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Human rights litigation and the 'war on terror'

Helen Duffy*

Helen Duffy is the Litigation Director of INTERIGHTS, the International Centre for the Legal Protection of Human Rights.

Abstract

The 'war on terror' has led to grave human rights violations and, in response, to a growing volume of human rights litigation. This article provides an overview of litigation that has unfolded in recent years in relation to issues such as arbitrary detention, torture and ill-treatment, extraordinary rendition, extraterritorial application of human rights norms and the creeping reach of the 'terrorism' label. These cases provide a prism through which are displayed key characteristics of the war on terror as it affects human rights, and enables us to begin to ask questions regarding the role of the courts and the impact of human rights litigation in this area.

On 12 June 2008 the Supreme Court of the United States decided that persons detained by the United States in Guantánamo Bay have the constitutional privilege of habeas corpus. The recognition that all detainees are entitled to this basic right, irrespective of their nationality, their designation as 'enemy combatants' or their offshore location, has been hailed as a victory for the rule of law. Jubilation is somewhat tempered by the fact that it took six years to decide that detainees are entitled to a protection that would normally guarantee judicial access within hours, days or maybe weeks.

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Whether you see the *Boumediene* judgment as a historic victory for justice or a reminder of its woeful failure, it tells a story. It provides a graphic illustration of how far executive violations of human rights have gone in the name of security, and of the nature of the judicial response: deferential and perhaps faltering at first, gradually ceding to a more invigorated role as a matter of last resort.

This judgment is only one part of a burgeoning mass of litigation, each component of which tells its own story. Cases vary as vastly in their goals – gaining access to information, challenging the legality of detention, preventing expulsion or deportation, securing acknowledgement of and compensation for wrongs, for example – as they do in their processes and outcomes. This article will present a necessarily brief survey of some of this practice of human rights litigation to date at the national, regional and international levels.[1]

An enquiry into current litigation practice can serve several purposes. First, it provides an insight into key human rights issues arising in the so-called 'global war on terror'. Looking at issues through cases necessarily gives a limited perspective: a case concerns a particular individual and particular sets of facts as assessed against the particular legal issues within the jurisdiction of the particular court. The number of affected individuals that make it to court is a tiny minority. But, taken together, the practice of litigation in relation to international terrorism over the past few years provides a prism through which, I believe, are displayed quite vividly some of the key characteristics of the global war on terror, its objective and modus operandi.

Second, the brief survey of litigation practice may provide a comparative framework for assessing the impact and limitations of that litigation itself, and the role of the courts in responding to the human rights challenges posed by the war on terror. It remains early days for any such assessment. The cycle of litigation takes time, particularly in the light of the challenges to bringing litigation in this field in the first place, some of which will be explored below, and relatively few cases have run their course. Certainly any assessment of the *impact* of litigation has to be seen through a long-term lens and anything like a meaningful audit of impact would have to wait perhaps another ten years. But the extent of recent developments suggests that it is timely to at least begin to enquire into practice to date and to ask questions regarding the role of the courts in this context.

I shall therefore look first at cases that have arisen post-9/11 addressing five groups of issues (which I believe are illustrative of key characteristics of the 'war on terror' as it affects human rights). These issues are arbitrary detention, extraterritorial application of human rights obligations, torture and related

1 This note focuses on select human rights cases against state violations brought before national or, to a lesser extent, regional and international human rights bodies. In many of the cases cited in this survey, INTERIGHTS was involved as representative or third party/*amicus curiae* intervener. It is noted that cases that serve human rights ends can take many other forms, from civil cases against corporations to criminal cases against individual members of intelligence agencies or – on the basis of universal jurisdiction – against high government officials. There are examples of such cases being brought in the relation to the GWOT but these are not addressed here.

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safeguards, extraordinary rendition, and the spreading reach of the 'terrorist' label and notions of guilt by association. In the conclusion I shall return to the question of the role of the courts and the impact of human rights litigation.

Issue 1: Arbitrary detention

Guantánamo

Probably the most notorious issue, and certainly the one giving rise to the most voluminous litigation, is the Guantánamo anomaly. The facts related to the detention of hundreds of enemy aliens by US personnel in Guantánamo Bay need no introduction.

Detentions at Guantánamo have spurred a litany of litigation in US courts (as well as beyond),[2] focusing mainly on two issues: the right to habeas corpus and the lawfulness of trial by military commission. It is worth sketching out the development of these cases in US courts and the curious game of legal ping-pong that has been played out between the judicial and political branches in the past couple of years, culminating in the 2008 *Boumediene* judgment referred to above.

Round 1: in 2004 a series of cases made their way through US courts challenging the denial of the right of access of detainees to a court to challenge the designation of the individuals in question as 'enemy combatants' and the lawfulness of their detention.[3] This led to two judgments handed down in June 2004. In *Hamdi* v. *Rumsfeld*,[4] the Supreme Court held that US nationals had certain constitutional rights, including having 'a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker'. Justice Sandra Day O'Connor famously cautioned on the behalf of the Court that 'We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens'.[5] This 2004 case was seen to represent an important marker of executive accountability, albeit in the limited cases where the detainees are US nationals.

2 As regards US responsibility under the American Declaration of the Rights and Duties of Man, see Inter-American Commission on Human Rights, Precautionary Measures in Guantánamo Bay, 13 March 2002. Another line of litigation has concerned the role of other states in transferring or failing to support nationals detained in Guantánamo: see, e.g., ECtHR, *Boumediene and others* v. *Bosnia and Herzegovina*, Application Nos. 38703/06, 40123/06, 43301/06, 43302/06, 2131/07 and 2141/07 found inadmissable by the ECtHR on 18 November 2008 before the European Court of Human Rights (ECHR = Convention), or England and Wales Court of Appeal, *R* (*Abbasi*) v. *Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598.

3 Two of the three groups of cases concerned US nationals detained in the United States or outside, and the third (affecting the vast majority of detainees) concerned non-nationals detained beyond US soil. The first of these cases – *Padilla* v. *Rumsfeld*, 352 F.3d 695 (2d Cir. 2003) – is less relevant, as it concerned a US citizen who was ultimately transferred to the regular criminal justice system within the United States, charged with conspiracy and found guilty before a federal court.

4 US Supreme Court, *Yaser Esam Hamdi and Esam Fouad Hamdi as next friend of Yaser Esam Hamdi, Petitioners* v. *Donald H. Rumsfeld, Secretary of Defense, et al.*, 542 US 507 (2004) decided June 28 2004.

5 Ibid., 536.

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In respect of the right of habeas corpus of the vast majority of detainees who were non-nationals detained outside the United States, in *Rasul & Ors* v. *Bush*[6] the Supreme Court took a far more cautious approach. It refrained from addressing the issue as a constitutional rights issue. But the Court found, by reference to a statute conferring jurisdiction on courts, that there was nothing to prevent the courts from exercising jurisdiction in these cases.

The government's response to these judgments is well known. As regards US nationals, one had already been released and the other was transferred to regular courts.[7] As regards the hundreds of non-nationals detained at Guantánamo, the response was quite different. First, the executive introduced the Combatant Status Review Tribunals and Administrative Review Boards in an apparent attempt to provide a habeas corpus substitute, despite these being non-judicial mechanisms that lacked basic procedural rights associated with the right of habeas corpus.[8] This provided cover for congressional follow-up with the Detainee Treatment Act 2005 (DTA), which, in addition to some positive provisions on treatment of detainees, responded to the judgment by making it explicit that there is *no* right of habeas corpus for Guantánamo detainees.

Round 2: this led to a second round at the Supreme Court in the form of *Hamdan* v. *Rumsfeld*.[9] The US government claimed that the DTA had stripped Hamdan of his right to habeas corpus. In its June 2006 judgment, the Court again refrained from addressing the question whether there was a constitutional right to habeas corpus that rendered the DTA's purported habeas corpus stripping unconstitutional. It found instead that the Act did not apply to Hamdan anyway, as his case was ongoing at the time the DTA was adopted.

Having determined that it had jurisdiction, the Court went on to find that basic due process guarantees contained in Common Article 3 of the Geneva Conventions, incorporated into US law by the Uniform Code of Military Justice (UCMJ)[10] statute, applied to all detainees. The decision that the military commissions were unlawful because they violated these basic provisions was an important and positive decision in terms of rights protection. It is noteworthy, though, that *Hamdan* is not framed in terms of 'individual rights', but as a separation of powers issue, addressing whether 'the President has acted in a way that exceeded [congressional] limits'.

6 US Supreme Court, *Shafiq Rasul, et al., Petitioners* v. *George W. Bush, President of the United States, et al.; Fawzi Khalid Abdullah Fahad al Odah, et al., Petitioners* v. *United States, et al.*, 542 US 466, decided June 28 2004.

7 See notes on *Padilla* and *Hamdi*, above notes 3 and 4.

8 For an analysis of the operation of the Combatant Status Review Tribunals, where detainees lack access to the evidence against them, see Mark Denbeaux et al., *No-Hearing Hearings: CSRT: The Modern Habeas Corpus?*, available at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf (last visited 15 October 2008).

9 US Supreme Court, *Salim Ahmed Hamdan, Petitioner v. Donald H. Rumsfeld & Others*, 548 US 557 (2006).

10 Uniform Code of Military Justice, UCMJ, 64 Stat. 109, 10 USC ch.47.

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Nonetheless, there had been a finding by the Supreme Court that the executive's conduct violated international and domestic law. The US government again faced the quandary of how to respond to this judicial slight. With the 2006 Military Commission Act, Congress responded in two ways. First, it determined that the relevant international law – the Geneva Conventions – could no longer be relied upon as a source of rights in habeas corpus or other civil proceedings against US personnel. Second, it provided that courts would not have jurisdiction to hear habeas corpus applications (or any other action) by any person determined to be an enemy combatant or awaiting such determination, thus extending the jurisdiction-stripping provisions of the DTA beyond Guantánamo to detentions anywhere.[11] Rather than a response that would seek to deal with the problem by bringing policy in line with law, the law was identified as the problem, and international sources of law and judicial oversight of them were removed.

Despite several Supreme Court judgments, the basic question of whether constitutional due process and habeas corpus protections apply to non-nationals detained outside US territory remained unanswered until June 2008.[12] With no further possibility of constitutional avoidance, in *Boumediene* v. *Bush*[13] the issue was finally resolved in the affirmative. The US Supreme Court ruled that 'enemy combatants' held by the United States at Guantánamo Bay have the right under the US Constitution to challenge their detention before regular courts. The Court also ruled that the procedures for review of the detainees' status under the 2005 Detainee Treatment Act were not an adequate and effective substitute for habeas corpus. It therefore declared unconstitutional section 7 of the 2006 Military Commissions Act, which denied habeas corpus to any detained foreign 'enemy combatant'.

The importance of this ruling should not be underestimated. Ultimately, the Supreme Court has addressed the issue of habeas corpus as the fundamental rights issue it is. It rejects artificial distinctions based on nationality or geographical location as relevant to determining the existence of rights and obligations.

11 MCA, s.7(1)(e):

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 USC 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

12 Little clarity was provided by lower courts. In two cases – *Al Odah* and *Boumediene* – the district courts reached completely different outcomes and, on 20 February 2007, the DC Circuit Court of Appeals ruled 2–1 that the Guantánamo detainees have no constitutional right to habeas corpus review of their detentions in federal court.

13 US Supreme Court, *Lakhdar Boumediene, et al., Petitioners* v. *George W. Bush, President of the United States, et al.*, 553 US.

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It represents the willingness of the judiciary to engage and fulfil their democratic mandate and reinforce the legal and constitutional limits on executive action. How the executive responds to those decisions will also be an important measure of the state of health of the rule of law and the separation of powers.[14] It will also determine what the ruling means in practice for the approximately 270 detainees remaining in Guantánamo Bay.

At the same time, the judgment itself was a close 5:4 decision, with some strident dissents that graphically demonstrate the extent of the antipathy of certain judges to step into what they see as issues of security properly for executive determination.[15] Of most concern, of course, is simply the time it has taken to reach this decision. Litigation is a time-consuming business, and due process of law and respect for the judicial function require that it be allowed to run its course. Undoubtedly, some gains have been made at each stage of this judicial marathon (as I shall return to when looking at the question of impact later). But one has to ask whether the judicial process has not been characterized by undue constitutional avoidance, as well as excessive judicial deference to the executive and congressional decision-making role, in the refusal to address the constitutional question at an earlier stage. Unfortunately, the political organs did not repay the democratic compliment and react to judicial suggestions about the need to bring policy into line with law.[16] Whether this was a miscalculation as to how the political branches would respond, or a strict approach to the judicial doctrine of constitutional avoidance, is open to question. But the somewhat anomalous result is a decision six years down the line that the right to habeas corpus applies, theoretically guaranteeing access to a court within hours or days of arrest and detention. One must question the extent to which this constitutes a meaningful a judicial response for this sort of emergency remedy.

The same day that the US Supreme Court handed down its judgment in *Boumediene* it also handed down *Munaf* v. *Geren*,[17] in which it acknowledged that persons detained in Iraq also have the right to habeas corpus. It found that in the Iraqi context it was Iraqi courts that should exercise jurisdiction, and it therefore denied the jurisdiction of US courts on that basis. But the case is significant in reinforcing the principle that the right of habeas corpus applies to persons detained by US personnel beyond US jurisdiction. This may become particularly important

14 While President Bush's immediate response to the judgment was equivocal, US President Barak Obama indicated shortly upon taking office that the Guantanamo facility would be closed. 'Obama plans executive order to close Guantanamo Bay' CNN on-line, 22 January 2009, http://edition.cnn.com/2009/POLITICS/01/21/guantanamo.hearings/index.html.

15 This was graphically demonstrated by the tone and content of some of the dissents, notably Scalia J's assertion of the 'disastrous conse-quences' of the majority judgment which he claimed 'will almost certainly cause more Ameri-cans to be killed'. *Boumediene*, above note 13, Dissenting Judgment of Scalia J, p. 2.

16 E.g., as noted above, Congress reacted to the *Hamdan* judgment by divesting the courts of jurisdiction and of 'inconvenient' sources of law, rather than taking the judicial lead and bringing policy into line with law.

17 *Munaf et al.* v. *Geren, Secretary of the Army, et al.*, Certiorari to the United States Court of Appeals for the District of Columbia circuit, No. 06–1666. Argued March 25, 2008 – Decided 12 June 2008.

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in a context of increasing resort to Guantánamo 'alternatives' in the form of detention abroad.

Belmarsh

In 2004, parallel cases made their way through the English courts, resulting in the famous *A & Ors* derogation case before the House of Lords (Belmarsh judgment).[18] The case concerned the detention of non-UK nationals in Belmarsh prison on the basis of their suspected involvement in international terrorism, pursuant to the 2001 Anti-Terrorism, Crime and Security Act.[19] In order to allow such a measure, the United Kingdom had derogated from its obligations in respect of the right to liberty under Article 5 of the European Convention on Human Rights (ECHR).

The case raised different issues from those before US courts. The UK Act itself provided for regular independent review by the Special Immigration Appeals Commission, which is a court of law, albeit in the context of limited and controversial rules and procedures.[20] The right of habeas corpus was not, as such, in dispute in the United Kingdom, and the case that made its way to the House of Lords concerned the lawfulness of the derogation and of the detention itself.

When the matter went before the House of Lords – the supreme court of appeal in the United Kingdom – the court found that the United Kingdom's derogation from the European Convention on Human Rights to enable it to detain people on national security grounds, potentially indefinitely, was not valid. The majority deferred to the government's assessment of the existence of an 'emergency' justifying derogation. However, they found that the detention of non-nationals could not be justified as strictly required by that emergency. The judgment notes that 'If derogation is not strictly required in the case of one group [nationals], it cannot be strictly required in the case of the other group [non-nationals] that presents the same threat.'[21] The court therefore found a violation of

18 UK House of Lords Appellate Committee, *A and Others* v. *Secretary of State for the Home Department, X and another* v. *Secretary of State for the Home Department* [2004] UKHL 56 (A & Ors (Derogation)).

19 See sections 21–32 of the United Kingdom's Anti-terrorism, Crime and Security Act, 2001, which 'allow[s] the detention of those the Secretary of State has certified as threats to national security and who are suspected of being international terrorists where their removal is not possible at the present time. These provisions change the current law, which allows detention with a view to removal only where removal is a realistic option within a reasonable period of time … '.

20 Controversial rules related to, for example, access to counsel and to evidence. See, e.g., the report of the United Kingdom's Parliamentary Constitutional Affairs Committee 'The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates', report of session 2004/5, HC 323-II, available at www.parliament.the-stationery-office.co.uk/pa/cm200405/cmselect/cmconst/323/323ii.pdf (last visited 15 October 2008). See also, e.g., 'Ian Macdonald QC resigns from SIAC', 1 November 2004, available at www.gardencourtchambers.co.uk/news/news_detail.cfm?iNewsID=268 (last visited 20 April 2008).

21 *A & Ors* (*Derogation*), above note 17, Lord Bingham, para. 132: 'I would hold that the indefinite detention of foreign nationals without trial has not been shown to be strictly required, as the same threat from British nationals whom the government is unable or unwilling to prosecute is being met by other measures which do not require them to be detained indefinitely without trial. The distinction which the government seeks to draw between these two groups – British nationals and foreign nationals – raises an issue of discrimination. But, as the distinction is irrational, it goes to the heart of the issue about

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the rights to liberty and to non-discrimination, provided for in law in the United Kingdom via Articles 5 and 14 of the ECHR.

The positive significance of this decision lies on many different levels. The first relates to the obvious importance of the strict approach to the protection of the right to liberty and the need for careful but challenging judicial oversight. Beyond that, the case did what much of debate and indeed litigation elsewhere – including the US litigation referred to above – had neglected to do, in signalling the centrality of the equality issue. This is particularly significant in a context of frequent reliance on divisions and distinctions based on nationality as well as other grounds as a basis for inferior treatment. While nationality does have some significance in the context of the application of certain aspects of international humanitarian law (IHL), it is a critical manifestation of the universality that underpins human rights law that nationals and non-nationals alike are protected.[22] The onus is on the state to demonstrate that discrimination is justified, which it was unable to do in this case.

The case is also constitutionally significant in its assessment of the proper judicial role and the limits of due judicial deference. In a powerful passage Lord Bingham famously rejects the Attorney General's submissions in this respect, noting,

> "I do not in particular accept the distinction which he drew between democratic institutions and the courts … the function of independent judges … [is] a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatise judicial decision-making as in some way undemocratic."

Significant too was the executive's response. The UK government changed its law and practice in the light of the Belmarsh judgment. The derogation and offending legislation were withdrawn, and new legislation was adopted, providing, *inter alia*, for 'control orders' rather than imprisonment for persons suspected of involvement in international terrorism.[23]

proportionality also. It proceeds on the misconception that it is a sufficient answer to the question whether the derogation is strictly required that the two groups have different rights in the immigration context. So they do. But the derogation is from the right to liberty. The right to liberty is the same for each group. If derogation is not strictly required in the case of one group, it cannot be strictly required in the case of the other group that presents the same threat.'

22 Only in relation to certain rights in limited circumstances – notably relating to political life – are rights enjoyed only or to a greater degree by a state's own citizens. See, e.g., UN Human Rights Committee General Comment No. 15, The position of aliens under the Covenant [1986], in UN Doc. HRI/GEN/1/Rev.6 (2003), p. 140. Also note the IACHR comment in relation to Guantánamo detainees: '[t]he determination of a state's responsibility for violations of the international human rights of a particular individual turns not on the individual's nationality … '. Inter-American Commission on Human Rights, Precautionary Measures in Guantánamo Bay, Cuba, 13 March 2002.

23 On control orders authorized by the Prevention of Terrorism Act 2005 and their operation, see the statement made by Tony McNulty, Minister for Security, Counter-Terrorism, Crime and Policing (The Rt Hon Tony McNulty) to Parliament: 'Control Orders Update (11 March 2008–10 June 2008)', 12 June 2008, available at http://security.homeoffice.gov.uk/news-publications/news-speeches/control-orders-update-0608 (last visited 15 October 2008). The Act authorized both derogating control orders,

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These orders spurred their own controversy and their own litigation. The judgments handed down provide, among other things, an interesting analysis of what constitutes 'detention' as opposed to limits on freedom of movement, and the stage at which not only physical limits but also the degree of control over aspects of daily life might amount to unlawful detention.[24] The House of Lords found in one case that those orders that allowed for persons to be confined to specified areas for up to 18 hours a day and cut off from contact with the outside world amounted to detention by any other name, and required derogation from Article 5 of the ECHR. These cases also demonstrated the willingness of the courts to engage in and seek to grapple with the difficult issue of what balance is an acceptable one in a democratic society facing the challenge of international terrorism.

Issue 2: Limiting the applicability of treaty obligations: extraterritorial application and action pursuant to Security Council authorization

Extraterritoriality

The rationale behind the Guantánamo anomaly referred to above was that, due to its offshore location, the constitutional human rights obligations that normally apply on US soil would not apply there. As a constitutional matter, the fallacy of such a distinction has been clarified by the *Boumediene* and *Munaf* cases discussed above. As a matter of international human rights law, the proposition was always straightforwardly wrong. The complete control exercised by the United States over the part of Cuba where Guantánamo lies, as well as over the detainees themselves, meant that the United States exercised jurisdiction and control to satisfy the criteria for applicability of human rights treaties.[25] As the Inter-American

where the government recognized that derogation from the ECHR would be required, and non-derogating orders, where, in the government's view, it would not.

24 UK House of Lords, *Secretary of State for the Home Department* (*Appellant*) v. *JJ and others* (*FC*) (*Respondents*), [2007] UKHL 45, decided 31 October 2007. On control order litigation in Australian courts, see High Court of Australia, *Thomas* v. *Mowbray* [2007] HCA 33, 2 August 2007, available at www.austlii.edu.au/au/cases/cth/HCA/2007/33.html (last visited 15 October 2008), where, in a 5:2 decision, the High Court of Australia upheld the constitutionality of a criminal anti-terror law under which a federal magistrate issued an interim control order.

25 Human rights bodies have long considered the extraterritorial application to depend on whether the state exercised 'effective control' abroad. See, e.g., International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, which, following earlier Human Rights Committee decisions, noted that it is unconscionable to permit states to do abroad what they are prohibited from doing at home. A stricter approach, at least as regards the ECHR, was apparent when the European Court of Human Rights suggested in the *Bankovic* v. *Belgium* case that control over territory, and not just control over individuals or situations by agents acting abroad, may be required for the Convention obligations to apply. See, e.g., Helen Duffy, *The War on Terror and the Framework of International Law*, Cambridge University Press, Cambridge, 2005, pp. 282–9, 332–7.

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Commission on Human Rights observed when requesting that the United States adopt precautionary measures to protect the detainees (a request ultimately unheeded),'[t]he determination of a state's responsibility [for human rights violations] turns not on the individual's nationality or presence within a particular geographic area, but rather on whether, under the specific circumstances, that person fell within the state's authority and control.'[26]

While the Guantánamo anomaly is so stark as to provide an easy target, a narrow view of extraterritorial application is mirrored elsewhere, albeit in slightly less caricatured form. In a judgment of June 2007, in *Al-Skeini* v. *Secretary of State for Defence*,[27] the House of Lords ruled on the application of the ECHR to the conduct of British troops in Iraq. The case concerned six appellants, the first five of whom had been killed by UK 'patrols' in occupied Basra, for example while eating a family evening meal, during a raid on a family member's house or while driving a minibus. The sixth, Baha Mousa Baha, was tortured while in UK custody in Iraq. The object of the litigation was to compel the government to carry out an investigation into these violations as required by the ECHR, incorporated via the UK Human Rights Act.

At first the government argued that the ECHR did not apply to its actions in Iraq. In the course of litigation the government's position changed (providing an example of how the process of litigation can itself quite directly shape policy), and it argued that the ECHR did apply to persons in UK custody in Iraq but not to persons killed or injured on the streets of Basra.[28]

When the case made its way to the highest UK court, the House of Lords, the court accepted the government's view as regards the scope of application of the Convention. It found that while individuals killed or mistreated within UK 'custody' are entitled to the protection of the ECHR, those on the streets of Basra – including those directly shot or mistreated by UK soldiers patrolling streets – are not.

The strength of the *Al-Skeini* case lies in its confirmation that for individuals detained by UK authorities anywhere in the world, the ECHR, and the Human Rights Act giving effect to it in the United Kingdom, apply. Although the issues were somewhat different, this sentiment is replicated and reinforced by the recent finding, in *Munaf* v. *Geren*, of the US Supreme Court concerning due process rights applicable to US detainees in Iraq. This rejects the more restrictive approach argued by the authorities of the United States, and at an earlier stage, the United Kingdom, as to the non-applicability of international human rights treaties.

However, on this occasion the House of Lords may have adopted an unduly restrictive approach to human rights protection in rejecting the applicability

26 See IACHR Guantanamo Bay Precautionary Measures, above note 21.

27 UK House of Lords, *Al-Skeini* v. *Secretary of State for Defence*, [2007] UKHL 26, 13 June 2007.

28 At all stages the government denied the extraterritorial applicability of the Human Rights Act (as opposed to the ECHR). The government did not challenge the fact that, provided that the Convention and the UK Act were applicable, there existed an obligation to carry out an investigation and the case should go back to the divisional court for assessment of the facts.

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of the European Convention beyond situations of detention. It rejected arguments that the relevant question related to the degree of control the state exercised over the situation, and whether there was in all the circumstances a sufficiently 'direct or immediate' link between the extraterritorial conduct and the alleged violation of individual rights.[29] It focused instead on what might be described as formalistic distinctions based on custody or not. The somewhat anomalous result is that an individual's ability to achieve redress depends on whether his abusers were courteous enough to arrest him beforehand, or whether his abuse occurred inside or outside prison walls. While the implications of this judgment remain to be seen, in *Al-Skeini* the House of Lords may have contributed to confusion in an already murky field.

A restrictive approach to extraterritoriality, and growing confusion in this area, has potentially important implications for accountability in the war on terror, a large part of which is being executed extraterritorially. Of course, states continue to be bound normatively by customary law and IHL. But, as this case shows, the extraterritorial application of human rights treaties is critically important in practice in a context where the application of human rights law in fact amounts to the only way of accessing a court of law and ultimately of securing a remedy.[30]

It remains to be seen whether this somewhat novel approach by the UK courts will be adopted elsewhere.[31] The Committee against Torture (CAT) has certainly made it clear that the Convention against Torture and Cruel, Inhuman and Degrading Treatment does apply extraterritorially, and has been implicitly critical of both the United Kingdom and United States for taking an approach limiting the Convention's applicability in Iraq or Afghanistan.[32] The CAT has stated, for example, that '[t]he State party should recognize and ensure that the provisions of the Convention expressed as applicable to "territory under the State party's jurisdiction" apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.'

29 For the NGO third-party intervention, including support for the 'direct or immediate' link, see www.interights.org.

30 As in the United Kingdom, human rights protections are often incorporated into domestic law. However, IHL violations lack an enforcement mechanism and, under CAT, neither the United States nor the United Kingdom has made the declaration required under Art. 22 to allow for individual petitions.

31 The *Al Skeini* case, above note 26, has been presented to the ECtHR.

32 See, e.g., Conclusions and recommendations of the Committee against Torture; United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006: 'The State party should recognize and ensure that the provisions of the Convention expressed as applicable to "territory under the State party's jurisdiction" apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.' See also Conclusions and recommendations of the Committee against Torture; United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, UN Doc. CAT/C/CR/33/3, 10 December 2004: 'The Committee expresses its concern at … the State party's limited acceptance of the applicability of the Convention to the actions of its forces abroad, in particular its explanation that " those parts of the Convention which are applicable only in respect of territory under the jurisdiction of a State party cannot be applicable in relation to actions of the United Kingdom in Afghanistan and Iraq"; the Committee observes that the Convention protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the de facto effective control of the State party's authorities.'

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Just as *Al-Skeini* raised questions about the applicability of human rights treaty obligations extraterritorially, a more recent House of Lords case provoked questions about the impact of such obligations where the state acts under the apparent authority of a Security Council resolution. This issue arose in the case of *R* (*on the application of Al-Jedda*) v. *Secretary of State for Defence*, decided on 12 December 2007.[33] A cautious and arguably restrictive approach to human rights protection was again apparent.

The case concerned Iraqis detained by UK soldiers (acting as part of a UN force in Iraq) on terrorism charges. The first question the House of Lords addressed on appeal was whether the government was liable for the appellant's allegedly wrongful detention, as opposed to the United Nations being responsible on the basis that the impugned acts were attributable to the United Nations as a result of Security Council resolutions authorizing the Multinational Force in Iraq. The Lords found the question of fact to be whether the United Nations exercised effective control over UK actions, which it found not to be the case.[34] The court had no difficulty in distinguishing this mission from the Kosovo Force (KFOR), where more difficult issues of attribution arise.[35] Thus the allegedly wrongful conduct was attributable to the United Kingdom, not the United Nations.

The second question proved more problematic. The court asked itself whether the United Kingdom's obligations under the European Convention on Human Rights were qualified by those that arise under the UN Charter, particularly under relevant Security Council resolutions. All five Lords of Appeal found that the United Kingdom's obligations under the European Convention had to be limited by those due under the Charter. They therefore upheld the authority to detain individuals in Iraq on this basis. However, Lord Bingham found that while the United Kingdom had the authority to detain the appellant pursuant to Security Council resolutions, it must still 'ensure that the detainee's rights under Article 5 [of the European Convention] are not infringed to any greater extent than is inherent in such detention'.

The Court did not find, as the applicants had argued, that a distinction should be drawn between clear *obligations* under Security Council resolutions, and other activities that might be authorized by, or indeed broadly carried out pursuant to, such resolutions. Article 103 of the Charter undoubtedly provides that where there is a conflict between obligations under the Charter and treaty obligations, the former prevail. But if the judgment were to be understood as exempting the whole range of actions taken under Security Council resolutions from human rights obligations (or indeed those under IHL), the result could be a serious

33 UK House of Lords, *R* (*on the application of Al-Jedda*) v. *Secretary of State for Defence*, [2007] UKHL 58, Judgment of 12 December 2007.

34 As the Lords noted, the United Kingdom had never claimed before the case that the UN did exercise control over these operations.

35 The majority distinguished the admissibility decision of the Grand Chamber of the European Court of Human Rights in *Behrami* v. *France*, *Saramati* v. *France, Germany and Norway*, Application Nos. 71412/01 and 78166/01, May 2, 2007, which attributed the acts of KFOR to the United Nations and not to the individual countries that contributed forces to that mission.

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protection gap. This is particularly so in the 'war against terrorism' context, where wide-ranging resolutions have called on far-reaching action against terrorism, but without clear definition as to either the action required or the nature of the terrorism against which it is directed.

Issue 3: Torture

Practices of torture and cruel, inhuman or degrading treatment have come to light in recent years with increasing regularity, as epitomized by (though far from limited to) scandals such as Abu Ghraib or Baghram. This has regrettably been coupled with attempts to redefine torture according to obscenely high thresholds of barbarity, to 'justify' it, *inter alia*, as a matter of 'executive privilege', or to undermine procedural safeguards associated with it. I shall highlight a couple of cases from the other side of the Atlantic that fall into the last category and illustrate attempts to erode, indirectly, the prohibition.

Deportation to torture or ill-treatment

The first set of cases, *Saadi* v. *Italy*[36] and *Ramzy* v. *Netherlands*[37] before the European Court of Human Rights (ECtHR), relate to the deportation of individuals to states where, the applicants allege, there is a real risk of their being subject to torture and ill-treatment. When the *Ramzy* case appeared before the Court, the Dutch government's case related, as many in Strasbourg do, to the difficult and not uncontroversial question of whether there was a real and personal risk to Mr Ramzy in Algeria. But several other governments, led by the United Kingdom, changed the face of the case by taking the unusual step of presenting a third-party intervention.[38] They argued that in the light of the growth of 'Islamist extremist terrorism' the Court should re-examine the relationship between protection from ill-treatment and 'national security' interests. In effect, they argued that, through introducing a 'balancing' test, national security could justify exposing persons to real and imminent risk of torture if those individuals were deemed by the government to represent a risk. Numerous international NGOs intervened, based on the absolute nature of the *non-refoulement* rule (the ban on forcible return), and the standard for assessing risk.[39]

36 ECtHR, *Saadi* v. *Italy*, Appl. No. 37201/06, Judgment of 28 February 2008.

37 ECtHR, *Ramzy* v. *the Netherlands*, Appl. No. 25424/05, pending, available at www.echr.coe.int/eng/press/2005/oct/applicationlodgedramzyvnetherlands.htm (last visited 16 October 2008).

38 The intervention was presented by the governments of Lithuania, Latvia, Portugal and the United Kingdom. See the 'refining' and limiting of the UK government position to cruel and inhuman treatment in the Parliamentary Joint Committee on Human Rights Thirty Second report, Session 2005-6, available at www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/27808.htm (last visited 15 October 2008).

39 For the intervention in the *Ramzy* case submitted on behalf of several international NGOs, see www.interights.org.

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When the *Saadi* case then came before the court addressing similar issues – Mr Saadi claimed that he would be at risk of torture and ill-treatment in Tunisia, where mistreatment of alleged terrorists is well documented – the UK government again seized its opportunity to argue in favour of the 'balancing' test on the same terms as it had in Ramzy. The *Saadi* case leapfrogged the Ramzy case, which is still pending at the time of writing, and the Grand Chamber of the Court handed down judgment on 28 February 2008.

In a unanimous judgment the European Court remained resolute in upholding the approach established by its earlier decisions and followed by other international courts and bodies. The judgment reaffirmed that the prohibition on transfer of individuals to countries where they face a real risk of torture or other ill-treatment is part of the absolute prohibition on torture. The Court was emphatic in recognizing the difficulties states face in countering terrorism, but categorical in its rebuke of the notion that there are exceptions to the absolute nature of the prohibition of torture or ill-treatment or any room for balancing:

> States face immense difficulties in modern times in protecting their communities from terrorist violence. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3 [of the European Convention, prohibiting torture and other ill-treatment].

Although they were unsuccessful, the very fact that governments made these interventions, despite the odds of success being seriously stacked against them (in the light of clear and on-point jurisprudence from the Court itself,[40] quite apart from any of the principles at stake), is telling. It arguably reveals a shift in the approach to rights protection by certain states at least, and a questioning and undermining of even the most sacrosanct human rights protections. The resolute rejection of this approach by the European Court is an example of the important role of the courts in reaffirming fundamental principles.

A & Ors: admissibility of torture evidence

A second issue related to safeguards against torture, which has arisen in several states in the context of the fight against international terrorism in recent years, is the reliance on, and admissibility of, evidence obtained through torture and ill-treatment.

Again in the United Kingdom, the issue played out in the case of *A and Others* v. *Secretary of State for the Home Department* (*No. 2*).[41] The case concerned the admissibility, before the UK Special Immigration Appeals Commission, of

40 See, most notably, ECtHR, *Chahal* v. *United Kingdom*, ECtHR Reports 1996-V, no. 22, Judgment of 15 November 1996.

41 UK House of Lords, *A* v. *Secretary of State for the Home Department* (SSHD) (No. 2) [2005] UKHL 71, Judgment of 9 December 2005.

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evidence that may have been obtained through torture by foreign states. The UK government advanced the argument – anomalous perhaps, yet accepted by the Court of Appeal – that evidence obtained through torture at the hand of a UK official is inadmissible, whereas evidence obtained through torture at the hand of foreign officials, for whom the United Kingdom is not responsible, is admissible.

In its judgment of 8 December 2005, the House of Lords rejected this rationale, finding that torture is torture no matter who does it, and that such evidence can never be admitted in legal proceedings. It also noted the link between the safeguards against torture and the incidence of torture, finding that the state 'cannot condemn torture while making use of the mute confession obtained through torture, because the effect is to encourage torture'.[42]

The judgment is a strong reassertion of principle, seeing the admissibility of evidence not only as linked to fair trial issues but also as an inherent aspect of the positive obligations around the torture prohibition itself. It is worth flagging, however, that the judgment is somewhat more limited in other respects. First, while clear on the principle of inadmissibility, it is less clear – and the court was more cautious – on how the rule would operate in practice. The court found that evidence is inadmissible where the tribunal had 'established' on balance of probabilities that it had been obtained under torture. If that is not 'established' – as presumably happens not infrequently in view of the opacity and uncertainty surrounding intelligence – but there remained a real risk that such was the case, the court found that evidence could be admitted but afforded less weight.[43]

Second, the court focused on the issue of admissibility in 'proceedings', but indicated what may be an overly sweeping inclination to accept the lawfulness of the use of torture evidence for other purposes, such as arrest, search or detention. The difficult and sensitive issue of the extent of obligations, if any, of states not to rely on, solicit or trade in evidence obtained through torture outside the courtroom remains unclear.

Issue 4: Extraordinary rendition

Among the most innovative and the most shocking of the many violations to which the war on terror has given rise is the practice of 'extraordinary rendition'. Reliable reports are increasing of the kidnapping and secret transfer of individuals without any process of law to various locations and/or to third states for what has been referred to as detention or torture by proxy.[44] This is straightforwardly a violation

42 Ibid., p. 30 citing McNally JA.

43 In contrast to the majority finding, compare the test proposed by Lord Bingham, according to which evidence should be regarded as inadmissible if the executive had been unable to show that it was not obtained by torture. Ibid., paras. 54–56.

44 See, e.g., Council of Europe Committee on Legal Affairs and Human Rights, Rapporteur Mr Dick Marty, Alleged secret detentions in Council of Europe member states, Information Memorandum II, AS/Jur (2006) 03 rev, 22 January 2006, available at http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf (last visited 15 October 2008).

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of many human rights, on account not only of its eventual purpose – torture, arbitrary detention or other serious violation – but also due to the procedural arbitrariness that attends it and, most insidiously, the effect of removing the person from the protection of law and withholding information from that person and his or her family. The latter characteristic has led to this practice being described as enforced disappearance.[45]

As is perhaps obvious, rendition litigation poses particular challenges for litigators, which can euphemistically be grouped as 'access' issues of various types: access to victims, to evidence and to courts. First and most obviously, the cases often concern disappeared persons. Despite the excellent monitoring work done by NGOs, journalists and investigators, for the most part we do not know who or where the victims are, at least not at the point when they most need protection. While jurisdictions vary, the ability to bring 'public interest' cases without identified victims is extremely limited. Access to information or evidence is inevitably extremely challenging, given the clandestine nature of operations, but made even harder by what has been described as a systematic cover-up to preclude such access.[46] The third group of access issues relates to effective access to courts. In the rare situation where a person emerges and is willing to put his or her head above the parapet again despite past abuses, the state secrets' doctrine is liable to have the case thrown out.

This was the experience of Khalid el-Masri, whose case provides graphic insight into both the practice of extraordinary rendition and the extent of the secrecy and challenges to litigation in this area.[47] El-Masri is a German citizen who was arrested by Macedonian border officials in December 2003, apparently because he has the same name as the alleged mentor of the al-Qaeda Hamburg cell and on suspicion that his passport was a forgery. After three weeks he was handed over to the US Central Intelligence Agency (CIA) and flown to Baghdad and then to 'the salt pit', a covert CIA interrogation centre in Afghanistan. He was held for 14 months, allegedly mistreated and prevented from communicating with anyone outside the detention facility, including his family and the German government. Along the way it became apparent to his captors that his passport was genuine and that he had nothing to do with the other el-Masri, so he was finally set free in May 2004. Instead of the grovelling apology and help in re-establishing his life one might expect in such circumstances, he was released at night on a desolate road in Albania.

When questioned in Germany over the el-Masri affair, the US Defence Secretary Condoleezza Rice stated, 'I believe this will be handled in the proper

45 See, e.g., Elaine Sciolino, 'Spanish judge tells US Guantánamo is an insult', *International Herald Tribune*, 4 June 2006, available at www.iht.com/articles/2006/06/04/news/gitmo.php (last visited 16 October 2008).

46 See Committee on Legal Affairs and Human Rights, Information Memorandum II, above note 43.

47 Information on the case is available at www.aclu.org/safefree/torture/29868res20070524.html (last visited 15 October 2008).

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courts here in Germany and if necessary in American courts as well'. In fact, when a lawsuit *was* brought before a US court, the government invoked the so-called 'state secrets' privilege, arguing that the 'entire aim of the case is to establish state secrets'. The case was dismissed in its entirety by the US District Court, upheld by the US Court of Appeals. In October 2007, the Supreme Court decided, without giving reasons, to refuse to review the case.[48] This is not a case in which courts settled on (or even considered) excluding particular documents, evidence or sources, holding parts of the hearing in camera, or taking other special measures. It is simply the end of the line for justice in US courts for el-Masri. The wholesale vacation of proceedings alleging government misconduct, on the basis of the government's own assessment that those proceedings might per se damage national security, is anathema to justice and a striking illustration of the extent of secrecy in this area.

The *el-Masri* case and others like it[49] have been taken up elsewhere, but attempts to secure justice continue to falter. Arrest warrants were issued by a German court in January 2007. But the German Justice Minister subsequently announced that, as the United States had made it clear that it would not co-operate, the German authorities would therefore not be pursuing a formal request for the extradition of the 13 CIA agents involved in el-Masri's abduction.[50] In a parallel development, Italian courts too have issued arrest warrants in respect of another CIA rendition, Abu Omar, who was kidnapped by the CIA while living in Italy, taken to Egypt and allegedly tortured there. Interestingly, however, the Italian government has also raised state secrets concerns before the Constitutional Court, and criminal proceedings have been suspended pending the decision.[51]

One of the striking characteristics of rendition is its transnational nature, involving multiple state agents who together share direct and indirect responsibility. It is therefore important that, through litigation and other measures, attempts are underway to hold a range of states to account separately for assisting rendition or facilitating or failing to prevent it on their own territory.[52]

48 In the US Supreme Court, *El-Masri* v. *United States*, Case No. 06-1613, petition for a writ of certiorari denied 9 October 2007. In the US District Court for the Eastern District of Virginia, *El-Masri* v. *Tenet*, Case 1:05-cv-01417-TSE-TRJ, order granting US motion to dismiss granted May 12, 2006. For details of the petition lodged before the Inter-American Commission on Human Rights, see www.aclu.org/pdfs/safefree/elmasri_iachr_20080409.pdf (last visited 15 October 2008).

49 See also, e.g., the case of Maher Arar, a Syrian-born Canadian detained in the United States and transferred to torture in Syria. 'Torture and accountability', *International Herald Tribune*, 19 November 2007.

50 See, e.g., Jeannie Shawl, 'US rejects German bid for extraction of CIA agents in el-Masri rendition', Associated Press via Jurist Legal News & Research, 22 September 2007, available at http://jurist.law.pitt.edu/paperchase/2007/09/us-rejects-germany-bid-for-extradition.php (last visited 16 October 2008).

51 'Italy indicts 31 linked to CIA rendition case', *International Herald Tribune*, 15 February 2007, available at www.iht.com/articles/ap/2007/02/16/europe/EU-GEN-Italy-CIA-Kidnap.php (last visited 16 October 2008).

52 As regards the *el-Masri* case specifically, calls for an effective investigation into the involvement of Macedonian officials have been reiterated. See, e.g., ICJ E-Bulletin on Counterterrorism & Human Rights, 'FYR Macedonia: UN experts call for Macedonian investigation in El-Masri case', No. 24, June 2008, available at www.icj.org/IMG/E-Bulletin_June08.pdf (last visited 15 October 2008): 'In April and

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One such example is the case of Boumediene and Ors v. Bosnia before the European Court of Human Rights. The case concerns Bosnians of Algerian descent held in Bosnia after 9/11 at the behest of the United States, eventually released by Bosnian courts for lack of evidence against them, and immediately then arrested by US authorities (apparently with some collusion from their Bosnian Counterparts) and transferred to Guantanamo Bay. In addition to the now famous proceedings in US courts,[53] this case has also gone before the ECtHR in a challenge against the Bosnian state for its part in the process.[54]

One of the questions arising is the nature and content of a state's ongoing obligations when it transfers or facilitates the transfer of an individual to a situation where there is a real risk of serious human rights violations. One of the issues that the Court itself has highlighted as a key consideration in the case is the extent to which Bosnia is obliged to make diplomatic representations on behalf of individuals to ensure their rights are not violated following transfer.[55]

Rendition cases are also beginning to unfold in Africa.[56] Reports allege, for example, the involvement of Kenyan authorities, at US behest, in the rendition of Somali and Kenyan nationals to Somalia and, in some cases, to Guantánamo Bay. It will be important to see what measure of justice is afforded in fora outside the United States. Clearly, rendition litigation promises to be a growth area, as cases seek to play their role in prising open the facts and pursuing justice against a range of international players in this most challenging of areas.

May, the UN Committee against Torture and the Human Rights Committee expressed concerns about the investigations carried out by the Former Republic of Macedonia in the abduction and ill-treatment of Mr Khaled El-Masri when held by CIA agents in secret detention. The Committees advised the Macedonian government to undertake a new and thorough investigation and the Human Rights Committee recommended that it should consider awarding him compensation'. Human Rights Committee, Ninety-second session, Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant: Concluding Observations Of The Human Committee: The Former Yugoslav Republic Of Macedonia, 17 April 2008, available at www.icj.org/IMG/HRC_Macedonia.pdf (last visited 15 October 2008).

53 When these individuals took proceedings in US courts challenging the lawfulness of their transfer and detention, it was at first held that the Military Commission Act prevented them from raising any claim in a US court, until this was overturned by the Supreme Court's June 2008 judgment.

54 Wilmer Hale, 'Guantanamo claims before EU Court of Human Rights', 14 March 2008, available at www.haledorr.com/about/news/newsDetail.aspx?news=1134 (last visited 15 October 2008). For the third-party intervention by INTERIGHTS and the ICJ, see www.interights.org. *Boumidiene and Others v. Bosnia and Herzogovina*, Applications nos. 38703/06 et al, decided 18 November 2008. One of the questions arising was the nature and content of a state's ongoing obligations following transfer of an individual to a situation where there is a real risk of serious human rights violations. However, the Court found the case manifestly ill-founded and inadmissible on the grounds that, on the facts, Bosnia and Herzegovina was taking all possible steps to the present date to protect the basic rights of the applicants.

55 See Applications 38703/06 et al, supra n.54, para 67.

56 See, e.g., Daniel Auma, 'US rendition on trial in Africa', Spero News, 25 September 2007, available at www.speroforum.com/site/article.asp?id=11196 (last visited 15 October 2008); see also Human Rights Watch, '*Why Am I Still Here?*': *The Horn of Africa Renditions and the Fate of the Missing*, September 2008, available at http://hrw.org/reports/2008/eastafrica1008/ (last visited 15 October 2008). A case on rendition of Kenyan nationals, for instance, is at the time of writing, before Kenyan courts.

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Issue 5: The 'terrorism' label and its implications for alleged terrorists and others associated with them

The 'terrorism' label has been applied liberally since 9/11, without clarity as to its scope (the term being undefined or ill-defined), often without due process, and with serious consequences for those thus branded or others associated with them.

Perhaps the most obvious manifestation of this phenomenon are the various terrorism 'lists' established at national, regional and (under the Security Council's watchful eye) international level. While systems and safeguards vary, the problem with these lists is often the lack of transparency around the reasons for inclusion in them, and the lack of meaningful opportunity to challenge such inclusion. Little by little, litigation is seeking to call governments to account for decisions made in this respect, and to provide a degree of judicial oversight at least to temper an otherwise opaque and arbitrary practice.

Some success has been had by litigants before the European Court of Justice (ECJ). In 2006 the Court held that individuals associated with a banned organization had the right to reasons for their listing, to effective judicial protection and to be heard.[57] Although disputed by the respondent state, the ECJ confirmed that while the common EU position that led to the listing in the first place could not be reviewed by the Court, the decision to include a particular organization on the list could. This robust approach was recently maintained by the Grand Chamber of the ECJ in respect of listings authorized by the Security Council.[58] Similar issues are currently pending before the European Court of Human Rights, which might be expected to follow the human rights-friendly approach of the ECJ.

In 2008 a parallel case, challenging domestic listing procedures, made its way through UK courts. On 7 May, the UK Court of Appeal upheld a decision of the Proscribed Organisations Appeal Commission requiring the removal of an Iranian opposition group from its blacklist of terror organizations.[59] The case illustrates the willingness of the courts, assessing in detail the facts and evidence available, to challenge the Secretary of State's determination that the organization was concerned in terrorism. The Court was satisfied that the organization was no longer engaged in violence, and it confirmed that proscription could not be justified on the basis that an organization had been engaged in violence and might at a future date reacquire the capacity and intent to so engage.

57 European Court of Justice, *Organisation des Modjahedines du peuple d'Iran* v. *Council of the European Union, United Kingdom of Great Britain and Northern Ireland*, Case T·228/02, Judgment of The Court of First Instance (Second Chamber), 12 December 2006.

58 Kadi and Yusef were unsuccessful in challenges at first instance: European Court of Justice, Case T·306/01 *Yusuf and Al Barakaat International Foundation* v. *Council and Commission*, [2005] ECR II-3533, 21 September 2005, para. 73 (*Yusuf*); and Case T·315/01, *Kadi* v. *Council and Commission*, [2005] ECR II-3649, 21 September 2005 (*Kadi*). However, the challenges were won on appeal: Cases C-402/05 P and C-415/05 P, Judgment of Grand Chamber on 3 September 2008, available at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-402/05 (last visited 15 October 2008). OMIC case distinguished them because they involved the direct imposition of Security Council resolutions.

59 England and Wales Court of Appeal, *Secretary of State for the Home Department* v. *Lord Alton of Liverpool and Others*, [2008] EWCA Civ 443, Judgment of 7 May 2008.

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The terrorism label can have far-reaching consequences not only for the alleged terrorists themselves, but for others associated with them. One illustration is found in a case currently being litigated in the ECtHR on behalf of the family of the killed Chechen leader Aslan Maskhadov.[60] Laws in the Russian Federation that were applied in this case stipulate that if persons deemed to be terrorists are killed by the state in the course of counter-terrorist operations, their bodies will not be returned to their families. This draconian measure targets families who are deeply affected by being unable to duly observe a mourning period, pay their last respects and bury their family member in accordance with Islamic religious requirements, which according to their religious tradition may ultimately lead to the deceased being denied access to heaven. While there is no meaningful relationship between the prevention of terrorism and such a measure, it is justified by reference to the deterrence of terrorism. This case, which has been declared admissible by the ECtHR, provides an example of the blanket use of the 'terrorist' label to justify otherwise unacceptable special forms of treatment, and to punish those 'associated' with persons accused of ill-defined acts of terrorism.

A positive example of courts curbing the creeping effect of the notion of guilt by association arose in an Australian case of 2007 – *Haneef* v. *Minister for Immigration and Citizenship* (*Federal Court of Australia*).[61] The case concerned Mohamed Haneef, whose visa was revoked by Australian authorities on the grounds that he was the second cousin of one of the men who had crashed a car into Glasgow airport's terminal building, had stayed in the same hostel and, on leaving the country, had left him his mobile phone.

In the Australian courts the authorities argued that any form of 'association' (family or other) with persons accused of this sort of criminal activity was enough to fail the 'character test' laid down in Australian immigration law. The judgment rejected this contention and provided a fitting rebuke to the spreading notion of guilt by association and the dangers of it. The judge questioned whether he might also fall within the category of person having associated with terrorists, given former professional association as a barrister. He held that, for the law to apply, the 'association' must itself be of a criminal rather than of a family or innocent nature.

I shall end this survey of cases by citing the observations of the government of Botswana in a case pending before the African Commission on Human and Peoples Rights:

> We wish to recall here the bombings that occurred in London, Madrid and the 2001 events in NY and more recently Egypt. It is against this background that

60 ECtHR, *Kusama Yazedovna Maskhadova and Others* v. *Russia*, Application No. 18071/05, Decision as to Admissibility, 8 July 2008. INTERIGHTS represents the applicants, the family of deceased Chechen leader Aslan Maskhadov. The case has been declared admissible. INTERIGHTS, Maskhadov Press Release, 1 October 2007, available at www.interights.org/view-document/index.htm?id=209 (last visited 15 October 2008).

61 Federal Court of Australia, *Haneef* v. *Minister for Immigration and Citizenship*, [2007] FCA 1273, 21 August 2007.

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> Botswana reminds the Commission that the declaration of Mr Good as a prohibited immigrant was made 'in the interests of peace, stability and national security' … We have given examples of traumatic results that occur once there is a lapse in dealing with national security issues … If the President visualizes a threat to national security, it is wrong for him to wait for the threat to materialize into a national disaster. It is right to state that decisions whether something is or is not in the interest of national security are not a matter for any organ other than the executive.[62]

One might assume that this case concerned terrorism. In fact it concerns a professor deported for criticizing presidential succession in Botswana. The facts could not be much further removed from the terrorism context. Yet this case exemplifies the extent to which national security, the global terrorist threat and the exceptionalism of the war on terror are being relied upon to set aside human rights in contexts that have nothing conceivably to do with international terrorism.

Concluding observations

The human rights picture

I said at the beginning of this article that litigation can serve to highlight key human rights issues. The case developments described above illustrate, in my view, some of these key characteristics of the war on terror as it impacts on human rights.

An overarching point is that, leaving aside military aspirations, the main policy aim being pursued after 9/11 was intelligence gathering. It was not and is not about justice in the legal sense, certainly not about criminal responsibility. While there may be many reasons contributing to this, it is suggested that this is consistent with and borne out by the dearth of criminal prosecutions of high-level al-Qaeda terrorist suspects. There have been more Supreme Court judgments on whether Guantánamo detainees have rights than there have been trials by military commission or otherwise. The first military commission judgment handed down, on 6 August 2008, convicts Osama Bin Laden's driver for providing support for known terrorists and sentences him to 66 months' imprisonment, of which he has already served 61.[63] Seven years on, experience does not point to a massive

62 The government cites the decision of the Supreme Court of Botswana, the highest judicial authority in Botswana, in *Kenneth Good* v. *Attorney General*, Civil Appeal No. 28/2005. An application to the African Commission on Human and Peoples' Rights was submitted by Interights on 10 October 2007 and was pending at the time of writing. The brief for the applicant is obtainable from www.interights.org.

63 'Bin Laden Driver Sentenced to a Short Term', William Glaberson, *New York Times*, 8 August 2008.

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global criminal justice campaign resulting in the investigation and prosecution of high-level suspects, although undoubtedly many have been either killed or detained and interrogated without charge.

Second, the cases illustrate that the means to achieve that intelligence has involved violations of the most sacred human rights norms, notably torture and arbitrary detention.

Third, to the extent that states may not themselves have engaged in torture, there has been widespread practice of playing fast and loose with safeguards *against* torture that are part of the prohibition thereof and essential to give it meaningful effect. The decision by some states to challenge the basic rules on *non-refoulement* before the European Court of Human Rights illustrates this point.

Fourth, unprincipled distinctions have emerged recurrently. This may be between nationals and non-nationals, as illustrated by widespread justification of arbitrary detention of non-nationals. It may be between standards that officials are expected to meet at home, and those considered applicable abroad, as highlighted by the approach of certain states, and the restrictive judgment referred to on the extra-territoriality issue. Or it may be evident in a 'hands off' approach to torture whereby distinctions are drawn between what states themselves do, and what they facilitate or encourage at the hand of others, as noted in the case concerning torture evidence, for example.

Fifth, and most insidious perhaps, has been the move from illegality to extra-legality – the practice of removing individuals from the protection of the law altogether, epitomized by rendition and disappearance that have been the subject of various litigation initiatives.

Finally, there is the 'creeping reach' of measures and approaches that are originally justified exceptionally in the context of international terrorism and national security. The 'terrorism' and 'national security' labels have been relied upon to erode standards beyond those exceptional circumstances, to affect persons loosely associated with persons loosely implicated in loosely defined acts of terrorism. The result is that genuine exigencies of the global fight against international terrorism are being brought to bear as a pretext for violations far beyond the terrorism context.

The role of the courts and the impact of human rights litigation

It is clear is that in recent years, across diverse systems, there has been a burgeoning of human rights litigation. That has reinforced the critical role for the courts in human rights protection. Caution is due in trying to draw conclusions from such wide-ranging practice, addressing different issues in diverse systems. But I will offer a few tentative observations on how we might begin to think about the practice of human rights litigation in this field to date and its potential impact.

In many cases the judiciary has shown its reluctance to make determinations that may impact on security, refusing, for example, to question executive assessments of the existence of an emergency. But when particular practices

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have come under scrutiny, the courts in diverse systems have often and increasingly proved themselves willing – in some cases promptly, in other cases after painstaking process and only as a matter of genuine last resort – to criticize the legitimacy, necessity or proportionality of particular measures.

While experience has been both positive and negative, I shall suggest the following ways in which litigation may have had, or in some cases may yet have, a positive effect.

First, simply taking a human rights violation to court frames the issue as a matter of law, not only of politics. As such it reasserts the principle of legality and the rule of law in the highly politicized discourse around terrorism and security. Critically, these cases indicate, to varying degrees, the existence of a check on executive action. This is seen in reminders that 'a state of war is not a blank check for the President' or by the willingness of courts in cases such as *Belmarsh* or *Haneef* to subject to close scrutiny the determination of what was necessary for national security. As a rebuke to the executive when it has failed in its role as primary protector of rights, this can be critical in reasserting the democratic credentials of the system, which are often lost through the illegitimacy of the conduct impugned.

Judgments have often, to quite varying degrees, been conservative and characterized by judicial deference to political branches. One may ask whether the US Supreme Court could and should have decided whether detainees have the basic right to habeas corpus when the matter first came before it in 2004. At what price in terms of judicial efficiency in the administration of justice – and protection of individuals – came the virtue of judicial restraint? But so far as jurisprudence reflects and deliberates on the thorny issue of the role of courts in determining such matters, and on the relationship between political branches and the judiciary, it may ultimately contribute to and enrich our understanding of the separation of powers and the democratic judicial function.

Second, litigation can also serve as a catalyst to change law or practice. In some cases, such as the changes in law and policy following the *Belmarsh* judgment, the causal effect is fairly clear. In others, it is difficult to tell to what extent, if at all, the irritant effect of litigation contributed to shifts in practice, such as the return of UK nationals from Guantánamo following unsuccessful litigation seeking to obligate the state to intervene on their behalf.[64] The course of litigation often itself exposes particular policies and practices, and may lead states to clarify their own policies or articulation of them.[65]

Judgments may themselves develop or clarify the law through jurisprudence or, as is often the case in the context of the war on terror, they may simply serve to reinforce established principles that have increasingly been cast in doubt,

64 *Abbasi* case, above note 2.

65 See, e.g., the *Al-Skeini* case, above note 26, in which the UK government shifted its position as regards the applicability of the ECHR to individuals detained by UK officials in Iraq and allegedly tortured in detention.

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as in the *Saadi* judgment.[66] The challenge in many of the cases highlighted has been to hold ground rather than to advance the protection of human rights as such, in other words to win back and keep winning gains that were made years ago, that were thought secure but rendered vulnerable in the course of the war on terror.

Sometimes courts serve as democracy alerters whereby the interplay between judicial and political branches is such that a signal from the former can be a catalyst to a more proactive approach by the latter. Persuasive judicial messages can also be sent transnationally, as seen, for example, in the unusually robust judicial rebuke of the system of Guantánamo Bay detentions by the English Court of Appeals in the *Abbasi* case.[67]

Cases can themselves play an important role in securing access to information and in prising open facts, sometimes in face of a wall of state secrecy. Litigation may have this as its goal – such as cases in the United Kingdom pursuing access to military files,[68] FOIA (Freedom of Information Act) litigation in the United States which has had a measure of success[69] and Canadian litigation where the government was compelled to produce information or evidence in relation to proceedings in another state[70] – or this may be a by-product of the process. This unearthing of information is particularly critical in areas such as rendition, characterized by a concerted cover-up. At a minimum litigation draws out government positions – as seen, for example, in the shift in positions of the UK government in the course of the *al Skeini* case – as they engage as parties and clarify or adjust their positions in the course of litigation.

Litigation of the sort referred to also opens legal systems to the cross-fertilization of ideas from other systems as international and comparative perspectives are brought to bear, notably through *amicus* interventions. Guantánamo litigation in the United States has been perhaps the most massive piece of international human rights litigation ever, if judged at least by the unprecedented level and nature of interventions before the Supreme Court.[71]

Ultimately, the impact of litigation on human rights issues generally lies in its gradual contribution to social change. There has, for example, been a shift in

66 This works both ways and can also weaken or confuse the framework of rights protection, as is suggested may have been the outcome of the *Al-Skeini* case, for example.

67 *R* (*Abbasi*) v. *Secretary of State for Foreign and Commonwealth Affairs*, [2003] UKHRR 76, where the English Court of Appeal criticized the system of Guantanamo detentions in unusually strident terms.

68 John Aston, 'Lawyers in Basra death case win access to files', *Independent*, 4 October 2007.

69 See, e.g., US District Court for the Southern District of New York, *Associated Press* v. *United States Department of Defense*, 498 F. Supp. 2d 707 (SDNY, 2007), and US Court of Appeals, DC Circuit, *Center for National Security Studies* v. *Dep't of Justice*, 331 F.3d 918 (DC Cir. 2003) (cert denied, 540 US 1104 (2004)).

70 Supreme Court of Canada, *Canada* (*Justice*) v. *Khadr*, 2008 SCC 28, 23 May 2008. On 23 May 2008, the Canadian Supreme Court ruled that the government had violated Canada's Constitution and its international human rights obligations by transmitting to US official information resulting from Canadian officials' interviews of Omar Kadhr at the Guantánamo Bay detention centre. The Court took the unusual step of ordering Canadian officials to allow Mr Kadhr access to records of his interrogations with Canadian agents, for use in preparing his defence before the Guantánamo Military Commission.

71 *Amicus* interventions appeared from such diverse quarters as British Lords as well as Israeli military lawyers.

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public opinion (national and international) on Guantánamo, and arguably litigation may have been an important contributor. What is undoubtedly true is that litigation has to be understood not in isolation but as one small piece of a much bigger and more complex puzzle.

Finally, and perhaps most importantly, real cases serve to tell the victims' stories. They provide often graphic illustrations of what euphemisms such as 'extraordinary rendition' and 'enhanced interrogation techniques' mean to human beings like you or me. Judgments validate those stories and experiences. One of the essential characteristics of the 'war on terror' has been the attempt to put certain people beyond the reach of the law. Litigation can be a tool, as one English judge put it, not for transferring power from the executive to the judiciary, but for transferring power from the executive to the individual.[72] If any particular case can bring an individual back into the legal framework, and reassert the individual as a rights-bearer and human being, then perhaps that is impact enough.

72 Dame Mary Arden has stated that 'the decision in the A case should not be misinterpreted as a transfer of power from the executive to the judiciary. The position is that the judiciary now has the important task of reviewing executive action against the benchmark of human rights. Thus, the transfer of power is not to the judiciary but to the individual'. (2005) 121 LQR at pp. 623–4, in A. T. H. Smith, 'Balancing liberty and security? A legal analysis of United Kingdom anti-terrorist legislation', *European Journal on Criminal Policy and Research*, 13 (2007), pp. 73–83, DOI 10.1007/s10610-007-9035-6.

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