
The Treatment of Foreign Terror Suspects

Clive Walker*

Following the bombings in London of July 2005, the Prime Minister, Tony Blair warned that 'the rules of the game are changing'. The proposed changes have primarily related to foreign suspects of terrorism and engage rules relating to asylum, deportation and nationality. The Terrorism Act 2006 and the Immigration, Asylum and Nationality Act 2006, which give effect to the proposals, are examined and analysed with reference to the policy choices in regard to counter-terrorism strategy, to the weighting of rights against policy, and to choices between rights, including the treatment of absolute rights.

UNWELCOME GUESTS

The bombings in London of 7 July 2005 killed or injured dozens of people. These attacks rightly gave pause for official reflection upon anti-terrorism laws, asylum policies and transport security.¹ In contrast to prior crises which resulted in legislation within short order,² there was no panic response. After all, already forearmed with most conceivable varieties of powers under the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001 and the Prevention of Terrorism Act 2005, an increasingly 'militant democracy' was emerging³ with no manifest legal gaps. However, the Prime Minister, Tony Blair, issued a stark warning on 5 August 2005 of future amendments: 'Let no one be in any doubt, the rules of the game are changing.'⁴

That statement may be questioned in several respects. One might deprecate the implication that solemn legal process determining vital individual rights and societal interests should be viewed as no more sacrosanct than a 'game'. One might also comment on the agenda highlighted for reform – in other words, the diminution of individual rights rather than possible intelligence and administrative failings. A subsequent refusal to allow any form of inquiry into the latter beyond the production of a 'narrative' confirms the official determination to manage the policy agenda.⁵ Nevertheless, the ensuing months witnessed the delivery

* Centre for Criminal Justice Studies, School of Law, University of Leeds. The author thanks the School of Law, Stanford University, for study facilities during a visiting professorship in January 2006.

- 1 On the latter, see House of Commons Transport Committee, UK Transport Security (2005–06 HC 637).
- 2 For the tendency towards 'panic' legislation, see J. H. Marks, '9/11+3/11+7/7=? What Counts in Counterterrorism?' (2006) 37 Columbia Human Rights L Rev 559; E. A. Posner and A. Vermeule, 'Emergencies and Democratic Failure' (2006) 92 Virginia L Rev 1091.
- 3 See A. Sajó (ed), *Militant Democracy* (Amsterdam: Eleven International Publishing, 2004).
- 4 *The Times* 6 August 2005, 1.
- 5 *Report of the Official Account of the Bombings in London on the 7th July 2005* (2005–06 HC 1087). See also Intelligence and Security Committee, *Report on the London Terrorist Attacks on 7 July 2005* (Cm 6785, London, 2005). A review of the capacity and resources of the security services has also been ordered: *The Guardian*, 29 September 2006, 1.

of some startling changes, especially through the Terrorism Act 2006. The Act provides for new offences relating to speech which might be construed as encouraging terrorism, other broad offences concerning preparatory measures and training, wider grounds for the proscription of organisations, and the extension of detention without trial upon arrest from 14 days to 28 days⁶ (but not to 90 days, as originally sought).⁷

One prominent aspect of the 'game' being played with terrorism concerns the treatment of foreign terrorist suspects, as a result of which the Immigration, Asylum and Nationality Act 2006 also delivered a significant aspect of the response. In a sense, it is almost perverse that the spotlight should focus upon foreigners. What was so remarkable about the London bombings of the 7 July 2005 was that they were perpetrated by British citizens. They were Yorkshiremen, whose mundane backgrounds set at naught several of the tactics of the security forces on the hunt for cells of foreigners. Whilst the Home Office,⁸ the Foreign Office,⁹ and later the Department of Communities and Local Government¹⁰ have subsequently shown concern for the attitudes of minority communities towards terrorism, much of the legislative attention has steadfastly remained focused upon foreigners. This paper will examine the policy choices and responses which have ensued, with reference to the design of counter-terrorism strategy, to the weighting of rights against policy, and to choices between rights, including the treatment of absolute rights.

POSSIBLE APPROACHES TO FOREIGN SUSPECTS OF TERRORISM

The United Kingdom government has been struggling for years to find a satisfactory response to foreign terrorist suspects, a problem which may be viewed as an acute aspect of the wider problems caused by population movements and especially by asylum claims.¹¹ At least four responses are conceivable.

6 The period had been increased from seven days by the Criminal Justice Act 2003, s 306, in the light of the difficulties posed by foreign terrorism.

7 See Terrorism Bill 2005–06 HC no 55 cl 23. Even the 28 day period is viewed as disproportionate by the Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005–06 HL75, HC 561) para 92.

8 Several studies were undertaken by working groups under the banner of 'Preventing Extremism Together' (London: Home Office, 2005), including: the creation of a National Advisory Council on Mosques and Imams; regional Forums Against Islamophobia and Extremism; 'Preventing Extremism Together' (PET) Scholars' Roadshows. Other initiatives include a Home Office 'Faith Communities Capacity Building Fund' and the training and accreditation of imams: HC Deb vol 440 col 167ws 15 December 2005, Charles Clarke.

9 Measures include: grant aid to Pakistan for education purposes (*The Independent on Sunday* 19 November 2006, 46); and work by the Islamic Media Team and by the Engaging with the Islamic World Group (see Home Office, *Countering International Terrorism* Cm 6888 (London: Home Office, 2006) para 49).

10 See its Commission on Integration and Cohesion: <http://www.communities.gov.uk/index.asp?id=1501520> (last visited 4 January 2007).

11 See Home Office, *Secure Borders, Save Havens* Cm 5387 (London: Home Office, 2002). Compare *Att Gen v Zaoudi* [2005] 1 NZLR 577 at [115].

Criminal prosecution model

Where there is sufficient evidence of criminal activity, then a criminal prosecution is a legitimate and morally desirable response.¹² That fate awaits the alleged bombers of 21 July 2005. But this criminal justice model is not for all. The peril of terrorism from al Qa'ida, characterised by wanton mass attacks on civilians, including the threat of the use of weapons of mass destruction, demands intervention at an anticipatory stage of the criminal enterprise. Unlike the actions of 'ordinary decent criminals',¹³ society cannot afford to wait upon the death and destruction of jihadist terrorism. But early intervention at the stage of preparatory actions might also pre-empt the avenue of proof beyond reasonable doubt, even where there are special 'precursor' offences.¹⁴ In addition, it may be unappealing to the security services to reveal in the public domain of a courtroom their methods and sources, as a result of which prosecutions may be deemed to be contrary to the public interest.¹⁵

War model

The opposite of a criminal justice approach is to take the suspects entirely out of the criminal justice or indeed any domestic legal system. One might depict this approach as the 'war' model. It has in part¹⁶ been adopted by the USA, after President Bush announced shortly after 9/11 that his country had entered 'the first war of the twenty-first century'.¹⁷ This policy strand is exemplified by the abyss of 'the legal black hole' that is the detention facility at Guantánamo Bay¹⁸ and the proposed trials of its inmates by military commission.¹⁹ This mode of approach is highly controversial because of its incursions upon liberty and due process. The US Supreme Court has sustained the President's imperious claims that a 'war' exists and that broad war powers can be invoked at home and abroad under his authority as Commander in Chief.²⁰ But the Court has not accepted that habeas

12 See L. Zedner, 'Securing Liberty in the Face of Terror' (2005) 32 JLS 507.

13 The term was coined by the *Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978* Cmnd 9222 (London, 1984) para 136.

14 Most prominent are the Terrorism Act 2000, ss 57 and 58.

15 Examples include the refusal to bring prosecutions concerning the Stalker/Sampson inquiries into the use of lethal force by the security forces (*The Times*, 26 January 1988).

16 See also the USA PATRIOT Act 2001 (Public Law No 107-56); A. Etzioni, *How Patriotic is the Patriot Act?* (New York: Routledge, 2004); J. A. E. Vervaele, 'The Anti-terrorist Legislation in the US' (2005) 13 *European Journal of Crime, Criminal Law and Criminal Justice* 201.

17 *The Guardian* 14 September 2001, 5.

18 J. Steyn, 'Guantánamo Bay' (2004) 53 *International and Comparative Legal Quarterly* 1. See also M. Mofidi and A. E. Eckert, 'Unlawful Combatants or Prisoners of War?' (2003) 36 *Cornell International LJ* 59; J. J. Paust, 'Judicial Power to Determine the Status and Rights of Persons Detained without Trial' (2003) 44 *Harvard International LJ* 503; D. M. Amann, 'Guantánamo' (2004) 42 *Columbia Journal of Transnational Law* 263; H. Duffy, *The 'War on Terror' and the Framework of International Law* (New York: Cambridge UP, 2005); C. Zerrougui et al, *Situation of Detainees in Guantánamo Bay* (E/CN.4/2006/120, New York, 2006).

19 See Military Commissions Act 2006, Public Law No 109-366, 120 Stat 2600 (2006).

20 See J. C. Yoo, *The Powers of War and Peace* (Chicago: University of Chicago Press, 2003); P. H. Heymann and J. N. Kayyem, *Protecting Liberty in an Age of Terror* (Cambridge, Mass: MIT Press, 2005); P. Irons, *War Powers* (New York: Henry Holt, 2005); P. Berkowitz (ed), *Terrorism, the Laws of*

corpus jurisdiction in the domestic courts can be wholly avoided.²¹ In response, the Detainee Treatment Act 2005 seeks to delimit severely the assumption of jurisdiction by the Federal courts. Beyond Guantánamo, there has been a belated admission in September 2006 of 'ghost' prisoners and 'black' prisons,²² when 14 'high value' prisoners were revealed.²³ Alongside the programme of detentions by US agents, the US Secretary of State, Condoleeza Rice, has admitted to rendition of suspects to other countries without process of law for the purpose of what critics term 'torture by proxy'.²⁴ There are at least three relatively well documented instances. One concerns Maher Arar, a Canadian of Syrian birth who was detained in New York and sent to Syria whilst en route to Canada.²⁵ Second was Khaled al Masri, a German citizen of Lebanese origin, who was arrested in Macedonia and taken to Kabul for interrogation before being returned to Albania.²⁶ Third was Abu Omar who was forcibly taken from Milan to Egypt in 2003; an Italian judge has ordered the arrest of 22 CIA agents who were traced to Milan at the crucial time.²⁷ A related war model tactic, the application of torture, inhuman and degrading treatment, as applied in Guantánamo Bay and also in Abu Ghraib prison in Iraq, has proven the most controversial of all.²⁸ An amendment to the Department of Defence Appropriations Act 2006, sponsored by Senator John McCain, forbids any cruel, inhuman or degrading treatment of detainees under the physical control of the US government anywhere in the world.²⁹ Finally, the

War and the Constitution (Stanford: Hoover Institution Press, 2005); M. Tushnet (ed), *The Constitution in Wartime* (Durham, NC: Duke UP, 2005).

- 21 See *Rasul v Bush* 542 US 466 (2004); *Hamdi v Rumsfeld* 542 US 507 (2004); *Rumsfeld v Padilla* 542 US 426 (2004).
- 22 See Committee on International Human Rights of the Association of the Bar of the City of New York and Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions'* (New York, 2004); Committee on Legal Affairs and Human Rights, *Alleged Secret Detentions in Council of Europe Member States* (AS/Jur (2006) 03 Council of Europe, Strasbourg, 2006); Temporary Committee on the Alleged use of European Countries by the CIA for the Transport and Illegal Detention of Prisoners, *Working Document No 7 on 'Extraordinary Renditions'* (DT\641309EN.doc, Strasbourg, 2006).
- 23 *The Times* 7 September 2006, 35.
- 24 *The Times* 6 December 2005, 33. Petitions by Guantánamo prisoners to be afforded notice of forced removal (which had been the fate of 65 inmates) have so far produced mixed outcomes based on court analysis of the certainty or immediacy of the harm: *Al-Joudi v Bush* [2005] US Dist LEXIS 34049; *Al-Anazi v Bush* 370 F. Supp. 2d 188 (2005); *O.K. v Bush* 377 F. Supp. 2d 102 (2005); *Sliti v Bush* 407 F. Supp. 2d 116 (2005).
- 25 See Commission of Inquiry into the Actions of Canadian Officials in relation to Maher Arar, <http://www.ararcommission.ca/eng/index.htm> (last visited 4 January 2007). The Head of the Canadian RCMP, Giuliano Zaccardelli, resigned in connection with the affair: *The Independent* 7 December 2006, 38. Arar's civil claims were rejected in *Arar v Ashcroft* 414 F. Supp. 2d 250 (2006).
- 26 See *The Independent* 7 December 2005, 6.
- 27 *The Daily Telegraph* 24 December 2005, 11.
- 28 See S. Levinson, *Torture* (New York: Oxford UP, 2004); M. Danner, *Torture and Truth* (New York: New York Review of Books, 2004); K. J. Greenberg, and J. L. Dratel, *The Torture Papers* (Cambridge: Cambridge UP, 2005).
- 29 Section 1003. There was already a legislated policy not to expel any person to a country in which there are 'substantial grounds for believing the person would be in danger of being subjected to torture' (Foreign Affairs Reform and Restructuring Act of 1998 (Public Law No 105-277, s 2242; 8 USC s 1231 note). Diplomatic assurances are forwarded for the consideration of the Attorney General under 18 CFR s 208.18(c). Forced return is being challenged in *Mahmoad Abdah v Bush* [2005] US Dist LEXIS 4942.

war model has emerged again in the leaked information about a US domestic surveillance programme³⁰ beyond the ambit of the Foreign Intelligence Surveillance Act 1978.³¹

Some of these US policies have repercussions for the United Kingdom government. It has successfully negotiated the release of all British citizens³² (but not British residents)³³ from Guantánamo Bay.³⁴ The Foreign Office has also been prompted to dispel allegations about 'ghost' prisons in British territory, denying any such detentions on Diego Garcia³⁵ but admitting two instances in 1998 of official permission for US agencies to land rendered detainees in transit through the United Kingdom.³⁶ At the same time, these figures may be misleading, for block permissions are granted to the US military for aircraft movements in the United Kingdom,³⁷ and the National Air Traffic Services has revealed that there were within the past five years around 200 movements of two CIA chartered aircraft for purposes unknown.³⁸ These are said to be part of a 'spider's web' of CIA detentions and renditions.³⁹

There has been some British dalliance with a 'war model' of its own. Abroad, the British government has been the most enthusiastic supporter of US military operations in Afghanistan and Iraq, though decidedly not including its Guantánamo policy.⁴⁰ Domestically, by contrast, its application has been more hesitant.

30 *The Times* 17 December 2005, 41.

31 50 USC s 1801.

32 Five were released in 2004: Ruhul Ahmed, Tarek Dergoul, Asif Iqbal, Shafiq Rasul, and Jamal Udeen (*The Times* 20 October 2004, 1). The remaining four were released in 2005: Feroz Abbasi, Moazzam Begg, Richard Belmar, and Martin Mubanga (*The Times* 28 January 2005, 26). See further Center for Constitutional Rights, *Composite Statement: Detention in Afghanistan and Guantánamo Bay* (New York, 2004); M. Begg, *Enemy Combatant: A British Muslim's Journey to Guantanamo and Back* (New York: Free Press, 2006).

33 British residents have been said to include Shaker Abdur-Raheem Aamer, Ahmed Ben Bacha, Benjamin Mohammed Al Habashi, Bisher al-Rawi, Jamil el-Banna, Ahmed Errachidi, Jamal Abdullah Kiyemba, Omar Deghayes, and Abdunour Sameur have been held in Guantánamo. Kiyemba was sent to Uganda on 9 February 2006, at the same time as an exclusion order was issued by the Home Office. Bisher al Rawi, Jamil el Banna, Omar Deghayes, Binyam Mohammed Habashi, Shaker Abdurraheem Aamer, Jamal Abdullah Kiyemba, and Ahmed Errachidi failed in their judicial review application against the Foreign Secretary: *R (on the application of Al Rawi and others) v Secretary of State for Foreign and Commonwealth Affairs and another* [2006] EWCA Civ 1279. The US authorities are reportedly willing to return the British related detainees, but the UK Government has declined since (with the exception of al-Rawi) they have no right of entry and it is not willing to promise to impose control orders (*The Guardian* 3 October 2006, 1).

34 See *The Times* 10 March 2004 1.

35 See HL Deb vol 642 col 1020 8 January 2003, vol 647 col 58w 28 April 2003, Baroness Amos.

36 HC Deb vol 440 col 1652w 12 December 2005, vol 441 col 38ws 20 January 2006 Jack Straw. 73 CIA flights have been acknowledged: HC Debs vol 443 col 2508w 17 March 2006 Alastair Darling. The UK government has also denied complicity in the arrests of al-Rawi, Al Habashi or el-Banna: HC Deb vol 447 col 352WH 15 June 2006 Ian McCartney.

37 House of Commons Foreign Affairs Committee, *Human Rights Annual Report 2005* (2005–06 HC 574) para 45.

38 *The Guardian* 23 February 2006, 5. Amnesty International calculates the total at 185: *Below the Radar* (London, 2006).

39 Council of Europe, Parliamentary Assembly, *Alleged Secret Detentions and Unlawful Inter-State Transfers involving Council of Europe Member States* (AS/JUR (2006) 16, Strasbourg, 2006) Part III.

40 See House of Commons Foreign Affairs Committee, *Human Rights Annual Report 2005* (2005–06 HC 574) para 38; N. Rose, 'Goldsmith Calls for US to Close Down Guantanamo and Back the Rule of Law' (2006) 103 *Law Society Gazette* 6.

For instance, the Prime Minister raised as part of his agenda in August 2005 the weakening of the Human Rights Act 1998 in order to facilitate the removal of terrorist suspects, but the Human Rights Act 1998 (though not the European Convention on Human Rights) has since been absolved of obstructing effective action against terrorism.⁴¹

Executive measures model

The third approach is somewhere between the two ends of the spectrum and comprises extraordinary executive intervention but still within the legal system – the ‘executive measures model’. The first phase of this approach involved detention without trial under Part IV of the Anti-terrorism, Crime and Security Act 2001,⁴² comprising a ‘prison with three walls’ for those foreigners suspected of involvement in terrorism.⁴³ This prison turned out to be sturdy enough for most of those detained without trial, since only a few were prepared to risk a return to their country of origin and therefore were held in high security conditions in Belmarsh Prison for around three years.⁴⁴ Part IV was condemned as disproportionate and discriminatory by the House of Lords in *A v Secretary of State for the Home Department*.⁴⁵ It was repealed by the Prevention of Terrorism Act 2005 in March 2005, which allowed for the issuance of ‘control orders’ by which restraints and monitoring can be imposed upon activities, movements and contacts of suspects.⁴⁶ Thus, the nine remaining Part IV detainees were immediately subjected to these control orders. The control order system avoids a breach of article 14 of the European Convention since it applies also to British citizens (and seven orders out of 16 currently in force have been issued against citizens).⁴⁷ Whether a given order complies with article 5 depends on the extent of its restraints on liberty.⁴⁸ In practice, orders ‘not very short of house arrest’,⁴⁹ were found to be incompatible, in the absence of any derogation notice under article 15, in *Re JJ*.⁵⁰ However, the Court of Appeal in *Re MB* accepted that the procedures for challenge were sufficiently robust to allow the system to be upheld as compatible with article 6.⁵¹ There were indications well before the Prime Minister’s pronouncements in August 2005 that the government was becoming dissatisfied with the control order arrangements. They cannot guarantee public safety to the same extent as when suspects were

41 See Department for Constitutional Affairs, *Review of the Implementation of the Human Rights Act* (London: Department for Constitutional Affairs, 2006) 4.

42 See C. Walker, *The Anti-Terrorism Legislation* (Oxford: Oxford UP, 2002) ch 9.

43 See C. Walker, ‘Prisoners of “war all the time”’ [2005] *European Human Rights L Rev* 50.

44 For evidence of psychological injury, see *The Independent*, 14 October 2004, 4.

45 [2004] UKHL 56.

46 See further C. Walker, ‘Keeping Control of Terrorists without Losing Control of Constitutionalism’ (2007) 59 *Stanford L Rev*, forthcoming.

47 HL Deb vol 687 col 176ws 11 December 2006, Baroness Scotland.

48 See *Guzzardi v Italy* Appl No 7367/76, Ser A 39; *Raimondo v Italy*, App 12954/87, Ser A 281-A; *Mancini and Mancini v Italy* App 44955/98, 2001-IX; *R (Saadi) v Secretary of State for the Home Department* [2001] EWCA Admin 670 at [41].

49 Lord Carlile, *First Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (London: Home Office, 2006) para 43.

50 [2006] EWCA Civ 1141.

51 [2006] EWCA Civ 1140.

locked away in a high security prison. Other practical concerns are the costs of monitoring and also the fear that the suspects might become the focus of support groups and media attention. For all these reasons, the government wanted to be rid altogether of these individuals.

Exit model

Consequently, the fourth approach is to remove the unwelcome guests by way of deportation or exclusion – the ‘exit model’.⁵² While the resolution of deportation or exclusion may appear the most obvious solution of all, the obvious may not, in reality, be the best. Whether it makes sense to lose sight of one’s enemies in policing terms was one of the doubts voiced by the Newton Committee:

Seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism. If people in the UK are contributing to the terrorist effort here or abroad, they should be dealt with here. While deporting such people might free up British police, intelligence, security and prison service resources, it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally. Indeed, there is a risk that the suspects might even return without the authorities being aware of it.⁵³

In the context of what became the Immigration, Asylum and Nationality Act 2006, the government promised by contrast that ‘we shall not use the powers to export risk’.⁵⁴ Any contradictions notwithstanding, a number of tactics are being adopted to enhance the exit model.

ENHANCEMENT OF THE EXIT STRATEGY

In one respect, the get-tough language about deportation and exclusion itself became the solution. If not purposely designed to frighten away some of the unwelcome guests, at least one prominent target, Omar Bakri Mohammed, decamped to Lebanon⁵⁵ in the aftermath of not only the increased likelihood of deportation but also a direct threat of prosecution.⁵⁶ But others remained, including those officially designated as suspected terrorists under control orders. Therefore, more substantive changes to the ‘rules of the game’ have been implemented to accomplish the exit strategy.

52 Along the same lines is the narrowing of the ‘political offence’ exception as a bar to extradition: see Suppression of Terrorism Act 1978, sch 1; Extradition Act 2003, ss 13, 81, sch 2.

53 Privy Councillor Review Committee, *Anti-terrorism, Crime and Security Act 2001 Review: Report* (2003–04 HC 100) Pt D, para 195.

54 House of Commons Standing Committee E col 271 25 October 2005, Tony McNulty.

55 *The Times* 9 August 2005, 1. He was born in Syria but left for Lebanon and acquired Lebanese citizenship in 1982. He did not face any criminal charges in Lebanon on his return in 2005 and so did not fall within any memorandum of understanding about returned persons (described later).

56 *The Times* 8 August 2005, 6.

Grounds for deportation or exclusion

First, the exit strategy has been furthered by changes to immigration rules and guidelines. Following a Consultation document issued by the Home Office on 5 August 2005, *Exclusion or Deportation from the UK on Non-Conducive Grounds*, guidelines have been instituted for deportation or exclusion under section 3(5)(a) of the Immigration Act 1971.⁵⁷ Where the Home Secretary has powers to exclude or deport non-UK citizens on the grounds that their presence in the UK is not conducive to the public good, those powers have been exercised in the past on the basis that: the person is a direct threat to national security, public order or the rule of law, or the UK's good relations with a third country; or where the person is suspected of involvement in war crimes or crimes against humanity. A further set of non-exhaustive criteria were to be added as illustrative 'unacceptable behaviours' as follows:

To express views which the Government considers:-

- Foment terrorism or seek to provoke others to terrorist acts
- Justify or glorify terrorism
- Foment other serious criminal activity or seek to provoke others to serious criminal acts
- Foster hatred which may lead to intra community violence in the UK
- Advocate violence in furtherance of particular beliefs

*and those who express what the Government considers to be extreme views that are in conflict with the UK's culture of tolerance.*⁵⁸

Some of the more controversial aspects were dropped from the final version, in particular the final phrase (set in italics for ease of reference),⁵⁹ but the remainder were implemented on 24 August 2005. Related work is underway to compile 'lists of extremist bookshops etc, engagement of which would trigger deportation' and 'to identify extremists overseas who pose a threat to the UK [and] a similar list of individuals in the UK'.⁶⁰

The views which the government considers to be 'unacceptable' are formulated in very broad and vague terms and may presumably include the advocacy of violence against regimes which are themselves guilty of terrorism or crimes against humanity.⁶¹ One might compare the more precise list in the 1951 Geneva Convention relating to the Status of Refugees, Article 1(F):

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

57 See further Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005–06 HL75, HC 561) para 109 et seq.

58 Home Office, *Exclusion or Deportation from the UK on Non-Conducive Grounds* (London, 2005) para 7.

59 See *ibid* para 115; Home Office, *Asylum Policy Instructions on the 'Cessation, Cancellation and Revocation of Refugee Status'* (London, 2005).

60 HC Deb vol 440 col 167ws 15 December 2005, Charles Clarke.

61 For criticisms in general, see Refugee Council and others, *Joint response to the Home Office consultation on exclusion or deportation from the UK on non-conducive grounds* (London, 2005).

- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.⁶²

In so far as the Home Office criteria go beyond the suppression of criminal speech, which would also apply to citizens, they are arguably discriminatory on grounds of nationality. This contention might be explored further in the light of article 16 of the European Convention on Human Rights, which provides that '[n]othing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.' However, restrictions on political activity must still be proportionate to a threat to the state or its inhabitants. In *Piermont v France*,⁶³ a German MEP was expelled from French Polynesia and not allowed to enter New Caledonia for taking part in a demonstration at which she denounced nuclear testing and the French presence in the Pacific. The European Court concluded that article 16 could not be invoked against her because of her citizenship of another European Union state and also because she was an MEP.⁶⁴ Resorting therefore to article 10(2), could the expulsion be said to be necessary for the maintenance of public order? The facts were against the French government:

... the utterances held against Mrs Piermont were made during a peaceful, authorised demonstration. At no time did the MEP call for violence or disorder; she spoke in support of the anti-nuclear and independence demands made by several local parties. Her speech was therefore a contribution to a democratic debate in Polynesia. Moreover, the demonstration was not followed by any disorder and the Government did not show that the stances taken up by the applicant caused any unrest in Polynesia.⁶⁵

These considerations were applied domestically in *R (on the application of Farrakhan) v Secretary of State for the Home Department*,⁶⁶ in which Louis Farrakhan, the spiritual leader of the Nation of Islam, was excluded from the United Kingdom in 2000, given 'the current tensions in the Middle East and ... the potential impact on community relations in the United Kingdom and in particular to relations between the Muslim and Jewish communities here and a potential threat to public order for that reason.'⁶⁷ The Divisional Court again considered 'where the

62 See 189 UNTS 150 and the 1967 Protocol (606 UNTS 267); UN High Commission for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* HCR/IP/4/Eng/REV1 (Geneva: UNHRC, 1992); J. C. Hathaway and C. J. Harvey, 'Framing Refugee Protection in the New World Disorder' (2001) 34 *Cornell International LJ* 257; E. Feller, T. Voller, and F. Nicholson (eds), *Refugee Protection in International Law* (Cambridge: Cambridge UP, 2003); T. Sidebotham, 'Immigration Policies and the War on Terrorism' (2004) 32 *Denver Journal of International Law and Policy* 539.

63 App nos 15773/89; 15774/89, Ser A 314 (1995). Compare *Adams and Benn v United Kingdom* App nos 28979/95; 30343/96, 88A D & R, 137 (1997).

64 *ibid* at [64].

65 *ibid* at [77].

66 [2002] EWCA Civ 606.

67 *ibid* at [2].

authorities of a State refuse entry to an alien solely to prevent his expressing opinions within its territory, art 10 will be engaged.⁶⁸ Under article 10(2), it was held that the ban reflected a proportionate balance between the aim of the prevention of disorder and freedom of expression.⁶⁹ By contrast, Article 16 was largely written out of existence: 'this Article appears something of an anachronism half a century after the agreement of the Convention. We do not consider that it has direct impact in the present case.'⁷⁰

The new Home Office grounds for exclusion or deportation comply in many respects with the emphasis against offences of violence or disorder outlined in the jurisprudence of the European Court. However, the wording of grounds such as 'glorifying' terrorism were not, at least when issued, explained by any corresponding domestic or international law offences. This disjunction has now been reduced by the enactment of section 1 of the Terrorism Act 2006, though its new offences of direct and indirect incitement to terrorism (including glorification) are themselves the subject of much criticism.⁷¹ It is arguable that section 1 is insufficiently connected to the production of violence⁷² and takes insufficient note of the value of political speech (provided it does not directly advocate violence or directly support a terrorist group)⁷³ to comply with article 10 of the European Convention.⁷⁴ By reference to section 17 of the Act, no account can be taken of the nature of the regime being attacked. In response, the government has emphasised that the prosecutorial discretion is purposively broad but that account will be taken of article 10 in its application.⁷⁵

Other changes within the exit strategy⁷⁶ include Section 7 of the Immigration, Asylum and Nationality Act 2006⁷⁷ which provides that in national security

68 *ibid* at [56].

69 *ibid* at [79].

70 *ibid* at [70].

71 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005–06 HL75, HC 561) paras 21, 117. See further A. Jones, R. Bowers, and H. D. Lodge, *The Terrorism Act 2006* (Oxford: Oxford UP, 2006); D. Barnum, 'Indirect Incitement and Freedom of Speech in Anglo-American law' [2006] *European Human Rights L Rev* 258.

72 Compare the direct link in the offence of incitement to murder: *R v El-Faisal* [2004] EWCA Crim 456; *R v Abu Hamza* [2006] EWCA Crim 2918.

73 See H. Davis, 'Lessons from Turkey: Anti-terrorism Legislation and the Protection of Free Speech' [2005] *European Human Rights L Rev* 75; *Hogefeld v Germany*, App no 35402/97, 20 January 2000; *Gündüz v Turkey*, App no 59745/00, 2003–XI.

74 See *Castells v Spain*, App No 11798/85, Ser A 236 (1992). It may be easier to justify as proportionate civil controls which affect the mode of dissemination of speech: *R v Secretary of State for the Home Department, ex p Brind* [1991] 2 WLR 588; *Purcell v Ireland* App no 15404/89, 16 April 1991; *Brind v United Kingdom* App no 18714/91, 9 May 1994; *McLaughlin v United Kingdom* App no 18759/91, 9 May 1994.

75 *Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005–06 HL 114, HC 888) 15.

76 See also existing measures which seek to prevent any potential asylum-seeker or refugee from even reaching the national frontiers: Immigration and Asylum Act 1999, ss 18, 19 and Pt II; Anti-terrorism, Crime and Security Act 2001, s 119; Schedule 7 to the Terrorism Act 2000 (Information) Order 2002, SI no 1945.

77 Inserting a new section 97A into the Nationality, Immigration and Asylum Act 2002. Subsection (4) allows repeal by order in the hope that a more congenial interpretation of the European Convention will emerge eventually from the European Court: HC Deb Standing Committee E col 300 25 October 2005, Tony McNulty.

deportations any appeal should be mounted only after the individual had been removed, a change which seems contrary to the 1951 Convention not only by returning the person to the country where they fear persecution but also by adding to their woes by labelling them as a threat to national security, a serious accusation which could trigger a reaction by the receiving state.⁷⁸ An exception relates to appeals pertaining to obligations under the European Convention on Human Rights, unless the Secretary of State certifies that removal would not breach the Convention (with appeal on that certificate to the Special Immigration Appeals Commission).

Defining exceptions to non-refoulement

A foreign suspect may seek to claim asylum – as a persecuted freedom fighter or political activist rather than a terrorist. If the claim is valid and they are categorised as the former rather than the latter, then refoulement will be forbidden under articles 32 and 33 of the 1951 Convention relating to the Status of Refugees:

32(1) The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

33(1) No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.⁷⁹

Section 54 of the Immigration, Asylum and Nationality Act 2006 seeks to ensure such claims to asylum can be more readily denied. Article 1F of the 1951 Geneva Convention relating to the Status of Refugees⁸⁰ disallows a claim for asylum if:

- (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

78 See Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005–06 HL75, HC 561) para 185; *Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005–06 HL 114, HC 888) 21; *Regina (Ullah) v Special Adjudicator; Do v Immigration Appeal Tribunal* [2004] UKHL 26.

79 See E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-refoulement' in E. Feller, T. Voller, and F. Nicholson (eds), *Refugee Protection in International Law* (Cambridge: Cambridge UP, 2003); *Secretary of State for the Home Department v Rehman* [2001] UKHL 47.

80 See G. Gilbert, 'Current Issues in the Application of the Exclusion Clauses', in Feller et al (eds), *ibid.*

- (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

These terms are to be interpreted under section 54 as including acts of committing, preparing or instigating terrorism (whether or not the acts amount to an actual or inchoate offence) and acts of encouraging or inducing others to commit, prepare or instigate terrorism. 'Terrorism' has the meaning given by section 1 of the Terrorism Act 2000 (section 54(2)). This definition is problematic for these purposes since 'terrorism' is not per se an offence let alone a 'serious' crime as appears to be required by Article 1F(a) and (b) of the 1951 Convention.⁸¹ In response, the government has called in aid 'the purposes and principles of the United Nations' under Article 1F(c) above, emphasising the statement in the preamble to the Security Council Resolution 1377 that 'the financing, planning and preparation of as well as any other form of support for acts of international terrorism . . . are . . . contrary to the purposes and principles of the United Nations'⁸² as well as Security Resolution 1624 relating to 'the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts'. The latter is an especially dubious interpretation, given that the phrase appears in the preamble while the substantive article 1 is confined to 'incitement'. Furthermore, 'terrorism' is not defined in these resolutions, and it certainly is not defined in the wider terms set out in the Terrorism Act 2000 which do not confine its ambit to 'extreme circumstances'.⁸³ Section 54 might also be viewed as unduly restrictive since no account can ever be taken of the circumstances of the political violence and whether it might be said to be used justifiably against a colonial or racist regime. In response, the government has adopted an absolute interpretation: 'there are today no circumstances in the world in which violence can be justified as a means of political change.'⁸⁴ Yet, this stance is not reflected in the 'purposes and principles of the United Nations' if those terms can also be read in the light of General Assembly Resolutions.⁸⁵ For example, United Nations General Assembly Resolution 3034

81 *T v Secretary of State for the Home Department* [1996] AC 742; Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters* (2005–06 HL75, HC 561) para 177. The difference between 'terrorism' and crime can be significant as in the case of *S and others v Secretary of State for the Home Department* [2006] EWCA Civ 1157, where a group of Afghani hijackers were acquitted of criminal liability.

82 See *Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005–06 HL 114, HC 888) 19, 20.

83 For consideration of the breadth of s 1, see C. Walker, 'The Legal Definition of "Terrorism" in United Kingdom Law and Beyond' [2007] *Public Law*, forthcoming. Compare United High Commission for Refugees, *Guidelines on International Protection: Application of Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* (HCR/GIP/03/05, Geneva, 2003).

84 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005–06 HL75, HC 561) para 176.

85 See S. M. Schwebel, 'The Effect of Resolutions of the UN General Assembly on Customary International Law' (1979) 73 *Am Soc'y Int'l L Proc* 301; B. Sloan, *United Nations General Assembly Resolutions in our Changing World* (Ardsey-on-Hudson, NY: Transnational Publishers, 1991); I. Sinclair, 'The Significance of the Friendly Relations Declaration' in V. Lowe and C. Warbrick (eds), *The United Nations and the Principles of International Law* (London: Routledge, 1994).

(XXVII) of 1972 on 'Measures to prevent international terrorism' not only condemns terrorism and sets up an Ad Hoc Committee to consider how to eliminate the problem but also 'Reaffirms the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and upholds the legitimacy of their struggle, in particular the struggle of national liberation movements'. This formula was repeated in several later Resolutions,⁸⁶ though the methods and practices of 'terrorism' were said to be contrary to the principles of the United Nations in article 2 of the Resolution 51/210 of 1997.⁸⁷

Where the Secretary of State rejects an asylum claim wholly or partly on the basis of the application of Article 1F, the Asylum and Immigration Tribunal or the Special Immigration Appeals Commission must begin its deliberations on the asylum aspects of any appeal by considering whether or not Article 1F applies and, if it does, it must dismiss the appeal in so far as it relies on the Refugee Convention.⁸⁸

Nationality as a weapon

Next, the Immigration, Asylum and Nationality Act 2006 seeks to use nationality as a weapon against terror suspects with foreign origins. Sections 56 and 57 allow for the deprivation of British nationality or rights of abode on the ground that it is conducive to the 'public good', the same formula as for deportation and exclusion which will presumably ensue once nationality has been stripped.⁸⁹ 'Public good' replaces the previous narrower criterion that the person concerned had done something which was 'seriously prejudicial to the vital interests of the United Kingdom or a British overseas territory'. Since there is no intention to create statelessness, this measure will inevitably discriminate against persons of minority racial or ethnic origins who have settled in the United Kingdom and have assumed dual nationality.⁹⁰ The charge of discrimination is denied by the government by reference to the statement in the British Nationality Act 1981, section 44, to the effect that '[a]ny discretion vested by or under this Act in the Secretary of State, a Governor or a Lieutenant-Governor shall be exercised without regard to the race, colour or religion of any person who may be affected by its exercise.'⁹¹ This explanation does not, however, address the full gamut of article 14 of the European Convention, which includes within its concerns 'national or social origin, association with a national minority', grounds which resulted in the condemnation of detention without trial in 2004.

86 See for example, 46/87 of 16 December 1991.

87 Compare: 46/51 of 9 December 1991, 48/122 of 20 December 1993, 49/185 of 23 December 1994, 50/186 of 22 December 1995, 52/133 of 12 December 1997, 56/160 of 19 December 2001.

88 Immigration, Asylum and Nationality Act 2006, s 55.

89 It is likewise intended to use the list of indicative behaviours: Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005–06 HL75, HC 561) para 157.

90 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters* (2005–06 HL75, HC 561) para 163.

91 *Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters* (2005–06 HL 114, HC 888) 17.

These provisions are designed to simplify the pre-existing nationality laws which were recently applied to David Hicks, an Australian citizen who, some three years after he was detained at Guantánamo Bay, sought British citizenship. He applied in the hope that the Foreign and Commonwealth Office would lobby for his release, in line with its treatment of all other British citizens.⁹² Whilst accepting his claim to registration, the Home Secretary responded by arguing that either his entitlement was subject to an overriding power to refuse on public interest grounds or that nationality legislation allowed the instantaneous withdrawal of citizenship, threats which sparked judicial review.⁹³ On the first point, the absence of any fraud or criminal wrongdoing which founded the claim to citizenship was held to be decisive against the Home Office's contention.⁹⁴ On the second point, the removal of nationality was an available power under section 40(2) of the British Nationality Act 1981 (inserted by section 4 of the Nationality, Immigration and Asylum Act 2002), which allowed the Secretary of State to take action where 'satisfied that the person has done anything seriously prejudicial to the vital interests of . . . the United Kingdom or . . . a British overseas territory' (a far more demanding test than the 'public good' test). The Secretary of State was also entitled to take account of factors under the previous incarnation of section 40, namely where 'that citizen (a) has shown himself by act or speech to be disloyal or disaffected towards Her Majesty; or (b) has, during any war in which Her Majesty was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business that was to his knowledge carried on in such a manner as to assist an enemy in that war . . . [provided that] he is satisfied that it is not conducive to the public good that that person should continue to be a British citizen'. The Administrative Court found the 2002 version of section 40 to have limited retrospective effect, while the prior version only allowed acts done or speeches made after the individual had become a British citizen to be taken into account. Since the Home Office proposed that the removal of citizenship be concurrent with its grant, there could be no conceivable evidence on which to act.⁹⁵ The Court of Appeal also rejected the Home Office's appeal.⁹⁶ It accepted that the previous version of section 40 did contemplate circumstances in which conduct before grant of citizenship could provide grounds for revocation of citizenship but then concluded that conduct in Afghanistan during 2000 and 2001 could not constitute disloyalty or disaffection towards the United Kingdom, at a time when Hicks was not a citizen nor owed any duty to that state. The Secretary of State would have to conduct an assessment of his state of mind after he became

92 See further *R (on the application of Abbasi and another) v Secretary of State for Foreign and Commonwealth Affairs and another* [2002] EWCA Civ 1598. Of the nine released, three had dual nationality but no steps were taken to remove it: *ibid* at [13].

93 *R (on the application of Hicks) v Secretary of State for the Home Department* [2005] EWHC 2818 (Admin). See further C. L. Lugosi, 'Mocking the Rule of Law – a Kangaroo Court for Australian David Hick' (2005) 14 *Temple Political & Civil Rights L Rev* 335.

94 *ibid* at [28]. Compare *R (on the application of Puttick) v Secretary of State for the Home Department* [1981] 1 All ER 776.

95 *ibid* paras 16, 20. The wording of the Immigration, Asylum and Nationality Act 2006, s 56 appears to avoid this difficulty, as public good factors are not linked to allegiance.

96 *Secretary of State for the Home Department v Hicks* [2006] EWCA Civ 400.

a citizen. This evaluation was subsequently undertaken, resulting in the predictable decision to divest citizenship on grounds of national security, reportedly based on admissions of consorting with terrorists made by Hicks to MI6 officers visiting Guantánamo in 2003.⁹⁷

The final aspect of policy development regarding nationality is section 58 which requires all applicants for British nationality by registration (unless on the basis of statelessness) to satisfy the Secretary of State that they are 'of good character'.⁹⁸ At present this requirement applies only to those seeking to acquire British nationality by naturalisation.

Diplomatic assurances

Even when the path to deportation or exclusion has been cleared under the foregoing rules, and any asylum claim can be rejected, the authorities must still contend with the European Convention on Human Rights doctrine pronounced in *Chahal v United Kingdom*.⁹⁹ The applicant settled illegally in the United Kingdom in 1971 but was granted indefinite leave to remain in 1974. During a visit to Punjab in 1984, he was detained and tortured. On his return to Britain, he became a prominent activist in favour of an independent Sikh homeland, Khalistan, but was subject to a deportation order in 1990. The European Court of Human Rights concluded there was a risk of torture if he were to be deported and that it would therefore be a breach of the Convention to send him back to India. This ruling applies even to a suspected terrorist, no matter how 'undesirable or dangerous'.¹⁰⁰ The Court specifically rejected the argument that article 3 should not apply where national security was at stake or that national security should be balanced against article 3.¹⁰¹ The situation is made more difficult for asylum states since indefinite detention as part of immigration controls is also forbidden. Article 5(1)(f) permits the detention of a person with a view to deportation only in circumstances where 'action is being taken with a view to deportation'.¹⁰² Therefore, detention will cease to be permissible under Article 5(1)(f) if deportation is not being prosecuted with due diligence (or at all), albeit that it remains the intended outcome.¹⁰³ Lengthy detention in those circumstances is also forbidden in domestic law.¹⁰⁴ Thus, a legal limbo is created for suspects, subject to a deportation order but not deportable in practice. Several persons with alleged terrorist links or sympathies have found themselves in this uncomfortable position, including Mukhtiar Singh and Paramjit Singh, alleged

97 *The Guardian* 11 January 2007, 4.

98 Some exceptions derive from the 1961 UN Convention on the Reduction of Statelessness or under the British Nationality Act 1981, s 4B.

99 App no 22414/93, 1996-V at [97]. See H. Lambert, 'Protection against Refoulement in Europe' (1999) 48 *International and Comparative Law Quarterly* 543.

100 *ibid* at [80].

101 *ibid* at [76, 80].

102 *ibid* at [112].

103 *ibid* at [113].

104 *R v Governor of Durham Prison, ex parte Singh* [1984] 1 All ER 983; *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97; *R (on the application of Saadi and others) v Secretary of State for the Home Department* [2001] 4 All ER 961; Home Office, *Secure Borders, Save Havens* (Cm 5387, 2002) paras 4.75, 4.78.

Sikh terrorists allowed to remain in the United Kingdom because of the fear of prosecution.¹⁰⁵ A further illustration is the case of the Saudi dissident, Dr Muhammad al-Masari. The deportation order against him was later set aside by the Immigration Appeals Tribunal in 1996, and exceptional leave to remain and then permanent residency were granted by the Home Office in 2001.¹⁰⁶ Control orders could be applicable in these circumstances but, for the reasons given above, have not been estimated to furnish an entirely satisfactory resolution.

Moves are afoot through Strasbourg litigation to sway the European Court of Human Rights to alter its stance in the pending case of *Mohammad Ramzy v Netherlands*, who is accused of fomenting terrorism¹⁰⁷ The chances of a *volte face* by the Court are estimated to be 'inconceivable'.¹⁰⁸ The Court has confirmed the *Chahal* line of reasoning on a number of occasions since 1996.¹⁰⁹ In addition, the Court's stance is bolstered elsewhere in international law. By the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984,¹¹⁰ article 3(1): 'No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'

Despite the legal obstacles, the government has renewed its efforts to explore new avenues for forced removal and, in the expectation of a successful outcome, the nine control orders issued against foreigners were revoked and they were detained in August 2005 pending deportation.¹¹¹ In total, notices of intention to deport on national security grounds where assurances from the receiving state are thought to be required have been served on 29 individuals.¹¹² Most remain in custody, since the government claims that agreements are 'imminent',¹¹³ despite the fact that no agreement has been secured with the country of origin of the majority (namely, Algeria) and despite the fact that even where an agreement is in existence (for instance, with Jordan) the relevant nationals, such as Abu Qatada, have still not been extradited.¹¹⁴ Consequently, Lord Carlile, the independent reviewer of terrorism legislation, has expressed concern about whether control orders under the Terrorism Act 2005 would provide a sounder basis for any restraint of liberty.¹¹⁵ However, the Court of Appeal in *R (Q) v Secretary of State for the Home Department*¹¹⁶ accepted that a detention period of one year, with the prospect of further detention until deportation to Algeria 'in the near future', was lawful. One

105 *The Times*, 1 August 2000.

106 (1996) *The Times* 6 March, 19 April and *Mail on Sunday* 3 July 2001.

107 App no 25424/05.

108 See A. Lester and K. Beattie, 'Risking Torture' (2005) 6 *European Human Rights L Rev* 565–566.

109 See *Ahmed v Austria*, App no 25964/94, 1996–VI; *D v United Kingdom*, App no 30240/96, 1997–III; *Mamatkulov and Askalov v Turkey*, App nos 46827/99; 46951/99, 4 February 2005; *Öcalan v Turkey*, App No 46221/99, 12 May 2005.

110 1465 UNTS 85.

111 *The Times* 12 August 2005, 6.

112 HC Deb vol 440 col 167ws 15 December 2005, Charles Clarke.

113 Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005–06 HL75, HC 561) para 121.

114 See Lord Carlile, *First Report of the Independent Reviewer pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (London: Home Office, 2006) paras 22, 23.

115 *ibid* paras 27, 28.

116 [2006] EWCA Civ 2690 (Admin) at [23].

must qualify this judgment with the fact that Q, who had previously been detained under the 2001 Act and then subjected to a control order, had constantly lied about his identity and was thus seen as contributing to the delays.

The principal device whereby the government hopes to overcome the restraints of *Chahal* and the Refugee Convention is to seek diplomatic assurances from the states of origin of the terrorist suspects. This avenue has been explored for some time. The problem was noted by Lord Lloyd's Inquiry into Legislation against Terrorism in 1996.¹¹⁷ It was reiterated by the Home Office in 2004,¹¹⁸ whereupon former Foreign Office Minister Baroness Symons was despatched to do the rounds of a number of Middle-Eastern and North African countries.¹¹⁹ The assurances subsequently secured are meant to furnish evidence that the receiving state's erstwhile habit of torture will not affect those returned from the United Kingdom, which can thereby be absolved from complicity in the risk of article 3 treatment. This notion of diplomatic assurances follows the precedent of assurances from US authorities not to apply the death penalty in non-terrorist extraditions, a response to the problem of prolonged periods spent on 'death row' being interpreted as a form of article 3 treatment in *Soering v United Kingdom*.¹²⁰ Yet, assurances in the context of the death penalty are far easier to monitor since the death penalty will normally be applied with official approval and will be announced and perhaps witnessed.¹²¹ The same device applied to torture stumbles over the ability to secure credible assurances against practices which are often flatly denied, hidden or ignored, or are simply hard to control even with the best of official intentions.

An illustration of the difficulties encountered in negotiating robust assurances concerns the case of *Hani El Sayed Sabaei Youssef v Home Office*.¹²² Youssef, an Egyptian, was detained under the Immigration Act 1971 with a view to deportation on national security grounds that he was a senior member of Egyptian Islamic Jihad. Efforts were then made in 1998 and 1999 to reach an agreement with the Egyptian government. There is revealed in the case documentation the repeated insistence of the Prime Minister that diplomatic assurances should be obtained but that it would be sufficient to base the agreement on the simple promise not to torture which would be taken at face value since Egypt is a party to the UN Convention against Torture and has passed domestic legislation to ban torture.¹²³ This approach was opposed by the Home Office and Foreign and Commonwealth Office, who warned that such a level of guarantees would not satisfy obligations under article 3 of the European Convention on Human Rights, especially as it was evident that those guarantees already given by way of adherence to international treaties against torture had not been observed. In any

117 (Cm 3420, London, 1996) para 18.14.

118 *Counter-Terrorism Powers* (Cm 6147, London, 2004) para 38.

119 HC Deb vol 430 col 107 26 January 2005 Charles Clarke.

120 App no 14038/88, Ser A 161 (1989).

121 The distinction between death penalty and torture assurances was also sustained in *Suresh v MCI and Attorney General of Canada* [2002] SCR 3 at [124].

122 [2004] EWHC 1884 (QB). See also the survey by Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (New York, 2005).

123 *ibid* at [38].

event, the Egyptian authorities refused to make even a basic assurance, let alone more ambitious assurances sought in early negotiations about procedural rights and monitoring of conditions by British officials and lawyers.

Since 1999, negotiations have been pursued with a number of states, culminating in an agreement with Jordan on 10 August 2005.¹²⁴ On the one hand, this document appears to represent a considerable improvement on the intended Egyptian version. Procedural safeguards require, *inter alia*, treatment in a humane and proper manner and in accordance with international standards, pre-trial legal assistance, prompt process, and a fair and public hearing.¹²⁵ There is also provision for visits by the representative of an independent body to be nominated jointly by the UK and Jordanian authorities.¹²⁶ On the other hand, consular visits are not permitted after arrest.¹²⁷ Nor is there provision for the recording of interrogations, regular and independent medical checks, or unannounced access by the independent body. Nor is there any specific guarantee against the death penalty. No suspect has yet been rendered back to Jordan on the basis of this agreement (as at the time of writing in January 2007).

A second Memorandum of Understanding was signed with Libya on 18 October 2005.¹²⁸ Notable extra clauses compared to the Jordanian version are the promise of re-trial where, before his deportation, a person has been tried and convicted of an offence in the receiving state in absentia and also the requirement of a specific assurance that the death penalty will not be carried out.¹²⁹ One wonders whether second thoughts about the treatment of the Jordanian case of Abu Qatada prompted these additions.¹³⁰ The details of the access to the independent monitoring body are also different. During any period before trial, contact is limited to a meeting at least once every three weeks (compared to once a fortnight for Jordan) but the monitoring body in Libya can order medical examinations.¹³¹ A third Memorandum of Understanding was agreed with Lebanon on 23 December 2005.¹³² In this case, a monitoring body is again to be responsible for monitoring the implementation of the assurances in general as well as the circumstances of any deportee falling within the agreement; the deportee can request a weekly meeting.¹³³ As regards

124 Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan Regulating the Provision of Undertakings in Respect of Specified Persons Prior to Deportation (2005).

125 *ibid* paras 1–3, 6–8.

126 *ibid* para 4.

127 *ibid* para 5.

128 Foreign and Commonwealth Office, Memorandum of understanding between the government of Libya and the government of the United Kingdom concerning the provision of assurances in respect of persons subject to deportation (2005).

129 *ibid* paras 1, 2.

130 He was detained on the basis of an extradition request from Jordan, having been sentenced to life imprisonment in 1998: *The Times* 11 August 2005, 7.

131 *ibid* para 6.

132 Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lebanese Republic concerning the provision of Assurances in respect of Persons Subject to Deportation (2005).

133 *ibid* para 4, The International Committee of the Red Cross refuses to provide monitoring unless it can access all prisoners in a given facility: House of Commons Foreign Affairs Committee, *Human Rights Annual Report 2005* (2005–06 HC 574) para 57.

Algeria,¹³⁴ it has been reported that the authorities were reluctant to formally admit that torture had been practised in the past, and so the British government has fallen back on assurances given in December 2005 based on an unpublished exchange of letters between prime ministers, bolstered by a bilateral agreement on the Circulation of Persons and Readmission signed in 2006 but without any provisions for ongoing monitoring or protections.¹³⁵ Further negotiations are proceeding with several other countries.¹³⁶

Is this type of document worth the effort? International law is rightly demanding over levels of protection under Article 3. In *N v Finland*, concerning an asylum-seeker from the DR Congo, the European Court of Human Rights stated that:

As the prohibition provided by Article 3 against torture, inhuman or degrading treatment or punishment is of absolute character, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration.¹³⁷

It would seem that the 'rules of the game' have certainly not changed in the eyes of international judges, and the same stance is echoed domestically with the Court of Appeal's refusal to endorse the removal of a group of Afghani hijackers who had been granted discretionary leave to remain, albeit on the different ground that the Home Secretary's attempt to resurrect a period of examination was unlawful.¹³⁸

Direct illustrations of the failure of assurances are the cases of *Ahmed Agiza and Mohammed al-Zari v Sweden* before the UN Committee against Torture.¹³⁹ These asylum-seekers were deported from Sweden to Egypt aboard an airplane leased by the US government, following written assurances from the Egyptian authorities that they would not be subject to the death penalty, tortured or ill-treated, and would receive fair trials and would also benefit from regular visits to the men in prison by Swedish diplomats. Agiza was tried in April 2004 before a military court which patently lacked some fundamental requirements of due process. Al-Zari was released without charge or trial in October 2003. Both complained of torture by the Egyptian agents and inaction on the part of the Swedish authorities.¹⁴⁰ The UN Committee against Torture found Sweden to be in breach of its obligations:

The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that

134 *The Guardian* 25 August 2006, 1. The details were revealed in *Y v Secretary of State for the Home Department* (SC/36/2005, 2006) para 241. The Special Immigration Appeals Commission accepted those assurances as reliable and sufficient. See further Home Office, *Countering International Terrorism* (Cm 6888, 2006) para 74.

135 Cm 6926, London, 2006.

136 <http://www.downingstreetsays.org/archives/001854.html> (last visited 4 January 2007). In all, 10 countries were mentioned in August 2005: *The Times* 6 August 2005, 1. For assessments of their human rights records, see Amnesty International, *United Kingdom: Deportation of Terror Suspects* (AI Index: EUR 45/046/2005).

137 App 38885/02, 26 July 2005 at [159].

138 *S and others v Secretary of State for the Home Department* [2006] EWCA Civ 1157.

139 CAT/C/34/D/233/2003, 24 May 2005.

140 Human Rights Watch, *Still at Risk*, n 122 above, 60. See also Human Rights Watch, *Empty Promises* (New York, 2004).

Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons. The State party was also aware that its own security intelligence services regarded the complainant as implicated in terrorist activities and a threat to its national security, and for these reasons its ordinary tribunals referred the case to the Government for a decision at the highest executive level, from which no appeal was possible. The State party was also aware of the interest in the complainant by the intelligence services of two other States: according to the facts submitted by the State party to the Committee, the first foreign State offered through its intelligence service an aircraft to transport the complainant to the second State, Egypt, where to the State party's knowledge, he had been sentenced in absentia and was wanted for alleged involvement in terrorist activities. In the Committee's view, the natural conclusion from these combined elements, that is, that the complainant was at a real risk of torture in Egypt in the event of expulsion, was confirmed when, immediately preceding expulsion, the complainant was subjected on the State party's territory to treatment in breach of, at least, article 16 of the Convention by foreign agents but with the acquiescence of the State party's police. It follows that the State party's expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.¹⁴¹

The Swedish cases should give pause for thought, and one could articulate a number of inherent problems which cannot easily be overcome even with the best of diplomatic intentions. First, the transfer of the issue into the diplomatic sphere means that human rights are no longer the sole or perhaps predominant issue. The maintenance of cordial relations, such as by avoiding recriminations or voicing suspicion, will surely mute the reactions of diplomats to allegations of mistreatment. In this way, 'The tender arts of negotiation and compromise that characterize diplomacy can undermine straightforward and assertive human rights protection.'¹⁴² Secondly, the very process of agreement-formation betrays the contradictory belief that there is a real risk of ill-treatment which is being condoned as the prevailing position. Thirdly, given that there is a record of torture in the receiving state concerned, one might infer a culture or sub-culture of torture. Thus, official pronouncements may be issued in good faith by the central authorities of the receiving state but will be subverted by local officials who probably believe that their actions are necessary, condoned in practice, and certainly not the subject of potential sanction against them. There is no evidence within the Memorandums of Agreement of any fundamental reform or reorganisation of security forces such as might give confidence to a reviewing court.¹⁴³ The linked fourth point against assurances is that it is not obvious what accountability might arise for breach of their promises. The sending state can of course refuse to render any more prisoners, which will be a source of irritation in the receiving state. But one senses that the irritation of the sending state in not being able to remit troublemakers will be the greater.

141 (CAT/C/34/D/233/2003, 24 May 2005) para 13.4.

142 Human Rights Watch, *Still at Risk*, n 122 above, 19.

143 See *Chahal v United Kingdom*, App no 22414/93, 1996-V at [103].

As a result of these problems, a number of bodies have expressed concerns about reliance upon this tactic. At an international level, the UN Committee against Torture certainly would not take at face value the plans of the United Kingdom delegation:

... the State party's reported use of diplomatic assurances in the 'refoulement' context in circumstances where its minimum standards for such assurances, including effective post-return monitoring arrangements and appropriate due process guarantees followed, are not wholly clear and thus cannot be assessed for compatibility with article 3 of the Convention.¹⁴⁴

Equally, the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism noted that the seeking of assurances is perhaps 'a tacit admission by the sending State that the transferred person is indeed at risk ... diplomatic assurances should not be used to circumvent the non-refoulement obligation.'¹⁴⁵ The same point has been echoed by the Council of Europe's Commissioner for Rights.¹⁴⁶ Many non-governmental organisations have also made adverse comments, especially Human Rights Watch.¹⁴⁷ At a domestic level, the Joint Committee on Human Rights, in its report, Counter-Terrorism Policy and Human Rights,¹⁴⁸ more cautiously reserved its position. While treating the strategy of assurances 'with great caution in case they undermine the absolute nature of the prohibition on deportation to torture', it emphasised the need to examine the content of the assurances relied upon in the context of any particular case.

Despite these warnings, the device of diplomatic assurances should not be discarded. It may serve wider policy goals of education and standard-setting for foreign states in transition towards criminal justice reforms. Furthermore, it is rightly said to be overly 'dogmatic' to assert that there can never be any circumstances whereby diplomatic assurances can afford sufficient practical protection against breaches of article 3.¹⁴⁹ Nevertheless, it is submitted that two conditions should generally be met before assurances can truly be convincing as a basis for extradition consistent with human rights obligations. First, the receiving state should demonstrate sustained and practical reforms, preferably both legal and political, which give confidence that their promises can be delivered in reality. The ratification of international instruments against torture and subsequent professions of fidelity to them are patently not convincing in themselves, and there should be

144 *Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland – Dependent Territories* (CAT/C/CR/33/3, 10 December 2004) para 4(d).

145 (E/CN/4/2005/103, 2005) paras 56, 61.

146 See A. Gil-Robles, *Report by Mr Alvaro Gil-Robles Commissioner for Human Rights on his visit to the United Kingdom* (Comm DH (2005) 6, Council of Europe, Strasbourg, 2005) para 29.

147 Human Rights Watch, *Empty Promises*, n 140 above; *Still at Risk*, n 122 above.

148 (2005–06 HC 561, HL 75) para 143.

149 Lester and Beattie, n 108 above, 569. Compare the UN Special Rapporteur on Torture, Manfred Nowak, Press Release 23 August 2005 (<http://www.unhchr.ch/hurricane.nsf/FramePage/torture?OpenDocument> (last visited 4 January 2007)). The Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters* (2005–06 HL75, HC 561) para 142, agrees with Lord Lester (one of its members).

evidence of fine deeds as well as fine words. Secondly, there must be instituted under the guise of diplomatic assurances a degree of intrusion into the receiving state's criminal justice and penal processes which goes well beyond what has been on offer to date – including effective record-keeping and independent legal and medical access.

The policy of diplomatic assurances has been examined in both international and national courts. In *Mamatkulov and Askalov v Turkey*,¹⁵⁰ the European Court of Human Rights took into consideration the bare assurances to Turkey by the Uzbek government in relation to two fugitives who were wanted for causing injuries by the explosion of a bomb in Uzbekistan and an attempted terrorist attack on the President of Uzbekistan. There was no breach of article 3, but the judgment occurred long after the return of the prisoners and so there was actual medical evidence and reports of diplomatic visits as to the health of the prisoners as opposed to only conjecture based on general evidence of practices of abuse. Thus, the case is not comparable to those facing the United Kingdom where the risk of torture is wholly prospective and can only be weighed at that point. The European Court of Human Rights more boldly accepted in *Abu Salem v Portugal* that assurances by way of diplomatic notes can suffice for the purposes of rights under articles 2, 3 and 6. Once again, the applicant had already been returned to India for bombings in Bombay some six months prior to the judgment, though no evidence of his subsequent treatment was adduced.¹⁵¹

The record of the United Kingdom courts on the acceptance of diplomatic assurances relating to terrorist suspects (all in the context of extradition) has been variable. One case concerns Babar Ahmad, a British citizen.¹⁵² He has been accused of material support of terrorism, support of the Taliban and Chechen rebels, conspiracy to kill (including the possession of plans for attacking US warships in the Straits of Hormuz), money laundering, solicitation of funds, and conspiracy.¹⁵³ He is also under suspicion for raising money for terrorists through websites which Ahmad ran until their closure in November 2001 through internet service providers in Nevada and then Connecticut. He was arrested by British authorities in December 2003 but then released, following which the US authorities commenced extradition proceedings. His extradition was ordered by the Bow Street Magistrates' Court, after a diplomatic note sent to Foreign Secretary Jack Straw by the US government was produced in court. The note promised that Ahmad would not face the death penalty or be sent to Guantánamo Bay.¹⁵⁴ The decision to extradite was confirmed by the Home Secretary and upheld by the

150 App nos 46827/99; 46951/99, 4 February 2005 at [67].

151 App no 26844/04, 9 May 2006. See also *Saoudi v Spain*, App no 22871/06, 18 September 2006.

152 See *The Times* 7 August 2004 1, 4. Ahmad's web sites were based in Connecticut. For further details, see <http://www.freebabarahmad.com> (last visited 4 January 2007).

153 The details of the warrant for arrest are set out at <http://news.findlaw.com/cnn/docs/ahmad/usahmad72804cmp.pdf> (last visited 7 January 2007). The offence of material support has in part been declared unconstitutional: *Humanitarian Law Project v Ashcroft*, 309 F. Supp. 2d 1185, 1200 (C.D. Cal. 2004). Sami Omar Al-Hussayen, a student at the University of Idaho, was acquitted of providing material support to terrorist groups through websites in circumstances similar to the case of Babar Ahmad: *Los Angeles Times* 11 June 2004, A20.

154 See *The Times* 18 May 2005, 6.

High Court.¹⁵⁵ One may argue that this assurance is similar to the death penalty cases (assuming also that such treatment would be a breach of article 3) – it is relatively straightforward for the United Kingdom government to discover whether the rendered prisoner has been sent to Guantánamo or has been tried by military commission – those processes do not occur without official sanction. By contrast, assurances by the Russian Federation concerning the treatment of Ahkmed Zakayev, a leading Chechen separatist, if he were returned on charges of murder, soliciting murder, wounding, false imprisonment, and levying war, were rejected in 2003.¹⁵⁶

When it comes to absolute rights against torture by countries with a pervasive record of torture, one hopes that the United Kingdom legislature¹⁵⁷ and courts will pay much more than ‘lip-service’ to the protection of rights. The latter promised to do so in *Av Secretary of State for the Home Department (no 2)*, where a signal was given against the reception of evidence obtained by third party torture.¹⁵⁸ Though not as strong as some of their Lordships would have wished, and not extending to inhuman and degrading treatment, the judgment certainly compares favourably to the approach in *Suresh v Minister of Citizenship and Immigration and the Attorney General of Canada and others*, where the Canadian Supreme Court stated that ‘the reviewing court should adopt a deferential approach’ and that ‘We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified . . .’.¹⁵⁹ If a ‘real risk’¹⁶⁰ of torture is sufficient to sustain a breach of article 3, it is hard to see how a piece of diplomatic paper can wholly expunge a bloody record. Equally, if the courts depict extraordinary rendition into the jurisdiction as a wholly unconscionable stain upon any subsequent legal process,¹⁶¹ so they should find to be a corresponding abuse of process any extraordinary rendition out of the jurisdiction. As for future policy and conduct by the United Kingdom government on its tactic of diplomatic assurances, a set of precepts have been devised by the Council of Europe Committee of Ministers in their guidelines on forced returns. The very first Guideline relates to the promotion of voluntary return: ‘The host state should take measures to promote voluntary returns, which should be preferred to forced returns. It should regularly evaluate and improve, if necessary, the programmes which it has implemented to that effect.’ Guideline 2 (1) states that:

1. A removal order shall only be issued where the authorities of the host state have considered all relevant information that is readily available to them, and are

155 *Ahmad v Government of the USA* [2006] EWHC 2927 Admin.

156 *The Times* 14 November 2003 at 15.

157 For evidence of a growing culture of rights, see J. L. Hiebert, ‘Parliamentary Revision of the Terrorism Measures’ (2005) 68 MLR 676.

158 [2005] UKHL 71 at [80] per Lord Nicholls. The sentiment is shared by the Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights* (2005–06 HC 561, HL 75) para 146, but compare *Gafgen v Germany*, App no 22978/05 (concerning a threat to torture a kidnapper who revealed the whereabouts of the victim’s body).

159 [2002] 1 SCR 3 at [29], [78].

160 See further *See R (Bagdanavicius) v Secretary of State for the Home Department* [2005] UKHL 38.

161 See *R v Horseferry Road Magistrates’ Court, ex parte Bennett* [1994] 1 AC 42; *R v Mullen* [2000] QB 520. There have also occurred some renditions without state complicity, notably Mordecai Vanunu, who was lured from London to Rome and then kidnapped to Israel: *The Times* 23 December 1986.

satisfied, as far as can reasonably be expected, that compliance with, or enforcement of, the order, will not expose the person facing return to:

- a. a real risk of being executed, or exposed to torture or inhuman or degrading treatment or punishment;
- b. a real risk of being killed or subjected to inhuman or degrading treatment by non-state actors, if the authorities of the state of return, parties or organisations controlling the state or a substantial part of the territory of the state, including international organisations, are unable or unwilling to provide appropriate and effective protection; or
- c. other situations which would, under international law or national legislation, justify the granting of international protection.¹⁶²

In this way, the Council of Europe has strongly pronounced against risky refoulement, and its basic principles are backed up by 18 other rules designed to ensure legality, transparency, due process, and respect for liberty and humanity. Adherence to these policies could be reflected in guidance under the Immigration Act 1971 and could also be underlined by the enactment of the UN Convention against Torture (including article 3).¹⁶³

ABSENT FOES

In so far as any terrorist suspect is sent abroad, can state liability be incurred for subsequent mistreatment which might occur? Assume for the sake of this argument that the diplomatic assurances offered and practical inspection mechanisms put in place are strong on paper and that the transfer does not *per se* breach any part of international law. Clearly, maltreatment of a prisoner will give rise to direct responsibility on the part of the receiving state. But could the sending state still be liable if the agreement is not observed?

One possible argument for liability may be made on the basis of the extraterritorial impact of the European Convention on Human Rights. That impact has been considered in the decision on admissibility of the Grand Chamber in *Banković and Others v Belgium and 16 other NATO States*.¹⁶⁴ The applications arose out of the bombing of the main Radio Televizije Srbije buildings in Belgrade on

162 Committee of Ministers, Forced Returns, 925th Meeting of the Ministers' Deputies (Strasbourg, 4 May 2005). See also Human Rights Watch, *Still at Risk*, n 122 above at 15–18.

163 See Lester and Beattie, n 108 above at 570; Joint Committee on Human Rights, *UK Compliance with the UN Convention against Torture* (2005–06 HC 701).

164 App no 52207/99, 2001–XII. See K. Altıparmak, 'Banković: An Obstacle to the Application of the European Convention on Human Rights in Iraq?' (2004) 9 *Journal of Conflict and Security Law* 213; M. O'Boyle, 'The European Convention on Human Rights and Extra Territorial Jurisdiction – A Comment on Life after *Banković*' in F. Coomans, and M. T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Antwerp: Intersentia, 2004); M. J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation' (2005) 99 *American Journal of International Law* 119. Compare *Ergi v Turkey*, App no 23818/94, 1998–IV; *Loizidou v Turkey*, App no 15318/89, 1996–VI; *Cyprus v Turkey*, App no 25781/94, 2001–IV; *Issa and Others v Turkey*, App no 31821/96, 16 November 2003; *Ila^ocu and Others v Moldova and Russia*, App no 48787/99, 8 July 2004.

23 April, 1999, by NATO air forces during the conflict in Kosovo, resulting in death and destruction. The Court concluded that the jurisdictional competence of the European Convention is 'primarily territorial'.¹⁶⁵ This approach is reflected generally in public international law and also in Article 1 of the European Convention, by which 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention.' It was recognised that responsibility is capable of being exceptionally engaged where 'the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government.'¹⁶⁶ Could the situation of a rendered prisoner, detained in a foreign, non-Contracting State under terms set by the sending state, be said to be still within the 'effective control' of the sending state? Clearly, that control would not be total – not even extending to all aspects of the treatment of the returned prisoner. Yet, the European Court allowed the exception to apply where control extended only to 'some' of the normal public powers of the receiving state. Nonetheless, the argument in relation to rendered prisoners appears weak. The sending state is not perpetrating the inimical action abroad, nor is the receiving state acting as its agent in detaining the prisoner but is motivated by independent purposes and processes.

Given the imperialist past (and, some would argue, present) of several Contracting States, most notably France and the United Kingdom, were the European Court to have decided upon a much more expansive jurisdictional coverage in *Banković*, then several uncomfortable repercussions would have been visited upon the Court which may have influenced the outcome.¹⁶⁷ No doubt, there would have been political complaints about judicial interference, and there would also have followed substantial practical difficulties for the Court as it tried to gather evidence from far flung conflicts and potentially faced floods of new cases on top of its current unmanageable workload. However, the jurisprudence does leave open the possibility of Convention protection of returned prisoners. In particular, the *Banković* principle should result in the shadow of Convention rights being cast upon prisoners held in prisons which are operated abroad by Contracting States or held in prisons operated by local agents at their behest.

That states should take such claims seriously was emphasised in *Markovic v Italy*.¹⁶⁸ A group of nationals of Serbia and Montenegro sought compensation in the Italian courts for the same air strike as in *Banković*. Their complaint (under article 6) arose when the Italian court disclaimed jurisdiction, even though, during the *Banković* proceedings, the Italian government had pleaded a failure to exhaust domestic remedies and actually cited the (then pending) *Markovic* case as proof of the existence of a remedy. The European Court contended that domestic

165 *ibid* at [59].

166 *ibid* at [71].

167 See R. Lawson, 'Life after *Bankovich*' in Coomans, and Kamminga (eds), n 164 above.

168 App no 1398/03, 14 December 2006. Compare *Z and Others v United Kingdom*, App no 29392/95, 2001-V.

proceedings did create a potential jurisdictional link, subject to the laws of the state concerned. It equally accepted that article 6 does not guarantee any particular content for (civil) rights and obligations but warned that the state's discretion is not absolute:

it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6(1) – namely that civil claims must be capable of being submitted to a judge for adjudication – if, for example, a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons.¹⁶⁹

But the conclusion was that a domestic court's powers of review of acts of foreign policy such as acts of war could be limited, at least for the purposes of awards of compensation, and that the Italian courts had suitably considered the issue.

The extent of the shadow of the Convention has been further explored in *R (Al-Skeini and others) v Secretary of State for Defence*.¹⁷⁰ An action for judicial review arose from six deaths of Iraqis at the hands of British soldiers, five in urban combat operations and one (Baha Mousa) during custody in military detention. In response to requests to comply with a request from the claimants' solicitors that the Secretary of State should conduct independent inquiries into all these civilian deaths, the Secretary of State denied liability under article 2 of the European Convention, and denied that any obligation to pay damages under the Human Rights Act 1998. Seeking to reconcile, with some difficulty, what he viewed as inconsistent Strasbourg jurisprudence, Lord Justice Rix in the Administrative Court emphasised that article 1 of the Convention (and the Human Rights Act follows suit in much the same way) accords jurisdiction on an essentially territorial basis, subject to exceptions.¹⁷¹ One exception is where the member state exercises effective control over another area (as recognised in *Bankovic*). Jurisdiction could otherwise arise only in 'exceptional and limited' circumstances, as where the United Kingdom assumed discrete and quasi-territorial control or acted in some capacity by consent and under international law such as by setting up diplomatic premises.¹⁷² The holding of a prisoner for three days in a military detention centre in Basra City did potentially establish jurisdiction, but the circumstances of the other five cases did not.

The Court of Appeal endorsed the outcome but elaborated upon the analysis.¹⁷³ Although the United Kingdom is an occupying power in Iraq, its armed forces have not exercised general 'effective control' of Basra City for the purposes of Convention jurisprudence. But it was conceded on behalf of the Crown that 'when a citizen of Iraq was in the actual custody of British soldiers in a military

169 *ibid* at [97]. The United Kingdom intervened to emphasise that disentitlement to compensation for acts performed in the conduct of foreign relations was commonplace in European and other jurisdictions: *ibid* at [87].

170 [2004] EWHC 2911 (Admin).

171 *ibid* [245], [301].

172 *ibid* [270]. See for example, *R (B) v Foreign Secretary* [2004] EWCA Civ 1344.

173 [2005] EWCA Civ 1609. New evidence had arisen as to the post-death investigations and so the case was remitted to the Administrative Court, subject to pending court-martial proceedings.

detention centre in Iraq during the period of military occupation he was within the jurisdiction of the UK within the meaning of Article 1 of the ECHR.¹⁷⁴ Furthermore, as well as accepting in principle that the effective control of an area (ECA) could be the basis for extra-territorial liability, Lord Justice Brooke contended that ‘State Agent Authority’ (SAA) can also found liability where authority and control is exercised over persons, notwithstanding that there is no effective control of the relevant territory and notwithstanding that the relevant territory is not within the *espace juridique* of the contracting state:

If an agent of a contracting state exercises authority through the activities of its diplomatic or consular agents abroad . . . that state is similarly obliged to secure those rights and freedoms to persons affected by that exercise of authority.¹⁷⁵

Before applying these rulings to suspects maltreated in foreign prisons where they reside as a result of removal under diplomatic assurance, one might consider four other cases which contain factual similarities to the issue of diplomatic assurances.

In *Hess v United Kingdom*,¹⁷⁶ complaints under articles 3 and 8 were brought on behalf of the war criminal Rudolph Hess, who was held in Spandau prison which was located in the British sector of Berlin but was controlled by the four principal World War II allied powers under an agreement which predated the European Convention. The European Commission on Human Rights rejected the application as inadmissible ‘*ratione personae*’. Given the joint responsibility for the prison, including the recognition that it was only the Soviets who vetoed a change of conditions, the regime did not come ‘within the jurisdiction’ of the United Kingdom for the purposes of article 1. The fact that the prison was in Berlin would not have avoided liability if the British government had been solely in charge: ‘The Commission is of the opinion that there is in principle, from a legal point of view, no reason why the acts of British authorities in Berlin should not entail the liability of the United Kingdom under the Convention . . .’¹⁷⁷ But in this case, the special international jurisdiction created for Spandau outweighed either effective control over the territory in which it was based or State Agent Authority which could not be parcelled out into four distinct portions.

In *Sanchez Ramirez v France*,¹⁷⁸ the applicant, commonly known as ‘Carlos the Jackal’, was detained in Khartoum by Sudanese officials and handed over to French police officers who escorted him to France. His complaint concerned article 5. The European Commission readily accepted that French authority applied at least from the point of handover, with SAA principles overcoming the fact that the events were extra-territorial. One wonders whether, if the Sudanese had been acting at the behest of the French (as they presumably were), any breach of article 5 (or article 3) could have accordingly been visited upon the French authorities.

174 *ibid* at [6].

175 *ibid* at [48].

176 App no 6231/73, 2 D&R 72 (1975).

177 *ibid* at [73].

178 App no 28780/95, 86 DR 155 (1996). Compare *Öcalan v Turkey* App no 46221/99, Judgment 12 May 2005.

In *Thanh and others v United Kingdom*,¹⁷⁹ the applicants, who were Vietnamese 'boat people', fled from Vietnam and claimed asylum in Hong Kong. The claims were denied, and they were held in a detention centre in Hong Kong. The applicants contended that their return to Vietnam would lead to the real risk of conduct in violation of article 3, as well as complaining that the conditions of detention in Hong Kong also breached article 3. However, the United Kingdom had not made a declaration extending the Convention to Hong Kong under article 63 (now article 56). The Commission decided that the application was inadmissible *ratione loci*.¹⁸⁰ No declaration has been made in respect of Iraq, but the Court of Appeal in *Al-Skeini* curtly rejected its absence as decisive. According to Lord Justice Brooke:

... the fact that the ECHR makes specific provision (by Article 56) for the responsibility of a contracting state to be extended to its dependent territories (subject to local requirements) does not appear to me to afford any good reason for holding that a contracting state should not also be fixed with having exercised extra-territorial jurisdiction in the very limited range of situations covered by the SAA exceptions to the general rule.¹⁸¹

The operation of other aspects of international law may also play a role in limiting the overseas application of Convention rights. In *R (on the application of Al-Jedda) v Secretary of State for Defence*,¹⁸² a claimant, who held dual British and Iraqi nationality, had been detained without trial on a visit to Iraq in 2004 for security reasons. He could not invoke article 5 of the Convention for the purpose of challenging the loss of liberty because his rights had been qualified by United Nations Security Council Resolution 1546 of 8 June 2004, which, by paragraph 10, '[d]ecides that the multinational force shall have all the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq' until the end of the mandated period.¹⁸³ Internment processes were expressly envisaged as part of this authority,¹⁸⁴ and they could be implemented without notice of derogation.¹⁸⁵ But Lord Justice Brooke was quick to point out that not all Convention rights were so overridden and that rights against torture would remain intact.¹⁸⁶

In applying these precedents to rendered prisoners, while the *Al-Skeini* judgment emphasises jurisdictional restraint, there remains the possibility of litigation under the Human Rights Act, but it is remote in the case of rendered prisoners to

179 App No 16137/90, 12 March 1990.

180 Compare *R (Quark Fishing Ltd) v Foreign Secretary* [2005] UKHL 57 where the Human Rights Act 1998 ss 6, 7 did not apply to South Georgia.

181 [2005] EWCA Civ 1609 at [91].

182 [2006] EWCA Civ 327. See also *R (on the application of Gentle and another) v Prime Minister and others* [2006] EWCA Civ 1690; *Mohammed v Harvey* 456 F Supp 2d 115 (2006).

183 The period was extended to 31 December 2007 by S/RES/1723 of 28 November 2006.

184 *ibid* [26], [28]. The reference to internment was contained in an annexed letter from the US Secretary of State.

185 Derogation has not been adopted in practice for overseas military campaigns, nor are the terms of article 15 of the European Convention on Human Rights easily met where, with a conflict wholly contained in the foreign territory and conducted by a volunteer, professional military, the impact on 'the life of the nation' is very limited: P. Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge: Cambridge UP, 2006) 119, 248.

186 [2006] EWCA Civ 1690 at [80]. The same applied to rights to life as in the case of *al-Skeini*: at [98].

date. However, as for future arrangements, one can envisage here a troublesome dynamic between diplomatic assurances and Human Rights Act liability. The more extensive the assurances, interventions and audits which are agreed diplomatically, the greater force will be imparted to the argument that State Agent Authority is conferred upon the British government. As such, a real but unavoidable dilemma is created for well-intentioned diplomats who genuinely wish to protect human rights but do not wish to assume responsibility for the misdeeds of other states.

CONCLUSIONS

Considerable legal support can be garnered for the proposition that absolute rights are not to be compromised for the pursuit of criminal process against terrorist suspects. As stated by the European Court in *Ireland v United Kingdom*:

The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols . . . Article 3 . . . makes no provision for exceptions and, under Article 15 para 2 . . . there can be no derogation therefrom even in the event of a public emergency threatening the life of the nation.¹⁸⁷

In fairness to the United Kingdom government, that proposition does not capture the whole of its concern which relates as much to the clash of absolute rights (such as between the right to life under Article 2 and the right to freedom from ill treatment under article 3) as to the clash between absolute rights and non-absolute rights (such as those in articles 5 and 6) or other non-absolute policy considerations, including national security.¹⁸⁸ Should absolute rights be traded off against each other? It has become almost fashionable to deliberate upon the use of torture as a realistic proposition in order, for example, to discover and defuse a ticking bomb and thereby save lives.¹⁸⁹ It is submitted that, whilst events may in practice precipitate priority for one absolute right or another or the absolute right of one person as compared to another, the correct approach for public authorities is to treat both as absolute objectives without compromise and certainly not to plan sacrifices as a matter of policy. This approach is warranted by two considerations. First, the post-1945 international legal order, which followed the worst and most

¹⁸⁷ App no 5310/71, Ser A 25 (1978) at [163].

¹⁸⁸ In his speech to the European Parliament (Plenary Session, 7 September 2005) Home Secretary Charles Clarke mentioned 'a balance in rights' in relation to the right to privacy, the right to property, and the right to free speech in addition to the right to life.

¹⁸⁹ See A. Dershowitz, *Why Terrorism Works* (New Haven: Yale UP, 2002); O. Gross, 'Chaos and Rules' (2003) 112 *Yale LJ* 1011; A. Etzioni, n 16 above; M. Ignatieff, *The Lesser Evil* (Edinburgh: Edinburgh UP, 2004); A. A. Moher, 'The Lesser of Two Evils? An Argument for Judicially Sanctioned Torture in a Post-9/11 World' (2004) 26 *Thomas Jefferson L Rev* 469; M. Bagaric and J. Clarke, 'Not Enough Official Torture in the World?' (2005) 39 *University of San Francisco of L Rev* 581; T. R. Hickman, 'Between Human Rights and the Rule of Law' (2005) 68 *MLR* 655; E. Posner and A. Vermeule, 'Should Coercive Interrogation be Legal?' (2006) 104 *Michigan L Rev* 671.

widespread atrocities of the last century,¹⁹⁰ unequivocally outlaws torture as a planned strategy. These established principles derived from the hard lessons of history, as affirmed by *Chahal* in 1996, speak to our current conflicts with their universal and transcendental values. Despite the rhetoric, 9/11 did not change everything. As for the application of the advocated precept of not planning to sacrifice absolute rights, one might consider the case of *McCann, Savage and Farrell v United Kingdom*, where the Court found a breach of Article 2 not directly because of the shooting dead of three suspected IRA bombers in Gibraltar, but because of the lack of planning on the part of the authorities.¹⁹¹ That deficiency left open the risk of a bombing and deaths amongst the general public, the avoidance of which must outweigh any concerns to facilitate a prosecution and trial. Secondly, a more pragmatic calculus suggests great caution against the use of torture. The supposed gains of torture – such as the revelation of reliable information or the intimidation and discouragement of foes – are far from certain.¹⁹² By contrast, the costs for the victim are evident, and the detriments to perpetrators, their sponsoring public agency and the society in which they operate are also not hard to discern in terms of the corrosion of control, of respect and of legitimacy and the incitement to further hatred and opposition such as might conduce to future terrorism.¹⁹³

If the exit strategy is not always viable, and its application against the globalised movement of persons and ideas seems at times forlorn, then alternative policies might involve a mixture of repression and tolerance. The repression arises through mechanisms such as control orders under the Prevention of Terrorism Act 2005, which remain viable options to deal with those against whom there is firm evidence of involvement of terrorism but either a lack of admissible evidence or the will to produce it. A criminal justice strategy is to be preferred, but it is currently hampered by the refusal to admit electronic intercept evidence.¹⁹⁴

The stance of tolerance is on the wane. The London attacks of July 2005 have triggered a political epiphany in the form of a fundamental reevaluation of the dangers of jihadism at home and a decisive policy switch away from 'Londonistan'.¹⁹⁵ During this erstwhile period of co-habitation, an indulgent but watchful forbearance was maintained for a decade, while the apparent provocations of

190 Compare House of Commons Liaison Committee, Oral Evidence given by Rt Hon Tony Blair MP (2005–06 HC 709) q98: 'the reality that most of us are facing today . . . is very, very tough'. Likewise, the Home Secretary, Charles Clarke, depicted the Convention as valuing rights and security in 'a balance . . . not right for the circumstances which we now face'. (European Parliament, Plenary Session, 7 September 2005).

191 App no 18984/91, Ser A 324, (1995) paras 200, 205.

192 See M. Strauss, 'Torture' (2004) 48 *New York Law School L Rev* 201.

193 See B. Cohen, 'Democracy and the Mis-rule of Law: the Israeli Legal System & Failure to Prevent Torture in the Occupied Territories' (2002) 12 *Indiana International & Comparative L Rev* 75; O. Gross, 'Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience' (2004) 88 *Minnesota L Rev* 1481; A. O'Rourke V. Chaudhri and C. Nyland, 'Torture, Slippery Slopes, Intellectual Apologists, and Ticking Bombs' (2005) 40 *University of San Francisco of L Rev* 85; J. Waldron, 'Torture and Positive Law' (2005) 105 *Columbia L Rev* 1681.

194 See HC Deb vol 430 col 18ws 26 January 2005, Charles Clarke; Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention* (2005–06 HL 240, HC 1576) para 101; JUSTICE, *Intercept Evidence* (London, 2006).

195 See M. Phillips, *Londonistan: How Britain is Creating a Terror State from Within* (London: Gibson Square, 2006).

jihadists, such as Abu Hamza, Omar Bakri Muhammed and Abu Qatada were dismissed as ineffectual.¹⁹⁶ That attitude is in decline. In the new spirit, it is perfectly correct to label as 'rubbish'¹⁹⁷ the 'grievance' of Mohammed Sidique Khan, one of the four July 7 bombers who spoke on a video released a few months later in which he stated, 'Until you stop the bombing, gassing, imprisonment and torture of my people we will not stop this fight . . . We are at war and I am a soldier. Now you too will taste the reality of this situation.'¹⁹⁸ But it remains evident that the grievance was felt deeply and that there has been little progress in determining whether it is a purely political phenomenon, an emanation of a time of war in Iraq, or a more deep-seated form of social anomie amongst certain strata of minority communities,¹⁹⁹ or a mixture of all. In view of the need to understand much more of this 'new reality',²⁰⁰ one wonders at the wisdom of measures which seek to regulate places of worship and religious leaders²⁰¹ (an idea later dropped)²⁰² or seek to stifle debate by criminalising political speech²⁰³ and political groups.²⁰⁴ The sacrifice of rights to expression and liberty in the Terrorism Act 2006,²⁰⁵ the official endorsement²⁰⁶ of the intolerance of offensive speech,²⁰⁷ and the devaluation of the humanity of outsiders²⁰⁸ may ultimately become part of the problem rather than the solution, for it is dialogue and honesty between individuals, communities and cultures which gives hope of an alternative to political violence.

196 See S. O'Neill and D. McGrory, *The Suicide Factory: Abu Hamza and the Finsbury Park Mosque* (London: HarperCollins, 2006).

197 House of Commons Liaison Committee, Oral Evidence given by Rt Hon Tony Blair MP (2005–06 HC 709) q.126.

198 See <http://news.bbc.co.uk/1/hi/uk/4206800.stm> (last visited 4 January 2007).

199 See W. S. F. Pickering and G. Walford (eds), *Durkheim's Suicide* (London: Routledge, 2000).

200 Sir Ian Blair, Dimpleby Lecture 2005 <http://news.bbc.co.uk/1/hi/uk/4443386.stm>, (last visited 4 January 2007).

201 Home Office, *Preventing Extremism Together: Places of Worship* (London, 2005).

202 HC Deb vol 440 col 167 ws 15 December 2005, Charles Clarke.

203 See Terrorism Act 2006, s 1.

204 See Terrorism Act 2006, s 21. Two candidates for proscription under s 21 were mentioned in the Prime Minister's speech on the 5 August 2005, namely, Hizb ut-Tahrir (the 'Party of Liberation') and al-Ghuruba ('The Strangers') which is the successor to al-Mujahiroun ('The Emigrants', which was founded in London in 1996 by Omar Bakri Muhammed). See further Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters* (2005–06 HL75, HC 561) para 63; K. Karajannis and C. McCauley, 'Hizb ut Tahrir' (2006) 18 *Terrorism and Political Violence* 315.

205 These changes add to the community disquiet caused by stop and search powers under the Terrorism Act 2000 s 44. See Home Affairs Committee, *Counter-Terrorism and Community Relations in the aftermath of the London bombings* (2004–05 HC 165-I).

206 Foreign Secretary, Jack Straw, praised the British media for not reproducing the cartoons of the Prophet Muhammed first appearing in the Danish newspaper *Jyllands-Posten: The Guardian* 3 February 2006. In 1989, by contrast, the Foreign Office expressed concern at protests over Salman Rushdie's book, *The Satanic Verses*, and halted diplomatic relations with Iran (*The Times* 15 February 1989; 27 February 1989). Prime Minister Thatcher stated that 'Freedom of speech and expression is subject only to the laws of this land, in particular libel and blasphemy, and will remain subject to the rule of law. It is absolutely fundamental to everything in which we believe and cannot be interfered with by any outside force.' (HC Deb vol 148 col 157 28 February 1989). The trend is also exemplified by the Racial and Religious Hatred Act 2006.

207 Compare K. R. Popper, *The Open Society and Its Enemies* (London: Routledge, 5th ed, 1966) 265 (warning that 'Unlimited tolerance must lead to the disappearance of tolerance').

208 See further J. Butler, *Precarious Life* (London: Verso, 2004).