
The European Response to Terrorism in an Age of Human Rights

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Abstract

However terrorism is defined, it covers some non-state violence directly or indirectly against state authorities. The authorities against which it is directed will always regard these activities as criminal. Accordingly, one line of response to core terrorism will be through criminal law enforcement. For many reasons, states do not always find that the 'ordinary' criminal law and procedure, with their delicate balances between preserving public order and respecting the rights of individuals, allows effective responses to terrorism. Modifications of the law, including special laws justified only on the basis of an exceptional emergency, have been enacted. These laws inevitably interfere with the human rights of individuals. It is for the state to justify these interferences within the scope of its human rights obligations. In Europe, the ratification of the European Convention on Human Rights (ECHR) by practically all European states means that the European Court of Human Rights will have jurisdiction over the striking of a balance between the rights of individuals and the response to terrorism. This ultimate judicial role is important because it means that the European states may not put 'terrorists' beyond the law. Where a state finds the threat to its security so serious that it must resort to a military rather than a police response, international humanitarian law (IHL) may apply but, because of the procedural avenue which the ECHR provides, it is important to stress that IHL does not apply to the exclusion of human rights law. It is suggested in the paper that the insistence on the application and observance of international legal standards of human rights, even if they must be modified in extremis, should be an essential feature of any response to terrorism, even a war against terrorism, which is waged to protect the rule of law. A postscript refers very briefly to part of the judgment of the Court of Appeal of England, which deals with the consequences of the obtaining of information by means of torture, a judgment which seeks to draw a strong line between the international obligations of the state and the interpretation of its national law in the interests of a more effective response to terrorism.

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1 State Force and Terrorist Violence

States claim a – usually – limited monopoly to use force within their territories. Accordingly, individuals who use force against the authorities (or against other people) have no right to do so; states regard these activities as criminal. But a constitutional state faces a dilemma – if the acts to which the state responds are crimes, then it is limited in how it may do so, not just its limited right to use force, but how it investigates, prosecutes and punishes those who have recourse to force against it. Yet, ‘terrorist’ criminals can be difficult to pursue through the ordinary criminal processes – the collective power of the group, the support of a broader community, a capacity to intimidate those who investigate and those who might give evidence, the ability to use international boundaries to secure sanctuary. Furthermore, since terrorism may threaten or be aimed at the state itself or its government, the criminality involved will be the most serious the state knows. If, on these accounts, the state resorts to special regimes to deal with terrorist crime, there is a risk that those targeted will regard this as an acknowledgement that they are ‘not really’ criminals but political offenders: the cause and the means used to achieve it obtain the very degree of legitimacy that the state is intending to thwart. Nonetheless, in some cases the threat posed by irregular violence to the state is so severe that the government has no option but to take that risk. I emphasize the ‘in some cases’. Terrorism is such a broad phenomenon that the risk to public order from any particular manifestation of it may be small, any threat to the existence of the state, non-existent: we should keep it in proportion.¹

Of course, unlawful violence of these kinds might not just be crime. The intensity of the campaign against the state may be so severe that the state decides upon a military response, first, in aid of the civil authorities but, possibly, reaching the level of an internal armed conflict. Even then, states often try to maintain that the conflict is a matter of domestic law and that there are only limited constraints on its capacity for action and no legitimacy at all for the rebels. With the single exception of wars of national liberation, as defined in Article 1(4) of Additional Protocol I to the Geneva Conventions, states have conceded no right to those engaged in internal armed conflicts to use force against the government, even if the government concedes some constraints upon how it might fight against the insurgency and how those who engage in action against the authorities may be treated. Here, it is argued, international humanitarian law (IHL) would then apply, but it would apply as well as human rights law (HRL), the latter possibly modified within its own terms to take into account the special situation then prevailing. The importance of this, in Europe at least, is that there is available a channel of accountability to the European Court of Human Rights (ECtHR), a passage along which individual applications may move. Whatever substantive advantages international humanitarian law might have over human rights law, its accountability and remedial processes are much weaker.²

¹ For an account of these dilemmas but one which takes a fairly robust view of the power of the liberal State to respond, see P. Wilkinson, *Terrorism and the Liberal State* (2nd ed., 1986). Also see D. Charters (ed.), *The Deadly Sin of Terrorism: Its Effect on Democracy and Civil Liberties in Six Countries* (1994).

² Zegveld, ‘Remedies for Victims of Violations of International Humanitarian Law’, 851 *IRRC* (2003) 497.

The thrust of Professor Neuman's comments on my paper³ was that it did not take enough account of these higher intensity manifestations of terrorism and, accordingly, did not place sufficient emphasis on the role of IHL, compared to HRL. I do not take him to be saying that HRL has *no* part to play where the conflict reaches the level of an armed conflict, but that the application of HRL must be sensitive to the circumstances of the conflict and that there are some unresolved difficulties in explaining how, in its own terms, HRL may be modified to give adequate weight to the exigencies of conflict. Where states were once reluctant to concede the application of IHL to internal conflicts, lest it handicap the way in which they responded to internal violence, the sea-change after 'September 11' is that states have characterized the activities of international terrorists as armed attacks, giving the target states the right to respond by way of self-defence, but those same states have not been prepared to accept the application, in full or at all, of IHL to those who have used force against them.⁴

I examine some of these issues at the appropriate places in the present paper (though not all: I leave most of that to Professor Neuman's paper) and I have something to say about the general issue at the end. However, one matter within Professor Neuman's critique has significant consequences for the operation of a 'crime' response to terrorism. Using criminal law envisages the prosecution of defendants before an independent court and the presentation of admissible evidence against them to demonstrate their responsibility for offences of such particularity as to satisfy the notion of 'criminal offence'. The strategy and resources of the security forces are thus directed to the gathering of evidence which will go to the securing of convictions, however hard that might be in the context of terrorism. The military are not concerned about process but about action, information is not 'evidence' for a trial but 'intelligence' for operations. Intelligence needs assessment and that assessment is not made by an independent adjudicator but by those who play the decisive part in initiating the use of military force. (This bifurcation is too stark for the real world: rather there is a range of situations from the pure crime model to the pure war one, but the dominance of the elements of the one over the other is likely to be determinative of how a state responds to that which it calls terrorism.⁵) Now for lawyers, intelligence is tricky stuff: how it is gathered, how it is evaluated, how it used. This is particularly so where we are concerned with preventative action under special regimes, where the state claims the necessity of interfering with an individual's rights in support of a public interest, relying on information which cannot be fully (or at all) revealed, cannot be

³ This article is a revised version of the presentation I gave at the 'Europe and International Law' symposium held in May 2004. I am very grateful for the observations of the commentators, Professors Neuman, Simpson and Bianchi. I hope that they can see their influence, even where there is no specific acknowledgement.

⁴ See, for instance, US Department of Justice, Office of Legal Counsel, Memorandum for Alberto R Gonzales, Counsel to the President, and William J Hayes II, General Counsel of the Department of Defense, 22 January 2002, arguing for the non-application of the Geneva Conventions to the Taliban, at 10–25, especially at 22–25.

⁵ Note the shifting back and forth of overall responsibility between British special forces and the Gibraltar police in *McCann v. United Kingdom*, ECHR (1999), Series A, No. 324, paras. 20–96, especially paras. 45, 54, 92.

properly challenged, either regarding its reliability or its probative value. The need to maintain accountability procedures as required by human rights standards as far as possible arises because of the fallibility of intelligence-based reactions to terrorism. Scepticism about the effectiveness of diluted regimes of supervision perhaps derives from the less than happy experiences of the United Kingdom in the execution of its policies in the colonies and with respect to Ireland and, more recently, Northern Ireland. The reflex of the British Government to introduce yet more emergency law after ‘September 11’ is an indication that past failures have not induced a more cautious note into British policy. Getting it wrong is not just a British foible though. The initial reaction to the Oklahoma bombing in the US, that it was the work of ‘foreign’ terrorists, and of the Government of Spain to the Madrid bombs, that they were the work of ETA, are symptomatic of a much wider susceptibility.

I shall confine the use of the term ‘terrorism’ to the activities of non-state actors. In the application of human rights law, this will mean that the focus will be on the counter-terrorism techniques of states. In extreme cases, those methods may overlap with a broader category of ‘state terror’, but I do not need to consider it as a distinct phenomenon for human rights purposes, though separate consideration would be necessary from the point of view of international humanitarian law and international criminal law. Equally, I do not address ‘state-supported terrorism’, which, depending on the circumstances, might require consideration of elements of general international law, raising matters of state responsibility and elements of human rights accountability.⁶

So, I start from the position that the ‘war on terrorism’ is not a legally useful notion – certainly in the European context, there is not much evidence that the post-‘September 11’ conditions are regarded as of a wholly different order such that the orthodoxies of human rights analysis cannot be applied to them.⁷ The core international legal content of ‘terrorism’ so understood is the anti-terrorism treaties from the Hijacking Convention of 1970 to the Terrorist Financing Treaty of 2000.⁸ It is to be noted that one of the objects of the Security Council’s Counter-Terrorism Committee has been to secure broader participation by states in these treaties. I shall, though, take as a major item for examination an aspect of the response of the UK to ‘September 11’ for, although it does not depend on a ‘war’ categorization, it does involve uniquely the derogation from a human rights obligation. However, I acknowledge that the European states which were members of NATO on 11 September 2001 accepted that Article V of the NATO Treaty applied to the situation immediately afterwards, and that more European states joined the coalition against the Taliban (more exactly, against

⁶ Note especially the difference in the categorization of the bombing of PanAm Flight 103 over Lockerbie between Libya on the one hand, and the US and the UK on the other about the application of the Montreal Convention: see *Question of the Implementation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jarahiriya v. United States)*, ICJ Reports (1992), 113, at 121–127, paras. 22–45.

⁷ See Lepsius, ‘Liberty, Security and Terrorism: the Legal Position in Germany (Part I)’, 5/5 *German LJ* (2004) 435, suggesting that the major elements in the legislative response in Germany to ‘11th September’ were not primarily dictated by those events but reflected a long-standing programme, at 437 the response was ‘triggered . . . but not motivated’ by those events.

⁸ See below, at ***.

Afghanistan) and/or voted for UN resolutions which accepted that there was an armed conflict. While the war against Afghanistan is undoubtedly at an end, there have been no unequivocal declarations that the 'war on terrorism' has been terminated. How could there be? Accordingly, we cannot rule out that some European states might argue for the parallel application of IHL to that of HRL to present counter-terrorism activities.

2 The System of the European Convention on Human Rights

In Europe, at least, since World War II, in the age of European human rights, the threats to the state from politically-motivated, non-state violence have been relatively rare and relatively unthreatening – the various Kurdish campaigns against Turkey and more recently the conflict in Chechnya being the most serious exceptions. There have been long-running actions in the UK (and to a much lesser degree it spread to other European states) about Northern Ireland, and in Spain and France about the Basque country. There have been isolated spectacular events, like the Lockerbie bombing (though, since that appears to have been state activity, it does not fit the 'terrorist' paradigm I am using). The result has been that those states faced with terrorism have in the main been able to deal with it by administrative measures (such as increased checks at airports), by increasing the man-power devoted to its control, by improving the techniques of investigation (better forensics, more interception of communications). Nonetheless, special laws have been introduced⁹ and, in a very few cases, states have found it necessary to declare a state of emergency to provide for suspension of certain civil rights. What the European states have not done is to declare 'war on terrorism'. Most of those European states which joined the Coalition to take the war on terrorism to Afghanistan after 11 September 2001 have responded in their domestic laws with circumspection. There have not been a raft of emergency laws and widespread interference with individual rights.¹⁰

Is the maintenance of this moderate reaction after 11 September principled or complacent? To the extent that it was principled in the first place, some degree of responsibility for that can be attributed to the fact that the re-emergence of terrorism in the 1960s and 1970s came when the system for the protection of human rights in Europe was beginning to establish itself. A human rights-sensitive response to terrorism did not appear to be incompatible with keeping its various European manifestations under control. Before that, the colonial European states had endured what they described as terrorism in their overseas territories. They did not always behave terribly well and the impact of the then emerging human rights system in the colonies was

⁹ For an extensive survey, see M. van Leeuwen (ed.), *Confronting Terrorism: European Experiences, Threat Perceptions and Policies* (2003); see also [UK] Home Office, *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society: a Discussion Paper* (2004), Cm 6147, at 12–16, available at http://www.homeoffice.gov.uk/docs3/CT_discussion_paper.pdf.

¹⁰ See EU Network of Independent Experts in Fundamental Rights (CFR-CDF), *The Balance between Freedom and Security in the Response of the European Union and its Member States to the Terrorist Threats* (2003). Nonetheless, the EU did take the opportunity to introduce a fundamental reform of its law on extradition.

only slight (but sometimes surprising to colonial administrators).¹¹ Some of the early case law in Strasbourg dealt with the importation of colonial practices into the domestic arena. The ECtHR showed a robust (though perhaps not a tough) reaction to this, notably in the *Ireland v UK* case, where it condemned the ‘five techniques’ of sensory deprivation as being in breach of Article 3 of the ECHR – it did so by classifying them as ‘inhuman treatment’ rather than ‘torture’.¹² Since then, the Court has had to fashion responses to the operation of Turkey’s internal security policy over a number of years in the face of action by Kurdish groups in the south-east of the country. The litigation strategy of applicants and the judgments of the Court have shown considerable legal imagination in developing the Convention standards to provide protection against serious human rights violations.¹³ The very success of individual applications, though, has shown the limits of the judicial mechanism in dealing comprehensively with structural patterns of violations of human rights and, though the cases are still being decided in large numbers in Strasbourg, some of the attention has shifted to the political organ, the Committee of Ministers, to fashion broad solutions to broad violations. The Court is beginning to hear cases from Chechnya, possibly facing even more intractable difficulties, if left to its own resources, without active support from the political arms of the European institutions.¹⁴ It is to be noted that the European High Commissioner for Human Rights has played a part in the Council of Europe’s treatment of the human rights situation in Chechnya.¹⁵

Only states may be defendants in Strasbourg. Very occasionally, though without much scientific basis, the Court has referred to acts of terrorists as violating human rights.¹⁶ In the context of the Convention, it is a strange idea but in political debate, it is a powerful one: it allows prominence to victims’ rights (victims, that is to say, of non-state actors) and for the state to claim to be acting to protect the human rights of these victims when it takes measures against the terrorists. Counter-terrorism policies and operations are then assessed, not by considering the impact on the human rights of people against the interest of preserving public order or fighting crime but in balancing the rights of suspects, defendants etc against the rights of the victims of terrorist action. This has become a notable theme of the developing jurisprudence on Articles 2 and 3, already referred to, in which the Court, in reinforcing the duties of states to the victims of excessive state action by finding increasingly demanding procedural obligations in Articles 2 and 3, has found the makings of other positive obligations to protect those at risk from irregular violence (and, by implication, to

¹¹ A. W. B. Simpson, *Human Rights and the End of Empire* (2001), Chs.6, 18, 19.

¹² *Ireland v. United Kingdom*, ECHR (1978), Series A, No. 25.

¹³ Buckley, ‘The European Convention on Human Rights and the Right to Life in Turkey’, 1 *Notts Human Rights Law Review* (2002) 35.

¹⁴ For example, *Isayeva et al. v. Russian Federation*, ECHR (admissible), Application 57947/00.

¹⁵ See *Report on a Visit to the Russian Federation (Chechnya and Ingushetia) by the High Commissioner*, Council of Europe CommDH (2003) 5.

¹⁶ *Supra* note 12, para. 149. And see Meron, ‘When do Acts of Terrorism Violate Human Rights?’, 29 *Israel Yearbook of Human Rights* (1989) 271, who seems to me to go too easily from the proposition that states might have human rights duties to control private actions to the conclusion that those private acts themselves violate human rights.

impose liability on the state if it fails in these preventative obligations). So, the very first principle in the 'Guidelines on Human Rights and the Fight against Terrorism', adopted by the Committee of Ministers of the Council of Europe, is 'States' obligations to protect everyone against terrorism'.¹⁷

In the post-September 11 circumstances, the Convention system will face new challenges if attempts are made by the states to respond to terrorism as though it were a 'war', a war to be fought without any limits. For an outsider, the initial failure of the American constitutional reflex to the official reactions to the attacks of September 11 came as a shock. It seems to be asserting itself again.¹⁸ The question is: Can the Convention system play its part in securing the protection of human rights if the atmosphere in Europe turns as single-minded about the defeat of terrorism as it is in the United States? Of course, national courts might do the job, if governments demand extensive powers and legislatures are disposed to grant them. They might. The UK courts have refused to extradite fugitives to France¹⁹ and Russia,²⁰ due to the courts' real reservations about the treatment they would receive upon being returned. A German court has recently reconsidered the conviction of the only person so far held responsible for the events of September 11 because of doubts about the fairness of the proceedings against him.²¹ There are signs the other way, too. The English Court of Appeal has upheld a central plank of the anti-terrorism legislation allowing for indeterminate detention of certain non-UK nationals (see below). Russia's claims that its lawful powers to deal with the Chechens are enhanced because they are being invoked to meet terrorist campaigns are expressed in such a way as being close to assertions of a legally-free hand.²² And this is a pervasive concern when states reach for the 'terrorist' label – that it is to delegitimize the claims the terrorists make to use violence but also to undermine the political objectives for which they are using force. There is a double danger: that rights are reduced to vanishing point and that those who seek the same ends by non-violent means (which might be whole communities) suffer the same stripping away of the protection of the law as do those who are engaged in the use of violence themselves. Constraining counter-terrorism powers, even using an IHL model, to reduce the impact of the policies on those who should not be caught up in them is an important objective of Professor Neuman's thesis that at least the core protections of IHL should apply, even if an armed conflict model is used.

¹⁷ Committee of Ministers, Council of Europe, *Guidelines on Human Rights and the Fight against Terrorism* (2002), at 20.

¹⁸ D. Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (2003); Koh, 'Rights to Remember', *The Economist*, 1 November 2003, at 24–26.

¹⁹ *Ramda (R on the application of) v. Secretary of State for the Home Department* [2002] EWHC 1278 (Admin).

²⁰ *Zakayev* (2003), Bow Street Magistrates' Court, available at <http://www.tjetjeien.org/Bowstreetmag.htm>.

²¹ See Safferling, 'Terror and Law – Is the German Legal System Able to Deal with Terrorism? The Bundesgerichtshof (Federal Court of Justice) decision in the case against *El Motassadeq*', *5/5 German LJ* (2004) 516.

²² See Shoumikhin, 'Deterring Terrorism: Russian Views', National Institute for Public Policy (2004), available at http://www.nipp.org/features_regional.php.

3 Post-September 11: Guantanamo

All this matters because we have been promised by those who would wage the war against terrorism an Orwellian world of perpetual conflict against an elusive enemy, where knowledge about the threat posed by the enemy, of victories and defeats, cannot be revealed other than through the organs of government. The decision to make sacrifices of liberty to power will be made by those who benefit from them, not by those who have to make them.²³

One would, perhaps, not write in such sensationalist tones if it were not for the fact that the shadow of Guantanamo hangs over all deliberations. After the magisterial rebuke delivered by Lord Steyn²⁴ for the creation of a legal Alsatia²⁵ for the inmates of Camp Delta at Guantanamo, further denunciation would be pip-squeakery. When this paper was given originally, the Supreme Court judgment in *Rasul* had not been delivered.²⁶ I dared to speculate that the Court could not confirm the judgment of the lower court that the law of the United States did not run to Guantanamo, though I considered the deliberate policy of the administration to try to put people beyond the reach of the courts both reprehensible and chilling. As is now well known, the Supreme Court has begun to put matters right, at least on the question of whether law applies at all there. The initial reaction of some of the lawyers for the detainees was strenuously optimistic. However, the reaction of the Department of Defense (DoD) has been forthright, too – not one of an administration about to throw its hand in.²⁷ The strategy was to identify what appeared to be the minimum process which would appear to satisfy the Supreme Court for a US citizen in the US who sought to contest his classification as an unlawful combatant²⁸ and provide an equivalent procedure for the detainees from Guantanamo. The DoD lawyers recognized that they could no longer stand between the detainees and the Federal courts: what they sought to do was to pre-empt the possibility of a successful challenge to the legality of their detention by the Guantanamo inmates. *Hamdi*, then, is read down to limit the procedural entitlements of the Guantanamo detainees. The *Hamdi* court expressly confined its judgment to constitutional considerations. If *Hamdi* is followed, and if it is as narrow in its effect as the DoD contend, then there will be scope for further argument based on the position of the applicants under international treaties. The Supreme Court was aware that the real function of process in the cases with which it

²³ White House, *National Strategy for Combating Terrorism* (2003), at 11–12.

²⁴ Steyn, 'Guantanamo Bay: the Legal Black Hole', (2004) 53 *ICLQ* 1, at 6–15.

²⁵ 'Alsatis' were where the law did not run, sanctuaries for criminals: D. M. Walker, *The Oxford Companion to Law* (1980), at 50. I am using the term slightly differently to cover claims or even judgments that the law does not run in particular locations – not to keep the government out but to insulate it against accountability for what it does there. See also Neumann, 'Anomalous Zones', 48 *Stanford LR* (1996) 1197 for an account of a previous occasion when Guantanamo's special status was called upon.

²⁶ *Rasul et al. v. Bush*, 542 US__ (2004) (28 June 2004).

²⁷ The Department of Defense proposals were outlined on 7 July 2004 but the detailed scheme was not available then. See News Transcript, 'Defense Department Background Briefing on the Combatant Status Review Tribunal', 7 July 2004, available at <http://www.defenselink.mil>.

²⁸ *Hamdi v. Rumsfeld*, 542 US__ (2004) (28 June 2004), at 25–29, per O'Connor J.

was faced was against mistaken or abusive detention, not detention *per se*: any process had to be effective to correct mistakes or preclude abuse.

In any event, there is much more to be decided: whether the conditions of detention comport with legality; for those against whom proceedings are initiated, whether or not the trial process is fair.²⁹ The first public criticism of the arrangements at Guantanamo by a UK public official was made by the Attorney-General in a speech on 25 June 2004 when he said:

... any restriction on fundamental rights must be imposed in accordance with the rule of law ... while we must be flexible and be prepared to countenance some limitation of fundamental rights if properly justified and proportionate, there are certain principles on which there can be no compromise.

Fair trial is one of those, which is the reason we in the UK have been unable to accept that the US military tribunals proposed for those detained at Guantanamo Bay offer sufficient guarantees of a fair trial in accordance with international standards.³⁰

It was the basic principle which had to be settled first: Did law apply? If there were people to whom it did not and places where it did not, the task of bringing 'Law to Power'³¹ is a vain one. The judgment is a narrow one, a point of statutory interpretation (and, therefore, within the power of Congress to modify it to the disadvantage of the inmates) vigorously contested by the dissenting judges. Furthermore, there have been news reports suggesting that the identity of some persons kept at Guantanamo has not been revealed – there is a category of 'ghost detainees' still beyond the reach of the law.³²

4 *Banković*³³

Of course, Guantanamo is an American business, not a European one (though one or two European states appear not to have, how shall we say, entirely distanced themselves from what has gone on – the UK sent interrogators to Camp Delta, Spain has commenced proceedings against one detainee who was released to its custody,³⁴ quite apart from complaints that they have not done enough actively to oppose the Guantanamo regime).³⁵ Could there be a Guantanamo under the regime of the ECHR? Of

²⁹ See 'Agora: Military Commissions', 96 *American Journal of International Law* (2002) 320.

³⁰ The text is available at http://www.news.bbc.co.uk/1/hi/uk_politics/3839153.stm.

³¹ Fitzpatrick, 'The War against Terrorism and Human Rights', 14 *European Journal of International Law* (2003) 241.

³² *Los Angeles Times*, 9 July 2004, at A1.

³³ *Banković v. Belgium and others*, ECHR (admissibility), Application 52207/99, 11 *Butterworths Human Rights Cases* 435.

³⁴ See <http://www.news.bbc.co.uk/1/hi/world/europe/3487807.stm>.

³⁵ See *Abbasi (R on the application of) v. Secretary of State for the Foreign & Commonwealth Office* [2002] EWCA Civ. 1598, also in 62 *ILM* (2003) 355; and see *The Guardian*, 26 June 2004, at 1 with alleged details of the British government's defence to a resumed application in the *Abbasi* case.

course we hope not, but we have to take into account the *Banković* case.³⁶ The European Court will not be concerned with ‘state terror’ as a normative category but with assessing a state’s counter-terrorism policies against its human rights obligations. But this assumes that the Convention applies. What *Banković* establishes is that the ECHR does not apply to every act of a state official of a Convention state, or which could otherwise be attributed to the state. The decision in *Banković* was that the Convention did not apply to the damage caused in Yugoslavia (arguably in breach of Article 2 of the ECHR) by a missile launched in an operation in which certain Convention states were implicated. Article 1 says that states ‘shall secure to everyone within their jurisdiction’ the enjoyment of Convention rights. The Court has interpreted ‘jurisdiction’ to extend beyond a state’s territory to include areas under its effective control and territory under military occupation.³⁷ In *Öcalan*,³⁸ the Court hints that actual control over a single individual on the territory of another state might bring Convention obligations into play. That might go so far as to mean that state officials could not take a person across the border for a bout of Convention-free torture but would ‘control’, even in this attenuated sense, include the sending of death squads to the territory of another state? Would France have been answerable in Strasbourg for the activities of its agents in New Zealand against the ‘Rainbow Warrior’?³⁹ Nothing in the most recent pronouncement of the Court about *Banković*, the judgment in *Assanidze*,⁴⁰ suggests it would. It is a counter-intuitive result that a state might be able to avoid the application of Convention obligations by stepping outside its territory to execute its plans but, a personal Alsatia, even if not a large one like Guantanamo, seems a possibility. Such an anomaly illustrates the essentially positivist nature of international human rights law. The ECHR is a regional treaty which expressly fixes its application through the location of the victim, rather than the status of the violator. The prominence given to targeted killings as an instrument of counter-terrorist policy suggests that this is not a peripheral gap in the protection that European human rights law can give in this field. Protection through IHL is subject to its remedial insufficiencies but as to its application, there are not the same limits as *Banković* suggests for European human rights law.

On the face of it, the decisions of the Human Rights Committee might concede a similar limitation to the application of the International Covenant on Civil and Political Rights (ICCPR) (*Lopez Burgos* was concerned with the detention and torture of the victim by Uruguayan agents in Argentina, i.e. there was control over the victim⁴¹). The latest

³⁶ See S. Williams and S. Shah, ‘*Banković and Others v Belgium and 16 Other Contracting States*’, 9 *Notts European Human Rights Law Review* (2002) 775; Heintze, ‘The European Court of Human Rights and the Implementation of Human Rights Standards during Armed Conflicts’, 45 *German Yearbook International Law* (2002) 60.

³⁷ *Loizidou v. Turkey (Merits)*, ECHR, (1996-VI) 2220; *Cyprus v. Turkey*, ECHR, (2001-IV).

³⁸ *Ocalan v Turkey*, ECHR, Application 46221/99, paras. 86–103.

³⁹ See M. King, *Death of the Rainbow Warrior* (1986), Ch.4. France originally denied involvement but eventually accepted state responsibility for the acts of its agents.

⁴⁰ *Assanidze v. Georgia*, ECHR, Application 71503/01, paras. 137–143, emphasizing the primarily territorial nature of jurisdiction. Judge Louciades’s concurring opinion regards *Banković* as wrong.

⁴¹ *Lopez Burgos v. Uruguay*, HRC 52/79.

General Comment, No. 31, confirms this: 'anyone within the power or effective control of that state party, even if not situated within [its] territory'.⁴² Professor Tomuschat's concurring opinion in *Lopez Burgos* is more far-reaching. 'Never,' he says, 'was it envisaged...to grant states unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens (sic, anyone) living abroad.'⁴³

5 ECHR Jurisprudence

It is to some of that positive law that I now turn. I am not going to go through the jurisprudence of the ECHR on terrorism.⁴⁴ That has been done recently in a neat but not comprehensive way by the Committee of Ministers of the Council of Europe in its publication, 'Guidelines on Human Rights and the Fight against Terrorism'.⁴⁵ I do, though, want to draw attention to certain strengths and weaknesses of the practice. The principal achievement, it seems to me, is that the Court has been able to elaborate an increasingly extensive view of human rights obligations of the states but one which possesses sufficient flexibility that states have seldom found the need to have recourse to the emergency derogation provision in Article 15, still less to find their circumstances so constrained that they should leave the Convention system altogether.⁴⁶ The great principles of interpretation of the ECHR adopted by the Court are that the Convention is a 'living instrument', to be interpreted in its economic, social and technical contexts, and that it is to be interpreted to secure the effective rather than the mere theoretical protection of human rights. To support these ideas, the Court has fixed its own meaning on the founding principles of the Council of Europe – the commitment of its members to democracy, human rights and the rule of law. 'Democracy' is not simply a notion of power lying in the hands of an electoral majority – it must be inclusive, accountable and respect human rights; human rights are strong rights, to be respected at all costs in some cases, not to be interfered with without substantial and demonstrated grounds in others, always in accordance with a limited and lawful mandate; and the rule of law goes beyond mere formal legal rules, there is a 'quality' idea of 'law' and 'lawfulness' to these terms whenever, which is frequently, they are used in the Convention. The achievement here has been to adopt fundamental concepts which may be integrated one with the other, when, on the face of it, there might have been serious conflicts between them. The test for the immediate future will be to see if this understanding is robust enough to stand up to the circumstances post-September 11.

⁴² HRC General Comment No.31, para. 9.

⁴³ *Supra* note 41.

⁴⁴ Warbrick, 'The Principles of the European Convention on Human Rights and the Response of States to Terrorism', *European Human Rights Law Review* (2002) 287.

⁴⁵ *Supra* note 17.

⁴⁶ The only case was the departure of Greece between 1970 and 1974 from the Council of Europe as well as the ECHR under the government of the 'Colonels'.

It is with the Convention idea of the rule of law that I begin. In *Maestri*, the Court said:

[It] reiterates that the expressions ‘prescribed by law’ and ‘in accordance with the law’ in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be accessible to the persons concerned and formulated with sufficient precision to enable him – if need be with appropriate legal advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail [authorities omitted].

For domestic law to meet these requirements, 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 rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of such discretion and the manner of its exercise.⁴⁷

Mutatis mutandis, similar language can be found about the words ‘law’ and ‘lawful’ in Article 5 and about ‘law’ in Article 7. This 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. In the present context, it is apparent that there will be difficulties if states resort to the use of ‘terrorism’ as an element of definition, of inclusion or exclusion, in their counter-terrorism laws. The term is too flexible to support the definition of a criminal offence which fits with the principle of legality; it might be too general to trigger the lawful recourse to special, intrusive, investigatory powers; but, as a descriptive basis for certain minor interventions, the Court has found it adequate.⁴⁸ I have been using ‘terrorism’ in a fairly promiscuous way already and it is very well known that there is no international law definition of terrorism, despite the best efforts of the General Assembly’s Special Committee.⁴⁹ The nearest thing we have at the moment is Article 2(1)(b) of the Terrorist Financing Convention (which is an offence-defining provision and so its adequacy should be subject to special scrutiny):

Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.

The use of the word ‘other’ in this definition is because reference has already been made to crimes in the anti-terrorism treaties.

⁴⁷ *Maestri v. Italy*, ECHR, Application 39748/98, para. 30.

⁴⁸ *Fox et al. v. United Kingdom*, ECHR, Series A, No. 182, paras. 40–42 (Art. 5(2)).

⁴⁹ See Perera, ‘Reviewing the UN Conventions on Terrorism: Towards a Comprehensive Terrorism Convention’, in C. Fijnaut, J. Wouters and F. Naert (eds.), *Legal Instruments in the Fight against Terrorism: a Transatlantic Dialogue* (2004), at 567; and GA Res 58/81 (2004).

One of the difficulties in arriving at a definition of terrorism is its protean nature – it can run from the bomb planted by the single-issue, single activist to the elaborate multi-featured campaign which seeks fundamental political reform in a state or the reformulation of state boundaries. The residuary offence in the Terrorist Financing Convention quoted above, carries with it its own limitation – ‘in a situation of armed conflict’ – which will exclude some activities routinely labelled ‘terrorist’. While states could agree to forego, and, therefore, to condemn, some techniques terrorists might use, say hijacking of commercial airliners, not all hijacking so identified is terrorism, that done for commercial gain, for instance. Using the manifestation of the conduct alone as the identifier of terrorism will then be too broad, but that is a price that states have been willing to pay in the various anti-terrorism treaties (so the person hijacking a plane to escape a tyrannical regime will be a criminal in his state of sanctuary, though he ought to be protected against return to the state from which he has fled). Where the conduct to be criminalized overlaps with conduct which a state might want to engage in, then careful lines have to be drawn in the treaty to preserve the option for the state, as part of its lawful monopoly of force, while catching the offences of the non-state actor. The complexity of the Terrorist Bombing Convention is in part explained by this. Article 19(2) says:

The activities of armed forces during an armed conflict, as those terms are understood in international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention.

A feature of the anti-terrorism treaties, which is made explicit in the more recent ones, is that the conduct constituting the crime retains its criminal character whatever the political, ideological, etc. motivation of the offender.⁵⁰ Another element in the more recent treaties is that the offences which states are required to create and prosecute may not be regarded as political offences for the purposes of extradition and mutual assistance.⁵¹ All this amounts to a pretty concentrated criminal model for identifying terrorism for criminal purposes by reference to its objective elements and, especially with the addition of the Terrorist Financing Convention, gives a substantial core to an understanding of ‘terrorism’. In compensation for the increasingly extensive rights of states under the conventions, there has been some specific references to human rights considerations, which serve to reinforce the general human rights obligations of parties.⁵² However, the suppression conventions are not a comprehensive statement of anti-terrorism law. They indicate the criminal manifestations of terrorism, the ‘what?’ of

⁵⁰ Terrorist Bombing Convention, Art. 5:

each State party shall adopt such measures . . . to ensure that criminal acts within the scope of this Convention, *in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons*, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature . . . [emphasis added].

⁵¹ *Ibid.*, Art. 11. Further, see the Protocol amending the European Convention on the Suppression of Terrorism, CETS No.190 (2003) at <http://www.conventions.coe.int>.

⁵² For a survey, see Boister, ‘Human Rights Protections in the Suppression Conventions’, 2 *Notts Human Rights Law Review* (2002) 199.

terrorism but have little to say about the ‘how?’, what measures must/may states take to investigate and prosecute terrorist crime. states do not adopt identical counter-terrorism policies nor do they regard all campaigns of terrorism as being of equal concern. Accordingly, one object of Security Council Resolution 1373 is to pre-empt this margin of appreciation as to how to react to what is now presented as a single phenomenon of international terrorism. States’ counter-terrorism measures might involve extended powers of investigation into terrorist crimes, of prolonged detention for those suspected of them and special courts for the trial of defendants. Freedom of expression and association laws might provide wider powers of the state to act against terrorist speech or terrorist organizations. Conditioning the lawful recourse to these powers on the response to ‘terrorism’ meets exactly the legal imprecision that the Court largely condemns in its understanding of the rule of law and principle of legality.

So, the question arises, how has the ECtHR managed when faced by defences from states that their actions were justified as responses to terrorism? I have already referred to the asymmetrical nature of the Court’s jurisdiction – ‘terrorism’ can only arise in cases brought against states. The questions for the Court will always be, has the state interfered with the enjoyment of the applicant’s human rights because its officials have done something to him in the course of the anti-terrorist campaign or because they have not done something to protect him against the collateral effects of the campaign or the acts of the terrorists themselves? The conduct of the terrorists will never be up for condemnation by the Court. But states do raise the ‘background’ of terrorism in seeking to justify their action.⁵³ The Court has not been oblivious to ‘terrorism’ as a descriptive term, but its approach to terrorism is as a material phenomenon: Does what is actually happening in a state justify the actual measures taken, which have had an impact on the enjoyment of human rights within the jurisdiction? For instance, the mere incantation that a state is faced with ‘terrorism’ would not be sufficient of itself to justify the declaration of an emergency under Article 15 – what the state must show is that the impact of this manifestation of terrorism, its intensity, its scope, are such as to threaten organized life⁵⁴ and then explain why the state needs to take the measures of derogation it proposes to meet the threat. The fact-finding and the assessment of the facts can be an exhausting process, but the Court’s approach avoids stigmatizing the person caught within the anti-terrorism measures as an especially dangerous or evil individual by reason of the label ‘terrorist’ alone – someone to whom the presumption of innocence does not really apply, who can be pursued with aggressive and pre-emptive force, who can be deprived of protection against even the most severe ill-treatment.⁵⁵ The role of human rights law in arresting the descent to outlawry in hard cases is one of its essential functions. As Professor Gearty astutely observed, the absence of a definition of terrorism may not be for want of effort but for want of will – the looser the definition, the more useful the concept to tar the political opponent, the industrial activist, the unpopular migrant as ‘terrorist’ and then proceed

⁵³ E.g. *Brogan v. United Kingdom*, ECHR, Series A, No. 145-B, para. 61.

⁵⁴ *Lawless v. Ireland (No 3)*, ECHR, Series A No. 3, paras. 23–30.

⁵⁵ A notable example is *McCann*, *supra* note 5, a case involving undoubtedly a potential terrorist action, which has been the foundation for the extensive development of the case law under Arts. 2 and 3.

against him without restraint: or not⁵⁶ – that states have not always disapproved of the use of violence that other states describe as terrorist is obvious enough, various elements of the anti-colonial struggles being sufficient examples. An elastic definition of terrorism makes it possible to include people out as well as to include them in. The post-September 11 approach taken by the Security Council is to condemn ‘international terrorism’ whatever its motive. It is an attitude which is commendable and sustainable within a liberal state where there is always a space for politics: it is not self-evident to me that it is one which will carry wide commitment over time among the states of an international system, where the space for politics may be very much narrower.

The avoidance of normative conclusions from the invocation of the term ‘terrorism’ has been important. Not only are the problems with legality much reduced, the stigmatizing sting of the term has been drawn. The institutions have maintained a view of terrorist suspects and those convicted of offences within what is described as a terrorist campaign which preserves their individual status. An early Commission decision in *McFeeley*⁵⁷ is significant: the Commission found no obligation on the UK to concede to the demands of protesting, para-military prisoners in Northern Ireland (since the UK was under no duty under the Convention to give the prisoners what they were demanding) but, equally, the UK could not turn its backs on the prisoners. The protest consisted in part of a refusal by the prisoners to leave the cells, which gradually became soiled by urine and defecation. From time to time, the prison authorities moved the prisoners to clean cells while they cleaned the dirty ones. The Commission said that the Government had to keep the prisoners’ conditions under review (in case they did deteriorate to below the Convention standard) and the Government had to maintain a line for negotiations, in case the prisoners wanted to re-engage with it. The Court has said on several occasions that the absolute prohibition on torture, etc. contains no exception for the campaign against terrorism. What might have seemed little more than rhetorical flourishes when they were made have become of practical import as information becomes available about the conditions in which persons caught up in counter-terrorism measures have been treated.⁵⁸

The cases in Strasbourg do not go all one way. First, because the ECHR sets a minimum standard of protection, states sometimes have a margin to depart from their ordinary standards of rights protection before they reach the floor established by the Convention.⁵⁹ Furthermore, the flexibility of the Convention standards themselves, especially the powers of states to interfere with them, allow scope for recourse to abnormal measures without violating the Convention. States may go so far, but their powers to do

⁵⁶ C. Gearty, *Terror* (1991), at 25.

⁵⁷ *McFeeley v. United Kingdom*, ECommHR, Application 8317/78, 20 DR 44.

⁵⁸ For an account by British detainees released from Guantanamo, see *The Observer*, 16 May 2004.

⁵⁹ The best known example is the introduction of ‘Diplock Courts’ in Northern Ireland for the trial of terrorist offenders: see *Report of a Commission to consider Legal Procedures to deal with Terrorist Activities in Northern Ireland 1972* (The Diplock Report) Cmnd. 5185. Lord Diplock’s terms of reference instructed him to find a mode of trial and procedure which was compatible with Art. 6 of the ECHR. The main innovation was the removal of the jury.

so are not unlimited: in *Hulki Gunes v Turkey*, the Court said of a decision to admit extensive hearsay evidence in the trial of the applicant:

[It] is fully aware of the undeniable difficulties of combating terrorism – in particular with regard to obtaining and producing evidence – and of the ravages caused to society by this problem, but considers that such factors cannot justify restricting to this extent the rights of the defence of any person charged with a criminal offence (emphasis added).⁶⁰

The accentuated words mean to the extent that the applicant was denied a fair trial. The sentiment follows that first expressed in *Klass v Germany*,⁶¹ where the Court explicitly recognized the dangers of over-reaction to terrorism. If the phenomenon was played up as a great threat, if its practitioners were demonized, then political support for stringent measures perhaps could be engendered: the familiar refrain that the authoritarian measures were necessary to defend liberty and democracy would be played. One might add that the symbolic reaction of an otherwise impotent legislature accountable to a frightened majority presents a danger quite as much as the deliberate step towards authoritarianism.⁶² What the Court required was that the nature of the particular threat be demonstrated and the proportionality of the response be established. A common feature of counter-terrorist policies is the enhancement of powers of the Executive and a diminution of the means of their accountability. In *Klass*, the Court emphasized the need for control, even of strong powers the necessity of which had been made out. The Court has been criticized for the way it applied this test. The case concerned clandestine telephone-tapping of suspects and their associates, activities about which the subjects might never be told and, of course, about which they could never complain. The Court found first that the power itself, though an interference with Article 8(1) rights, could be justified under Article 8(2). The procedure of accountability under German law involved the review of police practices by a Parliamentary Committee chaired by a judge. The Committee deliberated in private and could allow that persons not be told that their phones had been tapped. The Court found that this was sufficient – it was a remedy commensurate with the practical exercise of a power the Court found proper. Equally, the avenue of complaint was sufficient to satisfy Article 13. The obligation there to provide an effective national remedy had to be calculated in relation to the otherwise lawful powers of states to interfere with individual rights. Since an open proceeding before an independent tribunal would undermine what had been found lawful under Article 8, Article 13 could not be interpreted with its full rigour. This is, of course, a most significant judgment for measures of investigation in counter-terrorism operations. The state establishes its measure first; the Court then decides whether or not that measure is compatible with the substantive obligations under the Convention; then it decides what Article 13 remedy will fit with it. I wonder if we might have reached the time for a review of

⁶⁰ ECHR, Application 28490/95, para. 96.

⁶¹ ECHR, Series A No. 28, para. 49.

⁶² The UK experience shows that legislation introduced in response to a particular event and intended to be a temporary expedient can soon enter the general law and lose its temporary character: see Walker, 'Terrorism and Criminal Justice: Past, Present and Future', [2004] *Criminal Law Review* 311, 325–326.

Klass, to see if there is empirical evidence to show that these systems of secret, even if judicially supervised, reviews actually do work.⁶³ The burden cast on the reviewers is frequently heavy; the evidence that they discover abuses by the secret services thin; rather than securing confidence in the probity of the investigative services, there is a danger that these procedures just encourage cynicism. As the powers of the investigators are increased to meet the new terrorist threat, the established case-law could do with some refreshing. It would be an occasion for the Court to see if the context had changed, such that a reinterpretation in the light of new factors was required. The Committee of Ministers' Guidelines show faith in the balancing exercise, so long as the agreed standards are sufficiently precise to allow accountability and that an adequate procedural regime accompanies the innovations – even going so far as to foresee legitimate interventions in lawyer-client confidentiality.⁶⁴

Though *Klass* was stronger on rhetoric than it was on delivery, the Court did show that there were limits to counter-terrorist policies, limits which it would police. If an Article 13-compliant remedy was not provided, then the state had to make some effort to produce a substitute – explaining why Article 13 was too demanding but that its own proposal was, in the circumstances, all that could be expected. Even this degree of flexibility was not always enough to accommodate measures states wanted to take against those they described as terrorists. The Court has taken a protective attitude to those whose activities involve no violence or advocacy of violence but who express support for the terrorist objectives, often in intemperate tones. It has been even more difficult for states to modify their obligations with respect to the detention and trial of terrorist suspects. The language of the Convention and the seriousness which the Court attributes to these provisions can be illustrated by its strict approach to time limits for post-arrest detention in *Brogan*.⁶⁵ Although the Court acknowledged that the investigation of terrorist crime did cause special obstacles for the UK, it conceded a power to detain suspects after arrest but before they were brought before a judge which was scarcely longer than that allowed in ordinary criminal cases. The Government introduced a further Article 15 derogation in order to preserve a power it deemed essential to its counter-terrorist strategy. In *Brannigan*, the Court decided that the exercise of the extended power of detention was compatible with the Convention, given the Article 15 notice.⁶⁶ The Court has not always done so; in cases from Turkey, against an even more serious background of violence, it found that the extended powers of post-arrest detention (up to 30 days) could not be justified, even under an Article 15 derogation.⁶⁷

⁶³ See I. Cameron, *National Security and the European Convention on Human Rights* (2000), at 442, indicating that the Commission did not feel able to decide cases on the basis of mere suspicion that the national procedures were not working.

⁶⁴ Guidelines, *Supra* note 17, at 28–29.

⁶⁵ *Supra* note 53.

⁶⁶ *Brannigan v. United Kingdom*, ECHR, Series A, No. 258-B, paras. 55–66.

⁶⁷ *Aksoy v. Turkey*, ECHR, (1996-VI) 2260, paras. 71–84.

The long periods for which derogation was deemed acceptable with respect to Northern Ireland-related violence and the Kurdish campaigns in Turkey have been criticized,⁶⁸ but it does suggest that if it were possible to show that the threat posed by post-‘September 11’ terrorism was an open-ended one, then the Court might tolerate long-term derogations to meet the threat.

There is one further element of the jurisprudence which deserves special emphasis because it has a resonance for the current language of the counter-terrorism debate. There is much consideration of the rights, even the human rights, of the victims of terrorism. Indeed, the obligation of states to protect people against terrorism is the first principle in the Committee of Ministers’ Guidelines.⁶⁹ However, identifying what these ‘human rights’ are in the Convention scheme is not without its difficulties. The Convention, after all, sees states (and states alone) as defendants and fixes responsibility solely on the state. In particular, the Court has established that there is no general human right to bring or have brought a criminal prosecution, even for a violation of one’s human rights.⁷⁰ The result has been the elaboration of a number of positive obligations on states. The story is a long and complex one and I tell it here only in its bare outlines. First, the Court has held that there may be a positive obligation on the state to protect against the threat of private, life-threatening violence, where the threat was known to the security forces and it would have been reasonable for positive steps to have been taken to protect an individual from the danger. The leading authority, *Osman*, does not suggest that the duty is a very demanding one.⁷¹ However, where there may have been breaches of Article 2 (or Article 3), the state is under an obligation to investigate whether or not that is the case. The investigation must satisfy certain standards of promptness, effectiveness and independence. If the inquiry reveals evidence of criminal wrongdoing, then the prosecutor must proceed or give reasons why he is not doing so; this creates an individual right to a criminal prosecution in limited circumstances through the application of the idea of an ‘effective’ remedy under Article 13. Much of this case law has been developed against the background of the Turkish response to activity in the Kurdish areas of south-east Turkey. There is a clear overlap between the application of HRL and IHL. The pattern of the judgments has gone very much against the government. The reluctance of Turkey to concede the application of IHL to this conflict enhances the role of HRL but, as Professor Neuman suggests, it is necessary that the application of the latter be sensitive to the former, not just its prescriptions but the factual context in which it applies: if states are dubious about applying IHL, they are hardly likely to be more enthusiastic about even more demanding HRL standards.⁷²

⁶⁸ Gross, ‘Once More into the Breach: the Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies’, 23 *Yale Journal of International Law* (1998) 437.

⁶⁹ *Supra* note 17.

⁷⁰ *Perez v. France*, ECHR, Application 47287/99, para. 70.

⁷¹ *Osman v. United Kingdom*, ECHR, (1998-VIII), paras. 115–116.

⁷² Heintze, *supra* note 36, at 75–77.

6 ECHR and Emergencies – Post-‘September 11’

Given the number of terrorist campaigns in Europe, it is on the face of it surprising that states have not found it necessary to make Article 15 derogations more often. However, as I have suggested, those campaigns have usually not had very serious consequences for public order within a state and, in any event, the flexible approach to interpretation of the Court has allowed states to fashion Convention-compliant responses to their particular manifestation of terrorism. Emergency powers in the Convention sense may be resorted to in times of ‘war or other public emergency threatening the life of the nation’. In a ‘war’ on terrorism, might we expect to find the need to invoke Article 15 a more common event? So far, only one state has done so – the United Kingdom. I want to use the still unfinished story of the UK’s action to consider the questions which arise when a state uses Article 15 in the present circumstances. While it may often be the case that states are not able to do anything of great visibility and effectiveness in the aftermath of a serious terrorist incident, one thing that they may always do is to legislate – to introduce a new law, if not necessarily to help the investigation into this event, to do so for the future and, above all, to contribute to preventing a repetition. The UK has done this from time to time – after the Birmingham bombings in 1974 and after Omagh in 1998, for instance. However, Parliament passed the Terrorism Act 2000, legislation designed to provide a permanent and comprehensive structure for counter-terrorism operations, law claimed to be compatible with the ECHR without the need to rely on an Article 15 derogation.⁷³ The resolve not to derogate lasted scarcely a year. After September 11, Parliament passed the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), which included in Part 4 a procedure for the detention of non-UK national, terrorist suspects without convictions being obtained against them or, indeed, charges brought against them.⁷⁴ The UK filed notices of derogation under Article 15 of the ECHR⁷⁵ and Article 4 of the ICCPR. These events clearly indicated that, for the British Government at least, things had changed and changed substantially since 11 September.

The Government had identified a problem of bringing suspected terrorists to trial in the UK where the evidence against them would not be admissible because the Government did not want to reveal its source in the intelligence-gathering processes or because it was hearsay. Where such suspects were not UK nationals, it would have ordinarily been possible to deport them to their national state (always assuming that the suspect had one and that the other state acknowledged him as a national). However, an obstacle to this process could arise as a consequence of the ‘*Soering*’ principle⁷⁶ – a principle of ECHR jurisprudence which established that a Convention state may not remove a person within its territory to another state where that person presents substantial evidence that he would face a real risk of treatment seriously

⁷³ C. Walker, *Blackstone’s Guide to the Anti-Terrorism Legislation* (2002), at 11–20.

⁷⁴ For details, see Appendix 1.

⁷⁵ For details, see Appendix 2.

⁷⁶ *Soering v. United Kingdom*, ECHR, Series A, No. 161, para. 91. See also *Chahal v. United Kingdom*, ECHR, (1996-V) 1855.

incompatible with Convention standards. The *Soering* case involved treatment in breach of Article 3 (inhuman treatment); other possibilities are the death penalty and flagrant denial of fair trial. These protections go further than those of refugees and asylum seekers⁷⁷ because they admit of no exceptions based on the conduct of the suspect. In the cases of some of the suspects whom the UK authorities had in mind, it was apparently clear that they would raise the '*Soering*' principle as a bar to their removal if action were taken to remove them using ordinary immigration procedures, a prospect enhanced after the implementation of the Human Rights Act, behind which stood the possibility of an application to Strasbourg if no national relief were forthcoming. So, the Government was faced with the prospect that non-UK nationals whom it suspected of being involved in activities seriously detrimental to the UK's national security could not be prosecuted here nor removed to another state, nor could they be detained under the existing law, either as criminal suspects or as persons awaiting deportation.

In order to deal with these cases, the legislation proposed a power of detention, which, it was conceded, would require the submission of a notice of derogation to make it compatible with the ICCPR and the ECHR. This was because neither instrument allows preventative detention, which includes detention for deportation of a person for whom there is no immediate prospect of removal, either because no state can be identified which is obliged to take him or because his removal to any state willing to take him would expose him to a '*Soering*' risk and thus be incompatible with the Convention. Although there is a wide power to deport a non-national under the Immigration Act 1971 on the basis that his presence is not conducive to the public good on grounds of national security,⁷⁸ the English Court has held that detention for deportation without prospect of removal is unlawful.⁷⁹ It is important to emphasize that the derogation relates to Article 5(1)(f) for the situation might arise that a person detained may identify a country which is willing to take him (including his national state) and to which he is willing to go. If the power of derogation extends only to the identification of such a state, then, once a destination is established, there would appear to be no justification for continuing to detain him. However, nothing in the legislation appears to give a right to a detainee to be released and removed to a destination of his choosing (though that is what two persons have been allowed to do). What if the authorities are concerned that he might continue there with the activities which occasioned his detention in the first place? Perhaps he might be suspected of having information which would be valuable to those in the destination state who would engage in terrorist activities affecting the UK: Must he be allowed to go then? While, in UK domestic law at least, removal is a power of the state and not a right of the individual to go where he chooses, the power to detain for deportation, even with the derogation under the Convention, is confined to circumstances which are necessary for the exercise of the state's power: to detain a person in other situations would

⁷⁷ Convention relating to the Status of Refugees 1951, Arts. 1(F), 33(2).

⁷⁸ Immigration Act 1971, s.5(3).

⁷⁹ *R. v. Governor of Durham Prison, ex p Singh* [1984] 1 All ER 122.

appear to be unjustified, even in the light of the notice of derogation. The Attorney-General has recently confirmed his opinion that an individual who wishes to leave has a right to go to a destination state which is willing to take him.⁸⁰

The derogation is narrowly drawn – only from Article 5(1)(f). Arguably, other protections in Article 5 for persons detained will apply, in this case, the right to be informed promptly of the reasons for arrest (which embraces detention) in Article 5(2) and the right to take proceedings by which the lawfulness of detention can be speedily decided by a court and release ordered if the detention is not lawful, Article 5(4). The contrary view may be taken, since the power to detain is outside Article 5, then the protections which apply to detention within Article 5 fall away but, even if this were the case, there still would be a need for an Article 13 remedy to enable a person who wished to challenge the legality of the Article 15 notice itself or the measures taken in reliance on it to raise the claim in the national system. To see whether or not the requirements of the Convention are satisfied, it is necessary to look at the details of Part 4.

7 The Part 4 Scheme

Part 4 of the ATCSA provides the scheme for implementing the measures of derogation announced under the UK's notice. Section 21 provides a power of certification in the Home Secretary if he 'reasonably believes' that a person's presence in the UK is a threat to national security and that he 'suspects' that the person is a terrorist. 'Reasonably' was inserted after adverse comment by the Joint Committee on Human Rights on the original suggestion that purely subjective suspicion and belief should be sufficient. There is no qualification of 'risk', either in terms of its seriousness or its imminence. 'Terrorism' is given its very broad meaning in S.1 of the Terrorism Act 2000 and so is not restricted to action in or against the UK. However, a 'terrorist' for the ATCSA is one who is connected with an 'international' terrorist group, defined in S.21(3)(a) as 'subject to the control or influence of persons outside the UK'. A 'terrorist' is not merely one who has been directly involved in international terrorism but includes one who 'is a member of or belongs to an international terrorist group' (S.21(2)(b)) or 'has links' with such a group (S.21(2)(c)), a person having 'links' only if 'he supports or assists it' (S.21(4)). This last qualification is to exclude those who sympathize with or share the ends of the group without endorsing its means, a limitation made necessary to comply with Articles 10 and 11 of the Convention.

Section 22 allows any of the whole raft of immigration law decisions which may result in denial of entry to or removal of a person from the UK to be taken against a suspected international terrorist, even though the decision cannot result in the person's removal from the UK for legal or practical reasons. The incorporation of an immigration law element into the scheme means that it is applicable only to those who are not UK nationals. The legal reason predominantly will be that the removal would be contrary to the UK's obligations under the ECHR; practical reasons include

⁸⁰ *Supra* note 30.

the impossibility of establishing a travel route, e.g. with a regime with which there are no relations or with which travel is interrupted by instability there. Such people may be detained under S.23. Since there may not be a foreseeable prospect of their being removed anywhere, it is to allow detention in these circumstances for which the Article 15 derogation is necessary. Persons detained will be held ‘under remand conditions’ and may be granted bail, to be determined by the Special Immigration Appeals Commission (SIAC), S.24(2).

The procedural controls on the exercise of the power are provided by the SIAC, thus habeas corpus (and originally judicial review) were excluded. The SIAC is constituted as a superior court (S.35) and appeals lie from its decisions under the ATCSA to the Court of Appeal and House of Lords. The SIAC was established in response to the judgment of the ECtHR against the United Kingdom in *Chahal*⁸¹ by the Special Immigration Appeals Commission Act 1997 in order to provide a judicial process where the Government raised national security considerations about the presentation of evidence in immigration cases. The avenue of challenge to ATCSA decisions is by appeal against certification to the SIAC. The only remedy is cancellation of the certificate if either the SIAC considers that there are no reasonable grounds for the belief or suspicion required under S.21(a) or (b) or ‘for some other reason’ (S.25(2)). Appeals may go in the ordinary way to the Court of Appeal and House of Lords. A feature of the SIAC procedure is the possibility of the Commission appointing an independent lawyer to represent an applicant’s interests when considerations of national security mean that the applicant and his lawyers must be excluded from the proceedings while the sensitive evidence is put – a ‘person appointed’ (Special Immigration Appeal Commission Act S.6). There is specific jurisdiction in the SIAC to consider any questions arising out of the UK’s notice of derogation (S.30). The SIAC has exclusive jurisdiction to determine such matters and has the full powers of the High Court in order to do so; the usual appeals apply. The ‘person appointed’ procedure is applicable. The substantive jurisdiction is a ‘derogation matter’, which covers the derogation from Article 5(1) made by the UK and the designation of it under S.14(1) Human Rights Act. This allows a Human Rights Act challenge to the compatibility of the use of derogation power with an applicant’s Convention right. The arguments canvassed above on this question may be put to the SIAC (and, if they fail, available appeals must be tried as a precondition to any action in Strasbourg). In any action, the Government would point to SS.28 and 29, which respectively provide for a review of the operation of SS.21–23 by someone appointed by the Home Secretary within 14 months of their coming into force and for the duration of the provisions to be limited to 15 months (though thereafter they may be renewed for up to a year at a time). These sections acknowledge the abnormal nature of the measures under the derogation and, by providing time limits, maintain the ambition that they be only temporary. There are general review and report powers about the operation of the Act as a whole in SS.122, 123.

Challenges have been made to the legality of Part 4 under English law and to the lawfulness of the decisions to detain each individual. Seventeen people have been

⁸¹ *Chahal v. United Kingdom*, *supra* note 76, at 1831.

involved. Two have left the UK voluntarily for destinations to which the British authorities conceded that there was no right to remove them, that is to say, these two were willing to face what was a real risk of serious ill-treatment rather than be subject to indefinite detention in the UK. One has been released. One is now detained in a secure mental hospital; another has been released on conditional bail because of the deterioration of his mental health while in custody. The remainder are detained in high security jails. Those detained the longest have already been held for two and a half years. Their claims that the scheme of Part 4 was not compatible with the Human Rights Act were based on a number of grounds – that there was no Article 15 emergency (or no evidence had been presented that there was an emergency); that the derogation was too widely drawn, reaching any terrorist activity within the contemplation of the wide definition given in the Terrorism Act 2000; that the terms of the detention, especially its indeterminate length, breached Article 3 and could not be justified by reference to any Article 15 derogation; and that the scheme was discriminatory in that it applied only to non-UK nationals, whereas there was no power to detain UK nationals, however dangerous, against whom proceedings could not be brought for the same reason as the non-national detainees. The SIAC rejected all these arguments except the last, accepting the claim of discriminatory treatment and finding that Article 15 would not allow this kind of measure – not ‘strictly necessary’.⁸² The Court of Appeal confirmed all the SIAC’s findings, except the last, thus giving the entire arrangements a clean bill of health in human rights terms.⁸³ Emphasis should be given to the fact that the Government did not argue that the Article 15 derogation could be justified on the basis that there was a ‘war’ on terrorism in which the UK was engaged. An appeal will be heard by the House of Lords in October 2004 by a nine-judge court, almost unprecedented. If the House of Lords were to confirm the Court of Appeal’s judgment, undoubtedly some detainees will pursue their claims in Strasbourg.

While these appeals have been going on, the SIAC has heard the individual challenges to the exercise of the power to detain them. The SIAC disposed of several common aspects of the cases in what it called its ‘generic’ decision.⁸⁴ It found no fault with the structure of the scheme and no technical failures in its implementation. For present purposes, it is enough to record that the SIAC sets a very low burden for the Home Secretary to order a detention, that he has reasonable grounds for his suspicion and belief of involvement in international terrorism – ‘it is not a demanding standard for the Home Secretary to meet’.⁸⁵ In demonstrating that there is evidence to support his suspicion, the Home Secretary relied on intelligence reports, hence the need for the Special Advocates. There were concerns that some of the material on which the reports were based would have been obtained by torture or otherwise in breach of Article 3. The SIAC took a tolerant view of the value and admissibility of evidence so obtained. First of all, it put an almost impossible burden on an applicant to show that

⁸² *A and others v. Secretary of State for the Home Department* (30 July 2002), SIAC, SC/1–7/2002.

⁸³ *A, X, Y and others v. Secretary of State for the Home Department* [2002] EWCA 1502.

⁸⁴ *Ajouiou and A, B, C and D v. Secretary of State for the Home Department* (29 October 2003), SIAC SC/1,6,7,9,10/2002.

⁸⁵ At para. 71.

that were the case but if it were, even if it were known to the Government that it were, the SIAC found that there was no rule which required the exclusion of the evidence. The Home Secretary was entitled to rely on such information but evidence that it had been obtained by torture went to its reliability rather than its admissibility. Since the Home Secretary could consider the information, so could the SIAC. That runs in the face of Convention case law and the UK's obligations under the UN Convention against Torture.⁸⁶ It said, unconvincingly, 'We are, after all, concerned in these proceedings not with proof but with reasonable grounds for suspicion.'⁸⁷ Appeals in the individual cases are being heard by the Court of Appeal in July 2004. The reliance on evidence that might have been obtained by torture, claims enhanced by what has become known about conditions in Guantanamo and other places of detention, is a prominent element in the appeals.

In all the cases but one, the SIAC found the Home Secretary's decisions to be well-grounded. When the legislation was being considered, the Attorney-General said that the action which created a threat which reached the Article 15 standard of being 'a threat to the life of the nation' came from Al Qaeda and its associates and, despite the absence of any limiting words in the Statute, that is how the power would be used. In fact, the Government has taken a generous view of which groups have sufficient connection with Al Qaeda to fall within the ATCSA, a judgment confirmed by the SIAC. Clearly, though, there must be some limit – dissident Irish Republican groups, for instance. This was confirmed in the single case in which the detention was found to be unlawful, the case of *M*.⁸⁸ *M* was a member of the anti-Gaddafi Libyan opposition who had been in the UK for some time. It was accepted that he could not be returned to Libya because of the real risk to his security if he were. He was detained by order of the Home Secretary in November 2002. On 8 March 2004, the SIAC found that there was no evidence to support a reasonable suspicion that *M*'s presence in the UK was a threat to national security.⁸⁹ The SIAC accused the authorities of resolving every doubt against *M*, so that suspicion alone had become the effective yardstick. The Court of Appeal refused the Government leave to appeal, but the Court of Appeal did say:

We feel the case has additional importance because it does clearly demonstrate that, while the procedures which SIAC have to adopt are not ideal, it is possible by using special advocates to ensure that those detained can achieve justice and it is wrong therefore to undervalue the SIAC appeal process.

While the need for society to protect itself against acts of terrorism today is self-evident, it remains of the greatest importance that, in a society which upholds the rule of law, if a person is detained as *M* was detained, that individual should have access to an independent tribunal

⁸⁶ Art. 15 – the SIAC put the emphasis on the exclusion of a statement 'which is established to have been made as a result of torture', to rebut the applicant's claim that it was for the Government to show that the statement had not been so obtained.

⁸⁷ At para. 81.

⁸⁸ *M v. Secretary of State for the Home Department*, SIAC SC/17/2002.

⁸⁹ At para. 20.

or court which can adjudicate upon the question of whether the detention was lawful or not. If it is not lawful, he must be released.⁹⁰

This would have been an encouraging consolation for the Home Secretary. His department had already canvassed extending the Part 4 scheme to other offences – if only the Government demonstrated the exigency for dealing with them in this way in relation to the emergency which it has identified. The judgment will strengthen his hand in countering a report by a Committee of Privy Councillors recommending that Part 4 be replaced. But the seriousness of what is involved in the Part 4 scheme can be lost in the details of the process. It authorizes indefinite detention of persons on executive say so, on a low burden of suspicion, which can be justified in partly secret proceedings, *inter alia*, relying on intelligence material, including information which the Government might know had been obtained by torture. I go back to the beginning – the human rights components of the rule of law include the protection against the arbitrary exercise of power, even if the power has a formal legal base. The challenge in Strasbourg would not be presented quite like this: it would concern the application and limits of the Article 15 power. But this is really what is at stake – the departure from a central tenet of the rule of law on the grounds that it is necessary to fight terrorism to preserve the rule of law. Of course, it is a small example but the infiltration of special law into the mainstream has been a feature of some recent developments – terrorism to drugs, drugs to organized crime, organized crime to ordinary, decent crime: now it has been canvassed that the Special Advocate system might be introduced into the prosecution of some particularly intractable ordinary offences. It is a proposal which has been resisted, including by some of those who have been SIAC special advocates,⁹¹ but it shows that the thin end can be a pretty thick wedge.

Since *M*, in *G*,⁹² the SIAC has granted bail on stringent conditions to one detainee whose mental health had seriously deteriorated while he had been incarcerated and about the efficacy of whose treatment if he continued to be detained the SIAC had reservations. The Home Secretary indirectly described the decision as ‘bonkers’ and indicated that he proposed to introduce legislation to give him the power to appeal against such decisions.⁹³ As indicated above, a Committee of Privy Councillors (the Newton Committee) has ‘strongly recommended’ that the detention power be terminated ‘as a matter of urgency’;⁹⁴ the European Committee for the Prevention of Torture etc has twice visited the persons detained and has made adverse comments about

⁹⁰ *Secretary of State for the Home Department v. M* [2004] EWCA Civ 324, at para. 34.

⁹¹ Blake, ‘Special Advocates in Criminal Trials’ [2004] *New Law Journal* 233 and *The Times*, 7 February 2004, at 29.

⁹² Not yet reported.

⁹³ He said that it was ‘extraordinary’ but ‘others may call it “bonkers”’ - http://www.news.bbc.co.uk/1/hi_politics/3655073.stm.

⁹⁴ Privy Counsellor Review Committee, *Anti-Terrorism, Crime and Security Act 2001 Review: Report*, House of Commons, HC 100 (2003), paras. 185–204.

aspects of the regime of Part 4⁹⁵ and it is strongly opposed by human rights NGOs. However, the Home Secretary is convinced of the necessity for it. The most recent consultation paper from his office shows no inclination to depart from that conclusion.⁹⁶ Any further pursuit of the human rights case must be made to the House of Lords or, if that fails, to the ECtHR.

I have used the UK's detention power as the main illustration of the response of a European state to terrorism because it is the most serious in terms of its incompatibility with human rights law. One should begin, though, by recognizing the power of human rights law. The UK has adopted the course it has because of its human rights obligations: it acknowledged that there were circumstances when it would be bound not to deport persons it suspected of terrorism because of the evidence of the risk of ill-treatment of these people if they were removed. Such a perception was doubtless reinforced by the possibility of individual actions in the domestic courts and in Strasbourg. Even the Government concedes that the Part 4 power needs an Article 15 derogation. The Government's argument, it needs emphasizing, is that it is acting in a way that is compatible with its human rights obligations, given the power of emergency derogation. This raises the question as to whether or not there is an 'emergency' in the ECHR sense. The situation is unusual because material evidence of the reality of the emergency, which was all too apparent in the campaigns about Northern Ireland or Turkey before the Article 15 derogation notices were served, is not there for the UK at present. First, the Court must accept that a threat can constitute an emergency justifying measures of derogation. Second, the claim to rely on intelligence information and its assessment brings up again a matter canvassed by the dissenting commissioners in the *Greek* case as to whether this really is a justiciable question.⁹⁷ If it were not, then a further obstacle would arise to applying Article 15 in the ordinary way. The incomplete knowledge about what constitutes the emergency would then make the measure of the 'strictly required' test of any action taken in response to it difficult. There is, then, a burden on the courts to see how far the *Chahal* principle will run in extracting from the state the evidence on which it relies and how competent the courts feel in assessing this material. One British judge has said that substantial deference is required.⁹⁸

The attempt in Part 4 to meet any disproportionality argument which might be raised by the detainees through the device of the special advocate will merit particular attention. Some procedural compensation for individuals where the right to hearing is diminished or dispensed with has been an important element in its calculation

⁹⁵ Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture etc (CPT) from 17 to 21 February 2002, CPT/Inf(2003) 18 and the Government's Reply, CPT/Inf(2003)19; and the CPT News Flash, 24 March 2004, available at <http://www.cpt.coe.int/documents/gbr/2004-03-24-eng.htm>.

⁹⁶ Consultation Paper, *supra* note 9, at 16.

⁹⁷ *Denmark, Norway, Sweden and Netherlands v. Greece case*, ECommHR Applications 3321–3323/67, 3344/67, 12 YbECHR 1, at 76–93.

⁹⁸ Lord Hoffmann in *Secretary of State for the Home Department v. Rehmann* [2001] UKHL 47, para. 62. Lord Hoffmann said that the executive not only has the expertise, it has the political legitimacy to take such decisions. He made specific reference to the impact of '11th September'.

when the Court has found that special measures were justified.⁹⁹ On the other hand, the mental effects of indefinite detention in harsh conditions give rise to apprehension about ill-treatment and the apparent toleration of evidence which might be tainted by torture is especially to be deprecated: not even the war against terrorism can lead there and leave a human rights reputation intact. It is, then, not only the procedures to determine whether or not detention were justified but a substantive matter of whether or not the conditions of detention are compatible with the most basic human rights obligations. We can note two bids by the authorities to extend aspects of this power beyond the present circumstances. The Home Office has speculated about using the powers against British national terrorist suspects and about using the special advocate system for a wider variety of suspects than terrorists.

8 Miscellany

One could go on: the disregard of the extradition process in the 'rendition' of prisoners from one jurisdiction to another, the result of which is to deny prisoners the right to raise human rights issues which might forbid their removal,¹⁰⁰ a significant loss of opportunity because we have seen that national courts have been prepared to examine critically evidence about the likely treatment of a fugitive in the destination jurisdiction.¹⁰¹ More substantial has been the reform of extradition law by the EU states, introducing the European Arrest Warrant and stripping out many of the ordinary extradition law protections, such as double criminality, and using the peg of anti-terrorism policy on which to hang a reform which will extend to whole areas of ordinary crime which has no connection with terrorism, however widely defined.¹⁰² EU lawyers might have things to say about the constitutionality of recourse to the framework directives to achieve this reform.¹⁰³ A European Evidence Warrant along similar lines is under consideration.

In another initiative of doubtful constitutional propriety,¹⁰⁴ the Security Council effectively 'legislated' obligations for states in the field of terrorist financing, the binding force and uncompromising nature of which resulted in severe hardship for certain individuals (who contested the implication that they were engaged in the raising of

⁹⁹ See the references to the available remedies in *Brannigan*, *supra* note 66, paras. 62–64.

¹⁰⁰ For a striking example see *Boudella et al. v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, 13 BHRC 297, para. 300 (no guarantees against imposition of death penalty). The prisoners here were handed over by the Government for transfer to Guantanamo in defiance of the constitutional court's judgment: see <http://news.bbc.co.uk/1/hi/world/europe/1775514.stm>.

¹⁰¹ *Supra* notes 19, 20.

¹⁰² OJ 2002 L 190/1; Gilmore, 'The EU Framework Directive on the European Arrest Warrant . . .', *ERA-Forum* (2002) 144.

¹⁰³ For the EAW in the context of the responses to terrorism, see Knoops, 'International Terrorism: the Changing Face of International Extradition and European Criminal Law', *Maastricht Journal* (2003) 149.

¹⁰⁴ See Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations', *16 Leiden Journal of International Law* (2003) 593, at 607.

funds for terrorist purposes) which it was apparently beyond the power of states to alleviate.¹⁰⁵

The European view, wide if not universal, seems to accept that the task of protecting human rights cannot be switched off while terrorism is dealt with. It is important as well that we recognize the limits of a human rights approach based solely on the international instruments, even the European Convention. The Convention was intended as a minimum standard, a ratchet to prevent an irrevocable decline into something much worse. We should beware letting it become the benchmark, the norm, rather than the floor for protection.

9 Conclusion

The human rights implications of some of the initiatives scarcely seem to have been considered (or, worse, if considered, disregarded). Human rights law at best then becomes reactive, trying to provide *ex post facto* remedies for persons who have suffered serious violations of their rights. No attempt will be made by the authorities to explain the benefits which these costs might be said to have brought, what terrorist damage has been avoided by sacrificing a few individuals. The same reasons which justify withholding evidence from legal proceedings can be invoked to avoid later accountability. Not that this is really the point. The terrorists do their damage. We condemn it as crime; we should pursue it as crime. Sometimes, the imperfections of crime-fighting will involve individuals bearing terrible costs, but those costs cannot be charged to the state. If we want to maintain our distinction between legitimate and illegitimate violence, it is the crucial difference. The rule of law requires that we take the risk that the law may not protect perfectly, that the bomber will get through when a more unconstrained security policy would have prevented him. We make the calculation that the price of success for the more vigorous pursuit of terrorism would be abuse, mistakes, excesses. The evidence from jails in Northern Ireland and Turkey unearthed in Strasbourg proceedings has shown that these concerns are not fanciful. Securing human rights through effective accountability bolsters the rule of law and protects democracy from its own demons. There is an urban legend, sometimes from the French war in Algeria, sometimes from Vietnam – the officer surveys the burning village, the piled bodies and says, ‘We had to destroy this village to save it.’¹⁰⁶ When human rights lawyers speak to power like that, they can only say, ‘You can’t do that – because the law says you can’t and you say you are fighting to uphold the law.’ That is why the positive nature of international human rights law is crucial. We can say no more. If it is not enough, we cannot in any legally usefully way say, well,

¹⁰⁵ See Cameron, ‘UN Targeted Sanctions, Legal Safeguards and the ECHR’, 72 *Nordic Journal of International Law* (2003) 1 and ‘European Union Anti-terrorist Blacklisting’, 3 *Notts Human Rights Law Review* (2003) 225.

¹⁰⁶ I used this before, I am afraid, in the first paper I wrote on terrorism 25 years ago: Warbrick, ‘The Protection of Human Rights in National Emergencies’, in F. E. Dowrick, *Human Rights: Problems, Perspectives, Texts* (1979), at 89. If we are not much further on since then, perhaps we are no further back – but that there is a spirit abroad that would take us back is undeniable.

call it 'war' – for war implies what those who want to fight a 'war on terrorism' do not want, the prospect of some legitimacy of those who use force, even in a cause which is unlawful, because those who fight have some rights, however difficult it might be to determine what they are.¹⁰⁷ I am afraid that what the 'war on terrorism' protagonists want is not 'war law' but 'not law', at least for those who they call 'terrorists'.

While, of course, I endorse Professor Neuman's call for the application of the core standards of IHL to any 'war on terrorism' and I concede that there is more work to be done on how HRL applies in time of armed conflict, we need to hold fast to the position that human rights law does apply to armed conflicts and that, in Europe, at least, the prospect of individual actions before the European Court of Human Rights is an important extra avenue for trying to make sure that it is applied. Most of the time, though, it will be 'crime' and not 'war' with which we are dealing. Finally, there is another reason for preferring the human rights regime over the humanitarian one. If one takes the view that the 'war against terrorism' is no more likely to be won than the 'war against drugs' or the 'war against poverty', then containing the manifestations of terrorism will be a function of the criminal law, dealing with them will need some space for politics. That is what human rights law requires – however unforeseeable it may be today that we 'sit down with the men of violence', so it was that the colonial states would negotiate with their 'terrorists': but they did. Besides, there are the rings of associates to consider – the supporters, the sympathizers, those who share the same ends, those who share the same 'enemy', those who are indifferent. There is no space for politics if the maxim is, 'If you are not with us, you are against us.' This is the message from *McFeeley* – human rights law does not allow a state to slam the door on even its most implacable foe: no outlawry.

There is nothing new in this paper, but that is just the point.

Postscript

This paper has pointed to the great burden on national and international courts to hold the line against executive practices and executive-inspired legislation which seeks to limit human rights protections in the name of prosecuting the war against terrorism. It suggests that the courts will discharge this obligation most convincingly if they hold to a strict interpretation of the constitutional instruments or international treaties on which they rely as the sources of civil liberties and human rights. Nonetheless, setting 'bright lines' rather than contextual standards and maintaining broad standards rather than ratifying attempts to narrow them may be hard. This has been shown by a recent English judgment. On 11 August 2004, the Court of Appeal for England and Wales delivered its judgment in the appeals against most of the merits decisions of the SIAC under Part Four of the ATCSA mentioned in the paper (*A and others v Secretary of State for the Home Department* [2004] EWCA Civ 1123; <http://www.baillii.org/ew/cases/EWCA/Civ/2004/1123.htm>). The SIAC

¹⁰⁷ See Roberts, 'The Laws of War in the War on Terror', 32 *Israel Yearbook on Human Rights* (2002) 193, especially the conclusions at 241–245.

judgments confirmed the legality of the continued detention of the persons certified by the Home Secretary under S.21 ATCSA. The individual judgments in the Court of Appeal are long, the Court was divided and the issues were complex. This addendum is simply to draw attention to only one aspect of the judgments, the admissibility before the SIAC of materials alleged to have been obtained by torture. The SIAC had decided that it was permissible for the Home Secretary to take information obtained in such a way into account in reaching his decision to certify a person under S.21 and for the SIAC itself to do so when it reached its own decision on whether or not the conditions for certification were satisfied.

The claim by some applicants was that some of the information relied on by the Minister, later presented in closed session before the SIAC, had been obtained by torture of persons detained by the US at Guantanamo, in Afghanistan and elsewhere. The Government did not comment on the sources of any of its intelligence material but denied that any of it had been obtained by torture. The Court accepted the Government's assurance but, nonetheless, went on to decide the concededly hypothetical question of whether the Home Secretary and/or the SIAC was precluded from taking into account evidence obtained by torture where the torture had been carried out by officials of another state and without any connivance of UK officials. By a majority of 2 (Lords Justice Pill and Laws) to 1 (Lord Justice Neuberger), the Court of Appeal said that both the Minister and the SIAC were entitled to take into account information obtained in this way. The majority would have excluded information obtained by torture committed by or connived at by UK officials, but they did not accept that the very wide powers of the SIAC to receive evidence could be read down to keep out material obtained by torture by officials of another state. All the judges made extensive reference to international law standards (principally Article 6(1) ECHR and Article 15 UNCT) but differed both about what these rules meant and what their effect was in domestic law. The majority referred also to the UK's obligations to cooperate in the campaign against terrorism arising from Security Council Resolution 1373. Lord Justice Neuberger's dissenting judgment did reveal a consequential problem if his view that the evidence should not be relied upon were accepted. It is what the burden should be of showing that evidence had been obtained by torture and where that burden lay. The judge said that it lay on the SIAC to establish that, on the balance of probabilities, evidence before it had not been secured by torture. The way in which, and the timing with which, information about the treatment of detainees in Guantanamo has become available favoured the applicants here but it may be in future that the Government will be able to present its case (which, of course, will be in closed session) in a way that results in the identification of the source of the evidence and the means by which it was obtained remaining obscure.

The judgments received hostile receptions from human rights NGOs. It seems inevitable that, if there is not a domestic remedy, these cases will reach Strasbourg. The judgments have already demonstrated that there may be technical obstacles within a national legal system to giving effect to wide international rules, even on torture, and severe practical hurdles to be overcome even if the courts are more receptive on the matter of principle.