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A Tale of Two Countries: Fundamental Rights in the "War on Terror"

Douglass Cassel

The United States and the United Kingdom are, generally speaking, free societies – despite significant shortcomings in aspects of civil and political rights.[1]

TORTURE: A TELLING EXAMPLE

"It was one of the most shaming, self-abasing apologies ever made in the House of Commons, indeed arguably in any western legislature."[2]

On May 10, 2018, British Attorney General Jeremy Wright read out Prime Minister Theresa May's public apology to Abdel Hakim Belhaj and his wife, Fatima Boudchar. A Libyan dissident, Belhaj had been imprisoned and tortured by the regime of dictator Muammar Gaddafi for six years.

Britain had been complicit in the extraordinary rendition, arbitrary detention, and torture of the couple. The prime minister spoke the following:

> On behalf of her majesty's government, I apologise unreservedly. We are profoundly sorry for the ordeal that you both suffered and our role in it. The UK government has learned many lessons from this period. . . . [W]hat happened to you is deeply troubling. It is clear that you were both subjected to appalling treatment and that you suffered greatly, not least the affront to the dignity of Mrs Boudchar who was pregnant at the time. [Mrs. Boudchar said she was hung from hooks and punched in her womb while in CIA custody] We should have understood much sooner, the unacceptable practices of some of our international partners. And we sincerely regret our failures . . . . We shared information about you . . . [and] we should have done more to reduce the risk that you would be mistreated. We accept this was a failing on our part. Later, during your detention in Libya, we sought information about and from you. We wrongly missed opportunities to alleviate your plight: this should not have happened.

In 2004, the government of Prime Minister Tony Blair had informed the CIA of the whereabouts of the couple. After abducting them from an airport in Malaysia, the CIA spirited them to a secret detention center in Thailand, where they were both

brutalized, and then "rendered" them to Libya. Once there, from her separate cell, Boudchar could hear the screams of her husband being tortured. British agents were allegedly present at some torture sessions; they hoped to gain information about Al-Qaeda, to which Belhaj was linked.

In 2018, years of litigation by the family against the United Kingdom finally produced, first, a court order requiring the British government to turn over secret MI6 files on their extraordinary rendition[3] and, second, a settlement in which Belhaj received the prime minister's apology – all he asked for – and his wife was given £500,000.[4]

But what about the United States? If Britain colluded in the extraordinary rendition of the couple to Libya – and its foreseeably grisly consequences – the CIA actually carried out the operation. Would the US government apologize? Would the United States, too, learn from the incident?

Tory MP Andrew Mitchell, a member of Parliament's all-party group on extraordinary rendition, sounded hopeful. He called for the UK government to pass on details of the Belhaj file to US officials who were then examining the conduct of Gina Haspel, recently nominated by President Donald Trump to head the CIA.

"It's important that the attorney general hands his opposite number in Washington the details of this case," said Mitchell. "The next head of the CIA is currently going through an inquiry process. She was in charge of a black site in Thailand where this poor lady [Boudchar] was held."

Haspel had been in charge of the CIA black site in Thailand when, in late 2002, at least one detainee was tortured by waterboarding, and videotapes of the torture of another were erased. But one week after the British government's public apology for torture, the US Senate, by a vote of 54–45 on Haspel's nomination, confirmed a person implicated in torture to run the CIA.

The foregoing is only one illustration of a broader difference in culture, values, and law between Britain and its former colony across the Atlantic. During the post-2001 war on terror, Britain has not generally engaged in torture, extraordinary rendition, or prolonged arbitrary detention.

Instead Britain colluded – but generally only colluded – with American (and in this case Libyan) affronts to human rights. A June 2018 report on *Detainee Mistreatment and Rendition: 2001–2010*, by the Intelligence and Security Committee (ISC) of Parliament,[5] uncovered what the all-party parliamentary group on extraordinary rendition calls "shocking levels of UK complicity in rendition and torture."[6] As summarized by the all-party group, the ISC found:

- Thirteen incidents where UK personnel witnessed firsthand a detainee being mistreated by others.
- Twenty-five incidents where UK personnel were told by detainees that they had been mistreated by others.

- One hundred twenty-eight incidents where agency officers were told by foreign liaison services about instances of mistreatment.
- Two hundred thirty-two cases where UK personnel continued to supply questions or intelligence to liaison services after they knew or suspected mistreatment, and 198 cases where UK personnel received intelligence from liaison services which had been obtained from detainees whom they knew had been mistreated.
- Over seventy cases of UK involvement in rendition.[7]

More information may yet come out; at this writing, the all-party parliamentary group and others are calling for a "judge-led inquiry" into the matter.[8]

Comparably detailed breakdowns are not available for the United States. But a 2014 report by the Senate Select Committee on Intelligence confirms that the CIA used "enhanced interrogation techniques" on at least thirty-nine detainees between 2002 and 2007.[9] The committee rightly described these CIA interrogation techniques as "brutal."[10] Applied with "significant repetition for days or weeks at a time," and in combination, they included, among others, slamming detainees against walls, waterboarding, and sleep deprivation for up to 180 hours, inflicted on detainees "usually standing or in stress positions, at times with their hands shackled above their heads."[11] Especially in combination, such techniques violate the United Nations Convention against Torture.[12]

As later acknowledged by President Obama: "[W]hen we engaged in some of these enhanced interrogation techniques, techniques that I believe and I think any fair-minded person would believe were torture, we crossed a line."[13] In particular, US Attorney General Eric Holder recognized in 2009 that "waterboarding is torture."[14] Unlike Britain, then, the United States did not just collude in torture, it engaged in it.

In the Belhaj case – albeit only after losing court battles and following several changes of government – Her Majesty's Government ultimately confessed to collusion, delivered a public apology, and agreed to a substantial financial settlement. By contrast, the United States did not confess, apologize, or compensate the victims. Instead, Washington elevated a key perpetrator to the top of the CIA.

The point here is neither to praise the Brits (faintly) nor to condemn the Yanks (although condemnation is in order). Rather, the point is to highlight the difference in behavior between the two nations and then to explore this question: Why the difference?

If their differing approaches were evident only in the case of Belhaj and Boudchar, or even only in regard to torture, perhaps the contrast between London and Washington could be written off as episodic or random. In fact, however, in regard to several of the worst forms of human rights abuses in counterterrorism – torture, extraordinary renditions, detention without charge or trial, incommunicado detention, secret detention centers, and military commission trials – the United Kingdom has been systematically and consistently less abusive – albeit collusive – than the United States.

Why should this be? Compared to much of the world, both countries are rule-of-law democracies. If anything, one might expect the United States to do as well or better than the United Kingdom. After all, the United States has a written constitution and Bill of Rights. The United Kingdom has only an unwritten constitution. The United States invented constitutional review by an independent judiciary two centuries ago while courts in the United Kingdom are subject to parliamentary supremacy. Yet, both the law and the courts do a better job in the United Kingdom than in the United States when it comes to protecting fundamental rights in twenty-first-century counterterrorism activities.

One might be tempted to blame the difference on President Donald Trump, whose principal publicly stated objection to US torture of Al-Qaeda suspects was that it was not harsh enough.[15] News accounts report that only the opposition of Defense Secretary (and retired General) James Mattis stood between Trump and a resumption of US torture practices.[16]

But (in this context) Trump is merely an aggravation. The difference between British and American counterterrorism policies after 2001 arose and persisted well before he entered the White House. Something more systematic than a single personality must be at play.

EXTRAORDINARY RENDITIONS

Extraordinary rendition is a euphemism for extralegal, secret, governmental kidnapping of a person from one country to another. It often ends in torture, secret and incommunicado detention, or at least cruel, inhuman, or degrading conditions of detention. It often fits the UN treaty definition of "enforced disappearance," namely

> the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[17]

In 1999 a British Court of Appeal found that the rendition of a person from Zimbabwe to the United Kingdom to stand trial on terrorism charges, bypassing extradition procedures, was a "blatant and extremely serious failure to adhere to the rule of law" and an "abuse of process."[18] UK government policy since then "has been not to undertake such renditions to the UK."[19]

However, "that policy did not extend to involvement in renditions carried out by others."[20] The United Kingdom supported US extraordinary renditions in post-2001 counterterrorism operations by financing, facilitating, and endorsing renditions; by providing intelligence to enable renditions; and by failing to take actions to prevent renditions.[21]

In contrast, the United States actually carried out extraordinary renditions. Most of the more than one hundred prisoners held at CIA black sites, and of the more than seven hundred detainees held at Guantánamo over the years, were brought there by means of extraordinary rendition.[22]

DETENTION WITHOUT CHARGE OR TRIAL

The United Kingdom is also less tolerant of prolonged detention without charge or trial. From 2001 to 2004 Britain's Home Secretary was authorized to detain indefinitely, without charge or trial, foreign nationals he reasonably suspected of terrorism, if no other suitable country was willing to take them. In 2004 the Law Lords, acting under the Human Rights Act, ruled that such detention was a disproportionate and discriminatory restriction on the right to liberty under the European Convention on Human Rights.[23] Since then, suspected terrorists may be held in the United Kingdom for periods of no more than fourteen days, or twenty-eight days in "urgent" cases, before being charged with a crime.[24]

Even in occupied, postwar Iraq, where the British occupiers acted pursuant to a UN Security Council resolution authorizing internment where necessary for imperative reasons of security, the Law Lords were uncomfortable in a case where a British citizen was interned for three years without charge.[25] Although holding that the Security Council resolution prevailed over the right to liberty granted by the European Convention on Human Rights, the Lords looked for safeguards. In the words of Lord Robert Carswell,

> where a State can lawfully intern people, it is important that it adopt certain safeguards: the compilation of intelligence about such persons which is as accurate and reliable as possible, the regular review of the continuing need to detain each person and a system whereby that need and the underlying evidence can be checked and challenged by representatives on behalf of the detained persons, so far as is practicable and consistent with the needs of national security and the safety of other persons.[26]

The Grand Chamber of the European Court of Human Rights later held that the Security Council resolution merely authorized, but did not require, indefinite internment without charge. Hence, the United Kingdom's three-year internment of its citizen violated his right to liberty.[27]

It is understandable that the European Court – mandated to enforce human rights – might take a narrower view of the intent of a UN Security Council resolution than did the highest court of the United Kingdom, a permanent member of the Security Council. Yet neither court – British or European – thought an internment of three years without charge was compatible with the human right to liberty. If the indefinite detentions of prisoners without charge or trial by the United States at Guantánamo – some now lasting more than 15 years – had come before the Law Lords, it is difficult to imagine that they would uphold them.[28]

The gulf between British and American judicial tolerance of prolonged arbitrary detention of suspected terrorists was made clear as early as 2002, the year Guantánamo opened for business in the war against terror. At that point the Bush administration was holding detainees at Guantánamo, not only without charge or trial but also without access to lawyers, judges, or habeas corpus (judicial review of the lawfulness of a detention). Senior British judges were appalled. Writing for the UK Court of Appeal in a case brought on behalf of Feroz Ali Abbasi, a British citizen held at Guantánamo, Lord Nick Phillips, Master of the Rolls, wrote that "in apparent contravention of fundamental principles recognized by both jurisdictions [the US and the UK] and by international law, Mr. Abbasi is at present arbitrarily detained in a 'legal black hole.'"[29]

Two years later, the US Supreme Court – over dissents by three of the nine justices – ruled that prisoners at Guantánamo are entitled to habeas corpus, in other words, to judicial review of the lawfulness of their detentions.[30] It took four more years and two more Supreme Court judgments to overcome presidential and congressional resistance to ensure this basic right.[31] Even then, in subsequent years, federal judges have been so deferential to executive branch determinations that habeas petitions rarely free prisoners, even when the evidentiary basis for holding them is dubious at best.[32]

As of October 2018, of the forty prisoners reportedly remaining at Guantánamo, twenty-six are still being held indefinitely without charge or trial.[33]

INCOMMUNICADO DETENTION

British law and practice do not allow prolonged incommunicado detention. Even before the Law Lords ruled in 2004 against indefinite detention of suspected foreign terrorists at Belmarsh prison, the detainees could appeal to a quasi-judicial panel, could request and obtain release on bail, and could seek subsequent judicial review. Their detention was subject to periodic administrative review and parliamentary oversight.[34] As Baroness Hale pointedly observed, "Belmarsh is not the British Guantánamo Bay."[35]

Still, a standard of "not Guantánamo" was not good enough, either for Baroness Hale or for other Law Lords. Review of Belmarsh detentions by the Special Immigration Appeals Commission was quite limited, procedurally and substantively. Britain must do better: "We have always taken it for granted in this country that we cannot be locked up indefinitely without trial or explanation."[36]

For the CIA, on the other hand, the Guantánamo standard was too good for its "high value" detainees. At Guantánamo, the identities of prisoners would have to be disclosed to the International Committee of the Red Cross.[37] In addition, the CIA would risk "possible loss of control to the US military and/or FBI"[38] (which preferred to use rapport-building interrogation techniques).[39] At CIA black sites, the identities of detainees would not have to be revealed to anyone outside the US government. Abd al-Rahim al-Nashiri and Khalid Sheikh Mohammed, for example, were

detained incommunicado in black sites for more than three years.[40] Detainees could also be kept in complete isolation. Abu Zubaydah was at one point kept in isolation for 47 days straight.[41]

SECRET DETENTION CENTERS

So far as is known, Britain does not operate secret prisons – black sites – for detention and interrogation of suspected terrorists (although there are past reports of a black site and renditions operations on a military base leased by the United Kingdom to the United States on the island of Diego Garcia in the Indian Ocean).[42]

By contrast, the CIA has operated black sites in the past and could potentially open them again. In 2006 President George W. Bush acknowledged the existence of secret CIA detention sites and, at the same time, announced the transfer of the last remaining fourteen CIA detainees to military custody at Guantánamo.[43] However, he ambiguously left the door open: "The current transfers mean that there are now no terrorists in the CIA program. But as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical – and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information."[44]

In 2009 President Barack Obama closed this door, by issuing an executive order barring all CIA detention sites.[45] Eight years later, however, a draft executive order presented to President Trump seemed to open it again. The draft would have revoked the Obama order and reportedly "would clear the way for the C.I.A. to reopen overseas 'black site' prisons."[46] In fact, the Trump order actually adopted in 2018 did not take this step, but it left the door ajar by directing federal agencies to "recommend policies to the President regarding the disposition of individuals captured in connection with an armed conflict."[47]

MILITARY COMMISSION TRIALS

US trials of Guantánamo detainees by military commissions, first authorized by an executive order in 2001,[48] continue as of December 2018, seemingly mired in endless chaos.[49]

Senior British jurists have long taken a dim view of the US military commission trials. In 2003 Law Lord Johan Steyn minced no words in denouncing a "kangaroo court" whose trials implied "a pre-ordained arbitrary rush to judgment by an irregular tribunal, which makes a mockery of justice. ... The only thing that could be worse is simply to leave the prisoners in their black hole indefinitely."[50]

In 2004 the UK government successfully negotiated the release of five British detainees facing military commission trials at Guantánamo. The day following their arrival in Britain, police prosecutors freed them all without charge.[51]

WHY THE DIFFERENCE?

Across a range of serious human rights violations – including torture, extraordinary renditions, prolonged detention without charge or trial, incommunicado detention, secret prisons, and military commission trials – British counterterrorism practices since 2001 are more defensible than those of their American cousins. Why?

Some plausible explanations are, admittedly, accidental. One turns on the person and party occupying the White House at a given moment. Suppose Al Gore had been declared winner of the 2000 presidential election. When the twin towers fell on September 11, 2001, would he personally, and the Democrats, have been as prone to pursue a no-holds-barred war on terror as were George Bush (the incurious) and the Republicans?

Location is another: What if the massive 9/11 attack in New York had occurred in London instead? Would the British public have given Tony Blair the same blank check – please keep us safe at any cost – that a majority of the American public handed to George W. Bush following the attack?

There is no doubt an element of truth in these coincidental explanations. Even so, the divergences in the British and American approaches since 2001 have been so consistent, dramatic, and long-lasting, across the gamut of counterterrorism techniques, that there are likely more complete and compelling reasons why two rule-of-law democracies, both purportedly committed to human rights, and both steeped in the common law, follow such different anti-terrorism rule books.

To explore the underlying reasons, one relevant perspective is a comparative law approach. Upon examination, it turns out that the combination of federalism, common-law jurisdiction, constitutionalism, the manner in which human rights treaties are domesticated, submission to a regional human rights court, and the role and remedies granted to domestic courts in implementing human rights treaties collectively distinguish the British and American legal systems in ways that suggest very different outcomes.

Another viewpoint is historical and geopolitical. The differences in law between the two countries arise from context, including their respective regional and global relations and standing, past and present.

A third perspective views the two together and comes up with more than the sum of their parts. Over time, legal forms and power realities shape collective cultures. Internalized values and priorities become a force on their own.

LEGAL DIFFERENCES

1 Federalism and the Common Law

Despite recent partial devolutions, the United Kingdom has been a unitary state for three centuries whereas the United States was born, of political necessity, as a federal state.

For purposes of their approaches to counterterrorism, this difference did not matter until the twentieth century. In 1938, the US Supreme Court ruled that federal courts could no longer create general federal common law.[52] Technically, the ruling applied only in cases in which federal jurisdiction was based on diversity of citizenship, and even then, only to claims based on state law. But the judicial impact was sweeping: The role and mindset of federal judges was no longer to create or discover evolving legal norms. Except in a few discrete areas,[53] US federal judges ceased to be common-law judges.

By contrast, British judges are not constrained by federalism concerns. They remain common-law judges in the traditional sense. This has two crucial effects on human rights issues arising in twenty-first-century counterterrorism cases.

First, British courts have centuries of judge-made common law on which to draw in order to condemn outrages such as torture and prolonged arbitrary detention. This sets them apart from their American counterparts. The US Supreme Court would not feel free to decide cases on the basis of the reasoning of Lord Donald Nicholls: "Torture is not acceptable. This is a bedrock moral principle in this country. For centuries the common law has set its face against torture."[54] Or of Lord Tom Bingham:

> In urging the fundamental importance of the right to personal freedom, … the appellants were able to draw on the long libertarian tradition of English law, dating back to chapter 39 of Magna Carta 1215, given effect in the ancient remedy of habeas corpus, declared in the Petition of Right 1628, upheld in a series of landmark decisions down the centuries and embodied in the substance and procedure of the law to our own day.[55]

Second, customary international law is part of the common law.[56] British courts can and do draw on international human rights norms to inform their rulings on the common law. In excluding evidence obtained by torture, for example, Lord David Hope noted that Article 15 of the UN Convention against Torture, which bars the use in legal proceedings of statements obtained by torture, had not been incorporated into English law by statute. Still, he continued,

> I would hold that the formal incorporation of the evidential rule into domestic law was unnecessary, as the same result is reached by an application of common law principles. The rule laid down by article 15 was accepted by the United Kingdom because it was entirely compatible with our own law.[57]

2 *Constitutionalism*

The United States has a written constitution on which the US Supreme Court has the last word (barring amendments). The United Kingdom has no written constitution, and the UK Supreme Court is subordinate to parliamentary supremacy.

One might expect these differences to lead to stronger protections for human rights in the United States than in the United Kingdom. That is doubtless true in some areas

of the law. In counterterrorism, however, the reverse may be true. At least since 9/11, passions against terrorism have run so high that US political branches have shown a tendency to push the envelope as far as possible against terrorism and, if there is to be any limit on the techniques employed, to leave it to the courts to draw the line.

This was evident in the battle over habeas corpus for prisoners at Guantánamo. Beginning in 2001, the executive branch attempted to deny them habeas corpus altogether. The Supreme Court struck down this effort in 2004.[58] Congress and the executive then attempted to deny habeas corpus by statute. When the Supreme Court in 2006 strained to interpret the new statute as not clear enough to deny habeas corpus,[59] Congress and the executive passed a new statute that left no doubt. Finally, if habeas corpus was to be ensured, the Supreme Court was left with no alternative but to declare the new statute unconstitutional.[60]

On the one hand, this push-pull between the branches may be seen to reflect credit on the Supreme Court, which held to principle (albeit by divided votes). On the other hand, it can be read as an abdication by the political branches. They chose the politically popular path of denying habeas corpus to suspected terrorists while leaving it to the courts to worry about constitutional rights.

In contrast, in the United Kingdom with no written constitution, there is a lack of clarity, both about rights and about how far the courts will go to protect them. Parliament and government know that they cannot entirely "pass the buck" (or the pound) to the courts. There is a shared responsibility to uphold British rights traditions (even if not all MPs recognize their responsibility). Limits on governmental powers are not merely put on paper and left to someone else to enforce; if they are to be made real, they must be internalized as values and commitments.

It may be no coincidence that the two houses of Parliament have together established a Joint Committee on Human Rights whereas the US Congress has no comparably prestigious and empowered human rights body. Likewise, UK government ministers are obligated by law to attest to the compatibility of their legislative proposals with the European Convention on Human Rights (or, if not, to explain why they nonetheless make the proposal)[61] whereas US officials are under no such obligation.

British judges, too, cannot simply interpret statutes or written constitutional provisions and blame the legislators if they find the result unpalatable. They must study and internalize the history and values of the common law, if they are to apply it. The job of defining and enforcing rights rests on their shoulders, too, and they know it: "Constitutional dangers exist no less in too little judicial activism as in too much."[62]

3 *Domesticating Human Rights Treaties*

Treaties joined by the United Kingdom have no domestic legal effect unless enacted into domestic law by Parliament. For example, Parliament implemented the UN Convention against Torture by domestic legislation which also authorized judicial

remedies for violations.[63] This approach ensures domestic political buy-in, and legitimizes judicial enforcement, if Parliament so decides.

In contrast, treaties are enforceable in US courts if they are either "self-executing" or are implemented by statute. In ratifying human rights treaties, the Senate has a recent practice of attaching a formal declaration that the treaty is not self-executing.[64] Coupled with this is its practice to adopt either no implementing legislation[65] or woefully incomplete implementing legislation.[66]

The result is that UK courts, but generally not US courts, are empowered to rule on violations of human rights treaty commitments.

4 Regional Human Rights Court

As a party to the European Convention on Human Rights, the United Kingdom is subject to the binding jurisdiction of the European Court of Human Rights in Strasbourg, France. Major UK court rulings on human rights regularly parse and attempt to follow the jurisprudence of the European Court,[67] which historically has been as protective or more so of human rights than the British courts.[68] UK courts further pay attention to human rights guidance from the diplomatic organs of the Council of Europe,[69] the regional organization of which the European Court is part.

In contrast, the United States is a party to neither the American Convention on Human Rights nor the Inter-American Court of Human Rights. The United States is subject to nonbinding resolutions by the Inter-American Commission on Human Rights, but almost never complies with them. US courts rarely cite Inter-American jurisprudence or the diplomatic resolutions of the Organization of American States, the regional organization of which the Inter-American human rights bodies are part.

In short, regional jurisprudence and judicial review stiffen the human rights backbones of UK judges (and parliamentarians), but generally not of the US courts or the Congress.

5 Human Rights Act and Domestic Judicial Remedies

The United Kingdom's adoption in 1998 of the Human Rights Act, implementing the European Convention on Human Rights, has enhanced domestic judicial implementation of the convention in at least two main ways. First, British courts are expressly authorized to adjudicate claims of violations of the convention, to provide remedies for government acts violating the convention (where those acts are not compelled by primary legislation), and to make declarations of incompatibility of primary legislation adopted by Parliament where it is inconsistent with the convention.[70] Under these powers, for example, the Law Lords declared the parliamentary law authorizing indefinite detention of suspected foreign terrorists without charge or trial to be "incompatible" with convention jurisprudence requiring that restrictions on rights be proportional and nondiscriminatory.[71]

Second, the Human Rights Act does not empower the courts to dictate the remedies – if any – for incompatibility of primary legislation when they find it.[72] The fix – if any – is left to the UK government and Parliament. While this might seem to weaken defense of human rights by the courts, it may actually have the opposite effect. The courts are freed to "speak truth to power" without being burdened with devising a solution, leaving that instead to the democratically elected bodies. Courts need not hedge their rulings on the law merely because they hesitate over the proper remedy.

In contrast, the United States has no such legislation. US courts rarely rule US government actions or legislation to be incompatible with human rights treaties to which the United States is a party.

HISTORY AND GEOPOLITICS

The differences in British and American law do not arise in a vacuum but reflect underlying history and geopolitics. Some legal differences between the two nations – in federalism and common law, constitutionalism, and the manner of domestication of treaties – have long historical roots, anteceding the development of modern international human rights law in the period since World War II. Although not motivated by attitudes toward international human rights norms, they may nonetheless have a significant impact, as described above, on the extent to which British and American government officials, legislators, and judges choose to respect and follow international human rights law.

By contrast, the differences in regard to regional human rights treaties and courts, and their domestic implementation by law in Britain but not in the United States, owe much to the divergent geopolitical standing and international relations of the two nations in the decades since World War II. In postwar Europe, bounded by fascism in the south and menaced by communism in the east and internally, western European democracies joined to create the European Convention and Court of Human Rights in hopes of erecting a collective shield against erosions of civil liberty in fragile continental States. Britain was content to join a convention that articulated human rights in ways consistent with British traditions of liberty.[73]

As the project of European integration progressed in subsequent decades, the United Kingdom generally respected and complied with judgments of the European Court of Human Rights, even when disruptive of British tradition, or contrary to tenaciously held government policy.[74] In recent years, even as certain judgments of the European Court generated political controversy in the United Kingdom, along with threats by Conservative Party leaders to withdraw from the European Convention,[75] Britain remained in the system and continued to comply with almost all judgments against it by the European Court.[76] Even after the Brexit process began in 2016, the political documents on the proposed Brexit agreement with the European Union (as of December 2018) appeared to commit the United Kingdom to remain in the European Convention.[77]

The geopolitical factors influencing the posture of the United States toward its regional human rights system were markedly different. In the postwar period and up to the present, as a global superpower bathed in hubris, the United States saw itself as the uniquely successful, "indispensable nation."[78] Unlike London, Washington saw no prospect that a collective shield of international judges could preserve democracy and civil liberty in its region, where many of its neighbors to the south were revolving doors of caudillos, military juntas, and corrupt autocracies. Much less would the world's most powerful nation submit to the musings of foreign judges, or bend its legal traditions to fit what it perceived as the inferior civil law systems of its Latin American neighbors. Nor would Washington welcome regional judicial oversight of its various covert and overt interventions in the region. There was no way the United States would join a legally binding regional human rights regime, nor any occasion for it to adopt a law empowering its courts to deploy a regional human rights treaty against the actions of its government or against laws passed by its Congress.

This attitude reflected not only a regional perspective but also a worldview. The United States would no more bow to global than to regional human rights jurisdiction. When Washington finally ratified several major UN human rights treaties in the early 1990s,[79] it did so without accepting their individual complaint procedures. When the International Court of Justice (ICJ) ruled against the United States in cases brought by Nicaragua and Mexico,[80] both involving significant human rights issues, Washington responded by pulling out of the relevant jurisdiction of the court. Meanwhile, the US Supreme Court declared that the United States was not legally bound, as a matter of domestic law, to comply with the ICJ judgment in the case with Mexico.[81]

In short, Washington was a superpower in a region and world populated largely by undemocratic regimes, and in which the United States insisted on freedom of interventionist action. In contrast, London was a former superpower, now reduced to a regional power, in a region of democracies encircled by fascism in the Iberian Peninsula and by communism in the Soviet bloc. In geopolitical terms, their sharply differing approaches to regional and global human rights norms and institutions made sense to each of them from their differing perspectives.

CULTURE

The differing legal institutions and contrasting geopolitical positions of the two nations shaped and reinforced their distinctive legal and political cultures with regard to international human rights law. Invoked over time, endlessly remarked upon and repeated by multiple voices – in legislatures, courts, media and the academy – and confirmed by government practice, the United Kingdom's greater sensitivity to internationally defined limits on acceptable government conduct became a self-perpetuating factor in its own right. The converse was true in the United States. Culture joined law and geopolitics to condition the respective responses of British and American officialdom to twenty-first-century terrorism.[82]

In the United Kingdom, however, cultural and legal forces of self-restraint could succeed only so far. Propelled by its particular mission and by its discrete values and norms, Britain's secret intelligence service, MI6, did not fully accept the publicly stated rules of the counterterrorism game. Political and legal limits might constrain it from actually carrying out torture and extraordinary renditions, and from opening its own black sites, but behind the scenes MI6 could not resist cooperating with its American counterparts who were not comparably constrained. In some instances, MI6 prevailed on political leaders for quiet, even oral authorizations[83] while in others MI6 proceeded on its own behind a cloak of secrecy. Britain thus became complicit in, but generally did not engage in, the gross violations of human rights carried out by the United States.

CONCLUSION

In the event of further large-scale terrorist attacks in Britain and America, how will their public institutions respond? If the analysis in this chapter is accurate or close to it, one may expect far more restraint from London than from Washington. But history is not destiny. Nor is culture. Laws can be changed. The future will be shaped by many moving pieces, both domestically and internationally. Will Britain exit from Europe, and if so, where might that lead? Will the late twentieth-century human rights consensus in Europe continue to unravel, torn by rising populist authoritarianism, economic discontent, and resistance to mass immigration from nearby lands?

In the United States, following the ascension to the Supreme Court of Neil Gorsuch and Brett Kavanaugh, and if the occasion calls for it, will we see again the principled resistance to excesses by the political branches that characterized the jousting over Guantánamo in the first decade of this century?

In the longer run, as American superpower continues to slip in relative terms, and as potential military conflict with China becomes ever more plausible, will Washington rediscover the value of international law and multilateral institutions as mutually beneficial alternatives to armed conflict, and as serving the self-interest of all nations? Or, in the face of a weakened West, will the repressive values of the Chinese Communist Party triumph? Will international human rights law be downsized to little more than a turn-of-the-century memory?

None of these outcomes – good or bad – is inevitable. Those who embrace the values of human rights are well-advised to study the past, if we are to strengthen our cause in the future. The long tradition of the defense of liberty by the common law teaches that, despite all obstacles, principled progress is possible.