SHORTER ARTICLES, COMMENTS, AND NOTES

'CLEAR AND PRESENT DANGER': RESPONSES TO TERRORISM

I. INTRODUCTION

It was Oliver Wendell Holmes who used the words 'clear and present danger' in the judgment of the US Supreme Court in the *Schenk* case in 1919.[1] The Court upheld the conviction of Charles Schenk, general secretary of the American Socialist Party, under the 1917 Espionage Act, which prohibited attempts to obstruct military recruitment. Schenk had distributed leaflets allegedly calculated to cause insubordination and obstruction among recruits. He argued that his conviction was incompatible with the freedom of speech guaranteed by the First Amendment. The Supreme Court disagreed. Holmes wrote, in the remarkably short judgment in that case:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

The phrase 'clear and present danger' has become a by-word for the argument that in times of emergency the normal legal rules may be suspended. In Holmes's formulation, however, the phrase was a limiting and not a permissive one. It did not suggest that whenever the State faces a clear and present danger the State may take whatever steps it considers necessary to counter all threats, of whatever intensity. The decision set the threshold below which a threat could not properly be countered by a suspension of the law. Proxity and degree: is this man, in this place, at this time, a clear and present danger? And it affirmed that this is a question on which the courts may pronounce.

II. THE TERRORIST THREAT

My focus this morning is on the way that the law should deal with international terrorism. It is said that 'we' (by which is usually meant the peoples of that curious political entity, 'the West') face novel and unprecedented threats.

Some believe that the terrorist threat is so great and so pressing that it must be fought with the full range of measures that may be deployed in time of war, and with the concomitant freedom of action allowed to the executive, in order to restore security to a level where traditional liberties and procedures can safely be resumed. Exceptional anti-terrorist measures are justified by the exigencies of the current emergency as temporary derogations from the normal rules.

Others believe that the fight against terrorism is likely to be a very long one—indeed, a war that can never be objectively 'won' like a traditional war, but can only be declared to be over by the governments that pursue it. One must assume that any

[1] *Schenk v US*, 249 US 47 (1919).

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exceptional anti-terrorist measures will remain in force indefinitely, and that they are likely to set a procedural standard that will gradually percolate into other areas of the law.[2] The need is for a long-term solution, not a short-term fix.

The general question of how the law should respond to threats to the life of the State is not new. It is sometimes said that terrorists are not like combatants of the past because they do not wear uniforms or carry arms openly, but live and operate as civilians among civilians. There are fundamental differences between terrorists and traditional combatants: but the elusiveness of 'the enemy within' is not one of them. There was throughout the Second World War, for example, and no doubt through practically every war, a persistent fear of enemy agents and fifth-columnists operating incognito in factories and offices throughout the land. Those fears were addressed in emergency war-time measures, including widespread internment without trial.[3]

In broad terms, that is the choice which now confronts governments: to deal with the terrorist threat in the context of war-time emergency powers, or to deal with it in the context of peace-time criminal law enforcement. And that is a choice which is rooted in the structure of international law.

III. THE TRADITIONAL FRAMEWORK

International law has long been based upon a distinction between the law of peace and the law of war. In time of peace, states deal with threats through the mechanisms of the criminal law and various kinds of social engineering and exhortation. In time of war, many of the liberties and safeguards of peace-time law are curtailed, and threats are dealt with by a range of means, including military force.

IV. THE YEMEN EPISODE OF NOVEMBER 2002

The significance of the distinction between the law of war and the law of peace is illustrated by an episode reported to have occurred on 3 November 2002. An unmanned 'Predator' drone operated by the CIA launched a Hellfire missile at a car travelling through northern Yemen, apparently with the cooperation of the Yemeni authorities. It killed all six people on board. They were said to be Al Qaida members, including Qaed Senyan al-Harithi, allegedly a former bodyguard of Osama bin Laden and suspected of involvement in the attack on the USS Cole in Aden in October 2000.[4]

V. THE CHOICE BETWEEN LAW AND WAR

If that episode is viewed as an exercise in criminal law enforcement under the law of peace, it was an extra-judicial assassination, and would plainly violate international

[2] See on this H Kennedy *Just Law* (Chatto & Windus London 2004).

[3] See the brilliant study by AWB Simpson *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (OUP Oxford 1994). The same is true in international law: the Geneva Conventions of 1949 were drafted by men and women who understood well the role of clandestine forces, and of combatants such as the French resistance.

[4] <http://www.guardian.co.uk/alqaida/story/0,12469,830286,00.html>.

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law.[5] If, on the other hand, it is viewed as an episode in a war against Al Qaida and all of the passengers were 'combatant' members of Al Qaida, they were legitimate military targets. Which, if either, view is better?

It may seem odd to ask that question. The law, one might think, is the law; and there is no element of choosing. If the question were to be litigated today, that would be true. An international tribunal would decide the issue according to international law as it understood it. But legal systems such as international law, in which customary law is prominent, constantly evolve.

Claims made by States, accepted or rejected by other States, do not simply create pressure for changes in the law: they change the law itself. The need to carry the international community along with the development means that change is likely to be slow. But a government decision as to how it will handle an issue has a significance quite different from that which it has in municipal law. There is a genuine policy decision to be made.

The current legal position is, I think, quite clear. Armed conflicts such as that between the United States and the Taliban (who, though generally unrecognized, were without doubt the de facto government of Afghanistan), were certainly 'wars' or 'armed conflicts' as a matter of international law. Equally clearly, the 'war against terrorism' is not, as a matter of international law, a war properly so called.[6]

International law has not developed special principles to govern the problem of international terrorism on the Al Qaida scale. Principles developed in other contexts must be applied, and if necessary extended, to it. If, therefore, the United States or other States were to insist upon treating the fight against terrorism as being in law a 'war', with all the rights and duties entailed by that characterization, and other States were to accept that characterization, customary international law would begin to develop in that direction.

Both the decision of the State on how to characterize the matter, and the reaction of other States, are likely to be heavily influenced by the consequences of the choice, which include the legal consequences. Either choice—the law of peace or the law of war—has its inconveniences.

VI. TERRORISM AS WAR

Thus, if the fight against terrorism *is* in law a war, all the armed forces and other military facilities of the United States, the United Kingdom, and others in the 'Coalition of the Willing' would be legitimate targets.[7] An attack on the Pentagon might be carried out in an unlawful manner; but it would not be wrong to target the building.

All Al Qaida combatants are an obvious threat, and may be killed on sight unless

[5] See, eg, the jurisprudence of the UN Human Rights Committee, summarized in S Joseph, J Schultz, and M Castan *The International Covenant on Civil and Political Rights* (2nd edn OUP Oxford 2004) paras 8.01–8.18 ('The Right to Life—Article 6. Right not to be Killed by the State').

[6] See C Greenwood 'War, terrorism and international law' (2003) 56 Current Legal Problems 505–30.

[7] Cf Greenwood in D Fleck (ed) *The Handbook of Humanitarian Law in Armed Conflicts* (OUP Oxford 1995) 218: 'Military operations may not be carried out beyond the areas of war. That area is, however, extensive since it includes all of the territory of the parties to the conflict, and the high seas, and exclusive economic zones, including the exclusive economic zones (EEZs) of neutral states . . .'

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they surrender, but they could not, under the laws of war, be punished for their participation in hostilities unless they committed war crimes.

Prisoners of war could be detained; but only for the duration of hostilities, after which they must be repatriated.

Operational units outside the armed forces, such as the CIA, would not be classed as lawful combatants unless they bear arms openly and are under military command.

All non-combatant enemy nationals are suspect, because they owe allegiance to the enemy government. They may be interned without trial for security reasons, and business and other dealings with them may be prohibited.

Taking the example further, if the United States were to seek the extradition of those directing a war against it, it is by no means certain that existing extradition arrangements would operate in the normal way. Extradition of those who commit offences against the laws of war (into which category terrorist offences would fall) is by no means ruled out; but in practice the application of the political offence exception and the broader duties of neutrality are likely to hinder international criminal cooperation.

For all these reasons, among others, it is difficult to see that States will be enthusiastic about the legal consequences of a decision to treat terrorists as combatants in a war.

VII. TERRORISM AS CRIME

On the other hand, there may be a reluctance to treat terrorists as criminals. The idea that they are entitled to the benefit of rules on improperly obtained evidence, to prompt and fair trials, and to treatment in accordance with human rights conventions, will appear to some to be a statement of the obvious. But others may consider the ruthlessness of terrorist actions, and the death, injury, and damage that they threaten, to be on such a scale that the preservation of public life and public order require that exceptional measures be deployed against them.

Is it really right that terrorists should escape conviction and be freed to return to their trade because, for example, of the inadmissibility of evidence obtained through telephone tapping, or because the danger of compromising an informant or agent infiltrated into a terrorist cell precludes the public disclosure of compelling evidence against a terrorist? Is it right that, as between allies in the fight against terrorism, a key suspect cannot be returned for questioning and trial without going through the elaborate exercise of establishing a prima facie case against him for the purposes of extradition? Are existing legal protections to be unchangeable in the fight against terrorism?

VIII. THE PRINCIPLES AT STAKE

Demands for changes in the law do not all give rise to issues of equal gravity. Some may attack basic principles of the rule of law and natural justice. There may be calls for detention without trial, decisions taken on the basis of evidence that defendants or detainees are not allowed to challenge, or even to see. Some demands may go further still, calling for interrogators to use degrees of coercion that 'ordinarily' would be unlawful, for example. Others may seek relatively minor changes in rules on the admissibility of evidence.

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The choice between terrorism as war and terrorism as crime is, however, fundamental. The underlying character of the distinction between war and peace, as legal conditions, goes to the heart of the relationship between individuals.

In time of peace we walk down the street and presume that others with whom we share our roads and cities are, in principle, essentially benign. We assume, too, that as long as we are not violating any properly enacted law, the State should let us go about our business.

The hallmark of a war, in contrast, is its all-consuming quality. 'The enemy' is at all times and in all places a threat, because one must presume that it will take every opportunity, or at least every opportunity consistent with the laws of war, to attack the legitimate targets of its adversary. All those who belong to the 'enemy camp'—nationals of the enemy State and its allies, or members of the opposing faction in a civil war—are far from benign. We presume that they are all actual or potential threats.

The change in the perspective from which we see our neighbours is radical, and it is dictated by the fact that the State may demand complete obedience to its determination as to who the enemies of the State are. Dissent is not merely a matter of crime; it is a matter of treason.

There is a further difference, which affects third parties not actively engaged in the conflict. In time of war those who are not engaged in the conflict as belligerents are expected to remain neutral, unless they are directed by the UN Security Council to support or refrain from supporting one side or the other. The same basic principle applies in the context of internal, civil wars. Third States should not assist either side. The outcome of internal struggles should be determined by the people of that State and not by outside intervention. In broad terms, those not engaged in wars should remain impartial.

That principle stands in stark contrast to the position that obtains in relation to the criminal law. Citizens, of course, are under the same legal duty to accept as law what the State decides to make as law. There is no more a right to opt out of legal obligations in time of peace than there is in time of war. But for third States the position is very different. There is no question of them being obliged to remain neutral as between the State and the criminal. They are not merely entitled but expected, and indeed required under recent Security Council resolutions, to cooperate with authorities in other States in the detection and repression of criminal activity.

These consequences seem to me to indicate two powerful reasons for continuing to treat the fight against terrorism in the way that it is characterized in current international law: that is, as a matter of criminal law, under the law of peace, and not as a war.

The first reason is that the classification of an entire class of people as 'enemy aliens' in the war against terrorism is fraught with difficulty. Al Qaida has no nationality, no single territorial base. It has no monopoly on terrorism: the evidence suggests that much terrorist activity is organized by other groups sympathetic to Al Qaida but no more than loosely and indirectly linked to it.

There is neither a prima facie case for creating a class of enemy aliens in the war against terrorism, nor any rational basis on which such a class could be defined. But, in the curious way in which legal distinctions can insinuate themselves into popular consciousness, there is a real risk of the idea that there is a 'war' against terrorism as embodied in the idea of a war against a global network headed by Al Qaida becoming perverted into the idea that there *is* an identifiable class of people who are the equivalent of 'enemy nationals'. I think that there is a real danger of the fight against terrorism

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leading (or being led) to a schism in British society, largely along racial and religious lines.

The second reason for resisting any pressure to shift towards the 'war' model is that there can be no moral equivalence between terrorists and those who seek to prevent terrorist attacks. While it may well be that in particular cases there is room for a neutral stance, I do not think that there is room for a *principle* of neutrality in the general framework of the law governing the relations between terrorists and the States and governments that seek to repress them.

No matter what room there might be for debate over the justice of causes that are said to fuel terrorism, be they poverty, impiety, occupation or whatever, terrorist attacks upon innocent civilians are simply not justifiable within a moral framework that judges culpability according to a standard of individual responsibility. Innocence, as a moral concept, strikes me as something worth preserving. That is the basic approach of the criminal law, in principle at least; and the labelling of entire communities as 'enemies', as does the law of war, is not compatible with it. The primary and defining characteristic of terrorism is precisely that terrorist attacks are directed at the innocent. Terrorism is completely antithetical to the rule of law; and *all* States should be free, and indeed obliged, to cooperate in its repression. For that, the appropriate framework is that of international criminal cooperation.

There is also a third, practical, consideration pointing to the same conclusion. Military action against terrorist threats may sometimes be necessary, but most of the effort against terrorism will be based upon long-term routine police and intelligence work, whose effectiveness will depend in large measure upon international cooperation and coordination. The centre of gravity of the fight against terrorism lies with the civil, not the military authorities. Legal procedures should, accordingly, be calibrated to the standards of the peace-time criminal jurisdiction within which anti-terrorist measures will normally operate.

IX. THE NEED FOR CHANGE IN THE LAW

It is sometimes suggested that the deficiencies in the law of war and in criminal law alike are such that we should devise a new, 'third way' for dealing with terrorism. The Prime Minister's speech delivered at Sedgefield[8] in March 2004 is a notable example. He explained his concerns about 'Islamic extremism and terrorism' and 'the attempts by States—some of them highly unstable and repressive—to develop nuclear weapons programmes, CW and BW material, and long-range missiles' and said:

> The threat we face is not conventional. It is a challenge of a different nature from anything the world has faced before. It is to the world's security, what globalisation is to the world's economy.
>
> . . . [B]efore September 11th, I was already reaching for a different philosophy in international relations from a traditional one that has held sway since the treaty of Westphalia in 1648; namely that a country's internal affairs are for it and you don't interfere unless it threatens you, or breaches a treaty, or triggers an obligation of alliance. . . .[9]

There is a risk that a new category between war and peace will be created by default.

[8] The Sedgefield speech appears at <http://news.bbc.co.uk/2/hi/uk_news/politics/3536131.stm>.

[9] <http://news.bbc.co.uk/2/hi/uk_news/politics/3536131.stm>.

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'Harbouring' terrorists may be asserted as a sufficient ground for military interventions in third States. It may be stipulated that suspected terrorists are outside the protections of the laws of war, and then that they are not entitled to the rights accorded to 'ordinary' criminals either, thus leaving them in the legal black hole about which Lord Steyn spoke so memorably in his FA Mann lecture in November 2003.[10]

Yet even if revision were to proceed with deliberation, I do not think that any case has been made out for a fundamental reconstruction of international law. Certainly, individual rules may need to be reconsidered and developed; and that is true both of international law and of domestic law. But there is no evident need for a fundamental revision, creating some new legal status between war and peace.

X. REVISING THE RIGHT OF SELF-DEFENCE

What kind of rule revision might be necessary? In international law, it is clear that the traditional conception of self-defence, for example, is in need of revision.[11] The perception of that need lay at the heart of the United States' *National Security Strategy*, published in 2002. That document was prefaced by a letter from President Bush, in which he wrote that:

> The gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination. The United States will not allow these efforts to succeed. We will build defenses against ballistic missiles and other means of delivery. We will cooperate with other nations to deny, contain, and curtail our enemies' efforts to acquire dangerous technologies. And, as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed.

In the Report itself it was said that

> [t]he United States has long maintained the option of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively.

It added:

> The United States will not use force in all cases to pre-empt merging threats, nor should nations use pre-emption as a pretext for aggression. . . .

This claimed right to take pre-emptive action was the subject of a detailed statement by the British Attorney General on 21 April 2004, made in response to a Parliamentary Question. He said that:

> It is … the [*sic*, British] Government's view that international law permits the use of force in self-defence against an imminent attack but does not authorise the use of force to mount a pre-emptive strike against a threat that is more remote. However, those rules must be applied in the context of the particular facts of each case. That is important.
>
> The concept of what constitutes an 'imminent' armed attack will develop to meet new circumstances and new threats.

[10] J Steyn 'Guantanamo Bay: The Legal Black Hole' (2003) 53 ICLQ 1–15.

[11] This is the kind of development of the law within the UN framework for which I have argued previously: see (2004) 52 ICLQ 859 at 868–9.

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That seems to me to be precisely right. There is a need to develop the law. Consider the possibility of a dozen armed terrorists gathered in the hills of a foreign State. It is known that they have a nerve agent in sufficient quanties to cause widespread death and injury if released in, say, an underground system. It is known that they plan to make such an attack. It is not known whether it will be in Paris or London or Moscow or Madrid or somewhere else, and it may not even have been decided by the terrorists at that stage. The group is about to disperse, within hours. One of them—and we do not know which—will be carrying the nerve agent; and terrain, weather conditions, and available resources preclude the tracking of every one of the members.

In such circumstances would there be a right of self-defence? Application of the traditional formulation of the right of self-defence faces two immediate problems.

First, it is not known who is the victim entitled to exercise the right. Who is the 'self' that may defend itself? Even if one takes only France, Britain, Russia, and Spain, for any one of them it is much more likely that they are not the target than that they are. Collective self-defence will not help. Even if one overlooks the ICJ's requirement in the *Nicaragua* case that a State determine that it is under attack and request help before force is used to defend it, Russia is not a party to collective self-defence arrangements. And what if Russia is the only State able immediately to take action?

The second difficulty is imminence. The attack may be weeks or months away. On one view, action at this stage would not be an act of defence against an imminent attack, but action to prevent the terrorists acquiring the capacity, the material, to mount an attack. It would be pre-emption. On another view, however, it is an opportunity to take effective action to remove the threat in circumstances where there is no guarantee, nor even a high probability, that another such opportunity will arise in future, closer to the time of the planned attack.

If self-defence is regarded not as a crystallized legal rule but rather as an acknowledgement of a legal principle that States are entitled to take the measures necessary to deal with situations of clear and present danger, it is reasonable to interpret it flexibly. If the notion of 'self' is broadened to enable defensive action to be taken by any one among a number of potential targets, and the notion of imminence is broadened (or perhaps simply understood) to encompass action taken at the last opportunity that is certain to exist to take defensive measures, that strikes me as a reasonable and principled development of the right.

The United States has addressed both problems. Unlike the British statement, which spoke only of 'self-defence', the United States spoke of action to eliminate specific threats to itself or its allies or its friends. And the United States asserted the right to take pre-emptive action against 'emerging threats before they are fully formed'. Pre-emption, which is losing its prominence in US policy statements, may go rather further than the broadening that I have in mind; but the general thinking behind it is much the same.

In addition to the elements of defensiveness and imminence, there are of course other constraints upon State action. The minimum necessary force would plainly have to be used. If the detention of the terrorists is possible, there is no legal right to kill them, for example.

Moreover, there is arguably a wider principle of proportionality to be applied. The British Attorney-General referred to the need for uses of force to be 'proportionate to the threat faced and . . . limited to what is necessary to deal with the threat'.

One must always be cautious in reading too much into statements, but this appears

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to signal a double proportionality. Action must be proportionate to what is necessary to remove the threat: if foreign combatants will give themselves up in the face of threatened force, there is no justification for killing them. (It is an interesting question whether, in a case where action is justified on the basis of the inability or unwillingness of a government to prevent its territory being used as a base for terrorist operations, removal of the delinquent government might be said to be necessary to remove the threat.)

It must also be proportionate to the threat faced. An attack by a lone suicide bomber and an attack with a weapon of mass destruction would warrant different degrees of forcible preventive action.

One might debate the details; but this is, it seems to me, the kind of development that international law must undergo if it is to respond properly to the clear and present danger that international terrorists represent. And rather than agonize over the outer limits of the developing right to take action, it may be more fruitful to try to articulate the clear core case for action—a role discharged with great distinction by the House of Commons Foreign Affairs Committee in its report on the Kosovo intervention.

Some may lament even a modest encroachment on the prohibition on the use of force under Article 2(4) of the Charter; but it is worth recalling that within living memory States were legally entitled to resort to war for the defence of their essential interests, and it may be wiser to reconsider the scope of principled exceptions to Article 2(4) than to risk abandonment of the entire Charter framework.

Identifying the operative principle is important. It would be easy to slide from the 'Bush doctrine' on pre-emption to a conflation of the right of self-defence under the UN Charter, which every State may exercise unilaterally, with the powers of the Security Council to take steps to restore and maintain international peace and security. There is a risk of States asserting the right to act unilaterally in order to preserve international peace and security.

The fumbling attempts to justify the invasion of Iraq come close to this approach. There is perhaps something to be said in favour of the argument that States, such as the USA, which carry exceptional responsibilities in the field of international peace and security, should also have exceptional rights. What is not acceptable is the wholesale elision of self-defence and Chapter VII powers under the Charter. That is wrong in principle, as long as there is a functioning Security Council seised of the issue and able to discharge its responsibilities under the Charter in respect of international peace and security. The Charter system cannot work if it is optional.

There are, however, two qualifications to that position.

First, it must be said that this view imposes heavy demands upon States' members of the Security Council to discharge their responsibilities promptly, without fear or favour, and according to law. The extent to which individual UN representatives are supported by worldwide diplomatic structures, and the extent to which they enjoy the support and confidence of their home governments, may differ considerably. States need to consider, before accepting a seat on the Council and before supporting a candidature, whether the nominee will be able to fulfil the demands of office. If they cannot, they should not sit.

Secondly, it must be recognized that the style of legal argument can sometimes become an obstacle to practical decision-making. In the context of Iraq, for example, there is a tendency to assume that if there was no Security Council authorization for the invasion, and if there was no imminent threat from WMD, and if Ba'athist repression

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did not reach levels warranting humanitarian intervention, none of the criteria for the use of armed force is met and that use of force was therefore *necessarily* unlawful. I happen to think that is the right conclusion in that case; but the reasoning is perhaps not always correct.

If the situation is approached, not by setting out alternative grounds justifying armed action and noting that the facts do not quite meet the threshold for any one of them, but rather by assessing the degree of *risk*, the result may be different.

Suppose that it is estimated that there is a 40 per cent probability of a State imminently launching an attack on a neighbour, and a 40 per cent chance that it is engaged in genocide, and a 40 per cent chance that it is killing nationals of the neighbouring state; and suppose that if any of those situations were in fact to arise, it would justify armed intervention. It would be a fallacy simply to aggregate the probabilities and say that there is certainly a case for intervention; but is there not a case for saying that in some circumstances at least the coincidence of such probabilities may lift the case for intervention above the legal threshold?

This is a complex question, which I cannot pursue here, but I think it is a factor of some importance, to be borne in mind when considering changes in substantive legal rules.

XI. CHANGES IN DOMESTIC LAW

So much for the kinds of modification that might be necessary in international law. It is also necessary to consider what modifications might be necessary in municipal law. That is a question that demands a careful and detailed answer; but the underlying principle is plain enough. The principle must surely be that enunciated by Justice Holmes: modifications are justifiable in so far as they are necessary to cope with clear and present dangers, and that is an issue upon which the courts are competent to rule.

The justification for restrictions upon individual liberties lies in the nature and extent of the threat posed by the person whose liberty is restricted. The fact that a government may believe, entirely reasonably, that it faces a continuing threat from some person does not justify the taking of powers to curtail the rights and liberties of all persons unless it can be shown that those powers are necessary in order to avert the threat, and are proportionate to the threat, and are compatible with fundamental human rights. The rights I have in mind include the right to life and to freedom from torture and from punitive retrospective legislation.

That proposition is probably not controversial as a matter of abstract principle; but in any event it is a principle that is demanded by international human rights law, including the European Convention on Human Rights[12] and the International Covenant on Civil and Political Rights.[13]

The right of every person to a fair trial, to freedom from arbitrary arrest and detention, and to be informed of the reasons for arrest and of any charges against him, may be the subject of limited derogations, but only to the extent strictly required by the exigencies of the situation. While States may have a margin of discretion, the latter condition is ultimately an objective one to be measured against need, and the burden

[12] See Art 15; and cf the Human Rights Act 1998 (Designated Derogation) Order 2001, SI 2001 No 3644.
[13] See Art 4.

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lies upon the derogating State to make out the case for derogation. On that basis there is ground for concern over the current position in English law.

Britain's anti-terrorist legislation was reviewed in the Newton Report, drawn up by a cross-party committee of distinguished Privy Counsellors and submitted to Parliament in December 2003.[14] The Government's response was published in February 2004.[15]

The Newton Committee was particularly concerned by the provisions of Part IV of the Anti-Terrorism, Crime and Security Act 2001, which involves derogations from basic human rights standards that, as they noted, have not been found necessary by any other European State. The Act provides for the indefinite detention of foreign persons certified by the Home Secretary to be reasonably suspected of being a terrorist or of having links with a terrorist group and whose presence in the United Kingdom is believed to be a risk to national security.[16] Appeals by foreign detainees are to the Special Immigration Appeals Commission, which may decide upon the basis of secret evidence submitted by the government and not disclosed to the detainee or to the public. That system has been severely criticized, inside and outside Parliament.

The Newton Committee reported that they 'strongly recommend that the powers which allow foreign nationals to be detained potentially indefinitely should be replaced as a matter of urgency' with new legislation that does treat all suspected terrorists alike, regardless of nationality, and does not require a derogation from the European Convention on Human Rights.[17] The Government's response was to say simply that '[t]he Government believe that these powers continue to be necessary to address the current threat. The Government will consider how this threat could be changing and what else might be done.'

The obtuseness of the Government's response to serious, considered, and detailed criticisms of a system which has been said to offend every notion of justice, equal treatment of people, and the rule of law, is hardly reassuring.[18]

The criticisms are particularly poignant because of the probability that the anti-terrorism measures will be seen to operate in a discriminatory manner. The phenomenon was noted, in a different context, by Ronald Dworkin who pointed out that in revising the balance between traditional liberties and the needs of security,

> with hardly any exceptions, no American who is not a Muslim and has no Muslim connections actually runs any risk of being labeled an enemy combatant and locked up in a military jail. The only balance in question is the balance between the majority's security and *other* peoples' rights, and we must think about that as a matter of moral principle, not of our own self-interest.[19]

As the Newton Committee recognized, there is much that can be achieved by relatively minor adjustments to the law on evidence and surveillance, without departing from the basic principle that terrorists are criminals and should be treated as such. The report

[14] 'Anti-Terrorism, Crime and Security Act 2001 Review: Report', HC 100 <http://www.atcs-act-review.org.uk/lib/documents/18_12_2003/Report.pdf>.

[15] 'Counter Terrorism Powers: Reconciling Security and Liberty in an Open Society', Cm 6147.

[16] S 21.

[17] Para 25.

[18] H Kennedy *Just Law* (Chatto & Windus London 2004) 44.

[19] R Dworkin 'Terror and the Attack on Civil Liberties' (2003) 50 New York Review of Books No 17, 6 Nov 2003, 37 at 38.

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identified many such adjustments; and I will not repeat them here. I make the simple point that if efficient action against terrorism is possible within the rule of law, there is neither a legal nor a political case to be made out for claims to wider governmental powers that do infringe the rule of law. One can only hope that the Government rethinks its approach to this question.

I have argued, first, that terrorism is a threat that can be countered without any fundamental change in international law, and that terrorists should be treated as criminals and not as combatants. Secondly, I conceded that some changes might be necessary in particular rules of international law, such as the rules governing the use of force in self-defence. And third I accepted that similar changes may be necessary in domestic law.

The United Kingdom has more experience than most States of the struggle to deal with terrorist threats within the rule of law. Northern Ireland has produced many hard lessons. Those who are responsible, day by day, for counter-terrorist operations cannot be expected to do more than to take the best decisions that they can, in good faith, and within what is often the very short time available to them. It is right, however, that those free of those pressures, and independent of government, should reflect on the issues with all the care and seriousness that the issues demand. But it is not enough to be critical: it is necessary to offer some practical suggestions and alternatives.

The Newton Report is a model of the way in which this can be done within government. The British Institute of International and Comparative Law is a model of the kind of institution that can undertake this function independently of government. Refinement of international law, and the comparative study of the experience of different jurisdictions in dealing with common problems, are the tasks in which the Institute has a great and particular expertise. There is, I think, no more important task for lawyers at present, and no greater contribution that the Institute can make.

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