Act* (2005; American Bar Association), p. 129.

has been incorporated into domestic law (and all human rights treaties are deemed non-self-executing) and if it has not been subsequently overturned by legislation. Neither the International Covenant on Civil and Political Rights nor the American Declaration of the Rights and Duties of Man has been incorporated, although the right to effectively challenge the lawfulness of one's detention in customary international law can be evoked by the petitioner.[117] As *habeas corpus* claims by those detained under the USA Patriot Act are limited to the factual basis of the Attorney General's decision and do not appear to allow for a challenge to the lawfulness of that decision in relation to international legal standards, this *habeas corpus* provision may not satisfy international legal requirements.

It was, however, in the wake of the Supreme Court decisions to hear *habeas corpus* petitions from Guantánamo Bay detainees that the starkest jurisdiction-stripping provisions were introduced in the US. Following the Supreme Court's decision in *Rasul v Bush*[118] that Guantánamo Bay detainees had statutory *habeas corpus* rights, and the revelations of abuse in Abu Ghraib, Senator Lindsey Graham placed 'the Graham Amendment' on the Defense Appropriations for Fiscal Year 2006 Act. Senator Graham proposed a jurisdiction-stripping provision that, as originally worded, expressly removed federal courts' jurisdiction to consider both pending and future *habeas corpus* petitions lodged by or on behalf of Guantánamo Bay detainees. The floor speech that accompanied the introduction of the Bill clearly showed that he was exercised by the apparent security implications of this decision. While supporting the McCain amendment (guaranteeing detainees freedom from torture, inhuman or degrading treatment or punishment),[119] Senator Graham was adamant that *Rasul* went too far:

[117] Customary international law forms part of US domestic law as part of the federal common law – *The Paquette Habana* 175 U.S. 677, 700 (1900), *per* Gray J. Although this proposition is a long-standing one, it is not without controversy. For scholarship propounding this 'common law' view, see, e.g., H. Sprout, 'Theories as to the Applicability of International Law in the Federal Courts of the US' (1932) 26 *American Journal of International Law* 280, 282–5; L. Henkin, 'International Law as Law in the United States' (1984) 82 *Michigan Law Review* 1555, 1555–7. For scholarship claiming that customary law is not, or ought not to be, considered as federal common law, see, e.g., C. Bradley, and J. Goldsmith, 'Customary International Law as Federal Common Law: A Critique of the Modern Position' (1997) 110 *Harvard Law Review* 815; Somin and McGuinness, 'Should International Law be Part of Our Law?'

[118] 542 U.S. 466 (2004).

[119] For a note focusing predominantly on the treatment aspect of the Act, see A. Suleman, 'Recent Developments: Detainee Treatment Act 2005' (2006) 19 *Harvard Human Rights Law Review* 257.

> in the name of human rights, we are not going to let this jail [Guantánamo] run amok. We are not going to create a status in international military law that has never been granted before. Of all the people in the world who should enjoy the rights of an American citizen in Federal court, the people in Guantánamo Bay are the last we should confer that status on. We did not do it for the Nazis. We should not do it for these people.[120]

The amendment passed the Senate as originally worded, but concerns about its potential retrospective effect were quickly voiced, particularly by Senator Carl Levin (D-MI). In response, the amendment was redrafted, ostensibly to remove its retroactive effect.[121] The finalised version, as included in section 1005 of the Detainee Treatment Act 2005, amends 28 U.S.C. § 2241 by stripping all courts, justices and judges of jurisdiction to hear a *habeas corpus* petition, or any other action against the US, from any alien detained in Guantánamo Bay.[122] The Act also placed the Combatant Status Review Tribunal on a statutory footing and deemed its decision reviewable only in the federal courts of the District of Columbia.[123] Importantly, the Act specified that *in general* it was to become effective on its date of passage[124] and that *in particular* provisions relating to federal review of Combatant Status Review Tribunal and Military Commission decisions were to apply to both future and pending claims.[125] While this distinction suggested that

[120] Speech in the Senate, 10 November 2005, *Congressional Record*, p. S12657.

[121] This is evident in Senator Levin's floor speech accompanying the revised amendment (141 *Congressional Record* S12, 755 (14 November 2005)): 'The other problem . . . with the first Graham amendment was that it would have stripped all the courts, including the Supreme Court, of jurisdiction over pending cases. What we have done in this amendment, we have said that the standards in the amendment will be applied in pending cases, but the amendment will not strip the courts of jurisdiction over those cases. For instance, the Supreme Court jurisdiction in Hamdan is not affected . . . I cosponsored the Graham amendment with Senator Graham because I believe it is a significant improvement over the provision which the Senate approved last Thursday . . . The direct review will provide for convictions by the military commissions, and because it would not strip courts of jurisdiction over these matters where they have taken jurisdiction, it does, again, apply the substantive law and assume that the courts would apply the substantive law if this amendment is agreed to. However, it does not strip the courts of jurisdiction.'

[122] s. 1005(e)(1), Detainee Treatment Act 2005.

[123] s. 1005(e)(2), Detainee Treatment Act 2005.

[124] s. 1005(h)(1), Detainee Treatment Act 2005.

[125] s. 1005(h), Detainee Treatment Act 2005 provides:

Effective Date—

(1) IN GENERAL—This section shall take effect on the date of the enactment of this Act.

the jurisdiction-stripping enactment was not intended to apply to pending *habeas corpus* petitions, President Bush interpreted it as having retrospective effect.[126] In keeping with this interpretation, the government argued that all pending cases from Guantánamo detainees should be struck off for lack of jurisdiction.[127]

The notion of completely removing detainees' capacity to challenge the lawfulness of their detention by means of *habeas corpus* petitions raises serious questions in international law. As already considered in Chapter 2 there is a growing consensus that the right to challenge the lawfulness of one's detention by means of an effective and substantive adversarial review is a right that may not be derogated from even in times of emergency. Notwithstanding the emergency situation in which the US might be said to find itself, international law does not countenance detention that cannot be challenged by means of an effective review procedure, thus the only means by which international law could ratify this provision would be if an adequate alternative review mechanism had been introduced. The Combatant Status Review Tribunal was inadequate by both international and domestic standards. This is even more problematic when one considers that, at the time of its introduction, it was thought that Guantánamo Bay detainees had no capacity to avail of constitutional rights.[128] In *Hamdan v Rumsfeld*,[129] the US Supreme Court rejected President Bush's retrospective interpretation of section 1005 and held that federal courts retained statutory *habeas corpus* jurisdiction over Guantánamo Bay detainees whose petitions were lodged at the time of the Detainee Treatment Act's passage. The Justices did not consider the compatibility of the jurisdiction-stripping provision itself with domestic or international law, holding that the matter simply did not arise for consideration in the case at bar. This decision resulted in a

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS—Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

[126] President George W. Bush, President's Statement on Signing of H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (30 December 2005).

[127] Letter of Robert Loeb (Counsel for the US) to Mark Langer (Clerk of the DC Court of Appeals) of 3 January 2006. The Government argued that s. 1005 had the effect of striking-out pending claims in a number of cases, including in particular *Boumediene v Bush* (No. 05–5062) and *Al Odah v US* (No. 05–5064), then before the D.C. Circuit Court.

[128] *Johnson v Eisentrager* 339 U.S. 763 (1950).

[129] *Hamdan v Rumsfeld* 548 U.S. 557 (2006).

flurry of legislative activity that, while mostly concerned with the establishment of Military Commissions and the applicability of the Geneva Conventions, also included in section 7 a further *habeas corpus* jurisdiction-stripping provision that attracted surprisingly little attention at first.[130]

Section 7(a) of the Military Commissions Act 2006 expressly stripped federal courts of jurisdiction to hear *habeas corpus* petitions from any 'alien detained by the US who has been determined by the US to have been properly detained as an enemy combatant or is awaiting such determination'. The provision was expressly said to 'apply to all cases, without exception, pending on or after the date of the enactment of this Act' and relating in any way to the US's interaction with aliens detained since 11 September 2001. In addition, section 10 arguably broadened the scope of the Act's jurisdiction-stripping provisions from those detained in Guantánamo Bay to those detained anywhere, possibly including in the US itself.[131] The Act defined an 'unlawful enemy combatant' whose status was to be determined by the Combatant Status Review Tribunal as:

> (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the US or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
>
> (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[132]

Thus, the jurisdiction-stripping provision introduced in the Military Commissions Act 2006 was broader than that contained in the Detainee Treatment Act 2005: it was expressly retroactive, not limited to Guantánamo Bay, and applied to those who had been determined to be unlawful combatants and to all who awaited such a determination. Given the expansive nature of the provision, it is somewhat surprising that it attracted so little attention while the Bill was being negotiated. It was not until the impasse between the Bush Administration and Senators

[130] Military Commissions Act 2006, Pub. Law No. 109–366.

[131] This appears to be the plain reading of the provision, although s. 948(b), Military Commissions Act 2006 clearly states that only aliens can be tried by military commission.

[132] s. 948a(1), Military Commissions Act 2006.

Graham, Warner and McCain relative to the Geneva Conventions had been resolved that section 7 came under serious scrutiny. Although Senator Arlen Specter's amendment to remove the provision attracted the closest Senate vote on the Bill (it was defeated 51–48), section 7 remained. The Bill was passed by both Houses and signed into law by the President on 17 October 2006 as the Military Commissions Act 2006.

This provision suffered from many of the same deficiencies from a human rights law perspective as section 1005(1)(e) of the Detainee Treatment Act 2005, inasmuch as it purported to remove completely the potential for suspected terrorist detainees to challenge the lawfulness of their detention. In addition, section 7 of the 2006 Act was subsequently found to be unconstitutional.[133] In the wake of that decision it appears that the US executive has accepted that Guantánamo Bay detainees must be permitted to bring *habeas corpus* proceedings to federal courts. This does not, however, constitute a reprieve from legislative attacks on the right to be free from arbitrary detention. Rather, attempts continue to be made (both by the executive in litigation and by the legislature) to weaken the effectiveness of the review procedure. As we saw above, both the executive and Congress are attempting to ensure that those who succeed in *habeas corpus* petitions cannot secure their liberty in real terms. Added to that is the attempt by Senators John McCain and Joe Lieberman to effectively preclude *habeas corpus* for a separate category of detainees.

In the proposed Enemy Belligerent Interrogation, Detention and Prosecution Act of 2010, there was a plan to identify a set of detainees to be known as 'unprivileged enemy belligerents'. The legislation was proposed in the wake of the so-called 'Christmas Day bomber' (an attempt to detonate a bomb while travelling on a plane from Amsterdam to Detroit on 25 December 2009) and, according to Senator McCain, was intended to 'ensure that the mistakes made during the apprehension of the Christmas Day bomber, such as reading him a *Miranda* warning, will never happen again and put Americans' security at risk'.[134] Couching the proposed legislation in these terms clearly tied in with patterns of panic-related law-making: a dichotomy between security and rights was clearly identified, the suspected terrorist was 'othered' from 'ordinary'

[133] *Boumediene v Bush* 553 U.S. 723 (2008).

[134] Statement by Senator John McCain on the Enemy Belligerent Interrogation, Detention and Prosecution Act of 2010, 4 March 2010, available at, http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.FloorStatements&ContentRecord_id=2af60f3a-05dc-cdf6-7dc9-6501a995c17c (last accessed 21 February 2011).

criminals (who are entitled to a *Miranda* warning), and the Senator evoked a recent and salient attempted attack in order to justify the proposal. The Bill proposed that anyone captured by the US anywhere in the world who was 'suspected of engaging in hostilities against the United States or its coalition partners through an act of terrorism, or by other means in violation of the laws of war, or of purposely and materially supporting such hostilities'[135] was to be placed in military custody in order to be interrogated and have his 'status' determined. Such individuals would then be interrogated by an Interrogation Group – a group made up of 'such personnel of the Executive Branch having expertise in matters relating to national security, terrorism, intelligence, interrogation, or law enforcement as the President considers appropriate'[136] – which was to try to come to a determination as to the detainee's status within forty-eight hours where practicable.[137] During the period of interrogation for the purposes of status determination the detainee would not be entitled to a *Miranda* warning 'or otherwise be informed of any rights that the individual may or may not have to counsel or to remain silent'.[138] The Interrogation Group was intended to determine whether the individual was an 'unprivileged enemy belligerent', with this determination playing an important role in the venue for prosecution should a charge be levied; it would also have an impact on detention, since the Act, as proposed, would give legislative effect to the executive claim – considered in detail in Chapter 2 – of a right to detain belligerents until the cessation of hostilities.[139] This decision did not seem to be subject to traditional review mechanisms. The determination of the Interrogation Group would be communicated to the Secretary of Defense and Attorney General following consultation with senior members of the Executive.[140] This determination was then to be submitted to the President and 'appropriate committees of Congress' for

[135] s. 2, Enemy Belligerent Interrogation, Detention and Prosecution Act of 2010, as proposed.

[136] s. 3(a)(2), Enemy Belligerent Interrogation, Detention and Prosecution Act of 2010, as proposed.

[137] s. 3(c)(2), Enemy Belligerent Interrogation, Detention and Prosecution Act of 2010, as proposed.

[138] s. 3(b)(3), Enemy Belligerent Interrogation, Detention and Prosecution Act of 2010, as proposed.

[139] s. 5, Enemy Belligerent Interrogation, Detention and Prosecution Act of 2010, as proposed.

[140] According to s. 3(c)(1), Enemy Belligerent Interrogation, Detention and Prosecution Act of 2010, as proposed, the group would consult with the Director of National Intelligence, the Director of the FBI and the Director of the CIA.

determination as to whether the individual in question was in fact an unprivileged enemy belligerent and, '[i]n the event of a disagreement between the Secretary of Defense and the Attorney General, the President shall make the final determination'.[141] The finding of constitutional rights for Guantánamo Bay detainees in *Boumediene* suggested that if the legislation were introduced, and if it were to operate as proposed, these individuals would still have the right to lodge a *habeas corpus* petition,[142] but it is difficult to see how effective that could possibly be. How difficult would it be for a judge, particularly in one of the lower federal courts, to withstand the claim not only of the executive – as it always does in such *habeas corpus* cases – but of an executive acting on the advice of a cadre of 'experts' (classifiable as 'moral entrepreneurs') about the dangerousness of this individual? It strikes me that the pressure placed on courts in such a context would be almost overwhelming, and certainly individual detainees were likely to find it very difficult to mount a successful challenge to their determination given the 'pedigree' of the decision-makers involved. The McCain/Lieberman proposal did not seem expressly to exclude judicial review, but rather to somewhat invidiously undermine its capacity for effectiveness. The fact that it was introduced in such emotive terms, with proximity to a documented (although thankfully failed) attempt to carry out a terrorist act on an aircraft bound for the US, made it an example of quite concerted panic-related law-making that could be extremely damaging to individual detainees if successfully introduced.

The detention-related legislation introduced in the UK has not contained such full-frontal attacks on the availability of review as in the US, even when the most repressive of the post-2001 systems (detention under the Anti-terrorism, Crime and Security Act 2001) was in operation. As considered above, the Special Immigration Appeals Commission was to be the sole theatre for bail applications[143] and review of the decision to certify under the 2001 Act. While Fenwick correctly notes that through the exclusive jurisdiction provisions the Act 'appears to rule out *Habeas Corpus*',[144] the legislation nevertheless ensured that *some* means of review remained. Whether that review mechanism was sufficient to satisfy detainees' rights to challenge the lawfulness of their

[141] s. 3(c)(2), Enemy Belligerent Interrogation, Detention and Prosecution Act of 2010, as proposed.
[142] *Boumediene v Bush* 553 U.S. 723 (2008).
[143] s. 24(1), Anti-terrorism, Crime and Security Act 2001.
[144] Fenwick, 'The Anti-terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?', 739.

detention was dependent on its capacity to withstand interrogation as to its effectiveness and substance. While international human rights law makes it clear that review need not necessarily be equivalent to the review available through *habeas corpus* provisions, it ought to be adequate within the exigencies of the situation. It was always possible (if not probable) that this barrier would be set rather low by the European Convention on Human Rights, based on case-law emanating from the Northern Ireland conflict that appeared to assess only the presence of judicial review (by means of *habeas corpus* in that situation) as opposed to the depth of the review of the reasonableness of the suspicion that resulted in detention.[145] Indeed, in *A v United Kingdom*[146] the Strasbourg Court failed to really interrogate the depth and substantiveness of the review available in the Special Immigration Appeals Commission, focusing instead on detainees' legal representation. No opinions of the UN Human Rights Committee, however, support such shallow review, therefore even if these standards were said to satisfy the European Convention on Human Rights they may fall foul of the UK's obligations under Article 9(4) of the International Covenant on Civil and Political Rights.

The substitution of process for rights

Although both the US and the UK now make some form of review of detention available to suspected terrorist detainees, the mere existence of *some* judicial involvement in the detention process does not necessarily provide an assurance of fairness or protection of individual rights. Substantiveness of review has to do with more than mere availability or indeed the depth to which the arbiter will interrogate claims of the detaining party; it also has a lot to do with the way in which the review itself works. There is a tendency in the UK in particular, although also to some extent in the US, to substitute process for rights. In other words, to introduce a review system, represent that as satisfying (or even exceeding) the state's obligations, and design it in such a manner as to make it illusory in real terms.

We have already seen how the operation of the Combatant Status Review Tribunal in the US was deeply worrying from a substantive point

[145] See, in particular, *Brogan & Ors v UK* [1988] ECHR 24 and *Fox, Campbell & Hartley v UK* [1990] ECHR 18 considered in Chapter 2 above.

[146] *A v United Kingdom* [2009] ECHR 301.

of view: a process of review existed, to be sure, but its operation alienated the detainee to such an extent (through a combination of procedure and the lack of 'real' legal representation) that it was ineffective. In addition, we have seen how efforts to stymie courts or other reviewers in giving effect to a finding of unlawfulness of detention (by ordering release) have been – and continue to be – undermined in that jurisdiction. Added to that is the worrying and seemingly unsatisfactory nature of the review available under the USA Patriot Act which, as we saw above, allows for considerable detention to be imposed. Under this Act, detention pursuant to the Attorney General's certificate was to be reviewed within seven days, which appears at first to be an appropriate procedural safeguard to prevent arbitrary detention. This represented a significant change to the original proposal, under which the Attorney General could have indefinitely detained any alien that he 'had reason to believe' posed a terrorist threat. Furthermore this detention could have been continued notwithstanding 'any relief from removal the alien may be eligible for *or granted* until the Attorney General deems otherwise' (emphasis added).[147] The only relief proposed was to be *habeas corpus* proceedings in the District Court of the US District of Columbia. Although the process actually introduced was an improvement on that proposed, it remained susceptible to being classified as illusory because detainees could be retained in detention if they had not yet been removed from the jurisdiction or were not going to be removed in the foreseeable future because their release would threaten the national security of the US.[148] This continued detention was reviewable by the Attorney General on a six-monthly basis.[149] This reveals the indefinite nature of the detention allowed under section 412. The Attorney General was required merely, for example, to initiate removal proceedings; he was not required to release someone while those proceedings were ongoing or to release detainees if an Immigration Court found that there was no basis for removal. In those cases, it appeared, the detainee could be retained in custody. Thus, the Immigration Court's capacity to effectively order release was called into question in such circumstances.

The review procedures introduced in the UK's Anti-terrorism, Crime and Security Act also carry significant defects from a rights-based

[147] s. 202 as originally proposed.

[148] s. 236A(a)(6), Immigration and Nationality Act [8 U.S.C. 1101 *et seq.*], *as inserted by* s. 412, USA Patriot Act.

[149] s. 236A(a)(7), Immigration and Nationality Act [8 U.S.C. 1101 *et seq.*], *as inserted by* s. 412, USA Patriot Act.

perspective. As we have already mentioned, the review was to be taken in the Special Immigration Appeals Commission. The challenge or review itself was based on the assertion that 'there are no reasonable grounds for a belief or suspicion'[150] resulting in a certification, that formed the basis for detention. This was troubling because security-concerns dictated that detainees would not always have access to all of the information that formed the basis for the certification decision. Without this information the reasonableness of the decision was difficult, if not impossible, to challenge properly. This was further compounded by the fact that the hearings could take place in the absence of the detainee and/or their counsel,[151] although a Special Advocate would be assigned to the detainee and would 'represent' them. The difficulty with the Special Advocate scheme was that this advocate was not permitted to take instructions from the detainee despite being seised with responsibility to represent the detainees' interests.

As outlined in Chapter 2 international law does not suggest that proceedings in which the information available to the detainee is limited are automatically unlawful. What international law requires instead is that the detainee ought to be able to be represented in the proceedings. In keeping with the flexibility of international law in times of emergency or national strain, the means of representation may be varied dependent on the exigencies of the situation. Thus, provided the procedure is adversarial and the representative is briefed on the basis for the detention, international legal standards may be satisfied at least as far as the right to freedom from arbitrary detention is concerned.[152] The difficulty from the perspective of international law lies not merely with the restriction of information flow towards the detainee but also with the effectiveness of the review given the practical separation of the Special Advocate from the petitioner. The UK courts had themselves considered that the use of Special Advocates might bring the system closer to compliance with international law norms, although their mere appointment would not be sufficient on its own.[153] Following on from this, the

[150] s. 25(2)(a), Anti-terrorism, Crime and Security Act 2001.
[151] SIAC Rules of Procedures, SI 1998 No. 1881, amended by SI 2000 No. 1849.
[152] At this point due process protections, including in particular the right to instruct counsel and equality of arms, may become jeopardised by certain proceedings.
[153] *Home Department v MB* [2006] QB 415 (Court of Appeal); [2007] UKHL 46 (House of Lords; *per* Bingham LJ in particular, holding that while Special Advocates could mitigate the situation a detainee found himself in, the use of Special Advocates could not entirely do away with the disadvantage of not knowing the full extent of the case against one when challenging the lawfulness of one's detention).

European Court of Human Rights itself found that the use of Special Advocates could 'perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings'.[154] Whether or not the provision of a Special Advocate would, in fact, satisfy Article 5(4) of the European Convention on Human Rights in any particular circumstance would depend on the nature of the case itself and, in situations where 'the open material consisted purely of general assertions and SIAC's decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material',[155] the mere provision of a Special Advocate would not be sufficient. Thus, merely providing for *some kind* of representative for a detainee does not necessarily safeguard the rights of the detainee; that representative must be able truly to *represent* the detainees' position.

In the subsequent Prevention of Terrorism Act 2005, the need to introduce 'safeguard procedures' relating to the issuance of control orders (which were the replacement system for Part 4 detention under the Anti-terrorism, Crime and Security Act 2001) featured prominently in the rhetoric. As a result, it became the case that derogating control orders could only be imposed 'by the court on an application by the Secretary of State';[156] a standard that seems simultaneously to introduce high-level judicial control of such orders *and* assign an important legal function to the Secretary who would have to assess whether the control order he thought necessary required a derogation.[157] Where an application is made for a derogating control order the court holds a preliminary hearing,[158] from which the subject of the proposed order may be excluded and of which he need not be aware,[159] to determine whether a derogating control order is to be made[160] and, if so, to arrange for the holding of a full hearing to decide whether or not to confirm the derogating order or to modify the obligations imposed by it.[161] The derogating control order is only to be issued at the preliminary hearing

[154] *A v United Kingdom* [2009] ECHR 301 (19 February 2009), para. 220.
[155] *Ibid.* [156] s. 1(2)(b), Prevention of Terrorism Act 2005.
[157] Importantly, no derogating control orders could be issued in the absence of a derogation being agreed upon by both Houses of Parliament and entered to Article 5 of the European Convention on Human Rights (s. 4(3)(c), Prevention of Terrorism Act 2005).
[158] s. 4(1), Prevention of Terrorism Act 2005.
[159] s. 4(2), Prevention of Terrorism Act 2005.
[160] s. 4(1)(a), Prevention of Terrorism Act 2005.
[161] s. 4(1)(b), Prevention of Terrorism Act 2005.

where the court is satisfied that there is material capable of being relied on in court to establish that the subject of the order is, or has been, involved in terrorism-related activity, that there are reasonable grounds to believe that the imposition of the control order is necessary to protect the public, that the risk contemplated falls within an emergency situation for which there is a derogation under Article 5 of the European Convention on Human Rights, and that the obligations suggested should be imposed.[162] The standards are somewhat different in the full hearing where the court is to be satisfied that 'on the balance of probabilities' (the civil standard of proof) the subject of the order is or has been involved in terrorism-related activity, which makes the order necessary to protect the public in a situation of emergency in relation to which there is a derogation under Article 5 of the European Convention on Human Rights.[163] The court must also be satisfied that the obligations to be imposed are appropriate.[164] Thus the order can initially be issued on the basis of material that can be used in court, but is maintained in the full hearing only where the preliminary requirement of involvement in terrorism-related activity is proven on the balance of probabilities.

The derogating control order would last for six months,[165] although it can be revoked before that time[166] or renewed by the court on application[167] by the Secretary of State.[168] Renewal is allowable only where the court is satisfied that a derogating control order is: (1) necessary and appropriate, (2) related to an emergency in relation to which a derogation has been entered to Article 5, European Convention on Human Rights, and (3) imposing only obligations that are necessary.[169] Where necessary, a person in relation to whom an application for a derogating control order has been made can be arrested and detained to ensure that he receives notice of the order if it is made,[170] although in general terms the ensuing detention ought not to persist for more than forty-eight hours[171] unless the court extends that period of time by a further period

[162] s. 4(3), Prevention of Terrorism Act 2005.
[163] s. 4(7), Prevention of Terrorism Act 2005.
[164] s. 4(7), Prevention of Terrorism Act 2005.
[165] s. 4(8), Prevention of Terrorism Act 2005.
[166] s. 4(8)(a), Prevention of Terrorism Act 2005.
[167] s. 4(8)(c), Prevention of Terrorism Act 2005.
[168] s.4(8)(9), Prevention of Terrorism Act 2005.
[169] s. 4(10), Prevention of Terrorism Act 2005.
[170] s. 5(1), Prevention of Terrorism Act 2005.
[171] s. 5(3), Prevention of Terrorism Act 2005.

of no more than forty-eight hours.[172] The individual must be immediately released from detention once a derogating control order has been made or the court has refused to make such an order.[173] Importantly, courts retain some level of involvement even in the imposition of non-derogating control orders. These will only be imposed where the court is satisfied that the Secretary of State's reasoning in imposing the control order was not 'obviously flawed'.[174]

Subjects of prospective control orders can be excluded from the court's consideration of proposed or recently-issued control orders and so might never have been given the opportunity to make representations to the court or even have been made aware that the Secretary of State was contemplating a control order against him.[175] The court can choose to allow the control order as proposed, to strike out certain obligations if their imposition is 'obviously flawed' or to quash the order in its entirety if it considers its imposition to have been 'obviously flawed'.[176] Once the order has been issued the subject thereof ought to have the opportunity to make representations to the court within seven days.[177] On the occasion of a subsequent full hearing the standard for deciding whether the Secretary of State's decision was 'flawed'[178] changes by reference to the principles applicable in proceedings for judicial review.[179] Individuals may appeal the Secretary of State's decision to renew or modify, or refuse to revoke or modify, an order.[180] The appeal must be taken within twenty-eight days.[181] The role of the court in such appeals is to determine whether the decision accords with the norms of public law and whether the controls imposed are compatible with the European Convention on Human Rights.[182] The Constitutional

[172] s. 5(4), Prevention of Terrorism Act 2005.
[173] s. 5(5), Prevention of Terrorism Act 2005.
[174] This review could take place before the imposition of the control order (s. 2(2), Prevention of Terrorism Act 2005) or after the imposition of the control order (s. 2 (3)), but where the Secretary of State issued a control order without the permission of the Court 'he must immediately refer the order to the court' for consideration (s. 2(3)).
[175] s. 2(5), Prevention of Terrorism Act 2005.
[176] s. 2(6), Prevention of Terrorism Act 2005.
[177] s. 2(7), Prevention of Terrorism Act 2005.
[178] s. 3(10), Prevention of Terrorism Act 2005.
[179] s. 3(11), Prevention of Terrorism Act 2005.
[180] s. 10, Prevention of Terrorism Act 2005.
[181] Civil Procedure Rule 76.14, introduced by Civil Procedure (Amendment No. 2) Rules 2005 (SI 2005 No. 656).
[182] s. 10(6), Prevention of Terrorism Act 2005.

Reform Act 2005 appears to suggest that the control order would also have to comply with the rule of law.[183]

The court is empowered to deem any proceeding under the Prevention of Terrorism Act 2005 'private' if it 'considers it necessary . . . in order to secure that information is not disclosed contrary to the public interest' or 'for any other good reason'.[184] In such cases the relevant party and his legal representative can be excluded from the proceedings.[185] In addition, material that is brought before the court may be withheld from the suspect and his legal representative,[186] but can only be relied upon at hearing where a Special Advocate has been appointed and has been served with this material.[187] The Special Advocate, when appointed, would support the suspect's interests in situations where neither the suspect nor his legal representative can be present in court as a result of the sensitivity of the material under review. Importantly, however, the Special Advocate may not communicate with the suspect once he has seen the secret materials.[188] This is in spite of the dual function that the Special Advocate has in these cases: firstly to challenge the decision not to disclose evidence to the detainee and, secondly, to represent the interests of the detainee in the part of the hearing held *in camera* in spite of the detainee not being aware of the secret evidence against which the case on his behalf is being made.[189]

These 'safeguard' procedures certainly entail a higher degree of judicial involvement in the decision to deprive individuals of their liberty than were present in the Anti-terrorism, Crime and Security Act 2001. That said, many of the same difficulties arise. In the case of derogating control orders, in particular, which one might assume by practical implication would be imposed on individuals who pose the highest degree of threat to national security, the proposed controlee might be said to be deprived of the right to an adversarial challenge to the

183 s. 1, Constitutional Reform Act 2005.

184 Civil Procedure Rule 76.22, introduced by Civil Procedure (Amendment No. 2) Rules 2005 (SI 2005/656).

185 *Ibid.*

186 Civil Procedure Rule 76.28, introduced by Civil Procedure (Amendment No. 2) Rules 2005 (SI 2005 No. 656).

187 *Ibid.*

188 Civil Procedure Rule 76.25, introduced by Civil Procedure (Amendment No. 2) Rules 2005 (SI 2005 No. 656).

189 House of Commons Constitutional Affairs Committee Seventh Report of Session 2004–05, *The Operation of the Special Immigration Appeals Commission (SIAC) and the Use of Special Advocates* HC 323 (2005, London: The Stationery Office).

lawfulness of his detention and, in particular, to be disproportionately prejudiced through the appointment of a Special Advocate who cannot be instructed by or communicate with the controlee. As with the Special Advocate procedure as it existed in relation to Part 4 detention under the Anti-terrorism, Crime and Security Act 2001, the effectiveness of this appointment in actually protecting individual rights is very much undermined by the extent of the remove at which Special Advocates must operate from those whose liberties are in question. We have already noted how the European Court of Human Rights has insisted upon the Special Advocate system being made workable from a human rights perspective to ensure that a controlee in fact has the capacity to challenge the lawfulness of his detention.[190] In other words, controlees must be empowered to make an effective challenge to their detention; processes in which there is what is tantamount to absolute exclusion of the petitioner or someone who can represent his interests in an effective manner are particularly problematic from an international law perspective. Although the safeguard provisions within the Prevention of Terrorism Act 2005 can certainly be said to be closer in substance and form to that required by international human rights law than the illusory safeguard procedures provided for in the Anti-terrorism Crime and Security Act 2001, they are not sufficient in themselves. In the important case of *AF*[191] the House of Lords applied the European Court of Human Right's decision in *A v United Kingdom*[192] to the use of Special Advocates to conclude that '[t]he controlled person must be given sufficient information about the allegations against him to give effective instructions to the Special Advocate',[193] calling into serious question the continued viability of control orders as they stand.[194] Although that decision was based on Article 6 claims (on the right to a fair trial), it had clear bearings on the right to challenge the lawfulness of one's detention especially since the European Court has itself recognised that the procedural requirements of Article 6 can act as a guide to the procedural requirements of Article 5(4).[195] Furthermore, the Joint Committee on Human Rights has expressed concern that the safeguards provided for in relation to control orders are insufficient on numerous

[190] *A v United Kingdom* [2009] ECHR 301 (19 February 2009).
[191] *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28.
[192] [2009] ECHR 301. [193] *Ibid.*, para. 9.
[194] A. Kavanagh, 'Special Advocates, Control Orders and the Right to a Fair Trial' (2010) 73 *Modern Law Review* 824.
[195] *A v United Kingdom* [2009] ECHR 301 (19 February 2009).

occasions.[196] That notwithstanding, the UK Parliament continued to renew the control order system with apparently very little reluctance for its abandonment.

The control order system under the Prevention of Terrorism Act 2005 required renewal by the House of Commons after one year.[197] By the time the renewal debates came about, however, the counter-terrorist landscape in the UK had been changed by the 7 July attacks on the London Underground. Perhaps because of this, the renewal debate was poorly attended (at one point it was noted that there were only thirteen MPs in the Chamber[198]) and lasted a mere ninety minutes before being passed without a vote.[199] It also passed the House of Lords in a debate without a vote, notwithstanding the concerns of the Joint Committee on Human Rights noted above. In 2010 the system was renewed for a fifth time in spite of a strongly worded report recommending against renewal from the Joint Committee on Human Rights[200] and without any serious debate on the human rights implications of the control order system being undertaken. Introducing the renewal motion, Lord West of Spithead, the then Parliamentary Under-Secretary for Security and Counter-terrorism, assured the House of Lords that 'the threat to the United Kingdom from international terrorism remain[ed] real and serious',[201] pointing to the decision of the Joint Terrorism Analysis Centre to raise the threat level to 'severe' on 22 January 2010 (a mere month and a half before this vote). In an example of bemusing reasoning, Lord West addressed the House of Lords' decision in *AF* and, while acknowledging that it presented a challenge, concluded as follows:

> The judgment should also finally put to bed the argument of some noble Lords that control orders are in some way an affront to human rights. That is clearly not the case. The protection of human rights is a key principle in all our counterterrorism work, including the use of control orders . . . We remain firmly of the view that the legislation and the order before us today are fully compliant with the European Convention.[202]

[196] Joint Committee on Human Rights, *Preliminary Report on the Prevention of Terrorism Bill*, 23 February 2005, esp. paras. 4–17.
[197] s. 13, Prevention of Terrorism Act 2005.
[198] Note by Alistair Carmichael MP, *Hansard*, 15 February 2006: Column 1516.
[199] Prevention of Terrorism Act 2005 (Continuance in Force of Sections 1 to 9) Order 2006.
[200] Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights (Sixteenth Report): Annual Renewal of Control Orders Legislation 2010*, February 2010.
[201] HL Deb., 3 March 2010, c151. [202] *Ibid.*

Not only, then, were control orders a necessary counter-terrorist measure but they were, according to Lord West, entirely human rights compliant. The House of Lords seemed somewhat sceptical about these assertions, and indeed an amendment was tabled by Lord Lloyd of Berwick calling for the introduction of 'primary legislation to limit the duration of control orders to a maximum of one year, without renewal' in the light of the decision in *AF* and the fact that 'Her Majesty's Government have not, in the five years since the Act was passed, found a means of dealing with suspected terrorists that is just and effective'.[203] That amendment was agreed by a seven-vote majority. Once more, then, the House of Lords – separated as it is from the vagaries of the ballot box – showed itself more sceptical and, indeed, more willing to push back against assertions of risk and of rights-compliance than the House of Commons. Although it was initially thought that the counter-terrorist review ordered by the Home Secretary following her appointment in May 2010 would recommend retention of control orders,[204] it is now clear that they are to be replaced by Terrorism Prevention and Investigation Measures. These measures, already dubbed 'control orders lite', are likely to impose lesser restrictions on controlees, but it is not at all clear that the review processes will be more rights-compliant and robust than under the Prevention of Terrorism Act 2005.

The 'criminal justice' conundrum in the UK: extending time limits for counter-terrorist detention

Deciding to pursue its counter-terrorist policies by means of a criminal justice paradigm presented the UK with something of a conundrum when the executive determined that the period of pre-charge detention needed to be extended. We have already seen that there had been a system of indefinite detention under the Anti-terrorism, Crime and Security Act 2001 and that there is now a control order system that has been maligned as stopping just short of internment.[205] Both of those systems are for individuals in relation to whom a prosecution is not really envisaged. At the same time as those systems were being designed, voted upon, implemented, and defended in the courts, Parliament was also being asked to

[203] HL Deb., 3 March 2010, c1545.

[204] V. Dodd, 'Control orders for terrorist suspects to stay, says counter-terrorism review', *The Guardian*, 15 October 2010.

[205] D. Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?* (2007, Aldershot; Ashgate).

extend the period of pre-charge detention – at one point up to a proposed ninety days – on the basis of alleged policing needs.

The desire to extend pre-charge detention became clear in the wake of the attacks on the London transport system on 7 July 2005. Following those attacks the Terrorism Act 2006 was introduced, which amended Schedule 8 of the Terrorism Act 2000. The 2000 Act had ensured that suspected terrorists who were detained without warrant received periodic reviews of their detention from a review officer within the initial forty-eight hour period and could only be detained beyond forty-eight hours on the basis of a judicial warrant. The extension of permitted detention periods was a highly controversial element of the 2006 Act, with the Labour Government insisting that national security required an extension of up to ninety days detention without charge. Such an extensive period of detention was strongly resisted by parliamentarians and, in particular, by the House of Lords. Under the originally proposed Clause 23(6) of the 2006 Act, Schedule 8 of the Terrorism Act 2000 would be amended as follows:

- The initial forty-eight-hour period would operate as before with periodic review by a review officer;
- following this judicial authorisation could be granted for a further seven days;
- further seven-day authorisations, up to a maximum of ninety days, were allowable but every seven-day block required specific judicial authorisation.

In addition, the review officer would have broader grounds upon which to renew detention to include situations where he was 'satisfied that further detention is necessary pending the result of an examination or analysis of any relevant evidence or an examination or analysis that may result in relevant evidence being obtained'.[206] Despite the Home Secretary's statement that he believed the Bill as proposed to be compatible with the European Convention on Human Rights,[207] a broad coalition of

[206] See House of Commons Library, *The Terrorism Bill 2005–2006*, Research Paper 05/66, 20 October 2005, p. 37.

[207] The Declaration of Compatibility was inserted on the front page of the Terrorism Bill 2005/2006. Compatibility with the European Convention on Human Rights appeared to be a consideration of secondary importance for both the Home Secretary and the Prime Minister, both of whom stressed the alleged necessity of ninety-day detention in their statements prior to and during the debates on the Bill. See, Letter of the Home Secretary to Rt. Hon. David Davis MP and Mark Oaten MP, 6 October 2005, quoted in House of Commons Library, *The Terrorism Bill 2005–2006*, Research Paper 05/66, 20 October

parliamentarians,[208] senior judges[209] and lawyers,[210] human rights non-governmental organisations[211] and others[212] doubted the proposal's compatibility with basic civil liberties norms and/or the European Convention on Human Rights. In the end the House of Commons defeated the ninety-day proposal[213] and twenty-eight-day detention was introduced instead.

This was not, however, the end of the attempt to extend pre-charge detention. In the Counter-Terrorism Bill 2007–2008, the government attempted to introduce pre-charge detention for up to forty-two days on the basis of the possibility that a terrorism plot may arise in the future which is so complex as to take more than twenty-eight days to investigate effectively and bring a charge.[214] Although the government had provided no evidence of why forty-two days would be an appropriate period of detention and acknowledged that the twenty-eight-day period had been used in only an extremely small number of cases, it was utterly committed to introducing a 'reserve power' of forty-two-day detention that would be triggered by what was termed a 'grave exceptional terrorist threat'. Rather unsurprisingly, perhaps, section 22, as proposed, showed that the concept of such a grave exceptional terrorist threat was a loose one indeed:

2005, p. 16; Statement of the Prime Minister, Press Conference 11 October 2005, available at: www.number10.gov.uk/output/Page8294.asp (accessed 10 October 2006).

[208] For example, David Davis MP warned that a ninety-day detention period would be 'an affront to justice' and referred to the importance of balancing civil liberties with security concerns, although he did not refer expressly to the European Court of Human Rights – *Hansard*, 9 November 2005, Column 347.

[209] See, for example, Proposals by Her Majesty's Government for Changes to the Laws against Terrorism: Report by the Independent Reviewer, Lord Carlisle of Berriew QC, DEP 05/1221, 12 October 2005, para. 64.

[210] For example the Attorney General, Lord Goldsmith, was quoted as doubting compatibility, see N. Morris and B. Russell, '90 Days: Plans to lock up terror suspects without charge provoke outcry', *The Independent*, 13 October 2005.

[211] See, for example, Letter of 'Justice' to Home Secretary Charles Clarke, 27 July 2005, available at www.justice.org.uk/images/pdfs/cc270705.pdf (last accessed 25 October 2006); Amnesty International, Briefing on the Draft Terrorism Bill, 1 October 2005, available at: www.unhcr.org/refworld/type,COUNTRYREP,GBR,43b2717a4,0.html (last accessed 21 February 2011).

[212] See, e.g., Editorial, 'Why MPs Should Reject 90-day Detention', *The Guardian*, 9 November 2005.

[213] Ayes 291, Noes 322, 9 November 2005.

[214] The arguments presented by police officers and the Home Secretary in favour of the introduction of such a power are helpfully summarised in the Home Affairs Committee, *First Report: The Government's Counter Terrorist Proposals*, 11 December 2007.

(1) In this Part 'grave exceptional terrorist threat' means an event or situation involving terrorism which causes or threatens—
   (a) serious loss of human life,
   (b) serious damage to human welfare in the UK, or
   (c) serious damage to the security of the UK.

(2) For the purposes of subsection (1) (b) an event or situation causes or threatens damage to human welfare only if it causes or threatens—
   (a) human illness or injury,
   (b) homelessness,
   (c) damage to property,
   (d) disruption of a supply of money, food, water, energy or fuel,
   (e) disruption of a system of communication,
   (f) disruption of facilities for transport, or
   (g) disruption of services relating to health.

(3) The event or situation mentioned in subsection (1)—
   (a) may occur or be inside or outside the UK, and
   (b) may consist in planning or preparation for terrorism which if carried out would meet one or more of the conditions in that subsection.

The arguments in favour of this extension were deeply panic-related. The pre-trial detention proposals contained in the Bill were based primarily on unsubstantiated factual hypotheses that had never arisen in the UK and which were advanced (or at least advanced by reference to the represented needs and analyses of) by a primary moral entrepreneur in the criminal justice system, namely the police. In addition, the proposals seemed to enjoy at least some (albeit marginal) popular support: an ICM Poll released on 28 April 2008 revealed that 57 per cent of people polled supported extending the pre-charge detention period.[215] Although the proposal itself was not expressly limited to non-citizens or to members of Al Qaeda and related groups, its presentation in popular and political discourse made clear that it was motivated by and directed towards the perceived realities of 'Islamist fundamentalism' which, as considered in Chapter 3, the executive claimed posed particular challenges to the state not presented by other more traditional terrorist organisations. In addition to appearing to be primarily requested by the police forces, the so-called safeguard trigger mechanisms of this 'reserve power' also heavily involved the police force,[216] calling into question the police's capacity to guard effectively

[215] See F. Millar, 'Most Voters Support Brown's Terror Plan', *Irish Times*, 28 April 2008.
[216] s. 24, Counter Terrorism Bill 2007–2008 as passed by the House of Commons, 11 June 2008.

against unnecessary and disproportionate impositions of repressive conditions. It was – rather unsurprisingly perhaps – the House of Lords that put an end to the forty-two-day detention proposal, defeating it by 309–118 votes.[217] This followed a vote in favour of the Bill by the House of Commons, albeit with the government being forced to acquire the support of the Democratic Unionist Party following a Labour revolt.[218]

Although the proposal was defeated rather convincingly in the House of Lords, the government remained solid in its determination that a forty-two-day period of pre-charge detention would be required in the event of a grave exceptional terrorist threat. Further to this, the somewhat extraordinary step was taken of publicly preparing a piece of emergency legislation that could be introduced quickly should the need be considered to arise. This Counter-Terrorism (Temporary Provisions) Bill would remain in force for sixty days from the date of its passage[219] and allow for forty-two-day detention under essentially the same model as had been rejected by the House of Lords. This Bill was never brought into force, but its mere existence was an important indication that the government remained committed to the use of detention as a counter-terrorist tool and stood ready to introduce this system in a situation where the most acute sense of panic might be said to exist: namely in the wake of a major terrorist attack. Since their election, the Conservative–Liberal Democrat government has commissioned a review of counter-terrorist laws that has recommended the reduction of the twenty-eight-day period of pre-charge detention to fourteen days,[220] indicating to some extent a prospective return to 'normalcy' in respect of this kind of detention, although new Terrorism Prevention and Investigation Measures will be introduced. Whether the Counter-Terrorism (Temporary Provisions) Bill – or something like it – will reappear in the event of a terrorist attack on the UK remains an open question.

[217] This was in spite of the impassioned plea by Lord Carlisle for the provision to be introduced. Lord Carlisle abstained from the vote because of his position as the Independent Reviewer of the UK's counter-terrorist laws. In his view, the proposals were 'within the European Convention on Human Rights'. HL Deb., 13 October 2008, c504.

[218] R. Lyndall and G. Peev, 'Brown Survives Labour Revolt on 42-day Detention', *The Scotsman* 12 June 2008.

[219] s. 1(6), Counter-Terrorism (Temporary Provisions) Bill.

[220] Dodd, 'Control orders for terrorist suspects to stay'.

Conclusion

As outlined above, detention-related provisions introduced by Congress and, to a lesser extent, by Parliament have tended to fall short of the requirements of international human rights law. They were introduced largely on the basis of asserted risk-assessments that were not fully substantiated and were said, instead, to emanate primarily from the concerns of moral entrepreneurs such as the police. In this respect these laws might be classified as 'panic-related'. This characterisation of the post-11 September 2001 laws is bolstered by the fact that, in the case of both of the countries (although particularly the US) the formulation of these laws largely ignored the less repressive but nevertheless security-aware standards outlined in international human rights law. In designing and implementing strategy to fulfil its obligation to protect the state and 'the people', both states have identified detention or other means of liberty-deprivation as important tools. As mentioned in Chapter 2, detention plays an important role in any conflict whether conventional or not. It is a method of troop depletion, of breaking enemy spirit, of dissuading participation (particularly where the enemy does not have a conscription policy), of depriving the enemy of expertise and information, and of gathering information for the capturing forces. In both states, the alleged 'difference' of Al Qaeda to other terrorists has been used to represent these repressive laws as necessary, even if they do infringe upon the standards of international human rights law. Instead of adhering to 'pure' military or criminal justice paradigms, the case study nations have instead adopted 'hybrid' approaches to detention. For the US, 'combatants' are to be detained but without adherence to the *status quo ante* international humanitarian law requirements of individual assessment *ab initio*; in the UK, suspected terrorists are to be detained or deprived of their liberty if there is insufficient evidence upon which to base a prosecution.

Although the US Constitution allows in only a limited sense for what might be described as 'emergency powers',[221] the executive has claimed extensive powers to deal with the apparently extraordinary nature of the threat from Al Qaeda and has been aided in this project by the vague Authorization for the Use of Military Force[222] and facilitative

[221] These powers encompass the suspension of *habeas corpus* and various war powers, but there is no 'emergency' constitution. See generally, B. Ackerman, *Before the Next Attack: Protecting Civil Liberties in an Age of Terrorism* (2005, New Haven; Yale University Press).

[222] Pub. L. 107–40, 115 Stat. 224.

law-making by Congress. In contrast, the UK has taken a purely legislative approach but insisted on expanding upon the quite extensive terrorism-related powers enjoyed by the state prior to 11 September 2001.[223] In both jurisdictions, however, the extent to which either approach has been pursued in a manner compliant with international human rights law appears to have been largely defined by the desires of the executive.

While the UK's approach has been to augment existing laws to deal with the present threat while taking the European Convention on Human Rights into account, we have seen that this has not always resulted in compliant legislation. It is questionable whether European Convention on Human Rights standards would have played such a prominent role in post-11 September 2001 discourses in the UK were it not for the Human Rights Act 1998. Since 11 September 2001, however, the UK government has at times implied that the Convention has been more of a hindrance than a help.[224] It has mostly been through the House of Lords and the courts – bodies relatively unaffected by transmissions of popular panic from the electorate – that the Convention has been breathed into counter-terrorist legislation and placed prominently within the contemporary discourse. Thus the House of Commons has taken a traditional, primarily municipal approach to counter-terrorist law-making that does not fully take into account the by now well-developed international regime as a legal regime that is both appropriate to and equipped to deal with situations of emergency. This is notwithstanding the fact that, as we discussed in Chapter 2, the international system has sufficient inbuilt flexibility that, coupled with appropriate derogations where necessary, an effective system can be constructed.

In such a system it would be possible to specify extensive grounds upon which one could be taken into detention including, as

[223] On 11 September 2001 the UK already had a comprehensive system of counter-terrorism legislation in place. Most of the counter-terrorism legislation on the statute books had been originally motivated by concerns relating to Northern Ireland (Prevention of Terrorism (Temporary Provisions) Act 1989, *as amended by* Prevention of Terrorism (Additional Powers) Act 1996 and Criminal Justice (Terrorism and Conspiracy) Act 1998; Northern Ireland (Emergency Provisions) Act 1996 *as amended by* Northern Ireland (Emergency Provisions) Act 1998), however these provisions were generalised in the Terrorism Act 2000.

[224] See A. Lester and K. Beattie, 'Risking Torture' (2005) *European Human Rights Law Review* 565; A. Ashworth, 'Security, Terrorism and the Value of Human Rights' in Goold, B. and Lazarus, L. (eds.), *Security and Human Rights* (2007, Oxford; Hart Publishing), p. 203 at p. 203.

international law already permits, suspicion of involvement in international crime and preventive detention to protect against future involvement. The duration of detention prior to charge and/or trial would be entirely dependent on the exigencies of the circumstances of the case and, where there was to be no trial or charge, the existence of an effective review procedure would likely be sufficient to deprive the detention of any *prima facie* arbitrary character. Such a review procedure would either consist of *habeas corpus* petitions or an equivalent review mechanism, in which the detainee would have the capacity to substantively challenge the lawfulness of his or her detention in an adversarial procedure. In recognition of the sensitive nature of the information that may form the basis of the decision, international law will allow for a number of variations from 'the norm'. In this respect the detainee could be removed from certain elements of the procedure while his or her advocate remained present in a *viva voce* hearing, the procedure could be held *in camera*, the reasonability of suspicion of involvement could be assessed on a 'balance of probabilities' basis, advocates in the case could be bound by both self-regulatory professional codes of conduct and official secrets legislation not to disclose information heard in the course of the case, Special Advocates could be used to 'balance' security and liberty concerns provided the core of the case against a detainee is known to him and could be countered, and the tribunal could be empowered to release the petitioner if satisfied that the detaining power had failed to satisfy to even a lower standard of proof than normal that the detainee is lawfully detained on the basis of actions committed or threat posed. International human rights law allows for all of these variants on 'normal' procedure to be introduced in order to cater for the reality of an emergency situation. In this respect, as well as in the context of derogations, it is an accommodationist system. The fact that there is such scope for security measures within a human rights law framework not only highlights the capacity of international human rights law but also the extent to which the legislative approaches of both the US and the UK present a serious challenge to the relevance and content of this body of law.

We have also seen that, through a combination of executive actions and representations *and* facilitative legislatures these international standards have been severely challenged and represented as inappropriate for the 'realities' of today's risk-laden world. Indeed, in the US, in particular, there are continuing efforts to challenge these standards through proposed legislation *and* to stymie attempts to align the system

of counter-terrorist detention more closely with those standards. Whether or not international human rights law could stand firm and resist such powerful transmissions of repressive trends was an open question at the outset of the 'War on Terror': certainly some critics of the international system generally, particularly those from a neo-realist perspective, would confidently have predicted that international human rights law would bend to the will of such a powerful hegemonic combination of the US and the UK. What has, in fact, happened is, however, a more mixed and complex story than this theoretical prediction might have expected. At its core, the story is one of the resilience of international law's commitment to the right to challenge the lawfulness of one's detention; a commitment that suggests that international law may be more resistant to panic than the domestic legal systems in either the US or the UK. It is time, then, to explore in more detail how and where that resistance has shown itself.

5

International human rights law's resilience in the face of panic

We have seen already how the US and UK executives shaped a narrative of difference and dangerousness that both captured popular fear and panic about Al Qaeda *and* ratcheted it up to create a politico-legal space within which repressive counter-terrorist detention law and policy could be implemented. In both cases international human rights law was part of that narrative, represented either as inapplicable (by the US) or as permitting the behaviour or, if not, as being in need of reform (by the UK). This engagement with international human rights law was not, I submit, an accidental or even a marginal one. Rather it was the relationship through which an attempt to project panic through the hegemon of the US and the UK could take place with the ultimate aim of transforming international legal standards into the shape desired by either or both states. It was, in other words, the precursor for what we might call a classical exercise in power politics in international law and, furthermore, it was one that we might – if we were convinced by classical neo-realist descriptions of international law – have thought would be successful. The 'true story' of the right to be free from arbitrary detention and its safeguarding right to challenge the lawfulness of one's detention is messier and less categorical than this narrative might have expected. Rather than bend entirely to the will of the hegemon, international human rights law has shown a significant degree of normative resilience to these projections of panic.

This is not to suggest that this resilience has been complete; certainly in the UN Security Council (and especially in the earlier stages of the 'War on Terror') human rights have experienced a significant challenge and, indeed, the European Court of Human Rights appears to be willing once more to allow extensive discretion in respect of detention without insisting upon as strong safeguards as we might have wished for. However, the overall picture is one that suggests that the normative strength of the right to be free from arbitrary detention remains even in the light of a significant panic-related transformative surge by the US

and the UK. The explanation for that must, I argue, lie in the ways in which international law is insulated from the full power of the panic narrative which, as we already saw in Chapter 1, flows from a combination of popular panic (bottom-up) and manufactured panic (top-down). Popular panic does not, I argue, have anything like the same kind of impact in international politico-legal institutions as it does in their domestic parallels. Those international institutions are, therefore, relatively more resilient to its potency.

In this chapter, I begin by outlining what the classical realist predictions for international human rights law from a panic-related transformative surge of a powerful hegemon would have been, following which I outline how international human rights law has really behaved in respect of the right in question. The combination of these perspectives shows that there is a dissonance between those predictions and the reality; that there is something normatively resilient within international human rights law and, indeed, that this normative resilience seems to have a greater force in those international theatres than has been witnessed in the executive and legislative spheres of the US and the UK. How, then, can this dissonance be explained? In the last part of this chapter, I argue that such an explanation can be found by reference to what I term the 'four insulating factors' of international law in contrast to domestic law.

Power, panic and neo-realist predictions of international human rights law

Classical realist theory holds that international treaties and institutions are in place because powerful states benefit from their existence. From a classically realist perspective, states are motivated by their geopolitical interests alone, with international law being complied with only when it is in the interests of a hegemon or a few powerful states, which may in turn coerce less powerful states into accepting the regime and complying with it. This will, however, only happen when the effects of compliance with international law are compatible with the geopolitical objectives of the hegemon or group of powerful states. In this kind of construction, states might be said to interact with one another in much the same way as billiard balls on a snooker table;[1] as 'hard, opaque, unitary actors

[1] A. Wolfers, *Discord and Collaboration: Essays on International Politics* (1962, Baltimore; Johns Hopkins Press), pp. 19–24.

colliding with one another'.[2] In this construction, Morgenthau classically wrote that states can act in *status quo* (retention of power), imperialistic (increasing power) or prestige (demonstrating power) manners.[3] Thus, for Morgenthau, all state approaches can be understood in terms of power, which itself was to be conceptualised as a relative concept taking into account a nation's capacities to acquire and maintain power (such as national resources) *and* its ability to use those capacities well in the international sphere (i.e. the importance of good national diplomacy).[4] This was not merely because of the nature of states or the nature of power itself; rather it was connected to an international politics in which power 'is the value which international politics recognises as supreme',[5] meaning that it is an 'illusion' to suppose that a 'nation can escape, if it wants to, from power politics into a realm where action is guided by moral principles'.[6] That said, Morgenthau's conception of power was not entirely without restraint or limitation. In fact, he accepts that both the balance of power[7] and morality, mores and international law[8] can have an impact on states' international actions, but in a time of existential threat – as the US has represented the 'War on Terror' to be – power would be exercised to the full.

Building on, and significantly advancing, Morgenthau's classical realism is the emergence of structural realist thought, championed by Kenneth Waltz. Waltz conceives of states as unitary rational actors who behave in a self-help manner and have, as their ultimate goal, the maximisation of relative power in order to ensure security.[9] The structure of the international system (structured by patterns of power distribution and ordered by anarchy) punishes states that fail to behave in this way, resulting in states making self-help (or rational) decisions to maximise power. Thus, Waltz's primary assumption is that states act in order to ensure their survival:

[2] A.M. Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 1, 5.
[3] H. Morgenthau, *Politics among Nations: the Struggle for Power and Peace*, 5th edn., (1978, New York; Knopf).
[4] *Ibid.*, pp. 550–8.
[5] H. Morgenthau, *Scientific Man vs. Power Politics* (1946, Chicago; University of Chicago Press), p. 101.
[6] H. Morgenthau, *In Defence of the National Interest* (1951, New York; Knopf), p. 13.
[7] Morgenthau, *Politics among Nations*, Pt. Four.
[8] *Ibid.*, Pt. Five.
[9] K. Waltz, *Theory of International Politics* (1979, Reading, MA; Addison-Wesley).

> Internationally, the environment of states' action, or the structure of their system, is set by the fact that some states prefer survival over other ends obtainable in the short run and act with relative efficiency to achieve that end.[10]

Most states, therefore, have shared aims of state survival. In addition most states have similar structures inasmuch as they all operate as autonomous political units who face similar tasks, with their unitary nature required by the anarchical nature of international society. This anarchical condition dictates that the international system is defined in terms of states, even though non-state actors do have some minimal influence. The most significant impact of the condition of anarchy is that the threat of violence is ever present and there is, therefore, a perpetual condition of insecurity that works against states' attempts to work together and become co-dependent.[11] These considerations of anarchy and security lead to Waltz's concept of the balance of power, which claims that, as states are unitary actors who seek a minimum of self-preservation and a maximum of universal domination, they will operate through either internal or external balancing. Internal balancing consists of increasing economic and military strength, while external balancing consists of the creation of alliances.[12] Using the balance of power theory, then, Waltz claims that states' actions should be relatively predictable (although they are occasionally affected by international conditions) and that states' international actions can be understood from the perspective of balancing behaviour.

In Waltz's theory, compliance with international law does not mean the law is effective in shaping state action; rather it means that it aids the state actor in achieving its aims of self-promotion and maximisation of dominance. Where compliance with international law would not aid the balancing operation it does not happen, and the international environment remains an anarchical one governed by relative state power. Thus, for international law to remain relevant, it has to change its standards in line with the desired objectives and actions of the powerful states. Where those powerful states comprise a hegemon in a unipolar international environment – as the US and the UK arguably did in 2001 – Waltz's theory predicts that international law will bend easily to their will.

This kind of neo-realist approach to international law has been hugely influential, especially in the US. Within this school of thought international law was seen as being 'largely epiphenomenal'[13] inasmuch as it

[10] *Ibid.*, p. 93. [11] *Ibid.*, pp. 105–7. [12] *Ibid.*, pp. 116–28.

[13] O. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935, 1945.

arose incidentally to the creation of institutions by which power might be monopolised; it was not conceptualised as having its own autonomy or, indeed, something analogous to Fuller's internal morality of the law. Although Louis Henkin claimed that this was the cynic's formula for understanding international law,[14] and although it had been challenged in law and international relations, its basic premise seems to have survived notable theoretical challenge.

While both the New Haven School[15] and process-theorists[16] made strides in the attempt to refute the 'pure power' analysis of international law, they both ran into difficulties of generalising their theses in periods of extremity and perceived existential threat. In such circumstances, the New Haven School found it difficult to provide a motivation for states to continue to perceive and use law as a liberalising force, and process-theorists found it difficult to explain why a powerful state that could (in the realist conception) achieve its self-interest through illegitimate international law, would ensure (or even want) general legitimacy. Perhaps the most successful international legal refutation of state power came in the liberal international scholarship prominent in the 1990s, although the main protagonist in this movement – Anne Marie Slaughter – tended to take the state out of the equation in order to remove power.[17] For Slaughter, states are more accurately portrayed as disaggregated actors with a state's interest being defined not by some unitary self-interest but rather by the aggregation of individual and organisational interests.[18] For Slaughter, in particular, every government represents some aspect of society; some aggregation of interests that forms a 'group' loosely defined. In this theory, state power on the international scene is not as pivotal as state will: every state has a preference (reflecting the preference of the aggregate actors it represents) and 'the strength and intensity of a particular preference will determine how much the state is willing to

[14] According to Henkin, the realist perspective leads one to conclude that 'since there is no body to enforce the law, nations will comply with international law only if it is in their interest to do so; they will disregard law or obligation if the advantages of violation outweigh the advantages of observance'. L. Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edn., (1979, New York; Columbia University Press), p. 49.

[15] An overview of this school is provided by M. Reisman, *The View from the New Haven School of International Law: International Law in Contemporary Perspective* (1992, New York; Foundation Press).

[16] See esp. T. Franck, *The Power of Legitimacy Among Nations* (1990, Oxford; Oxford University Press).

[17] See esp. Slaughter, 'International Law in a World of Liberal States'.

[18] This element of her theory is most thoroughly considered in A.M. Slaughter, *A New World Order* (2004, Princeton; Princeton University Press).

concede to obtain that preference, which in turn will determine the likelihood of success in achieving the bargaining outcome it desires'.[19] For Slaughter it is states' preferences and their willingness to concede position that determines and shapes international law, rather than an exercise of state power.

From the perspective of trying to understand the potency of power, however, this liberal conception of international law is subject to the criticism that it 'hides' power behind interests; after all the extent to which a state needs to concede on the international plane may well be defined by the power that a state has to wield. In peaceful and harmonious times it may be less detrimental to a state to concede to an international norm than to rebel against it, however in times of strain – such as during war or in the light of a major terrorist attack – the more powerful state may not need to concede to international rules; it may in fact be the case that power still plays a role in this liberal conception of the international order. While the state would still be bound to comply with those rules, non-compliance coupled with a transformative surge by which the *status quo ante* is characterised as inappropriate in the context of new and more fundamental challenges to security would be more likely to result in recalibration of international standards if it emanated from a hegemon. We already saw in Chapter 3 that the US and the UK have attempted to transmit their panic-driven conceptions of contemporary risk and appropriate legal responses onto the international sphere and, thereby, to recalibrate international law in a manner that permits more repressive state action than the law as of 11 September 2001 would suggest is acceptable.

A similar argument is offered by constructivist scholars[20] who argue that interests and power are not divisible and, furthermore, that neither can be said to exist independently of the group or relevant actor. For authors such as Kratochwil the entire international system – dependent as it is on the state, sovereignty and state consent – is a mere construct to hide power relationships and to hide the process of creating and strengthening power: in his words 'the international legal order exists simply by virtue of its role in defining the game of international

[19] A.M. Slaughter, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *American Journal of International Law* 205, 228.

[20] See esp., E. Adler, 'Seizing the Middle Ground: Constructivism in World Politics' (1997) 3 *European Journal of International Relations* 3; J. Chekel, 'The Constructivist Turn in International Relations Theory' (1998) 50 *World Politics* 2.

relations'[21] and is itself constitutive of states and the international community. From a constructivist perspective international law creates and bolsters power; it produces ideology from a power base and therefore creates a legal culture, system and community that are inescapably linked to the most powerful states who have the greatest degree of influence over its development and continuation. As a result of this, international law is 'intrinsically indeterminate'[22] – vague, uncertain, and difficult to pin down – in order to shape it and construct it in line with the desires and interests of the hegemonic states (and, the hegemonic interest groups within those states).

Although these international legal theories are in some sense in contestation with one another, they all tend to accept that a state's interest, action and power on the international stage is a vital component to the effectiveness of international law in shaping and constraining state action. That is not to suggest that they all accept the basic premises of classical and neo-realist international relations theory, but rather to show that even across what might be described as a broad ideological spectrum of international law, power remained important. It was either presented as determinative of a state's capacity to resist compliance and to influence the shape of legal norms, or presented itself as a serious counter-argument to liberal conceptions of international law and of its potential. The theoretical landscape at the onset of the 'War on Terror' thus suggested strongly that a powerful hegemon – such as the US and the UK – should have been capable of successfully projecting panic onto international law in order to bend the relevant norms to the shape with which these states would comply. However, the extent to which this is what really happened – especially in respect of counter-terrorist detention – is another story.

Questioning the Al Qaeda 'other'

We have already seen that both the US and the UK have consistently asserted that Al Qaeda is a radically different kind of terrorist organisation to those with which the international community previously dealt, and that this has been a core element in their representations that

[21] F. Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989, Cambridge; Cambridge University Press), p. 251.

[22] D. Kennedy, 'A New Stream of International Law Scholarship' (1988) 7 *Wisconsin International Law Journal* 1.

international human rights law does not apply at all or, where it does apply, must recalibrate its standards downwards to allow states to manage appropriately the risk presented. In essence, this claim focuses on the perceived structure, reach, capacity, and fundamentalism of Al Qaeda, all of which are represented by the US and the UK as making Al Qaeda more dangerous and less manageable than 'traditional' terrorists. In this respect the two case study nations have reached differing outcomes on the basis of their assertion of difference; for the US this difference resulted in the adoption of a war paradigm and rejection of human rights law in its counter-terrorist operations; for the UK it resulted in multiple attempts to act more expansively than the *status quo ante* of international human rights law permitted and to persuade international legal institutions of the need for these standards to be recalibrated. While different, both of these strategies represent significant exercises in power politics. By turning away from international human rights law, the US adopted a strategy of power documented by Nico Krisch when he wrote that in some 'areas, dominant states are likely to withdraw from international law and to turn to other means of furthering their ends. This does not necessarily entail violations of existing law, but it will certainly include shifts away from legal mechanisms in areas central to the dominant state's interests, and in particular attempts at reducing the legal constraints on the tools of dominance'.[23] Krisch's scholarship also demonstrates the typicality of the UK's approach: instrumentalisation and a turn towards domestic law.[24] International human rights law has not, however, generally acceded to this assertion of difference. This is not to suggest that international human rights law has rejected the dangerousness of terrorist violence or denied the severe difficulties that terroristic challenges pose to states. Indeed, we already know that international human rights law has always been cognisant of such dangers and challenges and reflected this in its own internal structures allowing for flexibility and for derogations.[25] What it does mean, however, is that it has failed to be seduced by the powerful representations of *extraordinary* dangerousness and risk associated with 'new' terrorism.

As documented in Chapter 3, the transformative project engaged in by the UK has largely been internal to international human rights law; an

[23] N. Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *European Journal of International Law* 369, 379.
[24] *Ibid.*, esp. Section 5 (pp. 400–7). [25] See Chapter 2 above.

attempt to force its recalibration in recognition of the asserted difference of Al Qaeda. This comprised attempts by the UK to expand the degree of accommodation afforded by international human rights law to states that considered themselves at risk in two respects: the representation of the post-11 September 2001 *milieu* as one that constituted an emergency within international human rights law, and the representation of protracted detention without effective opportunity to challenge the lawfulness of one's detention as permissible either with or without a derogation. While international human rights law has tended to give in to assertions of emergency based on these circumstances, and to accept the possibility of derogations as a result,[26] it has not accepted the argument that fundamental principles of rights-protection within law need to be significantly recalibrated in response. Although the case concerned the deportation of a suspected terrorist, rather than his protracted detention, the reaction of the European Court of Human Rights to the UK's third party intervention in *Saadi v Italy*[27] demonstrates the degree of international human rights law's push-back against executive determinations of risk and permissible state action.

Saadi, a Tunisian national, was subject to an order for deportation from Italy to Tunisia on the basis of his alleged involvement in international terrorism. Having exhausted all domestic remedies, Saadi applied to the European Court of Human Rights for relief claiming that his deportation would violate, *inter alia*, Article 3 of the Convention as he was at a real risk of being subjected to torture, inhuman or degrading treatment or punishment on his arrival in Tunisia. He had been convicted *in absentia* of several terrorism offences before a Tunisian court and was due to be imprisoned upon his arrival in the country. The Italian government refuted the claim that Saadi would be subjected to treatment prohibited by Article 3 upon deportation to Tunisia, and claimed that Italy's positive obligations under Article 3 had been fulfilled by the diplomatic assurance it received from Tunisia. The relevant assurance stated that 'the Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia and secure to them the right to a fair trial . . . Tunisia has voluntarily acceded to the relevant international treaties and conventions'.[28] According to the Italian submissions to the Court, 'account had to be taken of the scale of the terrorist threat in

[26] *A v United Kingdom* [2009] ECHR 301.
[27] *Saadi v Italy*, Application No. 37201/06, judgment of 28 February 2008 (Grand Chamber).
[28] Quoted in, *ibid.*, para. 55.

the world today and the difficulties of combating it effectively, regard being had not only to the risks in the event of deportation but also to those which would arise in the absence of deportation'.[29]

An analogous argument was made by the UK, which made a third-party intervention in the case.[30] The UK claimed that the strict and limited test for the acceptability of diplomatic assurances outlined in *Chahal v UK*,[31] combined with the 'relatively general'[32] nature of the concept of degrading treatment and the 'speculative assessment'[33] involved in determining the risk to an individual upon deportation or extradition, were unsuited to the current climate of international terrorism. According to the UK, the standards laid down in *Chahal* had to be 'altered and clarified'[34] to take into account the threat posed by an individual and to allow the sending state to 'weigh the rights secured to the applicant by Article 3 of the Convention against those secured to all other members of the community by Article 2'.[35] The UK also argued that the standard of proof required to prevent deportation ought to take into account national security concerns, so that 'if the respondent State adduced evidence that there was a threat to national security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country'.[36] To this end the UK proposed a 'more likely than not' standard.[37] Finally, the UK claimed that diplomatic assurances could satisfy a state's Article 3 obligations and intimated that they ought to be interpreted with the exigencies of national security in mind.[38]

In its judgment, holding in favour of the applicant, the European Court of Human Rights acknowledged the difficulties involved in contemporary counter-terrorism[39] but nevertheless reasserted the absolute nature of Article 3 and of the attendant prohibition on *refoulement*. In succinct terms the Court reasserted the principle that:

[29] *Ibid.*, para. 114.

[30] Article 36 of the European Convention on Human Rights provides that the European Court of Human Rights may permit member states to intervene where one of its nationals is an applicant (Article 36(1)) or whether it would be in the interest of the proper administration of justice (Article 36(2)). Any time after the Court has given the respondent state notice of an application, a third party may be given permission by the Court to submit written comments or, in exceptional cases, to take part in hearings (Article 36(2), Rule 44(2)). In *Saadi* the UK intervened under Article 36(2), Rule 44(2).

[31] (1996) 23 EHRR 413.

[32] *Saadi v Italy*, Application No. 37201/06, judgment of 28 February 2008 (Grand Chamber), para. 121.

[33] *Ibid.* [34] *Ibid*, para. 122. [35] *Ibid.* [36] *Ibid.* [37] *Ibid.* [38] *Ibid*, para. 123.

[39] *Ibid*, para. 137.

> As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim's conduct, the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3.[40]

As a result, the Court absolutely rejected the UK's assertion that it would be possible to weigh the risk to the proposed deportee against the national security reasons for deportation[41] and held that, as the alleged dangerousness of the proposed deportee bore no relation to the risk posed to his human rights upon deportation, no higher standard of proof could be imposed in making Article 3 assessments relating to suspected or convicted terrorists.[42] As regards diplomatic assurances, the Court held that whether or not diplomatic assurances are sufficient to fulfil the Article 3 obligations of the sending state is dependent on whether, in all the circumstances, they provide 'in practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention'.[43]

Thus, although it did not deal with the right to challenge the lawfulness of one's detention, the Court's approach to the arguments of risk, difference, national security and novelty in the *Saadi* case is indicative of robustness on its part and of a commitment to holding states to well-established standards of international human rights law.[44] The Court's insistence on the integrity and continued application of international human rights law reflects the fact, as considered in Chapter 2, that pre-existing standards of international human rights law are sufficiently accommodating to allow a state to meet both its national security and human rights obligations. The apparent blindness of domestic legal systems and, in particular, of desired executive action to the appropriateness of international legal standards appears to emanate from the operation of the two levels of panic considered in Chapter 1: the 'top-down' panic of an executive that has both an obligation to protect and an interest in expanding its own power, and the 'bottom-up' panic of a victimised populace that demands

[40] *Ibid*, para. 127 (internal references omitted).

[41] *Ibid*, para. 138.

[42] *Ibid*, para. 139.

[43] *Ibid*, para. 148. For further discussion see F. de Londras, 'Shannon, *Saadi* and Ireland's Reliance on Diplomatic Assurances' (2009) 2 *Irish Yearbook of International Law* 79 and D. Moeckli, '*Saadi v Italy*: The Rules of the Game Have *Not* Changed' (2008) 8 *Human Rights Law Review* 534.

[44] See further F. de Londras, 'International Decision: *Saadi v Italy*' (2008) 102 *American Journal of International Law* 616.

security action and is blinkered from the human rights implications thereof by the 'othering' of the alleged enemy.

Responding to the external challenge

Perhaps the paramount task for international human rights law in light of the challenge posed to it by the US in particular was to unequivocally reassert its continuing relevance in the context of extreme assertions of security-related need and of a radically different and more threatening terrorist threat. We have already seen that rejection of the applicability of international human rights law has been a central plank of the US's approach to the 'War on Terror'.[45] In this context the US has represented the *lex specialis* rule as resulting in the complete displacement of international human rights law in favour of international humanitarian law, and asserted that even if human rights law applies it has no extra-territorial application. This latter point is particularly problematic given the executive policy of detaining the majority of suspected terrorists in its custody outside the US itself. Resultant from these representations, international law has had to face the challenge of reasserting its relevance in the context of 'new' terrorism. This task has been undertaken by the international legal order at multiple levels: international courts, the UN Security Council and human rights treaty bodies.

Although the International Court of Justice's *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Territories*[46] did not concern the US, it required the Court to consider the relationship between international humanitarian law and international human rights law in the context of terrorism-related conflict and extreme threats to Israel's national security. The context, therefore, allows for relevance to be drawn from the decision of the Court in this case. In essence, the case concerned questions relating to whether Israel violated international law by the erection of a Separation Barrier[47] between Israel and the West Bank area of the Palestinian Occupied Territories. The Separation Barrier was designed and erected in order

[45] See Chapter 3 above. [46] 43 I.L.M. 1009 (2004).

[47] There is significant disagreement as to the correct term to use in describing this construction. I, however, share Yuval Shany's view that 'Separation Barrier' is an appropriate term given the fact that 'more than 90 percent of the wall/fence consists of barbed wire and non-wall-like structures'; Y. Shany, 'Head against the Wall? Israel's Rejection of the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories' (2004) 7 *Yearbook of International Humanitarian Law* 352, 352, fn. 3.

to provide security and, in particular, to disrupt the ease of travel into Israel which, it was felt, was being exploited by suicide bombers and other terrorists. The Barrier's construction also, however, resulted in the extreme restriction of movement of Palestinians and the obstruction of their capacity to enter Israel in order to access work, health care, education and places of worship.

In finding that the Separation Barrier was unlawfully constructed, the International Court of Justice reaffirmed its opinion from its *Advisory Opinion on the Legality of the Use or Threat of Nuclear Weapons*[48] and held that international human rights law applies both in peacetime and in times of conflict and that it applies to acts undertaken outside of a state's territory.[49] As to the former, the Court held that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights'.[50] The latter point was substantiated by express reference to an 'object and purpose' test[51] and to the jurisprudence of both the UN Human Rights Committee and Committee on Economic, Social and Cultural Rights.[52] Thus, in its Advisory Opinion in this case, which was handed down in the context of a measure taken to protect Israel from an allegedly unprecedented level of suicide attacks and in the context of what the International Court of Justice itself classified as an 'occupation' in legal terms, the Court steadfastly insisted upon the complementary application of international humanitarian law and international human rights law and on the principle of the exceptional extra-territorial application of human rights obligations. It unambiguously held that rights from which there was no derogation continue to apply in times of conflict. If, as outlined in Chapter 2 above, the right to challenge the lawfulness of one's detention is an impliedly non-derogable right, this suggests that it applies in conflict to the same extent as it does in peacetime, subject to the provisions of international humanitarian law

[48] 1996 ICJ Rep 226.

[49] *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Territories* 43 I.L.M. 1009 (2004), paras. 105–9.

[50] *Ibid.*, para. 106.

[51] *Ibid.*, para. 109: 'The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.'

[52] *Ibid.*, paras. 109–12.

as *lex specialis*. This is a far more nuanced view of the applicability and relevance of international human rights law than that adopted by the US, which essentially rejects international human rights law in its entirety once a determination of 'armed conflict' has been made at the executive level.

The regional human rights institutions have equally remained steadfast in their commitment to the principles of the contemporaneous application of international human rights law and international humanitarian law and on the principle of exceptional extra-territorial application of human rights law. The Inter-American Commission on Human Rights, in responding positively to a request for precautionary measures considering the detention of suspected terrorists in Guantánamo Bay itself, was firm in its holding that the US's obligations under international law apply to its extra-territorial activities.[53] The Commission reiterated earlier jurisprudence from the Inter-American system[54] in support of its conclusion that 'international human rights law applies at all times, in peacetime and in situations of armed conflict' and that 'in situations of armed conflict, the protections under international human rights and humanitarian law may complement and reinforce one another'.[55] While the decision of the European Court of Human Rights in *Banković & Others v Belgium & 16 Other Contracting States*[56] cast some doubt over the extent to which a state's international human rights law obligations apply in the context of aerial campaigns where there is no 'on-the-ground' control, the effect of *Banković* has been somewhat ameliorated in relation to 'ground' campaigns, in which the European Convention on Human Rights may be applied extra-territorially if the Court is satisfied that the ground troops actually operated in and controlled the material region.[57] Despite its holding in *Banković* that the extra-territorial application of the European Convention on Human Rights is strictly exceptional, the Grand Chamber did not entirely preclude the possibility of the Convention applying in this manner; in fact, it expressly accepted that the Convention could apply extra-territorially in three circumstances, including where an area or person was under the

[53] *Detainees in Guantánamo Bay, Cuba: Request for Precautionary Measures*, IACHR (12 March 2002) *reprinted in* 41 I.L.M. 532 (2002).

[54] *Abella v Argentina*, Case No. 11.137, Report No. 5/97, Annual Report of the Inter-American Commission on Human Rights 1997.

[55] *Detainees in Guantánamo Bay, Cuba: Request for Precautionary Measures*, IACHR (12 March 2002) *reprinted in* 41 I.L.M. 532 (2002).

[56] *Banković and Others v Belgium and 16 Other Contracting States* (2001) 11 BHRC 435.

[57] See *Issa & Others v Turkey* [2004] ECHR 629.

effective control of the acting state, as is undoubtedly the case when someone is in the custody of that state.[58]

In the immediate aftermath of *Banković* there was some concern that the Strasbourg Court's enunciation of the concept of an *espace juridique* for the Convention might result in its extra-territorial reach being confined to extra-territorial action within the states parties to the Convention. Later decisions, however, suggest that the concept of *espace juridique* does not further limit the exceptional circumstances in which a state may be bound by the Convention in the course of extra-territorial activities.[59] The European jurisprudence on this question, although the least categorical of all the international institutions, therefore lends considerable support to the notion that human rights obligations extend to states' extra-territorial operations where that state exercises effective control as, for example, the US clearly does in Guantánamo Bay.

The monitoring bodies of the international human rights instruments have also reflected on the challenge to the relevance of international human rights law in the 'War on Terror' since 2001, and their conclusions have consistently stressed the obligation on states to comply fully with their international human rights law obligations in times of conflict. The UN Human Rights Committee, for example, has reiterated the applicability of international human rights law in concert with international humanitarian law during armed conflict in its communications with and conclusions on Israel,[60] Germany,[61] and the US.[62] In its concluding observations on the second and third reports of the US, the UN Human Rights Committee was particularly robust in its rejection of the state party's view that the International Covenant on Civil and Political Rights does not apply in times of war and does not apply outside the territorial jurisdiction of the US. The Committee proceeded to recommend that:

> The State party should review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose. The State party should in particular

[58] For elaboration on this point, see the decision of the House of Lords in *R (Al-Skeini & Ors) v Secretary of Defence* [2007] UKHL 26.

[59] *Assanidze v Georgia* [2004] ECHR 71503/01; *Ilascu & Others v Moldova and Russia* (2004) 17 BHRC 141; *Öscalau v Turkey* [2005] ECHR 46221/99.

[60] Concluding Observations, Israel, A/58/40 vol. I (2003), para. 85.

[61] Concluding Observations, Germany, ICCPR, A/59/40 vol. I (2004) 39 at para. 68(11).

[62] Concluding Observations, US of America, CCPR/C/USA/CO/3/Rev.1 (2006).

> (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory, as well as its applicability in time of war . . .[63]

The Committee on Economic, Social and Cultural Rights has also steadfastly continued to assert the relevance and applicability of international human rights law in times of armed conflict and, in exceptional circumstances, to extra-territorial activities. In its 2003 Concluding Observations on Israel, for example, the Committee noted 'its concern about the State party's position that the Covenant does not apply to areas that are not subject to its sovereign territory and jurisdiction, and that the Covenant is not applicable to populations other than the Israelis in the occupied territories'[64] and reiterated 'its position that even in a situation of armed conflict, fundamental human rights must be respected and that basic economic, social and cultural rights as part of the minimum standards of human rights are guaranteed under customary international law and are also prescribed by international humanitarian law. Moreover, the applicability of rules of humanitarian law does not by itself impede the application of the Covenant or the accountability of the State under Article 2(1), for the actions of its authorities.'[65] Expressing its particular concern with the detention of suspected terrorists in Guantánamo Bay, the UN Committee on Human Rights commissioned a report on this practice that stressed both the complementarity of international human rights and humanitarian law, and the applicability of international human rights law to extra-territorial activity in exceptional circumstances.[66]

Although the preceding paragraphs show that neither the international judicial organs nor the international human rights enforcement bodies have wavered in their assertion of human rights law since 11 September 2001, this is perhaps to be expected. After all, courts rarely overturn their own jurisprudence in so fundamental a manner as to undermine entirely the basic relevance of their subject matter, and the treaty enforcement bodies might be said to have acted somewhat predictably in their reactions. When one looks at a sterner test of the

[63] *Ibid.*, para. 10.
[64] Conclusions and Recommendations of the Committee on Economic, Social and Cultural Rights, Israel (2003), UN Doc. E/C.12/1/Add.90, para. 15.
[65] *Ibid.*, para. 31.
[66] Report on the Situation of Detainees at Guantánamo Bay, 27 February 2006, E/CN.4/2006/120.

resilience of international human rights law, however, the view, although slightly duller, is nevertheless bright.

The UN Security Council might be said to mirror most closely domestic legal structures and is considered to be a particularly stern test of the extent to which the institutional structure of the UN reinforces the importance of human rights.[67] The Security Council bears a structural resemblance to domestic law-making bodies because, unlike treaty-making mechanisms, it is designed to act and react swiftly, it has a relatively small membership, and it is distinctly power-structured. The reflection of power in the Security Council results from the fact that the five permanent members, including the US and the UK, hold a large amount of power and influence by means of their status and their veto power. As a result of its structure and directly participating constituency, particularly powerful permanent member states, such as the US and the UK, have a real potential to successfully transmit both manufactured and popular panic and to craft Resolutions that reflect their desires for expanded state powers.

Indeed, the early actions of the Security Council in the light of the 11 September 2001 attacks seem to resemble domestic panic-related actions to some extent. Firstly the Security Council began to take on the role of *quasi*-legislator and, by so doing, appeared to drastically change its sense of function. Although the Security Council has acted much more freely and expansively since the end of the Cold War,[68] the post-11 September 2001 patterns have been striking in the extent to which they constitute a sense of the Security Council as a law-making body. In this respect, Chinkin and Boyle describe Resolutions 1373 (2001) and 1540 (2005) as 'striking and unprecedented examples' of the Security Council's 'willing[ness] to legislate more generally on matters relating to peace and security'.[69] In noting the advantages of Security Council law-making, Chinkin and Boyle note its capacity to produce 'quick, universal and immediately binding obligations in a manner that no treaty negotiations or General Assembly resolution could replicate'.[70] They then proceed to criticise some law-making by

[67] See generally, R. Foot, 'The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas' (2007) 29 *Human Rights Quarterly* 489.

[68] See F. Kirgis, 'The Security Council's First Fifty Years' (1995) 89 *American Journal of International Law* 506.

[69] C. Chinkin and A. Boyle, *The Making of International Law* (2007, Oxford; Oxford University Press), p. 113.

[70] *Ibid*., p. 114.

the Security Council on the basis of the lack of accountability, limited participation, and lack of procedural fairness or transparency it reflects.[71] These negative factors were amplified in the immediate aftermath of the 11 September 2001 attacks when, as Foot notes, states responded quickly 'to the US call to participate in the "global war on terror"' and 'governments . . . picked up a signal that rights protections could more openly be sacrificed'.[72] The structure of the Security Council as a distinctly power-based institution in which panic-related motivations can be successfully transmitted is borne out by the fact that the earlier post-11 September 2001 Resolutions relating especially to the freezing of assets of suspected terrorists displayed little or no concern with human rights.[73]

Although a systematic treatment of terrorism has traditionally been difficult for international institutions, the Security Council occasionally addressed individual incidents of terrorism through various Resolutions and introduced Resolution 1267 in 1999 against the Taliban, which went on to form the cornerstone of the post-2001 counter-terrorist asset-freezing regime. First the Security Council introduced Resolution 1373, imposing a general obligation on all states to 'prevent and suppress the financing of terrorist acts' and establishing the UN Counter-Terrorist Committee[74] to administer and support the scheme. Second, the Security Council expanded the pre-existing asset-freezing regime under Resolution 1267. As a result of these developments, the Al Qaeda and Taliban Sanctions Committee (the 'Sanctions Committee'), established under Resolution 1267 in 1999,[75] now has an expanded remit to identify individuals and organisations whose finances are to be frozen or disrupted as a result of terrorist activity. The Sanctions Committee maintains a list of individuals and entities with respect to Al Qaeda, Osama Bin Laden, the Taliban, and other individuals, groups, undertakings and entities associated with them (the Consolidated List), which is the basis for the freezing of assets and disruption of finances by domestic financial services bodies under the Resolution 1267 regime. The Consolidated List can include listings not only of those said to be involved in or members

[71] *Ibid.*, pp. 114–15.

[72] Foot, 'The United Nations, Counter Terrorism, and Human Rights', 510.

[73] Disruption of terrorist financing is generally considered to be an important and useful mechanism of counter-terrorism. For a good overall perspective on terrorist financing see, e.g., J. Gurulé, *Unfunding Terror: The Legal Response to the Financing of Global Terrorism* (2009, Cheltenam; Edward Elgar Publishing).

[74] SC Resolution 1373 (2001), Operative Para. 6.

[75] SC Resolution 1267 (1999), Operative Para. 6.

of the Taliban and Al Qaeda, but also those who are said to be broadly 'associated with' Osama Bin Laden, Al Qaeda, the Taliban 'or any cell, affiliate, splinter group or derivative thereof' and any individual, entity, group or undertaking that "otherwise support[s] [their] acts or activities'.[76] The process by which an individual or entity is listed is particularly problematic from a rights-based perspective as it does not entail an opportunity for an individual or entity to effectively challenge their listing. This is notwithstanding the severe implications that listing has for an individual.

These early counter-terrorist measures, which were introduced, monitored, defined, and enforced by the Security Council, made essentially no mention of the obligation to limit state action to that which complies with a state's other international obligations, including those arising under international human rights law. In other words, the very early actions of the Security Council were entirely 'security focused'; they answered the demands of the US for additional measures to combat international terrorist networks without any apparent regard to whether rights-protection was important, feasible, or required in the course of such action. Importantly, however, the extent to which respect for human rights is embedded as an institutional value in the UN and wider international community remained evident and seems to have quickly had an effect on the form and substance of the Security Council's approach.[77]

In December 2001 seventeen Special Rapporteurs and Independent Experts of the UN expressed concern at the impact of expansive counter-terrorism measures on both individual human rights and human rights compliance as a value;[78] the Policy Working Group on the United Nations and Terrorism concluded that 'the United Nations must ensure that the protection of human rights is conceived as an essential concern';[79] briefings to the Counter-Terrorist Committee from both the High Commissioner for Human Rights, Mary Robinson,[80] and the Chair of the UN Human Rights Committee, Sir Nigel Rodley, stressed the

[76] SC Resolution 1822 (2008), Operative Para. 2.
[77] See, e.g., Foot, 'The United Nations, Counter Terrorism, and Human Rights'.
[78] See Digest of Jurisprudence of the UN and Regional Organisations on the Protection of Human Rights while Countering Terrorism (2003), p. 8, available at: www.ohchr.org/Documents/Publications/DigestJurisprudenceen.pdf (last accessed 21 February 2011).
[79] Report of the United Nations Working Group on the United Nations and Terrorism, UN Doc A/57/273-S/2002/875.
[80] Notes to the Chair of the Counter-Terrorism Committee, quoted in Foot, 'The United Nations, Counter Terrorism, and Human Rights'.

importance of upholding human rights and the Rule of Law.[81] These developments inside the UN were matched by the insistence on human rights compliance in counter-terrorism on the part of the Council of Europe,[82] the Organization of American States,[83] the European Union,[84] and the Rio Group of 19 Central and South American Countries.[85] Less than two years after the expansion of the sanctions regime and introduction of the Counter-Terrorism Committee, the Security Council passed Resolution 1456 (2003), which provided that states must ensure that all counter-terrorism measures adopted comply with international law and, 'in particular international human rights, refugee, and humanitarian law'.[86] This was followed, in 2005, by the appointment of a human rights expert to the Counter-Terrorism Committee. Thus, relatively quickly and, in fact, only three months after the Counter-Terrorism Committee Executive Directorate had become fully staffed, the Committee reported to the Security Council that compliance with international human rights law is required by states when implementing counter-terrorist measures. This stands in sharp contradistinction to the behaviour of domestic law-making bodies in the US and the UK.[87]

Added to the internal reassertion of the importance of human rights 'even' in the area of counter-terrorism was the reaction of the European Court of Justice to the implementation mechanisms of asset-freezing resolutions within the European Union. As all EU member states are members of the UN and bound by Chapter VII Resolutions of the Security Council, it was decided that harmonious implementation of this regime was appropriate.[88] The implementation system (which did

[81] Briefing to the Counter-Terrorism Committee, Sir Nigel Rodley, 19 June 2003, available at: www.unhchr.ch/huricane/huricane.nsf/0/EE1AC683F3B6385EC1256E4C00313DF5?opendocument (last accessed 21 February 2011).

[82] Guidelines on Human Rights and the Fight Against Terrorism (2002), available at, www.coe.int/t/dlapil/cahdi/Texts_&_Documents/Docs2002/H_2002_4E.pdf (last accessed 21 February 2011).

[83] Inter-American Convention against Terrorism (2002), Article 15.

[84] See Foot, 'The United Nations, Counter Terrorism, and Human Rights', 503.

[85] *Ibid.*, pp. 503–4.

[86] SC Resolution 1456, para. 6.

[87] See Chapter 4 above.

[88] Council Common Position 2002/402/CFSP, 27 May 2002; Council Common Position 2003/140/CFSP, 27 February 2003; Council Regulation (EC) 881/2002; Council Regulation (EC) 561/2003. This is not uncommon and can take place for a variety of reasons, including concerns about the disruption of the common market should each state implement such measures unilaterally. See F. de Londras and S. Kingston, 'Rights, Security, and Conflicting International Obligations: Exploring Inter-Jurisdictional Judicial Dialogues in Europe' (2010) 58 *American Journal of Comparative Law* 359, 364–8.

not add any level of rights-protecting process to the clearly deficient UN system) was subjected to a challenge on the basis that it violated the European Convention on Human Rights and was therefore unlawful.[89] The reaction of the European Court of First Instance to these claims was notably deferential to the Security Council[90] and seemed largely to give the rights-related argument short shrift and deal with them without the degree of rigour that might have been hoped for.[91] As the Security Council seems relatively susceptible to at least short-term panic-related law-making and as the US and the UK are veto-holding members of the Security Council, the Court of First Instance's deference towards the Security Council arguably constituted indirect deference towards the US and the UK. These issues came to a head in the *Kadi* case.[92]

The Court of First Instance had failed to find that the freezing of Kadi's assets under the European regime (which itself essentially reproduced the Security Council regime) violated the European Convention on Human Rights. The case was then appealed – together with *Yusuf and Al Barakaat*[93] – to the European Court of Justice. Prior to the full hearing, the Advocate General prepared his opinion, in which a strikingly different approach was taken to that adopted by the Court of First Instance.[94] Although the case had many technical aspects about the relationship between different legal regimes, which have been well considered elsewhere, the focus here is on the representations (including by the UK) that the lawfulness of Security Council Resolutions introduced

[89] It has long been established that there is a harmony or parallelism between European Convention on Human Rights rights protections and the rights-related values and obligations within the EU. This is notwithstanding the fact that the European Convention on Human Rights is not an EU document (rather it emanates from the Council of Europe) and that the EU was not a party to the Convention itself (Case C-84/95 *Bosphorus* [1996] ECR I-3953 and the European Court of Human Rights' decision relating to the same set of facts in *Bosphorus v Ireland* [2005] 42 EHRR 1).

[90] Case T-306/01 *Yusuf and Al Barakaat* [2005] ECR II-3533; Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-0000; Case T-49/04 *Faraj Hassan v Council and Commission* (12 July 2006) on appeal as Case C-399/06 *Hassan v Council and Commission* OJ 2004 C294/30; Case T-253/02 *Chafiq Ayadi v Council* [2006] ECR II-2139.

[91] In relation to Case T-253/02 *Chafiq Ayadi v Council* [2006] ECR II-2139, for example, Cian Murphy has observed that 'the whole issue of fundamental rights is overshadowed by the CFI's finding that the Community was not only competent, but compelled to adopt the regulations': C. Murphy, '*Ayadi v Council*: Competence and Justice in the "War on Terrorism"' (2007) 29 *Dublin University Law Journal* 426, 435.

[92] Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-0000.

[93] Case T-306/01 *Yusuf and Al Barakaat* [2005] ECR II-3533.

[94] Case C-402/05 P *Yassin Abdullah Kadi v Council and Commission*, Opinion of Advocate General Poiares Maduro, 16 January 2008.

under Chapter VII is a 'political question' that ought not to be considered by the Court. This argument closely mirrors assertions of lack of institutional competence used in the domestic sphere to justify the marginalisation of the judiciary in matters relating to national security, but found no favour with the Advocate General, who held:

> Certainly, extraordinary circumstances may justify restrictions on individual freedom that would be unacceptable under normal conditions. However, that should not induce us to say that 'there are cases in which a veil should be drawn for a while over liberty, as it was customary to cover the statues of the gods'. [internal citation omitted] Nor does it mean, as the UK submits, that judicial review in those cases should be only 'of the most marginal kind'. On the contrary, when the risks to public security are believed to be extraordinarily high, the pressure is particularly strong to take measures that disregard individual rights, especially in respect of individuals who have little or no access to the political process. Therefore, in those instances, the courts should fulfil their duty to uphold the rule of law with increased vigilance. Thus, the same circumstances that may justify exceptional restrictions on fundamental rights also require the courts to ascertain carefully whether those restrictions go beyond what is necessary . . . the Court must verify whether the claim that extraordinarily high security risks exist is substantiated and it must ensure that the measures adopted strike a proper balance between the nature of the security risk and the extent to which these measures encroach upon the fundamental rights of individuals.[95]

Advocate General Maduro thus rejected the security-related arguments presented by the UK, the European Council and European Commission and instead insisted that the implementation of Security Council Resolutions must comply with international human rights law. The provision of meaningful judicial review of whether such measures are human rights compliant is, he accepted, a difficult task. That notwithstanding, the Advocate General highlighted the patterns of panic-related law-making that occur in the political sphere in times of crisis in order to stress the importance of effective judicial review and, in so doing, provided perhaps the most express statement yet of the resilience of international human rights law in the 'War on Terror':

> The fact that the measures at issue are intended to suppress international terrorism should not inhibit the Court from fulfilling its duty to preserve the rule of law. In doing so, rather than trespassing into the domain of politics, the Court is reaffirming the limits that the law imposes on certain political decisions. This is never an easy task, and, indeed, it is a

[95] *Ibid.*, para. 35.

> great challenge for a court to apply wisdom in matters relating to the threat of terrorism. Yet, the same holds true for the political institutions. Especially in matters of public security, the political process is liable to become overly responsive to immediate popular concerns, leading the authorities to allay the anxieties of the many at the expense of the rights of a few. This is precisely when courts ought to get involved, in order to ensure that the political necessities of today do not become the legal realities of tomorrow.[96]

The judgment of the European Court of Justice was, as one might imagine, eagerly awaited. Whether the European Court of Justice would approach the matter in a manner analogous to the Court of First Instance (in which human rights arguments received short shrift) or the Advocate General (in which a much more rights-based approach was evident) would, to a large degree, dictate how the EU would approach these matters in the future and, by extension, how closely the Security Council would be required to truly engage with human rights norms. This is because two members of the EU have veto powers on the Security Council (the UK and France) and are bound by European Court of Justice jurisprudence. In addition, of course, all twenty-seven member states of the EU are bound by the jurisprudence of the European Court of Justice and would have to take this jurisprudence into account when trying to implement Chapter VII Resolutions (by which they are also bound). Having considered in great detail the technical questions relating to the relationships between Security Council Resolutions, EU law, and the European Convention on Human Rights and rejected the argument that it ought to err on the side of deference in this respect, the European Court of Justice went on to consider the rights-related arguments in the case.[97] Although not engaged in to the same degree or with the same rhetorical flair as by the Advocate General, the Court held that the rights of the defence, particularly the right to be heard, and the right to effective judicial review of those rights, had 'patently' not been respected.[98] According to the Court, protection of these rights required the grounds for inclusion on the list to be communicated 'so far as possible, either when that inclusion is decided on or, at the very least, as swiftly as possible after that decision'.[99] Again we witness here the recognition by an international court of the need for some balancing

[96] *Ibid.*, para. 45.
[97] *Kadi and Al Barakaat*, appealed from Case T-306/01 *Yusuf and Al Barakaat* [2005] ECR II-3533 and Case T-315/01 *Kadi* [2005] ECR II-3649.
[98] *Ibid.*, paras. 334–72.
[99] *Ibid.*, para. 336.

of rights in the context of security; the Court considered that *ex post* communication of these reasons would be sufficient, so that the aim of asset-freezing could not be frustrated in the light of information about a possible listing.[100] The European Court of Justice also accepted that the listing violated the right to property. Even though that right is not absolute and can be infringed upon in the context of counter-terrorist asset-freezing, such infringement could not be justified where the individual had been given no reasonable opportunity to put his case against such freezing.

The *Kadi* decision has received significant attention, much of it focused on the ways in which the European Court of Justice approached the relationship between European and international law and not all of it positive.[101] However, from the perspective of effective rights-protection and of ensuring human rights are taken into account in the creation of counter-terrorism law – even by the Security Council acting under Chapter VII – the case is a welcome development. This is especially so in respect of what Suzanne Kingston and I have termed elsewhere the 'external message' of the case.[102] In this respect, we argued that *Kadi* ought to be read bearing in mind the character of the EU as an international actor not just in itself but also as a collection of twenty-seven member states. By insisting upon the protection of individual rights that are common across the international legal spectrum (and not just in Europe), and acknowledging that some flexibility must be allowed for states and international organisations to effectively counter terrorist threats, the European Court of Justice was asserting 'the commonalities in values between two international institutions upon which an inter-institutional (ECJ and SC) and inter-organizational (EU and UN) dialogue can be based. [This was], in other words, a constitutionalist case.'[103] The implications of *Kadi* continue to work

[100] *Ibid*., para. 344.

[101] See, e.g., J. Weiler, 'Editorial' (2008) 19 *European Journal of International Law* 895; G. de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51 *Harvard International Law Journal* 1; K. Ziegler, 'Strengthening the Rule of Law but Fragmenting International Law: The Kadi Decision of the ECJ From the Perspective of Human Rights' (2009) 9 *Human Rights Law Review* 288; P. Eeckhout, 'Kadi and Al Barakaat: Luxembourg is not Texas – or Washington DC', *EJIL: Talk!*, 25 February 2009, available at www.ejiltalk.org/kadi-and-al-barakaat-luxembourg-is-not-texas-or-washington-dc/ (23 July 2009); N. Türküler Isiksel, 'Fundamental Rights in the EU After *Kadi and al Barakaat*' (2010) 16 *European Law Journal* 551.

[102] de Londras, and Kingston, 'Rights, Security, and Conflicting International Obligations', 405–9.

[103] *Ibid*., 407–8.

themselves out,[104] but its character in putting rights-related pressure on the Security Council and – critically – on two of its veto-holding members, emphasises again the extent to which both the internal mechanisms of the UN and the broader international community has attempted to counter the repressive, panic-related approach of the Security Council in the immediate aftermath of the 11 September 2001 attacks.

Not only does the example of this reorientation towards human rights concerns distinguish the international community significantly from domestic law-making bodies, it also suggests that international law, while not entirely impervious to power, may be more resilient in the face of extreme panic-related exertions of power than realist theory might have suggested. Although the Security Council moved in a manner not dissimilar to the progress of domestic law (i.e. towards repressive measures represented as required on national security grounds by the US) in the immediate aftermath of the 11 September 2001 attacks, it reoriented itself towards rights-protection on the advice of human rights officers and bodies in a fairly concerted and quite prompt manner. Although sidelined in earlier Resolutions, the insistence by other branches of the UN on the applicability and substance of human rights standards was positively received. Instead of moral entrepreneurs calling for expanding state powers and repressive measures, as transpires domestically, 'norm entrepreneurs'[105] on the international level insisted upon attention being paid to human rights compliance. It appears that while the projection of panic by the powerful states seeking to recalibrate international legal standards in this instance was effective, this recalibration was relatively short-lived. Thus, the international legal system – even at the level that is arguably most clearly analogous to the domestic system in structural terms – recalibrated itself towards rights-protection in a notably timely manner; brute projections of power were insufficient to chisel the international legal landscape into the terrain preferred by the hegemon.

Responding to the internal challenge

The US and the UK have both argued that they are entitled to detain individuals indefinitely who are thought to be engaged in terrorist

[104] For a thorough account see C. Murphy, *EU Counter-Terrorism: Pre-emption and Rule of Law* (2011, Oxford; Hart Publishing).

[105] C. Sunstein, 'Social Norms and Social Roles' (1996) 96 *Columbia Law Review* 903, 929 – defining norm entrepreneurs as those who 'can alert people to the existence of a shared complaint and can suggest a collective solution'.

activity. The US's approach is based on international humanitarian law and the long established doctrine of the right to capture and detain enemy fighters until the cessation of hostilities. While this principle occurs in international humanitarian law, the US has failed to acknowledge that there are difficulties with identification in this particular 'war' that do not normally arise (apart, perhaps, from the cases of spies and saboteurs). Because terrorists do not normally distinguish themselves from civilians and do not normally represent a state, they do not fit the concept of 'privileged combatant' found in international humanitarian law. Neither, however, do they fit the traditional concept of 'civilian'. Rather than characterise suspected terrorists as civilians who have engaged in criminal activity, the US has chosen to project its domestic legal concept of 'unlawful combatant', developed by the domestic courts before the development of international human rights law,[106] onto the international sphere. In so doing, the US not only rejected a plausible pre-existing structure within international humanitarian law (i.e. that of the civilian who acts unlawfully) but also attempted to transform international humanitarian law through the promotion of a category of detainee they originally claimed enjoyed neither the protections of international humanitarian law nor those of international human rights law. Because international law already provided a structure within which suspected terrorists could be identified, detained and, if appropriate, charged, this approach was an entirely unnecessary attempt to expand state power. Rather than representing a *bona fide* interpretation of international law, it constituted a transformative surge to acquire international legitimacy in an attempt to expand executive power in response to both the state's power-expanding tendencies and the populace's demand for 'absolute security'.

In addition to attempting to reshape the already loose bounds of international humanitarian law, the US has refused to acknowledge that the international prohibition on arbitrary detention and the right to challenge the lawfulness of detention are relevant; that international human rights law continues to apply in times of conflict and, where there is arguably a 'gap' in international humanitarian law, that human rights law can fill it. Thus, even in a time of conflict, international human rights law would require that detainees be given the opportunity to challenge the lawfulness of their detention through an effective, substantive, adversarial process. The US's claim to be entitled to hold

[106] *Ex parte Quirin* 317 U.S. 1 (1942).

suspected terrorists indefinitely ('until the end of hostilities' is an indefinite period of time in all conflicts) poses serious challenges to international human rights law.

The UK, in contrast, has operated primarily in a criminal justice paradigm since 2001, and accepts the relevance and applicability of international human rights law. Nevertheless, by means of Part 4 of the Anti-terrorism, Crime and Security Act 2001 (considered in full in Chapter 4 above), the UK purported to detain suspected terrorists indefinitely on the basis that they were too dangerous to enjoy their liberty, too vulnerable to be deported under the principle of *non-refoulement*, and too dangerous to risk charge and prosecution where the evidence available may not be sufficient to meet the criminal burden of 'beyond reasonable doubt'. The UK further argued that the provision of substitute oversight mechanisms that routinely minimised the degree and meaningfulness of judicial involvement was sufficient to bring such detention within the ambit of allowable state action.

Thus, both the US and the UK promoted perspectives that represented indefinite detention as lawful, quite in contrast to international human rights law. As noted in Chapter 2 above, not even a derogation to the right to be free from arbitrary detention can permit indefinite detention and all detention must be accompanied by an adequate facility by which its lawfulness can be challenged. These standards, which, as demonstrated in Chapters 2 and 4, lend themselves to the creation of a feasible detention and review mechanism for use in counter-terrorism, seem to have remained firm since the advent of the 'War on Terror'.

In contrast to the claims of the US and the UK, the UN Human Rights Committee has stressed the need to ensure compliance with a state's international human rights obligations and the prohibition, in international law, of indefinite detention and the denial of a right to challenge the lawfulness of detention. In relation to counter-terrorism, the UN Human Rights Committee has consistently insisted upon states not engaging in prohibited detention of suspected terrorists and on ensuring adequate oversight review mechanisms. Thus, in its Concluding Observations on Yemen, the Committee noted that '[t]he State party should ensure that the utmost consideration is given to the principle of proportionality in all its responses to terrorist threats and activities. It should bear in mind the non-derogable character of specific rights under the Covenant.'[107] Given the Committee's view that the right to challenge the

[107] Concluding Observations, Yemen, UN Doc. CCPR/CO/84/YEM (2005), para. 13.

lawfulness of one's detention is non-derogable under the International Covenant on Civil and Political Rights, this is clearly significant.[108] The Committee against Torture also expressed deep concern about the indefinite detention of individuals in Belmarsh prison under the Anti-terrorism, Crime and Security Act 2001.[109] In this respect, the Committee against Torture recommended that the UK ought to strengthen the independent periodic assessment of the continuing emergency provisions and urgently consider alternatives to indefinite detention.[110] On a related note, the UK was also subject to criticism from the Committee on the Elimination of Racial Discrimination for the targeting of non-citizens by the Anti-terrorism, Crime and Security Act 2001.[111]

The Committee against Torture was challenged by the US, which claimed that it was not entitled to consider issues of detention in Guantánamo Bay and elsewhere in the 'War on Terror' because the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment did not apply, and, in any case, the duration of detention is not within the scope of the Committee. Both of these representations were rejected by the Committee, which concluded not only that it had competence to consider issues relating to detention but also that indefinite detention without charge, trial or an effective mechanism for review constituted a breach of the US's obligations under the Convention.[112] This conclusion was particularly significant because of the implication it holds for the right to effectively challenge the lawfulness of detention.

Although the Inter-American Court of Human Rights had drawn express connections between *habeas corpus* and the protection of detainees from torture,[113] it had not held that indefinite detention without review, charge or trial could itself constitute torture or inhuman or degrading treatment. Through its Concluding Observations on the US, the Committee against Torture drew just such an express connection and implied, at least, that indefinite detention of this nature might constitute a violation not only of the Convention against Torture but also of the *jus cogens* prohibition on torture. The US made it clear that they did not consider the matter of the duration of detention in Guantánamo Bay to

[108] Considered in Chapter 2 above.

[109] Concluding Observations, UK, CAT, A/60/44 (2004), p. 16. [110] *Ibid.*

[111] Concluding Observations, UK, CERD, A/58/18 (2003) 88, paras. 536 and 538.

[112] Concluding Observations, US of America, CAT, CAT/C/USA/CO/2 (2006).

[113] *Advisory Opinion on Habeas Corpus in Emergency Situations*, Inter-American Court of Human Rights, (1987) 11 EHRR 33.

be within the scope of the Committee's mandate. As a result, and perhaps in an attempt to limit the extent to which the Committee's conclusions might be promulgated by other human rights institutions, the US claimed that 'the language in this report, is skewed and reaches well beyond the scope and mandate of this Committee . . . I don't know who the particular drafters are, but it may well involve individuals who have got particular concerns that they want to push.'[114]

If this is an attempt to limit the impact of the Committee against Torture's conclusion in this respect, it is somewhat unsurprising, as the establishment and reinforcement of the Committee's view in international human rights law would suggest not only that there is an impliedly non-derogable right to challenge the lawfulness of one's detention but also that this right may acquire the status of *jus cogens* and therefore be absolute. Such a development would constitute a significant advancement in the position and enforceability of the right to challenge the lawfulness of one's detention. The views of the Committee then suggest not only that the right is being protected and insisted upon by international institutions against the power projections of the US and the UK, but also that it may be strengthening. Should this tentative conclusion be further advanced in the future by either the Committee or other rights-enforcement bodies, this would constitute a major challenge to the realist view of the behaviour of international law.

The Council of Europe has not gone to the same lengths as the Committee against Torture in its insistence upon the right to challenge the lawfulness of detention since the attacks of 2001, but it has nevertheless suggested a strengthening of the right's status within the European human rights framework. As outlined in Chapter 2, the European Court of Human Rights has never held that the right to challenge the lawfulness of one's detention under Article 5(4) was non-derogable, although it has always considered the availability of *habeas corpus*, or adequate alternative, to be significant in assessing the compatibility of counter-terrorist detention with the European Convention on Human Rights. This notwithstanding, the Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment indicated that the right to challenge the lawfulness of one's detention may be acquiring non-derogable status in Europe. In its Seventeenth

[114] J. Bellinger, On-the-Record Briefing on the Committee against Torture Report, 19 May 2006, available at: http://web.archive.org/web/20060922230812/http://useu.usmission.gov/Dossiers/Detainee_Issues/May1906_Bellinger_UN_Torture.asp (last accessed 21 February 2011).

General Report, released in September 2007, the Committee made a clear statement of its understanding of the unlawfulness of both incommunicado detention and the removal of sufficient safeguards for detainees in the following terms:

> Secret detention can certainly be considered to amount in itself to a form of ill-treatment, both for the person detained and for members of his or her family. Further, the removal of fundamental safeguards which secret detention entails – the lack of judicial control or of any other form of oversight by an external authority (such as the ICRC) and the absence of guarantees such as access to a lawyer – inevitably heightens the risk of resort to ill-treatment.
>
> . . .
>
> All right-minded persons acknowledge that resolute action is required to counter terrorism, and this may have to include some adaptations of the existing legal framework. However, throwing overboard basic principles that characterise societies committed to human rights and the rule of law can only invite ignominy.[115]

In *A v United Kingdom*,[116] a decision of the European Court of Human Rights (discussed in Chapter 4) in which Part 4 detention under the Anti-terrorism, Crime and Security Act 2001 was considered, the questions of detention and challenge arose for substantive consideration by the Court. In that case the UK represented its decision to provide for indefinite detention of individuals suspected of being terrorists, but who could not be deported because of the principle of *non-refoulement*, as permissible under Article 5 of the European Convention on Human Rights. In particular, the UK claimed that the detention in such circumstances ought to be understood as 'being taken with a view to deportation' and therefore as permissible under Article 5(1)(f). When it came to individuals who – as we said in Chapter 4 – were considered too dangerous to be released but too vulnerable to be deported, the UK argued that detention represented a 'fair balance'[117] between individual rights and security needs. The UK also argued that this 'fair balance was further preserved by providing the alien with adequate safeguards against the arbitrary exercise of the detention powers in national security cases'.[118]

Considering these arguments the Court held that detention under Article 5(1)(f) must have a lawful basis but need not be reasonably established as being 'necessary'.[119] That notwithstanding, the Court

[115] Seventeenth General Report on the CPT's Activities, CPT/Inf (2007) 39, p. 5.
[116] *A v United Kingdom* [2009] ECHR 301. [117] *Ibid.*, para. 148. [118] *Ibid.*
[119] *Ibid.*, para. 164.

rejected the representation that Article 5(1)(f) detention can be indefinite; rather it can only be justified for as long as deportation or extradition proceedings are being progressed and, furthermore, that such proceedings must be prosecuted with 'due diligence'.[120] Because there were no proceedings regarding deportation or removal from the state, the UK had failed to establish that the detention was in fact related to Article 5(1)(f) and, as a result, that there was a lawful basis for it under the terms of Article 5(1).[121] Even where there was a serious terrorist threat, the Court held, the fundamental principle of permitting deprivation of liberty only on the limited bases of Article 5(1) cannot be subjected to a 'fair balance' expansion of those bases; they are, rather, exhaustive.[122] In this respect the Court maintained one of the main mechanisms by which international human rights law aims at preventing the arbitrary deprivation of liberty that we considered in Chapter 2: limited bases for detention. The Court also went on to reassert the fundamental principles of a review of the lawfulness of one's detention under Article 5(4) of the Convention: review on the basis of domestic and international law of the lawfulness of one's detention[123] by means of an adversarial process[124] where there is equality of arms between the parties,[125] argued before an arbiter with the competence to reach a decision on the lawfulness of the detention[126] and to order release of the detainee if it is found to be unlawful.[127] There may be variations to the process where the exigencies of the case require it, including 'restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person'.[128] We have already seen how the Court concluded that the incapacity of Special Advocates to consult effectively with clients once they have been made aware of closed material, even where those materials form the basis for the detention, was a violation of Article 5(4).[129] Thus, the second main safeguarding mechanism for the right to be free from arbitrary detention – reviewability in a substantive process – was also reiterated by the Court in *A v United Kingdom*. In addition, both of the restatements of the principles of the right to be free from arbitrary detention take into account the reality of the difficulties encountered in trying to manage a

[120] *Ibid.* [121] *Ibid.*, paras. 165–70. [122] *Ibid.*, para. 171. [123] *Ibid.*, para. 202.
[124] *Ibid.*, para. 203. [125] *Ibid.* [126] *Ibid.*, para. 202. [127] *Ibid.*
[128] *Ibid.*, para. 205. [129] See Chapter 4, p. 155.

terrorist threat and allow for some flexibility and variation as required; in other words, they reflect the well-established accommodation model of international human rights law. This is not to suggest flawlessness from a rights-protecting perspective in *A v United Kingdom*; as we will see below the Court acceded rather easily to claims of an emergency but it did nevertheless resist the claim for a rebalancing – or a reweighting of interests in favour of the state in a balancing exercise in respect of terrorism – when it comes to the necessity of limiting the bases for detention and providing some form of review under Article 5(4).

On the basis of this record, it appears that instead of buckling to the interpretations of international law advanced by the US and the UK, the international institutions have pushed back against it and insisted upon respect for the right to liberty, protected by the provision of effective means to challenge the lawfulness of detention, in a particularly robust manner. Instead of being overly influenced by panic-fuelled power exercises of the hegemonic states, international law has largely retained its structure and been markedly less willing to allow for overtly repressive state action than the executive and legislative branches of the domestic politico-legal systems in the US and the UK.

A realist(ic) footnote

The patterns of push-back, resilience and robustness outlined in the preceding sections must be read subject to an important realist footnote. It would be disingenuous to suggest that international institutions have not at all been swayed by the projections of power from the US and the UK, or that rights abuses have been absolutely resisted by these institutions. Instead, there have been some instances when rights-enforcement has been threatened or undermined by the security-paradigm in the 'War on Terror'. We have already seen that the UN Security Council's asset-freezing regime has had serious consequences for individual rights. Notwithstanding the important decision in *Kadi*, people continue to be subjected to a listing procedure without what might be described as a sufficiently rigorous capacity to challenge this listing and the decision has not resulted in a wholesale internalisation and manifestation of rights-based values within that system. Instead progress has been slow, filled with rights-related rhetoric perhaps, but not with as much effective rights protection as is required or desirable. Thus, while international institutions can continue to proclaim the importance of rights, actually bringing about a situation of rights

compliance is a difficult and protracted process with power brokers, such as the US and the UK, in a position to slow proceedings down and stretch out the rights-related repression as much as possible.

By means of example, one of the primary deficiencies with the previous sanctions regime was the limited means of petitioning for de-listing. Where a petition for de-listing was submitted to the Focal Point, the Focal Point was to determine whether this was a new or repeated request without any new information (in which case it was simply returned to the petitioner) and, if it found that the petition was either new or repeated but includes new information, it would inform the petitioner of the de-listing process and then send the petition to the designating state(s) and the petitioner's state(s) of nationality and residence. These states were then to communicate with one another as appropriate, review the petition and decide whether to oppose or support it. If any of these states recommended de-listing this would be communicated to the Sanctions Committee which would then place the petition on its agenda. In the event that any of the consulted states opposed the petition this was also communicated to the Sanctions Committee and any other member states who had evidence in support of the petition were 'encouraged' (although seemingly not obliged) to share this evidence with the states consulted. If three months passed without any of the consulted states commenting officially on the petition, then the Focal Point would inform all other members of the Sanctions Committee of this and forward the petition to them. At that time, any other member state of the Sanctions Committee could recommend de-listing and this would result in the petition being put on the Sanctions Committee agenda. If a month passed from the other states being informed of the lack of response from the consulting states without a recommendation, the petition would be deemed rejected. Importantly, in the absence of a recommendation for de-listing from either the states consulted or – after a three month period of no comment – another member state of the Sanctions Committee, the petition would not be put on the Committee's agenda. Equally, if a consulted state opposed the petition it would not go on the agenda (although other states could communicate with the consulted states should they have information in support of the petition, they did not, in such circumstances, have the capacity to place the petition on the agenda of the Committee itself). Since 2009 the Focal Point has been replaced with an Ombudsperson, whose office was established by Security Council Resolution 1904 (2009). The Resolution provides that:

> [W]hen considering delisting requests, the Committee shall be assisted by an Office of the Ombudsperson, to be established for an initial period of 18 months from the date of adoption of this resolution, and *requests* the Secretary-General, in close consultation with the Committee, to appoint an eminent individual of high moral character, impartiality and integrity with high qualifications and experience in relevant fields, such as legal, human rights, counter-terrorism and sanctions, to be Ombudsperson, with the mandate outlined in annex II of this resolution, and further *decides* that the Ombudsperson shall perform these tasks in an independent and impartial manner and shall neither seek nor receive instructions from any government.

The establishment of this office was certainly a positive development on its face, however serious difficulties remain. The role of the office was essentially to engage in fact-finding and to act as an intermediary between the petitioner and the Sanctions Committee. Crucially, the petition would now generally be placed on the agenda of the Sanctions Committee meetings.[130] In spite of the advancement represented by this change, the core difficulty with the process – i.e. its political nature and the failure to force consideration of rights-based claims on the decision-making entities – remains, as paragraph 10 of Annex II to Resolution 1904 provides that: 'After the Committee consideration, the Committee shall decide whether to approve the delisting request through its normal decision-making procedures.'

Not only is it difficult to actually operationalise rights-enforcing decisions and principles across the international community, but human rights institutions have themselves not always been as rigorous in interrogating the claims of the US and the UK as they might have been. For readers familiar with European human rights law this will, perhaps, come as no surprise, for we are well versed in the phenomenon of deferential and somewhat shallow analyses of allegations of 'emergency' under Article 15 of the European Convention on Human Rights.[131] Notwithstanding its reassertion of fundamental principles around arbitrariness in detention and the right to review the lawfulness of one's detention in *A v United Kingdom*, the European Court of Human Rights once more displayed a deferential tendency when it came to considering whether the UK had validly derogated under Article 15. In Chapter 3 we noted the difficulties that *mala fides* derogations pose to the international system of

[130] SC Resolution 1904 (2009), Annex II, paras. 1–7.

[131] F. Ní Aoláin and O. Gross, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 *Human Rights Quarterly* 625.

human rights protection and the importance of ensuring that they are entered only when the requirements of Article 15 are truly met.[132] We have also, however, noted the tendency on the part of the European Court of Human Rights to allow states a wide margin of appreciation in determining whether or not there was a war or emergency threatening the life of the nation that required the derogation. In *A v United Kingdom* the Court reiterated this discretion, or margin of appreciation, noting that it fell to the national authorities (including the courts) to determine whether the perquisite of a derogation actually exists.[133] The applicants in the case had made three arguments to substantiate their claim that Article 15 was not fulfilled: (1) there was no actual or imminent emergency; (2) the alleged emergency was not temporary in nature and (3) the practice of other Council of Europe states suggested that there was no emergency.[134] The Court, however, rejected all of these claims in a manner that was, as already mentioned, decidedly deferential to the UK's assertions of risk and dangerousness.

Firstly the Court considered the matter of imminence and actuality. Demonstrating again a lack of willingness to examine closely claims of the existence in fact of a terrorist threat, the Court proceeded to lay down an understanding of imminence and actuality that appears to place no real or testable limits on a state's capacity to declare an emergency:

> Although when the derogation was made no al'Qaeda attack had taken place within the territory of the United Kingdom, the Court does not consider that the national authorities can be criticised, in the light of the evidence available to them at the time, for fearing that such an attack was 'imminent', in that an atrocity might be committed without warning at any time. The requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it. Moreover, the danger of a terrorist attack was, tragically, shown by the bombings and attempted bombings in London in July 2005 to have been very real.[135]

The latitude afforded states under this understanding is broad indeed. First of all, by the Court's acceptance that they can take repressive action on the basis of a 'fear' of imminent attack, bearing in mind how unlikely it is that authorities would be forewarned of an attack, national authorities appear to have been handed a licence to take advantage of the very same kinds of speculative risk assessments that we already said tend to

[132] See Chapter 3, pp. 102–7. [133] *A v United Kingdom* [2009] ECHR 301, paras. 173–4.
[134] *Ibid.*, para. 175. [135] *Ibid.*, para. 177.

characterise manufactured panic.[136] Under this definition it is difficult to imagine *any* situation in which a state could not fulfil the imminence requirement; after all it is in the nature of most terrorist organisations who wish to cause significant civilian harm to strike without warning. A terrorist attack could, whether we like it or not, happen at any time, in any place, without any warning. This understanding of imminence appears to me to align itself well with the concept that the only way to manage this kind of risk is through repression rather than with an acceptance of the impossibility of entirely eliminating the risk of such attacks. The reference in the latter half of the extracted portion of the judgment reproduced above to the attacks of July 2005 as evidence of a threat in 2001 when the derogation was entered, is, frankly, unhelpfully circular in nature and seems to invite states to use the reality of tragic instances combined with risk-related genuine popular panic to make easy arguments about emergencies that necessitate derogation.

Furthermore, the Court proceeded to hold in *A* that – quite in contrast to most international legal norms relating to emergencies[137] – there is no requirement under the ECHR for an emergency (and, as a consequence, a derogation entered to deal with an emergency) to be of a temporary nature. Rather the Court held:

> [T]he Court's case-law has never, to date, explicitly incorporated the requirement that the emergency be temporary, although the question of the proportionality of the response may be linked to the duration of the emergency. Indeed, the cases cited above, relating to the security situation in Northern Ireland, demonstrate that it is possible for a 'public emergency' within the meaning of Article 15 to continue for many years. The Court does not consider that derogating measures put in place in the immediate aftermath of the al'Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, can be said to be invalid on the ground that they were not 'temporary'.[138]

Not only, then, can a state declare an emergency and enter a derogation under Article 15 of the European Convention on Human Rights on what appear to be extremely slender materials that need only be asserted and are unlikely to be subjected to any substantive investigation by the Strasbourg Court, but any such derogation and emergency need not be temporary in nature. The derogation can exist for a great number of years; it can, in other words, become significantly entrenched. This

[136] See Chapter 1, pp. 19–21. [137] See Chapter 2, pp. 62–4.
[138] *A v United Kingdom* [2009] ECHR 301, para. 178 (internal citations omitted).

portion of the judgment not only threatens to fundamentally undermine the central concept of a division between 'emergency' and 'normalcy' that underpins the derogations regime in international human rights law,[139] it also exposes the difficulties introduced by the first part of the judgment as it related to the existence of an emergency. The emergency can, it seems, be declared even where there is no real imminence, in the sense in which we might generally understand it, and then remain entrenched for many years, because there is no requirement of temporariness. Notwithstanding the Court's important proviso that duration can form part of a proportionality analysis in deciding whether a derogation is or remains valid, the message being communicated to states interested in repressive counter-terrorist action is a worrying one.

The third prong of the applicant's argument that the derogation was unlawful because of the lack of an emergency satisfying Article 15 was that no other state in the Council of Europe had reacted to the attacks through derogation, therefore there was no emergency or threat of the magnitude to justify derogation. The Court dealt very shortly with this argument, holding that while it was striking it is in essence a matter for every state to decide how to deal with a threat to its security and that: 'Weight must . . . attach to the judgment of the United Kingdom's executive and Parliament on this question. In addition, significant weight must be accorded to the views of the national courts, who were better placed to assess the evidence relating to the existence of an emergency.'

It is, I think, true to say that the approach of the Court to the question of the existence of an emergency here was disappointing, deferential and ineffectual. The reasoning was unconvincing and has serious potential consequences for individual liberties and for the emergencies regime itself but it is also, it must regretfully be noted, quite consistent with the Court's deferential record towards states on this question of determination.[140] The second stage of litigation challenging derogations and the measures introduced thereunder – concerning the lawfulness of measures introduced on the basis of the derogation – has always tended to see a much greater degree of resistance to executive assertions by the Court.[141] This element of *A v United Kingdom* is not, then, terribly surprising perhaps but it is nevertheless worrying. The laxness of the reasoning in this case (and other such cases discussed in Chapter 2

[139] On entrenchment of emergencies see, e.g., O. Gross, '"Once More Unto the Breach": The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies' (1998) 23 *Yale International Law Journal* 437.

[140] See, e.g., Ní Aoláin and Gross, 'From Discretion to Scrutiny'. [141] *Ibid.*

above) allows for states to take exceptional advantage of fear and panic in a context of an alleged terrorist threat and, where that threat is said to come from an organisation that is – as Al Qaeda is represented to be – more fanatical, more fundamentalist, more dangerous and more difficult to manage than other organisations that represent a security risk, then the decision seems to grease the wheels towards the creation within the law of a space of potential repression. Once that space has been entered, keeping measures within an acceptable sphere of repression can be difficult; at that point the horse has bolted and we are attempting to recover it and repair the stable door. However, it is rarely possible to repair the door to its full functionality and the horse finds it difficult to forget the headiness of the space outside.

Theorising the relative resilience of international human rights law: the insulating factors

In general, international human rights law has appeared to display a relative resilience against powerful projections of panic from the US and the UK when it comes to the right to be free from arbitrary detention and its safeguard right to challenge the lawfulness of one's detention. The steady development of the right to challenge the lawfulness of one's detention into an impliedly non-derogable right seems to have continued throughout the 'War on Terror' with the insistence that review must be available to all detainees regardless of their alleged misconduct, assigned status (as 'enemy combatant', 'terrorist', etc . . .) or place of detention. The executive (and internal legislative) policies of both the US and the UK (although particularly the US) in the 'War on Terror' stand in strict contrast to this international standard and, if international law were equally susceptible to panic and to the expanded state power that results from it, one might expect that the state conceptions of the right to be free from arbitrary detention – especially when they emanate from hegemonic states such as the case study nations – would have an effect on the international conception on the right, either in terms of limiting its scope or its content. In large part, however, this has not been the case.

The resilience of international human rights law against these powerful projections of panic stands in sharp contrast to the ease with which domestic legislatures have facilitated the flow of power to the executive in the 'War on Terror'. It therefore seems that there may be something 'different' about international human rights law; some characteristics

that insulate it from the effects of both manufactured and popular panic to a greater degree than domestic law. In essence, my argument is that the differentiation arises from the distance that exists between international legal institutions, the site of a trauma, and 'the people'; or what is sometimes called the 'democracy deficit' of international law.[142] This distance can be said to manifest itself in four interlinked 'insulating factors', which are presented here as being structural, situational, constitutive and constitutionalist. In spite of difficulties associated with such distance from the perspective of 'democracy', these factors appear to make international human rights law a comparatively stable territory in times when domestic law is heavily influenced by both manufactured and popular panic that tends to usher in repressive laws and endanger core norms that may be more secure in international law in times of crisis. These four insulating factors – structural, situational, constitutive and constitutionalist – are axes upon which both the Anglo-American and international constitutional and political traditions and structures can be compared and conceptualised.

A structural factor

As we have already seen, domestic law-making institutions are structured in a manner that allows for quick responses to emerging crises or critical states of affairs. Even in states like the US and the UK where there is no complete emergency constitution, the 'give' that domestic law-making institutions afford to the executive itself acts as a model of accommodation; a characteristic that 'countenance[s] a certain degree of accommodation for the pressures exerted on the state in times of emergency, while, at the same time, maintaining normal legal principles

[142] Ilya Somin and John McGuinness have argued that international law, particularly customary international law, is so 'anti-democratic' that it ought not to be made part of domestic law by any means other than express legislative incorporation. Their argument is based on a quite formalistic conception of 'democracy' that deems the principle of law being made only by those given the power to do so by 'the people' particularly significant; see I. Somin and J. McGuinness, 'Should International Law be Part of Our Law?' (2007) 59 *Stanford Law Review* 1175. This perspective, which denounces international law as a result of its 'democratic deficit', is subject to a critique on the basis of the means by which international law is made, i.e. primarily by states, represented by executives, answerable to legislatures and the electorate, notwithstanding the role of what the authors describe as 'publicists', such as law professors, in international law-making. The 'democracy deficit' asserted may not, therefore, be as pronounced as Somin and McGuinness suggest.

and rules as much as possible'.[143] Mechanisms of accommodating emergencies vary from models that allow for legal institutions to be suspended in favour of dictatorial rule, to those that replace the 'normal' legal institutions with a system specifically designed for emergency situations, to martial law, to the maintenance but relaxation of normal legal rules, structures and institutions.[144] Both the US and the UK have some elements of these models in place. In the US the Constitution expressly provides for the suspension of *habeas corpus* in limited circumstances,[145] and in the UK the royal prerogative[146] and later the derogations regime reflected in the Human Rights Act 1998[147] allow for some limitation of rights. In addition to these limited models of emergency accommodation, the domestic legal systems of the US and the UK have shown themselves to be structurally conducive to swift action that is particularly dangerous to fundamental rights in times of strain when panic (both popular and manufactured) has a discernible impact on governmental cognition. While international human rights law itself is a model of accommodation inasmuch as it allows for derogations and demonstrates flexibility in times of strain,[148] its insulation from powerfully transmitted panic arguably ensures that the accommodation allowed remains strictly limited even in the face of great trauma resulting in the concert of popular and governmental desire for more repressive, rights-endangering action in the name of national security. If, as I argue, the international human rights law regime is less susceptible to panic than domestic law, it is likely that it would resist attempts to act repressively outside what is strictly permitted, whereas domestic law may allow the executive and legislature to expand the arenas in which repressive action can be taken. As the material presented in Chapters 3 and 4 demonstrate, this appears to be what has happened in the 'War on Terror'.

Domestic susceptibility to panic-related law-making can be, at least partially, explained by the structural capacity of the legislature to act

143 F. Ní Aoláin and O. Gross, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2007, Cambridge; Cambridge University Press), p. 9.

144 The range of 'typical' response-models in times of emergency is usefully considered in J. Ferejohn and P. Pasquino, 'The Law of Exception – A Typology of Emergency Powers' (2004) 2 *International Journal of Constitutional Law* 210.

145 Article 1(9)(2), US Constitution.

146 See, e.g., M. Drake, *Problematics of Military Power: Government, Discipline and the Subject of Violence* (2002, London; Frank Cass Publishing Ltd.).

147 s. 14, Human Rights Act 1998.

148 See Ní Aoláin and Gross, *Law in Times of Crisis*, Pt. II and see also Chapter 2 above.

relatively quickly in both jurisdictions. While both the US and the UK have bicameral legislatures, it is possible (and, indeed, frequently happens in times of urgency) for legislation to be passed in a relatively short period of time in both states.[149] In addition, in both countries the executive has some powers to act unilaterally. This is certainly so in relation to military matters, which are central to the 'War on Terror' (regardless of whether one accepts the 'war' label as valid in this context or not). In the US, Congress has the exclusive capacity to declare war;[150] however, it is by now clear that the executive can act militarily without this declaration and that a vague Authorization for the Use of Military Force (such as that introduced following the attacks of 11 September 2001)[151] gives the President a great deal of latitude to act militarily in a manner that he sees fit.[152] In addition, certain policy decisions can be taken and implemented without congressional involvement – such as the decision to hold suspected terrorists in Guantánamo Bay. In structural terms, therefore, it is possible that the authors of domestic law and policy can act with such swiftness as to intensify the potency of the availability heuristic because of lack of time and thereby increase the likelihood of law and policy that unnecessarily and disproportionately undermine individual rights in a manner inconsistent with international human rights law.

By contrast, international law-making institutions are relatively slow moving and the creation of international law can quite frequently take an appreciable amount of time. This results not only from the number of constituents with whom international law engages (such as states, international institutions and non-governmental organisations) but also from the dictates of state sovereignty and sovereign equality. In other words, because international law is fundamentally premised on the concept of all states as equal, the law-making processes must allow for all states to have an input into the final legislative product. This is so in almost all forms of international law: customary international law is formed only through the development of generalised state practice accompanied by *opinio juris* and necessarily takes an appreciable amount

[149] By means of example, both the USA PATRIOT Act and the Prevention of Terrorism Act 1974 were introduced extremely swiftly in the light of serious terrorist attacks. See, e.g., B. Howell, 'Seven Weeks: The Making of the USA-PATRIOT Act' (2004) 72 *George Washington Law Review* 1145 and D. Bonner, 'Responding to Crisis: Legislating against Terrorism' (2006) 121 *Law Quarterly Review* 602.

[150] Article I(8), US Constitution.

[151] Pub. L. Nos. 107–40, 115 Stat. 224 (2001).

[152] *Hamdi v Rumsfeld* 542 U.S. 507 (2004).

of time to be developed and/or amended and *jus cogens* even more so; multilateral international treaties are drafted over exceptionally long periods of time and through many different stages usually culminating in a multinational conference or plenipotentiary to discuss and approve the final wording. It is perhaps only in the making of bilateral agreements and Security Council Resolutions that international law-making can take place at a swifter pace.

As a matter of international law, all states are obliged to take into account their international legal obligations in the creation of bilateral agreements and any treaties that offend against *jus cogens* norms are invalid.[153] In reality, bilateral agreements reached in the light of the 11 September 2001 attacks have not always complied with the principles of international law; this is particularly so in relation to extraordinary rendition, a process which comprises *inter alia* violations of an individual's right to challenge the lawfulness of detention as the detention is frequently 'unacknowledged'.[154] The making of bilateral agreements of this nature differs fundamentally from the making of multilateral treaties because: (1) the number of constituent parties is clearly far smaller, (2) the drafting process is likely to be much swifter, with consensus being easier to achieve, (3) power imbalances between parties are not easily resolvable by the creation of voting blocks as is the case in the negotiation of multilateral treaties and (4) directly-affected and therefore panicked states are likely to impart more influence on the content and implementation of bilateral agreements than is the case in relation to multilateral agreements. Thus, a panicked party – such as a nation that suffers under a (perceived or actual) threat of relatively imminent terrorist attack – appears capable of imposing their panic-induced priorities on the bilateral treaty-making process more easily than is the case in multilateral treaty-making processes. As a result, bilateral treaties of this nature can be said to be more susceptible to panic-induced law and policy; the closer the sources of law are to the panicked populace the more likely it is that the law produced from their processes will be influenced by panic-related considerations.

Security Council Resolutions are made more quickly than other forms of international law because of the fact that there are fewer participants in the process: only the fifteen members of the Security Council are

[153] Article 53, Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* 27 January 1980.

[154] See, e.g., P. Weissbrodt and A. Bergquist, 'Extraordinary Rendition: A Human Rights Analysis' (2006) 19 *Harvard Human Rights Journal* 123.

directly involved and, even then, the five permanent members hold a disproportionate amount of influence over the wording of the Resolution as a result of their veto power. Bianchi notes that:

> [T]hriving on the absence of other expedient law-making mechanism apt to produce general law and resorting to its powers under Chapter VII of the Charter, the Security Council has since taken on itself the dual tasks of imposing obligations of a general character on states and of targeted sanctions against individuals and corporate entities allegedly affiliated to the international terrorist network of Al-Qaeda.[155]

As considered above, in Resolution 1373 (2001), for example, the Security Council imposed Chapter VII obligations on states to, *inter alia*, suppress the financing of terrorism,[156] deny support to terrorism including the provision of safe haven,[157] ensure that their territories are not used to carry out or facilitate terrorist activity[158] and ensure that those involved in terrorism are 'brought to justice'.[159] The Security Council's reaction to the 11 September 2001 attacks thus represented something of a change from established practice: although targeted sanctions had been in use against the Taliban since 1999[160] and Osama Bin Laden and Al Qaeda since 2000,[161] the Security Council had previously confined itself to the creation of resolutions in connection with specific incidents and imposing specific obligations. By Resolution 1373, in particular, the Security Council appeared to have moved into a period of general law-making which both the US and the UK have described as historic and highly significant.[162] Resolution 1373 can be said to be one of the primary sources of both the Security Council's subsequent counter-terrorist resolutions and post-11 September 2001 counter-terrorism legislation in the majority of domestic legal systems,[163] and its significance must therefore

[155] A. Bianchi, 'The Security Council's Anti-Terror Resolutions and Their Implementation by Member States' (2006) 4 *Journal of International Criminal Justice* 1044, 1045.

[156] SC Resolution 1373 (2001), para. 1.

[157] SC Resolution 1373 (2001), para. 2.

[158] *Ibid.*

[159] SC Resolution 1373 (2001), para. 2(e).

[160] SC Resolution 1267 (1999) – sanctioning the Taliban for harbouring and training terrorists in Afghanistan.

[161] SC Resolution 1333 (2000) – extending SC Resolution 1267 (1999) to Osama Bin Laden, Al Qaeda, and affiliates.

[162] See, e.g., UK 2001 Report to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001, UN Doc. S/2001/1232 and US of America 2001 Report to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council Resolution 1373 (2001) of 28 September 2001, UN Doc. S/2001/1220.

[163] K. Roach, 'Sources and Trends in Post 9/11 Anti-Terrorism Laws' in Goold, B. and Lasarus, L. (eds.), *Security and Human Rights* (2007, Oxford; Hart Publishing), p. 227.

not be underestimated. The above analysis of the Resolution and its progeny, however, reveals that while the initial reaction to the attacks was both radical and unprecedented and may, therefore, have been inspired, to at least some degree, by fraternal panic, the development of the Security Council's resolutions and enforcement mechanisms in the intervening years has shown a move towards the integration of rights and security concerns. Thus, even if Resolution 1373 did indicate the Security Council's propensity towards some panic-related law-making, subsequent developments suggest a rejection of a panic-related security v. liberty dichotomy, and an embrace of long-term strategies recognising the necessity of handling the ubiquitous threat of violence from transnational non-state actors in a manner that does not unduly compromise the democratic values – including human rights values – of the international community.

A situational factor

In the light of a major terrorist attack, the domestic legal system is saturated with the trauma that catalysed the panic and endures a cognitive proximity to that trauma that makes rational and deliberative decision-making particularly difficult. When one recalls, in particular, the relevance of imaginability to degrees of salience, which then has a knock-on impact on the potency of the availability heuristic on decision-making, this situational proximity becomes a particularly important consideration. Unlike domestic law- and policy-makers, most international actors enjoy a cognitive distance from the site of the trauma that gave rise to the panic. As a result, the availability heuristic is not likely to be as potent and, while terrorist attacks will be salient for the international community, they seem unlikely to present the same level of salience as for domestic actors because they do not threaten the entire community in the way in which the community within a state is likely to be threatened and to feel collectively victimised by a massive terrorist attack and an essentially unmanageable terrorist threat. Decision-making, which is slowed down by the institutional mechanisms in any case and tempered by the entrenchment of global values considered below, is therefore less influenced by salience and confirmation biases. As a result, international law seems less likely to default to security in a manner that excessively violates individuals' rights to challenge the lawfulness of their detention.

A constitutive factor

Constitutive considerations may also play an important role in explaining the susceptibility of domestic law to panic-related law-making, undermining and in some cases extinguishing the right to *habeas corpus* or adequate alternative. As we have seen throughout this book so far, popular and manufactured panic can have an important impact on what people want their governments to do. The focus moves to security in the aftermath of a terrorist attack and the populace, experiencing collective victimisation from what appears to be an indiscriminate form of violent crime, demands state action. Electoral demands are particularly important to law- and policy-makers because, in the case of the US and the UK, they are only one degree removed from and in fact entirely dependent upon the electorate. Therefore the demands of 'the people' become the survival techniques of the elected. The people's desired response therefore becomes an agenda for governmental action, joining with the state's interest in the expansion of its power to act. International lawmakers do not work at this level of proximity to either trauma or the people, meaning that the potent impact of the ballot box is felt less keenly. This has been described by some as a democratic deficit that is particularly worrying for international law,[164] but in the context of emergencies and terroristic crises we can argue that, in fact, this alleged democratic deficit can help to maintain democratic values and protect them from the repressive impact of panic.

A constitutionalist factor

Where a state conceives of the protection of 'its people' as its primary moral obligation, rights can play a fluctuating role. In times of peace, the state guarantees rights to the greatest degree but in times of 'war' or other security crises these rights can be limited. International human rights law also allows for the limitation of rights in times of emergency through the derogation process; however, there are a number of important distinctions. Domestic legal systems traditionally have a strong theory of deference – if the political branches hold that certain rights restrictions are required in the name of 'security' the judicial branches traditionally defer to that conclusion. In international law, on the other hand, deference is less prominent (although not entirely absent,

[164] Somin and McGuinness, 'Should International Law be Part of Our Law?'

particularly in the case of the European Court of Human Rights) and the legal standards for derogation are at least *prima facie* evidence based. In addition, the right to challenge the lawfulness of one's detention – which we have already seen is an essential mechanism for safeguarding the right to be free from arbitrary detention[165] – is generally capable of limitation or suspension in domestic legal systems, which is not always the case in international law, where a concern with purposive and effective interpretation and application of international human rights norms has resulted in the evolution of a 'non-derogable' status for the right.[166]

The international community has developed a set of values that is essential to any understanding of the laws and policies that it introduces, and which is increasingly being documented and discussed in the project of the 'constitutionalisation of international law'. While the concept of a 'global value' is somewhat elusive, John Kekes's pluralist idea of 'possibilities whose realisation may make lives good' is apposite.[167] The entire international project of constitutionalisation was motivated, primarily, by a desire to achieve the global value of international peace and security and, as part of that value, the concept of formalised and enforceable human rights was developed.[168] In this respect international law is not fundamentally different from domestic law, which also considers the protection of rights and the limitation of state action a valuable and core concept. In times of substantial panic, however, structural, situational, and constitutive factors appear to have the potential to undermine these core norms in the domestic legal system. In contrast, the story of international law's reaction to the transformative surge of the US and the UK that is recalled in this chapter, suggests that those same factors may not be as 'successfully' transmitted in the international sphere, potentially resulting in a more resilient normative core.

The protection and promotion of human rights now seems to be a primary global value, as reflected by its centrality to the reform agenda of the UN,[169] its resurgence in the UN's counter-terrorist strategy and its

[165] See Chapter 2 above.
[166] Somin and McGuinness, 'Should International Law be Part of Our Law?'
[167] J. Kekes, *The Morality of Pluralism* (1993, Princeton; Princeton University Press), p. 27.
[168] David Forsyth has remarked upon how the development of human rights emerged from realist requirements of peace and security; see D. Forsythe, *Human Rights in International Relations* (2000, Cambridge; Cambridge University Press), p. 35.
[169] See K. Annan, *We the Peoples: the Role of the United Nations in the Twenty-First Century*, UN Doc A/54/2000 (27 March 2000); K. Annan, *In Larger Freedom: Towards Security, Development and Human Rights for All*, UN Doc A/59/2005 (21 March 2005).

resilience within international political discourse and rhetoric.[170] Not only is the protection and promotion of human rights a 'value' within the international community, but it is also accompanied by organisational rules for its support and realisation. These organisational rules are, in essence, the central international human rights treaties,[171] customary international law (which includes the right to challenge the lawfulness of detention[172]) and *jus cogens*. These organisational rules interact with international law- and policymakers and, because they reflect ingrained and foundational values of the international system, provide valuable guidance and limitation of action in the way that constitutional provisions normally do in domestic legal systems. Whereas domestic constitutional limitations might be pushed to one side by an expansionist executive facilitated by a panicked legislature, this seems unlikely to happen to the same degree in the international sphere because of international law's structure (which requires slower and more considered action than does domestic law), its cognitive distance from the site of trauma, and the detachment of its multiple constituents relative to that of domestic lawmakers and 'the public'. This 'slowing down' effect of international law is complemented by the continuous evolution of the idea of a 'global society'[173] constructed through a human rights lens.

Conclusion

The story presented in this chapter points towards the conclusion that international human rights law is capable of withstanding exertions of power from hegemonic states in favour of the maintenance and, in some cases, strengthening of individual rights. Undoubtedly this resilience is imperfect, however there appears to be significant robustness to international human rights law that itself seems to be capable of having a

[170] This is particularly reflected in the development of what Susan Marks calls 'the project of cosmopolitan democracy'; S. Marks, *The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology* (2000, Oxford; Oxford University Press), Ch. 5.

[171] Identified by Kofi Annan as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, United Nations Convention on the Rights of the Child and the United Nations Convention Against Torture: K. Annan, *Global Values: The United Nations and the Rule of Law in the 21st Century* (2000, Singapore; Institute of South-East Asian Studies), p. 11.

[172] See Chapter 2 above.

[173] Annan, *Global Values*.

rights-promoting impact on the activities of even the Security Council. Building on the understanding of panic as both top-down and bottom-up, this chapter speaks to the relatively insulated nature of international legal institutions' reaction to panic, which restricts the growth of a politico-legal space within which excessively repressive laws and policies can be introduced and enacted in the name of security.

In spite of this resilience it remains arguable that realist arguments relating to the potential for international law to exert an effective exogenous force on states may nevertheless stand. According to realist theory, even if international legal standards cannot be brought in line with powerful states' policies and priorities, these standards lack the capacity to effect state action from the outside. Realist theory also predicts that powerful states whose demands for more accommodation in international law are not met will withdraw – at least temporarily – and turn instead to their domestic legal systems. The turn to domestic law in the context of the 'War on Terror' is clearly demonstrable, but the behaviour of the executive and legislature ought not to be taken to be the end of the domestic legal story, for those actions can ultimately be tested before the courts. Indeed, the way that domestic courts – and especially apex courts – approach these matters is key to assessing the significance of the normative resilience of international human rights law. If those international norms are strong but essentially external to the domestic legal processes, then they risk categorisation as something of a lighthouse in a bog: brilliant, but useless.

If, in contrast, it were the case that there has been a reduction of deference on a rights-related basis by apex courts during the 'War on Terror' and that there is some connection between the apparent resilience of international human rights law and the reduction in judicial deference in domestic courts, this would pose a very significant challenge to realist conceptions of international law's capacity to exert any exogenous force on domestic law. It is time, then, to examine the judicial approach to counter-terrorist detention and the right to challenge the lawfulness of one's detention in the superior courts of the US and the UK.

6

Judicial responses to counter-terrorist detention: rights-based resistance?

It is one thing to say that international human rights law may have posed a serious challenge to neo-realist theories of international law and international relations by maintaining the integrity of the right to be free from arbitrary detention and insisting upon the relevance of human rights norms in the 'War on Terror'. It is quite another, however, to say that this matters in some way to how states behave. Neo-realist theory claims that international law is incapable of exerting an effective exogenous force on its own; that where international law will not recalibrate to fit the preferred vision of the hegemon, powerful states will simply withdraw from it until the crisis has passed or international law has gradually reshaped itself. While both the US and the UK have continued to participate in the institutions of international law and to engage with enforcement bodies, there have been some indications of a partial withdrawal. The US, for instance, intimated that the unfavourable conclusions[1] of the Committee against Torture on detention of suspected terrorists in Guantánamo Bay and elsewhere were beyond that Committee's remit and may have been inserted by people with a separate 'agenda'.[2] As a result, John Bellinger claimed that, although the US would not stop interacting with treaty enforcement bodies, the report 'raise[s] questions about when we show up before the committee, prepare an enormous amount of material for them and they ignore it, whether that is . . . a productive use of our time'.[3] In the UK, the Human Rights Act 1998 (incorporating the European Convention on Human Rights) has been repeatedly represented as an obstacle to required counter-terrorist

[1] Concluding Observations, US of America, CAT, CAT/C/USA/CO/2 (2006).

[2] J. Bellinger, On-the-Record Briefing on the Committee against Torture Report, 19 May 2006, available at http://web.archive.org/web/20060922230812/http://useu.usmission.gov/Dossiers/Detainee_Issues/May 1906_Bellinger_UN_Torture.asp (last accessed 21 February 2011).

[3] *Ibid.*

action and, in the years leading up to the 2010 general election, there was much discussion about replacing or supplementing the Human Rights Act 1998 with a so-called 'British Bill of Rights'.[4] However, quite apart from the executive and the legislature, whose activities in relation to counter-terrorist detention in the 'War on Terror' we have already considered, the role of courts remains to be considered.

Courts cannot pass law, or decide on foreign policy; those are properly activities of the legislature and the executive. What courts can do, however, is consider whether the laws and policies that have been shaped and implemented by the other branches of government are within the bounds of those branches' institutional capacities and the state's internal constitutional bargain. Where the boundaries of institutional capacity lie is a deceptively complex question, and one that we do not need to engage in here in any great depth except to note that in both the US and the UK one of those boundary lines is made up of what we know as 'human rights' (or, in the US constitutional discourse, 'civil rights'). In the US the doctrine of constitutional supremacy as developed in *Marbury v Madison*[5], and now considered a core element of the Constitution, provides that courts can declare a law invalid for unconstitutionality, including incompatibility with constitutional rights-protections. Rather than constitutional supremacy, the UK constitutional system is premised on parliamentary sovereignty. The concept of parliamentary sovereignty and its changing nature is itself the subject of extensive scholarly debate,[6] but for our purposes we might adopt Dicey's well-known definition to outline its primary features:

> The principle of Parliamentary Sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.[7]

[4] For an analysis see R. Smith, 'Human Rights and the UK Constitution: Can Parliament Legislate "Irrespective of the Human Rights Act"?' (2006) 6 *Legal Information Management* 274; Joint Committee on Human Rights, *The Human Rights Act: the DCA and Home Office Reviews* (2006), available at, www.official-documents.gov.uk/document/cm70/7011/7011.pdf (last accessed 21 February 2011).

[5] 5 U.S. 137 (1803).

[6] See, e.g., J. Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (2010, Cambridge; Cambridge University Press); A. Young, *Parliamentary Sovereignty and the Human Rights Act* (2009, Oxford; Hart Publishing).

[7] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn., (1915, London; Macmillan), pp. 3–4.

Of course, and as is well known, one of the implications of the doctrine of parliamentary sovereignty is that not even the highest court of the UK – the UK Supreme Court and, before its establishment, the House of Lords – can invalidate a law properly passed by Parliament. The introduction of the declaration of incompatibility in the Human Rights Act 1998 does not change this. A declaration of incompatibility can be handed down where the court finds a law to be incompatible with the European Convention on Human Rights as incorporated in the 1998 Act.[8] Such a declaration does not, however, prevent the continuing operation of the law in question;[9] the position then becomes one of politics although, in practice, such a declaration is quickly acquiring a cultural status that suggests a government would essentially never refuse to amend a law in relation to which such a declaration had been made.[10]

Rights, then, are one of the bases upon which domestic courts in the US and the UK can mark counter-terrorist behaviour as legally (un) acceptable. Because of the operation in both jurisdictions of the common law principle of *stare decisis* the decisions of apex courts – which we focus on in this chapter – are particularly important indicators of what is and is not permissible in the name of 'national security'. The historical record of these apex courts in the context of crisis, panic, fear and repression is not one that we might describe as glowing from a human-rights based perspective. In fact, in both the US and the UK the record shows a very deferential approach by apex courts to action represented as being required in the name of 'national security'. In this context deference is taken to mean 'the latitude to be accorded by the courts to the discretionary judgment of the original decision-maker'.[11] The classic cases of *Korematsu*[12] (in the US) and *Liversidge*[13] (in the UK), which are considered below, show that, in practice, this kind of deference

[8] s. 4, Human Rights Act 1998. [9] s. 4(6)(a), Human Rights Act 1998.

[10] The evidence from the UK in this regard is quite positive. In the UK, as at 18 June 2008, fifteen (final) declarations of incompatibility had been made; eight of these were remedied by later primary legislation, and one by remedial order under s. 10 of the Human Rights Act 1998, while three related to provisions that had already been remedied by primary legislation at the time of the declaration. The remaining provisions were at that date undergoing review: J. Beatson, S. Grosz, and T. Hickman *et al.*, *Human Rights: Judicial Protection in the United Kingdom* (2008, London; Sweet & Maxwell) paras. 5–154.

[11] T. Zwart, 'Deference Owed under the Separation of Powers', in Morison, J., McEvoy, K. and Anthony, G. (eds.), *Judges, Transition and Human Rights* (2007, Oxford; Oxford University Press), p. 73 at p. 74.

[12] *Korematsu v United States* 323 U.S. 214 (1944).

[13] *Liversidge v Anderson* [1942] AC 206.

has translated into something close to *carte blanche* being given to governments in past periods of insecurity and crisis. The fear at the start of the 'War on Terror' must surely have been that we would witness a reproduction of these deferential trends, leaving the liberty of the suspected terrorist 'other' at the mercy of a panicked and fearful group of folk saints ushered in by a cadre of moral entrepreneurs and led by a politically aware and expansionist political class.

If the judiciary were to continue with the traditional deferential pattern in this context, then the turn towards domestic law and away from international law, theorised by Nico Krisch as the response of powerful states unhappy with international law's behaviour,[14] would appear to perfect the executive's desire to act in a repressive manner and in breach of international human rights law standards *notwithstanding* the normative resilience displayed by the right to be free from arbitrary detention. If, however, domestic courts bucked this trend, then some explanation for the reduction in deference would be required. Looking at the cases relating to contemporary counter-terrorist detention in the US Supreme Court and the UK House of Lords, there seems to be a discernible reduction in deference and, in its stead, a resistance to repressive laws and policies. Furthermore, that resistance has in large part been expressed in a rights-enforcing manner and the courts have occasionally reached for international law. Even where international legal standards have not been expressly referred to by the domestic courts, domestic legal standards appear to me to have sometimes been restructured in a manner similar to the structures and standards that apply in international human rights law in times of emergency. Could it be, then, that judicial responses to counter-terrorist action may have transformed the external resilience of international law into internal resistance in domestic law in the context of counter-terrorist detention?

Judicial deference and security-related detention

The extensive deference that the US Supreme Court and the UK House of Lords has tended to afford to executive and legislative determinations of risk, dangerousness and necessity in times of major national security crisis has tended to allow for continuing repression in the name of

[14] See N. Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *European Journal of International Law* 369.

security. In particular, judicial deference has allowed for the continuing violation of the right to liberty, sometimes for years. These kinds of decisions had the effect of both facilitating desired panic-related law-making (by creating the expectation that such laws would not be subjected to weighty rights-based analysis by the judiciary) and of suggesting that domestic constitutional structures in both states would allow for the imposition of counter-terrorist detention notwithstanding any unexpected resilience on the part of international human rights law. This pattern – exemplified in the context of detention by *Korematsu* and *Liversidge* – did nothing to mitigate panic-related desires for detention in the wake of the 11 September 2001 attacks.

Korematsu concerned Executive Order No. 9066 by which President Roosevelt authorised the military to exclude Japanese-Americans from areas deemed particularly significant from a national-security perspective. The petitioner in this case – Fred Korematsu – defied the military order and remained at his home in San Leandro, California. As a result, he was convicted of evading internment. The US Supreme Court upheld the Executive Order and Mr Korematsu's conviction. Delivering the judgment of the Court, Justice Black acknowledged the hardship that moving a group of people away from the area where they lived and worked could cause, but held that:

> [H]ardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.[15]

It was the military, the Supreme Court held, that would decide whether and how particular citizens would feel these hardships more keenly than others and the extent to which a measure was necessary given the perceived security threat. These decisions, Justice Black held, were not for the Court but for the political branches (i.e. the executive and the legislature) to make and were to be afforded deference and, indeed, the benefit of the doubt against *prima facie* racist, or 'othering', motivations:

[15] *Korematsu v United States* 323 US 214, pp. 219–20 (1944).

> To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders – as inevitably it must – determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot – by availing ourselves of the calm perspective of hindsight – now say that at that time these actions were unjustified.[16]

These excerpts show that the same kind of patterns that we have already considered in the context of the 'War on Terror' – the primacy of moral entrepreneurs, the language of difference and dangerousness, and the rhetoric of (selective) human rights sacrifice – were present in the 1940s as well. *Korematsu* is hardly a high-point in the jurisprudence of the US Supreme Court and, indeed, Fred Korematsu's conviction was subsequently quashed in 1983.[17] When quashing the conviction, Judge Patel of the US District Court for the Northern District of California eloquently summarised the lessons that ought to have been learned from a case such as *Korematsu* thus:

> *Korematsu* remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.[18]

Korematsu tells an important story about judicial deference; it demonstrates the doctrine's deep roots in the American constitutional tradition,

[16] *Ibid.*, p. 223. [17] *Korematsu v US*, 584 F. Supp. 1406 (N.D. Cal. 1983).
[18] *Ibid.*, p. 1441.

substantiates the executive and legislative expectation that when crisis emerges courts take a step back, and testifies to the reality that the overstating of security concerns to the detriment of liberty interests can be facilitated by judicial deference. An empirical study into the degree of judicial deference in times of war or other crisis in the US, undertaken by Epstein *et al.*, demonstrates that *Korematsu* is not an anomalous judgment.[19] Rather, they find that the evidence of Supreme Court cases from 1941 to 2001 shows not only that curtailments on civil liberties and individual rights in general are more easily tolerated by the judiciary in a time of crisis, but that measures represented as being directly related to 'war' or 'emergency' receive a high degree of deference whether there is a declared war or not. In their analysis:

> [W]hen cases are directly related to the war, the traditional liberal-conservative dimension . . . becomes less meaningful. For cases that are directly related to the war or conflict, the Court seeks to shift responsibility towards Congress and the Executive . . . However, war appears to have no effect on the conservatism of the Court's decisions in cases closely related to an ongoing military conflict. In those cases, the Court retreats from its usual security-versus-liberty focus of decision making to a focus on institutional process.[20]

In an in-depth study, Natsu Taylor Saito identifies the plenary power as the basis for both the asserted right to 'exclude' Japanese-Americans and the contemporary claims of executive power to detain 'enemy combatants' whether citizen or not.[21] She further identifies the long pedigree of judicial deference where this plenary power is invoked,[22] thus suggesting that the detention-related 'War on Terror' policies ought, by reference to precedent, to be insulated from judicial oversight because of a deferential approach. Indeed, *Korematsu* has re-emerged in the post-9/11 *milieu* as an argument in favour of deference and judicial constraint.[23]

The concept of judicial deference also has a long pedigree in the UK courts and is given a particular force by the long-standing doctrine of

[19] L. Epstein, D. Ho, G. King, and J. Segal, 'The Effect of War on the Supreme Court' (2005) 80 *New York University Law Review* 1.

[20] *Ibid.*, p. 109.

[21] N. Taylor Saito, *From Chinese Exclusion to Guantánamo Bay: Plenary Power and the Prerogative State* (2007, Boulder, CO; University Press of Colorado).

[22] *Ibid*, Ch. 2.

[23] See, e.g., M. Tushnet, 'Defending *Korematsu*: Reflections in Civil Liberties in Wartime' in Tushnet, M. (ed.), *The Constitution in Wartime: Beyond Alarmism and Complacency* (2005, Durham; Duke University Press), p. 124.

parliamentary sovereignty.[24] As well as this general principle of deference resultant from parliamentary sovereignty, judicial deference to executive and legislative decision-making in times of crisis was well established in the UK prior to the 11 September 2001 attacks.[25] In *Liversidge v Anderson*[26] the House of Lords was asked to consider whether an individual detained pursuant to an order by the Home Secretary, which itself would be based on Regulation 18B of the Defence (General) Regulations 1939[27] could challenge that detention in court. Regulation 18B allowed for the Home Secretary to make an order for detention if he had 'reasonable cause to believe [the detainee] to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the realm or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over [the detainee]'. The challenge was, in essence, to the assertion by the Home Secretary that he could not be compelled to produce particulars of the 'reasonable cause to believe' that itself formed the basis for the detention. In a majority decision, the House of Lords held that the Home Secretary should not be so compelled and, in the course of doing so, exhibited a very high degree of deference.[28]

Given the realities of the time – in the middle of World War II – it is somewhat unsurprising that the House of Lords generally accepted the assertion that there was a crisis of security and degree of dangerousness that the government had to deal with. More worrying from a rights-based perspective is the extremely broad latitude – essentially absolute discretion – afforded to the government to counter this threat. A number of Law Lords noted that the wording of Regulation 18B, including its reference to the Home Secretary's 'reasonable cause to believe' and determination that 'it is necessary to exercise control over' the detainee, marked this as an area 'so clearly for executive discretion and nothing else that I cannot myself believe that [anyone] could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge

[24] B. Dickson, 'The House of Lords and the Northern Ireland Conflict – A Sequel' (2006) 69 *Modern Law Review* 383.

[25] See, e.g., *R v Halliday, ex parte Zadig* [1917] AC 260; *Liversidge v Anderson* [1942] AC 206; *Chandler v DPP* [1964] AC 763; Zwart, 'Deference Owed under the Separation of Powers', p. 73.

[26] [1942] AC 206.

[27] These regulations were introduced by the King on foot of s.1(1), Emergency Powers (Defence) Act 1939.

[28] The only dissenting speech was that of Atkin LJ ([1942] AC 206, pp. 225–47).

in a court of law'.[29] In addition, there was majority agreement that in many cases the relevant information would be of such a sensitive nature that it ought not to be disclosed to a court, not to mention being disclosed to a detainee.[30] A number of Law Lords also noted that the unreviewability of the Home Secretary's decision in court did not mean that the Secretary would be acting without any constraints whatsoever; rather, parliamentary and political accountability were present.[31] In his dissent, Lord Atkin noted that '[t]hese safeguards are nothing compared with those given to a man arrested by a constable who must at once be brought before a judicial tribunal who investigates the case in public'.[32] In addition, the effectiveness of such parliamentary and political safeguards looks very slight indeed when one bears in mind the role that panic and fear can play in the types of decisions taken by Parliament (and, more broadly, within politics) at a time of violent crisis. This certainly calls into question the words of Lord MacMillan who opined that '[t]he safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. If extraordinary powers are here given, they are given because the emergency is extraordinary and are limited to the period of the emergency.'[33] Perhaps most deferentially, there was a widespread acceptance among the majority that in times of emergency and war certain individual rights – including the right to liberty – were capable of sacrifice in the cause of the greater national safety and security,[34] and that decisions as to this sacrifice – and particularly as to who was to make the sacrifice – could not be judicially supervised.[35]

Liversidge was not a decision that lived in the difficult times of World War II alone; its sentiment and the core commitment within it to judicial deference in situations of violent emergency remained during the Troubles in Northern Ireland. In a comprehensive study of the performance of the House of Lords in relation to Northern Ireland, Steven Livingstone exposed a clear pattern of deference towards the executive.[36] In his consideration of detention-related cases, in particular, Livingstone found that:

[29] [1942] AC 206, p. 220, *per* Viscount Maugham.
[30] *Ibid.* pp. 221–2, *per* Viscount Maugham; p. 254, *per* MacMillan LJ.
[31] *Ibid.*, p. 222 *per* Viscount Maugham.
[32] *Ibid.*, p. 223.
[33] *Ibid.*, p. 261 *per* MacMillan LJ.
[34] See also *R v Halliday* [1917] AC 260.
[35] See especially [1942] AC 206, p. 257, *per* MacMillan LJ.
[36] S. Livingstone, 'The House of Lords and the Northern Ireland Conflict' (1994) 57 *Modern Law Review* 333.

> [T]he House of Lords declined to read emergency powers strictly to uphold only clear derogations from common law principles. Instead, emergency powers were given a broad reading on the pragmatic basis . . . that exceptions from established principles were necessary in the conflict situation of Northern Ireland. An opportunity thus to assert the values of the rule of law even in an extreme situation was thereby declined.[37]

Since the passage of the Human Rights Act 1998, the UK courts have consistently asserted that at least some judicial deference ought to be afforded to parliamentary and executive assessments of compliance with the European Convention on Human Rights, primarily on the basis of the democratic nature of parliamentary processes. Thus in *Brown v Stott*,[38] for example, Lord Steyn held:

> Just as there are circumstances in which an international court will recognise that national institutions are better placed to assess the needs of society, and to make difficult choices between competing considerations, so national courts will accept that there are some circumstances in which the legislature and the executive are better placed to perform those functions.[39]

The UK courts have also, however, developed a pattern of subjecting decisions relating to particular rights protected in the European Convention on Human Rights to more stringent curial scrutiny than may perhaps have previously been the case.[40] In this respect it appears that the nature of the right at issue is significant,[41] even where the action challenged falls within the realm of 'national security' (including

[37] *Ibid.*, 346; But see also Brice Dickson's recent reassessment of Livingstone's conclusions which notes that, while largely right, Livingstone could have paid more attention to the influence of factors such as parliamentary sovereignty on the House of Lords' capacity to act in a rights-protecting way; Dickson, 'The House of Lords and the Northern Ireland Conflict – A Sequel'.

[38] [2003] 1 AC 681, p. 703.

[39] *Ibid.*, p. 711, citing A. Lester and D. Pannick, *Human Rights Law and Practice* (1999, London; Butterworths), p. 74.

[40] For an excellent analysis of this emerging trend see Zwart, 'Deference Owed under the Separation of Powers', p. 73.

[41] See, particularly, *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, p. 381 *per* Lord Hope: 'In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention . . . It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified.'

counter-terrorism) – an area in which significant judicial deference has normally been in evidence.[42]

The deference debate

Although both the US and the UK have established principles of judicial deference, these principles differ in a significant respect. In the US the Constitution enjoys supremacy and the federal courts have the power to strike governmental action down as unconstitutional.[43] This is not the case in the UK where courts can identify the inconsistency of legislation with principles of the common law, the rule of law,[44] the requirements of the European Convention on Human Rights,[45] or other principles of international law but do not have the power to strike law down. Thus the general – or 'non-emergency' – operation of deference between the two states is different: in the US there is likely to be very limited deference in peacetime whereas there is always *some* degree of deference to Parliament in the UK. In times of crisis, emergency or war, however, both states historically exert deferential patterns towards the political branches of government. Numerous scholars have argued that judicial deference of the type typically displayed in times of crisis ought also to be displayed by the courts in the US and the UK in the 'War on Terror'. While these arguments emanate mostly from the US, they rely to a minimal degree on constitutional structures for their reasoning. Rather, arguments for judicial deference of some kind in the 'War on Terror' are primarily based on conceptions of the relationships between security and liberty and on the different competencies of institutions of the state.

Posner and Vermeule are forceful in their contention that, in times of terrorism, the courts ought to take a step back.[46] They advance their position on the basis of three related claims: (1) the executive is best placed to assess what is needed in a time of emergency, (2) there is no reason to believe that government decision-making will have a security bias in times of crisis, and (3) there is no reason to believe that judicial intervention would make things better, even if governmental decision-making *was*

[42] For statements of the fact that national security, foreign relations and counter-terrorism traditionally enjoin judicial deference, see, e.g., *Huang v Home Secretary* [2005] EWCA Vic 105, para. 52, *per* Laws LJ; *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, p. 381, *per* Lord Hope.

[43] *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803).

[44] s. 1, Constitutional Reform Act 2005. [45] s. 4, Human Rights Act 1998.

[46] E. Posner and A. Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (2007, New York; Oxford University Press).

biased in favour of security. The first two of these claims is severely challenged by the well-documented patterns of panic that emerge in times of either genuine or imagined crisis and which, as outlined in Chapter 1, can result in the executive desire to expand state power coalescing with the popular demand for 'absolute security' in a manner that facilitates the creation and implementation of repressive laws and policies. Although Posner and Vermeule contend that governmental decision-making might as easily show a bias towards 'liberty' as towards 'security' in such circumstances, their analysis does not properly take into account either the historical patterns of expansionism in counter-terrorist laws and policies or the ballot-box effect of a traumatised, panicked and collectively victimised populace.[47] The third of their supporting arguments – that there is no reason to believe that judicial decision-making would be 'better' from a rights perspective – seems *prima facie* to be borne out by the historical pattern of deference that we considered above, but is not an inevitable state of affairs. In fact, we will see that there has been a significant reduction in deference when it comes to counter-terrorist detention cases in the 'War on Terror' that calls this third prong of their argument into question. All three of Posner and Vermeule's supporting arguments are reliant on the acceptance of a basic premise of Posner and Vermeule's work: that there is a 'security-liberty frontier'[48] (i.e. a conceptual place of interaction between the two as a result of their inter-relationship), meaning that 'no win-win improvements are possible . . . any increase in security will require a decrease in liberty, and vice versa'.[49]

All accommodation models of law accept that it may be impossible to enjoy absolute security *and* absolute liberty at the same time; as Lawson writes: '[w]hile there can be specific policies that are *defended* as pro-security that in fact exact substantial liberty costs with little or no actual gain in security, it strains plausibility to think that liberty and security will never tug in opposite directions'.[50] We have already seen that international human rights law accepts the proposition that there may be times when some liberty-deprivation is required in order to acquire additional security. The manifestation of the so-called trade-off thesis in

[47] See Chapter 1 above and F. de Londras and F.F. Davis, 'Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight' (2010) 30 *Oxford Journal of Legal Studies* 19.

[48] Posner, and Vermeule, *Terror in the Balance*, p. 26.

[49] *Ibid.* See, also, R. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (2006, Oxford; Oxford University Press), esp. Ch. 2.

[50] G. Lawson, 'Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis' (2007) 87 *Boston University Law Review* 289, 294.

international law is subject to a number of limitations that Posner and Vermeule do not appreciate in their contemplation of the 'trade-off': international human rights law does not allow for *jus cogens* norms to be violated, specifies certain obligations to which no derogation may be entered and requires all action taken to be both necessary and proportionate. In contrast, Posner and Vermeule envisage the relationship between security and liberty as a generally dichotomous one in which any executive action motivated by security concerns would be permissible regardless of its implications for liberty. Even if, for the sake of argument, one accepts this conception of the so-called trade-off, however, the trade-off thesis itself does not support the denial of *habeas corpus* (or an adequate alternative thereto) to suspected terrorists detained in the 'War on Terror'; one of the actions that Posner and Vermeule argue ought not to be subjected to scrutiny by the federal courts.[51] In order to justify the reduction of liberty within the trade-off thesis as these authors formulate it, the measure introduced must objectively increase security; otherwise the liberty-deprivation does not bear out the basic premise of the trade-off thesis (i.e. that a reduction in liberty for X results in an increase of security for Y).[52] What is gained by denying suspected terrorists the opportunity to challenge the lawfulness of their detention in a meaningful and effective manner? Commonly advanced arguments claim that denying *habeas corpus* to such detainees ensures that the military is not consumed by endless litigation, that highly sensitive evidence is not released and that judges – who are deemed not to have the competence to make security-related decisions – are not involved in security-related decision-making. None of these three arguments stands up to serious scrutiny.

Military involvement in litigation ought not to be a primary factor in the consideration of the liberty-deprivation at issue in this case. On a principled basis, arguments of practicality ought not to trump arguments of liberty. Although the institutional operations of the military are, of course, important from a security-perspective, they are more easily resolved than are the implications of liberty-deprivation for both the individual and the institutions that rely on the writ of *habeas corpus*. The military can, for example, expand its Judge Advocate General (JAG) core or hire in civilian lawyers on carefully worded contracts; civil society finds it far more difficult to recover from the erosion of a primary democratic principle such as *habeas corpus*.

[51] Posner, and Vermeule, *Terror in the Balance*, pp. 252–9. [52] *Ibid.*, p. 28.

Furthermore, the sensitivity of evidence is not a barrier to judicial consideration – security-sensitive evidence is frequently used in judicial considerations and mechanisms can be developed for its careful and considered release to a court. In the US the Foreign Intelligence Surveillance Court was established to consider sensitive information while safeguarding liberties;[53] in the directly relevant example of review of the detention of suspected terrorists in the UK, Special Advocates are made available in order to make pleadings on behalf of suspected terrorists subject to control orders under the Prevention of Terrorism Act 2005 (and previously detained under the Anti-terrorism, Crime and Security Act 2001) in situations where evidence is of a particularly sensitive nature from a security-perspective. The arguments of evidence, therefore, are not sufficient to justify the liberty-deprivation at issue; the matter can be resolved without such an extreme measure.

Thirdly, the arguments of institutional competence are simply fallacious. Judges constantly make decisions on law based to some degree on matters on which they do not have expertise; judges are lawyers, they are not doctors or tax consultants or scientists but they frequently make decisions on medical treatment, tax arrangements and the environment. In other words, we consistently trust judges to use their intellect and the evidence adduced to them to understand how a particular area of activity is governed by law. There is no reason why the judiciary would be incapable of doing the same when security is the area of expertise involved. On this analysis the denial of *habeas corpus* or an adequate alternative is neither justified nor required by the trade-off thesis.[54]

Ackerman has proposed a model of deference that accommodates emergency action by the executive but incorporates emergency rights-protection mechanisms.[55] He contends that the Constitution ought to allow for an emergency system to be introduced when appropriate and required, and that the role of judges in such a system would essentially be one of macro-management of policy.[56] In his thesis 'judges should act with great restraint once an attack occurs, even if there is fair dispute whether the attack is so large as to justify an emergency response';[57] they

[53] This Court was established under the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. § 1801 *et seq.*) and oversees the granting and implementation of warrants for surveillance of suspected foreign intelligence officers within the US.

[54] F. de Londras, 'Guantánamo Bay: Towards Legality?' (2008) 71 *Modern Law Review* 36.

[55] B. Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (2005, New Haven and London; Yale University Press).

[56] See generally *ibid.*, Ch. 5.

[57] *Ibid.*, p. 102.

ought to 'sit on the sidelines while the political branches . . . determine whether the threat of a second strike is serious enough to merit a continuing state of emergency'.[58] Somewhat problematically, Ackerman's system is premised on a situation where the separation and balance of powers both between and within institutions is perfect; the executive can have 'most of the chips in this game' because the political branches provide the review and the judiciary need not involve itself to too great an extent. This is achieved artificially by, for example, placing congressional committees in the hands of the minority party once an emergency is declared.[59]

Such a situation does not always arise in practice and, in a state such as the UK where there is a fused executive and legislature, may not be possible in any real sense. Indeed it did not exist between 2001 and 2006 in the US, when the Republican Party held both the White House and Congress. Even if the legislature were to be held by the non-Presidential party in the US, that would in itself be no guarantee of rights-protection bearing in mind the popular demand for repression in times of emergency together with what Lord Steyn has described as a tendency towards "playing politics in an area which cries out for an objective and non-partisan approach'.[60] Importantly, however, Ackerman does not write judges out of the picture. Once the emergency constitution is in action 'the courts will always be active on a second front, involving the microadjudication of cases raised by particular detainees'.[61] Ackerman then goes on to imagine a complex and detailed model by which rights would be guaranteed to detainees that include safeguards such as maximum detention periods. While Ackerman's conception of the judiciary as having different roles regarding the overall running of an emergency and the individual treatment of detainees within the emergency paradigm is interesting and has the potential to be rights-protecting, its basis on a utopian balance and separation of domestic powers that is unlikely ever to arise in practice identifies it as somewhat problematic.

A third approach towards deference comes from the 'extra-constitutionalism' school, lead by Mark Tushnet.[62] In essence, this view attempts to find a third way between judicial review (which it finds

[58] *Ibid.*

[59] Similar suggestions have been made in D. Levinson and R. Richard Pildes, 'Separation of Parties, Not Powers' (2006) 119 *Harvard Law Review* 2311.

[60] J. Steyn, 'Civil Liberties in Modern Britain' [2009] *Public Law* 228.

[61] Ackerman, *Before the Next Attack*, p. 106.

[62] Tushnet, 'Defending *Korematsu*? Reflections on Civil Liberties in Wartime'; M. Tushnet, 'Non-Judicial Review' (2003) 40 *Harvard Journal on Legislation* 45.

generally to produce damaging precedent in the context of national security) and pure political control. Instead, Tushnet argues that courts confronted with repressive laws and policies that are designed to deal with security emergencies ought to acknowledge the severity of the situation and clearly label the matters before them as 'extra-constitutional'. In other words, the court ought to prompt close political scrutiny by identifying the extra-constitutional – or unanticipated – nature of the situation. The alternative, for Tushnet, is that courts will produce a judgment that lays down bad precedent because they are unlikely to frustrate desired executive action in a time of emergency.[63] This is not unlike the 'extra-legal measures' model proposed by Oren Gross, who argued that, once an emergency has passed, the state ought to be open about the nature of the actions undertaken during that emergency and *then* be subjected to accountability mechanisms, including political and popular accountability.[64] The core difficulty with the proposals of both Tushnet and Gross is, however, the extent of the faith that they put in the popular and political processes to ensure accountability; to be, in other words, expressive in their discontent with the kinds of security measures taken. The realities of politics and populism after a traumatic event and in the course of a violent crisis – such as the 'War on Terror' – leave me with little optimism that any such accountability is likely to arise in practice. When panic is understood as being both top-down *and* bottom-up the incentives for such rights-based accountability are difficult to identify. It is not impossible, of course, that people would express dislike of or discontent with something such as counter-terrorist detention when viewed from the aftermath of a crisis, but there is no guarantee that they would do so. In addition, such *ex post facto* expression of discontent does not have the same kind of value as a rights-protecting decision from an apex court in terms of playing a role in the design of any future response to violent crisis.

The pattern of judicial deference is, however, a major difficulty from a rights-based perspective. Where domestic courts are deferential and do not insist upon the protection of human rights by means of striking a

[63] F.F. Davis, 'Extra-constitutionalism, the Human Rights Act and the Labour "Rebels": Applying Prof. Tushnet's theories in the UK' [2006] 4 *Web Journal of Current Legal Issues*, available at, http://webjcli.ncl.ac.uk/2006/issue4/davis4.html (last accessed 21 February 2011).

[64] O. Gross, 'Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?' (2003) 112 *Yale Law Journal* 489; O. Gross, 'Extra-Legality and the Ethic of Political Responsibility' in Ramraj, V. (ed.), *Emergencies and the Limits of Legality* (2008, Cambridge; Cambridge University Press), p. 60.

balance between the demands of security and the demands of liberty, then individual rights are the losers in times of crisis. Muscular, rights-based judicial responses to counter-terrorist measures certainly would not have been expected in the 'War on Terror'; neither do they come without their own criticisms. Judicial stewardship of counter-terrorism is sometimes impugned as counter-majoritarian and undemocratic.[65] While it may, in ideal terms, be preferable to rely on 'the people' to show their disdain for overly repressive laws and policies and to allow the power of the ballot box to determine the extent to which the state will engage in expansion of its own powers, it seems clear that the 'people' are in fact unlikely to do this. When the polity experiences a feeling of collective victimisation[66] in the wake of massive trauma, situated within a 'risk society'[67] in which terrorist risk is represented as emanating from 'folk devils',[68] the likelihood of 'the people' forcing the state to roll back its proposed security measures is particularly slim. Thus, while placing trust in the judicial branches and the legal elite who interact with them may appear to contribute to what Gearty calls a 'crisis of legalism'[69] in human rights, this may well be a necessary step in situations of extreme trauma, crisis and panic, when there is an urge to sacrifice 'their' liberty for 'our' security as a result of both 'top-down' manufactured panic and genuine 'bottom-up' popular panic. This would only be effective, of course, if the courts in which we place our trust were to buck their deferential trend. How, then, have the apex courts in the US and the UK responded when faced with questions of counter-terrorist detention in the 'War on Terror'?

Interrogating the UK's assertion of an Article 15 emergency

As we have already seen, the UK's approach to counter-terrorist detention has largely been internal to international human rights law. Rather than turn away from international human rights law, the UK chose initially to characterise the post-11 September 2001 *milieu* as an emergency requiring

[65] For a strong statement of this position see the dissenting judgments of Roberts CJ and Scalia J in *Boumediene v Bush* 553 U.S. 723 (2008).

[66] D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001, Oxford; Oxford University Press), p. 144.

[67] U. Beck, *Risk Society: Towards a New Modernity* (Trans. M. Ritter), (1992, London; Sage Publications).

[68] S. Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (1972, London; MacGibbon & Kee).

[69] C. Gearty, *Can Human Rights Survive?* (2006, Cambridge; Cambridge University Press).

derogation and to introduce indefinite detention on the basis thereof. We know that the European Court of Human Rights does not have a good record of closely scrutinising such claims by states,[70] but also that the margin of appreciation that Court leaves to states in such circumstances assumes consideration of these fundamental questions by domestic courts.[71] The decision to declare a given state of affairs as constituting an emergency is generally considered to be an executive decision, based on an executive determination of risk and of the adequacy of the 'normal' legal system bearing such risk in mind. As a result there is a general reluctance to interrogate the claim by courts, both domestic and international. Although the House of Lords did not reject the determination that an emergency existed in the UK, at least some of the Law Lords subjected the claim to a degree of scrutiny that we were not altogether familiar with.

In *A (FC) and others; (X) FC and another v Secretary of State for the Home Department*[72] the applicants – who were detained under Part 4 of the Anti-terrorism, Crime and Security Act 2001 – claimed that the conditions required for an emergency under Article 15 of the European Convention on Human Rights had not been met in advance of the derogation and, as a result, that the declaration of emergency was invalid. The Home Secretary, on the other hand, argued that the UK faced a serious threat from Al Qaeda and that, given the special relationship between the UK and the US, the decision of other European states to stop short of announcing an emergency was of no comparative value. He also argued that a degree of deference towards the executive was required in relation to the question of whether such an emergency existed. Lord Hope looked closely at the nature of the alleged emergency that existed and held that it resulted from the threat of attack, as opposed to the imminence of an attack; a factor that was significant in the assessment of the proportionality and necessity of the provisions introduced in Part 4 of the Anti-terrorism, Crime and Security Act 2001.[73] In contrast, Lord Hoffmann was unconvinced that an emergency existed within the meaning of Article 15 of the Convention. He did not believe that Al Qaeda posed a threat to 'the fabric of organised society',

[70] F. Ní Aoláin and O. Gross, 'From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights' (2001) 23 *Human Rights Quarterly* 625.

[71] See, e.g., *A v United Kingdom* [2009] ECHR 301.

[72] [2005] 2 AC 68.

[73] [2005] 2 AC 68, pp. 129–32, *per* Lord Hoffmann; see also S. Shah, 'The UK's Anti-Terror Legislation and the House of Lords: The First Skirmish' (2005) 5 *Human Rights Law Review* 403, 408.

which he interpreted as being the correct meaning of 'the life of the nation'. Although the majority of the Law Lords found that an emergency that threatened the life of the nation in satisfaction of Article 15 did exist, this was only *after* a robust consideration of the issue.[74] A robust consideration might be as far as courts can legitimately go in assessing whether an emergency exists without overstepping the lines of their competence,[75] but in showing a commitment to interrogate the declaration, the House of Lords seems to have laid down a clear warning that there may, in future, be cases where such a declaration is so *mala fides* that the court will intervene.[76]

Resisting the process of 'othering'

We have already seen that the US and the UK were both committed to the process of 'othering' Al Qaeda by stressing alleged differences between them and other terrorist organisations and between them and other ('regular') combat forces. In other words, the allegedly radically different nature of Al Qaeda turned them into 'folk devils'. While the UK focused on citizenship as the dividing line between the 'folk saint' and the 'folk devil' (as reflected in the exclusive application of Part 4, Anti-terrorism, Crime and Security Act 2001 to non-British citizens), the US attempted to apply more repressive laws to suspected terrorist citizens than to others; association with Al Qaeda was the dividing line in the US. The courts in both jurisdictions have tended to rail against these attempts at 'othering'.

Citizens still enjoy constitutional rights, even if they are 'bad' citizens

While the initial law and policy in the UK was directed primarily at non-citizens,[77] the US asserted that the executive had a right (both as plenary power and by virtue of the Authorization for the Use of Military Force[78]) to capture and detain citizens who were determined to be acting against the state. Although these individuals were detained inside the territory of

[74] Contrast the nature of this consideration to that which was undertaken by the European Court of Human Rights in *A v United Kingdom* [2009] ECHR 301.

[75] C. Gearty, 'Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?' (2005) *Current Legal Problems* 25.

[76] I. Cram, 'Beyond Lockean Majoritarianism? Emergency, Institutional Failure and the UK Constitution' (2010) 10 *Human Rights Law Review* 461.

[77] Part 4, Anti-terrorism, Crime and Security Act 2001; see also Chapter 4 above.

[78] Pub. L. 107–40, 115 Stat. 224.

the US once their citizenship had been established, the executive claimed that they had no constitutional or statutory *habeas corpus* rights and could be held without charge or trial until the cessation of hostilities in the 'War on Terror'. The Supreme Court showed itself to be almost completely opposed to this principle (Justice Thomas was essentially the only exception) and found that citizen 'enemy combatants' were entitled to review of their designated status; in other words, that citizens still enjoyed constitutional rights, even if they were 'bad' citizens.

This issue originally arose in the case of José Padilla (also known as Abdullah al-Muhajir), an American citizen who, having converted to Islam, travelled to Egypt, Saudi Arabia, Afghanistan, Pakistan and Iraq. Upon his return to Chicago O'Hare Airport on 8 May 2002, he was arrested by federal agents pursuant to a material witness warrant issued by the District Court for the Southern District of New York. Notoriously dubbed 'the dirty bomber', Padilla was held as a material witness until 9 June 2002 when President Bush, asserting his authority under the Authorization for the Use of Military Force, directed that he be held as an enemy combatant.[79] As a result Padilla was transferred to a military brig in South Carolina. As an American citizen Padilla claimed a constitutional entitlement to *habeas corpus* and began proceedings claiming violation of the Suspension Clause,[80] and of the Fourth,[81] Fifth[82] and Sixth[83] Amendments to the US Constitution.

[79] On the following day the merits of Padilla's challenge to the material witness laws were due to be considered by the District Court.

[80] Article 1(9)(2), US Constitution.

[81] 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' Fourth Amendment, US Constitution.

[82] 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.' Fifth Amendment, US Constitution.

[83] 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.' Sixth Amendment, US Constitution.

The proceedings were lodged in the District Court for the Southern District of New York and named the President, Secretary Rumsfeld and Commander Melanie Marr (the commander of the brig where Padilla was being held) as respondents, but the government claimed that the court did not have jurisdiction and that only Commander Marr was the appropriate respondent in the case.[84] In *Rumsfeld v Padilla*[85] the US Supreme Court considered the questions of whether the petition was properly filed and whether the President had authority to order Padilla's detention as an enemy combatant. Taking a decidedly formalistic approach, the Supreme Court dismissed the *habeas corpus* petition on jurisdictional grounds.

Firstly, the Justices drew on statute[86] and precedent[87] to conclude that Commander Marr, as the person capable of producing the body given her status as Padilla's actual custodian, was the sole appropriate respondent. The Supreme Court therefore rejected the Second Circuit's decision that the strict 'immediate custodian' rule established in American law for *habeas corpus* respondents did not apply to cases where people were held other than in relation to federal criminal violations; rather that rule is relaxed where a petitioner is challenging something other than their physical confinement,[88] or where petitions must be addressed to the legal controller of the detainee for absence of an immediate physical custodian.[89] Importantly the Supreme Court distinguished *Ex parte Endo*[90] in reaching this conclusion.

In *Ex parte Endo*, an interned Japanese-American had lodged a *habeas corpus* petition against her immediate custodian in California and then been moved to Utah. However the Supreme Court allowed her petition

[84] The District Court decided in favour of Padilla on all questions: *Padilla ex rel. Newman v Bush*, 233 F. Supp. 2d 564 (2002); this was affirmed by the Court of Appeals in *Padilla ex rel. Newman v Bush*, 352 F. 3d 695 (2003).

[85] 542 U.S. 426 (2004).

[86] 28 U.S.C. §§ 2242–3 (providing that the appropriate respondent in a *habeas* claim is the custodian of the detainee).

[87] Citing *Wales v Whitney* 114 U.S. 564, 574 (1885) (holding that the custodian is the person capable of producing the body in court, i.e. the immediate custodian). The Supreme Court held that there was no reason for non-application of this rule in the instant case and that the expanding notions of custody in American case-law did not require an expanded notion of custodian in cases where, as in this one, there was a traditional custody and an immediate custodian; *per* Rumsfeld CJ at 542 U.S. 426, 435 (2004).

[88] Citing *Braden v 30th Judicial Circuit Court of Ky.* 410 U.S. 484 (1973); *Strait v Laird* 406 U.S. 341 (1972); *per* Rumsfeld CJ 542 U.S. 426, 437–8 (2004).

[89] 542 U.S. 426, 439 (2004).

[90] 323 U.S. 283, 304–5 (1944).

to be heard despite the fact that the respondent was no longer her immediate custodian. While Justice Stevens claimed in his dissent[91] that *Endo* was authority for the proposition that anyone with 'control' over the petitioner could be named as respondent, Rehnquist CJ for the Court held that *Endo* actually stood for the proposition that 'when the Government moves a habeas petitioner after she properly files a petition naming her immediate custodian, the District Court retains jurisdiction and may direct the writ to any respondent within its jurisdiction who has legal authority to effectuate the prisoner's release'.[92]

Secondly, the Supreme Court held that, in the territorial terms required by 28 U.S.C. § 2241, the District Court for the Southern District of New York court did not have jurisdiction. Relying on that section's grant of *habeas corpus* jurisdiction to courts in relation to those held within 'their respective jurisdictions', the Supreme Court held that the traditional rule (that *habeas corpus* only be available in the district of confinement) ought to be followed (*Carbo v US*).[93] In addition to the 'district of confinement' rule developed in *Carbo* that the Court relied on here, it also drew an inference from Congress's express exceptions to this rule for certain cases,[94] concluding that when a situation did not fall within one of the expressly exempted scenarios, then the district of confinement principle must be applied. The petition must therefore be lodged in the district of confinement which, by necessary corollary, will also be the district where the immediate custodian is located.

The dissent of Stevens J, in which he was joined by Souter, Ginsburg and Breyer JJ, rejected the strict proceduralism of the Majority, characterising this as 'an exceptional case' and not one that ought to be decided by a 'slavish application of a "bright-line" rule'.[95] Its exceptional status, Stevens J claimed, derived from the fact that it dealt with 'decisions [that] have created a unique and unprecedented threat to the freedom of every American citizen'.[96] The dissenting judgment was particularly concerned with the exceptional circumstances that arose as a result of the '*ex parte* proceeding',[97] by which Padilla was

[91] The Stevens J dissent was joined by Souter, Ginsburg and Breyer JJ.
[92] 542 U.S. 426, 441 (2004).
[93] The Court adopted the *dicta* in *Carbo v US* 364 U.S. 611, 617 (1961) in which it was held that the 'respective jurisdiction' clause was included in 28 U.S.C. § 2241 in order to prevent courts from granting *habeas* to petitioners who were distantly removed from the court's district; *per* Rehnquist CJ, 542 U.S. 426, 442 (2004).
[94] These exceptions are laid out in 28 U.S.C. § 2241(d).
[95] *Per* Stevens J, dissenting, 542 U.S. 426, 455 (2004).
[96] 542 U.S. 426, 461 (2004).
[97] 542 U.S. 426, 459 (2004).

transferred to South Carolina after being deemed an enemy combatant. According to the dissent, the fact that the petition as filed would have been in order under the bright-line rules had this transfer not arisen was a material consideration. Revealing the substantive rights-protection tenor of the dissent, Stevens J cited *Harris v Nelson*,[98] which stressed the need to apply the writ of *habeas corpus* in a manner that was sufficiently flexible to ensure that it could fulfil its objective, i.e. protecting people from unjustified deprivation of liberty.[99] Taking this approach to *habeas corpus* the dissenting Justices refused to manacle the petition by procedural concerns[100] and instead found in favour of the petitioner (Padilla).

Following this unsuccessful litigation, *Padilla II* began with the lodging of *habeas corpus* briefs in South Carolina against Padilla's immediate custodian who, at the time, was one Commander Hanft. The Fourth Circuit upheld his incarceration in military detention[101] but the Supreme Court subsequently approved his transfer to civilian custody[102] to face criminal charges. Three months later, the Supreme Court considered Padilla's application for *certiorari* to have his *habeas* petition considered and all but one of the Justices, Justice Ginsberg, denied *certiorari* on the basis of mootness.[103]

The government claimed that Padilla, having been released from military custody, had obtained the relief sought, whereas Padilla deemed this relief illusory as he could be redesignated as an enemy combatant and remanded in military custody once more at any time. Kennedy J, with whom Roberts CJ and Stevens J joined, held that although the history of his detention resulted in Padilla having concerns about redesignation, the problems he would face in such an event went to such fundamental questions of constitutional structure and individual liberties that they ought not to be considered in a case where they were, at the

[98] 394 U.S. 286, 291 (1969): 'The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.'

[99] 542 U.S. 426, 460 (2004).

[100] In this regard, the dissenting judgment cites *Hensley v Municipal Court, San Jose-Milpitas Judicial District, Santa Clara City* 411 U.S. 345, 350 (1973) in which the Supreme Court held 'we have consistently rejected interpretations of the *habeas corpus* statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements'; *per* Stevens J, dissenting, 542 U.S. 426, 461 (2004).

[101] *Hanft v Padilla* 423 F. 3d 386, 389 (4th Cir. 2005).

[102] On the 4 January 2006.

[103] *Hanft v Padilla* 546 U.S. 1062 (2006).

time of this decision, hypothetical events.[104] Dissenting from the denial of *certiorari*, Justice Ginsburg was not convinced that the case was moot and referred in particular to the fact that *habeas corpus* review ought not to be avoided by the lodging of criminal charges against Padilla when 'nothing prevents the Executive from returning to the road it earlier constructed and defended'.[105] While José Padilla's litigation did not, then, secure his freedom, the dissenting judgments in both the original case and the denial of *certiorari* indicated the level of concern held by the Supreme Court Justices for the rights-implications of Padilla's detention. These concerns also came to the fore in *Hamdi v Rumsfeld*.[106]

Yaser Esam Hamdi was an American citizen of Saudi descent, who was captured by the Northern Alliance during fighting in Afghanistan in late November 2001. Having been handed over to the American forces he was transferred to Guantánamo Bay and, once his citizenship had been ascertained, from there to Virginia and later South Carolina. Deemed an enemy combatant, Hamdi was denied legal counsel until December 2003. The government claimed, in the Mobbs Declaration,[107] that Hamdi had connections with a Taliban unit and that this Declaration ought to be accepted as sufficient basis for Hamdi's continued detention. The US District Court for the Eastern District of Virginia was unconvinced by this argument and ordered the government to provide materials for an *in camera* review of the detention.[108] This decision was reversed by the Fourth Circuit on the basis that Hamdi was captured in a combat zone.[109] The Fourth Circuit court also held that the Authorization for the Use of Military Force authorised executive detention without charge, counsel or process until an executive determination that these actions (detention without charge, counsel or process) were warranted. The detainee was not entitled to full judicial review of the factual basis for his detention. On appeal from the Fourth Circuit, the Supreme Court considered the lawfulness of detaining a citizen in this manner and the extent of the constitutional process to which Hamdi was entitled, if any.

[104] This was an application of the doctrine of constitutional avoidance. Under this doctrine, where an interpretation of statute would pose serious constitutional difficulties, courts will choose an interpretation that avoids those difficulties, unless that would be contrary to a clear legislative intent.

[105] *Hanft v Padilla* 546 U.S. 1062 (2006).

[106] 542 U.S. 507 (2004).

[107] This declaration was made by Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy.

[108] 316 F. 3d at 450, 462 (2003).

[109] 316 F. 3d (2003).

In relation to the former, a plurality of the Supreme Court noted the government's failure to provide a comprehensive definition of 'enemy combatant' and therefore limited its consideration to the government's authority to detain enemy combatants as defined by reference to Hamdi, i.e. individuals, including citizens, alleged to have been '"part of or supporting forces hostile to the US or our coalition partners" in Afghanistan and who "engaged in an armed conflict against the US there"'.[110] While the government claimed plenary authority to detain such individuals the Plurality did not consider whether the presidential war powers had such a reach, deciding instead that such authority was provided by the Authorization for the Use of Military Force.[111] Detaining enemy combatants, within the narrow definition laid out above, was 'so fundamental and accepted an incident of war' as to fall within the Authorization for the Use of Military Force,[112] and Hamdi's citizenship was no barrier to such classification and detention.[113] As the executive was authorised to engage in such detentions, Hamdi's claim that his detention was *per se* unlawful could not stand.

The Justices did, however, accept that the 'War on Terror' posed idiosyncratic difficulties that made the application of World War II precedents such as *Ex parte Quirin*[114] somewhat problematic. The open-ended nature of the conflict raised the credible possibility that detention for the duration of hostilities, recognised by international humanitarian law referenced by the Supreme Court,[115] might well amount to perpetual detention. The Court unequivocally rejected any proposition that 'indefinite detention for the purpose of interrogation'[116] had been authorised by the Authorization for the Use of

[110] 542 U.S. 507, 516 (2004) *per* O'Connor J. citing Brief for the Respondents.

[111] *Ibid.*, p. 518, Souter and Ginsburg JJ dissenting in this part; Scalia, Stevens and Thomas JJ dissenting in full.

[112] *Ibid.*

[113] Relying on *Ex parte Quirin* 317 U.S. 1, 28 (1942), the Court held that, although the detainee in *Quirin* was held pursuant to trial and conviction, 'nothing in [the case] suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities' 542 U.S. 507, 519 (2004) *per* O'Connor J.

[114] 542 U.S. 507, 519 (2004) *per* O'Connor J.

[115] The Opinion of the Court refers to Article 118, Geneva Convention (III) Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* 21 October 1950; Article 20, Hague Convention (II) on the Laws and Customs of War on Land; Article 20, Hague Convention (IV), U.S.T.S. 539, 2 A.J.I.L. Supp. 90, *entered into force* 26 January 1910; Article 75, Geneva Convention of 27 July 1929 Relative to the Treatment of Prisoners of War: 542 U.S. 507 (2004), Plurality Judgment, *per* O'Connor J, pp. 520–1.

[116] 542 U.S. 507, 521 (2004) *per* O'Connor J.

Military Force, but found that 'as of this date' the long-standing international principles of the law of war, including the power to hold enemies until the end of hostilities, had not been dismantled by circumstances 'entirely unlike those of the conflicts that informed the development of the law of war'.[117]

In his dissenting judgment Scalia J, joined by Stevens J, stressed both Hamdi's citizenship and the fundamentality of preventing indefinite executive detention to the US constitutional system. According to the dissent, the writ of *habeas corpus* was the mechanism by which this aim was achieved. Applying an originalist interpretation of the Constitution, these dissenting Justices held that there was no 'different, special procedure for imprisonment of a citizen accused of wrongdoing *by aiding the enemy in wartime*'.[118] Such individuals, they held, could be tried for treason or the writ of *habeas corpus* could be suspended, but a citizen cannot be detained indefinitely without trial or charge in the absence of a suspension. Even a 'bad' citizen enjoyed the protections of the Constitution.

The second question for consideration (i.e. the extent of the constitutional process to which such a detainee was entitled) involved the Suspension Clause (constitutional *habeas corpus* right), the Fifth Amendment (constitutional due process rights) and the Fourteenth Amendment (preventing, *inter alia*, the deprivation of liberty without due process of law). At base this question concerned whether and, if so how, an enemy combatant could dispute his assigned status on the basis of which he was subjected to executive detention. Both parties were agreed that, unless suspended in accordance with the requirements of the Constitution, *habeas corpus* was available to all those detained within the US, and that there had been no suspension in this case. Further to this, and referring to 28 U.S.C. § 2243,[119] the Supreme Court held that

[117] *Ibid.* [118] 542 U.S. 507, 558 (2004).

[119] Judiciary and Judicial Procedure:

> A court, justice or judge entertaining an application for a writ of *habeas corpus* shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.
>
> The writ, or order to show cause shall be directed to the person having custody of the person detained.
>
> It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.
>
> The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

enemy combatants have an entitlement to challenge the factual basis of their detention. Foreseeing such a conclusion, the government had argued that the Mobbs Declaration presented by them ought to be accepted as sufficient factual justification for Hamdi's detention because of both the allegedly 'undisputed' circumstances surrounding Hamdi's capture in Afghanistan, and the extraordinary constitutional interests at stake in this case. The Court was not convinced that the circumstances of capture were 'undisputed' as the government claimed and, furthermore, found that the facts as stated (i.e. that Hamdi lived in Afghanistan at the time of his capture) were insufficient to justify his characterisation as an enemy combatant within the definition outlined above.[120] The second alleged justification for acceptance of the Mobbs Declaration as a sufficient justification for detention – i.e. the extraordinary nature of the constitutional questions at issue – received a warmer response from the Justices.

Through this second argument, the government contended that, in deference to 'institutional competencies' and the separation of powers, there ought to be no judicial review of a designation as an enemy combatant and, furthermore, that if some review were to be engaged in it should be done in a highly deferential manner through which the government's production of 'some evidence' would be sufficient.[121] This 'some evidence' standard required merely an assessment of 'whether there is any evidence in the record that could support the conclusion' that an individual is an enemy combatant; no evidentiary weighting ought to be engaged in.[122] In other words, courts, the government argued, ought to assume the accuracy of the government's information

> When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.
>
> Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.
>
> The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.
>
> The return and all suggestions made against it may be amended, by leave of court, before or after being filed.
>
> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

[120] 542 U.S. 507, 527 (2004). [121] Brief for Respondents, pp. 26–34.

[122] This standard was drawn from *Superintendent, Mass. Correctional Institution at Walpole v Hill* 472 U.S. 445, 455–7 (1985).

and alleged basis for detention and therefore, in Hamdi's case, accept the Mobbs Declaration as sufficient justification for the designation of enemy combatant status.

While the Supreme Court did not accede to the government's request for either a review-free or 'some evidence' standard review, neither did the Justices accept that an enemy combatant is entitled to a fact-based review of equal depth to that made available to 'ordinary' criminal defendants. While Justices Souter and Ginsburg went so far as to call *habeas corpus* proceedings under the 'some evidence' standard 'virtually worthless as a way to contest detention',[123] the Plurality were more restrained in their dismissal of this standard and endorsed what is known as the '*Mathews* Calculus'. Espoused in *Mathews v Eldridge*,[124] this calculus is the means by which due process and public policy concerns are counter-balanced in order to ensure that the depth of review available to someone serves both individual interests and the common good. According to Powell J in *Mathews*:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[125]

Applying this test, the Supreme Court asserted the fundamentality of the right to liberty and stressed the risk that in situations of national emergency unchecked executive power to detain can become a vehicle for abuse, resulting in the detention of individuals who are not properly described as enemy combatants at all.[126] The nature of the allegations against Hamdi, the Court held, did not affect his entitlement to due process: 'We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without

[123] 542 U.S. 507, 541 (2004) *per* Souter J, joined by Ginsburg J, concurring in part, dissenting in part, concurring in the judgment.

[124] 424 U.S. 319 (1976); endorsed at 542 U.S. 507, 529 (2004) *per* O'Connor J. The test was previously accepted and applied in the cases of *Heller v Doe* 509 U.S. 312, 330–1(1993); *Zinermon v Burch* 494 U.S. 113, 127–8 (1990); *US v Salerno* 481 U.S. 739, 746 (1987); *Schall v Martin* 467 U.S. 253, 274–5 (1984); *Addington v Texas*, 441 U.S. 418, 425 (1979).

[125] 424 U.S. 319, 335 (1976).

[126] 542 U.S. 507, 529–30 (2004).

due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.'[127]

That fundamental right notwithstanding, however, the exceptional governmental interests at play in this case could not be ignored. While the Supreme Court refused to accept the assertion that allowing for judicial review would put unconscionable strain on the military,[128] military and security exigencies were taken into account in the deployment of the '*Mathews* Calculus'. Despite the Court's statements about the fundamentality of liberty and the risk of insufficiently checked executive detention powers, the Justices' conclusion on the constitutional entitlements of citizen enemy combatants was problematic in a number of ways. The Court held:

> We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker . . .
>
> At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of *Mathews*, process of this sort would sufficiently address the 'risk of erroneous deprivation' of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government.[129]

Scalia J dissenting, and joined by Stevens J, claimed that the '*Mathews* Calculus' may be appropriate for certain circumstances of property rights, but that 'it has no place where the Constitution and the common law already supply an answer'.[130] In the view of these dissenting judges

[127] *Ibid.*, p. 531. [128] *Ibid.*, pp. 531–2. [129] *Ibid.*, pp. 533–4. [130] *Ibid.*, p. 576.

the Plurality had in this case distorted *habeas corpus* which, the dissenting Justices held, was intended to consider the legality of detention. Instead of engaging in such a review, Scalia J held, the Plurality had attempted to 'make illegal detention legal by supplying a process that the Government could have provided, but chose not to'.[131] In this way, Scalia J held, the Supreme Court had not really engaged in a *habeas corpus* review at all but had rather engaged in a 'Mr. Fix-It' exercise well beyond its role and capacities.[132] Thomas J also dissented but in favour of the government. In his view the government had compelling constitutional interests that justified the detention of Hamdi without charge, trial or review. This decision was based substantively on Thomas J's interpretation of the scope of the President's powers in wartime and found little agreement in any of the other opinions delivered, with the exception of his contention of the Supreme Court's 'institutional inability to weigh competing concerns correctly',[133] which finds some concurrence in the Scalia, Stevens JJ dissent.

Having decided that this level of process was guaranteed by the Constitution, the Supreme Court did not consider whether treaty law entitled the detainee to any further protections or process.[134] Following the decision, Hamdi was released into the custody of Saudi Arabia on condition that he renounce his American citizenship, accept travel restrictions that prevented him going to America, Israel, Afghanistan, Pakistan, Gaza, the West Bank, Syria and Iraq, and promised not to sue for compensation or talk publicly about his time in US detention.[135]

The decision in *Munaf v Geren*[136] also indicated the Supreme Court's reluctance to strip citizens of their constitutional, rights-protecting entitlements on the basis of 'bad behaviour', even where that behaviour was such that the citizen found himself detained by the US in Iraq having been captured while fighting for 'the enemy' in the course of an armed conflict. The petitioners in *Munaf* were both US citizens held in Iraq by US forces serving as part of the Multinational Force-Iraq (MNF-I). They sought *habeas corpus* in the federal courts in order to avoid being transferred into the custody of Iraq, where they were charged with numerous offences relating to their alleged involvement in violent activity against the US and other members of the MNF-I. They claimed that any such transfer would expose them to the risk of torture and therefore

[131] *Ibid.* [132] *Ibid.* [133] *Ibid.*, p. 579. [134] *Ibid.*, p. 534.
[135] See 'Freeing Mr. Hamdi', Editorial, *Washington Post*, 24 September 2004, p. A24.
[136] 553 U.S. 674 (2008).

ought to be restrained by the federal courts. Their first claim, however, was jurisdictional, i.e. that the federal courts had the jurisdiction to hear their petitions notwithstanding their physical location outside of the territory of the US.

Writing for a unanimous Supreme Court, Roberts CJ held that US citizens had a statutory right to petition the federal courts for *habeas corpus* regardless of where they were being held by the US and irrespective of the nature of their alleged behaviour. The respondent had argued that the US courts had no jurisdiction in this case because the petitioners were detained by US soldiers serving as part of a multinational force and were not, therefore, held 'under or by colour of the authority of the US'.[137] The Court found, however, that because the military were under US control and command, the statutory requirement of being held 'by the US' was met. The petitioners' citizenship was also a material factor in this case, with Roberts CJ holding that '[t]hese cases concern American citizens . . . and the Court has indicated that habeas jurisdiction can depend on citizenship'.[138] Significantly, however, the mere right to lodge a *habeas corpus* petition in the federal courts did not, the Court held, oblige federal courts to entertain the petition. Rather, because *habeas corpus* is based on 'equitable principles', the federal courts may take equitable factors such as behaviour and the practical repercussions of granting *habeas corpus* into account and elect not to hear the petition. Although this latter element of the decision was significant for the petitioners, who were not granted *habeas corpus* in this case, it did not detract from the assertion of the judicial role by the Supreme Court. In essence, what this element of the judgment appeared to suggest was that the question of whether a citizen's *habeas corpus* petition ought to be entertained was to be based not on an executive military decision about the individual's behaviour, or as to whether the individual was to be detained, but rather on a judicial assessment of the circumstances.

Hamdi and *Munaf* strongly suggest the Supreme Court's reluctance to defer fully to the executive in questions of national security, and mark a significant departure from cases such as *Korematsu*. In *Korematsu* the claimant was a citizen, but that citizenship did not save him from repressive measures. In addition, the military was determined to be the party best placed to decide upon necessary measures and rights-infringements, whereas the Supreme Court in *Hamdi* used the '*Mathews* Calculus' to assert the judicial role in these questions and, in *Munaf*, ensured that citizens

[137] See 28 U.S.C. § 2241. [138] 553 U.S. 674, 688 (2008).

could avail of the right to petition the federal courts for *habeas corpus* regardless of the location in which they were detained by the US. Although Hamdi was a purportedly 'bad citizen', he was nevertheless a citizen. The executive's attempt to 'other' him to such an extent as effectively to rid him of the constitutional privileges of citizenship was unsuccessful.

Discrimination on the basis of citizenship is not permitted

In the 'first skirmish'[139] between Parliament and the judiciary in the UK, the House of Lords had to consider the lawfulness of detention pursuant to Part 4 of the Anti-terrorism Crime and Security Act 2001. As outlined in Chapter 4 above, Part 4 allowed for the detention of non-citizens pursuant to certification by the Home Secretary and was not applicable to UK citizens. While seventeen individuals were certified under Part 4, only sixteen were detained without trial, two of whom exercised their right to leave the country, three of whom succeeded in having their certificates quashed, and another two of whom were moved to medical centres during the course of their detention. Nine of the remaining detainees were detained in Belmarsh Prison in London and, in *A (FC) and others; (X) FC and another v Secretary of State for the Home Department ('Belmarsh')*[140] challenged the compatibility of the 2001 Act with the Human Rights Act 1998 and the European Convention on Human Rights.

These detainees had previously unsuccessfully claimed that there was no emergency threatening the life of the nation and that, even if such an emergency could be said to exist, the detention powers introduced in Part 4 were a disproportionate response thereto. The applicants had, however, had more success at Special Immigration Appeals Commission level, although not in the Court of Appeal, with the contention that the provisions violated Article 14 of the Convention, i.e. that they were discriminatory on the basis of non-citizenship.[141] In the House of Lords the applicants argued that: (1) there was no emergency threatening the life of the nation, (2) even if such an emergency existed the Part 4 provisions exceeded what was required by the exigencies of the situation and therefore violated Article 5 of the European Convention on Human Rights, and (3) in any case the provisions violated Article 14 of the Convention because they

[139] See Shah, 'The UK's Anti-Terror Legislation and the House of Lords'.
[140] [2005] 2 AC 68.
[141] [2002] HRLR 1274 (SIAC); [2002] EQCA Civ 1502; [2004] QB 335 (Court of Appeal).

applied discriminatorily to non-citizens only. The detainees succeeded in the House of Lords by a margin of eight to one. The House of Lords approach to the first two questions has been considered above; the focus in this section is on the detainees' Article 14 claim.

Lord Bingham held that the applicants' Article 14 rights had been violated because the differential treatment of nationals and non-nationals appeared to have no objective justification. In assessing this question and finding a violation, Lord Bingham applied the test developed by the Law Lords, relying on precedent from the European Court of Human Rights, in *R (S) v Chief Constable of the South Yorkshire Police*:[142]

> (1) Do the facts fall within the ambit of one or more of the Convention rights?
> (2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?
> (3) If so, was the difference in treatment on one or more of the proscribed grounds under article 14?
> (4) Were those others in an analogous situation?
> (5) Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?[143]

While the application of the first of these questions was uncontroversial the Law Lords were divided between the majority of eight and the dissent of Lord Walker on whether the appropriate comparator group was citizens living within the UK (as claimed by the applicants) or non-citizens who could be deported under *Chalal*[144] (as the Home Secretary argued). The majority concluded that the former was the appropriate comparator because, like a British national, these individuals could not be deported or expelled, nor, for various reasons, could they be subjected to prosecution.

Importantly for the purpose of the argument in this book the House of Lords drew on a number of binding and non-binding international legal instruments to substantiate their conclusion that non-nationals could be treated differently in the context of immigration alone: not in the context of counter-terrorism.[145] Although acknowledging that many

[142] [2004] UKHL 39. [143] *Ibid.*, para. 42. [144] *Chahal v UK* (1996) 23 EHRR 413.

[145] [2005] 2 AC 68, pp. 117–21 relying on Resolution 1271 adopted on 24 January 2002 by the Parliamentary Assembly of the Council of Europe; General Policy Recommendations published on 8 June 2004 by the European Commission against Racism and Intolerance; Universal Declaration of Human Rights; General Assembly Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live; General Comment No. 15 of the UN Human Rights Committee; International Covenant on Civil and Political Rights; General Comment No. 29 of the UN Human Rights Committee;

of these sources were not binding on the government, Lord Bingham held that: '[t]hese materials are inimical to the submission that a state may lawfully discriminate against foreign nationals by detaining them but not nationals presenting the same threat in a time of public emergency',[146] thus suggesting their status as part of the institutional materials to be relied upon by domestic judges. The principles outlined in these institutional materials applied where the international instruments, including the Geneva Conventions, pleaded by the Attorney General, did not because of the lack of a war or international armed conflict in a strict legal sense. The House of Lords therefore resisted the executive's attempt to 'other' non-citizens to such an extent as to allow for their indefinite detention without charge or trial when citizens who were also considered to be involved in 'international terrorism' could not be subjected to a deprivation of liberty of this nature.

Absolute rights are absolute – even for terrorists

For the UK the threat from contemporary terrorism has been represented as radically different to that presented by other terrorist organisations such as the Irish Republican Army. Because of this, the UK government has argued that some 'absolute' norms of international human rights law ought to be recalibrated and applied in a more permissive manner. This argument was especially made in the context of the expulsion or deportation of non-citizens, who were considered to be a threat to national security. Although expulsion or deportation is generally within the executive power, it is limited by the principle of *non-refoulement* in international law. This principle prohibits a state from sending an individual to a place where there is a 'real risk' of him being subjected to torture or inhuman or degrading treatment or punishment. *Non-refoulement* is inherent in Article 3 of the European Convention on Human Rights and results in a positive protective obligation on the prospective sending state.[147]

International Convention on the Elimination of All Forms of Racial Discrimination 1966; General Recommendation XI of the CERD Committee; Concluding Observations of the CERD Committee on the UK (10 December 2003, CERD/C/63/CO/11); R. Lillich, 'The Paris Minimum Standards of Human Rights Norms in a State of Emergency' (1985) 79 *American Journal of International Law* 1072.

[146] [2005] 2 AC 68, p. 121.

[147] *Chahal v UK* (1996) 23 EHRR 413; *Soering v UK* [1989] 11 EHRR 439.

Following the European Court of Human Rights decision in *Saadi v Italy*[148] (holding that a state's positive obligations under Article 3 of the European Convention on Human Rights remain absolute even where the prospective deportee is considered to pose a national security threat), the Court of Appeal in the UK was confronted with proposed expulsions that had Article 3 implications. In *AS & DD v Secretary of State for the Home Department*[149] the Court of Appeal endorsed the European Court of Human Rights' insistence on the application of 'rigorous criteria' and 'close scrutiny' when considering whether there was a 'real risk' of ill-treatment. When the Secretary of State for the Home Department claimed that this test was fulfilled by means of a Memorandum of Understanding between the UK and Libya, the Court held that the sufficiency of such memoranda was to be decided upon on a case-by-case basis taking into account the reality in the receiving state. The Court of Appeal therefore non-deferentially turned to the standards as laid down by the European Court of Human Rights in rejecting the UK's representations that the contemporary terrorist threat required a more permissive application of the *non-refoulement* principle in relation to individuals assessed (by the executive) to pose national security risks. The House of Lords subsequently considered analogous questions in the case of *RB (Algeria) v Secretary of State for the Home Department.*[150] The case concerned the proposed deportation of two individuals to Algeria and one to Jordan. All three individuals claimed that the diplomatic assurances acquired by the UK government from Algeria and Jordan respectively did not satisfy Article 3 of the European Convention on Human Rights. While accepting that it was to be guided by the decisions of the European Court of Human Rights in determining the principles upon which such questions should be resolved, the House of Lords concluded that in fact the adequacy of a diplomatic assurance was a question of fact that must be determined following a scrutiny of the close and careful kind anticipated by *Saadi v Italy.* Thus, the House applied the *Saadi* approach in this case; an approach that required a close scrutiny of executive claims as to the adequacy of diplomatic assurances or memoranda of understanding.

The US Supreme Court took a different, and less rights-enforcing, approach to an analogous question in *Munaf v Geren.*[151] The petitioners

[148] *Saadi v Italy*, Application No. 37201/06, judgment of 28 February 2008 (Grand Chamber).
[149] [2008] EWCA Civ 289. [150] [2009] UKHL 10; [2009] 2 WLR 512.
[151] 553 U.S. 674 (2008).

in this case argued that the US could not transfer them into Iraqi custody as this would expose them to a risk of torture. Eschewing an approach that would require 'close scrutiny' of such decisions, the Supreme Court held that whether or not to transfer an individual to the custody of another state was a question to be considered by the executive. Notwithstanding the fact that such risks were 'a matter of serious concern'[152] to the Court, it held 'that it is for the political branches, not the judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments'.[153] This element of the decision in *Munaf* reflects the fact that, while deference may have declined in the US Supreme Court, it has not disappeared completely and stands in strong contrast to the approach of the European Court of Human Rights in *Saadi*,[154] and the House of Lords in *RB (Algeria) v Secretary of State for the Home Department*[155] considered above. Notably, however, the Supreme Court did not absolutely foreclose the potential for the federal courts to scrutinise an executive decision to transfer an individual in an 'extreme case in which the Executive has determined that a detainee [in US custody] is likely to be tortured but decides to transfer him anyway'.[156] Indeed, the Concurring Opinion of Souter J, joined by Ginsburg and Breyer JJ, left open the potential for this caveat to be further broadened in an appropriate case, stating:

> I would add that nothing in today's opinion should be read as foreclosing relief for a citizen of the US who resists transfer, say, from the American military to a foreign government for prosecution in a case of that sort, and I would extend the caveat to a case in which the probability of torture is well documented, even if the Executive fails to acknowledge it. Although the Court rightly points out that any likelihood of extreme mistreatment at the receiving government's hands is a proper matter for the political branches to consider . . . if the political branches did favor transfer it would be in order to ask whether substantive due process bars the Government from consigning its own people to torture.[157]

Since *Munaf*, the US Supreme Court has declined to review the removal of Guantánamo Bay detainees to Algeria where they claimed there was a real risk that they would be subjected to torture or inhuman and degrading treatment, but no reasons were given for this decision.[158]

[152] *Ibid.*, p. 700. [153] *Ibid.*, pp. 700–1.
[154] *Saadi v Italy*, Application No. 37201/06, judgment of 28 February 2008 (Grand Chamber).
[155] [2009] UKHL 10; [2009] 2 WLR 512. [156] 553 U.S. 674, 702 (2008).
[157] *Ibid.*, pp. 706–7, Concurring Opinion of Souter J., joined by Ginsburg and Breyer JJ.
[158] *Mohammed v Obama*, Order declining *certiorari*, US Supreme Court, 16 July 2010, 131 S. Ct. 32; 177 L. Ed. 2d 1122; 2010 U.S. LEXIS 5544; 79 U.S.L.W. 3061.

Plugging the 'gaps'

We have already seen that executive policy in the US suggested that there were a number of 'gaps' in the law. These gaps were, in turn, being exploited by the US government in an attempt to argue for the most permissive interpretation of allowable action possible under international law. In two particular respects, the US attempted to create or expose gaps of this kind. The first alleged gap was created by detaining suspected terrorists outside the US, where it was claimed that statute, the Constitution, and international human rights law had no application. The second alleged gap was created through the claim that not only did domestic law not apply outside the territorial US, but international human rights law did not apply to the 'War on Terror' at all, and suspected terrorist detainees were 'unlawful combatants' without any rights under international humanitarian law. The US Supreme Court has been particularly forceful in resisting these repressive understandings of the reach of domestic law and the content of the applicable international legal standards.

Although the UK has not attempted to create gaps of this kind, the House of Lords has been clear in its jurisprudence that UK actors are subject to the requirements of international human rights law. In all of these circumstances, the approaches of the superior courts in both the US and the UK have largely resisted executive assertions of the applicability and reach, and therefore the relevance, of rights-protecting legal standards.

Domestic law reaches to Guantánamo bay

One of the policies adopted by the US has been to detain suspected terrorists outside its own territorial jurisdiction. This was designed to create what has been described as a 'legal black hole'[159] in which, according to the US, neither domestic nor international law would apply. This assertion was based on *Johnson v Eisentrager*[160] in domestic law (holding that non-citizens held outside the US had neither constitutional nor statutory *habeas corpus* entitlements), and on the US's long-standing position that

[159] This term was used by Lord Phillips to describe Guantánamo Bay in *Abassi v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ. 1598, para. 22. See also J. Steyn, 'Guantánamo Bay: The Legal Black Hole' (2004) 53 *International and Comparative Law Quarterly* 1.

[160] 339 U.S. 763 (1950).

international treaties do not have extra-territorial application.[161] The US Supreme Court has strongly resisted this attempt and held that federal statutes apply to Guantánamo Bay, including the federal *habeas corpus* statute. This position was laid down in the cases of *Rasul v Bush*[162] and *Hamdan v Rumsfeld*.[163] Later in this chapter we will see that the Court has also held that the Constitution itself applies to at least some degree to the detainees held at Guantánamo Bay.

Shafiq Rasul and his co-petitioners were non-citizens of the US and were detained in Guantánamo Bay. They claimed to be entitled to bring *habeas corpus* petitions to the US federal courts, thereby challenging the *Johnson* precedent on the basis of which it appears Guantánamo Bay had been chosen. While the Supreme Court did not overturn the constitutional analysis from *Johnson v Eisentrager*, it held that the statutory analysis no longer stood. According to the Supreme Court the (terse) statutory analysis in *Johnson* was based on the then-recent decision of *Ahrens v Clark*[164] in which the Supreme Court held that the District Court for the District of Columbia did not have statutory jurisdiction to hear the *habeas corpus* claims of aliens detained in Ellis Island, as the statute only applied to those within the courts' territorial jurisdiction.[165] The Court held that the later case of *Braden v 30th Judicial Circuit Court of Ky*.[166] rendered *Ahrens* inapposite and therefore undermined the statutory finding in *Johnson*. In *Braden* the Supreme Court had held that the location of the detainee within a court's territorial jurisdiction was not an essential pre-requisite to statutory *habeas corpus* jurisdiction; rather it was a question of whether the jailor was within the territorial jurisdiction of the relevant court.

This statutory analysis in itself lends support to a reading of *Rasul* as a strong rights-enforcing case: the case-law by no means required this finding and the application of *Braden* in this fashion was exceptionally controversial.[167] In this early 'War on Terror' case, then, the US Supreme Court opened a statutory route from Guantánamo Bay to the federal courts. Although the Court did not, in this case, have recourse to international law in recognising Guantánamo Bay detainees as statutory rights-bearers, the decision clearly had a rights-enforcing

[161] See L. Henkin, 'U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker' (1995) 89 *American Journal of International Law* 341.

[162] 542 U.S. 466 (2004). [163] 548 U.S. 557 (2006). [164] 335 U.S. 188 (1948).

[165] *Ibid*., p. 192. [166] 410 U.S. 484 (1973).

[167] See, e.g., R. Green, 'Wiley Rutledge, Executive Detention, and Judicial Conscience at War' (2006) 84 *Washington University Law Review* 99.

element to it. As *habeas corpus* is the means by which detainees can both challenge the lawfulness of their detention and enforce their other rights, including the right to be free from torture and degrading treatment, extending *habeas corpus* jurisdiction to those detained at Guantánamo Bay is an important statement by the US Supreme Court of its willingness to exercise oversight in an area traditionally insulated by the doctrine of deference.

Congress responded to *Rasul* by introducing a jurisdiction-stripping provision in section 1005(1) (e) of the Detainee Treatment Act 2005, thus attempting to facilitate the executive's desire for a zone of unrestricted action in Guantánamo Bay. Although the congressional record strongly indicated that this provision was not to apply retrospectively, President Bush interpreted it as having retrospective effect in his accompanying 'signing statement'.[168] In keeping with this interpretation, the government argued that all pending cases, including *Hamdan v Rumsfeld*,[169] should be struck-off for lack of jurisdiction.[170] The government's motion to dismiss Hamdan's claim for lack of jurisdiction presented the Supreme Court with an early opportunity to assess the nature and extent of this jurisdiction-stripping measure.

The government relied on a well-established line of authority based on *Landgraf v USI Film Products*[171] and *Bruner v US*[172] to make the argument that jurisdiction-stripping statutes are presumptively retrospective and that, as a result, Hamdan's petition could not now be heard as the Detainee Treatment Act 2005 had stripped the Supreme Court of jurisdiction over this (and all other) pending petition(s). In contrast, Hamdan claimed that this line of precedent only applied where ordinary

[168] President's Statement on Signing of H.R. 2863, the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 (30 December 2005). For more on the concept and history of signing statements see, e.g., P. Cooper, 'George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements' (2005) 35 *Presidential Studies Quarterly* 515.

[169] Respondents' Motion to Dismiss for lack of Jurisdiction, *Hamdan v Rumsfeld* (12 January 2006).

[170] Letter of R. Loeb (Counsel for the US) to Mark Langer (Clerk of the DC Court of Appeals) of 3 January 2006, available at, www.scotusblog.com/2006/01/government-seeks-to-end-detainee-cases/ (last accessed 21 February 2011). The government argued that s. 1005 had the effect of striking-out pending claims in a number of cases, including in particular the DC Circuit Court cases of *Boumediene v Bush* (05–5062) and *Al Odah v US* (05–5064).

[171] 511 U.S. 244 (1994). [172] 343 U.S. 112, 116–17 (1952).

canons of statutory interpretation were insufficient.[173] In this case, he claimed, the difference in language between the effective date provisions for the 'jurisdiction-stripping provision' and the 'appeal from final decision' provision should lead the Court to draw a negative inference.[174] In other words, he argued that because the two provisions were developed contemporaneously the difference in language could not be merely read out or glossed over. Rather, he argued, the differentiated 'effective date' clauses held real significance, and meant that the jurisdiction-stripping provision was not to apply retrospectively, while the exclusive jurisdiction of the District of Columbia courts over appeals from Guantánamo tribunals was to be so applied.

The government also claimed that Congress would have anticipated that the *Landgraf* and *Bruner* cases would be applied to section 1005 (e) and, as a result, that congressional history pointed towards an intended retrospective application for the jurisdiction-stripping provision. On this point the government's argument was heavily reliant on an *amicus curiae* brief from Senators Graham and Kyl,[175] which purported to present an accurate picture of the debates surrounding the provision, but was contradicted, Hamdan claimed, by the legislative history of the provision.[176] According to Hamdan Senator Levin had interjected precisely to remove the retrospective effect of the jurisdiction-stripping provision. As a result the government's

[173] Petitioner's Opposition to Respondents' Motion to Dismiss, 31 January 2006, p. 6, relying on *Lindh v Murphy* 521 US 320 (1997), available at, www.hamdanvrumsfeld.com/HamdanOppositiontoMotiontoDismissFINAL.pdf (last accessed 21 February 2011).

[174] The difference in language is considered in Chapter 4 above. By way of summary, s. 1005(h), Detainee Treatment Act 2005, provides:

Effective Date—

(1) IN GENERAL— This section shall take effect on the date of the enactment of this Act.

(2) REVIEW OF COMBATANT STATUS TRIBUNAL AND MILITARY COMMISSION DECISIONS— Paragraphs (2) and (3) of subsection (e) shall apply with respect to any claim whose review is governed by one of such paragraphs and that is pending on or after the date of the enactment of this Act.

[175] Brief of Senators Graham and Kyl as *Amicus Curiae* in Support of Respondents, February 2006, available at: www.hamdanvrumsfeld.com/GrahamBrief.pdf (last accessed 21 February 2011).

[176] Petitioner's Opposition to Respondents' Motion to Dismiss, 31 January 2006, available at: www.hamdanvrumsfeld.com/HamdanOppositiontoMotiontoDismissFINAL.pdf (last accessed 21 February 2011), pp. 6–12; 18–19; 22–3.

presentation of the legislative history was at best misrepresentative and, Hamdan claimed, based entirely on a *post hoc* colloquy that presented a fictional debate.[177]

The Supreme Court in *Hamdan* found that the applicability of the jurisdiction-stripping provision ought to be considered by reference to ordinary rules of statutory interpretation, and that the *Landgraf–Bruner* authorities ought not to be applied as an 'inflexible trump' to jurisdiction-stripping provisions.[178] In assessing the meaning of section 1005(e) through ordinary principles of statutory interpretation, the Court relied specifically on the narrative of the congressional passage of the Detainee Treatment Act 2005 as presented by Hamdan, and expressed doubt about the probative value of the history as presented in the Graham–Kyl *amicus* brief.[179] The Justices found that there was a clear intention, supported by the differentiated language in the statute itself, not to apply the jurisdiction-stripping provision to pending cases. As a result Hamdan's petition could be heard.

As with *Rasul*, the US Supreme Court chose to apply doctrines of statutory interpretation in *Hamdan* to extend *habeas corpus* jurisdiction to Guantánamo Bay, rather than relying on principles of constitutional or international law. That notwithstanding, the approach was distinctly rights-protecting, indicated a significant reduction in judicial deference, and presented the Supreme Court with the opportunity to recognise Al Qaeda detainees held in the base as rights-bearers under international law.

Al Qaeda detainees enjoy the protections of Common Article 3

The US executive not only claimed the right to capture and detain 'enemy combatants' but also claimed that Al Qaeda fighters were unlawful combatants who did not enjoy any protections under the Geneva Conventions. This claim, combined with the argument that neither the Constitution nor international human rights law applied at Guantánamo Bay, essentially represented those detained in Guantánamo Bay as being without enforceable rights. In *Hamdan*, however, the US Supreme Court refused to accede to this view and instead recognised alleged Al Qaeda fighters as rights-bearers under Common Article 3 of the Geneva Conventions. In order to reach this conclusion, the Supreme Court first had to establish that the 'War on Terror' was, in fact, an armed conflict within the meaning of international

[177] *Ibid*., p. 10. [178] Opinion of the Court 548 U.S. 557 (2006).
[179] *Ibid*., p. 580, fn. 10.

humanitarian law. We already know that this was a difficult proposition given the traditional understanding in international law of 'international armed conflicts' as conflicts between states, and 'non-international armed conflicts' as conflicts between a state and non-state actors primarily acting within the territory of that state.[180] The Supreme Court, however, adopted a literal approach to the concept of 'non-international armed conflict' to bring the 'War on Terror' firmly within the bounds of international humanitarian law and held that 'armed conflict not of an international character' ought to be defined as armed conflict not against a nation state. Thus the Court held that the conflict with Al Qaeda qualified as an armed conflict not of an international character. As a result, Hamdan was entitled to the protections of Common Article 3.

Common Article 3 of the Geneva Conventions lays down the baseline protections to be provided to those caught up in non-international armed conflicts. As Ní Aoláin and Gross have noted, it 'contains the lowest threshold of both application and protective standards'[181] in international humanitarian law. In essence, Common Article 3 is a rights-protecting provision providing for 'all of the judicial guarantees which are recognized as indispensable by civilised persons'. The US government has claimed that Common Article 3 is an overly vague standard to be applied in a time of armed conflict, and that it does not provide sufficient guidance to troops; however, the US Supreme Court expressly turned to Article 75 of the First Protocol Additional to the Geneva Conventions to elaborate on these standards. Although the Protocol has not been ratified by the US, Article 75 was held to reflect customary international law and, therefore, federal common law.[182] Article 75(3) First Protocol provides:

> Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be

[180] This is subject to the 'muddying' of these distinctions by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*), Appeals Chamber, Case No: IT-94–1-AR72 (2 October 1995), para. 70 and the 'scale and effects' test outlined by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US of America)(Merits)* [1986] ICJ Rep 16, para. 230.

[181] F. Ní Aoláin and O. Gross, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006, Cambridge; Cambridge University Press), p. 356.

[182] See Chapter 2, pp. 41–2.

> released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

If customary international law is to be seen as the repository of the 'judicial guarantees which are recognised as indispensable by civilised persons' it appears clear that, by reaching out to Common Article 3, the US Supreme Court was effectively holding that Al Qaeda detainees were entitled to customary international law rights in general, including the right to challenge the lawfulness of one's detention by means of an effective review procedure.

By reaching out to Common Article 3, the US Supreme Court was not only attempting to enforce the basic human rights protections of suspected terrorist detainees (thus breaking with the pattern of deference), but also doing so in a novel way. Various commentators have noted the general reluctance on the part of domestic courts to invoke Common Article 3,[183] thus making the Supreme Court's turn towards this element of international humanitarian law particularly significant. As Ní Aoláin notes, by applying Common Article 3 'the Court seems to reject the idea that the nature of the war on terror is so profoundly out of the legal universe inhabited by the state that new and completely different rules have to apply'.[184] Although the Supreme Court in this case reached out to international humanitarian law and refused to act in a traditionally deferential manner it did not ground its conclusions in particularly rigorous legal argumentation; rather the judgment appears result-oriented and focused on ensuring some minimum level of protection for individuals detained in the 'War on Terror'. While such an approach is subject to doctrinal criticism, it is nevertheless a strong indication of the Supreme Court's apparent persistence in ensuring that rights-protection is not completely abandoned in the 'War on Terror' and that state action is constrained to at least some extent.

Constitutional rights-protections follow the flag (?)

As considered in more detail below, the Supreme Court's decisions in *Rasul* and *Hamdan* only went so far. Both cases were decided primarily on the basis of legislation and, as Congress is empowered to amend its

[183] See esp. F. Ní Aoláin, '*Hamdan* and Common Article 3: Did the Supreme Court Get it Right?' (2007) 91 *Minnesota Law Review* 1525, pp. 1545–8 and the authorities therein referred to.

[184] *Ibid.*, p. 1551.

prior enactments even in a manner inconsistent with international human rights law,[185] the Supreme Court's approach arguably left it open to Congress to continue its facilitative approach through subsequent enactments. As demonstrated in Chapter 4, this is in fact what occurred with the passage of section 1005(e) (1) of the Detainee Treatment Act 2005 and, following *Hamdan*, the Military Commissions Act 2006. Not only did the 2006 Act once more include a substantial jurisdiction-stripping provision,[186] but it also purported to place assessment of compliance with Common Article 3 in the hands of the executive.[187] It appeared that the most fail-safe manner of ensuring that suspected terrorist detainees enjoy a minimum level of rights, including the right to challenge the lawfulness of their detention by *habeas corpus* or adequate alternative, was by holding that individuals detained by the US outside its territory could be considered constitutional rights-bearers.

The Supreme Court did not take this constitutional step in either *Rasul* or *Hamdan*, but it did hint at such a development in the future. This was particularly the case in *Rasul* where the Supreme Court engaged in a somewhat underdeveloped analysis of the status of Guantánamo Bay. The (limited) reasoning on this question focused on the nature of the US's arrangement with Cuba in relation to Guantánamo Bay. By the original lease the US recognised the 'ultimate sovereignty' of Cuba over the forty-five-square mile base, while Cuba recognised that 'the US shall exercise complete jurisdiction and control over and within' the area.[188] A 1934 treaty assured that the lease would remain in effect '[s]o long as the US of America shall not abandon' the area.[189] Using a relatively straightforward property-law analysis the Court could easily conclude that the US, as a perpetual lessee, has extensive proprietary rights over Guantánamo Bay, which, combined with the exclusive jurisdiction bestowed and acknowledged in the lease, gives the US a high degree of operational sovereignty over the base, thereby bringing it within the Supreme Court's territorial jurisdiction.[190]

[185] This results from the 'last in time' rule which holds that where treaties and federal statutes are inconsistent, that which was made last in time will prevail. The principle was first articulated in *Taylor v Morton* 23 F. Cas. 784 (C.C.D. Mass. 1855).

[186] s. 7, Military Commissions Act 2006.

[187] s. 6, Military Commissions Act 2006.

[188] Lease of Lands for Coaling and Naval Stations, 23 February 1903, US–Cuba, Article III T.S. No. 418.

[189] Treaty Defining Relations with Cuba, 29 May 1934, US–Cuba, Article III, 48 Stat. 1683, TS, No. 866.

[190] F. de Londras, 'In the Shadow of *Hamdan v Rumsfeld*: Habeas Corpus Rights of Guantánamo Bay Detainees' (2007) 17 *Irish Criminal Law Journal* 8.

Addressing this question Stevens J (for the Supreme Court) referred to *Foley Brothers Inc v Filardo*[191] and the Supreme Court's decision that the principle of non-extra-territorial application of legislation[192] 'certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the US'.[193] As the terms of the lease agreement give full jurisdiction over Guantánamo Bay to the US, it was deemed part of 'the territorial jurisdiction' of the US. Statutory *habeas corpus*, therefore, applied. Concurring in judgment, Kennedy J went further, holding that: '[w]hat matters is the unchallenged and indefinite control that the US has long exercised over Guantánamo Bay'.[194] The naval base, he concluded, 'is in every practical respect a US territory'[195] and, as a result, detainees there could, at the least, avail of the *habeas corpus* statute.[196] In fact, Kennedy J's construction of Guantánamo Bay as US territory 'in every practical respect' was somewhat evocative of the references to 'unincorporated territory' in *the Insular Cases*[197] and suggested that Kennedy J might consider detainees held there as being entitled to at least some constitutional rights, including the right to *habeas corpus*. It was not until the combined cases of *Boumediene v Bush* and *Al Odah v US* that the constitutional question took centre stage in Guantánamo Bay litigation before the Supreme Court.[198]

In his opinion for the Court in *Boumediene*, Kennedy J. expanded on the reasoning from *Rasul* and found that, at least in part, the US Constitution could be said to apply to non-citizens detained in Guantánamo Bay. In the view of the Court, any conception of the *habeas corpus* writ as protected by the Constitution that was applicable on the basis only of *de jure* sovereignty would undermine the basic function of the writ itself. Noting the particular status of *habeas corpus* as one of the very few individual rights protected in the original (i.e. non-Bill of Rights) Constitution, as well as the historical development of the writ, Kennedy J held that a *de facto* conception of

[191] 336 U.S. 281 (1949).
[192] It is well established that legislation is presumed not to have extra-territorial effect; *EEOC v Arabian American Oil Company* 499 U.S. 244, 248 (1991).
[193] *Rasul v Bush* 542 U.S. 466, 480 (2004). [194] *Ibid*., p. 487. [195] *Ibid*., p. 487.
[196] *Ibid*., 'Guantánamo Bay is in every practical respect a US territory, and it is one far removed from any hostilities'.
[197] See particularly *Downes v Bidwell* 182 U.S. 244 (1901). For general commentary on *The Insular Cases* see, e.g., J. Burgess, 'The Decisions of the Supreme Court in the Insular Cases' (1901) 16 *Political Science Quarterly* 486.
[198] *Boumediene v Bush* 553 U.S. 723 (2008).

sovereignty was more appropriate.[199] Finding that the writ of *habeas corpus* was both a means of individual rights-enforcement and a vital mechanism of maintaining the separation of powers, Kennedy J endorsed the notion of *de facto* sovereignty resulting in constitutional oversight:

> The writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain.[200]

The Supreme Court thus held that the constitutional protection of *habeas corpus* was available to non-citizens detained in Guantánamo Bay by a mechanism that was not dissimilar to the basis of extra-territorial application of human rights treaties in the international sphere, i.e. an 'object and purpose' test. Although no express reference to such a test, or to international legal precedents, was made in the case, the notion of *de facto* sovereignty resulting in a need for constitutional oversight on the basis of individual rights and the separation of powers, was analogous in its form to the international legal test of 'effective control and authority' resulting in a need for oversight of state action and the extra-territorial application of international human rights law obligations.[201] In addition, the Court's reference to the nature of *habeas corpus* as a particularly important mechanism for protecting individual rights when one is in a particularly vulnerable position in relation to the state was similar in its reasoning to the Inter-American Court of Human Rights finding that *habeas corpus* is an impliedly non-derogable right and must be available even in times of emergency.[202] Thus, while international legal instruments are not referred to and the decision in *Boumediene* is a domestic constitutional one, the basis for the US Supreme Court's rejection of its own earlier precedent, on the basis of which Guantánamo Bay appears to have been chosen as a detention

[199] It was this distinction that facilitated the Court in circumventing the decision in *Johnson v Eisentrager* 339 U.S. 763 (1950) that non-citizens detained by the US in Landsberg Prison, Germany, could not avail of the constitutional writ of *habeas corpus*.

[200] *Boumediene v Bush* 553 U.S. 723 (2008), pp. 755–6.

[201] I noted that it would have been preferable simply to adopt the international legal approach in F. de Londras, 'What Human Rights Law Could Do: Lamenting the Lack of an International Human Rights Law Approach in Boumediene and Al Odah' (2008) 41 *Israel Law Review* 562.

[202] *Advisory Opinion on Habeas Corpus in Emergency Situations*, IACHR, (1987) 11 EHRR 33; considered in Chapter 2 above.

facility for suspected terrorists,[203] had a distinctly rights-protecting and non-deferential tenor, the significance of which is notable.

This is not to suggest that *Boumediene* is entirely unproblematic; quite the opposite is true, in fact.[204] Because of the lack of clear guidance to the lower courts as to how they were to deal with *habeas corpus* petitions from Guantánamo Bay, substantial amounts of time and litigation continues in trying to work through the implications of the judgment for those detained on the base itself.[205] In addition, the articulation of the concept of '*de facto* sovereignty' was such that litigation continues in order to clarify whether other detention centres – such as the Bagram Air Base near Kabul – fulfil this criteria.[206] The answers to these questions remain unclear, but there were some indications in *Boumediene* that the deference previously associated with the US Supreme Court in such circumstances can no longer be absolutely expected.

Although the UK does not have a written constitution analogous to the US Constitution, the Human Rights Act 1998 is widely recognised as being of a *quasi*-constitutional nature.[207] Although the courts cannot strike down a piece of legislation by means of a finding of incompatibility with the European Convention of Human Rights,[208] findings of incompatibility are routinely acted upon by Parliament, which tends to attempt to bring impugned governmental action into compliance. Thus, any extension of Human Rights Act 1998 and European Convention on Human Rights, obligations on state actors acting abroad is an extension of *quasi*-constitutional obligations to the extra-territorial activity of the UK. The House of Lords has not balked at the wide-ranging implications

[203] *Johnson v Eisentrager* 339 U.S. 763 (1950).

[204] N. Nesbitt, 'Meeting Boumediene's Challenge: The Emergency of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation' (2010) 95 *Minnesota Law Review* 244.

[205] See, e.g., *Al-Bihani v Obama* 590 F.3d 866 (2010); *Hamlily v Obama* 616 F.Supp. 2d 63 (D.D.C. 2009); *Gherebi v Obama* 609 F.Supp. 2d 43 (D.D.C. 2009); *In re Guantanamo Bay Litigation*, Misc. No. 08–442, CMO § ILA (6 November 2008).

[206] *Al Maqaleh v Gates* 605 F.3d 84; 2010 U.S. App. LEXIS 10384.

[207] See, e.g., E. Shorts, and C. de Than, *Human Rights Law in the UK* (2001, London; Sweet & Maxwell), p. 13: 'The Human Rights Act changes forever the nature of British society, marking a major turning point in British constitutional history'; J. Miles, 'Standing Under the Human Rights Act 1998: Theories of Rights Enforcement and the Nature of Public Law Adjudication' (2000) 59 *Cambridge Law Journal* 133, 164: 'The special nature of the Human Rights Act as a constitutional document, albeit not entrenched, militates further in favour of viewing the courts' decisions as extending beyond merely resolving isolated disputes'; D. Vick, 'The Human Rights Act and the British Constitution' (2002) 37 *Texas International Law Journal* 329.

[208] s. 4, Human Rights Act 1998.

of such a finding and has, instead, recognised that such obligations apply to extra-territorial state action where that action falls into the extraordinary circumstances identified in the case-law of the European Court of Human Rights itself.

This issue arose in *R (Al-Skeini & Ors) v Secretary of State for Defence*.[209] In this case the House of Lords was asked to considered whether the European Convention on Human Rights and the Human Rights Act 1998 could be said to apply to the activities of British forces in Basra City, Iraq in late 2003. In essence there were two questions to be considered: (1) did these standards apply to Basra City generally at that time, and (2) did the Human Rights Act 1998 apply to those in the actual custody of British forces in Basra City at that time (it was accepted by the respondent that the European Convention on Human Rights did apply in Basra City)? The meaning of 'in relation to the UK' in section 1, Human Rights Act 1998 was said to be co-extensive with 'within the jurisdiction' [of the UK] in Article 1 of the Convention, therefore the House of Lords devoted sustained attention to the jurisprudence of the Strasbourg Court on extra-territoriality in deciding the above question.

The Law Lords considered *Banković*[210] in some detail and concluded that it did not displace the 'effective control over an area' jurisprudence exemplified by *Loizidou*[211] and *Cyprus v Turkey*.[212] Rather, these cases stood as precedent for the exceptional extra-territorial application of the European Convention on Human Rights. Although the Court of Appeal[213] had relied heavily on *Issa*[214] and claimed that it showed that the *espace juridique* principle in *Banković* did not have the effect of completely precluding the application of Convention rights and obligations outside the member states, the House of Lords acknowledged that *Banković* was the authority on Article 1 and as a result *Issa* ought not to be given undue significance. The House of Lords concluded that the UK did not have sufficient control and authority over Basra City in late 2003 for the Human Rights Act 1998 to apply generally to British forces' activities, but the 1998 Act did apply to the UK when someone was in their custody outside the state's territorial jurisdiction.

This element of the decision was significant, particularly in the context of those actually detained by a state outside its territory. The principles outlined by the House of Lords relating to *when* a domestic

[209] [2007] 3 WLR 33.

[210] *Banković and Others v Belgium and 16 Other Contracting States* (2001) 11 BHRC 435.

[211] *Loizidou v Turkey* [1996] ECHR 15318/89.

[212] (2001) 11 BHRC 45.

[213] [2006] EWCA Civ 1609; [2009] QB 140.

[214] *Issa v Turkey* [2004] ECHR 31831/96.

legal provision might have extra-territorial application were of especial interest. According to Lord Rodger of Earlsferry, citizens, as well as public authorities, could fall within Parliament's legislative reach when operating outside the UK provided this did not interfere with the sovereignty of the other state.[215] The important factors to be considered when assessing whether a provision has this extra-territorial effect were, firstly, who the legislation affected and, secondly, what was the purpose of the legislation?[216] In the case of the Human Rights Act 1998, its application was limited to public authorities and its purpose was to 'provide remedies in our domestic law to those whose human rights are violated by a UK public authority'.[217] As a result, the Human Rights Act 1998 could be applied within the principles on extra-territoriality laid down by the European Court of Human Rights in *Banković*.

The decision in *Al-Skeini* seemed to reflect a willingness by the Law Lords to ensure that the state's human rights obligations were applied in a manner that, in fact, met their purpose; to ensure that the mere location of an action did not determine the extent to which the state could be held responsible for it. In this respect, it was an important declaration of the House of Lords' intent to carry out a meaningful oversight function, even in indisputably military contexts.

Insisting on the integrity of human rights standards

As well as applying human rights standards to cases relating to national security and counter-terrorist detention, the domestic courts have also firmly resisted attempts to recalibrate those standards downwards and allow more repressive state action than was previously the case. In this respect, in particular, the House of Lords has exerted a notable degree of resistance. While the US Supreme Court has insisted on some form of review for suspected terrorist detainees, to some extent it allowed for the introduction of alternative review mechanisms that might call into question the extent to which its decisions in cases such as *Hamdi*, *Rasul* and *Hamdan* were concerned with individual rights (as opposed to with congressional involvement). The decision in *Boumediene v Bush*,[218] however, appeared to show that the Supreme Court's commitment lay

[215] [2007] 3 WLR 33, 56 at para. 46; see also *Clark v Oceanic Contraction Ltd* [1983] 2 AC 130.
[216] [2007] 3 WLR 33, 59 at paras. 53–4.
[217] *Ibid.*, 59–60 at para. 56.
[218] *Boumediene v Bush* 553 U.S. 723 (2008).

with rights-protection, even to the extent of laying down a radically new principle of extra-territorial constitutional rights as outlined above.

Control v. detention: a factual assessment of liberty-deprivation

After the House of Lords found that Part 4 of the Anti-terrorism, Crime and Security Act 2001 was incompatible with the European Convention on Human Rights, control orders were introduced in the UK through the Prevention of Terrorism Act 2005. Very few derogating control orders have been made under the 2005 Act, but around fifty non-derogating control orders have been made. These control orders are issued where the Secretary of State has reasonable grounds to suspect an individual of involvement in terrorism-related activity and considers the control order necessary to protect the public[219] *and* a court has given permission for the order.[220] This permission will not be granted where the Secretary of State's decision is said to be 'flawed'.[221] In October 2007 the House of Lords decided a trilogy of cases in which non-derogating control orders were challenged.[222]

The primary case from this trilogy is *Secretary of State for the Home Department v JJ & Ors.*[223] The case concerned six individuals who had been subjected to control orders, five of whom were Iraqi while the other was either Iraqi or Iranian. The detainees were subject to a wide range of controls under these orders, including confinement to their homes from 4 p.m. to 10 a.m., restriction to specified areas from 10 a.m. to 4 p.m., an obligation to inform the Home Office of any potential visitor to their residence, who must then receive security clearance, monitoring by means of an electronic tag and reporting obligations upon leaving and returning to their residences.[224] As these control orders were 'non-derogating', it was the Government's contention that the imposition of these obligations did not go beyond that which is permissible under Article 5(1) of the European Convention on Human Rights in the normal course of events.

Lord Bingham relied on the case-law of the European Court of Human Rights to establish that whether or not one is deprived of one's

[219] s. 2, Prevention of Terrorism Act 2005. [220] s. 3, Prevention of Terrorism Act 2005.
[221] s. 3, Prevention of Terrorism Act 2005.
[222] *Secretary of State for the Home Department v JJ & Ors* [2007] UKHL 45; *Secretary of State for the Home Department v E & Anor* [2007] UKHL 47; *Secretary of State for the Home Department v MB* [2007] 1 WLR 397.
[223] [2007] UKHL 45. [224] *Ibid.*, para. 20.

liberty is a matter of factual determination rather than a matter of form.[225] Based on this method of assessment he concluded that Article 5 of the European Convention on Human Rights was engaged because the effect of the controls was to deprive the controlees of their liberty:

> The effect of the 18-hour curfew, coupled with the effective exclusion of social visitors, meant that the controlled persons were in practice in solitary confinement for this lengthy period every day for an indefinite duration, with very little opportunity for contact with the outside world, with means insufficient to permit provision of significant facilities for self-entertainment and with knowledge that their flats were liable to be entered and searched at any time. The area open to them during their six non-curfew hours was unobjectionable in size . . . located in an unfamiliar area where they had no family, friends or contacts, and which was no doubt chosen for that reason. The requirement to obtain prior Home Office clearance of any social meeting outside the flat in practice isolated the controlled persons during the non-curfew hours also. Their lives were wholly regulated by the Home Office, as a prisoner's would be, although breaches were much more severely punishable. The . . . analogy with detention in an open prison was apt, save that the controlled persons did not enjoy the association with others and the access to entertainment facilities which a prisoner in an open prison would expect to enjoy.[226]

The Law Lords thus concluded, although not unanimously,[227] that the control orders, as imposed, were so extensive as to be a deprivation of liberty in a manner incompatible with Article 5(1) of the European Convention on Human Rights. This conclusion was particularly significant given the fact that it arguably extended the scope of the Article 5(1) protections beyond that outlined in the jurisprudence of the Strasbourg Court itself (particularly since in their eight hours of 'liberties' the controlees had access to quite a large area). Lord Bingham had previously warned against using the 1998 Act to provide protection beyond that already available under the jurisprudence of the Strasbourg Court.[228] The decision to nevertheless go beyond what was clearly laid down in the Strasbourg jurisprudence, combined with the established principle of deferring to a substantial degree to parliamentary and executive interpretations of the Convention, marked the House of Lords' decision in *JJ* as particularly non-deferential. What is especially

[225] *Ibid.*, paras. 15 and 16.
[226] *Ibid.*, para. 24. See also the judgment of Baroness Hale at para. 63.
[227] See the dissenting judgments of Hoffmann and Carswell LLJ finding that there was no deprivation of liberty such as to engage Article 5(1).
[228] *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, 350, para. 20.

significant in this case, however, is the House of Lords' quite clear rejection of any suggestion that international human rights law standards as they existed prior to the 'War on Terror' ought to be recalibrated to allow for more permissive detention-related action because of the dangerousness of Al Qaeda. In the words of Lord Brown:

> The borderline between deprivation of liberty and restriction of liberty of movement cannot vary according to the particular interests sought to be served by the restraints imposed. The siren voices urging that it be shifted to accommodate today's need to combat terrorism (or even that it be drawn with such need in mind) must be firmly resisted. Article 5 represents a fundamental value and is absolute in its terms. Liberty is too precious a right to be discarded except in times of genuine national emergency. None is suggested here.[229]

Securing the fair trial rights of prospective controlees

We have already seen that the mechanisms by which control orders can be acquired against individuals under the Prevention of Terrorism Act 2005 are seriously flawed from a process-based perspective. In particular, if evidence on the basis of which the control order is sought is said to be 'closed' then the capacity of a Special Advocate to properly represent the interests of prospective controlees is seriously undermined. Material that is brought before the court may be withheld from the controlee and his legal representative[230] but can only be relied upon at hearing where a Special Advocate has been appointed and has been served with this material.[231] The Special Advocate, when appointed, would support the controlee's interests, in the absence of the prospective controlee and his appointed legal counsel. Importantly, however, the Special Advocate may not communicate with the controlee once he has seen the secret materials.[232] In June 2009 the House of Lords had the opportunity to consider the compatibility of this procedure with the European Convention on Human Rights.[233] This followed shortly

229 *Secretary of State for the Home Department v JJ & Ors* [2007] UKHL 45, para. 107.
230 Civil Procedure Rule 76.28, introduced by Civil Procedure (Amendment No. 2) Rules 2005 (SI 2005 No. 656).
231 *Ibid.*
232 Civil Procedure Rule 76.25, introduced by Civil Procedure (Amendment No. 2) Rules 2005 (SI 2005 No. 656).
233 *Secretary of State for the Home Department v AF and another* [2009] UKHL 28.

after the Strasbourg Court had itself decided the case of *A v United Kingdom*.[234] In that case the Court held that whether or not the provision of a Special Advocate would in fact satisfy Article 5(4) of the European Convention on Human Rights in any particular circumstance would depend on the nature of the case itself. In situations where 'the open material consisted purely of general assertions and SIAC's [Special Immigration Appeals Commission's] decision to uphold the certification and maintain the detention was based solely or to a decisive degree on closed material'[235] the mere provision of a Special Advocate would not be sufficient.

In *Secretary of State for the Home Department v AF*[236] the House of Lords had to decide on the compatibility of the Special Advocate procedure as it applied in the Prevention of Terrorism Act 2005 in the wake of the Grand Chamber decision in *A*. The House of Lords held that the effect of *A* was to lay down a Convention principle that:

> [T]he controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.[237]

The House of Lords thus found that the control orders against the applicants in this case were not compliant with the Convention. Indeed, in some instances this finding was made with regret and in the fear that it would result in the destruction of the control order system in general.[238] We have already seen that the truly adversarial nature of proceedings such as those undertaken in the course of placing someone under a control order is fundamental, even where international human rights law allows for some flexibility on the part of the state, bearing in mind the gravity of the situation that the state faces.[239] By applying the decision of the Grand Chamber in *A* in this manner, the House of Lords

[234] *A v United Kingdom* [2009] ECHR 301 (19 February 2009).
[235] *Ibid*., para. 220.
[236] [2009] UKHL 28.
[237] *Ibid*., *per* Phillips LJ at para. 59.
[238] See the speech of Hoffmann LJ (at paras. 70–4) in particular.
[239] See Chapter 2, pp. 59–60.

clearly endorsed a commitment to such adversarial procedures even though – strictly speaking – the House of Lords was not bound by the decision in *A*.[240]

Following the decision in *Secretary of State for the Home Department v AF*[241] the Home Secretary decided to revoke the control orders against the applicants instead of revealing the basis for their imposition. That gave rise to the question of whether those control orders had in fact ever been valid; a question that was of particular significance to whether the former controlees would be likely to be compensated for the deprivation of their liberty under these orders. In addition, one of the former controlees faced criminal charges for breach of the control order which, if the order were to be quashed *ab initio*, would then no longer stand. In the July 2010 case of *AN v Secretary of State for the Home Department*,[242] the Court of Appeal found that, in fact, the control orders were to be quashed *ab initio*; this was required in order to ensure that they received a remedy that satisfied Article 13 of the European Convention on Human Rights. It is now clear that the control orders system is entirely untenable and in 2011 the Conservative–Liberal Democrat coalition government proposed the repeal of control orders and their replacement with a surveillance order system; a move largely motivated by the continuing difficulties in defending control orders in the superior courts.

[240] s. 2(2), Human Rights Act 1998 requires UK courts to take European Convention on Human Rights cases into account but does not make them binding on domestic courts. There is now a presumption that principles laid down in the decisions of the Strasbourg Court will be followed (*R v Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury Developments Ltd* [2001] UKHL 23; *R (Anderson) v Secretary of State for the Home Department* [2002] 3 WLR 1800; *R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26; *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484; *M v Secretary of State for Work and Pensions* [2006] UKHL 11; *Huang v Secretary of State for the Home Department* [2007] 2 AC 167). These decisions can be departed from in limited circumstances: where the decision is not clear and consistent (*R v Secretary of State for the Environment, Transport and the Regions, ex parte Alconbury Developments Ltd* [2001] UKHL 23, para. 26); where the application of the principles laid down in Convention jurisprudence would result in practical difficulties of such magnitude that the courts would consider themselves justified in departing from those principles (*Doherty v Birmingham City Council* [2008] UKHL 57; *R v Horncastle & Others* [2009] UKSC 14); where the European Court of Human Rights judgment is not carefully considered (*R (on the Application of Anderson) v Secretary of State for the Home Department* [2002] 3 WLR 1800 *per* Bingham LJ at para.18).

[241] [2009] UKHL 28.

[242] [2010] EWCA Civ 869 (28 July 2010).

Enforcing human rights standards or requiring democratic process?

As considered above, the US Supreme Court had, until June 2008, confined its reasoning in Guantánamo Bay cases to a statutory basis and had not engaged in constitutional decision-making relating to non-citizen detainees. As a result, it seemed arguable until 2008 that the Supreme Court's non-deferential decisions, outlined above, were merely 'democracy-enforcing' rather than rights-enforcing. In other words, that the result of the Court's judgments in these 'War on Terror' cases was merely to catalyse legislative action, rather than to protect individual rights effectively. Certainly, as Chapter 4 demonstrates, the US Congress reacted to the decisions in *Rasul* and *Hamdan* by means of legislation that consistently attempted to minimise judicial involvement. On closer inspection and by particular reference to the decision in *Boumediene v Bush*, however, it appears that the Supreme Court's motivation was more likely to be one of rights-protection than of ensuring congressional involvement. This was discernible from the nature of the statutory analysis engaged in by the Court. In *Hamdan* the Supreme Court chose to find jurisdiction when the Justices could easily have accepted the Graham–Kyl interpretation of the Detainee Treatment Act 2005 as retrospective in its jurisdiction-stripping provision. Certainly, the precedent relied upon by the government was equally as convincing as that relied upon by the petitioner in the case. In addition, the Opinion of the Court clearly indicated that the Supreme Court did not rule out constitutional adjudication in the future – Stevens J expressly held '[w]e find it unnecessary to reach [the Constitutional] arguments . . . at least insofar as this case, which was pending at the time the [Detainee Treatment Act] was enacted, is concerned'.[243]

Although the US Supreme Court acknowledged, in *Boumediene v Bush*,[244] that Congress could determine the manner in which a review tribunal would operate in relation to those detained in Guantánamo Bay, it not only found that those detained there could avail themselves of the constitutional right to *habeas corpus* but also laid down what it considered to be a number of essential elements that any review process must contain in order to satisfy constitutional standards. This is not to deny the difficulties that have arisen from the failure to lay down a detailed process for such petitions, but the principles are

[243] *Hamdan v Rumsfeld* 548 U.S. 557 (2006).
[244] *Boumediene v Bush* 553 U.S. 723 (2008).

themselves important. Although Kennedy J expressly stated that the elements identified in the judgment were not exhaustive, he outlined the following:

(1) the review process must provide opportunity for the petitioner to make a meaningful case that his detention is unlawful;
(2) the review body must have the capacity to order release although that is not the only remedy that might be provided in the occasion of a successful petition;
(3) where a person is detained on the basis of executive, rather than court, order, the review tribunal must be enabled to conduct a thorough and meaningful review in relation to whether due process has been accorded.

In sum, Kennedy J held:

> For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT [Combatant Status Review Tribunal] proceedings. This includes some authority to assess the sufficiency of the Government's evidence against the detainee. It also must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the earlier proceeding.
>
> . . .
>
> [W]hen the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release.[245]

The processes available to Guantánamo Bay detainees under the applicable statutes (i.e. Detainee Treatment Act 2005 and Military Commissions Act 2006) did not, the Court held, satisfy these requirements. The Court accordingly found section 7 of the Military Commissions Act 2006 unconstitutional. In his closing passage Kennedy J appeared to try to placate those who would protest that this decision constituted an unconscionable burden on the executive in its attempts to secure the US against the contemporary threat, but nevertheless clearly asserted the Court's conviction that it was entitled, if not obliged, to ensure that basic principles of the rule of law were maintained, notwithstanding substantial security threats. Kennedy J held:

[245] *Ibid.*, pp. 786–7.

> In considering both the procedural and substantive standards used to impose detention to prevent acts of terrorism, proper deference must be accorded to the political branches . . . Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people. The law must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security. Officials charged with daily operational responsibility for our security may consider a judicial discourse on the history of the Habeas Corpus Act of 1679 and like matters to be far removed from the Nation's present, urgent concerns. Established legal doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not.
>
> Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers. It is from these principles that the judicial authority to consider petitions for habeas corpus relief derives.
>
> Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.[246]

While acknowledging that some level of deference to executive decision-making and to Congress was appropriate, therefore, the Supreme Court in the *Boumediene* case appeared to recognise that this deference was not without an outer limit and that the courts were entitled, if not obliged, to step in, in order to restrain governmental action that was overly repressive.

Interestingly, while international law was not referred to in the judgment, the assertion of *habeas corpus* jurisdiction and the essential elements of an adequate review outlined in the judgment, bear a resemblance to the standards contained in international human rights law. As considered in Chapter 2 above, international human rights law requires that all those detained would be entitled to mount a substantive

[246] *Ibid*., pp. 796–7.

challenge to the lawfulness of their detention in an adversarial process conducted before a neutral arbiter with the power to order release if appropriate. The basic elements of review laid down by Kennedy J in this case encompass all of those elements.

The House of Lords has equally chosen a more rights-enforcing path in cases where a deferential approach was available to it. In the *JJ* case,[247] considered above, the Law Lords accepted that whether or not the particular combination of controls imposed actually constituted deprivation of liberty was a question of opinion, rather than of law. As Lord Bingham noted, there is no bright line separating deprivation and restriction of liberty: 'the process of classification in borderline cases . . . is one of pure opinion or what may, rather more aptly, be called judgment'.[248] By exercising this judgment in such a way as to categorise the effect of the control orders as a deprivation of liberty, thereby engaging Article 5(1) of the European Convention on Human Rights, the House of Lords similarly chose the path of rights-protection over that of deference and insisted that the government act only within the allowable boundaries as established in international human rights law. In essence, every time that a UK court finds something to be incompatible with the Convention under the Human Rights Act 1998, it is forcing the matter onto the political agenda and enjoining the democratic process to concern itself with it. It is open to the government and Parliament to refuse to do anything in response to such a finding, although the pattern since the introduction of the Human Rights Act 1998 is that in fact such declarations are responded to. Thus, while a declaration of incompatibility does not strike down a law and does not strictly *require* a change in the incompatible law at issue, the reality is that such change normally does arise. As a result, a finding of incompatibility is a powerful tool for courts to 'nudge' the political branches towards a more rights-compliant position and is, in this way, both rights-enforcing *and* democracy-enforcing.

Increased international resilience and decreased domestic deference – related phenomena?

If, as the materials presented in this chapter suggest, the domestic courts in the US and the UK have been less deferential in their approach to executive action, facilitated by legislative enactment, in the 'War on Terror' than might have been expected given the historical patterns of

[247] *Secretary of State for the Home Department v JJ & Ors* [2007] UKHL 45.
[248] *Ibid.*, para. 17.

deference, this suggests that something important has changed. Could it be that this change resides in awareness of the grave human rights implications for those caught in the national security net and of the fact that individual rights protections remain enforceable, even in times of crisis? In other words, is there some connection between this domestic pattern and the nature, form and resilience of international human rights law? A connection between the importance of human rights protections and the reduction of deference was expressly asserted in *Al-Rawi & Ors v Secretary of State for Foreign and Commonwealth Affairs.*[249]

In *Al Rawi*, the families of three long-term non-citizen residents of the UK argued that the government had an obligation to make representations about the liberty and welfare of those individuals to the US, which was holding them in detention. In considering the claim, the Court of Appeal held that if the state had no obligation to make representations in respect of citizens it certainly could not be said to have obligations in respect of non-citizens. While this conclusion may not have been overly surprising, the fact that this case reached judicial review at all was significant. This is because the conduct of foreign affairs is an exclusively executive function. Addressing this argument, Lord Laws held that in normal circumstances a case that so clearly fell within the exclusive competencies of the executive would not be subject to judicial oversight.[250] The review was warranted in this case, however, as a result of the 'grave privations' it was assumed the detainees suffered in Guantánamo Bay.[251] This exceptional judicial foray into executive territory was, therefore, expressly justified by reference to human rights standards.[252]

Not only have the Superior Courts in the US and the UK therefore heard claims on areas that would normally be considered outside their jurisdiction on the basis of human rights concerns, but they have often referred quite expressly to international law in reaching their conclusions in all of the cases considered above. In addition, and as considered above, in *Boumediene v Bush* the US Supreme Court mirrored international principles in its description of the nature of the *habeas corpus* right in the course of finding that non-citizens detained in Guantánamo Bay had a constitutional right under the Suspension Clause.[253]

[249] [2006] EWCA Civ 1279. [250] *Ibid.*, para. 2. [251] *Ibid.*, para. 3.

[252] This is not to suggest in any way that the decision itself was rights-enforcing. In fact, the Guantánamo detainees in question were not aided by the decision. For a thorough review of the case, see, e.g., C. Murray, 'The Ripple Effect: Guantánamo Bay in the United Kingdom's Courts' (2010) *Pace International Law Review (OC)* 15.

[253] *Boumediene v Bush* 553 U.S. 723 (2008).

In the UK, the House of Lords applied the principle of proportionality from international human rights law in *A (FC) and others; (X) FC and another v Secretary of State for the Home Department (‘Belmarsh’)*[254] in a manner that Rivers claimed limits, rather than optimises, the state.[255] According to Rivers, this approach to proportionality goes beyond the approach adopted even by the European Court of Human Rights. In his view, the Strasbourg Court tends to adopt an optimising approach to proportionality, seeing the doctrine ‘as a structured approach to balancing fundamental rights with other rights and interests in the best possible way’,[256] whereas the UK courts have used proportionality ‘as a set of tests warranting judicial interference to protect rights’.[257] Rivers advocates a turn towards a more typically European conception of proportionality that would comprise both a substantive concept of proportionality (requiring ‘the seriousness of any rights-infringement to be matched by the importance of a competing right or public interest’[258]) and a formal concept of proportionality (‘the seriousness of prima facie rights-infringement [would] be matched by decreasing judicial deference and restraint’[259]). In *A*, Rivers claims, the House of Lords rejected an optimising approach which would have merely asked whether the policy introduced was capable of addressing the emergency currently being experienced; its *partial* ineffectiveness, under-inclusiveness and over-inclusiveness would have no impact on the proportionality decision.[260] Rivers’s analysis further highlights the extent to which the House of Lords has acted in a manner that is calculated to protect individual rights and force the state to recalibrate its machinations in order to protect security within a human rights framework, rather than allowing the state to recalibrate the human rights framework in its own vision.

In contrast to the House of Lords, the US Supreme Court has not referred expressly to international human rights law in its judgments on counter-terrorist detention. That said, however, it has equally chosen the rights-protecting path over the deferential one in the ‘War on Terror’ cases. Of particular significance is the fact that the Supreme Court has chosen to protect Al Qaeda detainees by virtue of Common Article 3 of the Geneva Conventions – the provision of international humanitarian law with the lowest threshold for application and which incorporates customary principles of international humanitarian law, including the

[254] [2005] 2 AC 68.

[255] J. Rivers, ‘Proportionality and Variable Intensity of Review’ (2006) 65 *Cambridge Law Review* 174, 176.

[256] *Ibid.*, 176. [257] *Ibid.* [258] *Ibid.* [259] *Ibid.* [260] *Ibid.*, 188–9.

right to challenge the lawfulness of one's detention. Thus, even though the US Supreme Court did not reach out for international human rights law – either because it is not incorporated into domestic law or because it was not argued before them[261] – the part of international humanitarian law that it did reach for, Common Article 3, is saturated in human rights principles and standards. In addition, many domestic legal principles applied by the Supreme Court bear a clear structural resemblance to principles of adjudication in international human rights law. In *Hamdi*, for example, the Court attempted to ensure balance through the application of the '*Mathews* Calculus' considered above. Despite the protestations of the dissenting judges in *Hamdi* there is nothing inherently unsuitable about this calculus; in fact it incorporates elements of necessity and proportionality found in international human rights law through the language of interests and public welfare.

Through a reduction in deference, then, the domestic courts in the US and the UK appear to be trying to nudge the state into counter-terrorist detention policies that are more in line with the requirements of international human rights law. Even where the revised policies and laws introduced in the wake of these decisions are not human rights

[261] The briefs and oral argumentation in *Boumediene v Bush* No. 06–1195 and *Al Odah v US* No. 06–1196, for example, never reference international human rights law: Oral Transcript, *Boumediene v Bush*; *Al Odah v US*, 5 December 2007. The transcript of the oral hearings features no reference to international human rights law whatsoever. International law fares only marginally better in the documentary briefs submitted by the parties, where once again international human rights law does not feature at all. The original Brief for Petitioners Al Odah *et al.* (available at www.mayerbrown.com/public_docs/probono_AlOdah_Abdah.pdf, last accessed 21 January 2008) focuses on international law in respect of cessation of Guantánamo Bay (pp. 16–23) and the concept and definition of 'enemy combatant' (pp. 38 and 41). The Brief for Petitioners El-Banna *et al.* (available at www.mayerbrown.com/public_docs/probono_El-BannaBrief_Final.pdf, last accessed 21 January 2008) invokes international law only inasmuch as it refers to the Geneva Conventions (pp. 48–9). The Brief for Petitioners Boumediene *et al.* (available at www.mayerbrown.com/public_docs/probono_Boumediene_Petitioners_Merits.pdf, last accessed 21 January 2008) similarly invokes only international humanitarian law (both the Geneva Conventions and customary international law) when considering whether the US has lawful authority to detain the particular detainees at all, particularly in relation to the concept of direct participation in hostilities (pp. 37–42). The only reply brief to make any meaningful reference to international law is Reply Brief for Petitioners Al Odah *et al.* (available at www.mayerbrown.com/public_docs/probono_Reply_Brief_al_Odah.pdf, last accessed 21 January 2008), which states, at page 6, that 'CSRTs are not contemplated or governed by international law and are not sufficient under international or U.S. law to justify detention without meaningful judicial review in territory under the exclusive, and effectively permanent jurisdiction of the US' but does not specify whether this conclusion is drawn from international humanitarian law, international human rights law, or both.

compliant, they tend to be closer in form to that required by human rights law than the laws or policies impugned by the domestic courts were. The reduction in deference by the domestic courts could, of course, be explained by reference to the lack of temporal proximity between the attacks and the time of judicial adjudication. The slow-moving nature of the courts means that Superior Courts rarely decide on contentious issues of detention and national security in the height of the crisis. But the pattern of deference that was exemplified by cases such as *Korematsu*[262] and *Liversidge*[263] shows that temporal removal from a crisis does not necessarily reduce judicial deference in relation to issues that are represented by the executive as related to war or emergency.[264] Nor can it be wholly attributed to the judiciary's removal from the panicked populace because of the lack of judicial election at superior federal level in the US. The Justices of the *Korematsu* Court, for example, were no less subject to the power of the ballot box than were those of the *Hamdan* Court. There must, it seems, be another explanation. It seems possible, that the resilience of international human rights law and its persistence in asserting its own relevance in the 'War on Terror' ties in with a judicial sense of self that sees rights-enforcement as a central part of the judge's role and views international human rights law as an institutional material to be drawn upon in that exercise, if not as 'rules' (if they lack domestic enforceability for lack of incorporation), then perhaps as 'principles'.[265]

Lord Bingham's consideration of the meaning of the rule of law suggests that international human rights law may well be acquiring a status of this nature.[266] While appreciating and acknowledging the notoriously nebulous content of the concept, his Lordship felt compelled to try to break it down into a number of sub-rules by the introduction of section 1 of the Constitutional Reform Act 2005, which expressly recognises the rule of law as 'an existing constitutional principle'.[267] Almost all

262 323 U.S. 214 (1944). 263 [1942] AC 206.

264 Epstein *et al.* 'The Effect of War on the Supreme Court'.

265 Dworkin defines a principle as 'a standard to be observed, not because it will advance or secure an economic, political, or social situation, but because it is a requirement of justice or fairness or some other dimension of morality'; R. Dworkin, *Taking Rights Seriously* (1978, London; Duckworth), p. 22.

266 T. Bingham, 'The Rule of Law' (2006) 66 *Cambridge Law Journal* 67; T. Bingham, *The Rule of Law* (2010, London; Allen Lane).

267 s. 1, Constitutional Reform Act 2005: 'This Act does not adversely affect (a) the existing constitutional principle of the rule of law, or (b) the Lord Chancellor's existing constitutional role in relation to that principle.'

of these sub-rules were presented by Lord Bingham as having a direct relevance to current 'War on Terror' policies. Included among these sub-rules are a number that relate directly to human rights protection and are not usually perceived as being classically within the definition of the rule of law, namely respect for fundamental human rights and compliance with international legal obligations. While commentators have long contended that the most renowned of the British rule of law scholars, Dicey, did not intend for respect for human rights to be a requirement of the rule of law,[268] Lord Bingham drew on the Universal Declaration of Human Rights and the European Convention on Human Rights to substantiate his claim that this is now a fundamental part of the contract between state and individual and a contemporary pillar of the rule of law. This is not to say that the rule of law protects all those rights protected by the international covenants cited, but rather that it protects those freedoms, including the right to liberty, involved in the social contract Lord Bingham argues affords basis to the rule itself.

Lord Bingham's reflections on the meaning of the rule of law are a rare inside glimpse into the centrality of interpreting and applying international law to the job of a twenty-first century Law Lord or Supreme Court judge. This seems enormously significant for the status of international law and internationally recognised rights. If the Constitutional Reform Act 2005 reaffirms the role of the judge in assessing the compatibility of statutes with the rule of law and, as provided for by the Human Rights Act 1998, with the European Convention of Human Rights, then individual rights may become judicially protected against national security actions unless those actions: (1) comply with the sub-rules of the rule of law and (2) are either not violations of individual rights or, if they do limit individual rights, are necessary and proportionate limitations pursuant to a derogation under the Convention. The judge, therefore, would become very much the guardian of individual rights without any need to step outside his strict institutional powers – precisely the position envisaged by early constitutional scholars to ensure that the principle of parliamentary sovereignty did not

[268] See, for example, J. Raz, 'The Rule of Law and Its Virtue' in Raz, J., *The Authority of Law: Essays on Law and Morality* (1979, Oxford; Oxford University Press), p. 221; P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467. For a detailed consideration of the rule of human rights and judicial determination thereof within a Rule of Law paradigm, see B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004, Cambridge; Cambridge University Press), pp. 104–8.

result in governmental tyranny.[269] It seems possible that the decline in deference that I perceive in the counter-terrorist detention cases in the US and the UK since 2001 is connected in some way with the normative strength of international human rights law. This case is certainly easier to make in the UK where – as the views of Lord Bingham show – the principles of international human rights law are becoming increasingly internalised, due in no small part to the introduction of the Human Rights Act 1998. In the US, however, the evidence for some connection to international human rights law's resilience is more difficult to find but there are, as I have argued, at least some indications that there may be a connection of some kind between the reduction in deference by domestic courts and the resilience of the right to be free from arbitrary detention in international law. This argument does not depend on some kind of myth-laden historicisation of human rights law;[270] rather it reflects the close normative connections between the values and constitutionalist limits that underline core international human rights standards and domestic conceptions of the rule of law, limitation of state power and protection of individual liberties.

Conclusion

In this chapter, I have attempted to complete the picture presented of how domestic legal institutions in the US and the UK have behaved in the context of detention-related law and policy introduced and pursued in the 'War on Terror'. As outlined in Chapters 3 and 4 above, the executive and legislative limbs of government have mostly acted in a manner that advocates and introduces repressive laws and policies directed against 'folk devils' that are represented as security-enhancing. In addition to promoting their assessments of contemporary terrorism as being radically different and more dangerous than that which came before in order to shape repressive laws and policies in the panicked and traumatised domestic sphere, the governments in both states have

[269] Dicey famously argued that individuals' liberties remained protected because of the three-part legislative structure (Monarch, Commons and Lords) and the centrality of the Rule of Law to the English constitutional structure. This structure, he claimed, was 'no mere matter of form; it has most important practical effects. It prevents those inroads upon the law of the land which a despotic monarch . . . might effect by ordinances or decrees . . .'; A.V. Dicey, *An Introduction to the Law of the Constitution*, 8th edn., (1915, London; Macmillan), quoted in C. Stychin and L. Mulcahy, *Legal Method: Text and Materials*, 2nd edn., (2003, London; Sweet & Maxwell), p. 63.

[270] S. Moyn, *The Last Utopia: Human Rights in History* (2010, Cambridge, MA and London; Harvard University Press, *imprint* Belknap Press).

attempted to promote their assessments of risk, permissible state action, and the appropriate shape of international legal standards onto the international sphere. As we have seen, however, these attempts to transmit panic-related assessments internationally do not appear to have been as successful as neo-realist theory might have predicted; international human rights law seems to have shown, and to continue to show, a significant resilience in this context. This international resilience, however, can arguably only go so far; particularly if, as realists claim, international law has an extremely limited potential to exert an exogenous force on powerful states' behaviour.

As the case-law that we have considered here suggests, the superior courts of the US and the UK have acted in a less deferential manner than was the case in earlier situations of emergency or war, notwithstanding the fact that they have not completely rejected the notion that some level of deference may be appropriate. Where challenges to repressive detention-related laws and policies have arisen before the courts in both the US and the UK, the relevant governments have been in a position to present quite compelling arguments in their favour based on domestic precedent, the principle of deference and the executive role in ensuring national security. The domestic courts, therefore, were presented with plausible routes towards conclusions that would have allowed for the desired governmental action. Rather than take these routes, however, the domestic courts have frequently arrived at more rights-enforcing conclusions than a deferential approach would have given rise to. This has resulted in findings that that domestic constitutional and *quasi*-constitutional rights protections apply to extra-territorial state action; asserting the principle of non-discrimination on the basis of non-citizenship; assessing the factual nature of the imposition of measures that were not labelled 'detention' but nonetheless having the effect of detention upon their subjects; and questioning executive assessments of risk.

Although the domestic courts in these jurisdictions did not always reach for international law in coming to their conclusions in these cases – and, indeed, the US Supreme Court did so in only relatively rare cases – the structure of the reasoning employed frequently resembled that employed in international human rights law. Thus, the US Supreme Court neatly circumvented its own strong precedent to find that the Constitution would apply in situations where the state had *de facto* sovereignty based on the separation of powers and the nature of the *habeas corpus* right; an approach quite analogous to the 'objects and purpose' test for extra-territorial application used in international

human rights law. In addition, the Supreme Court applied its own 'balancing test' from *Mathews* to assess the extent to which a citizen who was alleged to have fought against the US might be entitled to exercise constitutional rights; a structure that is similar to the proportionality approach adopted in international human rights law. And when the Supreme Court did reach expressly for international law, the object of its attention was Common Article 3 of the Geneva Conventions; a provision that has an extremely low threshold for application and whose content is informed, the Court held, by, *inter alia*, customary international law, including customary international human rights law. The courts of the UK have been rather more express in their references to and use of international human rights law, not only in relation to the content and requirements of the Human Rights Act 1998 (which is, after all, an incorporating statute for the European Convention on Human Rights), but also in referring to unincorporated international instruments and principles of customary international law in their decisions.

While this by no means proves conclusively that the resilience of international human rights law has resulted in a reduction in judicial deference in the 'War on Terror', it begs the question as to whether there may be some connection between the two apparent phenomena. Could it be that international human rights law's apparent resilience has established its content and principles as 'law' to the extent that they have become a part of the general institutional materials within which judicial decision-making takes place? If this were the case, and there seems to be at least an indication in the case-law presented in this chapter that it may be, this would be a rebuff to realist theorists who claim that even where international law will not bend to powerful states' will it can be ignored by means of state withdrawal. Such withdrawal would not be effective if, as has arguably been the case, domestic courts began to insist on much the same standards of governmental behaviour as international law does, either by express reference to international legal standards or by reshaping domestic standards to a broadly analogous mould.

Conclusion

As I set out in the Introduction, the purpose of this book was really to test the dominant hypotheses as to how domestic and international law would respond to counter-terrorist detention in the 'War on Terror'. Such detention puts in serious jeopardy the right to be free from arbitrary detention and the safeguard right to challenge the lawfulness of one's detention. The answer to this question is really that in some ways the law has behaved in accordance with theoretical predictions and in other ways it has not; it is, in other words, a somewhat mixed – perhaps even messy – picture. I have tried to show that the US's and UK's political branches, i.e. the executive and legislature, have generally behaved in a panic-related manner, introducing repressive counter-terrorist law and policy against a backdrop of the discourse of crisis, emergency, novelty of risk and extremity of dangerousness. In many ways these laws and policies were clearly in breach of the international right to be free from arbitrary detention and its equivalent protections in the domestic law of both the US and the UK. International human rights law, on the other hand, seems to have displayed a somewhat unexpected degree of resilience in protecting its normative core from powerful hegemonic projections by the US and the UK. The US Supreme Court and UK House of Lords (now the UK Supreme Court) seem to have bucked their deferential trend in the cases before them that relate to counter-terrorist detention. Certainly, their approaches to such detention subject the representations of the government to significantly closer scrutiny than was the case in cases such as *Korematsu*[1] and *Liversidge*.[2] The question that remains, of course, is what all of this means?

To suggest that the rights-enforcing decisions in the US and the UK, or the normative resilience of international human rights law, have, in fact, delivered liberty in the physical sense of the word to detainees in the

[1] *Korematsu v United States* 323 US 214 (1944).
[2] *Liversidge v Anderson* [1942] AC 206.

'War on Terror' would be clearly to overstate the case. In the US the constitutional and political difficulties of closing Guantánamo Bay are great and many individuals remain detained there, even in the wake of successful *habeas corpus* petitions. The closure of Guantánamo Bay has perhaps proved to be more difficult than was predicted, partially because of the immense political resistance to closure that is likely now to persist for the foreseeable future following the Republican victories in the November 2010 Mid-Term elections, the restrictions placed on transferring detainees in the 2011 Defense Authorization Act,[3] and the forthcoming presidential election campaign in 2012. Meanwhile, thousands of people remain detained by the US in other locations around the world, including Bagram Air Base near Kabul, although it does appear that the so-called 'black sites' or 'ghost prisons' that existed in many locations (including in Europe) have closed and those detained there have been moved elsewhere.[4] And still the wave of proposed repressive legislation continues. At the time of writing, in early 2011, Senator Lindsey Graham had proposed a Terrorist Detention Review Reform Act, without the support of the Obama Administration, that attempted to clarify the processes for *habeas corpus* petitions of counter-terrorist detainees while, at the same time, providing that the President may detain suspected terrorists, including anyone who has purposefully and materially supported hostilities against the US or its coalition partners. The disentanglement of the counter-terrorist detention system driven by the Bush Administration will take a substantial amount of time, but the extent to which that system will stand as a precedent for future responses to violent crises is questionable. This is, I submit, primarily because of the reduction in deference from the US Supreme Court; because of the clear sign that absolute, executive power – even when facilitated by Congress – cannot be countenanced no matter what the prevailing circumstances.

In the UK, those individuals who succeeded in landmark decisions such as the *Belmarsh* case[5] were generally released from one kind of captivity only to be bound to their homes by control orders.[6] And,

[3] See Chapter 4, pp. 125–7.

[4] D. Marty, 'Secret Detentions and Illegal Transfer of Detainees Involving Council of Europe States: Second Report' (2007), available at, http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf (last accessed 21 February 2011).

[5] *A (FC) and others; (X) FC and another v Secretary of State for the Home Department* [2005] 2 AC 68.

[6] See generally K. Ewing, *Bonfire of the Liberties: New Labour, Human Rights and the Rule of Law* (2010, Oxford; Oxford University Press).

indeed, in spite of the repeated findings from the superior courts in the UK that the system of control orders is flawed and incompatible with the European Convention on Human Rights that system remains in place with no certainty whatsoever that the system to be introduced by the Conservative–Liberal Democrat coalition will be any better.[7] However, even bearing all of this in mind the UK judiciary has laid down some clear and significant landmarks in the past nine years; it has sent a clear message that parliamentary sovereignty means that Parliament may pass laws allowing for counter-terrorist detention or, indeed, any other counter-terrorist measure, but those remain subject to judicial censure when they overstep the boundaries of the Human Rights Act 1998 and the rule of law, now seemingly conceptualised in a manner that includes respect for human rights and compliance with international obligations.[8]

Furthermore, international human rights law has sent a signal; it has asserted, in the context of the right to be free from arbitrary detention, a normative resilience and an autonomy that confounds those who view international law as a mere instrument of power. Power unconstrained fundamentally endangers the rule of law and, in the context of violent emergency, power can easily unshackle itself from human rights and constitutional principles in the name of 'security'. The right to be free from arbitrary detention, and its accompanying right to challenge the lawfulness of one's detention, have been designed in international law with the realities and exigencies of emergency in mind. In that respect they allow for extensive state action in order to protect national security, but faced with demands for ever more permissiveness in the 'War on Terror' international human rights law has stayed firm and largely retained the integrity of this right.

I have argued that there may well be some connection between these two trends: between the resilience of international human rights law and the rights-based resistance of the judiciary to overly repressive counter-terrorist detention law and policy. That argument is, of course, somewhat speculative and based on a particular reading of the jurisprudence emanating from the US Supreme Court and the UK House of Lords (now the UK Supreme Court), and I do not claim that this is the only reading of those cases. But even if one were not convinced of that

[7] A. Rawnsley, 'The Fierce Battle Behind the Scenes for the Coalition's Soul', *The Observer*, 31 October 2010.

[8] T. Bingham, 'The Rule of Law' (2006) 66 *Cambridge Law Journal* 67; T. Bingham, *The Rule of Law* (2010, London; Allen Lane).

reading, those two trends themselves are incredibly significant. They may not, as of yet, have secured the physical liberty of all of those who are detained in the course of the 'War on Terror' (or have ensured that those who remain in detention have all been charged with a criminal offence) but that should not be taken to mean that they have no significance. They set a marker for any future actions; one that is significantly different to, and more committed to the protection and promotion of human rights than, the World War II precedents that the US and the UK governments relied upon in their design of their contemporary counter-terrorist detention systems.

I do not mean to discount the problematic nature of identifying elite, non-democratic bodies as rights-enforcing and trustworthy institutions in situations of crisis. I am also conscious of the frequent examples of failure on the part of the judiciary to recognise the rights-based claims and entitlements of those considered 'other' by virtue of their gender, race, religion, sexual orientation or other status. What I do mean to do here is to recognise that, in spite of these difficulties, no other organ of the state than the judiciary has shown itself to be better at insisting upon a rights-protecting balance being struck in relation to counter-terrorist detention in the context of the terrorism-related crisis that has prevailed since the autumn of 2001 and to which no end is yet in sight. The executives in the US and the UK have advocated extremely repressive laws and policies and, to bolster the case, created 'folk devils' in this endeavour; the legislatures, forced by *Realpolitik* not to 'endanger security', have largely facilitated the executive's desired actions; and 'the people' have supported politicians and administrations that have pursued repressive approaches.

Reliance on the judiciary is imperfect, as is reliance on international law, but where international human rights law has shown itself to be relatively insulated from projections of panic it seems to have maintained the integrity of its normative core, which in turn may have formed part of the institutional materials relied upon by domestic courts to limit repressive state action. Domestic law-making institutions do not, thus far, appear to have shown the self-restraint required to eschew unnecessary and disproportionate violations of the right to liberty, safeguarded by the right to challenge the lawfulness of one's detention. As a result, it seems to me that reliance on a resilient and accommodationist international human rights law and a rights-enforcing judiciary may be the way in which human rights have, indeed, fought back against counter-terrorist detention in the 'War on Terror'.

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