JUSTICE JOURNAL

JUSTICE – advancing justice, human rights and the rule of law

JUSTICE is an independent law reform and human rights organisation. It works largely through policy-orientated research; interventions in court proceedings; education and training; briefings, lobbying and policy advice. It is the British section of the International Commission of Jurists (ICJ).

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JUSTICE is grateful to Lovells for its generous support of this journal

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ISSN 1743-2472

Designed by Adkins Design
Printed by Fretwells Ltd

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Welcome

Welcome to the first edition of JUSTICE's journal. This is the first of the two editions which we will be publishing this year. Our objective is to establish a form in which we can advance our key concerns – human rights, justice and the rule of law. We intend this journal to be a way in which we can place in the public domain thoughtful articles covering aspects of the major issues on which JUSTICE is working which are designed for an educated but non-specialist readership. We hope that the challenge of writing articles for the journal will encourage greater levels of analysis than are possible in shorter briefings and writings.

Two of the articles or papers in this journal relate directly cover developments emanating from the European Union. This reflects both the increasing importance of the Union in domestic UK legal developments and the consequent focus of JUSTICE's work. We have had a major engagement with Europe for some years - with publications on the Schengen Information System and, last year, published the *European Arrest Warrant – a solution ahead of its time*. Other contributions cover international issues, notably the legitimacy of the second Iraq war and aspects of the 'war against terrorism'. We hope that this international engagement will continue. JUSTICE is the British section of the International Commission of Jurists and, particularly through this connection and an engagement in human rights, has an international perspective on legal developments.

In this first edition, all the articles, save the lecture on Iraq, are written by JUSTICE staff. This will not necessarily be so in editions to follow. However, as a result, the reader will get a good sense of the sheer range of work being undertaken by a very small but professional staff. We have programmes in human rights; criminal justice; equalities; the rule of law/access to justice; the EU charter; and EU justice and home affairs. For those wishing to follow up on our briefings, a list of those written in the six months to the end of February 2004 is contained at the end of the book. All these, together with more, are available from our website www.justice.org.uk.

JUSTICE cannot survive without the support of its members and supporters who give so generously both in time and money. We are extremely grateful to Lovells for their sponsorship of this initial edition of the journal. Our thanks are also due to the editorial advisory board for their assistance: Philip Havers QC, Allan Levy QC, Barbara Hewson QC, Professor Carol Harlow and Anthony Edwards. If you would like to contribute to the journal or in any other way to assist our work, please do get in touch.

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Editorial

Less haste, more speed

The second reading debate on the Constitution Reform Bill in the House of Lords ended, once the dust had settled, with a satisfactory reference to a select committee and a bipartisan timetable for its passage. This Bill, of all bills, needed pre-legislative scrutiny and the government looked foolish in being forced into it. JUSTICE unequivocally supports the creation of a Supreme Court and a Judicial Appointments Commission. We have never, however, suggested that these reforms would be easy to implement. They go to the heart of the constitution and care is required to get them right.

The Bill contained some howlers that were, presumably, unintended and can now be reconsidered. For example, it seems unlikely that ministers intended to be quite so evidently disingenuous as to declare a statutory duty to appoint judges on merit but only on the basis of a definition supplied by the Secretary of State. Similarly, the provisions in the Bill on the appointment of members of the Judicial Appointments Commission were surely a mistake. The concordat with the Lord Chief Justice clearly states that there will be an independent appointing panel for the commissioners: the Bill, as clearly, establishes an advisory panel with power vested in the minister.

The government's case for headlong progress was more than a little weakened by the judgment of the House of Commons Constitutional Affairs Committee that: 'It is a matter of regret that the proposals were formulated and announced in a way that was hurried and evidently without the knowledge of many of those who would be expected to have been extensively consulted'. The commitment to such breakneck speed was the more surprising given that there remain substantial doubts on when a Supreme Court could actually commence sitting in its own premises. In addition, the explanatory notes to the Bill reveal that the Judicial Appointments Commission will only have its own premises in 2007 and then only partly. Until then, and unlike the existing oversight commission chaired by Sir Colin Campbell, it will be based 'within existing Department of Constitutional Affairs estate'. This is surely unsatisfactory for a body whose independence will be hotly examined. Presumably, as a result, the existing departmental officials conducting judicial appointments will simply stay at their existing desks. What chance has the Commission for developing its own ethos and a new approach?

The reason for keeping the Commission in-house is, hopefully, more to save costs than to control decisions. However, the issue of cost has to be tackled more coherently. One advantage of the existing arrangements for the Lord Chancellor

and the House of Lords appellate committee is that they are cheap. The Lord Chancellor saves us the start-up cost of the commission – just under £3m, according to the government and up to £8m in running costs. Some of this will duplicate expenditure currently undertaken within the Department of Constitutional Affairs (DCA) but the commissioners themselves will cost £665,000. The capital cost of the Supreme Court will cost up to £32m, according to the Secretary of State, and £50m, according to the Lord Chancellor. Running costs will be between £6m and £10m. The court will lose the covert subsidy that it current enjoys on 'common services in the Palace [of Westminster] such as library, security and accommodation costs'.

The DCA has presumably obtained no additional funding from the Treasury for these reforms. It expects to recover 80 per cent of the costs of the Supreme Court in civil cases from litigants. All court litigants will be surcharged to meet this cost. This is not just. The role of the Supreme Court is to develop the law. It provides a service to all in society by doing so. Cases without a public interest should not reach it. By this principle, it is unfair to lay the cost of its establishment at the door of all litigants. It should be provided and funded as a public service. This needs to be further debated.

The Bill puts into writing a substantial corner of the constitution. That requires articulating existing constitutional conventions with precision and new ones even more carefully. For example, what does 'independence of the judiciary' mean? Is the obligation on ministers not to interfere with the judiciary's independence limited to attempts to influence them in particular cases? Or does it extend to not attacking particular decisions which, if they are to be challenged, could be appealed? The Bill contains provisions on the former but not the latter. Yet, the executive's relationship with the judiciary raises issues that need to be teased out. Politicians are democratically accountable and must have the right to raise matters of political concern. However, the hostility to the judiciary engendered at times during the periods in office as Home Secretary of both Michael Howard and David Blunkett may have some political appeal to a disaffected electorate but is seriously challenging to the people's sense of constitutional integrity. What are the appropriate conventions to regulate this difficult relationship? According to the Lord Chief Justice, the Court Service was nearly transferred to the Home Office. If this was stopped because the judiciary objected, as Lord Woolf revealed, what is the principle and how do we spell it out?

The absolutely crucial issue on which there needs to be further debate and discussion was identified by the Constitutional Affairs Committee: 'Whoever carries out the functions of the office of Lord Chancellor will be in charge of the Court Service and will play a central role in the administration of justice. Part of the role is

the protection of the judiciary from political pressure in cabinet and, when necessary, in public. There is a radical difference between on the one hand a Lord Chancellor, who as a judge is bound by a judicial oath, who has a special constitutional importance enjoyed by no other member of the Cabinet … [and] on the other hand a minister who is a full-time politician.'

The consequence of the wider brief for his department is that the Secretary of State will no longer perform the traditional function of the Lord Chancellor of what was often described as a 'hinge' between the judiciary and the executive. Recent holders of the post have taken their duties as head of the judiciary with seriousness. Lord Hailsham described himself as the 'private representative' of the judges in Whitehall. Lord Mackay suggested that the Lord Chancellor provides 'a voice for the judges whilst at the same time ensuring that they are not placed in a direct and probably inappropriate relationship with the executive'. The proposed duty on the Secretary of State to protect judicial independence must be expressed in stronger language. Further, the duty might apply more widely. For example, the South African constitution states that: 'Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts'.

We need further checks and balances in the system. A Joint Parliamentary Committee on the Judiciary should be established with the same kind of credibility as the Joint Committee on Human Rights. Its duty should include consideration of, and report upon, the independence, impartiality, dignity, accessibility and effectiveness of the courts. It should receive appropriate reports, annual and otherwise, from the Secretary of State and the Lord Chief Justice. The office of the Lord Chief Justice needs to be expanded beyond what is contemplated in the Bill. It requires adequate financial and staffing resources; an express duty to monitor judicial independence; a duty to make a public report annually; and a forum to receive the publication (such as the Parliamentary Joint Committee); and a duty to raise any concerns in relation to judicial independence with ministers.

Accordingly, there is much for the Select Committee to discuss. Provided that it avoids the temptation to seek to wreck the Bill and keeps to the agreed June deadline, it may yet provide the sort of scrutiny for which the government will be grateful.

Iraq: The Pax Americana and the Law

Lord Alexander of Weedon QC

This paper is an extended version of the JUSTICE Tom Sargant annual memorial lecture given by Lord Alexander in October 2003. He argues that a legal basis for the Iraq war in 2003 is unclear; legal advice from the Attorney-General on the question of the legality of the decision to go to war should, in future, be disclosed in full; and that the courts should be willing to decide that a government's decision to declare war should be justiciable.

Introduction

In March 2003 the United States and our own country invaded the sovereign state of Iraq to secure regime change with the aim of eliminating weapons of mass destruction.[1] This novel action had been preceded by a notable political debate, despite the official opposition giving full support to the government. But the legal debate played a much lesser part. The Attorney-General gave his view, which chimed in with that of the Foreign Office, that the invasion was legal.[2] The great majority of those public international lawyers who expressed a view did not agree.[3] But the wider debate largely turned on conflicting views of the morality and wisdom of waging war. International law, if not exactly a sideshow, was pushed into the background. Nor has any court passed judgment on the legality of the war.[4] Courts in the United States and the United Kingdom have declined applications to date. In the United States the issue falls firmly within the 'political question' exception to what is traditionally justiciable.[5] In this country the courts have also historically deferred to the government in its conduct under its prerogative powers of foreign policy.[6] Nor could there be any challenge to this act of war in the International Court of Justice.[7] Yet there has surely been no more important or far-reaching issue of law for many years.

The very importance of the issue makes the topic especially daunting. All the more so as I, as a common lawyer, do not pretend to any specialist expertise in international law. The issue is also clouded by the various and often shifting justifications that have been given for the armed invasion. This means that the legal analysis has to range widely, if it is to confront all the variously stated reasons for going to war.

The principles underlying international law are not recognisably different to those that exist in all civilised legal systems. They seek to foster liberty, promote equality of participation, and to set boundaries to the pursuit of self-interest. As

with any system of law there are restraints and sanctions to protect the community, including the use of force as a last resort.

In achieving these objectives in international law it is obviously necessary in particular to restrain the actions of the most powerful nations. The founding fathers of the United States knew, and indeed relied upon, their reading of Emer de Vattel, writing in the middle of the eighteenth century, that in international law:

> *Strength or weakness, in this case, counts for nothing. A dwarf is as much a man as a giant is; a small Republic is no less a sovereign State than the most powerful Kingdom.8*

Thus, it is not surprising that the underlying purposes of international law are to ensure equal treatment and, where appropriate, to protect the weak against the strong just as our own national systems of law seek to do domestically. This was particularly significant in the case of the UN Charter which was negotiated against a background of the ruthless and unjustified invasion of smaller states by Germany, Japan and the Soviet Union. Not surprisingly, respect for sovereignty and constraints on the unilateral use of armed force were uppermost in the minds of the founders.

I wish briefly to touch on a threshold argument that some who describe themselves as practical realists would advance. What, they would say, is the point of traversing old ground? The war in Iraq, so bravely and searingly chronicled by intrepid journalists and able political commentators, now lies in the past. It may have inflicted heart-rending casualties but at least it was short. The Iraqis should think themselves fortunate that the indisputably vile regime of Saddam Hussein was at last driven from power. In time there will be an Iraqi government to replace the outgoing regime and to introduce democracy to that country; the country may be unstable now, but we have to see it through. So what is the point of raking over the embers?

Such appeals to so-called reality command a swift and simple riposte. International law, like the common law, is founded upon precedent. A bad precedent should not be allowed to stand. This US led action was aimed at nullifying a rogue state. But the United States have identified other rogue states as being part of what they regard as 'the axis of evil'. These states were identified as North Korea and Iran by President Bush in his 'State of the Union' speech in 2002.[9] Moreover, the United States have since identified Syria, Cuba and Libya as being a threat.[10] So it becomes especially important now to weigh up whether the precedent is sound. In turn this engages the larger geo-political question of the

extent to which the United Nations and other international institutions such as the European Union can act as a check on the hegemony of the United States.

The United States and multilateralism

I do not use the word 'hegemony', or as a former French Foreign Secretary would say 'hyper-puissance', in a pejorative sense.[11] We all owe a remarkable debt, which it is right in time of widespread criticism of the United States we should acknowledge, to the commitment of that remarkable country to a pursuit of world order and peace. This is particularly so since the end of the Second World War.

In marked contrast to the isolationism that followed the First World War, the United States played a visionary role in creating the institutions forged at the end of the Second World War. Let us recall some of their greatest contributions. The Bretton Woods agreement with the creation of the International Monetary Fund and the World Bank, and above all the commitment of President Roosevelt to the creation of the United Nations. The drive with which his widow, Eleanor, as the first US ambassador to the United Nations, shaped the Declaration of Human Rights, which in turn was the inspiration for our own great European Convention on Human Rights. The vision of General Marshall in financing the reconstruction of a Europe broken and bankrupted by war, so creating the framework from which far-sighted leaders of France and Germany could seek a historic reconciliation through binding economic ties. The preservation through NATO of the security of Europe against the ambitions of the former Soviet Union. Far-flung conflicts to restrain perceived aggression, such as in Korea or, more misguidedly, in Vietnam. The retaking of Kuwait from the invasion by Saddam just over a decade ago.

In all this, the United States were obviously acting out of enlightened self-interest, but laced with a strong element of idealism. Some of their views and actions were not always palatable to our country. They encouraged the dismantling of our remaining empire, and undermined our unlawful and disreputable Suez adventure. In all these actions they were, generally, a standard-bearer for democracy and the rule of law. These ideals have prevailed in countries as distant from each other as Spain, Portugal and the former Soviet Union and its satellites. Thomas Jefferson's 'Empire of Liberty' stretches more widely than ever before.

It is perhaps no accident that in these 60 years of remarkable achievement the United States were committed to the principles of multilateralism. During the Cold War the concept of the preservation of 'the West' against the Soviet Union demanded a close-knit engagement with Europe. But there were always currents of thought in the United States that instinctively shied away from an

institutional approach and believed that the United States should pursue more closely defined national interest.[12] The end of the Cold War, and with it much of the justification for multilateralism, gave impetus to these views. The refusal to ratify the Kyoto Convention on the environment, or to participate in the International Criminal Court, and indeed the withdrawal from the Anti-Ballistic Missile Treaty are all illustrations.[13] The United States now feel freer of constraint to act in what they consider to be their own best interests regardless of the views of other countries. They see themselves, too, and rightly so, having in many ways wider responsibilities than any other country for upholding order whether in Asia or in the Middle East. These are not responsibilities that Europe can fulfil. The United States have continued to commit more than 3 per cent of their GDP to defence notwithstanding the end of the Cold War, whereas Europe, in pursuing the peace dividend, has allowed its defence spending to fall below 2 per cent. The US military budget is about double that of the other NATO countries put together.[14] On this basis the disparity of power will grow.

All this is brilliantly brought out in a short and remarkable book by Robert Kagan called *Paradise and Power*.[15] He points out cogently that the differing perspectives of Europe and the United States reflect the military weakness of Europe as compared with the power of the United States. For the weaker Europe negotiation, diplomacy and international law are the only ways in which its aims can be achieved. As he puts it: 'For Europeans the U.N. Security Council is a substitute for the power they lack'.[16] By contrast for the United States it is a potential restraint on their clear ability to act alone to preserve their national interest.

This dichotomy, which the events leading up to the Iraq war so graphically highlighted, means that some wring their hands and ask whether anything can be done to build checks and restraints on the United States. But this seems far from easy. *The Economist* has recently pointed out that the American population is growing faster and getting younger whilst the European population declines and steadily ages.[17] The economic consequences of this obviously favour the United States. *The Economist* has summarised it in these terms: 'The long-term logic of demography seems likely to entrench America's power and to widen existing transatlantic rifts', providing a gloomy 'contrast between youthful, exuberant, multi-coloured America and ageing, decrepit, inward-looking Europe'. All of which means that we have to rely on the acceptability of evolving international law together with the underlying liberal democratic values of the United States for a check on neo-conservative, supremacist tendencies. There is, too, a growing realisation within the United States that they cannot, and do not want to, undertake the task of policing the world alone. In practical terms, the difficulties inherent in the long-term occupation of a country highlight the need

to engage other states and multilateral institutions. The cost of war is much higher if pursued unilaterally, as are the costs of reconstruction.[18] The need for wider participation in peace-keeping and the value of UN involvement is now belatedly being realised.

The basis for the invasion of Iraq

How do the rival arguments for the invasion of Iraq stand up? This demands particularly close analysis. In part, as already mentioned, this is because different arguments were advanced at different times for the waging of war. At one time it appeared that reliance was placed on an imminent threat of the use of weapons of mass destruction by Saddam Hussein on the United States or their allies. Indeed, the now notorious government dossier of 24 September 2002 asserted: 'his military planning allows for some of the W.M.D. to be ready within 45 minutes of an order to use them … Unless we face up to the threat … we place at risk the lives and prosperity of our own people.'[19] Later, emphasis was placed on the importance of bringing humanitarian relief against dictatorship to the people of Iraq.[20] Jack Straw stated: 'For over two decades, Saddam Hussein has caused a humanitarian crisis in Iraq and one which at least equals Milosevic's worst excesses … Saddam has waged a war, but a hidden one, against the Iraqi people.'[21] Yet later, the focus became the desirability of liberating that country and giving it the opportunity of democratic government.[22] In a joint statement in April George Bush and Tony Blair stated: 'After years of dictatorship, Iraq will soon be liberated. For the first time in decades, Iraqis will soon choose their own representative government … We will create an environment where Iraqis can determine their own fate democratically and peacefully.'[23]

What became totally clear was that the United Nations would not approve the invasion of Iraq, at any rate until the weapons inspectors had been given a significantly greater time to find out whether Iraq currently possessed such weapons of mass destruction. So in March 2003 the United States and their allies withdrew their proposed resolution seeking approval for the use of force, because they knew the majority of the Council would reject it, including Russia, Germany and France. They had to find some other way of justifying their action in international law. So they fell back on the 12-year-old Resolution 678 of 1990 passed for the purpose of authorising the expulsion of Saddam Hussein from Kuwait and the restoration of peace in the Middle East.[24] An old resolution passed for a more limited purpose was ingeniously used as a cloak for the very action that the United Nations would not currently countenance. To a common lawyer, taking such a tortuous route to avoid the clear, current wish of the United Nations seems, as Professor Robert Skidelsky has put it, 'straining at a gnat'.[25] But it was seriously advanced and needs consideration in a little detail.

The facts

What are the facts on which the government relied? I shall not spend time on the so-called 'dodgy' dossier of February 2003. It seems to have been conceived in desperation, based on an old PhD research paper generated from the internet. It richly warranted Jack Straw's frank admission that it was 'Horlicks'. What I shall focus on is the government dossier of 24 September 2002 and the assessment by the two very experienced UN weapons inspectors, Dr Hans Blix and Dr Mohamed El Baradei. The dossier contained the 45 minutes claim. There is no doubt that this led to the widespread impression that our country could be attacked on 45 minutes notice.[26] We now know that this was simply wrong. The claim should have applied only to the deployment of battlefield munitions. Yet the government did nothing to dampen down the concern they created. Perhaps one day we will be told why they allowed it to start. In as far as the parliamentary Intelligence and Security Committee has said: 'Saddam Hussein was not considered a current or imminent threat to mainland U.K.'[27]

The whole thrust and purpose of the dossier at the time was to persuade us that Saddam Hussein's continuous breaches of UN resolutions called for further action by the international community. It acknowledged the success of weapons inspections between 1991 and 1998 in identifying and destroying very large quantities of chemical weapons and associated production facilities. It claimed that there had been an increase in capabilities to produce such weapons since 1998, but also acknowledged that these facilities are capable of dual use for petrochemical and biotech industries. It did not suggest that a nuclear threat is less than a minimum of one or two years away.

What the dossier does not contend is also of some importance. It does not suggest that Iraq has current links with Al Qaeda nor with the terrible assault on the United States of 11 September 2001. Nor does it suggest that Saddam has any present motive for launching an attack on any of his neighbours or any current intent to do so. It fails to tell us that the Joint Intelligence Committee had advised that an invasion of Iraq might increase the threat from Al Qaeda.

The dossier concludes with an account of the tyrannical behaviour, in breach of all human rights, of Saddam to his own people and highlights some of the grisly Stalinesque details. It is sickening reading but no suggestion is made that we have not known about this for years, nor any explanation offered as to why action was not taken before. So the dossier may make out a case for a new UN resolution such as 1441, but it nowhere argues that in the absence of such international action there are reasons for the United States and the United Kingdom to go it alone.

Nor did the information change between September and the fateful week in March when the inspectors were recalled and we launched the invasion. On the contrary the authoritative reports of the weapons inspectors confirmed the prior assessment. In February 2003 Dr Hans Blix reported to the United Nations that there were now more than 250 inspectors in Iraq and that although Iraqi co-operation had been less than full, access to sites had been promptly given on demand. No weapons had yet been found and there was as yet no firm evidence that they did or did not exist. He in no way suggested that there was a continuing build-up. He clearly saw his task in searching for chemical and biological weapons as unfinished.[28] On the same day Dr Mohammad El Baradei repeated that by December 1998 the International Atomic Energy Authority had neutralised Iraq's past nuclear programme and had to date found no evidence of ongoing prohibited nuclear or nuclear related activities in Iraq.[29]

In summary, the dossier and the later reports of the inspectors made out a convincing case that the United Nations should insist on continuing with inspections. But none of these facts made any case for the dramatic breaking off of inspections, disregarding the United Nations and invading another sovereign state with all the loss of life, civilian as well as military, destruction of infrastructure and internal occupation which followed. No wonder Kofi Annan said ahead of such action that it could not be in conformity with the UN Charter.[30] Which brings us to the Charter itself.

The Charter

The opening line of the preamble of the Charter, '[w]e the peoples of the United Nations, determined to save succeeding generations from the scourge of war …', reflects a central purpose of the treaty: to ensure international peace and security through collective action. The Charter seeks to achieve this by outlawing the unilateral use of force except in self-defence, resolving international disputes by peaceful means, promoting co-operation in solving international economic, social, cultural and humanitarian problems, and promoting respect for human rights.

The lynchpin of the Charter is Article 2(4) which prohibits the use or threat of force in international relations in the following terms:

> *All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations Charter.*

The Charter permits only two exceptions to the prohibition. The first is

collective action authorised by, and only by, the Security Council acting under Chapter VII. The second is the inherent right to individual or collective self-defence as enshrined in Article 51 of the Charter. This strong protection against the invasion of one country by another reflects the understandable reaction against the horrors inflicted before, and during, the Second World War.

Thus, Articles 41 and 42 in Chapter VII lay down both the non-forceful and, as a last resort, forceful measures that the Security Council may take to counter threats to international peace and security. If the Security Council decides that non-forceful measures under Article 41 are inadequate, Article 42 states that it may take 'such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. Article 51 contains the sole, and limited provision, for one country or group of countries to go it alone without prior Security Council backing. It states that '[n]othing in the … Charter shall impair the inherent right to individual or collective self-defence if an armed attack occurs against a Member of the United Nations'.

I suspect that there are a comparatively large number of people who are unclear as to the exact legal justification ultimately advanced by the government for invading Iraq. So it is worth stressing that when it came to the point the UK government based its case on, and only on, UN Resolution 678 passed as long ago as 1990, in conjunction with Resolution 1441 of 2002. There were other potential legal arguments which would have seemed to be more in harmony with the various political reasons advanced. In the end none of them would have stood up in law. But they are worth looking at to show why the government was driven to scrape the bottom of the legal barrel. These arguments, which merit brief consideration, are fivefold: self-defence, humanitarian intervention, implied authorisation, the unreasonable use of a Security Council veto, and a breach of Resolution 1441.

Self-defence

There was a suggestion during the run-up to war that we were going to invoke our right to self-defence.[31] This was the impression created by the 45 minutes claim. The right to self-defence is protected by Article 51 of the Charter.[32] The use of the word 'inherent' in that Article indicates that it is the customary international law right of self-defence that is preserved.[33] That doctrine was formulated in the seminal case of *The Caroline* in 1841 when American Secretary of State Daniel Webster wrote that there must be a 'necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation'.[34] The element of necessity is to be determined by the claiming state. But once force has been initiated its legality must be assessed by an impartial body and not by the parties to the conflict.[35] The use of force in self-defence must

always be proportionate, that is, in the words of Webster, involving 'nothing unreasonable or excessive, since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it'.[36]

Article 51 refers to the use of self-defence in the event of an 'armed attack'. This raises the question of when, if ever, a state may legally use self-defence in advance of an attack. There is a school of academic thought that considers that the wording of Article 51 precludes action in anticipation of an armed attack, or 'anticipatory self-defence' as it is known.[37] Anticipatory self-defence was an accepted part of customary international law. But it maintained the high standard of necessity enunciated in *The Caroline*. It required a threat to be imminent before a defensive attack could be undertaken in anticipation of it.[38] So the question at the heart of the debate is whether Article 51 qualifies or restricts the wide scope of the customary law doctrine of self-defence.[39]

Those who argue for a restrictive interpretation point out that anticipatory self-defence is contrary to the wording of Article 51 as well as to the objects and purposes of the Charter. The imminence of an attack cannot usually be easily assessed on objective criteria. So the decision whether to undertake such an attack would be left to the individual state's discretion and this contains a manifest risk of abuse.[40] Those who take the contrary view point out cogently that the relinquishment or restriction of a right in international law should not be presumed. So the mention of 'armed attack' in Article 51 does not necessarily mean that a state cannot act to forestall an imminent attack upon it.[41] The French text, too, may be slightly wider when its speaks of '*agression armée*'.

The capacity of modern weaponry equips many states with the capability to strike almost without warning and with devastating consequences. So the better, and more realistic, view is that the Charter does not prohibit the use of anticipatory self-defence in all circumstances.[42] The requirements of necessity and proportionality in these cases are obviously even more stringent than when an attack has actually been launched.

A newer, and much more controversial, development in international law is the doctrine of pre-emptive self-defence, advocated by the Bush administration in their 'National Security Strategy of the United States' in 2002.[43] This doctrine is broader than anticipatory self-defence and seeks to adapt the concept of 'imminent threat' in order to counteract the dangers posed by rogue states and international terrorists.[44] This is a development that troubles many international lawyers, as the removal of the 'imminent threat' criterion lowers the threshold for the use of unilateral military action and may lead to the escalation of violence in already volatile situations.[45] In some circumstances regime change is a

corollary of pre-emptive self-defence, and obtaining a new regime in Iraq has been an official part of US foreign policy since 1998.[46] Most states strongly oppose these developments, believing rightly that such policies pose too great a threat to state sovereignty. With such great international opposition the policy of one state is not sufficient to create a valid rule of international law. Neither regime change nor pre-emptive self-defence can provide a legal justification for the use of military force in Iraq. Nor, as I understand it, was it suggested in the end that it could.

Humanitarian intervention

The idea of humanitarian intervention has strong, understandable and emotional support. Humanitarian intervention has been a notoriously controversial doctrine since it was first advocated by Grotius in the seventeenth century.[47] But the prohibition on the use of force in Article 2(4) makes it very unlikely that any customary international law right of unilateral humanitarian intervention survived the Charter.[48] By contrast, under the auspices of the United Nations there have been several instances of multilateral intervention on humanitarian grounds. These operations were authorised by the Security Council exercising its powers under Chapter VII to counter threats to international peace and security. The relief of famine in Somalia in 1992, the intervention in the Rwandan genocide in 1994, and humanitarian operations in East Timor in 1999 are all examples of this.[49] Outside the United Nations, state practice reveals few clear-cut examples of humanitarian intervention before 1990. India's intervention in East Pakistan in 1971, Vietnam's overthrow of the Khmer Rouge in Kampuchea and Tanzania's ousting of the regime of Idi Amin in Uganda in 1979 all resulted, in fact, in humanitarian relief. All three states, however, preferred to justify their action in terms of self-defence.[50] Likewise US led interventions in Grenada in 1983 and in Panama in 1989 cited humanitarian concerns as reasons for action, although it was not suggested that these concerns were sufficient legal justifications.[51] Since 1990 there have been three occasions on which states have considered humanitarian considerations to be a justification for the use of force. These were the intervention of ECOWAS in the civil war in Liberia in 1990; the imposition of safe havens and no-fly zones by the United States, the United Kingdom and France to protect Iraq's ethnic minorities in the aftermath of the first Gulf war; and NATO's bombing campaign in Serbia in 1999 to bring a halt to ethnic cleansing in Kosovo.[52] The international response to such initiatives has been mixed. Liberia's intervention was retrospectively approved of by the Security Council in Resolution 788 of 1992. The coalition in Iraq received little outright condemnation, but there was also little international support for the legality of the action. NATO's action was hotly contested by several states, and caused the International Court of Justice to express concern.[53] In the United Kingdom, the Foreign Affairs Committee

concluded that: 'NATO's military action, if of dubious legality in the current state of international law, was justified on moral grounds'.[54]

This examination of state practice reflects an evolving human rights culture in international law. This is reflected in the proliferation of treaties and international judicial fora designed to protect and enforce those rights. Some states, including the United Kingdom, are taking a more expansionist and interventionist approach to international law.[55] The Foreign Office has lain down guidelines in the hope of building an international consensus as to when a state should intervene in the affairs of another sovereign state on humanitarian grounds. One of these principles is that:

> *When faced with an immediate and overwhelming humanitarian catastrophe and a government that has demonstrated itself unwilling or unable to prevent it, the international community should take action.56*

These developments suggest that a doctrine of humanitarian intervention may be developing. It is however clear that any such legal doctrine is still evolving. The growing sympathy for such a right should surely shape the actions of the United Nations rather than leaving individual states to apply their own judgment of when they should intervene.

The humanitarian situation in Iraq in March 2003, grim though it was for the Iraqis, was not claimed by the government to amount to an 'overwhelming humanitarian catastrophe' as required by the Foreign Office criteria. Even if a right to humanitarian intervention had developed in international law, it would not have applied to Iraq any more than to any of the arbitrary tyrannies which sadly still exist. There are many who consider that, when it comes to removing Saddam Hussein, the end justified the means, indeed, would justify almost any means. This instinct is all too understandable. But surely it would be a most dangerous path to embark on. Careful criteria would need to be established to ensure that the oppressed are liberated in all cases of need, regardless of whether their state is rich in oil or diamonds. We must be careful when celebrating the demise of Saddam Hussein not to create a dangerous precedent in which any unilateral military action may be condoned when one of its consequences happens to be humanitarian relief.[57] It is UN decisions and their implementation which should be the rock on which the international community sets its feet when it intervenes on humanitarian grounds.

Implied authorisation

It is sometimes argued that the existence of Security Council approval to use force can be implied from prior Security Council decisions without having to obtain

explicit permission. Advocates of this approach argue that it is politically convenient because it enables states to act at times when minimum world order requires that action be taken, but there are geopolitical factors in play which prevent express Security Council authorisation.[58]

In practice, there have been several instances when states have relied on arguments of this kind. These include: India's seizure of Goa from Portugal in 1961;[59] the US interdiction of ships en route to Cuba in 1962;[60] the protection of safe havens and enforcement of no-fly zones by the US led coalition in Iraq in 1991;[61] and, most recently, NATO's campaign in Kosovo in 1999. [62] Most of these instances have been strongly contested by other states.[63] The practice does not amount to a 'constant and uniform usage practiced by the states in question' required to establish a customary norm in international law.[64]

A short examination of the implied authorisation argument reveals its fallacy. First, it is inconsistent with the principles and purposes of the UN Charter. From reading Article 1 it is clear that the basic premise of the collective security system is that force should only be undertaken jointly and in the interests of the international community as a whole. A system that allows states to decide unilaterally when a use of force is or is not in the interests of the international community is dangerously vulnerable to abuse. The only way to ensure that military action is truly collective is if it is expressly authorised by the Security Council. But implicit authorisation would entail the interpretation of the words and actions of members of the Security Council said and done in a highly political context.[65] This is at best ambiguous, at worst a fig-leaf giving the powerful states carte blanche to act as they wish, justified by the creative interpretation of past Security Council practice.[66]

Second, the Charter requires the Security Council to consider whether non-forceful measures would be an appropriate solution to the problem before authorising the use of force.[67] For force is a last resort. This requirement is devalued, if not completely ignored, under the doctrine of implied authorisation. Some advocates of implied authorisation suggest that the failure of the Security Council to condemn an action is a tacit approval of it.[68] This is a similar argument to that advanced by the Attorney-General that Resolution 1441 would have expressly stated if a further resolution was necessary for force to be authorised.[69] Given the veto power of the permanent five members this line of argument is unconvincing. It is also conceptually misconceived. It suggests that the Security Council must denounce an action in order to render it illegitimate. But this argument is an attempt to stand on its head the clear prohibition in Article 2(4) on the unilateral invasion of sovereignty.

Unreasonable Security Council veto

In the debates before the war the Prime Minister several times suggested that an unreasonable use of the veto in the Security Council would somehow allow members of the United Nations to act unilaterally without express authorisation.[70] This is a variation of a theory, expressed in academic literature, that the inability of the Security Council to fulfil its collective security role restores the right of each member state to act unilaterally.[71] This concept has no basis in international law.[72] The use of the veto is a legitimate exercise of Security Council procedure under Chapter V of the Charter. The United Kingdom has itself used its veto 32 times since 1945.[73] A doctrine that enables one member to bypass the requirement of Security Council authorisation by unilaterally deeming a use of the veto to be unreasonable is dangerously subjective, and poses an unacceptable risk that the Security Council's monopoly on the authorisation of the use of force will be undermined.

Breach of Resolution 1441

Resolution 1441 was the freshest, and most immediate resolution in force at the time of the invasion. Yet there has been no suggestion that Resolution 1441 justified the invasion. Why? Because Resolution 1441 did not expressly authorise force.[74] The collective security system requires that the authority to use force, which is the most serious and deadly means of enforcement, can only be conferred by unambiguous means.[75] The graver the consequences, the clearer must be the words providing for them. No one has suggested that Resolution 1441 contains such clear language. Indeed a draft resolution containing the phrase 'all necessary means', the diplomatic code for the authorisation of force, was rejected by members of the Security Council in early October 2002.[76] The parties to 1441 all recognised that there was no 'automaticity' of consequences and that the issue would have to come back to the Council which was 'to remain seized of the matter'.[77] It was later suggested somewhat faintly that the 'further consideration' mentioned in 1441 meant that there would simply be a report and a debate without the Security Council determining what the serious consequences should be. If that was so it is far from clear why the United States and our government worked so hard to sponsor a second resolution to spell out the consequences of Iraq's failure to comply. It was only the realisation that a second resolution would not get through which led the United States and the United Kingdom to change tack and to look for some other basis in international law that allowed them to invade Iraq. They alighted upon Resolution 678. It was their only lifeline. For it is recognised that nothing short of a statement of the right to use 'all necessary means' or 'all necessary force' would be sufficiently unambiguous as to allow the extreme step of engaging in armed hostilities or invasion.[78] None of the subsequent resolutions, including 1441, gave such a mandate.

Does Resolution 678 justify the invasion of Iraq in 2003?

There has been a long-standing tradition that our government rarely, if ever, discloses the advice of the Attorney-General or indeed, whether he has advised at all.[79] But on this occasion, in a parliamentary answer, Lord Goldsmith QC published his advice in summary form. Because of its importance and its brevity it is convenient to set it out in full:

> *Authority to use force against Iraq exists from the combined effect of Resolutions 678, 687 and 1441. All of these resolutions were adopted under Chapter VII of the U.N. Charter which allows the use of force for the express purpose of restoring international peace and security:*
>
> *1. In Resolution 678 the Security Council authorised force against Iraq, to eject it from Kuwait and to restore peace and security in the area.*
> *2. In Resolution 687, which set out the ceasefire conditions after Operation Desert Storm, the Security Council imposed continuing obligations on Iraq to eliminate its weapons of mass destruction in order to restore international peace and security in the area. Resolution 687 suspended but did not terminate the authority to use force under Resolution 678.*
> *3. A material breach of Resolution 687 revives the authority to use force under Resolution 678.*
> *4. In Resolution 1441 the Security Council determined that Iraq has been and remains in material breach of Resolution 687, because it has not fully complied with its obligations to disarm under that resolution.*
> *5. The Security Council in Resolution 1441 gave Iraq 'a final opportunity to comply with its disarmament obligations' and warned Iraq of the 'serious consequences' if it did not.*
> *6. The Security Council also decided in Resolution 1441 that, if Iraq failed at any time to comply with and cooperate fully in the implementation of Resolution 1441, that would constitute a further material breach.*
> *7. It is plain that Iraq has failed so to comply and therefore Iraq was at the time of Resolution 1441 and continues to be in material breach.*
> *8. Thus, the authority to use force under Resolution 678 has revived and so continues today.*
> *9. Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that Resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force.80*

The Foreign Secretary also provided to many parliamentarians a longer Foreign Office advice that was to the same effect.

What is not known is whether the Attorney-General had given any fuller advice. In response to my request that he should disclose his full advice he retreated behind the arras and claimed that his parliamentary answer was an exception to the usual convention and so we were not entitled even to know whether he had advised more fully or, if so, in what terms.[81] This leaves us in doubt as to the extent to which he considered at all the cogent arguments that had been advanced against his view. Did he examine how, since there is no doctrine of implied authorisation, the quaint concept of the 'revival' of Resolution 678 was possible? Did he deal with the issues of necessity and proportionality, given that the inspectors had reported nothing concrete and were asking for more time? Did he grapple with the persuasive arguments advanced against the war by the majority of distinguished international lawyers who expressed a view? Did he explain how the United States and this country could act on their own because of Iraq's breach of resolutions rather than, as is normal, the United Nations authorising the appropriate action? Perhaps even more fundamentally, what were the facts he assumed for the purpose of his advice?

What does appear to be clear is that neither the Foreign Office opinion nor the parliamentary answer set Resolution 678 in its context. This was the invasion in August 1990 of Kuwait by Iraq. The United Nations responded by passing Resolution 660 the very same day. This determined 'that there exists a breach of international peace and security as regards the Iraqi invasion of Kuwait' and demanded the immediate and unconditional withdrawal of Iraqi forces. The nature of the issue was defined at the outset and was to be the expulsion of the Iraqi invaders from Kuwait. Four days later on 6 August Resolution 661 stressed the determination 'to bring the invasion and occupation of Kuwait by Iraq to an end' and affirmed the inherent right of individual or collective self-defence under Article 51 of the Charter. Sanctions were imposed on Iraq to achieve this clear but limited objective. This was reinforced by a decision 'to keep this item on its agenda and to continue its efforts to put an early end to the invasion by Iraq'.

This was the background for Resolution 678 almost four months later on 29 November. This resolution authorised member states, unless Iraq withdrew by 15 January 1991, fully to implement those resolutions and 'to use all necessary means to uphold and implement Resolution 660 and all subsequent relevant resolutions, and to restore international peace and security in the area'. So Resolution 678 was always firmly anchored to implementing Resolution 660 and so to driving Iraq from Kuwait.

By 2 March the military action to end the invasion had been successful. Resolution 686 then confirmed all the previous resolutions on the issue and demanded essentially that Iraq should implement its withdrawal, provide appropriate compensation and return Kuwaiti property. There are two other interesting points that arise from this resolution. The first is that it affirms the commitment 'of all member states to the independence, sovereignty and territorial integrity of Iraq and Kuwait'. Resolution 686 also referred to the fact that allied forces were 'present temporarily in some areas of Iraq'. The resolution also recognised that 'during the period required for Iraq to comply … the provisions of paragraph 2 of Resolution 678 remain valid'. In other words it was a temporary provisional ceasefire. This resolution is a cogent further indication of the limited purpose of Resolution 678. I do not believe that any of the political leaders at that time contemplated that Resolution 678 would justify waging wholesale war on Iraq in order to secure a regime change. Indeed, the leading actors in that drama said so clearly. George Bush senior has written that: 'Going in and occupying Iraq, thus unilaterally exceeding the United Nations' mandate, would have destroyed the precedent of international response to aggression that we hoped to establish'.[82] General de la Billiere, Commander of the British Forces during the first Gulf War, wrote: 'We did not have a mandate to invade Iraq or take the country over …',[83] and John Major has said: 'Our mandate from the United Nations was to expel the Iraqis from Kuwait, not to bring down the Iraqi regime'.[84] Nothing could be plainer or more statesmanlike.

So we come to Resolution 687 on 3 April 1991. Again this resolution also affirms the 'sovereignty, territorial integrity and political independence of … Iraq'. It also widens the obligations on Iraq because it requires Iraq in effect to accept the 'destruction, removal or rendering harmless' of chemical and biological weapons and ballistic missiles with a range greater than 150 km. It set up a regime for the provision of information and inspection. It provided for a formal or permanent ceasefire and that the United Nations could 'take such further steps as may be required to implement the present resolution and to secure peace and security in the area'. There was the specific provision enabling 'all necessary measures', which clearly would have included force, to guarantee the inviolability of the boundary between Kuwait and Iraq. But in sharp contrast there was no provision at all in this resolution for the use of force to enforce the disarmament obligations. Nor has there been any subsequent resolution that provided for the use of force against Iraq. Hence the government desperately trawled way back to Resolution 678 to find a flag of convenience, a flag disowned by Kofi Annan.[85] But the flag simply cannot fly.

The language of 660 was restrictive, clearly designed to achieve the end of the Iraqi invasion of Kuwait. Resolution 678 was backing this resolution by the

potential use of force. Resolution 660 was complied with. Resolution 678 was contemplated as only remaining in force until the consequences of the Iraqi invasion of Kuwait had been dealt with. Resolution 687 introduced the wider and distinct issue of weapons of mass destruction. It gave no comfort to the use of force to achieve this aim and specifically contemplated that the United Nations, and not any member countries acting unilaterally, would remain in charge of the issue, as was cogently argued by Rabinder Singh QC and Charlotte Kilroy in one of their impressive opinions on the conflict. The suggestion that the authority to use force 'revives' like spring flowers in the desert after rain, to be invoked by the United States and the United Kingdom contrary to the wishes of the Security Council, is risible.[86] Nor does it find any support in international law.

The suggestion that the violation of a ceasefire agreement authorises the other party to use force appears to be based on pre-Charter customary law. Under the Hague Regulations 1907 a party was released from his obligations under an armistice agreement when the terms were violated by the other party.[87] 'Ceasefires', the term being relatively modern, are not dealt with under these rules but are generally treated as being synonymous with armistices.[88] These rules are almost 100 years old and have certainly been modified, if not completely supplanted, by the UN Charter. For it remains the case that all non-defensive uses of force must be authorised by the Security Council, even if the use of force is a reprisal for the violation of the terms of a ceasefire.[89] In 1948, in response to violations by both sides of the Israel/Egypt armistice, the Security Council passed a resolution stating that: 'no party is permitted to violate the truce on the ground that it is undertaking reprisals or retaliations against the other party'.[90] In 1955 and 1956 South Korea argued at the United Nations that North Korean and Chinese violations of the North Korea Armistice Agreement (1953) warranted a termination of the armistice and the resumption of hostilities. This was a position that no other state adopted.[91] Once a ceasefire is in place it is the Security Council alone that must determine whether its terms have been complied with and, if they have not, whether the use of force is an appropriate response.[92] This chimes in with the underlying purpose of the Charter that force must be used in the interests of the community as a whole and with UN authority. The unreality of the reliance on Resolution 678 was summed up by Michael P Scharf, the former Attorney Advisor for UN Affairs at the US Department of State: 'It is … significant that the administration of Bush the elder did not view Resolution 678 as a broad enough grant of authority to invade Baghdad and topple Saddam Hussein. It is ironic … that the current Bush administration would now argue that this Resolution could be used ten years later to justify a forcible regime change.'[93]

Conclusion

The last time this country waged a war of aggression was almost 50 years ago during the brief Suez adventure. It was my first term as an undergraduate. Sir

Anthony Eden, as is the case with Tony Blair, was not by temperament a warmonger. He had only shortly before refused the request of John Foster Dulles, the US secretary of state, that our countries should together intervene militarily in Indo-China and instead had brought that dispute to a temporary settlement at Geneva. In the first months of the Suez crisis he sought to act through the United Nations and with wide international support. Similarly Tony Blair insisted for months that we should act through the United Nations, subject only to the novel suggestion that we could ignore an 'unreasonable' veto.

Then in 1956, just as in the build-up to Iraq, there was a dramatic change of gear. We invaded Egypt with the nation, including undergraduates who like me were naïve enough to trust our government, blissfully unaware of the infamous Sèvres agreement providing secretly that Israel should invade, and France and we should then intervene to stop them. In the case of Iraq I shall never forget being in the United States in March 2003 and watching with dismay as events unfolded. We learnt that the proposed further resolution was to be withdrawn because of lack of support. The inspectors had their work in Iraq summarily terminated. The leaders of the United States and the United Kingdom travelled to the bizarre location of the Azores and delivered their ultimatum for regime change, and three days later launched the invasion. All this change of approach in a single week. We can only speculate why they did so in so much haste. The most probable reason is that the troops were there and were to be deployed before the summer heat of the Middle East. We will not know for a very long time whether there was any substance in Clare Short's assertion that the Prime Minister had committed himself way back last year to supporting the United States even if the United Nations declined its backing. If so, there would be another deeply dark parallel with Suez.

There is undoubtedly one more parallel. The strength of the United States was in each case decisive. At Suez, influenced by presidential electoral considerations, the United States declined their support and we had to withdraw. In Iraq it was the United States who similarly called the shots, but this time as the promoters of war.

What are the lessons for the future? The first is positive. Our government apparently accept that they must act in accordance with international law, even though their arguments were flawed and most experts doubt the lawfulness of what they did in our name. The second too is positive. The United States is, for the future, the only world power that can act unilaterally and their values and commitment to democracy make them the least undesirable supreme power. But while we are thankful for this, we should also be wary. The bi-polar world, in which the Soviet Union had an effective veto on US action when it threatened the balance of world power, has collapsed. To create a new multilateralism is not easy. It would, or so it seems to me, not require change to the UN Charter to allow

UN sanctioned intervention to prevent genocide and humanitarian disaster. Nor would it require any change to allow the United Nations to act to prevent the proliferation of weapons of mass destruction.

For this country I would only offer two suggestions. The first is practical, which is that we should seek to influence the United States through Europe, which was at all times supportive of Resolution 1441. It seems to me that the Prime Minister followed the long-standing Atlanticist view succinctly expressed by Sir Winston Churchill in the last week of his premiership: 'We must never get out of step with the Americans – never!'[94] With our wider role in Europe this seems no longer wise. After all it was Eden himself who 50 years ago during his quest for peace in Indo-China wrote: 'Americans may think the time past when they need consider the feelings or difficulties of their allies'.[95] There should be time now for reflection. Our government has a massive job to rebuild trust before they could again lead us into war. And to rebuild resources before again fighting a war of choice as Admiral Sir Michael Boyce stressed on retirement this summer.

The second suggestion more directly relates to the part the law should play. As we have seen, it played a markedly subordinate role in the debate. I have for some time been unconvinced by the argument that the Attorney-General's advice is not normally disclosed.[96] It is given for the public good and the public should generally be entitled to know what is the government's view of the law, just as we receive the opinion of ministers on whether bills presented to parliament conform with the Human Rights Act. While it was welcome that the Attorney-General allowed a peep though the curtains in his parliamentary answer, I find it almost incomprehensible that he then declined even to tell us whether he has given any advice apart from the published summary. The result is, and the Foreign Office advice is but a fuller version of the same answer, that the government's view of the law was never exposed to the spotlight of reasoned argument or scholarship. How can this be avoided, as I think it should, in the future?

I believe the time has arrived when the courts should not be so diffident where an important aspect of the legality of foreign policy is challenged. There can clearly be no challenge to the policy itself. This is obviously for the government to decide. But it is well recognised that international law is part of our domestic law. As Lord Phillips MR has said: '[The] court… is free to express a view in relation to what it conceives to be a clear breach of international law, particularly in the context of human rights'.[97] Where public law has evolved so far and now considers on a daily basis wide-ranging issues of varying importance, it seems strange for the courts not to be able to give rulings on the legality of an act as fundamental as the invasion of another sovereign state by an act of war. The knowledge that the courts might be willing to do so would surely promote greater

responsibility and thoroughness in the giving of advice. Law cannot just be the handmaiden of real politik. The outcome of a legal decision would, I believe, be the firm conclusion that, except in self-defence against actual or imminent attack, we can only use force to invade another country under the authority of a current UN resolution passed to cover the specific situation. And that would seem to mean an end to Suez or Iraqi adventures.

Finally, it seems to me that the most important lesson to be learnt is the one that sadly has so often been ignored since time immemorial. In the words of General Sherman, and he was victorious: 'War is hell'. We abandoned diplomacy too fast in March. With it we abandoned the fragile international consensus on the way in which to handle the issue of the weapons in Iraq. The emphasis of the Charter is right. And that is because those who crafted it knew at first hand that the one reason that force is a last resort is that the human cost of war is too high for it to be used for any other reason. Nations need to respect the international institutions rather than give effect to their own beliefs as to how the law should be applied. It was President Dwight Eisenhower, who was also seared by war, who stated in his farewell address to the nation: 'The weakest must come to the conference table with the same confidence as do we, protected as we are by our moral, economic, and military strength. That table, though scarred by many past frustrations, cannot be abandoned for the certain agony of the battlefield.'[98] A timeless, eloquent statement and one which I hope may once again come to underpin the long-term policies of a nation whose passionate commitment to freedom and self-determination has given the world so much.

Lord Alexander is the chairman of JUSTICE's council.

Notes

1 'Saddam Hussein and his sons must leave Iraq within 48 hours. Their refusal to do so will result in military conflict commenced at a time of our choosing.' President George W Bush, Address to the Nation, 17 March 2003.

2 The Attorney-General Lord Goldsmith QC's parliamentary written answer to Baroness Ramsay of Cartvale, HL Debates col WA1, 17 March 2003. Foreign Office legal advice published to the Foreign Affairs Committee, 17 March 2003.

3 Prof Ulf Bernitz, Dr Nicolas Espejo-Yaksic, Agnes Hurwitz, Prof Vaughan Lowe, Dr Ben Saul, Dr Katja Ziegler (University of Oxford), Prof James Crawford, Dr Susan Marks, Dr Roger O'Keefe (University of Cambridge), Prof Christine Chinkin, Dr Gerry Simpson, Deborah Cass (London School of Economics), Dr Matthew Craven (School of Oriental and African Studies), Prof Philippe Sands, Ralph Wilde (University College London), Prof Pierre-Marie Dupuy (University of Paris), *Guardian*, 7 March 2003. Leading academics who supported the war included Prof Christopher Greenwood QC (London School of Economics), *Guardian*, 28 March 2003, and Dr Ruth Wedgewood (Yale Law School), *Financial Times*, 13 March 2003.

4 In *R (CND) v Prime Minister and Secretaries of State* [2002] EWHC 2777, [2003] ACD 36 the Campaign for Nuclear Disarmament (CND) brought an application in the High Court for an advisory declaration as to whether the UK government would be acting in breach of international law if it went to war with Iraq on the basis of Resolution 1441 alone. The

applicants argued that an advisory declaration was necessary to ensure that the defendants had not misdirected themselves in law on the question as to whether a further resolution was necessary. They reasoned that the prohibition on the use of force was a peremptory norm of customary international law and, as such, also a part of UK law and therefore within the common law jurisdiction of the court. They argued that, as the case raised a pure question of law and did not require a consideration of policy by the court, the matter was justiciable. The High Court expressly declined to adjudicate the matter. In the US case of *Doe v* Bush No 03-1266 (1st Cir, 13 March 2003) a group of plaintiffs, including four anonymous US soldiers and six members of the House of Representatives, challenged the authority of the President and the Defence Secretary to wage war on Iraq, absent a clear declaration of war by the US Congress. The court dismissed the suit under the doctrine of ripeness, holding that it was too soon to consider the issue as the war had not yet commenced.

5 *Colegrove v Green* 66 S Ct 1198. Under the 'political question doctrine' courts will not decide questions that have either been constitutionally committed to another branch of government, or that are inherently incapable of judicial resolution. Matters of foreign policy are almost always non-justiciable under this doctrine (*Baker v Carr* 32 S Ct 691). However, the political question doctrine is notoriously difficult and courts have not always taken the same approach on the justiciability of war powers. Compare *Berk v Laird*, 429 F 2d 302, 306 (2nd Cir, 1970) and *Dellums v Bush*, 752 F Supp at 1150 with *Holtzman v Schlesinger*, 484 F 2d 1307, 1309-11 (2nd Cir, 1973) and *Ange v Bush*, 752 F Supp at 512.

6 *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374. There are some traditionally non-justiciable areas that are now considered by the courts. These include the power to issue a passport (*R v Secretary of State for Foreign and Commonwealth Affairs ex p Everett* [1989] 1 QB 811) and the prerogative of mercy (*R v Secretary of State for the Home Department ex p Bentley* [1994] QB 349). Furthermore, the development of the public law doctrine of legitimate expectations now permits a limited consideration of the exercise of a discretion to exercise a prerogative power, such as the provision of diplomatic and consular assistance to British nationals abroad (*R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, [2003] UKHRR 76). However, the extent to which courts will consider matters of national security continues to be very limited and great weight is given to the views of the executive (*Home Office v Rehman* [2001] 3 WLR 877, per Lord Steyn at 889). Foreign policy matters and the deployment of the armed forces are not justiciable at all (*R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs*; *R (CND) v Prime Minister and Secretaries of State*, n4 above).

7 As the ICJ can only adjudicate cases in which the parties have a sufficient legal interest (*Ethiopia and Liberia v South Africa* (*South West Africa Case*), Second Phase (1966) ICJ Reports 6), Iraq is the only state with locus standi to bring such a case. Iraq never signed the optional clause acceding to the compulsory jurisdiction of the ICJ and in any case has no independent government with sufficient standing to bring a case. Furthermore, the US revoked their signature to the optional clause in 1986. The UK is the only relevant state that is a current signatory to the optional clause.

8 Emer de Vattel, *Le Droit des Gens* (Leiden, 1758) translated in *The Law of Nations* (Washington, Carnegie Institution Washington, 1916), p7, as quoted in Gerald Stourzh, *Alexander Hamilton and the Idea of Republican Government* (Stanford, Stanford University Press, 1970), p134.

9 'States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world.' President George W Bush, State of the Union speech before Congress, 29 January 2002.

10 'In addition to Libya and Syria, there is a threat coming … [from] Cuba.' US Under Secretary of State John Bolton, 'Beyond the Axis of Evil: Additional Threats from Weapons of Mass Destruction', Remarks to the Heritage Foundation, Washington DC, 6 May 2002.

11 Robert Kagan, *Paradise and Power: America and Europe in the New World Order* (London, Atlantic, 2003), p43.

12 eg, 'The U.N. has become a trap. Let's go it alone.' US Senator Robert Taft, quoted by Rep James B Utt, *Congressional Record House,* 15 January 1962.

13 The US are a signatory to the Kyoto Protocol to the UN Framework Convention on Climate Change (1997) but have never ratified it. The US signature to the Rome Statute of the International Criminal Court (1998) was formally renounced on 6 May 2002, and the

US formally withdrew from the Anti-Ballistic Missile Treaty (1972) on 13 December 2001.
14 '[The US] spends 3% of its GDP on its armed forces, France and Britain around 2.5%, Germany just 1.6%.' 'Undermining NATO?', *The Economist*, 1 May 2003.
15 Kagan, n11 above.
16 ibid, p40.
17 'Half a billion Americans?', *The Economist*, 22 August 2002.
18 The overall military cost of Iraq, on the assumption of a four-year occupation, has been estimated at $150 billion. Reconstruction costs are more uncertain but could rise to the same figure. This cost would be more greatly shared if there were wider international support. In 1999 the coalition to liberate Kuwait orchestrated by President Bush funded 80% of the overall costs. See Leal Brainard and Michael O'Hanlon, *Financial Times*, 6 August 2003.
19*Iraq's Weapons of Mass Destruction: The Assessment of the British Government* (London, The Stationery Office Ltd, 2002), p7: 'The policy of the United Kingdom Government … is related to the threat which the Saddam Hussein regime poses to the rest of the world. And that threat comes from its unlawful, unauthorised, wilful possession and development of weapons of mass destruction.' Jack Straw, interview on BBC Radio 4, 13 September 2002.
20 This was never wholly explicitly put forward as a legal justification. 'The nature of Saddam's regime is relevant … because Saddam has shown his willingness to use [weapons of mass destruction] … let us …. not forget the 4 million Iraqi exiles, and the thousands of children who die needlessly every year due to Saddam's impoverishment of his country … [and the] tens of thousands imprisoned, tortured or executed by his barbarity every year.' Tony Blair, HC Debates, col 130, 25 February 2003; '[This] is a war against Saddam because of the weapons of mass destruction that he has, and it is a war against Saddam because of what he has done to the Iraqi people.' Tony Blair, interview with the BBC World Service, 4 April 2003.
21 Jack Straw, Newspaper Society Annual Conference speech, 1 April 2003.
22 This was also not put forward explicitly as a legal justification. 'We know that most Iraqis want to see political change in their country … The U.K. wants to help Iraq to achieve this. If we are obliged to take military action, our first objective will be to secure Iraq's disarmament. But our next priority will be to work with the United Nations to help Iraqi people recover from years of oppression and tyranny, and allow their country to move towards one that is ruled by law, respects international obligations and provides effective and representative government.' Jack Straw, International Institute of Strategic Studies speech, 11 February 2003.
23 Tony Blair and George W Bush, joint statement on Iraq, 8 April 2003.
24 n2 above. It was also suggested by the US that they were acting under their inherent right to self-defence in international law. 'Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself.' Preamble to the Authorisation for Use of Military Force Against Iraq Resolution of 2002 (HJ Res 114).
25 Robert Skidelsky, 'The American Contract', *Prospect Magazine*, July 2003.
26 'The dossier was for public consumption and not for experienced readers of intelligence material. The 45 minutes claim, included four times, was always likely to attract attention because it was arresting detail that the public had not seen before … The fact that it was assessed to refer to battlefield chemical and biological munitions and their movement on the battlefield and not to any other form of chemical or biological attack, should have been highlighted in the dossier. The omission of the context and assessment allowed speculation as to its exact meaning. This was unhelpful to understanding the issue.' Report of the Intelligence and Security Committee, *Iraqi Weapons of Mass Destruction*, September 2003, p27.
27 ibid, p31.
28 Hans Blix, Report to the Security Council, 14 February 2003.
29 Mohammad El Baradei, Report to the Security Council, 14 February 2003.
30 '[If] action is taken without the authority of the Council, then the legitimacy and support for that action will be seriously impaired.' Kofi Annan, Secretary-General's press

conference, Brussels, 17 February 2003.
31 'It is right [to go to war] because weapons of mass destruction – the proliferation of chemical, biological, nuclear weapons and ballistic missile technology along with it – are a real threat to the security of the world and this country.' Tony Blair, HC Debates, col 682, 15 January 2003; 'This resolution [1441] does not constrain any member state from acting to defend itself against the threat posed by Iraq, or to enforce relevant U.N. resolutions and protect world peace and security.' Ambassador Negroponte, statement to Security Council, 8 November 2002; Preamble to the Authorisation for Use of Military Force Against Iraq Resolution of 2002 (HJ Res. 114), quoted n24 above. However, arguments of self-defence were not in the end seriously advanced in the UK. Although much time has been spent scrutinising the quality of the government dossiers on Iraq, this is not an issue required to be analysed here. It seems to be common ground that parts of the second dossier, published 3 February 2003, were plagiarised from a PhD thesis. This implies that the government only presented information to the public that they thought would justify the course of action they had chosen to take. '[T]he significance of intelligence lies not only in the information, be it empiric or uncorroborated conjecture, which it is thought fit to put into this or that document, but more importantly what interpretation is placed upon it … on the basis of the way in which whatever was said or written was presented, the British people obtained the distinct impression that the threat from Iraq was more massive and imminent than has since proved to be the case, or indeed may ever have been. There were other tenable reasons which could have been used to justify military force, but none which would have satisfied Parliament and the country as regards the necessity and legality of such action.' Field Marshall Lord Bramall, letter to *The Times*, 1 July 2003.
32 Article 51, Charter of the United Nations 1945. 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.'
33 *Nicaragua v United States of America* (1986) ICJ Reports 4, 94.
34 29 BFSP 1137-38. During a Canadian rebellion against British rule in 1837, insurgents used an American ship to transport their supplies. In retaliation the British government sent a detachment of troops to capture the ship. The troops burned the ship and set it adrift causing the death of one man. It was during an exchange of conciliatory letters between the American Secretary of State Daniel Webster and Lord Ashburton in 1841 that the principles of self-defence were formulated.
35 Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order* (London, New Haven Press, 1961), p230; Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford, Clarendon Press, 1933), pp177-182; DW Bowett, *Self Defence in International Law* (Manchester, Manchester University Press, 1958), p193; Judgment of the International Military Tribunal at Nuremberg, 1946, 1 TRIAL OF GERMAN MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 208 (1947).
36 n34 above.
37 Hans Kelsen, *The Law of the United Nations* (London, Stevens, 1950), pp269, 787-789; Ian Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon Press, 1961), p275; Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford, Oxford University Press, 1994), p676. For the opposite view see Bowett, *Self-Defence in International Law*, n35 above, pp187-193; Stephen Schwebel, 'Aggression, Intervention and Self-Defence in Modern International Law' (1972-II) 136 Hague Rec 411, 479; MacDougal and Feliciano, n35 above, pp231-241.
38 The *Caroline Case*, n34 above, was itself an example of anticipatory self-defence. The International Military Tribunal for the Far East (1948) 994 found that the declaration of war on Japan by the Netherlands in 1941 was a legitimate act of self-defence in response to an imminent Japanese attack on the Dutch East Indies.
39 The customary law doctrine of self-defence is very wide, arguably including more controversial rights such as the protection of nationals abroad, and the protection of certain vital economic interests. Simma, n37 above, p790.

40 This interpretation of the effect of Article 51 was also adopted by the International Court of Justice in *Nicaragua v United States of America*, n33 above, 103: 'in the case of individual self-defence, the exercise of this right is subject to the state concerned having been the victim of an armed attack. Reliance on collective self defence of course does not remove the need for this.'
41 Schwebel, n37 above.
42 Jennings and Watts (eds), *Oppenheim's International Law* (9th ed, Harlow, Longman, 1992), pp421-422. See also Schwebel, n37 above, 481: 'Perhaps the most compelling argument against reading Article 51 to debar anticipatory self-defence whatever the circumstances is that, in an age of missiles and nuclear weapons, it is an interpretation that does not comport with reality.' Although this pragmatic approach is necessary in today's world, its dangers should not be forgotten. The Brezhnev doctrine was a derivative of self-defence and resulted in the annexations of Czechoslovakia in 1968 and Afghanistan in 1979. It is crucial that the boundaries of self-defence are fiercely drawn or there is an unacceptable potential for abuse.
43 *National Security Strategy of the United States* (Washington DC, The White House, 2002).
44 'We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries', ibid, p19. This is because 'the nature of what [terrorists] do makes it difficult to apply the imminent threat criterion' meaning that for sake of security past practice and knowledge of a threat will suffice. (James Steinberg, quoted in *The Washington Lawyer*, January 2003).
45 Rogue states, unlike terrorists, can be deterred from unwanted behaviour by other means, including economic and diplomatic pressure. *The Washington Lawyer*, January 2003, p26.
46 Iraq Liberation Act (Public Law 105-338, 1998); Authorisation for the Use of Military Force Against Iraq (Public Law 107-243, 2002). W Michael Reisman, 'Assessing Claims to Revise the Laws of War' 97 AJIL 82. However, regime change has never been part of British foreign policy, nor was it submitted by the British government as a valid legal justification for war: 'is the focus of this international coalition which we hope to put together regime change? Is that the objective of the United Nations Security Council resolution? No. The whole focus is on the disarmament of Saddam Hussein's weapons of mass destruction.' Jack Straw, interview on BBC Radio 4, 12 October 2002; 'I have never put the justification for action as regime change. We have to act within the terms set out in resolution 1441 – that is our legal base.' Tony Blair, statement to the House of Commons, 18 March 2003.
47 Hugo Grotius, quoted in MDA Freeman, *Lloyd's Introduction to Jurisprudence* (6th ed, London, Sweet & Maxwell, 1994), p99.
48 Brownlie, n37 above, pp338-342; Natalino Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Grounds of Humanity* (Boston, Hingham, 1985), p108; Lori Fisler Damrosch in Damrosch and Scheffer (eds), *Law and Force in the New International Order* (Oxford, Westview, 1991). Examples cited in academic works of a pre-Charter practice of humanitarian intervention include France, Russia and the UK's intervention in the Ottoman Empire to protect the Greeks in 1827 and to protect the Christians in Lebanon in 1860. See Istvan Pogany (1986) 35 ICLQ 182.
49 S/RES/794 (1992) (Somalia); S/RES/918 (1994) (Rwanda); S/RES/1264 (1999) (East Timor).
50 India justified its action on the basis of self-defence following border incidents with East Pakistan and a massive influx of refugees. It also cited humanitarian reasons and the right to self-determination. Vietnam based its action on a tenuous argument of self-defence on the basis of border incidents. It also cited humanitarian intervention as a justification. Tanzania based its action on self-defence alone and did not use humanitarian justifications. Ronzitti, n48 above; Tom Farer, 'An Inquiry into the Legitimacy of Humanitarian Intervention' in Damrosch and Scheffer (eds), n48 above.
51 Ruth Wedgewood, 'Unilateral Action in a Multilateral World' in Forman and Patrick (eds), *Multilateralism and U.S. Foreign Policy: Ambivalent Engagement* (London, Lynne Rienner, 2002).
52 ECOWAS cited four justifications for their actions: (i) the need to stop the large-scale killing of civilians; (ii) the need to protect foreign nationals; (iii) the need for a regional organisation to protect international peace and security in the region; (iv) the need to restore a measure of order to an anarchic state. Final Communique of the ECOWAS

Standing Committee and the Committee of Five, paras 6-9, quoted in David Wippman, in Damrosch (ed), *Enforcing Restraint: Collective Intervention in Internal Conflicts* (New York, Council of Foreign Relations Press, 1993). The coalition in Iraq justified its action in part on S/RES/688 (1991) condemning Iraqi repression of its civilian population, and also by reference to humanitarian considerations. 'We operate under international law … International law recognises extreme humanitarian need … We are on strong legal as well as humanitarian ground in setting up this "no-fly zone"'. Foreign Secretary Douglas Hurd, BBC Radio 4's 'Today' programme, 19 August 1991. NATO expressly cited humanitarian intervention as a justification for its action. 'Our legal justification rests upon the accepted principle that force may be used in extreme circumstances to avert a humanitarian catastrophe.' Defence Secretary George Robertson, HC Debates, cols 616-617, 25 March 1999; 'Belgium in particular, felt obliged to intervene to forestall an ongoing humanitarian catastrophe … The purpose of NATO's intervention is to rescue a people in peril, in deep distress.' *Serbia and Montenegro v Belgium*, Belgian Oral Pleading, Verbatim Record, 10 May 1999.

53 Russia, China, the FRY, Namibia, Brazil, Cuba, Belarus, Ukraine, India and Mexico expressed their disapproval of NATO action in Kosovo as being unlawful. Furthermore, Slovenia, Malaysia, Argentina, Bahrain, Gabon, Gambia, Costa Rica, Iran and Albania emphasised the central role of the Security Council in authorising the use of force. 4011th Security Council Meeting, 10 June 1999. The ICJ stated that: 'the Court is profoundly concerned with the use of force in Yugoslavia … the Court deems it necessary to emphasise that all parties appearing before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law.' *Serbia and Montenegro v Belgium*, Request for Indication of Provisional Measures, Order of 2 June 1999, paras 17, 19.

54 Fourth Report from the Foreign Affairs Committee, *Kosovo*, Session 1999-2000, para 138. The government responded that it, 'is … satisfied that it [the war in Kosovo] was legally justified'. Fourth Report from the Foreign Affairs Committee, Session 1999-2000, *Kosovo*, Response of the Secretary of State for Foreign and Commonwealth Affairs, August 2000, p8.

55 Tony Blair, 'Doctrine of the International Community', Economic Club, Chicago, 24 April 1999: 'We are all internationalists now, whether we like it or not … We cannot turn our backs on conflicts and the violation of human rights within other countries if we want still to be secure … We are witnessing the beginnings of a new doctrine of international community … the principle of non-interference must be qualified in important respects.'

56 *Human Rights*, FCO Annual Report 2001 (London, The Stationery Office Ltd, 2001), p138.

57 Furthermore, as Lord Wright notes in his letter to *The Times*: 'There is no doubt that these discoveries [of mass graves] apparently of Iraqis slaughtered by Saddam Hussein's regime shortly after the 1991 Gulf War, add further confirmation, if confirmation were needed, of the appalling nature of Saddam Hussein's tyranny, and might well be argued to be justification for taking action against Iraq at that time. But they do not, in my view, affect the repeated claims of the British Government that the sole aim of the present coalition against Iraq was to remove Iraq's weapons of mass destruction – none of which have been found.' Patrick Wright, Head of HM Diplomatic Service 1986-91, House of Lords.

58 'There is a subtle interplay of politics that renders any demand for "unambiguous authorisation" unrealistic.' Anthony D'Amato, 'Israel's Airstrike on the Iraqi Nuclear Reactor' 77 AJIL 584, 586.

59 India argued that it was enforcing UN resolutions against colonialism. A draft resolution complaining of Indian aggression and demanding Indian withdrawal was vetoed by the Soviet Union, and another rejecting the Portuguese complaint failed to pass. 'In these circumstances, Council silence suggests implied disapproval and not authorisation.' Quincy Wright, 'The Goa Incident' 56 AJIL 617, 629.

60 The US argued that they had implied Security Council authorisation to interdict ships en route to Cuba on the basis that the Council had not voted on a Soviet resolution disapproving the US action and had encouraged a negotiated settlement. However, the Security Council also refrained from acting on a US draft resolution that would have expressed approval of US action.

61 This action was based on S/RES/688 (1991), not passed under Chapter VII, calling on Iraq to end its repression of its civilian population. It was passed ten votes to three (Cuba,

Yemen, Zimbabwe) with two abstentions (China, India). The Secretary General criticised the coalition's action saying that Iraq's consent was necessary for such consent to be legal (*Keesing's Record of World Events* (1991), p38126).
62 This action was based on the following resolutions, all taken under Chapter VII: S/RES/1160 (1998) noting a threat to international peace and security; S/RES/1199 (1998) expressing alarm 'at the impending humanitarian catastrophe'; S/RES/1203 (1998) finding a threat to international peace and security arising from the situation in Kosovo. A draft resolution condemning NATO action was rejected 12 votes to three (Russian Federation, FRY, Namibia). Belgium stated before the ICJ that: 'as regards the intervention … Belgium takes the view that the Security Council's resolutions … provide an unchallengeable basis for the armed intervention.' *Serbia and Montenegro v Belgium*, Request for Provisional Measures, Oral Pleadings, 2 June 1999.
63 Jules Lobel and Micheal Ratner, 'Bypassing the Security Council: Ambiguous Authorisations to Use Force: Ceasefires and the Iraqi Inspection Regime', 93 AJIL 124, 133.
64 *Columbia v Peru (Asylum Case)* (1950) ICJ Reports 266, 276-277.
65 Lobel and Ratner, n63 above.
66 Furthermore, as Christine Gray points out: 'there is a serious risk that the Security Council will become reluctant to pass resolutions under Chapter VII condemning state action if there is a possibility that such resolutions might be claimed as implied justification for some regional or unilateral use of force.' *International Law and the Use of Force* (Oxford, Oxford University Press, 2000), p195.
67 Articles 33, 41, 42 UN Charter (1945).
68 eg the US used this argument to justify their blockade on Cuba. Abram Chayes, 'Law and the Quarantine of Cuba', 41 *Foreign Affairs* 550, 556. D'Amato takes the argument further and argues that implicit support can even be derived from a Security Council resolution condemning an action so long as it does not impose sanctions: 'It is often politically expedient for the community to condemn a forceful initiative in explicit terms, yet approve of it in fact by stopping short of reprisals against the initiator.' Anthony D'Amato, *International Law: Process and Prospect* (New York, Transnational Publishers, 1987), p78.
69 n2 above.
70 'Of course we want a second resolution and there is only one set of circumstances in which I've said that we would move without one … that is the circumstances where the U.N. inspectors say he's not cooperating and he's in breach of the resolution that was passed in November but the U.N., because someone, say, unreasonably exercises their veto and blocks a new resolution [sic].' Tony Blair, BBC 'Breakfast with Frost', 26 January 2003.
71 Julius Stone, *Aggression and World Order* (London, Stevens, 1958), p96: 'any implied prohibition on Members to use force seems conditioned on the assumption that effective collective measures can be taken under the Charter to bring about adjustment or settlement "in conformity with the principles of justice and international law." It is certainly not self-evident what obligations (if any) are imported where *no* such effective collective measures are available for the remedy of just grievances.' For the opposite view, see Ian Brownlie, 'Thoughts on Kind-Hearted Gunmen' in Lillich (ed), *Humanitarian Intervention and the United Nations* (Charlottesville, University Press of Virginia, 1973), pp139, 145.
72 'The Prime Minister's assertion that in certain circumstances a veto becomes "unreasonable" and may be disregarded has no basis in International Law.' Bernitz et al, n3 above.
73 Rabinder Singh, Legal Briefing Given to MPs, 12 March 2003.
74 The Security Council diplomatic convention is to authorise force using one of the following phrases: 'all necessary means' S/RES/678 (1990), S/RES/794 (1992), S/RES/940 (1994), S/RES/929 (1994); 'all measures necessary' S/RES/770 (1993); and 'all necessary measures' S/RES/1264 (1999).
75 Lobel and Ratner, n63 above.
76 US/UK Draft Security Council Resolution, leaked to the *Financial Times*, 2 October 2002. It was circulated to other Security Council permanent members but was never formally tabled.
77 Ambassador John Negroponte, statement to Security Council, 8 November 2002; Ambassador Sir Jeremy Greenstock, statement to the Security Council, 8 November 2002;

Joint statement by China, Russia and France, 8 November 2002.
78 n74 above.
79 Whether or not to disclose the opinions of the Law Officers is a matter of discretion on the part of the government. There is no obligation to divulge such advice as to do so might inhibit the frankness and candour with which the advice was given, or cause a Law Officer to be criticised for a policy for which the Minister is rightly responsible (see John Ll J Edwards, *The Law Officers of the Crown: a study of the offices of the Attorney General and the Solicitor General, with an account of the office of the Director of Public Prosecutions in England* (London, Sweet & Maxwell, 1964).
80 n2 above.
81 Letter to the author from the Attorney-General Lord Goldsmith QC, 21 May 2001.
82 George Bush (Senior) and Lieutenant General Brent Snowcroft, *A World Transformed* (New York, Knopf, 1998).
83 General Sir Peter De La Billiere, *Storm Command* (London, Harper Collins, 1995), p304.
84 'Our mandate from the United Nations was to expel the Iraqis from Kuwait, not to bring down the Iraqi regime … We had gone to war to uphold international law. To go further than our mandate would have been, arguably, to break international law.' John Major, speaking at Texas A&M University 10th Anniversary celebrations of the liberation of Kuwait, 23 February 2001. See also the testimony of Assistant Secretary of State John Kelley and Assistant Secretary of Defence Henry Rowen before the Europe and Middle East Sub-Committee of the House Comm. on Foreign Affairs, *Federal News Service*, 26 June 1991, p151, available in LEXIS news library, Fednew File, cited in Lobel and Ratner, n63 above, at n61. This proposition has also been recognised by the current Foreign Secretary: 'the reason the United States did not continue on to Baghdad was because the United States and the other coalition allies felt they did not have a legal mandate for this; the legal mandate they had was to free Kuwait and then to deal with WMD, not to take over the state of Iraq.' Jack Straw, evidence to the Foreign Affairs Committee, 4 March 2003.
85 n30 above. It is hard to see how a resolution passed 12 years ago can validate military action that was actively opposed and would have been vetoed by at least one, probably three, members of the permanent five in the Security Council, and whose legitimacy has been questioned by the Secretary General.
86 '[The Security Council] decides to remain seized of the matter and to take such further steps as may be required for the implementation of the present resolution and to secure peace and security in the area', S/RES/687 (1991). Rabinder Singh and Charlotte Kilroy, *In the Matter of the Potential Use of Armed Force by the U.K. Against Iraq*, Further Opinion for the Campaign for Nuclear Disarmament, 23 January 2003.
87 Hague Regulations 1907, Article 40. 'Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.'
88 Ceasefire is a term used by the UN. It is used interchangeably with armistice. Sydney D Bailey, *How Wars End* (Oxford, Clarendon Press, 1982), Vol 1; Yoram Dinstein, *War, Aggression and Self Defence* (Cambridge, Grotius, 1988), p48.
89 Richard R Baxter, 'Armistices and Other Forms of Suspension of Hostilities', Rec. des Cours, 149 (1976-I0) 355, 382; David Morris, 'From War to Peace: A Study of Ceasefire Agreements and the Evolving Role of the United Nations' (1996) 36 VJIL 802, 822-823; Christine Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force', 65 BYIL 135, 143; Lobel and Ratner, n63 above, 142.
90 S/RES 56 (1948).
91 Unified Command Report on the Neutral Nations Supervisory Commission in Korea, UN Doc A/3167 (1956) UNYB 129, 130.
92 It seems self-evident that a ceasefire that is negotiated, drafted and signed under the aegis of the UN will also be policed and enforced by the UN. This is consistent with the clear and consistent philosophy of the UN Charter that only the Security Council may authorise non-defence uses of force.
93 *International Bar News*, March 2003.
94 DR Thorpe, *Eden: The Life and Times of Anthony Eden First Earl of Avon 1897-1977* (London, Chatto & Windus, 2003), p541.
95 ibid, p402. Echoes of this sentiment can be heard in the words of Peter Riddell: 'Yes, Britain should be a candid friend of America. But candour should not require the

suppression of British interests when, occasionally, these clash with American interests.'
Times, 24 April 2003.
96 See the author's Denning Society Lecture 2001.
97 *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs*, n6 above, 97.
98 President Dwight Eisenhower, Farewell Address to the Nation, 17 January 1961.

Necessity and Detention: Internment under the Anti-Terrorism Crime and Security Act 2001

Eric Metcalfe

This paper reflects the work that the author is undertaking for JUSTICE in relation to the Anti-Terrorism Crime and Security Act 2001. It deals with the internment provisions in Part 4. Later contributions will cover the role of special advocates before the Special Immigration Appeals Commission and JUSTICE's response to the Home Office consultation paper on counter-terrorism policy.

Introduction

In his foreword to the recent Home Office discussion paper on counter-terrorism,[1] the Home Secretary David Blunkett recalls Abraham Lincoln's suspension of habeas corpus during the American Civil War as an example of how extreme circumstances have forced democratic governments 'to strike a balance between the powers of the state and the rights of the individual'. Responding to criticism of the suspension in 1861, President Lincoln famously asked: 'are all the laws but one to go unexecuted, and the government itself go to pieces, lest that one be violated?'.[2] The Home Secretary too has voiced exasperation at criticism (and critics) of his measures,[3] and the consultation paper is essentially a spirited defence of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA). In particular, Mr Blunkett is keen to justify Part 4 of the ATCSA that permits him to detain indefinitely without trial those foreign nationals whom he suspects of being international terrorists – a set of provisions that have required the United Kingdom to derogate from Article 5(1) (the right to liberty) of the European Convention on Human Rights 1950 (ECHR).

But Lincoln's suspension of habeas seems a less than auspicious example for a Home Secretary to cite in defence of his own emergency measures. In 1866, the US Supreme Court held that Lincoln had gone too far.[4] Suspension of such a fundamental right, the court ruled, could only be permitted where actually necessary, ie in those places where 'the courts and civil authorities are overthrown'.[5] Accordingly, the privilege of the writ of habeas corpus could not be suspended in any state 'where the courts are open and their process unobstructed'.[6] As Justice Davis remarked: 'No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of

[the Bill of Rights] provisions can be suspended during any of the great exigencies of government'.[7]

The House of Lords has yet to rule on whether the government's derogation from Article 5 ECHR for the purpose of interning foreign terrorist suspects under Part 4 is lawful.[8] But a committee of Privy Counsellors appointed by the Home Secretary to review the ATCSA has already recommended that Part 4 be 'replaced as a matter of urgency'.[9] According to one of its members, the former law lord Lord Browne-Wilkinson, the committee thought that indefinite detention under Part 4 'was not a tolerable system in a civilised community'.[10] It was the committee's criticism, together with the fact that Part 4 is subject to annual renewal by Parliament and that the Act itself is due to lapse in November 2006, that prompted the government to bring forth the latest consultation paper. The Home Office paper, while dismissive of the critical parts of the committee's report, has nonetheless invited a broader public debate on counter-terrorism measures.

Whether that debate will be a genuinely informed one, though, is another matter. The decision to derogate from the ECHR in November 2001, the specific decisions to detain 16 people as suspected terrorists over the past two years, and the ongoing defence of Part 4 are all based – apparently to a significant extent[11] – on material that cannot be disclosed publicly for reasons of national security. It seems ironic, then, that the subtitle of the discussion paper is 'Balancing Liberty and Security in an Open Society' – the premise of an open society, according to Popper's *locus classicus,* being one in which its members are able to know the reasons for any governmental decision and assess its merits for themselves.[12] Whether democratic deliberation is possible where public policy is justified by reference to secret evidence remains to be seen.

Bearing these limitations in mind, this paper examines the government's continued defence of Part 4 of the ATCSA, including (i) the derogation from the ECHR; (ii) the framework of Part 4 itself, including the use of immigration law powers to detain terrorist suspects rather than criminal law; (iii) difficulties prosecuting terrorist offences under existing criminal law; and (iv) alternatives to Part 4, including those suggested by the Privy Counsellors' Review Committee.

A 'public emergency threatening the life of the nation'

The idea that rights can be abridged in times of emergency is undoubtedly controversial, but it has a long history.[13] The power to suspend habeas corpus under the US Constitution in 'cases of rebellion or invasion' was the first positive provision in relation to civil and political rights,[14] but the general concept of

formal emergency powers regulated by law derives from the office of dictator *rei gerendae causa* during the Roman republic[15] – the appointment of a military ruler in times of crisis for a maximum of six months or for the duration of the emergency, whichever was shorter.[16] The practice of allowing derogations from basic rights is reflected in both national constitutions and international human rights instruments[17] – from the International Covenant on Civil and Political Rights[18] to the infamous Article 48 of the Weimar Constitution.19 Article 15(1) ECHR provides:[20]

> *In time of war or other public emergency threatening the life of the nation any [state party] may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*

At first glance, the idea of an emergency 'threatening the life of the nation' might appear to set the threshold for derogation somewhat higher than a terrorist threat. On its face, even a serious terrorist attack involving major loss of life would not seem to pose a risk to the survival of the state itself, at least not in the same way as we might think of wars and rebellions as doing so. What counts, though, as an 'emergency threatening the life of the nation' has been interpreted by the European Court of Human Rights as being 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is part'.[21] Past instances of emergencies accepted by the court have included 'PKK terrorist activity in South-East Turkey' in 1990,[22] and the situation in Northern Ireland during both 1971[23] and 1988.[24] Indeed, a fresh derogation by the United Kingdom in 1989[25] in respect of the Prevention of Terrorism (Temporary Provisions) Act 1989 was only ended with the coming into force of the Terrorism Act 2000. Although the court must be satisfied that the conditions for a derogation exist, it has held that states parties enjoy a 'margin of appreciation' when declaring the existence of a state of emergency, on the basis that they are 'in principle better placed' to decide such matters 'than [an] international judge'.[26]

The state of emergency justifying the current derogation was described in the schedule to the Human Rights Act 1998 (Designated Derogation) Order 2001 as follows:[27]

> *The terrorist attacks in New York, Washington, D.C. and Pennsylvania on 11th September 2001 resulted in several thousand deaths, including many British victims and others from 70 different countries … The threat from international terrorism is a continuing one … There exists a terrorist threat*

> *to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom. As a result, a public emergency, within the meaning of Article 15(1) of the [ECHR], exists in the United Kingdom.*

However, using the horrific events of 11 September to justify a state of emergency in the United Kingdom seems problematic in at least two ways. The first point is obvious enough: although 67 British nationals were killed in the attack on the World Trade Centre,[28] the attacks themselves were restricted to US targets. In so far as the attacks disclosed a continuing threat, then, it was not obvious that this extended to the United Kingdom in its own right. That no other European country has seen fit to derogate from the ECHR in the wake of 11 September would seem to strengthen this doubt. In proceedings before the Special Immigration Appeals Commission (SIAC), however, the government maintained that no other European country faces the same risk as the United Kingdom, and the Commission accepted that the evidence showed that 'the United Kingdom is a prime target, second only to the United States of America'.[29]

The second problem is that, while the scale of the attacks on 11 September was far beyond what might have been expected, the threat itself was not a new one. Before September 2001, Al Qaeda had been publicly linked to the attack on the USS Cole in Yemen in October 2000, the bombing of US embassies in Kenya and Tanzania in August 1998, and the 1993 bombing of the World Trade Centre, among others. Nor would one assume that the presence of foreign terrorist suspects in the United Kingdom was somehow a sudden, post-11 September discovery. However serious the threat posed by such suspects might continue to be, therefore, it seems doubtful that it was properly an *emergent* one. As the Director General of the Security Service, Eliza Manningham-Buller acknowledged, '[the] level of threat has been constant for several years but the scale of the problem has become more apparent as the amount of intelligence collected and shared has increased'.[30] Conversely, if the threat of terrorism *was* emergent in late 2001, then the question becomes whether it can still be so described over two years later.

Whatever doubts one might have as to its justification, though, it seems likely as a matter of law that the European Court of Human Rights would accept the UK government's claim that the threat of terrorism in late 2001 justified the

recognition of a 'public emergency threatening the life of the nation' within the meaning of Article 15(1). Indeed, the existence of an emergency has thus far been upheld by SIAC and the Court of Appeal.[31] Whether, though, the Strasbourg Court would also accept that the specific measures taken by the United Kingdom under the derogation were 'strictly required by the exigencies of the situation' or whether it accepts that the conditions for the emergency still obtain over two years later are – as we shall see – different matters altogether. In particular, the government's claim that the terrorist threat comes chiefly from foreign suspects, and not UK nationals, seems open to question.

'Measures strictly required by the exigencies of the emergency'

At first glance, the specific measures taken by the United Kingdom under its derogation appear relatively limited. The key provisions, contained in Part 4 of the ATCSA, are ss21 and 23. First, s21(1) provides that the Secretary of State may certify an individual where he reasonably suspects that person to be a terrorist[32] and a threat to the national security of the United Kingdom. Secondly, s23 provides that someone certified as a suspected international terrorist may be detained under the Immigration Act 1971, 'despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely)'.[33] This reference to immigration detention highlights what is surely the most unusual aspect of the United Kingdom's counter-terrorism measures post-11 September: provision for the detention of terrorist suspects is achieved not by way of a separate administrative regime created de novo, but by simply withdrawing any right they may have as foreign nationals to remain in the United Kingdom. This, in turn, triggers the standard powers of the Home Secretary to detain them pending their removal. Similarly, the extension of immigration powers to detain terrorist suspects means that only foreign nationals, and not UK nationals, are subject to the provisions of Part 4.

The government's decision to use immigration powers in this way has much to do with the interrelationship between Article 3 (the right to be free from torture, inhuman or degrading treatment) and Article 5 (the right to liberty) of the ECHR as they apply to immigration removal. On the one hand, the European Court of Human Rights has held that Article 3 not only prohibits torture or inhuman treatment within a state's own territory but also prohibits states removing persons to another state in cases where there is a real risk that they would be subject to similar ill-treatment.[34] As such, there may be cases where a person has no right to remain in the United Kingdom (such as a failed asylum-seeker) and yet it would be unlawful for the United Kingdom to remove them, because they are likely to be subject to torture if returned to their home country. The right to be free from torture and ill-treatment under Article 3 is an absolute right and, as

such, the United Kingdom cannot derogate from it even in times of emergency.

On the other hand, the general right to liberty under Article 5 ECHR is subject to various limitations, including Article 5(1)(f) which provides that detention for the purposes of deportation or extradition is a legitimate restriction on liberty where provided by law. In *Chahal v United Kingdom*,[35] the Strasbourg Court considered the application of a Sikh activist detained under the Immigration Act 1971 pending his deportation. In respect of the deportation order, the court held it would be unlawful for the United Kingdom to deport the applicant as there was a real risk of ill-treatment contrary to Article 3 if he were to be returned to India.[36] In respect of his detention pending deportation, the court held that detention under the 1971 Act is:[37]

> *only justified for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5(1)(f).*

The net effect of *Chahal* is that it will be contrary to Article 5 to detain someone in circumstances where they cannot be removed. Note that this includes not only cases where removal would breach Article 3 but also those cases where removal would be lawful but cannot be effected for other reasons, for example there exists no practicable route for a person's return.[38] Accordingly, the government has sought to derogate from the ECHR in the following terms:[39]

> *The Government has considered whether the exercise of the extended power to detain contained in the [ATCSA] may be inconsistent with the obligations under Article 5(1) of the Convention … [T]here may be cases where, notwithstanding a continuing intention to remove or deport a person who is being detained, it is not possible to say that 'action is being taken with a view to deportation' within the meaning of Article 5(1)(f) as interpreted by the [Strasbourg] Court in the Chahal case. To the extent, therefore, that the exercise of the extended power may be inconsistent with the United Kingdom's obligations under Article 5(1), the Government has decided to avail itself of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice.*

The derogation order also notes the difficulty that 'it may not be possible to prosecute [terrorist suspects] for a criminal offence given the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required'.[40] We will consider the adequacy of the criminal law to cope with terrorist offences under a separate heading below. But the 'necessity' of extending immigration powers for this purpose appears

problematic in at least two other ways. First, if the justification for detention is to prevent terrorist suspects from committing acts of terrorism, then it seems surprising that it remains 'open to a detainee to end his detention at any time by agreeing to leave the United Kingdom'.[41] Secondly, it has been argued that the scheme under Part 4 is discriminatory, on the basis that only foreign terrorist suspects are subject to detention: terrorist suspects who are UK nationals are outwith the scope of the ATCSA.

The first point is not an academic one. Two of the 16 persons certified by the Home Secretary under s21 of the ATCSA have since left the United Kingdom voluntarily, for France and Morocco respectively.[42] Taking the government at its word, if the evidence against an individual was sufficiently serious to warrant their detention on an indefinite basis as a suspected terrorist and a threat to national security, how is the threat to the United Kingdom ameliorated by that person's removal to another country? The government's position would appear to be that removal would be sufficiently disruptive to terrorists' ability to plan attacks in the United Kingdom itself.[43] However, while removal would undoubtedly be disruptive, it seems odd for the government to assert that this alone would reduce the risk to a sufficient degree in each and every case, given the lack of any kind of formal assessment procedure in the ATCSA framework. If the threat posed to the United Kingdom by an extensive system of Al Qaeda training camps in Afghanistan was sufficient to justify UK participation in the invasion of that country in October 2001, then it seems implausible to suggest that removal of individual terrorist suspects will always effectively remove the threat to the national security of the United Kingdom. As the Privy Counsellors' Review Committee noted:[44]

> *Seeking to deport terrorist suspects does not seem to us to be a satisfactory response given the risk of exporting terrorism. If people here in the UK are contributing to the terrorist effort here or abroad, then 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.*

Conversely, if the threat posed by foreign terrorist suspects is so weak that it would be sufficiently disrupted by mere removal in all cases, then this tends to suggest that other measures short of indefinite detention may be as effective in combating the threat in the United Kingdom. For instance, one objection raised by the Home Office to less restrictive measures suggested by the Privy Counsellors' Review, such as electronic tagging, is that it would not prevent terrorist suspects from using telephones or computers.[45] It is difficult to take this

kind of objection seriously, however, if the Home Office is prepared to allow the voluntary removal of terrorist suspects to their home country or a safe third country where their access to telephones and computers, etc, would presumably be unimpeded and unmonitored.

The second point is that subjecting only foreign terrorist suspects to indefinite detention under Part 4 fails to treat like cases alike and thereby undermines the government's case that detention is strictly necessary to combat terrorism. In other words, if British suspects pose the same threat as foreign suspects, and the government does not consider it necessary to detain British suspects, then it becomes impossible to see how the detention of only foreign suspects can be justified as 'strictly necessary'. Indeed, it was on this point that SIAC found the derogation in respect of Part 4 of the ATCSA to breach Article 14 ECHR as discriminatory on the basis of national origin:[46]

> *If there is to be an effective derogation from the right to liberty enshrined in Article 5 in respect of suspected international terrorists – and we can see powerful arguments in favour of such a derogation – the derogation ought rationally to extend to all irremovable suspected international terrorists. It would properly be confined to the alien section of the population only if, as the Attorney General contends the threat stems exclusively or almost exclusively from that alien section … [95] But the evidence before us demonstrates beyond any argument that the threat is not so confined. There are many British nationals already identified – mostly in detention abroad – who fall within the definition of 'suspected international terrorists', and it was clear from the submissions made to us that in the opinion of the [Secretary of State] there are others at liberty in the United Kingdom who could be similarly defined.*

However, the Court of Appeal upheld the derogation as lawful, on the basis that the different degree of legal control that foreign nationals are subject to was a rational distinction for distinguishing the treatment of foreign terrorists suspects from that of suspected terrorists who are British nationals.[47] As the Chief Justice found:[48]

> *As the [detainees] accept, the consequences of their approach is that because of the requirement not to discriminate, the Secretary of State would, presumably, have to decide on more extensive action, which applied to both nationals and non-nationals, than he would otherwise have thought necessary. Such a result would not promote human rights, it would achieve the opposite result. There would be an additional intrusion into the rights of nationals so that their position would be the same as non-nationals.*

The court's logic has a certain reductive charm. Strictly speaking, it cannot be thought disproportionate to detain a smaller number, for example 50 suspects, when you could – in principle – detain a larger number, for example 100 suspects. The difficulty with that reasoning is that, if one agrees that it is *not* necessary to detain 50 suspects and it is conceded that they pose the same risk as 50 who *are* detained, then that invites the conclusion that it was not strictly necessary to detain the original 50. For his part, the Home Secretary does not concede that UK terrorist suspects pose the same risk,[49] but it appears to be one of SIAC's findings of fact and not in itself disputed by the Court of Appeal. What the House of Lords or the Court in Strasbourg will make of this point remains uncertain. The underlying fear is that, if pushed by a higher court to accept SIAC's finding, the Home Secretary would be more likely to extend the scope of detention than reduce it.

Problems with prosecuting terrorism offences under existing criminal law

Another plank of the argument supporting the necessity of detention is the claim that 'it has not been possible to convict [those detained under Part 4 of the ATCSA] of criminal offences'.[50] In order to show that indefinite detention is needed, it has first to be shown why the ordinary processes of the criminal law – by which a person suspected of involvement in terrorism would be charged with an applicable criminal offence – are somehow inadequate to the task. As the Home Office minister Lord Rooker stated during the ATCSA's passage in the House of Lords, the powers under Part 4 would only be used 'where no other response is possible' and 'we shall prosecute if there is admissible evidence'.[51] But as the Privy Counsellors' Review Committee noted:[52]

> *The existing range of terrorism-related offences is broad. It has not been represented to us that it has been impossible to prosecute a terrorist suspect because of a lack of available offences. The inhibiting factor in the cases to which the Part 4 procedure is applied seems to be that intelligence on which suspicion of involvement in international terrorism is based*
>
> *a. would be inadmissible in court; or*
>
> *b. the authorities would not be prepared to make it available in open court, for fear of compromising their sources or methods.*

Problems with bringing prosecution for terrorism offences are not new. The 1996 review of counter-terrorism legislation by the former law lord Lord Lloyd of Berwick identified inter alia a particular problem with the ban on evidence obtained by way of intercepted communications ('intercept evidence'), and recommended that it be

lifted.[53] Despite this, the ban was confirmed by the passing of s17(1) of the Regulation of Investigatory Powers Act 2000. Speaking during the debates on the 2000 Act, Lord Lloyd referred to the 'idiocy' of the clause:[54]

> *We have here a valuable source of evidence to convict criminals. It is especially valuable for convicting terrorist offenders because in cases involving terrorist crime it is very difficult to get any other evidence which can be adduced in court, for reasons with which we are all familiar. We know who the terrorists are, but we exclude the only evidence which has any chance of getting them convicted; and we are the only country in the world to do so.*

The concern of the police and security services appears to be that disclosure of such evidence would allow suspects to infer how such surveillance is conducted, leading to a loss of useful intelligence. However, the United Kingdom's self-imposed ban on the use of intercept evidence is anomalous within the common law world: the United States, Canada, Australia, South Africa, and New Zealand all allow such evidence to be used in criminal proceedings.[55] Both Lord Carlile of Berriew QC (the independent statutory reviewer of Part 4 of the ATCSA) and the Privy Counsellors' Review Committee have recommended that the ban be lifted,[56] and the Home Secretary has indicated that the issue is under review.[57]

More generally, the Privy Counsellors' Review Committee noted a number of additional measures that could be introduced to facilitate prosecution of terrorism offences within the mainstream criminal justice system, including recognising terrorism as an aggravating factor in sentencing,[58] the use of special security-cleared judges to assemble evidence in preliminary proceedings,[59] the adoption of more structured disclosure rules,[60] and an increased role for the courts in plea bargaining.[61]

Prior to the release of the consultation paper in late February 2004, the Home Secretary was reported as considering a number of fresh measures as part of a new counter-terrorism framework, including lowering the standard of proof in criminal cases, and the use of closed criminal proceedings before a security-vetted judge.[62] While these proposals did not appear in the final consultation paper, it suggested a corollary to the principle identified by the Privy Counsellors' Review Committee that terrorism, as a crime, should be dealt with as far as possible by the ordinary criminal courts. The basis for this would seem to be the idea that the same standards and procedures should apply to all, so far as possible. In light of the floated proposals, the corollary is also worth stressing: that the ordinary criminal law should not be watered down or standards lowered for the sake of prosecuting more cases of terrorism in the ordinary courts. This reflects the

general principle in relation to emergency measures as found in *Ex p Milligan*: there should be no recourse to exceptional measures or abridgment of ordinary procedures while the 'courts are open and their process unobstructed'.

Alternatives to indefinite detention without trial

While it noted a number of ways in which terrorist cases could be brought within the ordinary criminal justice system, the Privy Counsellors' Review Committee also hinted at the possibility that some exceptional measures may yet be necessary to cope with the threat of terrorism. Commenting during the Lords debate on the Privy Counsellors' Committee Report, Lord Browne-Wilkinson noted the absence of any Home Office consideration of alternatives to detention:[63]

> *One of the significant things that struck us during our inquiry was that, apparently, no steps, or very limited steps, were being taken to examine alternatives to Part 4. It was just allowed to drag on. The ideas in our report – good, bad, or indifferent as you may think them to be – were self-generated ideas based on evidence brought before us. They were not matters under consideration by the Home Office, and for that reason if for no other I believe that the committee has done valuable work;*

The Committee referred to the general unacceptability of indefinite detention without trial under Part 4 and noted that the government should seek to replace it with measures that 'deal with all terrorism, whatever its origin or the nationality of its suspected perpetrators' and 'not require a derogation from the [ECHR]'.[64] Specifically it suggested that, were exceptional measures strictly necessary:[65]

> *it would be less damaging to an individual's civil liberties to impose restrictions on:*
>
> *a. the suspect's freedom of movement (e.g., curfews, tagging, daily reporting to a police station);*
>
> *b. the suspect's ability to use financial services, communicate or associate freely (e.g., requiring them to use only certain specified phones or bank or internet accounts, which might be monitored); subject to the proviso that if the terms of the order were broken, custodial detention would follow.*

These measures would certainly be less restrictive means of achieving the same end as indefinite detention and, in light of the Home Office's willingness to allow

individuals voluntarily to leave the United Kingdom without restriction, likely as effective. However, while the goal of not derogating from the ECHR is an admirable one, it seems unlikely that one could subject individuals not charged with any criminal offence to such a range of restrictions on liberty and not also derogate from Article 5 to the extent necessary. Indeed, there is a sound argument that, whenever exceptional measures are to be adopted that interfere with basic rights, it would be better to seek a derogation if only to mark out that such measures are not to be countenanced except in an emergency.

Conclusion

Passed in the immediate wake of 11 September, the ATCSA represented a significant investment of public trust in the decisions of government concerning matters of national security. Whatever view one takes concerning the events of the intervening two years, however, it does not seem unfair to say that there has been a marked increase in public scepticism of governmental decision-making, especially where it is based on intelligence. It seems appropriate, then, to consider the comments of the independent statutory reviewer of Part 4, Lord Carlile of Berriew QC, who cautioned: 'the pursuit of intelligence is real and continuing. By its nature it is sometimes wrong; but often it is right. We mock it at our literal peril.'[66] But while it is appropriate to recognise that democratically-elected governments are typically best-placed in times of emergency – both constitutionally and practically – to strike the correct balance between human rights and national security, this does not mean that they are infallible. It is entirely proper that Parliament and the courts should continue to second-guess the government in relation to counter-terrorism policy, and critically analyse whatever flaws its policy may possess. Only in that way, and through the scrupulous observance of individual rights, can the public's trust be secured. As the US Supreme Court in *Milligan* once also cautioned: 'it could be well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation'.[67]

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Notes

1 *Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society*, Cm 6147 (Home Office, February 2004).

2 Address to Joint Session of Congress, 4 July 1861. Lincoln was seeking Congressional approval to suspend the writ, his earlier attempt to do so by way of executive order having been ruled invalid by Chief Justice Taney (*Merryman v US* 17 F Cas 144 (1861)) on the basis that, under Article 1, s9 of the Constitution only Congress could suspend the writ 'when in cases of rebellion or invasion the public safety may require it'.

3 See eg Alan Travis, 'Blunkett drops plans to lower level of proof', *Guardian*, 26 February 2004: explaining the absence of fresh proposals in the consultation paper, the Home Secretary stated, 'I was aiming to start a debate, but putting forward some concrete suggestions only encouraged civil liberties groups and lawyers to come forward with their

bulldozer'.
4 *Ex p Milligan* 71 US 2 (1866).
5 Ibid, 126.
6 Ibid, 121. The court contrasted the situation in Indiana, a state loyal to the Union where 'Federal authority was always unopposed' (Ibid), against that in Virginia, 'where the national authority was overturned and the courts driven out' (127).
7 Ibid.
8 The matter is currently listed to be heard in October 2004.
9 Privy Counsellors Review Committee, *Anti-Terrorism Crime and Security Act 2001 Review: Report* (HC 100, 18 December 2004), para 205.
10 HL Debates, col 792, 4 March 2004.
11 See *A v Secretary of State for the Home Department* [2002] HRLR 45 at [14] per Collins J: 'It is obvious that the closed material is most relevant to the issue whether there is such an emergency'.
12 Popper, *The Open Society and Its Enemies* (5th ed, Princeton, Princeton University Press, 1971).
13 See eg *States of Emergency: Their Impact on Human Rights* (International Commission of Jurists, 1983).
14 Article 1, s9. Lincoln's first attempt to suspend habeas in 1860 was ruled invalid by the Chief Justice sitting as a Federal Circuit judge in *Ex p Merryman* 17 F Cas 144 (1861). While Lincoln ignored the ruling, he prevailed upon Congress to authorise its suspension in a special joint meeting. It was this suspension that was later found to be overly broad by the Supreme Court in *Ex p Milligan*.
15 Machiavelli was particularly impressed by the Roman office of dictator, on the basis that it was better to provide a formal office limited by law to cope with emergencies rather than wait until the time itself and exercise power in a wholly unregulated way: see eg *Discourses on Livy*, Bk 1, Ch 34 (trans by Henry Neville, 1772): '[I]n a Republic, it should never happen that it be governed by extraordinary methods. For although the extraordinary method would do well at that time, none the less the example does evil, for if a usage is established of breaking institutions for good objectives, then under that pretext they will be broken for evil ones. So that no Republic will be perfect, unless it has provided for everything with laws, and provided a remedy for every incident, and fixed the method of governing it. And therefore concluding I say, that those Republics which in urgent perils do not have resort either to a Dictatorship or a similar authority, will always be ruined in grave incidents.'
16 In 81 BC, Sulla appointed himself dictator *rei publicae constituendae causa* – an office with the same powers as the earlier office of dictator *rei gerendae causa*, except that the term was unlimited. Julius Caesar was appointed dictator *rei gerendae causa* for nine consecutive one-year terms, starting in 46 BC, before the Senate granted him the title dictator perpetuus.
17 See eg s4(2) of the Canadian Charter of Rights and Freedoms 1982; s37 of the Constitution of the Republic of South Africa 1996; Article 16 of the French Constitution of 4 October 1958; Articles 80a, 81 of the Basic Law for the Federal Republic of Germany 1949.
18 Article 4.
19 The Weimar Constitution 1919, Article 48 allowed the Reich President to take such measures necessary for the restoration of 'public order and security', including the power to 'temporarily suspend, wholly or in part, the basic rights in this Constitution'.
20 Emphasis added. The terms of Article 4(1) of the International Covenant on Civil and Political Rights 1966 follow the language of Article 15(1) ECHR very closely: 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation'.
21 See eg *Lawless v Ireland (No 3)* A 3 (1961) 1 EHRR 15 at [28].
22 *Aksoy v Turkey* (1996) 23 EHRR 553 at [31], [70].
23 *Ireland v UK* A 25 (1978) 2 EHRR 25 at [32], [205].
24 *Brannigan and McBride v UK* A 258-B (1993) 17 EHRR 539 at [12], [47].
25 The 1989 derogation is set out in Sch 3, Pt 1 to the Human Rights Act 1998. The derogation was in response to the finding of the Strasbourg Court in *Brogan v UK* A145-B (1988) 11 EHRR 117.
26 *Aksoy*, n22 above, at [68].

27 SI No 3644.
28 'British victims of September 11', *Guardian*, 10 September 2002.
29 *A,* n11 above, at [35].
30 Consultation paper, Pt 1, para 6.
31 See *A*, n11 above; *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2003] 2 WLR 564.
32 A 'terrorist' under Pt 4 is someone who is either involved in 'the commission, preparation or instigation of acts of international terrorism' (s21(2)(a)); a member of an international terrorist group (s21(2)(b)); or who 'has links with an international terrorist group' (s21(2)(c)). The meaning of 'terrorism' is taken from s1 of the Terrorism Act 2000. Section 21(1) also requires the Secretary of State reasonably to believe that the person's presence in the UK poses a risk to national security.
33 While s23 allows certified persons to be detained under the 1971 Act, it is s22 that enables the Secretary of State to make the relevant decisions that would normally trigger the use of detention powers.
34 See eg *Soering v UK* (1989) EHRR 439.
35 (1996) 23 EHRR 413.
36 Ibid at [107].
37 Ibid at [113].
38 See eg *Khadir v Secretary of State for the Home Department* [2003] EWCA Civ 475, [2003] INLR 426. Note also that the Home Office sometimes does not enforce removal to certain countries as a matter of general policy, eg Zimbabwe, notwithstanding decisions in particular cases that it would be safe for a particular person to return.
39 Human Rights Act 1998 (Designated Derogation) Order 2001, n27 above.
40 Ibid.
41 Ibid.
42 Report of Lord Carlile of Berriew QC, *Anti-Terrorism Crime and Security Act 2001 Part IV Section 28 Review 2003* (January 2004), para 96.
43 See *A v Secretary of State for the Home Department* [2002] EWCA Civ 1502, [2003] 2 WLR 564 at [43]: 'Mr Whalley, who has made a statement on behalf of the Secretary of State covering this point, contends that irrespective of whether nonnational suspected terrorists are detained or leave the country, the terrorist organization in the UK will be disrupted. He also relies on the fact that the detention or the deporting of nonnational suspected terrorists will indicate that this country is not a safe haven for terrorists.'

44 para 195. Emphasis in original.
45 See consultation paper, Pt 2, para 45: 'The government does not believe that tagging or the other measures suggested offer sufficient security to address the threat posed by international terrorists. Modern technology such as pay as you go mobiles, easy access to computers and other communications technology mean that tagging by itself would not prevent these individuals from involvement in terrorism and the Government cannot guarantee the success of such an approach.'
46 *A*, n11 above, at [94]-[95]. Emphasis added.
47 *A*, n 43 above, per Woolf CJ at [47]-[48]: 'there are objectively justifiable and relevant grounds which do not involve impermissible discrimination. The grounds are the fact that aliens who cannot be deported have, unlike nationals, no more right to remain, only a right not to be removed, which means legally they come into a different class than those who have a right of abode. [48] The class of aliens is in a different situation because when they can be deported to a country that will not torture them this will happen.'
48 Ibid at [49].
49 See consultation paper, Pt 1, para 7: 'International terrorists can be foreign nationals or British citizens. The Government's assessment in 2001 was that the threat came predominantly but not exclusively from foreign nationals.That remains the case.'
50 Blunkett, 'Defending the Democratic State and Maintaining Liberty – Two Sides of the Same Coin', Harvard University, Cambridge, MA, 8 March 2004.
51 HL Debates, col 509, 29 November 2001.
52 Para 207.
53 Lord Lloyd of Berwick, *Inquiry into Legislation against Terrorism*, Cm 3420 (30 October 1996).

54 HL Debates, cols 109-110, 19 June 2000.
55 See Lord Lloyd, ibid, col 106: 'evidence of telephone communications of that kind is admissible in court in every country in the world as I am aware. The countries I visited during my inquiry into terrorism – France, Germany, the United States and Canada – regard such evidence as indispensable. They were astonished to hear that we do not use it in this country.'
56 Para 208.
57 Consultation paper, Pt 2, para 35.
58 Paras 216-223.
59 Paras 224-235.
60 Paras 236-239.
61 Paras 240-243.
62 See eg 'Blunkett plans secret trials for terrorism', *Daily Telegraph*, 2 February 2004.
63 HL Debates, col 792, 4 March 2004.
64 Para 203.
65 Para 251.
66 JUSTICE Human Rights Law Conference, 17 October 2003.
67 n4 above, at 128. Also: 'by the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers, or the clamor of an excited people'.

Charting the New Territory of the European Union's Bill of Rights

Marilyn Goldberg

Marilyn Goldberg discusses its history, scope, content, effect, future and relationship with the European Convention on Human Rights.

Introduction

The European Charter of Fundamental Rights and Freedoms ('the Charter') is the first formal EU document to combine and declare all the values and fundamental rights to which EU citizens should be entitled – both economic and social as well as civil and political. Thus, the Charter raises issues that extend beyond legal technicalities and are intrinsically linked to the question of the role of the Union in the lives of its citizens.

The Charter has already achieved a status to which national courts and the judicial institutions of the Union give weight[1] even though it is not, as yet, legally binding. The increasing capacity of the Union's institutions to affect the human rights of its citizens[2] and their current lack of accountability have now surely made desirable the adoption of a binding catalogue of fundamental rights. Such a charter would significantly advance the protection of rights. Citizens of the Union, as well as member states, should be able to challenge the legality of acts of the EU institutions and bodies where they allege that their fundamental rights have been infringed.[3]

Historical background

The obligation to respect human rights is embedded in many constitutions of EU member states.[4] By contrast, the Community treaties in their original form contained no obligation or express requirement to observe human rights. Gradually, however, the European Community, and now the Union, have absorbed human rights into their laws and policies, both internal and external. The Treaty of Maastricht in 1992[5] first made provision for the concept of EU citizenship and established that the Union should 'respect fundamental rights, as guaranteed by the European Convention for the Protection of Fundamental Rights and Fundamental Freedoms … and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.[6] For the next decade, progress was made in developing the Union's human rights commitment, mainly in its external policies,[7] though they were also

incorporated within the Copenhagen criteria for enlargement of the Union in 1993.[8]

The desirability of creating a charter became apparent with the expansion of community or Union competences into new areas, such as the eastern enlargement by inclusion of the former Communist countries; the developing rhetoric of a 'peoples of Europe' and of European citizenship; as a means to underpin the European Court of Justice's (ECJ) existing human rights jurisprudence; and as a mechanism for providing a more effective check on the administrative and legislative activity of the Union. Expansion of the Union aside, the fact that the European Convention on Human Rights (ECHR) is regarded as an incomplete instrument (for example, it contains no general prohibition against discrimination, nor does it deal with social and economic rights) also prompted the European Union to establish a modern Charter of Fundamental Rights.

The origins of the Charter lie in a decision taken in 1999 by the European Council (the heads of all member states) in Cologne that the fundamental rights applicable at Union level should be consolidated in a Charter in order to make their overriding importance and relevance more visible to the Union's citizen. There was no decision on its precise status. The Charter was then drafted by a convention with a view to its incorporation within the Union's Constitution. The Parliament voted in favour of incorporation and joined the Commission in agreeing the draft before the European Council meeting in Nice in December 2000 where it was signed and proclaimed by all three bodies. The Council stalled on the question of its legal status by referring it for further discussion in the context of the future of the Union's Constitution. The Commission, however, was willing to accept its immediate effect and President Romano Prodi said, 'by proclaiming the Charter of Fundamental Rights, the European Union institutions have committed themselves to respecting the Charter in everything they do and in every policy they promote … The citizens of Europe can rely on the Commission to ensure that the Charter will be respected.'[9] The Parliament also accepted that the Charter was 'the law guiding the actions of the Assembly … the point of reference for all the Parliament acts which have a direct or indirect bearing on the lives of citizens throughout the Union'.[10] President Chirac, president of the Council, remarked with prescience that the Charter's 'full significance will become apparent in the future'.[11]

A convention on the future constitution of the Union was established and presented its results in July 2003.[12] The Charter of Fundamental Rights was incorporated into the Constitution as Part II of the document.[13] Its inclusion in the draft Constitution triggered heated discussions, which resulted in a certain

amount of redrafting. The whole idea of a written constitution is particularly alien to the United Kingdom which has always done without one while still retaining a strong tradition of civil individual liberties, although the Human Rights Act 1998 has now incorporated the ECHR into domestic law.[14] The United Kingdom was, therefore, suspicious of the whole drafting exercise. In addition, the United Kingdom and Ireland lobbied for amendment to the 'horizontal clauses' that relate to the breadth of the Charter's application. They also sought some guarantee that the inclusion of the Charter in the Constitution would not affect their national sovereignty, enlarge EU authority or erode the governing power of member states.

In the end, the Foreign Secretary felt confident enough to assert that the UK government would not oppose the Charter as drafted in the constitution and would wait and see what happened in negotiations. He announced to the House of Commons:

> *The Convention text makes clear … that the Charter 'does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution.' It therefore does not give any new powers to the EU. The Member States are affected only when they are implementing Union law. The Government will make a final decision on incorporation of the Charter into the draft Constitutional Treaty only in the light of the overall picture at the [Inter-governmental conference].*[15]

Acceptance of the Constitution, planned for April 2004, was stalled by what turned out to be wider issues relating to the weights of votes between members – a discussion in which the United Kingdom had little direct interest – and, in fact, the UK government's position appears to be a de facto acceptance of the Charter as drafted within the new Constitution if this can be agreed by all member states.

Scope

The Charter embraces the classical human rights of the ECHR as developed by the jurisprudence of the European Court of Human Rights (ECtHR) in Strasbourg. However, its scope is much wider. The Charter sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic and social rights as well as the right to good administration, and certain 'third generation' rights such as the rights to environmental and consumer protection applicable to the European citizens and all persons resident in the Union. As the European Parliament declared:

> *The Charter has, first of all, a catalogue of rights that stem from the competence of the European Union as laid down in the Treaties and as*

> *developed by the case law of the European Court of Justice in Luxembourg. Second, importantly, the Charter reaffirms the rights and principles resulting from the constitutional traditions and international treaty obligations common to Member States. Third, the Charter addresses modern scientific and technological developments. Fourth, the Charter fully reflects and respects the European social model.*[16]

It sets out in readable and accessible language a set of rights under the following six headings: dignity, freedoms, equality, solidarity, citizen's rights and justice. It is largely based on the various obligations that Member States had accepted in a range of international conventions including the ECHR, the Council of Europe's Social Charter and the European Community's Charter of Fundamental Social Rights of Workers.

Some member states were deeply uneasy about including many of what became the 'solidarity' rights in the Charter. The United Kingdom, especially, feared that these social rights such as the right to strike, the right to a job, the right of workers to be informed and consulted, and even 'the right to a free [job] placement service', would be a backdoor way of re-regulating its labour market. However, the United Kingdom felt it had safeguarded its position by ensuring that the Charter is stated only to be applicable to EU related matters and that it creates no new rights.[17] More broadly, some governments undoubtedly decided not to press for greater legal status for the Charter as a necessary compromise to ensure acceptance of these solidarity rights in the text.[18] Thus, there is an unavoidable element of ambiguity at the heart of the Charter which will have to be worked out in practice.

Beyond civil rights

The inclusion of social and economic rights in the Charter text posed severe problems for some member states. Social and economic rights are often not regarded as 'rights' at all, or at least not *fundamental* rights, but more as policies or programmes capable of progressive realisation which require a substantial investment of resources, the establishment of an effective infrastructure, and progressive taxation. In addition, there is a widespread refusal to believe that social and economic rights can be constitutionally protected as a matter of practice.

Both these arguments are oversimplified and fallacious. Categories of rights cannot logically or practically be separated or compartmentalised and are mutually dependent. Economic and social rights, such as those contained in the European Social Convention, are often envisaged as being justiciable and can be formulated in such a way as to be capable of protection through systems of

adjudication.[19] For example, Professor Keith Ewing[20] points out that 'the EC Treaty already includes (admittedly limited) provisions on fundamental social rights, most notably in Article 141 on equal pay'. He continues:

> *[I]t has never been suggested before that this right is non-justiciable, and the evidence would tend to suggest otherwise. Even if some social rights are non-justiciable this does not mean that all of them should be considered as non-enforceable. The right to organise, the right to bargain and the right to strike are self-evidently justiciable[21], and do not call on the governments to allocate resources for particular programmes.*

He argues that:

> *[E]ven substantive rights based on political programmes, such as social security, health care and housing can be seen as justiciable. The Courts could be asked not to determine what the budgets for these programmes should be, but to declare whether minimum standards are being met, and whether the rights in question are being allocated or applied on the basis of rules which can be rationally justified.*

Social rights have also inspired a significant number of EU directives[22] in a number of social fields. These have subsequently been transposed into the national laws of the member states and have, therefore, become justiciable before the national courts. These are to be regarded as an expression of the constitutional traditions common to the member states,[23] and are enforceable by the ECJ 'as general principles of Community law'.[24]

Those suspicious of the Charter were able to introduce a number of devices to limit its effect. First, each element of the Charter is traced back to its source in a set of 'explanations' designed to contain its impact within their existing scope. The Preamble to the Charter states that it 'will be interpreted by the courts of the Union and the Member States with due regard to the explanations', which are appended. Those provisions taken from the ECHR are specifically to be given the same 'meaning and scope'.[25] In addition, a provision has been specifically added to the earlier version for the purposes of the draft for the constitution to state that 'full account shall be taken of national laws and practices'.[26]

Second, the Charter, as proposed for the constitution, now makes a distinction between 'rights' and 'principles' – though without defining which of its provisions come under which heading. Principles must be given effect by the Union or by member states when implementing Union law and, by implication,

not otherwise.[27] They then become 'judicially cognisable' for the purposes of interpretation. The Convention Working Group attempted to clarify the issue by stating that:

> *Principles are different from subjective rights. They shall be observed …and may call for implementation through legislative or executive acts; accordingly, they become significant for the Court when such acts are interpreted or reviewed. This is consistent both with case law of the court of Justice (ECJ) and with the approach of the member states constitutional systems to 'principles' particularly in the field of social law.*[28]

Of major concern, however, is that the distinction between 'rights' and 'principles' as referred to in the Charter does not indicate on its face which provisions fall into which category. The distinction between 'rights' and 'principles' can be implied from the Preamble and Article 51(1) but there is no great conformity. Some provisions, for example, have been referred to as principles[29] in the Charter, such as Articles 1 (human dignity), 34(1) (social security and social assistance), 35 (healthcare), 36 (access to services of general economic interest), 37 (environmental protection) and 38 (consumer protection); whereas several of these provisions have been referred to by other sources as 'rights'. This drafting technique has given rise to legitimate doubts as to whether social rights might be ranked as principles and thus considered as not binding. It also prevents these provisions from serving as a point of reference in the interpretation of other primary and secondary law. It is designed to stop the ECJ embarking on a more active fundamental rights jurisprudence, notably in the field of social rights.[30]

The fact that not all EU member states recognise social rights as justiciable before their national jurisdictions is surely no reason to catalogue social rights as principles, as suggested by the Charter.[31] This result is clearly problematic and runs counter to the Charter's objective of making it more visible and accessible to the EU citizen. On the one hand, this amendment will inevitably change the contents of the Charter. On the other hand, the ECJ is also placed in an awkward position. When the ECJ decides for example to use Charter provisions as interpretative points of reference in its future jurisprudence, there will be expectations that it will treat these provisions as 'rights' in subsequent cases and use them in rulings on the legality of legal acts. If the ECJ, on the other hand, treats these provisions as 'principles' by emphasising that they need to be implemented by legal acts, it must, in future, not even explicitly refer to these provisions as points of reference in the interpretation of other norms.[32] For these reasons, the Charter should list those provisions that require subsequent implementation in order to confer legal rights more explicitly.

Finally, the general provisions in the Charter (also known as 'horizontal clauses') are aimed at clarifying the scope of the Charter and reassuring member states who fear that the Charter will reduce levels of national control over domestic policies. Article 51[33] states that the Charter does not enlarge EU authority or erode the governing power of member states. It expressly limits the Charter's application to the activities of the EU; states that it does not 'establish any new power or task' for the Union, and reasserts the European notion of 'subsidiarity' – a legal concept designed to preserve local and national decision-making competences within the European legal system.[34] Amendments introduced during the constitutional discussions provide that member states are 'merely' bound by national fundamental rights and international conventions such as the ECHR, and do not come under ECJ control in this remaining field of national activities.[35] By contrast, Article 53 preserves human rights and fundamental freedoms contained in the constitutions of member states.[36] These provisions in the Charter should comfort those member states that are against the incorporation of the Charter into the Draft Treaty establishing a Constitution for Europe. These provisions prevent EU 'mission creep' and fortify national sovereign powers.[37]

Status: legal effect

The Charter's current status is, at present, short of being legally binding and it is not, therefore, directly justiciable. However, its status as a solemn proclamation by the EU institutions means that it has already become an important reference document. It is respected by the EU institutions and is also invoked by both member states and citizens, in particular through petitions submitted to the European Parliament and complaints[38] lodged with the European Ombudsman. The Charter has also become the European Parliament's frame of reference. This can be seen most clearly in its annual report on fundamental rights. Since 2000, the provisions of the Charter have provided the basic framework for such reports.[39]

The Advocates General of the ECJ have referred on several occasions to the Charter in order to identify fundamental rights to be respected within the Community.[40] In the *Hautala* case, AG Léger described it as 'a source of guidance as to the true nature of the Community rules of positive law'.[41] The Court of First Instance has also on several occasions taken account of the Charter's rights.[42] However, the ECJ still considers the ECHR as its primary source of reference[43] and has yet to refer expressly to the Charter. It has not referred to the Charter at all in cases of some importance which have been regarded as victories for fundamental rights.[44] . The ECtHR, on the other hand, mentioned the Charter in the *Goodwin*[45] case where Judge Fischbach referred to it as 'a source of inspiration in the interpretation of the Convention'.

Even national courts,[46] including those in the United Kingdom, have cited or relied on the provisions in the Charter. In *R (Robertson) v Wakefield MDC*[47] a successful challenge was made to the legality of the sale of copies of the electoral register to commercial interests without seeking the consent of electors whose names appeared on the register. Maurice Kay J decided the case on the basis of Article 8 ECHR, but cited Article 8 of the Charter which confers the right to protection of personal data. The judge added, however, that he did not treat the Charter provision as 'a source of law in the strictest sense'. In a later case, *R (Howard League for Penal Reform) v Secretary of State for the Home Department (No 2)*,[48] Munby J repeated this formula but appears to have derived real assistance from a provision contained in the Charter. Munby J cited Article 3 ECHR, two Articles from the UN Convention on the Rights of the Child and Articles 24.1 and 24.2 of the Charter. He said:

> *The European Convention is, of course, now part of our domestic law by reason of the Human Rights Act 1998. Neither the UN Convention nor the European Charter is at present legally binding in our domestic law and they are therefore not sources of law in the strict sense. But both can, in my judgment, properly be consulted insofar as they proclaim, reaffirm or elucidate the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the European Convention.*[49]

AG Jacobs said before the House of Lords Select Committee on the European Union:

> *[E]ven though there may be some uncertainty about the Charter's precise status, it is clear that the Charter is being used as an authoritative source in identifying fundamental rights at the EU level and in domestic law. The Charter is not without present legal significance. Experience to date before the Community Courts shows that the Charter may help to identify those fundamental rights which form part of the general principles of law governing Union activity. But although the Charter may help to clarify the obligations of the institutions of the EU, it does not directly confer enforceable benefits on individuals.*[50]

The European courts will, presumably, continue to refer to the Charter as a form of protection of human rights, which they characterise as general principles of EC law. Reference to it has become routine. It is, indeed, difficult to see how the European courts could legitimately decide that the old approach of construing fundamental rights as cases come and go is to be continued *without* looking at, and integrating the Charter into, the protection of fundamental rights.[51]

Those who argue against a binding Charter point to the subtle and incremental effect that 'soft law' or non-justiciable human rights standards can have on the development of EU law and EU competences. The enormous influence of the Universal Declaration of Human Rights in shaping the development of the customary international law of human rights, and in forming the basis for binding human rights conventions, provides the most obvious example. A largely declaratory Charter in the European Union, they argue, could increase awareness of human rights within the Union, enhance their status in the ECJ, and represent the first step towards a more binding Charter and EU accession to the ECHR. Some even fear that incorporating the Charter into the Treaty and giving it 'full legal status' would risk altering the balance of responsibilities between European institutions and national governments. There are fears that the Charter will reduce levels of national control over domestic policies.

It may well be that the Charter will alter substantially the respective powers of the European Union and its member states. But the crucial question about the Charter to keep in mind is *how far it can achieve the objective of any human rights instrument, and the objective cited in the Preamble of the Charter: enhancing the protection of fundamental rights*. Surely, this can best be done by making it legally binding. Expanding the role of national parliaments in the activities of the European Union, in particular by ensuring scrutiny of government action in the Council, including monitoring respect for the principles of subsidiarity and proportionality and by allowing national parliaments to scrutinise and formulate their own position on all proposals for EU legislative measures and actions,[52] should appease fears that incorporation of the Charter into the Treaty would create legal uncertainty and risk altering the balance of responsibilities between European institutions and national governments.

A legally binding Charter with constitutional status should be a cornerstone of the European Constitutional Treaty. The added force that would be given to the Charter by incorporation would help to entrench a culture of rights within the Union. It would also encourage the creative application of human rights provisions in the ECJ, which has until now refrained from reference to the Charter, and would support the increased use of the Charter by the Court of First Instance, Advocates General, and other EU bodies. Any status for the Charter that lacks clarity, or creates uncertainty as to its application, will result in deep criticism and confusion for both courts and citizens.

For the European Union to attain full legitimacy in the exercise of governmental and enforcement powers, its actions must be conditioned, in the same way as for the EU member states, by constitutional protection of fundamental rights. Declaratory human rights instruments have played a crucial part in building

human rights awareness and protection internationally (for example, the Universal Declaration on Human Rights), but declaratory instruments alone do not fulfil a creditable constitutional role for bodies exercising state power.

EU accession to the ECHR

A binding Charter with treaty status does not preclude EU accession to the ECHR, a parallel goal that JUSTICE has long supported. This is proposed in the new constitution. The coexistence of the ECHR and of a binding Charter should be seen as a positive element, that will improve the protection of the rights of EU citizens.

Coexistence does, however, raise certain issues. The extent and modalities of protection of fundamental rights of EU citizens will depend on the subject of the case. If the case does not concern EU law, the competent domestic courts will apply the ECHR and not the Charter, and the ECtHR will be competent to review these judgments. If the case does concern EU law, either the affected private party will be in a position to bring it before the ECJ, which will apply the Charter (and not the ECHR directly), or, if direct access before the ECJ is not possible, the affected natural or legal person will be able to raise the issue before the competent domestic court, which may in turn apply to the ECJ seeking an interpretation of EC law. In giving its preliminary ruling, the ECJ will apply the Charter. The domestic court, however, will have to apply both the Charter and the ECHR. In light of its 'extended' competence, the ECtHR will arguably be competent to review both the judgment of the domestic court and that of the ECJ.[53]

This overlapping of legal instruments and fora would not constitute a threat to legal certainty if the guarantees afforded by either system were exactly the same. Absolute consistency between the case law of the ECJ and the ECtHR, however, cannot be guaranteed, despite the admirable efforts of the ECJ. Differences in the interpretation of the ECHR and the Charter (in spite of the latter's horizontal clauses) would seem, to some extent, inevitable in the absence of accession by the EU to the Convention.[54] Accession would also create a stronger coherence in human rights protection across the Union by subjecting the EU institutions to the same protection regime as the member states. Accession to the ECHR would also bring the EU institutions within the best regional human rights system and ensure consistency in the protection of a high standard of civil and political rights in Europe. EU accession to the ECHR would, in particular, subject EU action to the external review of the ECtHR, providing EU citizens with equivalent protection vis-à-vis the EU institutions as they presently enjoy vis-à-vis the member states.

As regards the autonomy of EC law, the ECJ would remain the court of last instance for Community law. Accession should not have any impact on the

autonomy of the Community legal order. The ECtHR will function as a specialist court of scrutiny of the ECHR obligations and not as a court superior to the ECJ. It must not be forgotten that the human rights codified in the ECHR are the expression of fundamental values that are common to all European states, including EU states. EU member states have all accepted supervision by the ECtHR. The concern of preserving the autonomy of EC law has so far not prevented the ECJ from turning to the ECtHR as a source of interpretation of the fundamental rights of EU citizens.

The relationship between the ECJ and the ECtHR would also be exactly the same as that of national supreme or constitutional courts that recognise the role of the ECtHR to verify consistency and compatibility with pan-European human rights norms. The ECtHR would have the last word in the interpretation of the ECHR and would thus be competent to review the ECJ's rulings in human rights matters that are covered by the ECHR. This would rather mean that the Strasbourg Court would carry out complementary work in its capacity as the more specialised body, better equipped to deal with these matters and able to do so from a global perspective.[55] The ECJ will retain its role as the EU constitutional court and the sole arbiter of EU law.

Finally, therefore, accession of the European Community to the ECHR appears to be the key to securing the necessary consistency in the interpretation and the application of similar provisions of the ECHR and the EU Charter, thus securing the effectiveness of the Strasbourg system.

Apart from making a contribution towards legal certainty in human rights protection in the EU legal space and towards the strengthening of European common values and their effective enforcement, accession would allow for the full representation of the European Union in the Strasbourg Court, the taking into consideration by the latter of the specific experiences of the Union, and the satisfactory handling of those issues arising from implementation of judgments in cases involving EC/EU issues.

Conclusion

Incorporation of the EU Charter will benefit the protection of citizens' human rights. It is a necessary political and legal step in the development of the Union. Full incorporation will therefore ensure a move towards a citizen-orientated Union and provide citizens with an extra and tangible level of democratic control of EU acts.

The UK government's reticent approach to incorporation of the Charter is regrettable. Incorporation will not create new rights but will make existing rights more visible and accessible to the EU citizen. Incorporation must, however, entail

the ability to enforce Charter rights in national courts and ultimately the ECJ. The government should seize this opportunity to place respect for fundamental rights at the centre of an enlarged and rapidly evolving Union.

Accession to the ECHR is an essential corollary to incorporation. Human rights protection within the European Union would best be reinforced if the Union becomes a party to the ECHR. This is particularly important in light of the increasing ability of EU institutions and agencies to impact on the rights of individuals. Accession would establish the central place of human rights in the Union through the acceptance of scrutiny by an independent court, the European Court of Human Rights, and ensure consistency as between the human rights jurisprudence of Luxembourg and Strasbourg, and that of the member states.

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Notes

1 Conclusions of AG Tizzano in Case C-173/99 *R (BECTU) v Secretary of State for Trade and Industry*, at [28], and for the first time since its proclamation in the judgments of the Court of First Instance delivered on 30 January and 3 May 2002.
2 In relation to asylum, criminal, discrimination or employment issues.
3 Memorandum by JUSTICE to the Sixth Report of the House of Lords Select Committee on the European Union, Session 2002-2003, *The Future Status of the EU Charter of Fundamental Rights*, p77
4 eg Belgian, German and French Constitutions.
5 Consolidated Version of the Treaty on European Union (TEU) [2002] OJ C325/5; http://europa.eu.int/eur-lex/en/treaties/dat/EU_consol.pdf.
6 Article 6(2) TEU: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.
7 http://www.europa.eu.int/comm/external_relations/human_rights/intro/index.htm.
8 Copenhagen criteria: (1) stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; (2) the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union; and (3) the ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.
9 Nice, 7 December 2000.
10 Mrs N Fontaine, President, Nice, 7 December 2000.
11 Nice, 7 December 2000.
12 Draft Treaty establishing a Constitution for Europe [2003] OJ C169/01; http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/c_169/c_16920030718en00010105.pdf.
13 Constitution Part Two, The European Convention, CONV 797/1/03 (English).
14 Magna Carta of 1215; Human Rights Act 1998, 2 October 2000.
15 9 September 2003.
16 2002/2139(INI) European Parliament resolution on the impact of the Charter of Fundamental Rights of the European Union and its future status, 23 October 2002, p2.
17 See General Provisions in Charter of Fundamental Rights, Articles 51-54.
18 Christopher McCrudden, *The Future of the EU Charter of Fundamental Rights* (Jean Monnet Center, 2001).
19 J Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility' in T Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights, A Legal Perspective* (Oxford, Hart, 2003), p2.

20 KD Ewing, *EU Charter of Fundamental Rights: Waste of Time or Waste of Opportunity?* (Institute of Employment Rights, London, May 2002), p58.
21 Ewing, ibid, p34; See *NV Dutch Railways v Transport Unions FNV, FSV and CNV* [1988] 6 Int Lab Law Resps; decision of the Hoge Raad (Supreme Court of the Netherlands) on the justiciability of Article 6(4) (on the right to strike) of the Council of Europe's Social Charter of 1961.
22 Council Directive 91/533/EEC of 14 October 1991 on the employer's obligation to inform employees of the conditions applicable to the contract of employment relationship; Council Directive 92/56/EEC of 24 June 1992 amending Directive 75/129/EEC on the approximation of the laws of the member states relating to collective bargaining; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant mothers and workers who have recently given birth or are breastfeeding; Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (amended by Directive 2000/34/EC); Council Directive 94/33 EC of 22 June 1994 on the protection of young people at work; Council Directive 94/45/EC of 22 September 1994 on the establishment of European Work Council or a procedure in Community-scale undertakings and Community-scale group undertakings for the purposes of informing and consulting employees; Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex; Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP, and the ETUC; Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the member states relating to safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses; Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the member states relating to the collective redundancies; Council Directive 99/70/EC of 28 June 1999 concerning the Framework Agreement on fixed term work concluded by UNICE, CEEP, and the ETUC; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the member states relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses.
23 See n16 above.
24 Article 6(2) TEU.
25 Article 52(3) EU Charter.
26 Article 52(6) ibid.
27 Article 52(5) ibid.
28 CONV 354/02, Convention Working Group II, 22 October 2002; http://register.consilium.eu.int/pdf/en/02/cv00/00354en2.pdf.
29 CONV 828/1/03 REV 1, 18 July 2003.
30 Erich Vranes, *The Final Clauses of the Charter of Fundamental Rights – Stumbling Blocks for the First and Second Convention*, European Integration online papers, 7; http://www.eiop.or.at/eiop/texte/2003-007a.htm.
31 CONV 828/1/03 REV 1, 18 July 2003, 51.
32 Vranes, n30 above.
33Article 51 EU Charter: '(1) The provisions of this Charter are addressed to the Institutions, bodies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution. (2) This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution.'
34 Article 51(1) EU Charter.
35 Vranes, n30 above.
36 Article 53 EU Charter: 'Nothing in this Charter shall be interpreted as restricting or

adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions'.

37 In 2002, British Minister for Europe, Peter Hain, complained that 'creeping federalism' was moving sovereign power 'towards Brussels and away from nation states'. Andrew Grice, 'Hain Warns of "Creeping Federalism" in EU', *Independent*, 22 July 2002, p1.

38 Article 43 EU Charter.

39 With the adoption of the Cornillet report by the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

40 Case C-491/01 *R v Secretary of State for Health ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (10 September 2002); Case C-112/00 *Eugen Schmidberger Internationale Transpore Planzuge v Austria* (11 July 2002); Case C-466/00 *Kaba v Secretary of State for the Home Department* (11July 2002); Case C-126/01 *Ministre de l'économie, des finances et de l'industrie v GEMO SA* (30 April 2002); Case C-340/99 *TNT v Postale Italiane* [2001] ECR I-4109; Case C-313/99 *Mulligan v Attorney-General* (12 July 2001); Case C-413/99 *Baumast v Secretary of State for the Home Department* (5 July 2001); Case C-377/98 *Netherlands v Parliament and Council* (14 June 2001); Case C-270/99P *Z v Parliament* (12 March 2001); Case C-50/00P *Unión de Pequeños Agricultores v Council* (21 March 2001); Case C-353/99P *Council v Hautala* (10 July 2001); Case C-309/99 *Wouters v Nederlandse Orde van Advocaten* (10 July 2001); Case C-173/99 *R v Secretary of State for Trade and Industry ex p BECTU* [2001] ECR I-4881.

41 Case C-353/99P *Council v Hautala* (10 July 2001).

42 Case T-54/99 *Max.Mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313; Case T-198/01R *Technische Glaswerken*, order of 4 April 2002; Case T-177/01*Jégo-Quéré & Cie SA v Commission* [2002] ECR II-2365.

43 Case C-117/01 *KB v National Health Service Pensions Agency and Secretary of State for Health*, 7 January 2004,
http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=62001J0117.

44 Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279; Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] 2 CMLR 34.

45 *Goodwin v UK* (2002) 35 EHRR 18, at 447.

46 Spanish Constitutional Court made express reference to the EU Charter in its judgment of 30 November 2002.

47 [2001] EWHC (Admin) 915, [2002] QB 1052.

48 [2002] EWHC (Admin) 2497, [2003] 1 FLR 484.

49 *The Future Status of the EU Charter of Fundamental Rights*, 6th Report, 2003-03, HL Paper 48, para 33.

50 ibid para 34.

51 Piet Eeckhout, 'The Proposed EU Charter of Fundamental Rights: Some Reflections on Its Effects in the Legal Systems of the EU and of Its Member States', in *The EU Charter of Fundamental Rights* (Federal Trust for Education and Research, 2000), pp103-104.

52 See Working Group IV: *The role of national parliaments*, CONV 353/02, 22 October 2002, p15.

53 European Commission for Democracy through Law (Venice Commission) Opinion no 256/2003 on *The implications of a legally binding EU Charter of Fundamental Rights on Human Rights Protection in Europe*, Strasbourg, 18 December 2003, para 41;
http://www.venice.coe.int/site/interface/english.htm.

54 ibid para 43.

55 ibid para 61.

Test Case Strategies and the Human Rights Act

Roger Smith

This paper reports on the test case strategies adopted by national legal pressure groups and community law centres and the impact of the Human Rights Act.

A Public Law Project (PLP) research study on the impact of the Human Rights Act (HRA) on judicial review concluded that 'there is little evidence that the introduction of the Human Rights Act has led to a significant increase in the use of judicial review'.[1] This is an interesting conclusion since one of the government's fears about the HRA was that it would encourage a litigation explosion. It is supported by the statistics. The number of judicial review applications that were issued in cases in categories other than immigration, asylum, crime, housing and homelessness (the types of review most likely to relate to individual circumstances) has actually fallen from 1,577 in 1998 to 1,394 in 2002.[2] This paper has two objectives in the shadow of the PLP research. First, to explore among legal pressure groups the extent and nature of any test case strategies that they may proclaim. Second, in particular to examine an implication of the PLP's conclusion: that the HRA has made relatively little difference to any such strategies.

Test case strategies

Test case litigation in the United Kingdom is often regarded as a vaguely American import, characterised by the groundbreaking *Brown v Board of Education* on segregation or *Liebeck v McDonalds* on the temperature of take-out coffee[3] according to your view. However, both England and Scotland have a creditable history of public interest or test case litigation. Slavery was successfully challenged in both jurisdictions by cases taken as part of the anti-slavery movement.[4] Indeed, in two key Scottish test cases, interested persons made 'memorials' that displayed 'a copiousness and variety of curious learning, ingenious reasoning and acute argumentation'[5] – early versions of third party interventions. The victories on slavery were, however, against the grain of the English constitution with its demands of parliamentary supremacy. Professor Tony Prosser's study of test cases conducted by the Child Poverty Action Group concluded in 1982 that:

> *Not only are the indirect effects of test cases more important than the direct effects, but the role of the courts is overall marginal.*[6]

This judgment needs to be measured against changes that have occurred in the meantime that have given the courts more power. First, though it remains true that the executive can and will overturn judgments of domestic courts with a fair degree of ease, the courts themselves have become adjusted to playing a more active role in the monitoring of government. Second, there is the growing importance of the European Union where the European Court of Justice can deliver interpretations binding on national government. Third, the HRA 1998 makes an enormous difference. It gives courts a duty to do all that is possible to construe legislation in accordance with the Convention or to make a declaration of incompatibility.[7]

Two legal pressure groups stand out in any history of taking test cases: Liberty and the Child Poverty Action Group (CPAG). Diane Pretty. David Shayler. Katherine Gun. These were all Liberty cases that brought major media attention to a particular issue – respectively, the right to die, the Official Secrets Act, and the legality of the second Iraq war. Liberty has an unrivalled track record for taking individual cases that bring out key issues, often of constitutional importance, going back to the *ABC* trial in the 1980s, litigation in relation to the privacy rights of future government ministers, Patricia Hewitt and Harriet Harman, and beyond. Liberty (previously the National Council for Civil Liberties) has picked up its cases by its sheer activism and reputation together with the capacity and resources to undertake cutting edge cases as a part of its campaigning work.

CPAG is different and has had an overt test case strategy since the late 1970s expressly based on a North American model.[8] The definition of a test case itself is relatively unproblematic. For example, CPAG uses the following: a case 'where the outcome will have significance not only for the person bringing it but for others too. It seeks a ruling on an untested point of law or seeks to overturn or confirm a prevailing judicial interpretation.'[9] Russell Campbell, Shelter's former Head of Legal Department, adds another factor. 'One element', he says of the work of his legal team, 'can be to accelerate developments of law and practice in a particular locality where there is, for some reason, a problem.' He gives the example of a court that is failing – through ignorance –to deal properly with homelessness cases or defended possession actions. Shelter might then take what could legitimately be called test cases with the intention of improving practice in a local area even though the law is clear. Additional assistance on definition may come from the Access to Justice Act 1999 which gives the Legal Services Commission (LSC) power to grant funding for cases where there is a 'significant wider public interest' at stake beyond that of the individual litigant.

Most experienced practitioners at the top of their game will take leading cases and even seek them out as part of their overall work, but an institution following a test case strategy is seeking to specialise in them as a deliberate policy priority.

So, a test case strategy is a deliberate policy decision to give precedence to cases that are felt to be significant, generally at the expense of income, volume or first-come-first-served casework. An agency or institution taking a test case strategy is deliberately seeking a strategic approach.

Why take test cases?

The role taken by a campaigning organisation in test case litigation can differ. For example, Russell Campbell identifies the following strands to Shelter's approach.[10]

> *First, are cases in which it is decided that Shelter should be the applicant. For example, in 1996, Shelter challenged the retrospective effect of the Immigration and Asylum Appeals Act. The second component is the conventional one of dealing with a new point. The local Centres are in everyday contact with housing authorities and what is going on in their area. They are a good base from which key emerging issues can be identified. We have taken cases involving priority in homelessness and home loss payments. The target is to try to get important cases to the Court of Appeal where they can set a precedent. The third strand is to use our authority and knowledge to join in on cases run by others. Shelter has developed the use of a witness statement as an alternative to third party intervention. This avoids some of the problems with third party interventions in relation to partiality etc. It is also a way around any potential liability for costs. [In addition] one of the functions of a national team can be to accelerate developments of law and practice in a particular locality where there is, for some reason, a problem. As an example, we have been involved in some areas where there are local courts which do not have much experience of dealing with homelessness appeals. In that type of case, we have intervened to help local agencies effectively to educate the court and local practitioners. Once that has been done, we withdraw.*

CPAG produces a similar, though slightly different, list – for it, test cases can:

> *a. Deter unlawful administrative practice and lead to improvements in this area;*
>
> *b. Lead to improvement in standards of adjudication;*
>
> *c. Highlight the improved standards of adjudication;*
>
> *d. Generate publicity for CPAG and promote the aims of the organisation;*
>
> *e. Promote an interpretation of the law which maximises benefits to claimants;*

> *f. Even if we do not actually win the case, it can still highlight injustices and help build pressure to remedy these.*[11]

CPAG has been pretty good about generating publicity for its cases over many years.[12] But Liberty has been the best. Their most spectacular media case – with major coverage in all media – was that of Diane Pretty. This was a case in which the legal argument was probably never regarded as strong but media coverage generated a major public debate on the subject of suicide.[13] The Diane Pretty case is probably the best example of the compensatory value of losing in the courts.

A major test case can generate publicity for a pressure group in which its lawyers act for one of the parties. However, more publicity is generated for the group if the case is brought in its own name. This approach was pioneered by CPAG[14] but has since been used by a number of national organisations such as the Joint Council for the Welfare of Immigrants,[15] Shelter, Liberty and MIND.

How?

The big split between agencies consciously espousing a test case strategy in such terms is between those that expressly seek to concentrate almost completely on test cases as against those that take on a volume of work from which test cases are selected. Law centres are decidedly in the second category. So, too, is CPAG. The PLP would be an example of the first – although, in practice, the differences are rather shaded. Its director, Conrad Hayley, reports:

> *The volume of our cases varies over time. We probably have around 15 major cases at any one time with a further six which are more routine.*

Even the PLP has a second-tier advice contract from the LSC and picks up a certain amount of routine work: 'We generally get three to four cases involving further action from each advice session'.

Some agencies have the luxury of defining much of their litigation so that, by the very definition, they take significant cases. For example, the AIRE (Advice on Individual Rights in Europe) centre gives 'where appropriate, direct representation before international tribunals'. Its director, Nuala Mole, even has the luxury of denying that the centre has a test case strategy:

> *We do not hold ourselves out as doing test cases. It is not the philosophy of the organisation. Our philosophy is not to litigate pre-selected cases. We hold to the idea that we need to do a volume of casework to provide a service and also to identify the good cases.*

Yet, by defining a major part of its work as cases going to the European Court of Human Rights, the AIRE centre guarantees a good stream of high quality cases such as the key case of *Osman*.[16]

Most national organisations, like Shelter, undertake a certain throughput of cases so that they keep in touch with developments. Most have an advice line of some kind. CPAG's lawyer works within their Citizens Rights Office which provides an advice and referral service.

The most sophisticated approach to seeking test cases is shown by CPAG. It advertises for cases on its website and in its *Welfare Rights Bulletin*. Its website in mid-March 2004 was showing 11 'current' test cases – including two cases in the European Court of Human Rights and four in the Court of Appeal. It advertised for 8 specific cases for which litigants were being sought.[17]

Community law centres

Test cases present particular challenges for community law centres. There are currently 57 community law centres in England, Wales and Northern Ireland whose representative body is the Law Centres Federation (LCF). A disproportionate number are situated in two urban centres: right in Manchester in the north of England and 24 in London. The balance of 'routine' to 'test' or strategic work has been a continuing strain of debate within law centres since they were established in the 1970s – with the first, North Kensington, espousing an open approach and a range of centres, initially including Brent and Newham, arguing for a more targeted approach.

The major sources of funding are, and always have been, local authorities and the LSC. The form of Commission funding has, however, changed from case-by-case funding for advice and litigation towards contracts for advice. Steve Hynes, the LCF director, reports that there is an observable trend of law centres covering wider areas beyond a single borough because they are encouraged by the Commission to bid for legal help (advice) contracts in more than one 'bid zone'. Thus, Wandsworth Law Centre's catchment area, for example, stretches into the neighbouring borough of Merton. This has brought funding into centres but it has also increased the importance of advice work undertaken primarily to meet contractual requirements.

Helen Tyrrell, a solicitor at North Kensington Law Centre, says:

Our legal services contract does not actually deter us from taking cases but it might be a problem internally. I have to meet the target of hours worked. Organisations [like the law centre] have to hit around 91-2 per cent of their

> *target hours or they stand to lose their contract. We could probably negotiate with the commission in relation to taking a test case but there is a potential problem here.*

Steve Hynes, LCF director, agrees that the focus tends to be, on the one hand, on legal help (advice) and, on the other, on pursuing a volume of cases rather than pursuing strategic litigation:

> *Lawyers in law centres don't act strategically like Shelter and Liberty. Some individual law centres do take test cases. But one of the complaints our people make is that national charities are good at test cases but not at the bread and butter work … There is some resentment that the national organisations are creaming off the best cases but not really providing a national service … There has been a trend to develop legal help rather than undertaken full legal aid. Our priority is now to encourage centres to take on full certificated work.*

Law centres wishing to undertake test cases struggle against the vicissitudes of being small organisations with limited resources, with responsibilities for providing a community service. North Kensington's Helen Tyrrell laments:

> *I was appointed with the idea that I would do about half of my casework in public law, taking cases to judicial review. But the pressures of work and changes in the office have rather overwhelmed us.*

The law centres that undertake test cases are those whose lawyers tend to operate within a focus that is akin to that of national organisations. Law Centre (NI), based in two locations in Northern Ireland, operates throughout the province. Les Allamby, its Director, is clear about the role, proclaiming it to be 'a second-tier agency'. The centre has about 90 members which are advice organisations. The centre runs a five day a week advice line for the agencies and accepts casework only on referral, working in the areas of social security, employment, community care, housing and immigration. He says:

> *We explicitly aim to undertake test cases. The issues are rather different in relation to our different areas of work. The main points for which we are looking are:*
>
> *a. Social security. We take complex or technical issues or those relating to European law or the Human Rights Act.*
>
> *b. Industrial tribunals. We have no employment appeal tribunal in*

> *Northern Ireland and it is difficult to get the Court of Appeal to take cases on appeal. Thus, we have tended to take important cases [at the initial tribunal level] and use publicity as our major weapon. Thus, we took a case on the [European] working time directive [that regulates maximum hours of work] and then publicised it as a way of spreading the word. So, we have a strategy which is more based on publicity for cases rather than litigating them to the highest level.*
>
> *c. Community Care ie non-child cases relating to social services provision such as respite or residential care.*
>
> *d. Housing. We have not really developed housing as much as we could.*
>
> *e. Immigration.*

The law centre incorporates test cases into its planning:

> *We produce a business plan each year. We set out the number of cases that we expect to take. It is currently around 300 pieces of representation. We aim that around 25 are strategic and have a test case element … We are interested in taking public interest cases but we give that a broad definition. It would be enough, for example, for around 60 people to benefit from our winning one of our cases.*

Law Centre (NI) is untypical because its wide province-wide catchment area means that it operates much like a national organisation. Hammersmith and Fulham Law Centre is, by contrast, more typical of most community law centres with a relatively small, borough-wide remit. However, former law centre solicitor Sue Willman indicates how cases come through experienced centre lawyers using the opportunities that exist for networking:

> *Test cases come out of our training and policy work. For example, we were looking for a case on s55 of the Nationality Act. We had lobbied against this Act while it was a Bill going through Parliament. The case would have depended on a similar argument to one which was run in relation to earlier similar legislation. We mentioned the point in training to local agencies. We also have links outside the law centre. I am involved in co-ordinating a joint group of housing and immigration lawyers. We meet and talk about issues. We talk about possible cases. In the event, the s55 case was taken by others but we were ready to go.*

Law centres fight, however, against the odds. Sue Willman continues:

> *A problem for us is that we are seen as local to Hammersmith and also as an organisation that will take on cases that private practitioners will not.*

For all the frustrations, some law centres do undertake important cases. A Lawtel search indicates that community law centres acted for one of the parties in 21 reported court cases between 1 January 2002 and 31 January 2004, a creditable number – though the cases are heavily concentrated. Eleven centres were responsible for the total of 21 cases but three – Hackney, Hammersmith and Fulham, and North Lambeth – were responsible for 12 of these. A comparison with the work of national organisations is provided by the figures for Liberty – eight in the same period – and the AIRE centre which had five cases decided before the European Court of Human Rights.

Sue Willman explains her centre's experience:

> *Our policy in some areas means that we almost unavoidably take on test cases though we have no express policy to take test litigation. For example, in employment, we would not do an ordinary dismissal. We concentrate on complex areas. We do sometimes specifically look for types of cases. For example, some 8 or 9 years ago, we were looking for cases in relation to maternity leave and pay. We did eventually find a number of cases that we took and were important.*

An interesting and difficult question for community law centres is whether the development of funding for legal help (advice) and the sheer grind of volume work has led, in effect, to a 'dumbing down' of the law centre movement. Steve Hynes admits:

> *There has been a tendency to develop legal help [advice]. Our priority is to develop full certificate work. We recognise that this is an area we still have to develop. To get high level cases, we need to develop full certificate work. Many centres are good at this but we need to do more. We should be doing more.*

The LCF, in addition, hopes to encourage centres to develop work in the field of public law.

Hammersmith's example indicates what can be done impressively by lawyers operating strategically within a law centre setting. It would be excellent if the LCF could encourage this to be the norm. To do so may, however, raise some major organisational issues. Russell Campbell, while at Camden Law Centre, was forced to work into the night to type up his own documentation during a concerted and

strategic attack on the homelessness policies of the local authority. Supporting staff may be needed in ways that cut against the ethos of some centres, at least. It is true, however, that there are already demands for more streamlined structures in the form of management requirements imposed implicitly or explicitly through contracting with the LSC.

Funding

The trend for national agencies to link their test case work with advice has been accentuated by funding opportunities provided by the LSC, and a number of national agencies have contracts for 'second tier' advice to other agencies. These provide some distortions that probably do not matter in terms of being able to identify test cases. For example, CPAG has a contract for second tier advice on social security only for the Eastern region of the country. It also has a contract for high level legal casework. It has also operated on other bases:

> *We do take some cases without funding from the Legal Services Commission. In these, the Government has generally agreed not to come after us for costs if they win. We either find the resources to pay our own counsel or they operate pro bono. We have used conditional fees.*

Most of the large national organisations have contracts with the LSC that both encourage their trawl for cases and provide important sources of funding. For example, the PLP has a general civil contract from the LSC and a second tier advice contract in human rights. Shelter was early into the contracting system with a general law contract in 1996, now supplemented by a second tier housing advice contract. Liberty has contracts for criminal and public law representation and also a second tier contract for advice on human rights.

The changes in legal aid funding are not, however, unproblematic for agencies where lawyers could formerly use the legal aid scheme without passing through the bureaucratic hoops required to obtain a Commission contract. Simon Foster, MIND's principal solicitor, stated:

> *Financial reasons restricting us from taking test cases relate to legal aid policy. We applied for a Legal Services Commission contract and we passed the preliminary audit. However, we could not promise the volume of cases to justify taking a contract and we dropped out. Finally, we came back in with a second tier contract in October last year. This has just been extended for another six months till October 2003. However, this remains a pilot scheme and we do not know what will happen in the longer term.*

The AIRE centre encountered a version of the same problem:

> *[A funder] requested that all people receiving a grant from them to do case work should meet the requirements of the LSC quality mark. We decided that it needed too much administration and, therefore, decided not to go for one. The LSC is considering a niche quality mark which we might be able to get. We have found the bureaucratic requirements too much to get an ordinary quality mark.*

Interestingly, the increasing concentration of legal aid on legal representation in public law cases and away from private disputes creates competition with private practice. Many areas of work covered by law centres and the national organisations discussed here have developed into areas with blocks of specialist private practitioners who take large amounts of work that is both interesting and remunerative. MIND's Simon Foster reported:

> *We are regularly asked to help on individual cases. If there is a more general point in these, then there is often a solicitor already involved. We do a lot of assisting and supporting solicitors to take a case.*

Sue Willman gave a law centre lawyer's perspective:

> *In terms of the cost of doing cases, most of the cost is in the preparation. This is where we often can help private practice because they can't afford it. Once a case is actually taken and legal aid is available it's actually very well funded. Private practitioners like taking these cases because they are enjoyable and remunerative.*

One of the interesting developments over the last 30 years since law centres were established has been the increasing engagement of private practitioners in test cases. There are now a number of practices, particularly in London, which are test case litigators in private practice – often staffed by former law centre or legal NGO lawyers. They act as privately funded public interest law firms.

A law centre's very capacity for preparation can work against getting a case to court, says Sue Willman:

> *Interestingly, the amount of preparation that we are able to do may well mean that we actually settle more cases than private practice. They probably tend to litigate at an earlier stage and to push the case through. We take more time and often the other side gets to see our point of view.*

Costs are a problem in test case litigation in two ways. A litigant needs to be covered not only for his or her own costs but also against the potential liability

of an order to pay those of the other side if the case is lost. This liability remains, at least in theory, even if the litigant has no resources. A number of strategies are deployed to deal with this problem. First, it can be avoided in cases where costs are not awarded. This is the case in appeals from an employment tribunal to the Employment Appeal Tribunal, which is a boon for law centres undertaking employment work. Second, occasionally for the big cases, a conditional grant can be obtained from a funder, ie a grant that will only be payable if the case is lost and money is required to meet the other side's costs. This was deployed at least once by CPAG in the 1980s. Third, and most easily, sometimes government departments will agree not to seek costs if they win. This used to be fairly routine but practice is hardening. Finally, there has been considerable interest in the idea of 'a protective costs order', an advance order of the court that costs will not be ordered or, if they are, will be limited. MIND made this work for them in a case in which a potential costs order limited their prospective liability to £2,000.[18] In the event, its argument was accepted and there was no costs order.

Effect of HRA

The HRA provided a potential new impetus to a test case strategy. Additional powers were, consciously, being granted to the judiciary at the potential expense of the executive – not, however, without a degree of retrospective discontent, often expressed most forcefully by the current Home Secretary[19]:

> *We need to remember this - it is justice we seek, not just the primacy of jurisprudence.*

Vada Bondy was the researcher for the PLP project on how the HRA made a difference to judicial review applications. This linked with work on how third party interventions might be encouraged. She reported that:

> *About half of all judicial reviews raise a human rights issue. Undoubtedly, many litigators use it as a fall back argument to bolster a case [rather than a primary cause of action]. There is an increase in the number of judicial reviews but the growth is actually at the same rate as has been apparent in recent years. So, the picture is not entirely clear.*

This fits with the message from litigators in the NGOs. They report that a major value of the HRA was the stimulus that it gave, through training and reflection, to looking at potential test cases of a kind that might have been justified in any event but which had added force after the coming into effect of the Act. Thus, AIRE centre's Nuala Mole:

> *The Human Rights Act certainly helped us to think about the legislation in*

> *the training that we undertook and this led us to identifying some sorts of cases that were likely to come. For example, we thought that issues might arise over care orders and the court would begin to want to look behind the order to the arrangements to see if Articles 8 or 6 were breached.*

Her experience is reflected at Hammersmith's grassroot level:

> *The value of the Human Rights Act was that it made people review their work. So you looked for cases. It may also have helped give people the confidence to take cases.*

The report from Belfast is broadly in line with the above:

> *Human Rights have made a difference but not quite as expected. Most of our direct challenges under the Act have not succeeded, I have to admit. Partly, this has been due to a certain caution in the judiciary. We have, however, settled a significant number of cases involving HRA arguments. These have certainly helped settlements. It is good to be able to argue the HRA in a case.*

The HRA certainly focuses lawyers' minds on principle and has helped a number of lawyers to keep a mental checklist of cases that might turn up. Helen Tyrrell of North Kensington provides an example:

> *The Human Rights Act is relevant in most immigration cases and it reinforces arguments that we have made before, giving them more weight. I do have a shortlist of cases that I am looking for. These include a challenge to the Immigration Rules relating to same sex partnerships – potential discrimination under Article 14 and the right to family life in Article 8 in relation to family members from abroad, particularly where someone is suffering from a mental handicap or disability.*

The core procedural provisions of the HRA are ss3 and 4. Liberty's director, Shami Chakrabati, indicates that Liberty has found the HRA more useful than some of the other organisations, perhaps because Liberty took advantage of the Act to identify itself very precisely as a human rights organisation. She says that the two sections are:

> *… proving a real boon. We had two examples of locally important cases involving these provisions. One involved a very rigid rule of procedure at the Employment Tribunal whereby a party was required to give details of their address on the record. In our case, one of the parties had fled paramilitaries*

> *in the North of Ireland and did not wish to give her current address in a way that was open to the public. We successfully argued that the legislation should be construed flexibly. In another case, we successfully got an advice agency to run the argument that a list of exclusions relating to those who could receive disabled living allowance should be read as non-exhaustive whereas, on the face of it, the legislation appeared exhaustive.*

Overall, CPAG's experience of the HRA, as reported by legal officer Stewart Wright, seems pretty commonly held:

> *The Human Rights Act did not create a big bang in test cases. Nor did we think that it would. There were, however, a number of changes. First, we got a large number of rights queries from advisers who had a vague idea that human rights might be relevant but no precise understanding. Second, we put in a lot of time training. Thirdly, its introduction did make us think through different types of challenge in which we might be involved.*

The consensus seems to be that the year after the implementation of the Act, 2001, was very quiet. There was a lull that no one really expected. This was also the case in relation to cases before the European Court of Human Rights. Now, however, numbers are rising again.

Third party interventions

Legal NGOs are increasingly interested in test case strategies that involve intervening as third parties in what they see as important cases. The law and practice of such interventions is still emerging as increasing use is made of the procedure. Numbers of third party interventions (TPIs) has risen, for example, from four applications for leave and four grants in the House of Lords during 1997 to 14 applications for leave and eight grants in 2002.[20] The rules relating to such interventions have been described as:

> *Widely drafted, giv[ing] no guidance as to when intervention be allowed and thus provide the judiciary with unfettered discretion as to who may intervene and when.*[21]

In the absence of precision, legal NGOs have made a number of significant interventions in cases. For example, JUSTICE has successfully intervened in relation to life sentences in cases at the European Court of Human Rights and unsuccessfully in a Court of Appeal case relating to the definition of 'public function';[22] the AIRE centre has also intervened in cases involving other countries before the European Court of Human Rights but which had UK implications.[23] Liberty has intervened widely in such cases as that involving a challenge to the

Anti-Terrorism, Crime and Security Act 2001.[24]

Most public interest litigators are remarkably cautious. CPAG's Stewart Wright reported:

> *We have made one third party intervention, at commissioner level. For us, it is very rare to think of third party intervention. Our relationship with welfare rights agencies is such that we can generally act for the client directly.*

Russell Campbell said that:

> *We have developed the use of a witness statement as an alternative to third party intervention. This avoids some of the problems with third party interventions – of partiality etc. It is also a way around any potential liability for costs.*

Nuala Mole of the AIRE centre was also diffident. Third party interventions:

> *Can be damaging to litigation which is being handled perfectly well by competent lawyers. You have to be careful. There may be points that they are deliberately not raising. For example, there was a discrimination point in Osman which we really did not want to take because it would have confused the argument. I always consult with the lawyers involved and ask if they are willing for us to intervene.*

MIND's Simon Foster is similarly careful:

> *We have, in a number of cases, submitted witness statements or letters to support litigants. We have not yet made a third party intervention but we are about to apply to intervene to the Court of Appeal. One of the potential problems here is the liability for costs. We want to make both oral and written submissions. We are trying to go for an agreement to limit our potential liability to £2000. There are really three reasons for being involved in TPIs. First, the key issues are important to us. Secondly, it is good for us to be seen to be active and our members and supporters like it. Thirdly, in this particular case, there is a real reason for us to make an intervention. We want to raise a general issue of principle unrelated to the question of the litigant's particular conduct which will undoubtedly be raised between the parties.*

JUSTICE and the PLP have called for a review and codification of the rules relating to TPIs and this seems overdue.[25] In the meantime, there is a danger of

something of a backlash – not only from predictably conservative forces but also from those with a constitutionalist perspective who argue that TPIs can be justified beyond a certain point in terms of democratic decision-making. As one academic commentator has put it:

> *The current drift towards an expanded regime of public interest intervention should be scrutinised and contained.*[26]

Conclusion

The interesting issue is whether Professor Prosser's propositions from 20 years ago that the indirect effects of test case strategies are more important than the direct effects and that, overall, the role of the courts is marginal, still stand. Of course, they could both be true and still test cases would have a value. All the national campaigning groups – such as Liberty, CPAG or Shelter – have, in any event, objectives relating to political change rather than legal change. They are using the law precisely for its indirect effects on the political process. Test cases are undoubtedly still good for political profile – of which Liberty in the national media, Law Centre (NI) in its local media and CPAG in the welfare rights media provide good examples. Law centres probably would have much to gain in extending their profile by undertaking more nationally significant cases. Test cases keep agencies engaged in the cutting edge issues of the areas in which they are concerned. The HRA broadens the tantalising prospect of a court victory that sets binding precedent and a new standard. The broadening of rules relating to TPIs opens up new possibilities for court intervention by a wider range of organisations. In its turn, it brings a new debate about how far it is desirable to push this new approach.

Roger Smith is JUSTICE's director and was from 1981-86 solicitor at the Child Poverty Action Group.

Notes

1 PLP, *The Impact of the Human Rights Act on Judicial Review: an empirical research study* (2002), p3.1.
2 ibid, p10.
3 $2.7m to compensate Mrs Liebeck for scalding by superheated coffee.
4 See C Harlow and R Rawlings, *Pressure through Law* (Routledge, 1992).
5 *Sheddan v Knowles* and *Knight v Wedderburn*, quoted in *Somerset v Stewart* King's Bench 1772; http://medicolegal.tipod.com/somersetvstewart.htm
6 T Prosser, *Test Cases for the Poor: legal techniques and the politics of social welfare* (CPAG, 1982).
7 ss3 and 4.
8 Analysed up to the date of publication by Prosser, n6 above.
9 *CPAG Test Case Strategy*, unpublished.
10 Shelter is a national organisation which has around 50 local housing advice centres that 'keep the legal team in touch with what is happening around the country'. It has had a legal department since the early 1990s.
11 See n11 above

12 See eg R Smith, 'How Good are Test Cases' in J Cooper and R Dhavan, *Public Interest Law* (Blackwell, 1986).
13 See http://www.justice4diane.org.uk.
14 *R v Secretary of State for Social Services ex p CPAG and GLC* (1985) *Times* 16 August.
15 *R v Secretary of State for Social Security ex p B and Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275.
16 *Osman v UK* (1998) 29 EHRR 245.
17 http://www.cpag.org.uk.
18 *R (Munjaz) v Mersey Care NHS Trust* [2003] EWCA Civ 1036.
19 *Guardian* 4 October 2002.
20 S Hannett, 'Third Party Intervention: in the public interest?' [2003] PL 128-150.
21 ibid at 141.
22 *Anderson v Secretary of State for the Home Department* (CA, 17 November 2001); R (Heather) v Leonard Cheshire Foundation [2002] EWCA Civ 366, [2002] 2 All ER 936.
23 *Zenide v Roumania* 31679/96 (2001) 31 EHRR 7; *Pellegrini v Italy* 30882/96 (2002) 35 EHRR 2.
24 R(Q and others) v SSHD.
25 *A Matter of Public Interest: reforming the law and practice on interventions in public interest cases* (JUSTICE and PLP), 1996.
26 The conclusion of Hannett, n22 above.

Identity Cards: Next Steps

Rachel Brailsford discusses the latest Home Office plans

The government's proposals for an identity card scheme follow from two Home Office consultation papers. The first, published in July 2002,[1] was followed by a seven month consultation process till January 2003. The second paper was published in November 2003.[2] Draft legislation is due to be published in 2004. The Home Office alleges that identity cards are popular and that 60 per cent of respondents to its consultation were in favour. However, it achieved this figure by discounting all responses that came via the particular website of 'an organised campaign' from which 96 per cent were against. It makes no allegation of fraud against the campaign and it would appear that actually a majority of respondents to its consultation were against the idea of identity cards.[3]

The current proposals suggest an incremental approach to the introduction of identity cards. The 'Next Step' proposals are in two stages with the first stage to include:

- a national identity register;
- passports and driving licences to contain biometric information;
- a voluntary plain identity card for those who do not have a passport or driving licence; and
- mandatory biometric identity documents for foreign nationals coming to stay in the United Kingdom for more than three months.

These four elements are intended to provide the basis for the establishment of a compulsory national scheme, the second stage of the process, which will only happen after a full debate and votes in both houses of Parliament. Under the compulsory part of the scheme it will be obligatory to have a card but not to carry one. The card will also be used to access certain public services, which will be detailed in legislation. The government claims that the benefits of the scheme will be a reduction in illegal immigration, a reduction in identity fraud and theft and fraudulent access to public services, and it will also provide assistance in the fight against terrorism and organised crime.

A national identity register will contain basic personal information that might include name, address, date of birth, gender, immigration status, nationality, whether the person has the right to work, and a biometric. The details that are to

be placed on the register will be set out in statute. The card scheme will be used by any public or private service to establish the identity of the cardholder but there will be strict limits on the information available.

Biometric changes will be made to the renewal of passports and driving licences. Biometric information is unique personal detail, most likely to be iris or fingerprint scans or facial recognition systems. The changes to these documents will increase cost, with estimates that passports will rise from £42 to £77, driving licences from £38 to £73. Holders of both documents will only have to pay the increased cost for the first document they renew.

A plain identity card will be introduced for those who do not have a passport or a driving licence. The estimated cost for a ten-year card will be £35. Foreign nationals (including EU nationals) will be charged the same for a residence permit if they intend to stay for more than three months. These estimated costs will mean that cards for some people will be subsidised. Free identity cards will be given to 16-year-olds. A lifetime card would be given to the elderly (defined as those over 75). There is a proposed cost of £10 for those on low incomes. The government will investigate the possibility that cards could be paid for in instalments. The plain identity cards are to be introduced from 2007-2008 and the government estimates that 80 per cent of the population will be covered by one of the biometric card schemes by 2013.

The government states that the move to the compulsory part of the scheme will only happen when there has been a comprehensive evaluation and when there is clear public acceptance. Both houses of Parliament are promised a debate and a vote in relation to any compulsory scheme. JUSTICE has been sceptical in response to proposals for the introduction of identity cards.[4] A degree of caution seems justified in relation to the case that the government has put forward for the establishment of the current scheme.

Key considerations include the following:

Constitutional and cultural resistance

The introduction of identity cards may change the perception of the individual's relationship with the state. For many people, an identity card has an important cultural resonance; perhaps particularly so among ethnic minorities where, for example, the South African pass laws provide an unfortunate image. Notably, there has been no successful introduction of an identity card scheme in any other country with a system of common law. The idea has been strongly rejected in New Zealand, Australia (where the majority of public opinion changed from indifferent to the scheme to widely opposed in a matter of weeks following a high

profile campaign) and America. The introduction of an identity card scheme adjusts the relationship between the individual and the state, and even if the scheme does not become compulsory, the onus to prove identity by the use of this one means shifts the balance. Without clear and legitimate safeguards laid out in statute, this could be a worrying precedent.

The fact that one card will be used in a variety of circumstances for the individual's relationship with the state also has constitutional implications. Different government departments require different information for different purposes, and this raises important issues. The matter of access to information is vital – who is able to see what and where. It may well be that the individual legitimately wants to tell government departments different facts.[5] The issue with identity cards is, of course, not only the card itself: it is the database of information to which it gives access. A card on its own is much less problematic but is not proposed.

Justification

The government proposes identity cards as a means of tackling terrorism and organised crime, reducing illegal immigration and working, reducing identity theft and fraud and the fraudulent use of accessing public services.[6]

It is worth noting that all of the hijackers involved in the events of 11 September 2001 had identity documents; some were legitimate whilst others were fraudulent. The terrorist events in Madrid in March 2004 occurred notwithstanding the Spanish identity card scheme. The introduction of identity cards might impact little upon dedicated terrorists. The acts of terrorism obviously occur outside the law, and additional requirements to prove identity may not be an appropriate means to attempt to control this. The issue also raises the possibility of discrimination; the use of the cards to determine who is thought to be a 'terrorist' may well have the effect of discriminating against innocent citizens. This is likely to be felt disproportionately by elements of the ethnic minority population.

With regard to crime, identity is not often in issue and, for this reason, it is unlikely that identity cards will help very much. There has been no evidence of the reduction in crime from countries that have introduced an identity card scheme. Those involved in illegal immigration and illegal working are by their very definition acting outside the law. There are already legal safeguards and requirements in place, and while the extent to which these are satisfactory and appropriate may well be questioned, the fact is that those involved in illegal immigration and working already ignore the law and are likely to continue to do so, regardless of whatever new measures are put in place. Again the issue of discrimination is pertinent.

Identity fraud and theft is undoubtedly a major issue but the usefulness of the proposed measures is questionable. This is very closely linked to the technological concerns over the possibility of forging identity cards, even with biometric identifiers. The more emphasis that is placed on a means of identification surely increases the urgency with which such documents can be fraudulently produced. As the Cabinet Office study states: 'a card would carry a huge premium around its secure issue and reissue'.[7]

Measures should, of course, be taken to impact upon the issues above. However, an identity card scheme is not necessarily the correct answer, and it has serious implications for all citizens. While the concept has been introduced as a voluntary scheme, the objective is to move towards this becoming compulsory.[8]

Human rights

Article 8 of the European Convention on Human Rights guarantees the qualified right to privacy:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

A human rights perspective allows the government a duty to protect the life, security and property of its citizens, but although it may interfere with its citizens' right to privacy, it must act proportionately. There has been little discussion of human rights issues in the government's proposals so far.[9] Linked to this is a concern with the data protection principles put in place by the Data Protection Act 1998. These state that data must be: fairly and lawfully processed; processed for limited purposes; adequate, relevant and not excessive; accurate; not kept for longer than is necessary; processed in line with one's rights; secure; and not transferred to countries without adequate protection.

There is no clear law on privacy in the United Kingdom, and the introduction of identity cards would have serious implications. Much will depend on what information is to be stored on the card. The proposals suggest that this will be basic personal information such as name, address, date of birth, gender, immigration status and permission to work, and a biometric. The Information

Commissioner has already expressed unease about address information being included, and has stated he would be very unhappy if National Insurance numbers were to be added.[10] However the Police Federation and the Local Government Association have both stressed the importance of address information being contained.[11]

There are understandably concerns that the introduction of identity cards will lead to discrimination in practice. A study carried out by Privacy International in 1994 of countries that had identity card schemes found that in many countries there were examples of police using the cards to discriminate.[12] It must be made clear that there is no move in the United Kingdom to grant the police a power to stop and demand that the card be produced. However, there is a clear intention to move to a compulsory scheme and there is concern about the possibilities of function creep. The Police Federation has clearly stated that it wishes the scheme to be compulsory.[13]

An identity card is very likely to be requested disproportionately from some communities. There are clear examples, such as the Algerian community in France, of identity cards being used to discriminate against sections of society. Parallels will surely be drawn with the situation of stop and search powers in England and Wales, figures relating to which are disproportionately high in relation to ethnic minorities.[14] An important point that should also be highlighted is the fact that religious freedom[15] may mean that collecting biometric information is not possible. Many French Sikhs, for example, do not have identity cards because the photos must be taken bareheaded. There is also the possibility that it may offend some people's religious beliefs to have a biometric identifier taken. For many people taking fingerprints may have clear links with criminal behaviour.

Technological

The concept of using biometric identifiers has many implications – some of them very practical – for effectiveness and cost. The Assistant Information Commissioner describes biometrics as the representation of a persistent physical characteristic.[16] Their use in identifying citizens is undoubtedly becoming more commonplace – identity cards in Malaysia contain fingerprint information. The United States are changing their immigration procedures to require passports to contain biometric information or else a visa will be required for people entering their borders. A pilot study by the UK Passport Service has begun to test biometric technology. This will involve 10,000 people providing fingerprints, facial and iris scans, using four testing stations and a mobile biometric reader, to assess both the cost involved and the public perception and reaction.[17]

There are also concerns about how such information will be read and the costs of introducing such technology. The Police Federation has indicated a clear wish for the police to have individual readers to verify information on the street.[18] It is already being alleged that it will be possible to forge identity cards even with the protection of biometric information. It may well be likely that an identity can be created using false personal details (using a stolen birth certificate for example) but with the correct biometric information for the person concerned.

There has already been much discussion concerning the advantages and disadvantages of the use of biometric information. The more effective forms of technology are undoubtedly the more expensive. Iris recognition has been claimed to be the most accurate form of individual identification, but may prove unusable because of the widespread use of glasses and contact lenses. Facial recognition is supposedly the least successful of the proposed methods,[19] and accuracy rates become crucial when they are magnified by the fact that an entire population will be covered,[20] so large scheme identification may well be problematic. A Cabinet Office study, released in July 2002, stated that:

Biometric systems are by no means foolproof: all types of biometric systems currently available run the risk of reporting 'false positives' or 'false negatives; around 10-15% of 'genuine' people will fail the test if it is set to minimise the numbers of fraudulent people … Biometrics offer undoubted potential, but it is a potential which has yet to be realised in any large scale applications.[21]

The issue of data protection and guarantees about the availability of the information is vital. The government has not yet put forward a clear proposal of who will be able to access the information or for what purpose. It has already been claimed that there may be variations in the methods of checking the information by different departments, ranging from a quick visual check to a full online biometric check.[22] This needs to be clearly set out in statute, and again there may well be concern about function creep.

Practical

The government's ability to introduce and manage such a wide scheme may surely be doubted; a fact that has even been acknowledged by the Home Secretary.[23] The failures of previous major proposals, such as the new system for the passport service, do not inspire confidence that a scheme covering highly personal information will be successful. The disarray the Data Protection Act has recently been shown to be in has highlighted the matter. There is also some confusion about what the actual costs of the scheme will be, which is worrying as the increased cost of biometric passports and driving licences is to be placed on the public. Until there are more details concerning the type of information

that will be stored and used on the card, the cost cannot accurately be discussed. So much is dependent on the type of biometric information that will be used.

However, the Home Office has subsequently raised the possibility that the cards may only last for five years, due to the estimated life expectancy of the biometric chip that will store the information. This will have clear implications for cost. There are also practical considerations about the replacement of lost, stolen or damaged cards and the costs involved for this. There will undoubtedly be an impact on those whose addresses change regularly (as in many London boroughs, for example). Evidence, albeit from some time ago, showed that this problem arose with the poll tax where in some boroughs the annual turnover of addresses was more than 60 per cent and on average there was a 34 per cent turnover of the community charge register.[24] Information from the electoral register suggests that on average in London 40 per cent of people change addresses each year.[25]

Conclusion

The Cabinet Office study is somewhat more wary than might be suggested by the Home Secretary's enthusiasm and it may be that elements in the government are less convinced than he appears to be. The study suggested that 'the key elements of an overarching strategy' should include:

- identity should be validated and verified on the basis of biographical checks for most applicants and checked against a register of known and suspected frauds – with those not passing such checks invited for face-to-face interview;

- there should be a register of stolen identity documents available to both private and public sectors; simple anti-counterfeiting measures should be more widely adopted;

- there should be stronger and more joined-up action to counter identity fraud involving both public and private sectors, building on present liaison systems.

All this would grab fewer headlines but might, after all, be more effective.

Rachel Brailsford is personal and research assistant to JUSTICE's director.

Notes

1 *Entitlement Cards and Identity Fraud* Cm 5557, July 2002.
2 *Identity Cards: The Next Steps* Cm 6020, November 2003.
3 ibid, para 11.
4 As shown in the joint publication with the Institute of Public Policy Research, *Identity Cards*

Revisited, and in responses to the two government consultation papers referred to in nn1 and 2 above.

5 Vicki Chapman, The Law Society, gives the example in uncorrected evidence to the Home Affairs Committee on 3 February 2004, q174, that a married woman may want to be known by her maiden name by the tax office for employment purposes and her married name by the benefit office for family purposes. She also warns of the possibility of 'turf war' between different departments over the validity of the whole of the information when each department will only use a part of it.

6 n2 above.

7 Cabinet Office, *Identity Fraud: a study* (July 2002), para 8.45.

8 Beverley Hughes, Immigration Minister, quoted in the *Guardian* 4 December 2003, said that the pilot scheme to test biometric information being carried out by the UK Passport Service is creating the foundations for a compulsory identity card scheme.

9 In fact the issues of human rights and privacy are not addressed at all in the November 2003 paper, n2 above.

10 Richard Thomas, uncorrected evidence to the Home Affairs Committee, 3 February 2004, q204

11 Jan Berry, Police Federation and Gerald Vernon-Jackson, Local Government Association, uncorrected evidence to the Home Affairs Committee, 10 February 2004, q288.

12 http://www.privacyinternational.org/issues/idcard/ index.html.

13 Jan Berry, Police Federation, uncorrected evidence to the Home Affairs Committee, 10 February 2004, qq265 and 266.

14 Home Office statistics published in March 2003 show that black and ethnic people were eight times as likely to be stopped under the police's stop and search powers.

15 Protected under Article 9 ECHR.

16 Jonathan Bamford, uncorrected evidence given to the Home Affairs Committee, 3 February 2004, q230.

17 The pilot has been criticised for consisting of a self-selecting group, see Shami Chakrabarti, Liberty, uncorrected evidence to the Home Affairs Committee, 3 February 2004, q191.

18 Berry, n13 above, q245.

19 'Does the new security work?' *Financial Times* 22 January 2004.

20 'With more than 60 million people travelling through Heathrow each year, even if an iris scanning system with 99.9% accuracy was used, it could still fail to register 63,000 individuals a year.' Facing a biometric future, http://news.bbc.co.uk, Technology section, 13 January 2004.

21 *Identity Fraud*, n7 above, p61.

22 Discussed in uncorrected oral evidence to the Home Affairs Committee, 11 December 2003, q10, by Nicola Roche, Director, Children, Families, Entitlement Cards and Coroners, Home Office.

23 HC Debates col 239, 3 July 2002.

24 HC Debates col 240, 22 June 1994, quoted in *Identity Cards Revisited*, n4 above.

25 Gerald Vernon-Jackson, Local Government Association, uncorrected evidence to the Home Affairs Committee, 10 February 2004, q250.

The European Union's Twin Towers of Democracy and Human Rights Post 11 September

Marisa Leaf discusses the European Union's response to counter-terrorism measures

Since 11 September 2001, the European Union has acted quickly to prevent international terrorists exploiting the freedom of movement, lack of internal borders and advanced communications technology within its territory. Its response has infiltrated all three of its so-called 'pillars', encompassing transport policy, finance, police and judicial co-operation, foreign policy, and immigration and asylum.[1] It has, however, been most focused in justice and home affairs (JHA) and common foreign and security policy (CFSP), where police and judicial co-operation between member states as well as with non-member states has been accelerated, if not transformed, under the aegis of the Union's counter-terrorism policy. International co-operation in these sensitive policy fields can have a serious impact on the exercise of individual rights. New measures must therefore incorporate corresponding safeguards to ensure that any interference with the rights to privacy, data protection, liberty and a fair trial are necessary and proportionate to the policy goal of combating international terrorism. The threat posed by counter-terrorism measures to fundamental rights is even greater in an EU context than in individual member states, due to the lack of effective democratic and judicial controls, notably in Title V (foreign policy) and VI (police and judicial co-operation in criminal matters).[2]

The principal conclusions reached by the Newton report on the UK Anti-Terrorism, Crime and Security Act 2001[3] underscore the importance of ensuring that special legislation or special procedures introduced to combat terrorism be 'limited to dealing with terrorism' and 'accompanied by tailored safeguards'. Although the European dimension is barely acknowledged in that report, its conclusions are equally applicable to EU counter-terrorism measures and procedures. The label of 'terrorism' has been attached to proposals that target a far broader spectrum of offences. In a letter dated 16 October 2001 from President Bush to Romano Prodi, President of the European Commission, the United States proposed a total of 40 measures under nine separate headings 'to help the United States in the international effort against terrorism'. These proposals in fact extend far beyond terrorism into the realm of criminal investigations, data surveillance and exchange, border controls and immigration policies – moreover, without a

single reference to the need to ensure that individual rights are adequately safeguarded.

The political will generated by 11 September to develop this new framework of police and judicial co-operation so rapidly has not been matched when it comes to forging agreement on common safeguards that should condition such extensive co-operation. Indeed, the threat of terrorism has been used to justify the routine removal of safeguards and the employment of urgent procedures in order to secure political agreement on controversial and often constitutionally sensitive issues. The overall effect of the post-11 September transformation in JHA has therefore been to remove barriers to international criminal co-operation, while preserving those that condition the availability of individual safeguards.[4]

EU co-operation agreements with the United States

Of particular concern are three agreements made with the United States. They stem from the JHA Council held in the aftermath of 11 September but have not been restricted in scope to terrorism. These agreements fail to take adequate account of the fact that the United States have not undertaken the same regional or international human rights commitments as EU member states, notably to the European Convention on Human Rights (ECHR) and the European Court of Human Rights (or indeed its regional equivalent, the American Convention on Human Rights). In the absence of comparable protection in the United States, these agreements will diminish the protection that EU citizens are entitled to in the European Union. US protections may be further reduced by application of the Homeland Security Act 2002 to non-US citizens. These controversial agreements have been negotiated in secret, with limited input from the European and national parliaments, and in the shadow of tight deadlines.

EU/US agreements on extradition and mutual assistance

A pair of agreements, one on extradition, the other on mutual assistance,[5] was originally conceived to target terrorism. The EU Presidency was, however, ultimately given a mandate to negotiate agreements that encompass 'co-operation in criminal matters' generally. This is reflected in the broad scope of both agreements: the extradition agreement will in fact apply to *all offences punishable by imprisonment for one year or more* or, where a sentence has already been imposed for an extraditable offence, where at least four months of that sentence are still to be served. The agreement on mutual assistance authorises the exchange of bank information of those 'suspected or charged with *a criminal offence'*, and US participation in joint investigation teams 'for the purpose of facilitating *criminal investigations or prosecutions involving the US and one or more Member State[s]'*.

While these agreements represent an important political step and will enhance

co-operation between the United States and the European Union in the fight against crime, they do not sufficiently acknowledge that the protection provided in the European Union by the ECHR, the EU Charter and specific EU legislation, for instance the EU Mutual Assistance Convention, is not binding on the United States. EU member states risk being complicit in serious US violations of these standards pursuant to the co-operation agreements. Furthermore, what political message does the European Union in fact send by making these agreements when no deal has been reached between the European Union and the United States on the European citizens held in Guantanamo Bay, who face the very real prospect of trial by military commission and potentially the death penalty?

As treaties, these two agreements were negotiated in confidence under Articles 24 (CFSP) and 38 (JHA) of the Treaty on European Union (TEU). When the draft text was eventually made public in May 2003,[6] the EU Committee of the House of Lords was effectively presented with a *fait accompli* and, to ensure signature would go ahead as scheduled in June, was given an extremely short time frame within which to scrutinise the agreements. The Home Office minister made it clear that the government would override parliament's scrutiny reservations if necessary, on the basis that these agreements formed part of the counter-terrorism package agreed by the Extraordinary Council in September 2001. Given the scope of these agreements and their ability to affect citizens' rights, such practices undermine the democratic principles on which the European Union claims, in Article 6(1) TEU, to be based.[7]

It is unclear whether the usual rules governing the jurisdiction of the European Court of Justice (ECJ) in police and judicial co-operation in criminal matters will apply to these agreements due to the joint legal basis, the CFSP element of which would exclude ECJ jurisdiction entirely. In any case, these rules contain various opt-outs that allow member states to exclude ECJ jurisdiction or limit it to references from final courts only.[8] There is also an important exception to ECJ jurisdiction in respect of 'operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent on Member States with regard to the maintenance of law and order and the safeguarding of internal security' which could also allow them to evade judicial scrutiny.[9]

As the first agreements on extradition and judicial co-operation to be concluded between the European Union as a whole and a third country, these two agreements are likely to serve as a model for future negotiations with third countries.

Europol/US treaty on the exchange of personal data

The draft Europol/US treaty on the exchange of personal data,[10] authorised by the December 2001 JHA Council, has been similarly 'marked by the urgency linked

to the 11 September attacks'.[11] An 'emergency' provision exceptionally allowing Europol to transmit personal data to third states where 'absolutely necessary to safeguard the essential interests of the Member State concerned … or in the interests of preventing imminent danger associated with crime'[12] has been exploited since September 2001 pending the conclusion of a formal agreement with the United States. The final agreement was once again submitted to the UK Parliament as a done deal that could not be modified[13] and was accompanied by a Home Office explanatory memorandum to the effect that it should be processed 'as a matter of urgency'. In fact, the government ultimately overrode the House of Lords Scrutiny Committee's reserve. These shortfalls in transparency and accountability are aggravated by the fact that the European Parliament has no right to be consulted on the text of the agreement, nor will the ECJ have jurisdiction to rule on its validity or interpretation.

Despite the fact that the accelerated procedures were justified on the basis of 11 September, Article 1 of the draft agreement states that its purpose is to 'enhance … [Europol/US] cooperation … in preventing, detecting, suppressing, and investigating *criminal offenses'* [emphasis added]. This is reinforced by Article 5(1) which refers to 'any specific criminal offenses', without, however, enumerating these offences. It is envisaged that the circumstances in which assistance will be refused or postponed should be limited 'to the greatest extent possible'.[14] The treaty authorises the exchange of sensitive data, namely race, political opinions, religious or other beliefs, health or sexual life.[15] In spite of the nature of the data to be exchanged and the scope for which it can be used, the agreement does not contain a single specific reference to data protection rules. The EU data protection directive will not be applied outside of the first pillar context.[16] However, in the absence of common data protection standards between the European Union and the United States with regard to the use of and access to data and the rights of the data subject, the predominantly self-regulatory US data protection scheme will not meet the necessity and proportionality requirements of article 8 ECHR. Nor will it meet the comply with articles 7 and 8 of the EU Charter whose provisions, although not yet binding, emphasise that privacy and data protection are fundamental and autonomous rights in the EU.[17]

EU/US agreement on passenger name records (PNR)18

The agreement negotiated by the European Commission requiring airlines that fly to, from or through the United States to provide passenger data – including names of travellers, all contact details, bank numbers and credit card data – to US Customs is the latest in this series of co-operation agreements. It seeks to resolve the legal uncertainty, notably with regard to EU data protection rules, to which European airlines have been subjected since the introduction in November 2001 of US legislation on the transfer of airline passenger data.[19] These records are

regarded by the United States as 'vital' in the fight against terrorism. However, the initial proposal extended the list of purposes 'far beyond terrorism'[20] and although it is understood to have been reduced, notably to exclude purely domestic crime, it still reportedly covers unspecified 'other serious crimes, including organised crime, that are transnational in nature'.[21] This is not a satisfactory response to the Article 29 Data Protection Working Party's call for a 'clear and limited list of serious offences directly related to terrorism' in its June 2003 Opinion.[22] Concerns also remain in respect of the length of time for which data can be retained in the United States, access to and use of data by third parties, the number of data required and the lack of independent judicial or extra-judicial review to determine US compliance with its undertakings.

Again, this agreement was negotiated in secret – the draft text is still not publicly available[23] – limiting the opportunities for effective and timely scrutiny by both national parliaments and civil society. Furthermore, negotiations have been placed under extreme time pressures by virtue of the US legislation introduced in November 2001 and US demands for the PNR agreement to come into effect by February 2003.

The 1995 EU Data Protection Directive[24], applicable to first pillar measures only – and so to the processing and transmission of data by airline companies, requires the Commission to determine that there is an 'adequate level of [data] protection' before data may be transmitted to a non-EU country. Although, at the time of writing, the Commission has not yet made such a finding in relation to the United States, data transfers are nonetheless taking place between certain airlines and the United States on the basis of a provisional deal agreed by the European Commission and the US customs authorities in February 2003. This is clearly an unacceptable infringement of EU citizens' fundamental rights, taken by a Union that apparently 'cannot refuse its ally in the fight against terrorism'.[25]

EU measures

Several landmark measures to improve police and judicial co-operation between member states have also been agreed as part of the European Union's counter-terrorism response, even though many of the agreements that the post-11 September proposals will replace have not yet even been implemented. Most of these are based on the principle of mutual recognition, proclaimed at Tampere to be the 'cornerstone' of judicial co-operation within the European Union, and often marketed as a more palatable alternative to harmonisation. Mutual recognition is premised on trust in the existence and application of comparable individual safeguards across the Union. However, it has been queried whether such mutual trust is in fact little more than blind faith, due in part to a lack of knowledge of other EU member states' criminal rules and procedures and in part

to the false assumption that membership of the ECHR can provide an adequate common standard of human rights protection.[26] Without a greater degree of mutual knowledge and a robust set of EU-wide standards in criminal procedural laws, the JHA co-operation forged in the aftermath of 11 September may prove to be unworkable.

A proposal from the EU Commission for a framework decision on procedural safeguards would be an important first step to redress the imbalance that has been created by the rapid agreement of measures to accelerate and simplify co-operation between EU member states. The green paper put forward by the Commission in February 2003 is not, however, being pursued with the same urgency as moves to enhance co-operation. The accession of ten new member states in May 2004 will accentuate the need for such minimum standards and yet is likely to further diminish the chances of reaching unanimous agreement on such a proposal.

The European arrest warrant

Although the seeds of the European arrest warrant (EAW)[27] are to be found in the 1999 Tampere Council Conclusions, it was undoubtedly the momentum of 11 September that prompted its inclusion on the EU Roadmap with a tight three-month deadline for adoption.[28] Moreover, such a radical measure would never have been agreed so rapidly without the political will generated by the events of that day. The EAW will, however, be issued 'for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order'[29] and so will be available in respect of all criminal offences where these are punishable by a maximum sentence of at least 12 months' imprisonment or in respect of which a sentence of at least four months has already been passed. In its Minority Opinion on the Commission proposal for a EAW,[30] the European Parliament emphasised that the accelerated negotiations requested by the Extraordinary Council did not 'allow scope for anything approaching serious consideration of the proposal and a measured assessment of its particularly wide ranging implications for the rules of criminal procedure'. Moreover, it noted that the reason for requesting an urgent procedure – the 11 September attack on the United States – did not constitute genuine grounds since the proposed legislation covers numerous criminal acts that have no connection with anti-terrorism measures. The distorting effect the EAW could have on ordinary rules of criminal procedure across the European Union is yet to be seen.[31]

The EAW scheme will supplant existing extradition procedures with a system of transfer between EU member states, abolishing the former role of the executive and dispensing with the specialty requirement (on a reciprocal basis). It will also remove the double criminality requirement for a list of 32 types of offence that

are punishable by a maximum period of at least three years' imprisonment in the issuing state. The list includes terrorism but also incorporates vague categories such as 'computer-related crime', 'racism and xenophobia' and 'swindling'. Member states do not have a clear idea of the potential offences that could fall within any one of these categories and the final classification will be undertaken by the authority that issues the EAW.

The EAW is the first measure to implement the principle of mutual recognition in the European Union and is broadly thought to be both 'premature in terms of the development of EU-wide substantive and procedural law and under-developed in terms of technical detail'.[32] In terms of safeguards, the EAW scheme relies primarily on Article 6(1) TEU and the ECHR. A breach of fundamental rights in the issuing state is not, however, included among the mandatory and optional grounds for non-execution of a EAW. The continuing fact of judgments against EU member states in the European Court of Human Rights, as well as recent case law in the member states,[33] reinforces the fact that the European Union cannot, however, afford to be complacent. While the ECHR may provide a common floor of protection, its interpretation by the European Court of Human Rights in accordance with a margin of appreciation means that important differences in implementation remain across the Union. Stronger and clearer safeguards on the face of the EAW would have aided both the consistent and certain implementation of the EAW as well as adequate protection of human rights.

Similar criticisms have been made with regard to the framework decision on joint investigation teams and the recommendation on the exchange of information on terrorists, also spurred by 11 September but not restricted to terrorism. Even the framework decision on terrorism itself is drafted in such broad terms that it may allow national authorities to target protesters who, with the aim of 'unduly compelling a government or international organisation to perform or abstain from performing any act' cause 'extensive destruction to … private property likely to … result in major economic loss' in the course of a demonstration. This uncertainty extends to other legislation that adopts the framework decision definition, such as the Common Position on the application of specific measures to combat terrorism, only with the added concern that the limited human rights provisions in the framework decision have not also been adopted.

EU Terrorist Lists

On 27 December 2001, the European Union adopted four counter-terrorism measures. Amongst these is a Council Common Position[34] on the application of specific measures to combat terrorism. It was adopted by written procedure set out in Articles 21 and 39 TEU which do not require the European Parliament to be consulted or even informed of foreign policy measures or of third pillar

common positions. Articles 2 and 3 of the Common Position direct member states to freeze 'the funds and other financial assets or economic resources' of the 'international terrorists' listed in an annex to the Common Position, and to prevent funds, financial assets etc from being made available for their benefit. Article 4 applies to both the 'domestic' and 'international' terrorists named in the annex and instructs member states to 'afford each other the widest possible assistance in preventing and combating terrorist acts' by police and judicial co-operation in criminal matters. These lists have been drawn up without reference to any legal – let alone public – criteria. The risk of abuse by member states in determining those individuals and organisations to be included in the lists is manifest and national political interests of individual states were, from the start, reflected in their composition.

This Common Position was adopted on the basis of Articles 15 and 34(2)(a) TEU which cover CFSP and JHA respectively. The use of a foreign policy instrument to establish lists that will apply to EU citizens in respect of the JHA co-operation foreseen by Article 4 is not only illogical but confuses the routes of political and judicial accountability since different rules apply to the second (CFSP) and third (JHA) pillars. In particular, while the ECJ has no jurisdiction over foreign policy instruments it does have an, albeit limited, jurisdiction over third pillar common positions. The CFSP context may however remove this entirely, leaving those EU citizens named in the lists with no judicial recourse at all.

Conclusion

Within the European Union, the framework of police and judicial co-operation that is evolving rests on mutual trust in the criminal justice systems of all other member states. This trust is in turn based on membership of the ECHR. Reliance on broad-based international treaties such as the ECHR to provide an adequate and consistent level of protection across the Union will not only jeopardise the protection of individual rights but will also undermine the success of the EU mutual recognition programme itself. In relation to non-member states, notably the United States, even the minimum protections of the ECHR are not common ground and the inclusion of adequate safeguards on the face of the agreements is imperative.

The threat – to both fundamental rights and efficient co-operation where this is based on a high level of mutual trust – is accentuated by special counter-terrorism measures that remove fundamental protections and are adopted by impoverished democratic procedures. This distortion of democracy threatens to have wider effects on European criminal justice where so-called 'counter-terrorism' measures in fact have a far broader reach. If any of the agreements made post-11 September are to achieve their ultimate goal of preserving the democratic values on which

the European Union and the United States are both founded, they must account for the fact that different standards of protection do nonetheless exist, both amongst member states and between the European Union and non-member states. They may require more rather than less democratic scrutiny to ensure that this is so.

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Notes

1 See the 2003 Thematic Report of the EU Network of Independent Experts in Fundamental Rights.
2 See the EU Anti-terrorism Roadmap, SN 4019/01 (and subsequent updates).
3 HC 100, 12 December 2003.
4 Idea explored by Professor Elspeth Guild at JUSTICE seminar on the European evidence warrant, London, 24 February 2004.
5 Council Decision of 6 June 2003 concerning the signature of the Agreements between the European Union and the United States of America on extradition and mutual legal assistance in criminal matters [2003] OJ L181/25.
6 Following an unprecedented letter to the EU Presidency from the UK Parliament, indicating that effective scrutiny would be impossible so long as the agreements remained confidential.
7 Report by the European Parliament Committee, *Citizens' Freedoms and Rights, Justice and Home Affairs*, containing a proposal for the European Parliament recommendation to the Council on the EU-US agreements on judicial co-operation in criminal matters and extradition, A5 – 0172/2003, 22 May 2003.
8 These have currently been taken up by the UK, Ireland and Denmark.
9 Article 35(5) TEU.
10 15231/02 LIMITE EUROPOL 104.
11 Highlighted by Mr Alex Turk in his evidence before the EU Committee of the French Senate and reported by Valsamis Mitsilegas, 'The New EU-USA Cooperation on Extradition, Mutual Legal Assistance and the Exchange of Police Data' (2003) 8 *European Foreign Affairs Review* 515.
12 Article 2(2) Council Act adopting the rules governing the transmission of personal data by Europol to third States and bodies [1999] OJ C88/1.
13 Mitsilegas, n11 above.
14 Article 5(4).
15 Article 6.
16 Directive 95/46/EC
17 Public security versus data privacy: the airline passenger data disclosure case and the EU-US debate, Maria Veronica Perez and Yves Poullet, Computer Law and Security Report vol 20 no. 2 2004 p 98.
18 For further information, see Statewatch PNR Observatory at http://www.statewatch.org.
19 Airlines are presently 'caught between a rock (if they follow Community law, they are liable to US sanctions) and a hard place (if they give in to the US authorities' demands, they fall foul of the data protection authorities)', EP Motion for a Resolution PE 326.131, 6 March 2003, p3.
20 Mr Rodota, chair of the Article 29 Working Party on Data Protection in his address to the European Parliament LIBE Committee, 25 November 2003. Also highlighted by the European Parliament in resolution finding that the data protection provided by the US was not 'adequate' in the sense of Article 25 Dir 95/46/EC, P5_TA-PROV(2003)0429, and by the Article 29 Data Protection Working Party Opinion 4/2003 on the level of protection ensured in the US for the transfer of passengers' data, 13 June 2003.
21 Press release of the US Mission to the EU, 'US, EU agree on air passenger data transfer', 16 December 2003 and Frits Bolkestein, address to the EP LIBE Committee on the EU/US Talks on transfers of airline passengers' personal data, 16 December 2003.

22 n19 above.
23 A confidential draft of the 'Undertakings of the Department of Homeland Security Bureau of Customs and Border protection', 12 January 2004 has however been exposed by Statewatch, 2 February 2004.
24 Article 25(2).
25 Bolkestein, n20 above.
26 Alegre and Leaf, *European arrest warrant: A solution ahead of its time?* (JUSTICE, 2003).
27 Council Framework Decision on the European arrest warrant and the surrender procedures between member states of 13 June 2002 [2002] OJ L190/1.
28 Political agreement was reached on 6-7 December 2001 and the framework decision was adopted once parliamentary scrutiny reservations had been lifted in June 2002.
29 Article 1 EAW.
30 A5 – 0397/2001.
31 Only seven out of 15 member states have in fact managed to meet the 1 January 2004 implementation deadline.
32 Alegre and Leaf, n25 above.
33 *R v Secretary of State for the Home Department ex p Rachid Ramda* [2002] EWHC 1278 (Admin).
34 2001/931/CFSP (and subsequent updates).

The Defence of Provocation – In Need of Radical Reform

Janet Arkinstall responds to a Law Commission proposal on the reform of some of the particular defences to murder, in particular, provocation. She sets out the arguments underlying JUSTICE's response

In October 2003, the Law Commission published a consultation paper[1] on reform of certain defences to murder that reduce the offence to one of manslaughter. The Commission's brief was limited by the Home Secretary to the defences of provocation; diminished responsibility; and aspects of self-defence.[2] The narrow remit is regrettable. The substantive law of murder is overdue for review.

The government had earlier expressed its concern at the law relating to provocation in the context of its domestic violence strategy, set out in *Safety and Justice – the Government's Proposals on Domestic Violence,*[3] which led to the Domestic Violence Bill.[4] It argued, first, that provocation is being relied upon too often by men accused of domestic killings of women in circumstances involving jealousy or at the termination of a relationship, where the degree of provocation is minimal; and, second, that sentences in cases of provoked domestic homicides are too lenient.[5]

The need for special defences

The government has rejected abolition of the mandatory sentence of life imprisonment – introduced when the death penalty was abolished.[6] However, the mandatory sentence, and the consequent lack of flexibility, is the main factor responsible for the problems besetting the law of homicide. More generally, the government has fought against the requirements of the European Convention on Human Rights to transfer sentencing to the judiciary. The Home Secretary has, for example, opposed a series of decisions removing his power to set the actual sentence served by those convicted of murder.[7] In 1988, JUSTICE stated in its evidence to the House of Lords Select Committee on Murder and Life Imprisonment, on the basis of its wide experience at that time of dealing with a large number of persons convicted of serious offences:

> *Experience has shown that the great majority of murders are committed in domestic circumstances by persons under immense emotional stress who are unlikely to offend again. In such cases an indefinite power of control is unnecessary. In other cases, where there is a real risk that the murderer might kill again, and he or she is a continuing threat to the public, the*

> *appropriate sentence is likely to be one of imprisonment for a long period, even for life. The most heinous murders will surely always attract such a sentence. In this respect, we think it difficult to distinguish between such murders and the worst cases of rape and, perhaps, armed robbery. If it is a very bad case, or if the offender is likely to re-offend on release from prison, the sentence is likely to be one of life imprisonment in each case. Equally, if these factors do not apply, life imprisonment would be wrong … For these reasons we recommend that the law should be changed to abolish the mandatory sentence of life imprisonment upon a conviction for murder ... The maximum sentence should be one of life imprisonment but the sentencing court should have a complete discretion over sentence in individual cases.*[8]

As Lord Hailsham put it:

> *Murder, as every practitioner of the law knows, … consists of a whole bundle of offences of vastly differing degrees of culpability, ranging from brutal, cynical, and repeated offences like the so-called Moors murders to the almost venial, if objectively immoral, 'mercy killing' of a beloved partner.*[9]

Provocation

A defence such as provocation remains justified even if the mandatory penalty is removed. It can be argued that all intentional homicide should be classified as murder even in circumstances of provocation or diminished responsibility. The sentencing process could then be used to indicate the degree of moral obloquy. Almost all other crimes are, after all, defined simply in terms of the physical action performed in combination with a particular state of mind. However, in the case of homicide there should be a requirement of 'fair labelling'. The stigma of the term 'murderer' should not attach to those who commit a killing, albeit with the mens rea necessary for murder but who are less culpable due to provocation or diminished responsibility (or due to another partial defence).

The Homicide Act 1957 states:

> *Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.*

Provocation has been considered problematic for some time, both here and in a number of other jurisdictions.[10] The Law Commission argues in relation to the problems of the present law of provocation that the 'moral, theoretical and practical difficulties go beyond the "reasonable man" test'.[11] The Commission considers that the moral basis of the defence has never been satisfactorily articulated, making it difficult to identify 'whether the defence developed on the foundations of a coherent moral basis or whether it developed in casuistic fashion responding primarily to changes in contemporary moral and social standards of behaviour[12]. Is it that a provoked killing is less serious because it is partially *justified* by the conduct of the provoker, or because it is partially *excused* by the behaviour of the provoked defendant who, due to the loss of control, is not entirely to blame for his conduct?

The justification approach has the unfortunate effect of blaming the victim. A deceased's relatives may feel that a conviction for the lesser offence of manslaughter, resulting from and justified by the deceased's behaviour, means that the law attributes some responsibility to the victim for their fate, in effect saying it was the victim's conduct that caused the killing. The resulting sense of injustice may be exacerbated by the fact that the deceased is, of course, not able to counter the defendant's assertions as to their provocative behaviour.

At common law, the defence had three essential requirements: there must have been provocative conduct by the victim; that conduct must have caused the defendant to respond in anger; and there must be a reasonable relationship between the provocative conduct and the defendant's response. The difficulties derive from provocation's historic origins in the sword-carrying, insult-throwing age of the seventeenth and early eighteenth centuries. Violent anger might then have been considered to be a virtue in men of honour. A killing might reasonably be classified as manslaughter, rather than capital murder where the defendant killed the victim as the result of a loss of control due to the victim's own offensive or objectionable conduct.

With its emphasis on anger and loss of control, the defence of provocation has been criticised as being too readily available to excuse male violence toward women, particularly in situations involving sexual jealousy or the termination of a relationship. Conversely, a number of high profile cases have shown the inadequacy of the law in cases where an abused woman has killed her abuser, and which do not fit easily into the provocation or self-defence categories. The fact that women are more likely to experience 'slow burn' anger, rather than a sudden loss of control, has only recently been taken into consideration in deciding whether the provocation defence should be available.[13] In twenty-first century Britain it is surely illogical that there should be a defence that excuses a

deliberate killing caused by sudden anger but not one caused by other emotions such as fear or despair.

The Homicide Act expanded the common law defence by abolishing the rule that words alone could not constitute provocation. Judicial interpretation subsequently removed any requirement that the conduct or words be inherently provocative. Consequently, 'provoked' has come to mean no more than 'caused', an interpretation now reflected in the direction to the jury recommended by the Judicial Studies Board.[14] The breadth of the current definition of provocation is illustrated by the following cases quoted by the Law Commission:

> *On this view conduct may amount to provocation which is both entirely lawful and morally blameless: a planning officer enforcing an order (Dryden [1995] 4 All ER 987) or a baby crying (Doughty (1986) 8 Cr App R 319). Nor need the provocation come from the deceased (Davies [1975] QB 691). Further, on this view, logically there is no reason in principle why 'provocation' should be confined, as it is by the 1957 Act, to 'provocation' from a human being. A dog barking can be as irritating as a baby crying. So can other things, such as a car breaking down or a bus not arriving on time.*[15]

If these problems were not enough, the virtual abolition of the objective 'reasonable man' standard by a majority of three to two members of the House of Lords in *R v Morgan Smith*[16] has caused considerable further confusion. There has been an ongoing judicial, academic and parliamentary debate as to whether the defence of provocation should incorporate an objective or subjective test, and concerning the extent to which the defendant's characteristics, other than age and gender, should be taken into account in determining provocation. The question is whether the law should set a standard of self-control, that of the reasonable man, to which every one is expected to conform regardless of their personal characteristics (which may in fact make them more likely to lose control); or whether, in considering whether a particular defendant was in fact provoked, the law should attribute to the 'reasonable man' the defendant's characteristics?

The minority position in *Morgan Smith*[17] is that the defendant's characteristics (in Smith's case, his depressive illness) should be taken into account by the jury in deciding how grave the provocation was and whether the defendant was in fact provoked to lose his self-control, but should be disregarded when considering whether a reasonable person in the same situation would have acted as the defendant did. The majority,[18] however, held that the characteristic was also relevant to the question of whether the defendant had conformed to the

standard of self-control required of the reasonable man, or, in other words, whether a reasonable person in the same situation as the defendant and sharing his characteristics, would have acted as the defendant did. The Law Commission has identified problems with both approaches:

The minority's approach is problematic because of the artificiality and complexity of dividing the defendant's personality so as to separate his or her 'power of self-control' from his or her susceptibility to the gravity of provocation. A person's characteristics may mould not only his or her perception of the gravity of the provocation but also his or her emotional and psychological disposition in response to such provocation.

On the other hand, the majority's position requires or enables the jury to judge the defendant by the standard of self-control of an 'ordinary' person suffering from an abnormal condition that reduces his capacity for self-control. This test is not just artificial but self-contradictory and is tantamount to dispensing with the objective test.[19]

An alternative

In view of the difficulties identified by the Law Commission and referred to above, the defence of provocation should be replaced with a new defence. One answer would be to combine provocation with a general defence of mental disturbance.[20] *Morgan Smith* does indicate an apparent convergence of provocation and diminished responsibility. However, the two defences represent distinct and different reasons for reducing murder to manslaughter. Provocation introduces an element of excuse; diminished responsibility or denial of responsibility.

Any alternative defence should, like provocation, contain an element of loss of self-control. The concept of 'extreme emotional disturbance' is used in equivalent elements of the American Law Institute's Model Criminal Code.[21] Rather than asking whether the defendant provoked, with the risk of importing the problems associated with the concept of provocation, the question for the jury would be: 'Does that fact that the defendant was acting in circumstances of an extreme emotional disturbance mean that he should be excused for having so far lost self-control as to have formed an intent to kill or cause grievous bodily harm, so as to warrant the reduction of murder to manslaughter?'

This new defence would have an excusatory rather than a justificatory moral base. The reason for treating a killing committed in a state of extreme emotional distress as morally less reprehensible than murder is because the defendant was in such a state as not to be able to exercise self-control, and is therefore not fully

responsible for his actions. The new defence would accommodate emotional states other than anger. The requirement that there be a loss of control would be maintained, so as to prevent the defence being available in cases of planned killings by persons who could be said to be in an emotionally disturbed state due, for example, to a passionate obsession with an issue such as abortion, or vivisection. However, the defence would not require a defendant to prove a *sudden* loss of control, a factor significantly responsible for the gender bias against women in the use of provocation. The defence will thus accommodate those who undergo a 'slow burn' reaction to violence or other abuse, and who may be outwardly acting in a calm and deliberate manner at the time of killing, but who have in fact lost control due to their extremely disturbed emotional state.

The jury would be asked to decide whether the defendant's actions were influenced by an extreme emotional disturbance, and whether there was a reasonable explanation for the disturbance. This concept of reasonable explanation for the disturbance is borrowed from the American Model Code. The reasonableness of the explanation should be determined from the point of view of the defendant, taking into account all the circumstances and characteristics of the defendant.

A recommendation of the New South Wales Law Reform Commission is helpful. It favours a subjective test in place of an ordinary person test, so that the question becomes whether 'the accused, taking into account all his or her characteristics, should be excused for having so far lost self control' as to warrant reducing murder to manslaughter.[22] In this way, the subjective majority view in *Morgan Smith* would be adopted explicitly. Such a test would leave the determination of the defence entirely to the jury, with the risk of decisions made on the basis of its particular prejudices or sympathies. However, the test is clear and focuses on the important question, namely, whether murder should be reduced to manslaughter.[23]

However, this generous subjective aspect of the defence should be subject to limitations that reflect community standards of what is acceptable and non-acceptable behaviour. Such limitations are necessary to remove from the scope of the defence situations where it would never be just to call a killing manslaughter rather than murder. For example, current societal norms would hold that the idea that a killing committed because of sexual jealousy or the termination of a relationship should be reduced from murder to manslaughter, is completely outdated and unjust. Societal norms would hold that no matter what emotional state a defendant was in as a result of being arrested, the killing of a police officer in the course of an arrest should be murder rather than manslaughter.[24] It is really a question of the gravity of the killing, and whether it is something that should

result in the label of murder and a life sentence, or whether it is sufficiently excusable for it to be manslaughter instead of murder.

The limitations, or situations where the defence should not be available, should not be expressly included in the statute. Society, and its attitudes, change and evolve over time. Defining certain situations will exclude others. Rather, the trial judge should have the power to decide that the defence should not be left to the jury, where, taking the facts as they are most favourable to the defendant, no reasonable jury could possibly find that he was acting in an extreme emotional state so as to justify reducing the killing from murder to manslaughter. Thus, in most cases the jury would represent the voice of the community and apply its view of current standards of behaviour, but, in what would necessarily be extreme cases, the judge would also perform the function of reflecting community standards. Such a position would be similar to the ability of the judge to withdraw provocation from the jury, as in pre-Homicide Act 1957 days here and as pertains in other jurisdictions now.

The following draft defence seeks to incorporate the above criteria:

1. *A defendant who would otherwise be guilty of murder is not guilty of murder but guilty of manslaughter if, at the time of the commission of the offence, he was under the influence of an extreme emotional disturbance, for which there is a reasonable explanation, that caused in him such loss of self-control that his criminal responsibility was affected to such a degree that the offence ought to be reduced to one of manslaughter.*

2. *In deciding whether the defendant was acting under the influence of an extreme emotional disturbance, whether there was a reasonable explanation for the disturbance, and whether in all the circumstances the offence ought to be reduced from murder to manslaughter, the jury must take into account the defendant's characteristics and circumstances.*

3. *The fact that the defendant was in a state of self-induced intoxication, whether resulting from alcoholic drink, drugs or any other similar substance, may not be taken into account in deciding whether the defendant was acting under the influence of an extreme emotional disturbance, whether there was a reasonable explanation for the disturbance, or whether in all the circumstances the offence ought to be reduced from murder to manslaughter.*

The issues of whether the defendant was under the influence of an extreme emotional disturbance, whether it had a reasonable explanation and whether it caused such loss of self control so that it ought to reduce murder to manslaughter will usually be for the jury to decide. However, the judge may withdraw the issue from the jury where s/he considers that no reasonable jury could find the defence made out. It is unnecessary expressly to provide this in the definition of the defence. While a broad subjective test as expressed in point 2 above is desirable, self-induced intoxication should be excluded from consideration by the jury on obvious public policy grounds, as in point 3.

It is a fundamental principle of justice that where the defendant properly raises a defence the Crown should bear the legal burden to disprove it. Therefore, where the defendant has discharged the evidential burden to raise the extreme emotional disturbance defence, the prosecution should bear a legal burden to disprove it. The burden of proof in respect of the defence of extreme emotional disturbance would thus remain as it now applies to provocation.

The Law Commission has indicated that its final report will be published in spring 2004, and we await their recommendations with interest. Clearly this is an important and difficult area of the law and we look forward to further contribution to the debate regarding its most appropriate reform.

Janet Arkinstall is JUSTICE's director of criminal justice policy.

Notes

1 Law Commission Consultation Paper 173, *Partial Defences to Murder* (London, TSO, October 2003).
2 Thus excluding consideration of other partial defences, such as infanticide, assisted suicide or a killing by the survivor of a suicide pact.
3 Cm 5847, June 2003.
4 At the time of writing this bill is in its early parliamentary stages.
5 *Safety and Justice*, n3 above, para 64.
6 See, eg, Baroness Scotland QC, in relation to an amendment to the Criminal Justice Bill moved by Lord Ackner QC, seeking to abolish the mandatory sentence, who stated '… I must make it clear that we have absolutely no intention to abolish the mandatory life sentence. That is our firm policy and an understanding of our position is reflected throughout the Law Commission report.' HL Debates col 1809, 17 November 2003.
7 See, eg, *R v Secretary of State for the Home Department ex p Anderson* [2002] UKHL 46, [2003] 1 AC 837; *R v Pyrah and Lichniak* [2002] UKHL 47, [2003] 1 AC 903; *R v Secretary of State for the Home Department ex p Hindley* [2001] 1 AC 410; *T and V v UK* (2000) 30 EHRR 121.
8 *Report of the Select Committee on Murder and Life Imprisonment*, HL paper 78-II, 1989, Vol II, p176.
9 *R v Howe* [1987] 1 AC 417, 433.
10 eg, reform has recently been considered in Ireland, New Zealand, and in the Australian states of Victoria and New South Wales.
11 Law Commission Consultation Paper 173, n1 above, para 12.2.
12 ibid, para 3.5.
13 *R v Ahluwalia* [1992] 4 All ER 889; *R v Thornton (No 2)* [1996] 1 WLR 1174.

14 See Law Commission Consultation Paper 173, n1 above, para 4.8 – the JSB specimen direction to the jury on the meaning of provocation is: 'A person is provoked if he is caused suddenly and temporarily to lose his self-control by things that have been [said and/or done] by [X and/or others]'.
15 ibid, para 1.33.
16 [2001] 1 AC 146.
17 Lords Millet and Hobhouse.
18 Lords Slynn, Hoffmann and Clyde.
19 Law Commission Consultation Paper 173, n1 above, paras 1. 38-1.39.
20 See RD Mackay and BJ Mitchell, 'Provoking Diminished Responsibility: Two pleas merging into one?' [2003] Crim LR 745.
21 American Law Institute, *Model Penal Code* (1985), cl 210.3(1)(b) – see Law Commission Consultation Paper 173, n1 above, para 12.78.
22 New South Wales Law Reform Commission, *Partial Defences to Murder*: *Provocation and Infanticide: Report 83* (1997), para 2.81. See Law Commission Consultation Paper 173, n1 above, para 12.48.
23 Law Commission Consultation Paper 173, n1 above, para 5.49.
24 The following situations, taken from the Victorian Law Reform Commission's report, are suggested as ones where it would be unjust to reduce murder to manslaughter: (a) because the deceased has left, attempted to leave or threatened to leave an intimate sexual relationship; (b) because of suspected, discovered or confessed infidelity; (c) because of a non-violent sexual advance; (d) because of the defendant's racist attitude toward the victim. See Victorian Law Reform Commission, *Defences to Homicide: Options Paper*, June 2003, p90.

Equality Re-imagined

GAY MOON explains why substantive and comprehensive reform of the equality and discrimination laws is overdue, as well as some of the considerations that would need to be taken into account in any redrafting of the law.

Equality is a European 'value' identified in clause 2 of the draft European Constitution. It is a vital part of modern life in Britain. Real equality of opportunity inspires individuals to fulfil their potential. The ideal of fairness brings people together. Different cultures and lifestyles enrich our communities. Making use of all the talent available makes Britain more productive and prosperous. But does law serve those noble aims?

The current discrimination laws are notoriously complex and inaccessible. The first discrimination Acts date back to the 1970s and have developed on a piecemeal basis, suffering progressively from additions and accretions from new Acts, statutory instruments and EC directives. Now the list of relevant legislation would tax a revenue lawyer let alone an individual litigant. A recent count has identified 35 Acts, 52 statutory instruments, 13 codes of practice, three codes of guidance and 16 EC directives and recommendations that apply to equality law.[1] This makes it hard for employers to keep track of their responsibilities and for lay people to understand the law. The position has only deteriorated in the four years since Bob Hepple, Mary Coussey and Tufyal Choudhury commented:

> *The statutes are written in a language and style that renders them largely inaccessible to those whose actions they are intended to influence. Human resource managers, trade union officials, officers of public authorities, and those who represent victims of discrimination find difficulty in picking their way through it all.*[2]

Following submissions from JUSTICE and others the UN Committee for the Elimination of all forms of Race Discrimination expressed its concern about the complexity of the UK race laws. One member commented that they were more inaccessible than the Danish tax laws and as a committee they recommended that:

> *the State Party consider introducing a single comprehensive law consolidating primary and secondary legislations, to provide for the same protection from all forms of racial discrimination, as enshrined in Article 1 of the Convention.*[3]

Our equality laws set a very poor example since they are themselves unequal – they give more rights to some people than to others. Thus it is still legal for suppliers of goods and services to discriminate against people on grounds of their religion, sexual orientation and age. Consequently, for example, a Muslim family who are refused accommodation because they are Muslim will have no redress but Jews or Sikhs could take action because the law treats them as belonging to an ethnic group as well as a religious group. This is unfair, illogical and works against the principal of equality.

The laws are also confusing because they are inconsistent. The key terms are still defined differently in different Acts relating to different types of discrimination and the remedies victims receive vary depending on the reason for the discrimination. This makes no sense to people facing discrimination and is confusing for employers.

Our discrimination laws are backward looking. They rely on victims to challenge discrimination after the event instead of making sure that institutions act to prevent discrimination happening. But, even in this, they are also inconsistent. Exceptionally, public sector bodies are required to promote race equality,[4] and a similar duty in respect of disability is soon to be enacted.[5] This creates a hierarchy of provision in which race discrimination is the clear winner but for no apparent reason apart from being first in the field.

Additionally, the law is victim-focused, rather than function-focused. Thus equality laws are directed at the category of discrimination rather than the area of activity to be legislated, for example, employment.

What is needed?

Ideally, we need a comprehensive reform Act to bring the main provisions of equality law together in a clear, straightforward and comprehensible way that eliminates inconsistencies and ensures that each strand receives the same level of protection. The key to this is getting the content of any new Act right. It would entail common, clear standards that employers and the public can understand, including consistent definitions of key terms and common and effective remedies.

Any Act should have an objects clause that would be used to influence the interpretation of the Act when the law is ambiguous. Such clauses have played a useful and important part in the operation of discrimination law in Canada.

What kind of equality?

The analysis of the objective of removing unlawful discrimination and facilitating equality is critical in ensuring that legislation meets the need for which it is

implemented. It is a multifaceted task. Equality has been described in different ways that are sometimes complementary and sometimes supplementary, but each plays its part in the delivery of real equality.

The first type is equality as consistency; that likes should be treated alike. This is encompassed in the current concept of direct discrimination, which entails a comparison with others who do not have the discriminatory status, and whose circumstances are not materially different from those of the disadvantaged person. Its limitation is that it ignores past or present imbalances of power in society which ensure that particular groups, for example, women or ethnic minority people, continue to be put at a disadvantage. Nor does it take account of historic disadvantages suffered by particular sections of society.

Sometimes, as a result of past or historic discrimination, equal treatment will not result in substantive equality because it will be more difficult for someone from a disadvantaged group to fulfil apparently neutral criteria. This has given rise to a concept of indirect discrimination, which can occur when selection criteria, policies, practices or rules are put in place that have a disproportionate effect on people because of their race, sex, disability, sexual orientation or religion or belief. Whether this is unlawful will depend on whether the discriminatory treatment can be justified; whether it is appropriate, proportionate and necessary in order to achieve a legitimate aim.

Indirect discrimination is a very useful tool, but essentially it is an individual remedy and there are circumstances when it is not available. Sometimes an exclusionary provision cannot be identified, a comparator cannot be found or the provision can be adequately justified. So it is important to look for further measures that will achieve an equality of outcomes that will be more effective in achieving change for excluded minorities.

Consequently, a new tool has been developed, a positive duty to promote equality. This currently applies in Great Britain, in the field of race, to all public authorities. Such a duty is anticipatory, requiring public authorities to promote equality of opportunity, to consider and monitor their practices and policies and take remedial action where patterns of under-representation or under-use can be identified. In this way equality of opportunity can be achieved.

This can be a slow method of achieving change and, where past inequalities of treatment have systematically disadvantaged or disenfranchised particular minorities, it may be necessary, for a limited period, in order to achieve defined objectives, to adopt positive action measures. Such measures have been put in place in Northern Ireland in the context of the massive under-representation of

Roman Catholics in the Royal Ulster Constabulary (RUC). The Police (Northern Ireland) Act 2000 now requires the appointment of equal numbers of Roman Catholics and non-Roman Catholics. This is a temporary provision that requires renewal after three years, and which has improved the numbers of the Roman Catholic community serving in the RUC. Measures such as these can do much to ensure fair participation and access for all.

The debate about the meaning and content of equality is a debate about the very idea of modern society and is therefore of the first importance. It is also timely, as the new Commission for Equality and Human Rights is set up. It would be a paradox if it has to secure compliance only with our present grossly unequal equality laws.

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Notes

1 See full list at http://www.justice.org.uk/ourwork/discrimination/index.html.
2 Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework*, report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation, the University of Cambridge Centre for Public Law and the Judge Institute of Management Studies (Hart, 2000) para 2.1.
3 UN CERD report on the UK 2003, para 15;
http://www.ohchr.org/tbru/cerd/United_Kingdom.pdf.
4 Race Relations Act 1976 s19B as amended by the Race Relations (Amendment) Act 2000.
5 Draft Disability Discrimination Bill.

Book reviews