

# Chapter Nine

## Black Holes, White Holes and Worm Holes: Pre-emptive Detention in the 'War on Terror'

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### I. Introduction

This chapter explores the use of detention as a response to terrorism in the United States (US), United Kingdom (UK) and Australia. I have chosen to focus on these three countries because it is clear that Australia has taken some leads from the US and UK in this area as a result of its close connections with them. The three countries have obvious cultural connections and they were all members of the 'coalition of the willing' that invaded Iraq in 2003. It is apparent that detention has become a favoured preventative measure in the 'fight against terror' in all three countries, and that the rules that would generally govern and constrain detention have altered dramatically. Indeed, the rules are so different, subject to so many ongoing changes, and based on such flimsy rationales that they lack legitimacy.

In this chapter, I also comment on the relationship between detention and torture. Places of detention are often places of torture, which is one reason for human rights safeguards surrounding detention such as the right to come before a judge. The interrogation techniques used by the US in Guantánamo Bay have been denounced as torture by international non-government organisations, as well as bodies within the United Nations human rights system.<sup>1</sup> Meanwhile, the UK has sought to deport people whom it would otherwise wish to keep in detention on the basis of 'diplomatic assurances' that torture will not occur once the person is returned to their home country, assurances that should carry little, if any, weight.

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<sup>1</sup> See, eg, Amnesty International, 'Close Guantánamo. Guantánamo – Torture and other ill-treatment' AMR 51/189/2006. The findings of various parts of the UN human rights system are examined below in part II.B.

Various argumentative strategies used by governments to support the use of detention and to circumvent the prohibition on torture, the flaws in these strategies, and possible long-term ramifications for core human rights norms such as the prohibitions on arbitrary detention and against torture are examined. I will focus on two principal arguments put by governments, which are sometimes interrelated. One is to deny that a person is truly a person entitled to all human rights — for example, by attempting to differentiate between aliens and citizens, or lawful and unlawful combatants. The other is to put the person in a legal 'black hole', to use Lord Steyn's terminology,<sup>2</sup> whether by removing the person from a state's territory, or creating executive-controlled detention — for example, by depriving courts of jurisdiction. A third argument will also be noted along the way. This is the 'balancing' argument, namely that human rights need to be balanced against national security, which is another route to the same result — denial of a person's rights as a fellow human being, or a justification for putting them into a legal black hole.

A common theme underlying these arguments is that there exists an emergency that permits extraordinary measures. The emergency may be characterised as a 'war', or a 'threat to the life of the nation', which justifies derogation from rights,<sup>3</sup> or a situation in which the executive is able to limit rights without invoking the need to derogate from rights. As the title of the chapter suggests, the argumentative strategies employed by the governments concerned are as dangerous as space travel, and as improbable as some science fiction.

## II. The Black Hole of Guantánamo Bay

The analogy of the black hole was first employed as a description of Guantánamo Bay by Lord Steyn in the Twenty-Seventh F A Mann Lecture<sup>4</sup> in order to describe the right-less vacuum into which the US sought to place the detainees in Guantánamo Bay.<sup>5</sup> The analogy also warns that by denying the detainees'

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<sup>2</sup> Lord Johan Steyn, 'Guantánamo Bay: The Legal Black Hole' (2004) 53 *International and Comparative Law Quarterly* 1.

<sup>3</sup> See the language of the 'derogation clause' in art 4, *International Covenant on Civil and Political Rights*, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR).

<sup>4</sup> Above n 2.

<sup>5</sup> According to Steyn, 'the purpose of holding the prisoners at Guantánamo Bay was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of the victors.' *Ibid* 8.

status as rights-holders, US society itself — not just the detainees, who are usually, but not always, foreigners<sup>6</sup> — may be sucked into the vortex.<sup>7</sup>

Four years after Lord Steyn gave his speech, US policy in relation to Guantánamo Bay remains largely unchanged, although there have been some important victories in US courts and some strong denunciations of US policy at the international level. The US government has tried to shield its policies from scrutiny with variations on the theme of the black hole, such as attempting to deprive US courts of jurisdiction or denying that treaties that prohibit torture extend to Guantánamo. I turn first to examine the extent to which US courts have confronted and dismissed the strategies outlined above.

## A. Staring into the Abyss? Confronting Jurisdictional Limits before US Courts

US courts have granted the detainees some recognition of their rights, resulting in changes to the legislative regime governing the treatment of the detainees. In *Hamdi v Rumsfeld*,<sup>8</sup> the Court found that detainees had the right to challenge their classification as an enemy combatant before a neutral decision-maker. Combatant Status Review Tribunals were then established for the purposes of this task.

In *Hamdan v Rumsfeld*, the Court held that the military commissions established to try Guantánamo detainees were not validly constituted, because, among other things, they violated common Article 3 of the Geneva Conventions.<sup>9</sup> Article 3 requires detainees to be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'<sup>10</sup> This phrase incorporates the customary international legal requirements for a fair trial, including the right of accused persons both to be present at their trial and to see the evidence against them.<sup>11</sup>

So long as the US government regulates the treatment of the detainees, through the establishment of military commissions and so on, any attempt to keep questions regarding the detentions completely out of the courts may be doomed

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<sup>6</sup> A recent decision from the US Supreme Court concerns a US national arrested at O'Hare airport in Chicago after returning from Pakistan: *Padilla v Hanft*, 547 U.S. 1062 (2006). The Supreme Court declined to hear the case because Padilla's case is now being heard by the civilian justice system instead of the controversial military commissions and he is entitled to the full protection of the ordinary criminal law, including the right to a speedy trial. In their explanation of their vote to deny *certiorari*, Chief Justice Roberts and Justices Kennedy and Stevens concluded that 'Padilla's current custody is part of the relief he sought, and ... its lawfulness is uncontested'. *Ibid* 4.

<sup>7</sup> '[D]enial of justice to foreigners was bound to erode the civil liberties of citizens in the United States.' Lord Steyn, above n 2, 12.

<sup>8</sup> *Hamdi v Rumsfeld*, 543 US 507 (2004).

<sup>9</sup> *Hamdan v Rumsfeld*, 126 S Ct 2749 (2006), (Stevens J), 2797.

<sup>10</sup> See eg, art 3(1)(d), *Geneva Convention relative to the Treatment of Prisoners of War*, 75 UNTS 135 (entered into force 21 October 1950).

<sup>11</sup> *Hamdan*, above n 9, 2798.

to failure. The very act of regulation contradicts the concept of the black hole, and opens the US government up to scrutiny on the basis of standards that are not of the executive's making. In the latest of the Guantánamo detainees' victories against the US government, the US Court of Appeals (DC Circuit) held that in order for the courts to fulfil their role in 'determining the validity' of a Combatant Status Review Tribunal's determination under the *Detainee Treatment Act 2005* (USA),

the court must be able to view the Government Information with the aid of counsel for both parties; [and] a detainee's counsel who has seen only the subset of the Government Information presented to the Tribunal is in no position to aid the court. There is simply no other way for the counsel to present an argument that the Recorder withheld exculpatory evidence from the Tribunal in violation of the specified procedures.<sup>12</sup>

The US government has, however, attempted to keep at bay what is perhaps the most fundamental question concerning US courts' jurisdiction — the constitutional right of detainees to petition the court for *habeas corpus* — using the device of 'jurisdiction stripping'<sup>13</sup> (or what Australians call a 'privative clause'). The first round of jurisdiction-stripping came in the wake of *Hamdi*<sup>14</sup> and *Rasul v Bush*,<sup>15</sup> in which the Supreme Court held that the statutory right to claim *habeas corpus* applied to the Guantánamo detainees. The *Detainee Treatment Act 2005* attempted to remove the right to claim *habeas corpus* retrospectively. However, in *Hamdan*,<sup>16</sup> the Supreme Court found, on the basis of ordinary principles of statutory construction, that the courts had not been deprived of their jurisdiction. The question of whether Congress could achieve its aim with a clearer statute was left open. Subsequently, the *Military Commissions Act 2006* (USA) was enacted, and its privative clause has so far been upheld, both as in accordance with principles of statutory interpretation and as constitutional by the US Court of Appeals (DC Circuit).<sup>17</sup>

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<sup>12</sup> *Bismullah v Gates*, 501 F.3d 178, 196 (D.C. Cir. 2007), 2007 WL 2067938, 6. It should also be noted that in two cases, the Military Commissions have refused to proceed with cases on the basis that the Combatant Status Review Tribunals had not determined that the detainees concerned were enemy alien combatants as required for the purposes of the *Military Commissions Act 2006* (US), only that they were enemy combatants. See *United States of America v Omar Ahmed Khadr*, 4 June 2007 <<http://www.nimj.com/documents/Khadr%20Order%20on%20Jurisdiction.pdf>>, and *United States of America v Salim Ahmed Hamdan*, 4 June 2007.

<sup>13</sup> See generally G Shay and J Kalb, 'More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)' (2007) (29)(1) *Cardozo Law Review* 291.

<sup>14</sup> Above n 8.

<sup>15</sup> *Rasul v Bush*, 542 U.S. 466 (2004).

<sup>16</sup> Above n 9.

<sup>17</sup> *Boumediene v Bush*, 476 F.3d 981 (DC Cir 2007). Interestingly, in *Boumediene v Bush*, the D C Circuit disagreed with the Supreme Court's reading of the common law right to *habeas corpus* in *Rasul*, holding that under the common law in 1789 (when the US Constitution came into force), *habeas corpus* 'would not have been available to aliens ... without presence or property within the United States.' *Boumediene*, *ibid* 990. It will be interesting to see whether the Supreme Court continues to follow its own reading

## B. Exposing the Black Hole to the Light of Human Rights: the US Confronts the UN Human Rights System

The US has also sought to rely on the black hole conceit at the international level. In its dealings with the UN Human Rights system, the US has denied that the human rights treaties to which it is party apply in Guantánamo. The US relies on the fact that Guantánamo is not fully 'sovereign' US territory (as opposed to being completely within US jurisdiction). The US has also relied on strained readings of the terms of the treaties as well as US reservations to them. The report by five of the UN Commission on Human Rights mandate-holders<sup>18</sup> and the official US response<sup>19</sup> provides us with a good illustration of the US's argumentative strategy.

In their report, the five mandate-holders made several damning conclusions. First, they concluded that the detention is, or rather the *detentions* are, governed by general international human rights law, despite the US's insistence that they are governed solely by the law of armed conflict. From this starting point, they went on to find that the detentions and military commissions are in breach of Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR) — the right to liberty — as well as Article 14 which guarantees the right to a fair trial.<sup>20</sup>

The finding that general human rights law governs the situation is made after the mandate-holders draw attention to several important factual variations in the detention of particular detainees. These concern:

1. The context in which persons were initially detained — whether on the battle-field in Afghanistan or, rather, off the battle-field in a distinctly civilian context as in the case of six Algerians arrested in Bosnia-Herzegovina (a factor which was also important to the Supreme Court in *Hamdan* when it found the military commissions to be invalidly constituted);<sup>21</sup>
2. The purpose for which the persons are detained — whether they are 'combatants' detained for the duration of the armed conflict or persons

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once Justice Roberts (formerly of the D C Circuit Court) is able to sit. Justice Roberts abstained from the decision in *Hamdan* because he had ruled on the decision of the DC Circuit Court which was being appealed. See *Hamdan v Rumsfeld*, 415 F 3d 33 (DC Cir 2005).

<sup>18</sup> 'Situation of detainees at Guantánamo Bay', Report of the Chairperson of the Working Group on Arbitrary Detention, Ms Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr Paul Hunt, 15 February 2006, UN Doc E/CN.4/2006/120 ('the five mandate-holders' report').

<sup>19</sup> Letter dated 31 January 2006, addressed to the Office of the High Commissioner for Human Rights, by the Permanent Representative of the United States of America to the United Nations and Other International Organizations in Geneva, *ibid*, Annex 2, 43-4.

<sup>20</sup> Above n 18, [84] and [85].

<sup>21</sup> Above n 9, (Stevens J), 2777-8.

- detained for criminal prosecution as a result of activities that took place during such conflict, or, by contrast, persons detained for the illegitimate purpose of intelligence-gathering; and
3. The prevailing context of the detentions, namely whether the United States was or continued to be currently engaged in an international armed conflict between two parties to the Third and Fourth Geneva Conventions.<sup>22</sup>

The mandate-holders said that the US was not, at the time of their investigation, engaged in an international armed conflict.<sup>23</sup> Accordingly, it was not permissible for the US to read down the guarantees associated with the protection against arbitrary detention in Article 9 of the ICCPR so that they cohere with the *lex specialis* prevailing during a time of international armed conflict.<sup>24</sup> The mandate-holders noted that the US is a party to the ICCPR and that Article 2 of the ICCPR applies to persons within the effective control of the state party, whether or not they are within the physical territory of the state party.<sup>25</sup>

The US response to this finding was as follows:

The United States ... is engaged in a continuing armed conflict against Al Qaida ... the law of war applies to the conduct of that war and ... related detention operations, and ... the International Covenant on Civil and Political Rights, by its express terms, applies only to "individuals within its territory and subject to its jurisdiction." ... The Report's legal analysis rests on [a] flawed position ... [which] leads to a manifestly absurd result; that is, during an ongoing armed conflict, unlawful combatants receive more procedural rights than would lawful combatants under the Geneva Conventions.<sup>26</sup>

There are several problems with this response. The main one lies in the US argument that the global 'war on terror' is an armed conflict, rather than a struggle against various groups committing criminal acts. It is to be expected that all persons receive more procedural rights than lawful combatants under the Geneva Conventions when there is no armed conflict. On the other hand, the Supreme Court accepted that Hamdan had been detained during the course of a non-international armed conflict in Afghanistan, in which case some of the laws of war are applicable.<sup>27</sup> However, the Supreme Court did acknowledge

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<sup>22</sup> *Geneva Convention relative to the Treatment of Prisoners of War*, above n 10 ('Third Geneva Convention'); *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287 (entered into force 21 October 1950) ('Fourth Geneva Convention').

<sup>23</sup> Above n 18, [24]. The US Supreme Court found that common art 3 of the Geneva Conventions was applicable precisely because the conflict between Al Qa'ida and the US should be considered a 'conflict not of an international character' ie, one that does not involve conflict between two states. Above n 9, (Stevens J), 2796.

<sup>24</sup> Above n 18, [24].

<sup>25</sup> *Ibid* [11].

<sup>26</sup> Above n 19, 54.

<sup>27</sup> Above n 9, (Stevens J), 2796.

problems with using military commissions with respect to particular detainees where they had not been detained within the theatre of war and when the charges against them did not relate to well-established war crimes.<sup>28</sup> The report of the mandate-holders and the decision of the Supreme Court in *Hamdan* both demonstrate that while there may be some aspects of the 'war on terror' that really do involve armed conflict and require the invocation of the laws of war, the attempt to categorise every governmental action against every detainee as part of a 'war' is ridiculous.

As for the distinction between unlawful combatants and lawful combatants — terminology that is not contained in any international instrument dealing with international humanitarian law — that distinction means that those designated as unlawful combatants forfeit possible status as prisoners of war. However, this does not leave them in a rights vacuum. They cannot be tortured, they are still entitled to a fair trial and they may not be arbitrarily detained.<sup>29</sup> There are fundamental linkages between these three aspects of the detainees' treatment in Guantánamo Bay as it is clear that the prolonged detention and other forms of ill-treatment occurring there will impact on any prospect of a fair trial at the end of the day.

Finally, the interpretation adopted by the Human Rights Committee in relation to the language of Article 2 of the ICCPR,<sup>30</sup> upon which the five mandate-holders draw, is preferable to that adopted by the US. Article 2 requires a state party 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.' The word 'and' in Article 2 is read disjunctively, rather than as imposing cumulative prerequisites for legal responsibility. The Committee has recently pointedly reaffirmed its interpretation in its concluding observations on the US periodic report under

<sup>28</sup> Above n 9, (Stevens J), 2777-8 (relating to when and where persons were apprehended); 2779-86 (concerning the need for a well-established war crime).

<sup>29</sup> The prohibition on torture is a well-accepted norm of *jus cogens*. According to the Human Rights Committee, the rights to a fair trial and the prohibition on arbitrary detention, while not listed as non-derogable rights in art 4 of the ICCPR, are also *jus cogens* and may never be derogated from. Human Rights Committee, General Comment No 29, UN Doc CCPR/C/21/Rev.1/Add.11, 31 August 2001. Even a more cautious reading of *jus cogens* norms to include *prolonged*, arbitrary detention would pose a challenge to the detentions at Guantánamo Bay. Academic writing has also pointed out that it doesn't matter what labels are used, some model of rights will still be applicable. Tom Farer points out that the military commissions model shares many of the same fair trial deficits of the military trials for civilians conducted in Latin America when he was a member of the Inter-American Commission on Human Rights. T J Farer, 'The Two Faces of Terror' (2007) 101 *American Journal of International Law* 363. Tom Franck, who appears to accept that new norms may be required for the post-September 11 world still requires that a minimum rule of law model has to apply. T M Franck, 'Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror' (2004) 98 *American Journal of International Law* 686. See also the point that the rights of 'protected civilians' may be applicable in L Vierucci, 'Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantanamo Bay Detainees are entitled' (2003) 1 *Journal of International Criminal Justice* 284.

<sup>30</sup> Human Rights Committee, General Comment No 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, [10].

Article 40 of the ICCPR.<sup>31</sup> The Human Rights Committee's reading is one of the alternatives open on the ordinary meaning of the text and it is the one that coheres with the object and purpose of the treaty and the intentions of the framers.<sup>32</sup> The language of Article 2 was designed to avoid responsibility in situations where another sovereign was responsible — for example, in the case of occupying troops.<sup>33</sup> The US, on the other hand, seeks to achieve the opposite (and manifestly absurd) result in relation to Guantánamo Bay, namely to do what it would not be allowed to do on US soil in a geographical region that is technically not part of the US but that is nevertheless subject to its physical and legal jurisdiction as a result of its lease agreement with Cuba.

### C. The Terrorists Unmasked

The mandate-holders made a second very important finding, namely that the US is in violation of the prohibitions on torture enshrined in the *Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment* ('Convention against Torture') and the ICCPR. Des Manderson, in this volume,<sup>34</sup> attacks the philosophical basis for arguments that torture may sometimes be justified. In this chapter, I offer a more limited, legal discussion of the issues as they arose in the context of the exchange between the mandate-holders and the US, and in the context of subsequent consideration by the Human Rights Committee of the US' second and third periodic reports under the ICCPR.

There are four main aspects of the treatment of the Guantánamo detainees that raise allegations of torture. They are the interrogation techniques; the overall conditions of detention; excessive force during transportation; and force-feeding of detainees on hunger strike. The five mandate-holders' report found that the conditions of detention,

in particular the uncertainty about the length of detention and prolonged solitary confinement, amount to inhuman treatment and to a violation of the right to health as well as a violation of the right of detainees under Article 10(1) of the ICCPR to be treated with humanity and with respect for the inherent dignity of the human person.<sup>35</sup>

The excessive violence and force-feeding were found to constitute torture — the latter finding evoking an expression of 'bewilderment' by the US given that

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<sup>31</sup> Human Rights Committee, Concluding Observations, United States of America, CCPR/C/USA/CO3, 15 September 2006, [10].

<sup>32</sup> This is consistent with the usual rules of treaty interpretation, as codified in art 31 of the *Vienna Convention on the Law of Treaties*, 115 UNTS 331 (entered into force 27 January 1980).

<sup>33</sup> See the discussion in M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, 1<sup>st</sup> ed. (Strasbourg: NP Engel, 1993) 41-3.

<sup>34</sup> See Chapter 3.

<sup>35</sup> Above n 18, [88].

the purpose of force-feeding is to save lives.<sup>36</sup> Interesting as this aspect of the treatment of detainees is, I will focus on the issue of the interrogation techniques, which have attracted so much attention in the media.

As described by the mandate-holders' report, the interrogation techniques authorised at the time of writing the report were as follows:

- B. Incentive/Removal of Incentive ie, comfort items;
- S. Change of Scenery Down might include exposure to extreme temperatures and deprivation of light and auditory stimuli;
- U. Environmental Manipulation: Altering the environment to create moderate discomfort (eg, adjusting temperature or introducing an unpleasant smell).
- V. Sleep Adjustment; Adjusting the sleeping times of the detainee (eg, reversing sleep cycles from night to day). This technique is not sleep deprivation.
- X. Isolation: Isolating the detainee from other detainees while still complying with basic standards of treatment.<sup>37</sup>

The US has defended these techniques with various arguments, the first of which is a narrow reading of the definition of torture. In a notorious advice from J S Bybee, then Assistant Attorney-General, to Alberto Gonzales, then Counsel advising the President, torture was defined as follows:

[W]e conclude that torture as defined in and proscribed by Sections 2340-2340A [of title 18 of the United States Code], covers only extreme acts. Severe pain is generally of the kind difficult for the victim to endure. Where the pain is physical, it must be of an intensity akin to that which accompanies serious physical injury such as death or organ failure. Severe mental pain requires suffering not just at the moment of infliction but it also requires lasting psychological harm, such as seen in mental disorders like posttraumatic stress disorder. ... Because the acts inflicting torture are extreme, there is a significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture. ... Finally, even if an interrogation method might violate Section 2340A, necessity or self-defense could provide justifications that would eliminate any criminal liability.<sup>38</sup>

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<sup>36</sup> Above n 19, 53.

<sup>37</sup> 'Counter Resistance Techniques in the War on Terror', Secretary of Defence memorandum for the commander, US Southern command, 16 April 2005, 1, see above n 18, [50].

<sup>38</sup> See Memorandum for Alberto R Gonzales Counsel to the President, from Jay S Bybee, Assistant Attorney-General, US Department of Justice, Re Standards of Conduct for Interrogation under 18 USC, ('Bybee-Gonzales memorandum') in K J Greenberg and J L Dratel, *The Torture Papers: the road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005) 172, 213-4.

The advice makes clear that the relevant sections of the US Code are designed to implement the US' reservations and understandings to the ICCPR and CAT<sup>39</sup> (the Convention against Torture).<sup>40</sup>

This memorandum has been overtaken by the memorandum from former Acting Assistant Attorney-General, Daniel Levin, to James B Comey, then Deputy Attorney-General.<sup>41</sup> Nevertheless, it seems plain from the US' response to the five mandate-holders' report that the US still seeks to rely on the arguments put forward in the original advice. In its response to the report, the US coyly, cryptically and in my view, largely mischievously, asserted that the mandate-holders,

have relied on international human rights instruments ... without serious analysis of whether the instruments by their terms apply extraterritorially; whether the United States is a State Party — or has filed reservations or understandings — to the instrument; whether the instrument ... is legally binding or not; or whether the provisions cited have the meaning ascribed to them in the Unedited Report.<sup>42</sup>

The argument concerning extra-territoriality has already been dealt with.<sup>43</sup> The next question is whether the reservations — another kind of 'black hole' — provide an excuse for the US.

The US has entered reservations to Article 7 of the ICCPR and Article 16 of the Convention against Torture stipulating that the US is bound by the provisions concerning cruel, inhuman or degrading treatment or punishment 'only insofar as the term ... means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.'<sup>44</sup> The US has also entered a 'declaration of understanding' to Article 1 of the Convention against Torture. Article 1 contains the definition of torture. The US 'understanding' is as follows:

The United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by

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<sup>39</sup> Bybee-Gonzales memorandum, *ibid* 172 and 183.

<sup>40</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* 1465 UNTS 85 (entered into force 26 June 1987).

<sup>41</sup> Memorandum for James B Comey Deputy Attorney-General, from Daniel Levin Acting Assistant Attorney-General, US Department of Justice, Re Legal Standards Applicable Under 18 USC §§ 2340-2340A. The second memorandum specifically replaces the earlier memo in its entirety in response to a request that the earlier memo be rescinded.

<sup>42</sup> Above n 19, 54.

<sup>43</sup> See above n 30 and accompanying text.

<sup>44</sup> See the reservations and declarations in the Multilateral Treaties Deposited with the Secretary-General in the UN Treaty Collection:

<<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty6.asp>> (ICCPR)

<<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp>> (CAT).

or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.<sup>45</sup>

Interestingly, the US did not enter a similar reservation to the ICCPR, which, although it does not define torture, does prohibit it. This raises an arcane question. Given that the Convention against Torture definition is read into Article 7 of the ICCPR, could the US rely on its reservation to the Convention against Torture with respect to its obligations under the ICCPR? The answer has to be no. The Human Rights Committee did not consider such an argument when it expressed concerns about the interrogation techniques in its concluding observations on the US periodic report under Article 40 of the ICCPR.<sup>46</sup> This is undoubtedly because the US is required to enter appropriate reservations to all treaties to which it becomes party if it wishes to narrow its obligations.

In any event, I doubt that the reservation or the understanding is helpful to the US. To begin with there is the question of validity. The mandate-holders note the view taken by the Human Rights Committee that the reservation to the ICCPR is invalid.<sup>47</sup> Of course the decision by the Human Rights Committee that it has the power of determination in relation to reservations and may therefore sever the reservation<sup>48</sup> is controversial. However, if it is accepted that, as the mandate-holders say, the prohibition on torture is a norm of *jus cogens*, then it

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<sup>45</sup> See the US reservations and declarations to the Convention Against Torture, *ibid*.

<sup>46</sup> Concluding Observations of the Human Rights Committee, UN Doc CCPR/C/USA/CO/3/Rev 1, 18 December 2006, [13].

<sup>47</sup> Above n 18, [45]. In General Comment No 24, the Human Rights Committee states that: 'Reservations that offend peremptory norms would not be compatible with the object and purpose of the Covenant. Although treaties that are mere exchanges of obligations between States allow them to reserve *inter se* application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. Accordingly, provisions in the Covenant that represent customary international law (and *a fortiori* when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be.' Human Rights Committee, General Comment No 24, Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under art 41 of the Covenant, UN Doc CCPR/C/21/Rev.1/Add.6, 11 April, 1994.

<sup>48</sup> General Comment No 24, *ibid* [18].

is arguable that no reservations to the definition of torture are permitted. The International Law Commission's work on reservations to treaties has avoided drawing this conclusion owing to the theoretical debate between those who think certain reservations are simply impermissible and invalid and those who think that the key issue is acceptance or rejection of reservations by other states (the question of 'opposability' of reservations to other states). However, the ILC has provisionally adopted a guideline which states that '[a] reservation cannot exclude or modify the legal effect of a treaty in a manner contrary to a peremptory norm of general international law'.<sup>49</sup> In other words, the US reservations cannot have the effect of permitting the US to practise torture on the basis of a definition of torture that does not accord with the internationally accepted definition. It should also be said that the norm prohibiting torture binds the United States as a matter of customary international law, regardless of the impact of reservations to treaties.<sup>50</sup>

These propositions also stand true for the 'understanding' that might well be a disguised reservation,<sup>51</sup> and which, in any event, could only provide an acceptable interpretation of the treaty if it was consistent with the broader international community's interpretation of torture. This, however, is not the case. In its concluding observations concerning the US' initial report, the Committee against Torture expressed its concern about the US' 'failure to enact a federal crime of torture in terms consistent with article 1 of the Convention', and '[t]he reservation lodged to article 16, in violation of the Convention, the effect of which is to limit the application of the Convention'.<sup>52</sup> The Committee recommended that the US 'withdraw its reservations, interpretations and understandings relating to the Convention'.<sup>53</sup> More recently, in its concluding observations on the US' second report, the Committee reiterated this recommendation as well as making the following, very specific one:

The State party should ensure that acts of psychological torture, prohibited by the Convention, are not limited to 'prolonged mental harm' as set out in the State party's understandings lodged at the time of ratification of the Convention, but constitute a wider category of acts, which cause severe mental suffering, irrespective of their prolongation or its duration.<sup>54</sup>

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<sup>49</sup> See Guideline 3.1.9. Reservations contrary to a rule of *jus cogens*. International Law Commission, Report on the Work of its Fifty-Ninth Session, UN Doc. A/62/10, 2007, chapter IV, 65. For the explanation for the compromise, see the commentary to the guideline, *ibid* 99-104.

<sup>50</sup> In my view, a norm of *jus cogens* must, by definition, form part of customary or general international law. The test for a norm of *jus cogens* set out in art 53 of the Vienna Convention on the Law of Treaties speaks of its acceptance by the international community as a whole.

<sup>51</sup> It is accepted that an understanding that attempts to alter the sense of treaty words is in fact a reservation: *Belilos v Switzerland* (10328183) [1988] ECHR 4 (29 April 1988).

<sup>52</sup> Report of the Committee against Torture, UN GAOR Supp. No 44 (A/55/44) (2000), [175][180], [179].

<sup>53</sup> *Ibid* [180].

<sup>54</sup> Concluding Observations of the Committee against Torture, UN Doc. CAT/C/USA/CO/2, 25 July 2006, [13].

These responses from the Committee against Torture, along with the typically few, but principled objections to the US' reservations and understandings by other states parties,<sup>55</sup> show that the US' right to make the reservations and understandings in question is not accepted.

Having dismissed the contentions concerning extra-territoriality and reservations, the remaining arguments are the definitional question and the argument concerning necessity, which appears as an afterthought in case the definitional arguments are unsustainable and it is necessary to contend that 'anything goes' in wartime. The argument based on necessity should be put to rest first. Simon Bronitt's chapter in this volume<sup>56</sup> refutes the necessity argument on the basis that 'balancing' is an inappropriate framework for dealing with terrorism and human rights, given that its effect is to trade away human rights in the name of 'security'. Similarly, Manderson in Chapter 3 this volume, puts paid to the idea that torture — a consciously manipulative process that seeks to gain a particular end and is used by the *state* — could ever be viewed as an act of self-defence. Action in self-defence is an immediate response by a person directly under threat. Moreover, it should be noted that although the Bybee-Gonzales memo is discussing domestic US law, as a matter of international law, the US' contention is also unsound. It has already been shown that the laws of war do not oust general human rights law, so any argument concerning 'military necessity' as part of the laws of war may rest on a shaky foundation. The fact that torture is prohibited by the laws of war and is a war crime<sup>57</sup> makes a nonsense of any such argument in any event. It is also highly questionable whether one can mount a case based on a more general defence of necessity that lies outside the parameters of the exceptions established by the governing human rights instruments. As noted by the International Court of Justice in the opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, '[s]ince those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being

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<sup>55</sup> Of the three objections received, two noted that the understanding had no effect. Only three states lodged objections to the US' reservations and understandings: Finland, the Netherlands and Sweden. The Netherlands stated that '[t]he Government of the Kingdom of the Netherlands considers the following understandings to have no impact on the obligations of the United States of America under the Convention: II.1 a [the understanding concerning the definition in Article 1 of the Convention] [t]his understanding appears to restrict the scope of the definition of torture under article 1 of the Convention.' Sweden stated that '[i]t is the view of the Government of Sweden that the understandings expressed by the United States of America do not relieve the United States of America as a party to the Convention from the responsibility to fulfil the obligations undertaken therein.'

<sup>56</sup> See Chapter 5.

<sup>57</sup> Common art 3 of the *Geneva Conventions* prohibits torture. Torture is also defined as one of the 'grave breaches' that can result in prosecutions. See, eg, art 130 of the Third Geneva Convention, above n 10.

challenged.<sup>58</sup> In any event, as the prohibition on torture is a norm of *jus cogens*, no derogation is permitted on any basis whatsoever.

All that is left, then, is the definitional question. Article 1 of the Convention against Torture defines torture as an act that inflicts 'severe pain or suffering, whether physical or mental'.<sup>59</sup> It also requires participation or acquiescence of a public official and the pain has to be inflicted for particular purposes, such as gaining a confession from a person. The Bybee-Gonzales memo imposes additional requirements to the international definition of torture that do not comport with the ordinary meaning of the words of the Convention, read in the light of their context and the object and purpose of the Convention.<sup>60</sup> Internationally, the weight of opinion is against the US. The report of the five mandate-holders concluded that some of the techniques, particularly if used simultaneously, amount to torture.<sup>61</sup>

Having dismissed all the US' legal arguments, a more intriguing question arises. The true puzzle is not whether or not the interrogation techniques constitute torture. Rather, it is why, given that they clearly constitute cruel, inhuman or degrading treatment in any event<sup>62</sup> and the Human Rights Committee and the Committee against Torture have both indicated that this is the case,<sup>63</sup> the US seeks to utilise such techniques. Evidence gained from torture is unreliable, and those who have argued to the contrary have met with sound rebuttals.<sup>64</sup> Do US officials think that the evidence gained from cruel, inhuman or degrading

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<sup>58</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice, 9 July 2004, [2004] ICJ Rep 136, [140]. The Court did not have to decide the question given that it held that the construction of the wall was not the 'only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction': *ibid*.

<sup>59</sup> Above n 40.

<sup>60</sup> This reading is required by the ordinary rules of treaty interpretation under art 31 of the *Vienna Convention on the Law of Treaties* above, n 32. For a critique of the ethics of the memo see R B Bilder and D F Vagts, 'Speaking Law to Power: Lawyers and Torture' (2004) 98 *American Journal of International Law* 689.

<sup>61</sup> Above n 18, [87]. The mandate-holders' conclusion was based, among other things, on the interviews with former detainees undertaken by the Special Rapporteur on Torture, which yielded the information that detainees perceived the techniques to cause severe suffering: *ibid* [52]. The remaining elements of the prohibition on torture are clearly met, as stated in the report, *ibid* [51]. We should note here that the US did not want any interviews to take place. Three of the mandate-holders were offered a one-day visit to Guantánamo Bay by the US government. However, the visit was to be subject to the proviso that no private interviews could be carried out with detainees. The offer was therefore refused as being inconsistent with the work of the special procedures of the UN Commission on Human Rights and interviews were undertaken with former detainees instead. Yet the US castigated the mandate-holders for not basing their conclusions 'clearly in the facts': *ibid* 53.

<sup>62</sup> See generally M E O'Connell, 'Affirming the Ban on Harsh Interrogation' (2005) 66 *Ohio State Law Journal* 1231.

<sup>63</sup> See the Concluding Observations of the Human Rights Committee, UN Doc. CCPR/C/USA/CO/3/Rev 1, 18 December 2006, [13], and the Concluding Observations of the Committee against Torture, n 54 above, [13], [19], [22], [24].

<sup>64</sup> See, eg, the rejoinder to the arguments in favour of torture put by Mirko Bagaric and Julie Clarke in P N S Rumney, 'Is Coercive Interrogation of Terrorist Suspects Effective? A response to Bagaric and Clarke' (2006) 40 *University of San Francisco Law Review* 479.

treatment or punishment is reliable? If not, are the detention and interrogation themselves a form of punishment of the individuals concerned? This is really what torture is about — the transformation of a person, the very self, with that person's body used as a means to effect this transformation.<sup>65</sup> As the Secretary-General of the UN has noted, torture is a form of terror.<sup>66</sup> The black hole has swallowed its creators.

### III. A Black Hole or a White Hole: Does Belmarsh Prison have Only Three Walls?

In December 2004, the House of Lords handed down its decision in *A and Others v Secretary of State for the Home Department, X and another v Secretary of State for the Home Department*.<sup>67</sup> The case concerned foreign terror suspects detained in Belmarsh prison. As is well-known, the Court determined that the detention was discriminatory and disproportionate as nationals suspected of terrorism were not also detained.<sup>68</sup>

As a result, the relevant provisions of the *Anti-Terrorism, Crime and Security Act 2001* (UK) were repealed — demonstrating that the declarations of incompatibility that the judiciary are empowered to issue under the *Human Rights Act 1998* (UK)<sup>69</sup> are not toothless. 'Control orders' that impose severe restrictions and that are applicable to all nationals were instituted instead,<sup>70</sup> however. Thus, along with Chris Michaelsen, Chapter 7 in this volume, we may ask whether the Court should have gone further in its decision and questioned the characterisation of the terrorist threat as an emergency that permits such intrusions. In doing so, we note that, as Colm O'Cinneide, Chapter 15 this volume relates, control orders have also been subjected to searching review by the courts. The present chapter looks at the way in which detention was characterised in the context of Belmarsh — as a semi-black hole into which only foreigners could fall and from which they could potentially escape, provided they were willing to run the risk of any consequences when they were returned home.

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<sup>65</sup> See the analysis in R Copelon, 'Intimate Terror: Understanding Domestic Violence as Torture' in R J Cook (ed), *Human Rights of Women* (Pennsylvania: University of Pennsylvania Press, 1994); P Dubois, *Torture and Truth* (New York: Routledge, 1991).

<sup>66</sup> UN Secretary-General, Press Release, 'Torture, Instrument of Terror, Can Never Be Used to Fight Terror', SG/SM/10257 HR/4877 OBV/533, <<http://www.un.org/News/Press/docs/2005/sgsm10257.doc.htm>>.

<sup>67</sup> *Belmarsh* [2005] 2 AC 68.

<sup>68</sup> *Ibid* (Lord Bingham) (lead judgment) [68]; (Lord Nicholls) [83]; (Lord Hope) [132]-[139]; (Lord Scott) [155]-[160]; (Lord Rodger) [189]-[190]; (Baroness Hale) [228]-[239]; and (Lord Carswell) [240].

<sup>69</sup> *Human Rights Act 1998* (UK), s 4.

<sup>70</sup> *Prevention of Terrorism Act 2005* (UK), ch 2.

## A. The Belmarsh Detainees: Caught between Liberty and Torture

Detention in Belmarsh prison shared some characteristics with the black hole of Guantánamo, but there were some crucial differences in the way in which the UK tried to justify the detention. The UK's arguments have a decidedly more legal character than the simple and rather rhetorical characterisation by the US of the struggle against terrorism as a 'war'. The UK has attempted to characterise terrorism as a threat to the life of the nation that permits derogation from certain rights.<sup>71</sup> This is, in fact, a questionable characterisation, although Lord Hoffmann was the only judge in the Belmarsh detainees' case willing to take on the executive on this issue.<sup>72</sup> However, it is less extreme than the stand taken by the US.

Moreover, unlike the US, which is determined to hold persons in Guantánamo indefinitely, until such time as the 'war on terror' is over, apparently the UK was and remains keen to get rid of the Belmarsh detainees. Detention was to be indefinite only if the detainees could not be ejected. The obstacle in the path of the UK acting as it wished and deporting foreign suspects, was that the suspects feared they would be tortured upon return. The guarantees against *refoulement* in Article 3 of the Convention against Torture,<sup>73</sup> and implicit in Article 3 of the European Convention on Human Rights<sup>74</sup> and Article 7 of the ICCPR prevented the UK from returning them. And yet, these suspects had no legal right to be in the UK, thus detention was — as the government saw it — the only option, unless the suspects volunteered to return, or the UK was able to rely on diplomatic assurances to the effect that the person would not be tortured. It was argued before the House of Lords that Belmarsh prison had only three walls, since foreigners could purportedly elect to go home, whereas for nationals the prison would most definitely have four walls.<sup>75</sup>

Since the 'choice' for the individuals concerned is really no choice at all, and the diplomatic assurances on which the UK seeks to rely have been said to have

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<sup>71</sup> Art 4 ICCPR. Note that art 9 is not listed as a non-derogable right, however, the Human Rights Committee has stated that art 9, paras (3) and (4) are also non-derogable as they underpin rights that are listed as non-derogable. 'In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.' Human Rights Committee, General Comment No 29 above n 29, [16] and fn 9.

<sup>72</sup> *Belmarsh* [2005] 2 AC 68, (Lord Hoffmann), [91]-[97].

<sup>73</sup> Above n 59.

<sup>74</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222 (entered into force 3 September 1953, amended by the various protocols).

<sup>75</sup> *Belmarsh* [2005] 2 AC 68, (Lord Nicholls) [81].

no legal worth<sup>76</sup> (although they have been accepted in some UK decisions),<sup>77</sup> the detention was really just like the black hole of Guantánamo. Taking the space analogy a little further, we might say that the alternative of deportation pursuant to a diplomatic assurance is like a white hole. Unlike the black hole that sucks in all matter, the white hole is never reached as it pushes all matter away.<sup>78</sup> Exit from Belmarsh prison was impossible in many senses. Deportation would often not be effected despite the UK government's best efforts. There is also no real guarantee that torture will not occur. Finally, deportation is ineffective as a tool against terrorism.

On the question of effectiveness, some of the Law Lords (one of them a Lady) commented on the unlikely utility of deportation.<sup>79</sup> As Baroness Hale asked, '[w]hat sense does it make to consider a person such a threat to the life of the nation that he must be locked up without trial, but allow him to leave, as has happened, for France where he was released almost immediately?'<sup>80</sup>

Yet it appears that the UK is hell-bent on pursuing the expulsion of the Belmarsh detainees and others like them. Indeed, the UK is so determined, that one senses a ritual purge is taking place. The state, as in Foucault's description of the scaffold, displays its power,<sup>81</sup> even though the effectiveness of the measure in deterring or preventing future crime is highly questionable.

## B. Great Britain: Caught between Life and Torture?

It is tempting to see the UK as simply reckless as to whether torture will eventuate — that it regards expulsion to a possible place of torture as an appropriate

<sup>76</sup> The Special Rapporteur on the question of torture is particularly clear on this point. In his first report to the UN Commission on Human Rights, the Special Rapporteur, Manfred Nowak, gave a summary of his presentation at a meeting of experts discussing possible guidelines for diplomatic assurances. In addition to the fact that the principle of *non-refoulement* is non-derogable, he included the following concern. 'Diplomatic assurances are sought from countries with a proven record of systematic torture, i.e., the very fact that such diplomatic assurances are sought is an acknowledgement that the requested State, in the opinion of the requesting State, is practising torture. In most cases, those individuals in relation to whom diplomatic assurances are being sought belong to a high-risk group ('Islamic fundamentalists').' Further, he says, '[d]iplomatic assurances are not legally binding. It is therefore unclear why States that violate binding obligations under treaty and customary international law should comply with non-binding assurances.' He concludes by saying 'diplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition on torture and refoulement ...' Report of the Special Rapporteur on the question of torture, Manfred Nowak, E/CN.4/2006/6, [31]-[32].

<sup>77</sup> See the discussion in O'Connell's chapter in this volume (Chapter 15).

<sup>78</sup> The author takes no responsibility for accuracy of the scientific explanations underlying the conceits that link the various species of detention examined in this chapter. For a basic description of the science, see <<http://www.crystalinks.com/wormholes.html>>.

<sup>79</sup> *Belmarsh* [2005] 2 AC 68, (Lord Bingham) [43] approving the appellant's 'central complaint' that 'the choice of an immigration measure to address a security problem had the inevitable result of failing adequately to address that problem' (by allowing non-UK suspected terrorists to leave the country with impunity and leaving British suspected terrorists at large).

<sup>80</sup> *Ibid* (Baroness Hale), [230].

<sup>81</sup> M Foucault, *Discipline and Punish: the Birth of the Prison* (trans A Sheridan) 48-65 (NY: Pantheon Books, 1977).

punishment. Certainly, the UK's latest attempt to secure its objective suggests that the UK government believes that, given the perceived risk to the UK community, the risk to the individual terror suspect should be downplayed. The UK has led the intervention in the case of *Ramzy v the Netherlands* before the European Court of Human Rights.<sup>82</sup> The intervening governments argue that the Court should read down the absolute prohibition on torture and related *non-refoulement* obligation so that it is no longer absolute, but is consonant with the narrower obligation of *non-refoulement* set out in the *1951 Convention Relating to the Status of Refugees* ('Refugee Convention').<sup>83</sup> The governments point out that *non-refoulement* has been read into Article 3 of the European Convention on Human Rights, whereas the Refugee Convention expressly denies refugee status to persons who act contrary to the principles and the purposes of the UN.<sup>84</sup> (And of course, according to the UN Security Council, terrorism is now considered to be contrary to these principles and purposes.<sup>85</sup>) The intervening governments argue that '[i]n those circumstances, it is difficult to see how those who negotiated and agreed upon both Conventions can have intended that that position under the 1951 Convention should effectively be reversed by interpretation of Article 3 of the Convention.'<sup>86</sup>

This argument is seriously misguided. The submission seeks to pull a dynamic interpretation of provisions that are silent on the question of *refoulement* back to the notion that there are some people 'unworthy' of protection. Article 5 of the Refugee Convention preserves the more extensive rights that refugees may have under other instruments, and international law has moved on since 1951. The Convention against Torture now expressly prohibits *refoulement* to a place of torture, on the basis that notions of worthiness are anathema to human rights law. The older and newer law are not incompatible. It is perfectly consistent with the Refugee Convention to exclude someone from refugee status, but to refuse to return such persons to a place of torture because of a recognition of common humanity. The underlying rationale for each position is actually the same. Refugee status is about avoiding complicity in persecution and it is therefore wrong to give 'safe haven', in the sense of giving a persecutor the particular rights that attend refugee status, or to deny a request for extradition in the case of someone accused of a crime. It is equally necessary to avoid

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<sup>82</sup> See *Observations of the Governments of Lithuania, Portugal, Slovakia and the United Kingdom Intervening in Application No 25424/05 Ramzy v the Netherlands* (available at the International Commission of Jurists' site <[http://www.icj.org/IMG/pdf/UK\\_observations\\_Ramzy\\_case.pdf](http://www.icj.org/IMG/pdf/UK_observations_Ramzy_case.pdf)>).

<sup>83</sup> *Convention Relating to the Status of Refugees*, 606 UNTS 267, (entered into force 22 April 1954).

<sup>84</sup> Art 1F(c) Refugee Convention, *ibid*.

<sup>85</sup> SC Res 1373, UN Doc S/RES/1373 (2001), [5].

<sup>86</sup> Above n 82, [8]-[9.3].

complicity in the erasure of humanity that torture inflicts.<sup>87</sup> The best solution is to prosecute or extradite for the purposes of a prosecution.<sup>88</sup>

In a further attempt to counter the absolute nature of the prohibition on *refoulement* to a place of torture, the intervening governments make arguments about the standard of proof. They point out that the wording of Article 3 of the Convention against Torture, 'substantial grounds for believing that [a person] would be in danger of being subject to torture,' is open to interpretation, while the standard of proof in a prosecution — beyond reasonable doubt — is high.<sup>89</sup> The governments then argue that they have also to be concerned about the risk to the lives of persons in the community. Thus, it is argued, they need to undertake a balancing act between the rights of citizens and others living in the community, on the one hand, and alien terrorist suspects on the other.<sup>90</sup> In this balancing act, the active duty to protect the right to life of the people in Britain prevails over duties of non-complicity in relation to the prohibition on torture.<sup>91</sup>

This strategy is deeply concerning. Indeed, it may be more concerning than the US' attempt to justify torture by US officials. Essentially, the UK's intervention seeks to subvert the entire philosophy underlying human rights — that rights are universal, indivisible, interdependent and inter-related.

#### IV. A Parallel Universe — Preventative Detention Down-Under

It is not surprising that when the country in which the writ of *habeas corpus* was developed attempts to resile from it, its former colonies follow suit. So it is with preventative detention in Australia. The model of preventative detention adopted in this country was based on the UK model under the *Terrorism Act 2000*,<sup>92</sup> and the apparent trigger was the London bombings of 7 July 2005. Nothing had occurred in Australia that would have indicated that the legislation was necessary.

<sup>87</sup> See P Mathew, 'Resolution 1373 — a Call to Preempt Asylum Seekers? (or 'Osama the Asylum Seeker')' in J McAdam (ed), *Forced Migration, Human Rights and Security* (Oxford: Hart Publishing 2008) 19, 45-6.

<sup>88</sup> The Convention against Torture is one of the building blocks allowing prosecution to occur, as art 5 establishes a semi-universal jurisdictional basis for prosecution of torturers, and the establishment of the International Criminal Court is perhaps the cap-stone in the architecture of international prosecutions.

<sup>89</sup> Above n 82, [17]-[26].

<sup>90</sup> *Ibid* [5] as compared with [8].

<sup>91</sup> *Ibid* [10].

<sup>92</sup> Preventative detention is permitted in the UK under s 41 and sch 8 of the *Terrorism Act 2000* (UK). Section 41(1) provides that '[a] constable may arrest without a warrant a person whom he reasonably suspects to be a terrorist.' This includes persons who have been 'concerned in the commission, *preparation or instigation* of acts of terrorism': s 40(1)(b) [emphasis added]. The initial period of detention under s 41 lasts for 48 hours. After that, detention may be authorised by a 'judicial authority' for up to 28 days. (The original period of seven days was lengthened to 14 by the *Criminal Justice Act 2003* (UK), and then to 28 by the *Terrorism Act 2006* (UK) (see ss 23 and 24)).

In 2005, two anti-terrorism bills were introduced into the Commonwealth Parliament. That legislation sought to introduce preventative detention in cases where it was sought to prevent an imminent terrorist attack or to preserve evidence relating to a recent attack, create a control order regime and update sedition offences, among other things. I will focus here on the provisions concerning preventative detention.

## A. The Legislative Scheme for Preventative Detention Orders

Under division 105 of the *Criminal Code Act*, an initial preventative detention order may be sought for up to 24 hours<sup>93</sup> by a member of the Australian Federal Police (AFP) and made by a senior member of the AFP.<sup>94</sup> If detaining someone in connection with an imminent attack — one that will take place within 14 days<sup>95</sup> — the AFP has to be 'satisfied' that:

- a. there are reasonable grounds to suspect that the subject:
  - i. will engage in a terrorist act; or
  - ii. possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
  - iii. has done an act in preparation for, or planning, a terrorist act; and
- b. making the order would substantially assist in preventing a terrorist act occurring; and
- c. detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).<sup>96</sup>

If detaining someone in connection with a recent attack — one that has taken place within the last 28 days<sup>97</sup> — the AFP has to be 'satisfied' that:

- a. a terrorist act has occurred within the last 28 days; and
- b. it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and
- c. detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the purpose referred to in paragraph (b).<sup>98</sup>

The initial preventative detention order may be extended and further extended, so long as the total period of detention does not exceed 24 hours.<sup>99</sup>

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<sup>93</sup> *Criminal Code Act 1995* (Cth) ('Criminal Code'), s 105.8(5).

<sup>94</sup> See the definition of issuing authority, *Criminal Code* s 100.1(1).

<sup>95</sup> *Criminal Code* s 105.4(5).

<sup>96</sup> *Criminal Code* s 105.4.

<sup>97</sup> *Criminal Code* s 105.4(6)(a).

<sup>98</sup> *Criminal Code* s 105.4(6).

<sup>99</sup> *Criminal Code* s 105.10.

A continuing preventative detention order<sup>100</sup> may then be issued by a Federal Judge or Magistrate, a State or Territory Supreme Court Judge, a retired Judge, or the President or Deputy President of the Administrative Appeals Tribunal (provided the latter two persons are lawyers)<sup>101</sup> sitting in a personal capacity.<sup>102</sup> The entire period of detention under the initial and continuing preventative detention order is a maximum of 48 hours.<sup>103</sup>

The reason for the short period of time is that this is federal legislation and there is some concern that any longer period of detention could breach the constitutionally embedded separation of powers doctrine.<sup>104</sup> Deprivation of liberty for the purposes of punishment is accepted as a core feature of judicial power and unduly long detention could transform the detention from non-punitive, preventative detention to impermissible punitive detention ordered by the executive. The States and Territories were to enact their own legislation to provide for detention for up to 14 days, effectively taking over from the Commonwealth if it is thought necessary to detain a person for longer than 48 hours.<sup>105</sup>

Under the Commonwealth legislation, there is no court hearing and the proceedings are purposefully *ex parte*. Although the Act spells out that a remedy (which is not defined) may be sought from a federal court,<sup>106</sup> it appears that in many cases there will be no basis upon which the court could order a remedy such as *habeas corpus* because the legislation authorises this sort of administrative detention. The jurisdiction of State and Territory supreme courts is specifically ousted with respect to a Commonwealth preventative detention order while that order is on foot.<sup>107</sup> State and Territory supreme courts may, however, review the Commonwealth order on the same grounds on which review is provided for by the relevant legislation in relation to state orders,<sup>108</sup> once a person has been detained under a state order. Also after the detention pursuant to a Commonwealth order is over, the Administrative Appeals Tribunal may determine that the decision to issue the preventative detention order is void and that compensation should be paid.<sup>109</sup>

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<sup>100</sup> Criminal Code ss 105.11 and 105.12.

<sup>101</sup> Criminal Code s 105.2.

<sup>102</sup> Criminal Code s 105.18(2).

<sup>103</sup> Criminal Code s 105.12(5).

<sup>104</sup> See speech by the President of the Australian Human Rights and Equal Opportunity Commission, Justice Von Doussa, 'Are We Crossing the Line? Forum on National Security and Human Rights', Canberra 31 October 2005. Section 71 of the *Australian Constitution* entrenches the separation of judicial power.

<sup>105</sup> See, eg, the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT).

<sup>106</sup> Criminal Code s 105.51(1).

<sup>107</sup> Criminal Code s 105.51(2).

<sup>108</sup> Criminal Code s 105.52.

<sup>109</sup> Criminal Code s 105.51(5).

Quite apart from issues of jurisdiction, it may prove difficult for any detainee to bring proceedings given the problems in securing adequate reasons concerning the order. The detainee must be informed about 'the fact that the preventative detention order has been made in relation to the person',<sup>110</sup> but this does not deal with the reasons for which the order was made. A summary of the grounds on which the order is made must also be supplied,<sup>111</sup> but it is unclear how far this summary might go beyond, say, information that the order was imposed to prevent an imminent attack or to preserve evidence of a past attack. Moreover, some information may not be included if it is 'likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)).'<sup>112</sup>

## B. Enter the Worm Hole: Is this Executive-controlled Detention Legal?

Having set out the scheme of preventative detention under the Commonwealth legislation, it is now possible to examine whether it is legal under international human rights law. Unlike the jurisprudence of the European Court of Human Rights (which may have led the UK formally to derogate from its obligations under the European Convention in November 2001, although it is notable that the UK has also derogated from its obligations under the ICCPR), preventative detention has received an ambiguous acceptance in the jurisprudence of the Human Rights Committee. In *Lawless v Republic of Ireland*, the European Court of Human Rights clearly stated that it was not permissible to detain a person without intending to bring the person before a court unless the State concerned was derogating from the right to liberty set out in Article 5 of the European Convention on Human Rights.<sup>113</sup> The Human Rights Committee, which has not yet had to consider the precise issue of preventative detention occurring in the context of terrorism in an individual communication,<sup>114</sup> has stated somewhat

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<sup>110</sup> Criminal Code s 105.28(2)(a).

<sup>111</sup> As soon as practicable after being taken into custody, the detainee must be given a copy of the preventative detention order: Criminal Code s 105.32. The order contains a summary of the grounds on which it is given: see in relation to initial preventative detention orders, s 105.8(6)(c); in relation to continuing preventative detention orders, s 105.12(6)(d).

<sup>112</sup> Criminal Code s 105.8(6A) (initial preventative detention orders); s 105.12(6A) (continuing preventative detention orders).

<sup>113</sup> '[T]he said clause [art. 5(c)] permits deprivation of liberty only when such deprivation is effected for the purpose of bringing the person arrested or detained before the competent judicial authority, irrespective of whether such person is a person who is reasonably suspected of having committed an offence, or a person whom it is reasonably considered necessary to restrain from committing an offence, or a person whom it reasonably considered necessary to restrain from absconding after having committed an offence.' *Lawless v Republic of Ireland* (No 3), [1961] ECHR 2 (1 July 1961), [14].

<sup>114</sup> Preventative detention has been endorsed in the quite different case of convicted sex offenders where the period of detention had been extended owing to the likelihood of the prisoner re-offending: See *Rameka v New Zealand*, CCPR/C/79/D/1090/2002.

cryptically in General Comment Number 8 that if preventative detention is imposed, it must comply with the provisions set out in Article 9 of the ICCPR.<sup>115</sup>

Under Article 9, three requirements must be met. First, the detention must not be arbitrary (art 9(1)). Second, arrested persons must be informed of the reasons for arrest (art 9(2)). Third, proceedings may be taken before a court in order that the court may decide 'without delay' on the lawfulness of the detention (art 9(4)) — lawfulness, according to the jurisprudence of the Committee, meaning that the courts may determine whether or not the detention is arbitrary as a matter of *international law*.<sup>116</sup>

It may not be surprising that this apparent legal loophole has been exploited so assiduously, when we consider that Mr Philip Ruddock has until recently been Attorney-General. As Minister for Immigration, Mr Ruddock proved a past master at exploiting the many frustrating silences in the Refugee Convention. However, the Howard government may have misread the relevant international law and placed the bar too low. In relation to Commonwealth preventative detention orders, it appears that there is *no* meaningful court control as required by Article 9(4) of the ICCPR. Apparently, it is thought that the duration of the detention is so short that meaningful judicial control is not necessary, or that a (most probably) post hoc remedy for detention that is wrongful under Australian law is all that is required. After all, the rule of thumb for bringing an ordinary criminal suspect before a judge appears to be around 48 hours. In the context of pre-trial detention, the Human Rights Committee has suggested guidelines of a couple of days in relation to bringing someone 'promptly' before a court for the purposes of Article 9(3) (which is specific to criminal cases), while a few weeks has been suggested as a guideline for a 'decision without delay' by a court for the purposes of Article 9(4).<sup>117</sup>

But, if this is what the Commonwealth seeks to rely on, then the Howard government took the outer limits of what is *permissible* (giving governments some leeway) and effectively made it *impermissible*, or at least virtually meaningless, for a person to complain within that period. Therefore, even if we view General Comment 8 as endorsing the idea of preventative detention, it may be that Parliament has failed to enact a scheme that would satisfy the requirements of Article 9 of the ICCPR because it has effectively created a parallel universe of detention — one that is almost entirely within executive control.

<sup>115</sup> For the text of General Comment No 9, see <<http://www2.ohchr.org/english/bodies/hrc/comments.htm>>.

<sup>116</sup> *A v Australia*, UN Doc. CCPR/C/59/D/560/1993, [9.5].

<sup>117</sup> See the discussion of the Human Rights Committee's jurisprudence in M Nowak, *UN Covenant on Civil and Political Rights* (1<sup>st</sup> ed, 1993) 176, 179. See also S Joseph, J Schultz and M Castan, *The International Covenant on Civil and Political Rights, Cases and Commentary* (2<sup>nd</sup> ed, 2004) 325.

In any event, the idea that the presumption of liberty enshrined in Article 9(3) has been overturned when it is not contemplated that a full and fair trial will follow, on the basis there will be some remedy if, in fact, the executive got it wrong, should be at least mildly discomfiting. An executive-controlled power to detain even for very short periods may be enough to terrorise those persons who experience it.

Australia's legislation underscores the fundamentally problematic nature of preventative detention highlighted by the European Court of Human Rights in *Lawless*. In *Lawless*, the Court concluded that its interpretation — that detention could only be *for the purposes of bringing someone before a judge*, unless the state concerned was derogating from the right to liberty — had to be correct. It warned of the consequences of the alternative interpretation:

anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its [sic] being possible to regard his arrest or detention as a breach of the Convention; whereas such an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention.<sup>118</sup>

Moreover, while the Human Rights Committee's general comment seems to permit preventative detention to some degree, the Committee has also said that it is not possible simply to escape the protections due in ordinary criminal and civil proceedings pursuant to Article 14 of the ICCPR. Article 14(1) states that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

The Committee's 'concluding observations' in relation to India's third periodic report under the ICCPR with respect to India's use of preventative detention in connection with national security are instructive:<sup>119</sup>

24. ... The Committee is ... of the view that preventive detention is a restriction of liberty imposed as a response to the conduct of the individual concerned, that the decision as to continued detention must be considered as a determination falling within the meaning of article 14, paragraph 1, of the Covenant, and that proceedings to decide the continuation of detention must, therefore, comply with that provision. Therefore:

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<sup>118</sup> *Lawless Case*, above n 113. For similar analysis, see J Fitzpatrick, *Human Rights in Crisis: the International System for Protecting Rights During States of Emergency* (Philadelphia: University of Pennsylvania Press, 1994) 38.

<sup>119</sup> It should be said that the periods of detention in India were often very lengthy indeed.

... *The question of continued detention should be determined by an independent and impartial tribunal* constituted and operating in accordance with article 14, paragraph 1, of the Covenant. [emphasis added]<sup>120</sup>

In the attempt to avoid judicial scrutiny, the detention regime in Australia shares some similarity with the black hole of Guantánamo Bay. One of the Constitutional heads of power upon which the Commonwealth has relied in order to defend the enactment of the legislation that introduced preventative detention orders is the defence power (s 51(vi) *Australian Constitution*). A majority of the High Court has accepted that characterisation in a case concerning a challenge to the provisions relating to control orders.<sup>121</sup> Only Justice Kirby dissented on that point,<sup>122</sup> expressing the view that,

[a]s drafted, Div 104 proceeds outside the proper concerns of s 51(vi) and into areas of ordinary civil government.<sup>123</sup>

However, it appears that the Australian government views preventative detention orders as consistent with the right to liberty protected by Article 9 ICCPR, and unlike the UK, it certainly has not sought to derogate from its obligations under Article 9. Perhaps, then, rather than being a black hole, a more appropriate comparison is that preventative detention in Australia is like a 'worm hole'. A worm hole is a short cut through time and space. Just as a worm eats its way through the apple from one point to another, instead of wriggling across the apple's surface, it is sometimes suggested that a worm hole may allow us to travel from one parallel universe to another. The Australian legislation is rather like a worm hole as it seeks to place detainees quickly and temporarily into a parallel universe of executive detention that is almost entirely free of judicial scrutiny. And, like the worm hole, *legal* preventative detention may not exist. At least, the detention may not be legal if there is no possibility of meaningful court control, even, perhaps, if this is for only a brief period of time as under the Commonwealth legislation.<sup>124</sup>

The existence or adequacy of court control of the Commonwealth order is not the only point at which Australia may fail to comply with Article 9 of the ICCPR. The question of court control intersects with questions as to whether arbitrary detention could result in any particular case from the AFP being 'satisfied' that

<sup>120</sup> UN Doc CCPR A/52/40 (1997) at [439].

<sup>121</sup> *Thomas v Mowbray* [2007] HCA 33 (2 August 2007), (Gleeson CJ) [6]; (Gummow and Crennan JJ), [132]-[148]; (Hayne J) [444]; (Callinan J) [582]-[589]; (Heydon J) [611]-[649].

<sup>122</sup> Justice Hayne dissented but not on the grounds relating to the defence power.

<sup>123</sup> *Thomas v Mowbray*, [2007] HCA33 (2 August 2007), (Kirby J) [264].

<sup>124</sup> These concerns would be magnified had the States and Territories essentially tracked the Commonwealth model for the lengthier period of 14 days' detention, however, most of them have written in some form of court control. In the ACT, for example, the Supreme Court must issue an order. In the Northern Territory, although an issuing authority is a judge sitting in a personal capacity, there is provision for review of the order by the Supreme Court. Queensland's model is probably closest to the Commonwealth model, although it does provide for the involvement of the Public Interest Monitor.

there are 'reasonable grounds to suspect' that the prerequisites for the detention are present. The thresholds for detention are low.<sup>125</sup> I think it is arguable that detention pursuant to the provisions concerning preservation of evidence will almost by definition be arbitrary. And while some element of proportionality has been incorporated, there is no explicit consideration as to whether there are less restrictive measures that may be imposed.<sup>126</sup> The existence of remedies against wrongful detention under *Australian* law is not an adequate safeguard from detention that is arbitrary as a matter of international law. It is also worth reiterating the point that the short duration of the detention does not assuage the concern that the presumption of liberty has been displaced and on so *slim* a basis.

Finally, there are the questions about the timing and quality of the reasons given to the detainee.<sup>127</sup> The Human Rights Committee has specifically dealt with the situation where the only information given to the detainee was that a person was arrested 'under prompt security measures without any indication of the substance' and the Committee determined that Article 9(2) was violated.<sup>128</sup> The Australian model appears to go beyond this, but it may be questionable how much information detainees receive. So there are many points at which a human rights lawyer should be critical of the legislation.

### C. Liberty *or* Security of the Person?

As in the US and the UK, there has been an attempt to shift thinking concerning human rights in Australia.<sup>129</sup> The former Australian Attorney-General sought to justify all anti-terrorism legislation with the language of human security. In a speech delivered at the Australian National University, he said:

there is growing support for the view that national security and human rights are not mutually exclusive. This analysis is based on the concept of human security and it builds upon Article 3 of the Universal Declaration of Human Rights which states that 'everyone has the right to life, liberty and security of person'. In broad terms, 'human security' argues that people will only be able to reach their full potential if they live in a secure environment where their fundamental human rights can be realised. Based on this premise, there is not a massive dichotomy between security legislation and human rights. Indeed, the extent to which we can continue to enjoy our civil liberties rests upon the effectiveness of our counter-terrorism laws. I am not suggesting that

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<sup>125</sup> See above n 96 and accompanying text.

<sup>126</sup> The legislation in the ACT incorporates the test that detention must be the 'least restrictive' means. See sub-s 18(4)(c) and 18(6)(c), *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT).

<sup>127</sup> See above n 111.

<sup>128</sup> *Drescher Caldas v Uruguay*, UN GAOR Supp. No. 40 (A/38/40) at 192 (1983), [13.2].

<sup>129</sup> It should be said that Australians have until fairly recently been 'reluctant' to adopt bills of rights. See H Charlesworth, 'The Australian Reluctance about Rights' (1993) 30 *Osgoode Hall Law Journal* 195.

counter-terrorism legislation should not be scrutinised to ensure that limitations on human rights are minimised. But we must recognise that national security can in fact promote civil liberties by preserving a society in which rights and freedoms can be exercised.<sup>130</sup>

Essentially,<sup>131</sup> the argument posits that in order to secure the right to life or human security for some, the right to liberty of others must be sacrificed. Although the legislation itself is facially neutral, in practice, these others will often be Muslims. The legislation ignores the fact that by creating a sense of insecurity for these Australian citizens and residents, a sense of grievance that provides fertile ground for extremism may well be created or maintained. This misunderstands the idea of human security — it is not a trade whereby a sense of security is created for some (and a false sense at that) by generating real insecurity for others.

That this insecurity is real is demonstrated by the case of Dr Haneef. Mohamed Haneef was arrested at Brisbane airport on 2 July 2007 on the basis of a suspicion that he was involved in the failed car bombings at Glasgow airport. Dr Haneef was not detained under a preventative detention order, but under a different provision allowing the police to hold a person without charge for an extended interrogation. Under s 23CA of the *Crimes Act 1914* (Cth), a recently created provision for terrorist investigations, a person may generally be arrested for investigation for up to four hours.<sup>132</sup> An extension of the period for another 20 hours may be sought under s 23DA of the *Crimes Act*. Dr Haneef was held for 12 days before being charged, as a result of provisions that stop the clock from running when, for example, the detainee is communicating with his or her lawyer or resting.<sup>133</sup> His 'crime' was that he was a cousin of one of the bombers and had lived with this cousin, and he had also 'recklessly' given this cousin his mobile phone SIM card. Originally, it was reported that the card was found in the burnt out car at Glasgow airport, but events subsequently transpired to show that the SIM card was found hundreds of miles away in Liverpool, at the flat which Dr Haneef had shared with his cousin. Eventually charged with providing support for an organisation being reckless as to whether the organisation is a terrorist organisation,<sup>134</sup> Dr Haneef was granted bail, only to have his visa cancelled by then Immigration Minister, Mr Kevin Andrews, on

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<sup>130</sup> P Ruddock, 'International and Public Law: Challenges for the Attorney-General' (Speech at the Australian National University, Tuesday June 2004).

<sup>131</sup> For a far more nuanced and detailed critique of the Attorney's reading of human security, readers may look to G Carne, 'Reconstituting "Human Security" in a New Security Environment: One Australian, Two Canadians and Article 3 of the Universal Declaration of Human Rights' (2006) 25 *Australian Year Book of International Law* 1. This paper was also presented at the workshop on which this book is based.

<sup>132</sup> In the case of a person who is or appears to be under 18 years of age or who is an Aborigine or Torres Strait Islander, the limit is two hours.

<sup>133</sup> Sub-s 23CA(8).

<sup>134</sup> Criminal Code s 102.7.

the grounds of 'bad character' pursuant to s 501 of the *Migration Act 1958* (Cth). This permitted Dr Haneef to be placed in immigration detention. Ultimately, in a highly embarrassing series of events, the charges were dropped, and Dr Haneef was permitted to leave for India, which he had been trying to reach 24 days earlier, in order to meet his new-born baby girl.<sup>135</sup> In addition, the Federal Court determined that the cancellation of Dr Haneef's visa was invalid.<sup>136</sup>

A little caution may be required when commenting on Dr Haneef's case given that not all of the evidence known by the police is in the public domain. However, one may hope that the Kafka-esque nature of Dr Haneef's ordeal may have alerted the Australian public to the false hierarchy established by the Australian government, in which human rights are actually traded away in the name of a false sense of security. On the other hand, perhaps the silent majority feels the same way as one member of the public who, after watching the tabloid-style television current affairs program '60 Minutes', expressed sympathy with Dr Haneef but opined that it was the 'price we have to pay' if we want to combat terrorism successfully. It is perhaps unnecessary to point out that 'we' are not paying — only Dr Haneef has paid the immediate price — and that the long-term cost to Australians also needs to be considered.

## V. Conclusion

The three countries whose laws and practices have been examined in this chapter exist in a shared universe in which one cosmic event has ramifications for other entities in the universe. The US and the UK have attacked the prohibition on torture which was, until now, thought to be absolute and beyond attack in principle (although the practice never conformed to that principle). The results are sadly evident in the appalling pictures of torture that emanated from Abu Ghraib. Torture becomes routine and it degrades the torturer as well as its victims. Victims become terrorists.

The detention practices of each state attempt by various devices to erect a shield against legal scrutiny. None of these attempts may be successful in the end, with Australia's being, perhaps, the most reasonable — a seemingly plausible attempt to milk the legal ambiguity surrounding the concept of preventative detention. However, each of them is fraught with danger from a human rights perspective.

Perhaps the most dangerous of these developments are those in the UK — in many respects a country that could be seen as the Big Bang of human rights. The intervention in the *Ramzy Case* comes close to a full-frontal attack on the fundamentals of international human rights law, that is, that rights are universal, indivisible, interdependent, and inter-related. The UK's argument may be shown

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<sup>135</sup> For some of the details concerning the saga, see H Thomas and P Walters, 'Liberty for Haneef', *The Australian* (Sydney), 28 July 2007.

<sup>136</sup> *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 (21 August 2007).

to be spurious or misguided, however, in many ways it is fairly honest and perhaps, therefore, when compared with the language of 'war' used by the US, a more formidable argument that could reshape international human rights law.

I hope not. Human rights have long been criticised for their absolute nature and hidden assumptions that are said to belie their purported universalism.<sup>137</sup> I am, in many respects, a fellow-traveller with these critics.<sup>138</sup> Clearly, however, in the case of the 'fight against terrorism', it would be even worse if human rights failed to remain absolutist at this point, transparently bending to the will of the powerful. In the 'fight against terror', the road to hell is paved with 'balanced' arguments.

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<sup>137</sup> For an example of such criticism in this volume, see Pue, Chapter 4.

<sup>138</sup> Indeed, at a launch of a number of books, including a text for students written by myself and others, my fellow authors and I were challenged by a High Court judge for espousing postmodern views. We had presented a number of critical perspectives on the law, such as feminist perspectives, in order to assist students in criticising laws that entrench an unjust status quo. We did this, because we all heartily wished that more of our teachers had done the same for us. We felt that this would have allowed us the space to be critical of laws that, for example, denied Aboriginal people property rights in the land they had occupied for time immemorial.