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Author: Duffy, H.  
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The Role of the Courts: Human rights litigation in the ‘War on Terror’\(^1\)

*Our strength as a nation state will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes, and terrorism.*

National Defense Strategy for the United States of America, 2005

On 12 June 2008, the Supreme Court of the United States decided that persons detained by the US in Guantánamo Bay have the constitutional privilege of habeas corpus. The recognition that all detainees are entitled to this basic right, irrespective of their nationality, designation as “enemy combatants,” or offshore location, was hailed as a victory for the rule of law. Jubilation was somewhat tempered by the fact that it took six years to decide that detainees are entitled to a protection that would normally guarantee judicial access within hours, days, or maybe weeks.\(^2\)

Whether you see the *Boumediene* judgment as a historic victory for justice or a reminder of its woeful failure, it tells a story. It provides graphic illustration of how far executive violations of human rights have gone in the name of security, but also of the nature of the judicial response: deferential and perhaps faltering at first, gradually ceding to a more invigorated role as a matter of last resort. This judgment is only one part of a burgeoning mass of litigation worldwide, each component of which tells its own story. Cases vary vastly in their nature and goals - ranging from challenging unlawful practices and preventing wrongs to gaining access to information and securing reparation or judicial oversight itself, for example – as they do in their processes and outcomes. They occur in and reflect the vastly different political and cultural contexts as well as the diverse legal and constitutional systems from which they emerge. This chapter will present a necessarily brief survey of some

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1 An early version of this chapter was delivered as the Annual Public Lecture in International Law at the School of Law, London School of Economics, 2007 and published in *IRRC* 2008. The author was involved in several of the cases cited as counsel or third party/amicus curiae intervener.

2 On questions regarding the effectiveness of the remedy in practice see below and Chapter 8.
of this diverse body of practice of human rights litigation to date on the national, regional and international levels.3

An enquiry into current litigation practice can serve several purposes. First, it illustrates some of the key human rights issues arising in the so-called “global war on terror” discussed in this book, as they affected specific individual victims. Looking at issues through cases necessarily gives a limited perspective: a case concerns a particular individual and particular set of facts as assessed against the particular legal issues within the jurisdiction of the particular court. The number of affected individuals that make it to court is a tiny minority. But taken together, the practice of litigation in relation to international terrorism over the past few years provides a prism that displays quite vividly some of the key characteristics of the global war on terror, its objectives, modus operandi, and human impact.

Second, and more critically for the purposes of this chapter, the brief survey of litigation practice may provide a comparative framework for assessing the impact and limitations of that litigation itself. What is the role of the courts in responding to the human rights challenges posed by the war on terror, how has it been discharged, and to what effect? What role has there been (or should there be) for the courts as a bulwark against executive overreach? How have regional and international courts and processes upheld or advanced international law where national courts have failed to do so? It remains early days for any such assessment given the lengthy time frames often involved in the cycle of litigation, but the extent of judicial responses in recent years suggest that it is timely to enquire into the role of the courts in responding to the war on terror.

The role the judiciary has played as guardian of human rights post 9/11 has to be considered alongside the impact of post 9/11 practices on the judicial role. As a preliminary matter, it is therefore worth recalling the extent to which laws and practices have curtailed the judicial function itself; a recurrent theme running through many of the human rights concern post 9/11 addressed in other chapters.5 The most notorious illustrations (addressed more extensively later) are the divestiture of the right of ‘habeas corpus’ review of the lawfulness of detention,6 the denial through legislation or practice of the right of access

3 This note focuses on select human rights litigation brought by victims against the state before national, regional and international courts and bodies. It is noted that cases that serve human rights ends can and have taken many other forms, from civil cases against corporations to criminal cases against individuals (see eg. Chapter 10).
4 The underlying issues are addressed more comprehensively in Chapters 7 (Human Rights), 8 (Guantanamo), and 10 (Rendition).
6 This will be addressed in relation to Guantanamo detainees (Chapter 8) or other prisoners held in Afghanistan and beyond (Chapters 6 and 7.3).
to courts to seek damages, or the lack of judicial oversight of targeted sanctions. Examples discussed in Chapter 4 reveal further restrictions in the area of international cooperation, where developments purportedly designed to streamline extradition have limited the judicial function, for example by limiting the grounds on which cooperation can be refused, preventing courts from looking behind the executive’s assessment of risks in the receiving state, or removing the requirement of minimum evidentiary showings in extradition proceedings. ‘Expedited’ procedures have also led to ‘emergency deportations’ proceeding even when the outcome of appeal proceedings is pending, in clear disregard for the judicial process.

In some scenarios, the interference with the judicial role has been more dramatic in effect, such as resort to ‘special’ or military courts to judge terrorist related offences, undermining the cardinal notion of judicial independence from the executive. Attacks on judiciaries where they have shown independence have been more common, as given graphic illustration by the Pakistani President’s condemnation of the Supreme Court for “working at cross purposes with the executive and legislature in the fight against terrorism and extremism” and thwarting intelligence agencies’ activities, by questioning the

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7 E.g. Patriot Act 2001 which provided that certain categories of detainees would have no right to seek relief before US courts; see also broad government claims of state secrets and national security below or the UK Justice and Security Act 2013 on closed material proceedings.
8 E.g. for UN terrorism-related sanctions see UN Doc. S/RES/1267 (1999), paras. 4(a), 4(b) and 6, which has successively been extended.
9 See Chapter 4 on enhancing cooperation post 9/11 and Chapter 7B on violations of the rule of non-refoulement.
10 At one extreme, the judicial role has been bypassed entirely through extraordinary rendition, including where extradition proceedings were pending or had been dismissed, see Chapter 10.
11 Ibid.
12 Some undermine the extent to which judges can look behind the extradition request and assess human rights concerns that may arise from its nature, motivation, or effect; see Chapter 4B.
13 See Kagomba II litigation in US courts, noted in Chapter 8; See also Munaf et al. v Geren, Secretary of the Army, et al. No.06-1666 (12 June 2008).
14 See e.g. Article 8(3)(c) US-UK Extradition Treaty 31 March 2003; see also Article 8 ‘European Arrest Warrant’ and case of Lofti Raissi in Chapter 4B.2.
16 See Chapter 7A ‘Fair Trial’ and discussion of US military commissions in Chapter 8B.4.5.
government on the practice of forced disappearances.\textsuperscript{17} Other examples of harsh criticism of judges for applying human rights law to counterterrorism appear in other contexts too.\textsuperscript{18} Needless to say the role of the courts can only meaningfully be realized where there are courts of sufficient independence, impartiality and capacity to discharge that function. These challenges are coupled with a broader range of legal, political and practical obstacles facing victims in bringing human rights actions in a climate of excessive secrecy and securitization, some of which have been discussed in previous chapters while others will be highlighted below.

Despite these impediments to, and limits on, the judicial role, and their undoubted impact, a vast volume of litigation has been brought by victims and adjudicated by the courts. In some (but not all) cases, this litigation has addressed precisely these issues concerning the judicial role – the lawfulness of measures seeking to curtail judicial engagement – alongside a broad array of other human rights issues. The following is a selection of cases that have arisen post-9/11 addressing five groups of issues (which are illustrative of key characteristics of the war on terror as it affects human rights explored in other chapters). These issues are: arbitrary detention; extraterritorial application of human rights obligations; torture and related safeguards; extraordinary rendition; and the spreading reach of the “terrorist” label and notions of guilt by association. After a summary of the cases, the conclusions return to the question of the role of courts and the impact of human rights litigation in the war on terror.

11.1 \textbf{ISSUE 1: ARBITRARY DETENTION}

11.1.1 Guantánamo

Probably the most notorious issue, and certainly the one giving rise to the most voluminous litigation, is the Guantánamo anomaly. The facts related to the detention of hundreds of enemy aliens by United States personnel in Guantánamo Bay are addressed in Chapter 8.

\textsuperscript{17} President Musharraf took exception to Supreme Court’s requests to the Interior Ministry for answers on enforced disappearances: see Human Rights Watch, Destroying Legality: Pakistan’s Crackdown on Lawyers and Judges, 2007, page 19.

\textsuperscript{18} In the UK, see comments on Lord Bingham in \textit{A & Ors} in the UK House of Lords below. Statement by Home Secretary Teresa May to the Conservative party conference, in ‘Tories promise to scrap HRA,’ \textit{Guardian} 30 September 2013. “Some judges chose to ignore parliament so I am sending a very clear message to those judges… Parliament wants the law on people’s side, the public wants the law on the people’s side…”.
Detentions at Guantánamo have spurred a litany of litigation in US courts (as well as beyond), focusing mainly on two issues: the right to habeas corpus and the lawfulness of trial by military commission. It is worth recalling the development of these cases in US courts and the curious game of legal ping-pong that played out between the judicial and political branches in the years leading up to the 2008 Boumediene judgment referred to earlier.

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

In respect of the right of habeas corpus of the vast majority of detainees who were non-nationals detained outside the US, in Rasul & Ors v. Bush, the Supreme Court took a notably distinct and far more cautious approach. It refrained from addressing the issue as a constitutional rights issue (and indeed from even recognizing international law despite copious amicus curiae briefs). Rather, the Court found, by reference to a statute conferring jurisdiction on

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19 See Chapter 8.C.3 on attempts to secure accountability in foreign courts. Another line of litigation has concerned the role of other states in transferring to, or failing to support nationals detained in, Guantánamo: see e.g. Boumediene and others v. Bosnia and Herzegovina, Application Nos. 38703/06, 40123/06, 43301/06, 43302/06, 2131/07 and 2141/07 (held inadmissible in the European Court of Human Rights (ECtHR) as the transfer was before Bosnia ratified the ECHR) or R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598. See also Al Rawi and Ors v The Security Service & Ors [2009] EWHC 2959 (QB) (18 November 2009) in UK courts (Al Rawi & Ors).
20 Litigation seeking damages for violations in Guantánamo (and elsewhere) has encountered greater obstacles and borne less fruit than the habeas litigation: see Chapters 7B14 and 10.
22 Hamdi v. Rumsfeld, ibid.
23 Hamdi v. Rumsfeld, ibid.
24 Rasul, supra note 21.
courts, that there was nothing to prevent the courts from exercising jurisdiction in these cases.

The government responded to these judgments, but not as the plaintiffs or lawyers might have hoped. As regards US nationals, one had already been released and the other was transferred to regular courts. For the hundreds of non-nationals detained at Guantánamo, the response was again quite different. First the executive introduced the Combatant Status Review Tribunals and Administrative Review Boards in an apparent attempt to provide a habeas corpus substitute, despite these being non-judicial mechanisms that lacked basic procedural rights associated with the right of habeas corpus. This provided cover for congressional follow-up with the Detainee Treatment Act 2005 (DTA), which – in addition to some positive provisions on treatment of detainees – responded to the judgment by making explicit that there is no right of habeas corpus for Guantánamo detainees.

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

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

Nonetheless, there had been a finding by the Supreme Court that the executive’s conduct violated international and domestic law. The US government again faced the quandary of how to respond to this judicial slight. With the 2006 Military Commission Act, Congress responded in two ways. First, it determined that the relevant international law – the Geneva Conventions – could no longer be relied upon as a source of rights in habeas corpus or other civil proceedings against US personnel. Secondly, it provided that courts would not have jurisdiction to hear habeas corpus applications (or any other action)

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25 See notes on *Padilla* and *Hamdi*, in Chapter 8.
26 For an analysis of current review procedures see Chapter 8.
by any person determined to be an enemy combatant or awaiting such deter-
mination, thus extending the jurisdiction stripping provisions of the DTA
beyond Guantánamo to detentions anywhere. Rather than a response that
would seek to deal with the problem by bringing policy in line with law, the
law was identified as the problem, and international sources of law and judicial
oversight of them were removed.

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

The importance of this ruling should not be underestimated. Ultimately
the Supreme Court addressed the issue of habeas corpus as the fundamental
rights issue it is, without artificial distinctions based on nationality or geo-
ographical location as determinative of the existence of rights and obligations. It symbolized the willingness of the judiciary to engage and fulfill their demo-
cratic mandate and reinforce the legal and constitutional limits on executive
action.

At the same time, the judgment itself was a close 5:4 decision, with some
strident dissents that graphically demonstrate the extent of the antipathy of
certain judges to step into what they see as issues of security properly for

29 Sec. 7(1) MCA: “(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider
an application for a writ of habeas corpus filed by or on behalf of an alien detained by
the United States who has been determined by the United States to have been properly
detained as an enemy combatant or is awaiting such determination.
(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment
Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear
or consider any other action against the United States or its agents relating to any aspect
of the detention, transfer, treatment, trial, or conditions of confinement of an alien who
is or was detained by the United States and has been determined by the United States to
have been properly detained as an enemy combatant or is awaiting such determination”.
30 District courts reached different decisions in eg Al Odah and Boumediene and on 20 February
2007, the D.C. Circuit Court of Appeals ruled 2-1 that the Guantánamo detainees have no
constitutional right to habeas corpus in federal court.
32 See however, determinations in other cases where these principles are not followed.
executive determination. Of real concern, of course, is simply the time it took to reach this decision. Litigation is a time-consuming business, and due process of law and respect for the judicial function require that it be allowed to run its course. Undoubtedly, some gains have been made at each stage of this judicial marathon (as discussed when looking at the question of impact later). One has to ask, however, whether the judicial process has not been characterized by undue constitutional avoidance, as well as excessive judicial deference to the executive and congressional decision-making role, in the refusal to address the constitutional question at an earlier stage. Unfortunately the political organs did not repay the democratic compliment when it came to the judicial suggestion about the need to bring policy into line with law. Whether this was a miscalculation as to how the political branches would respond, or a strict approach to the judicial doctrine of constitutional avoidance, is open to question. But the somewhat anomalous result is a decision six years down the line that the right to habeas corpus applies, theoretically guaranteeing access to a court within hours or days of arrest and detention. One must question the extent to which this constitutes a meaningful judicial response for this sort of emergency remedy.

As regards the impact of the *Boumediene* decision on detainees, a few comments are merited. In many cases, the government’s position vis-à-vis particular individuals took a surprising volte-face. For example, in some cases exorbitant allegations were dropped once confronted with the prospect of legal review — a reminder of the importance of procedural safeguards including access to the court — even before that oversight actually takes effect. Less positively, reports suggest that individuals were transferred out of Guantanamo and to other areas where there was no right of habeas, in anticipation of the *Boumediene* decision. This manoeuvre to avoid the human rights effects of litigation is both a troubling circumvention of the role of the courts, and a testament to the importance of that review from the government’s perspective.

The limited geographic scope of the decision must also be borne in mind. It applied only to Guantanamo detainees, rather than having established a broader point of principle as regards the right to habeas of detainees wherever detained. It quickly became apparent that the hard fought *Boumediene* results

33 This was graphically demonstrated by the tone and content of some of the dissents, notably J. Scalia’s assertion of the “disastrous consequences” of the majority judgment, which he claimed, “will almost certainly cause more Americans to be killed.” Dissenting judgment of Scalia J, p. 2.

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

35 E.g. A case in point is that of Abu Zubaydah, one of a number of people publicly proclaimed to have been the ‘number three’ in al Qaeda, yet these allegations and indeed those that alleged membership of al Qaeda, were dropped when he could access a lawyer and the prospect of legal review materialised. See eg *Abu Zubaydah v Poland*, in Chapter 10.

36 See Chapters 8 and 10.
would not necessarily be replicated for US detentions elsewhere in its ‘global war on terror’. The same day that the US Supreme Court handed down its judgment in *Boumediene* it also handed down *Munaf v. Geren*,37 in which it acknowledged that persons detained in Iraq also had the right to habeas corpus, but found that in the Iraqi context it was Iraqi courts that should exercise jurisdiction, therefore denying the jurisdiction of US courts (and effectively denying the right) on that basis. The right of habeas corpus continues to be denied to Guantánamo “alternatives” such as detentions in Afghanistan, as discussed further below.38

Where there have been habeas proceedings for Guantánamo detainees, their process and outcome have been telling. In the first few years of habeas review, in the clear majority of habeas cases the lawfulness of detention was successfully challenged.39 The habeas proceedings and results indicated both the lack of justification for detentions by the executive and the importance of the judicial review function. However, concern has been voiced that this trend has been reversed, as a result of criticism by superior courts of the high rate of successful habeas challenges and the lower courts’ willingness to question the government’s assessments of fact.40 In *al Adahi v Obama* of 2010 the appeals court did not change the test for evaluating evidence (a ‘preponderance of evidence’ test which neither of the parties contested), but it suggested *propio motu* (and *obiter*) that a more restrictive test requiring ‘some evidence to support the order’ was appropriate.41 Subsequent decisions have shown a

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39 A ‘scorecard’ maintained by the Centre for Constitutional Rights as of Sept. 2011, indicated approximately 75% of success. Human Rights First also holds a table of habeas cases in the US District Court of DC (March 2011) where 39 of 59 detainees saw their habeas granted. However, see shift in 2010 discussed below.

40 Some suggest the turning point was *Mohamad al Adahi v Obama*, Case No. 09-533 (Court of Appeals, DC Circuit) 3, 13 July 2010. Appeals from the United States District Court for the District of Columbia (No. 1:05-CV-00280-GK); Seton Hall ‘No Hearing Habeas,’ D.C. CIRCUIT Restricts Meaningful Review, 1 May 2012 (Seton Hall ‘No Hearing Habeas’ Report); see also Seton Hall press release quoting Professor Mark P. Denbeaux: “Since Al-Adahi, judges are effectively robo-signing denials and rubber-stamping government allegations. The Supreme Court gaveth and the Appeals Court taketh away.”, available at http://law.shu.edu/about/news_events/releases.cfm?id=289524 (accessed on October 26, 2013).

41 See *Mohamad al Adahi v. Obama*, supra note 40, at, p 5: “For years, in habeas proceedings contesting orders of deportation, the government had to produce only “some evidence to support the order.” INS v. St. Cyr, 533 U.S. 289 (2001), at 306; Bakhtriger v. Elwood, 360 F.3d 414, at 421 & n.7 (3d Cir. 2004). This may seek to avoid similar criticism or being overturned on appeal in the future.
far more deferential approach to the government, with only one successful
case having been decided since 2010.42 This approach, together with preexistent
procedural concerns regarding admissible evidence and the difficulty of challenge43 has led some to question whether litigation on this basis provides
any meaningful review at all.44

The judicial engagement of the US courts in protecting the right to judicial
review in detention has undoubtedly been important (just as has the related
judicial role in the criminal process discussed in Chapter 4). Gains have been
made in recognizing the principle of habeas corpus, and if there was any doubt
as to why such judicial oversight is needed it should be promptly dispelled
by regard to the many habeas proceedings which have revealed that there
was little real evidence on which people described as the worst of the world’s
worst were held in arbitrary detention for many years. The experience will
also continue to raise questions as to the nature of the judicial role and due
deferecence however. It was too little too late for many detainees who we now
know had their most fundamental rights violated for years while the protection
of judicial review was being adjudicated, and less still for those captured or
shipped off to detention in Afghanistan or elsewhere who continue to have
that protection denied to them altogether. Even in respect of Guantanamo
detainees themselves, questions remain as to whether Boumediene’s hard won
promise of ‘meaningful’ review will be given real effect in future cases.

11.1.2 Baghram

Hundreds of individuals have been detained by the US administration in
Afghanistan since the military intervention of 2001. Many of them were cap-
tured in Afghanistan but substantial numbers having been detained elsewhere
and transferred into Afghan detention centres, where they have been denied
due process rights including review of detention and in some cases been

42 Seton Hall ‘No Hearing Habeas’ Report, supra note 40.
43 The reliance on hearsay, on evidence allegedly obtained under torture was contested
unsuccessfully in al Adahi. It has been described as ‘almost impossible’ for detainees to
question intelligence use by the government. See also Linda Greenhouse, ‘Goodbye to
blogs.nytimes.com/2012/05/16/goodbye-to-gitmo/ (accessed on October 26, 2013).
44 See e.g. Seton Hall ‘No Hearing Habeas’ Report, supra note 40; see N. Nesbitt, “Note,
Meeting Boumediene’s Challenge: The Emergence of an Effective Habeas Jurisprudence
and Obsolescence of New Detention Legislation”, Minnesota Law Review (2012), available
at http://www.minnesotalawreview.org/articles/meeting-boumediene-s-challenge-the-
emergence-of-an-effective-habeas-jurisprudence-and-obsolescence-of-new-detention-legis-
lation/.
subject to torture and ill treatment. As one judge put it (in familiar terms), they are held in, ‘a ‘black hole,’ in a ‘law-free zone.’\textsuperscript{45}

The approach of the US Courts in the ‘Baghram litigation’ to date is instructive. Petitions for habeas relief were brought in April 2009 by a Tunisian and two Yemenis who alleged that they were captured outside Afghanistan, far from combat zones, mistakenly identified as terrorists and transferred for imprisonment to the Baghram Air Base military prison in Afghanistan.\textsuperscript{46} The federal district court judge ruled that while habeas did not operate in an area of war, as these detainees were not captured in an area of war, they had the right to challenge their detention; by contrast, those others captured in Afghanistan and held there did not.\textsuperscript{47} The federal appeals court for the District of Columbia overturned this decision however, finding that as the site of their detention was in an ‘active theatre of military combat,’ and in light of ‘pragmatic obstacles’ stemming from the detention being within the sovereign territory of another state, detainees held at Baghram, regardless of where they were captured, have no constitutional right to challenge their detention in a US court.\textsuperscript{48} Surprisingly, perhaps, given that the cases raised substantially the same fundamental issues as the Guantanamo litigation, the Supreme Court has again recoiled, denying certiorari to review that decision.\textsuperscript{49}

The net effect of these cases is that years after the Guantanamo cycle of litigation, there still exists a judicially endorsed void into which detainees captured anywhere in the world can be deposited to avoid judicial oversight. The black hole is not now an island but an amorphously defined and potentially permanent state of armed conflict of global reach, in which the government’s actions, including detention anywhere in the world, are purportedly not subject to judicial oversight.\textsuperscript{50} The principle often associated with the Boumediene judgment - that all human beings are entitled as a minimal guarantee to habeas corpus – has not in fact held true.

The District Court decision was however noteworthy in so far as the judiciary was willing to look past the government’s assessment of armed

\begin{footnotes}
\footnotetext[45]{J. Bates reviewing the lawfulness of the mens’ cases in January 2009. See Editorial, “Backward at Baghram”, \textit{N.Y. TIMES}, June 1, 2010, at A26. This description resonates with that of Guantanamo; see ‘black hole’ and ‘legal limbo’ discussed at Chapter 8.}
\footnotetext[46]{The individuals allege they were captured in Thailand, Pakistan and another location beyond the Afghan border, all far from hostilities.}
\footnotetext[47]{See Bates, supra note 45.}
\footnotetext[48]{Al-Maqaileh, et al., supra note 38 finding that ‘the Boumediene analysis has no application beyond territories that are, like Guantanamo, outside the de jure sovereignty of the United States but are subject to its de facto sovereignty’. It also denies the applicability of GCIV guarantees. See R. Goodman, Editorial Comment ‘The Detention of Civilians in Armed Conflict’ 103 \textit{AJIL} 48-74 (2009).}
\footnotetext[49]{Ibid.}
\footnotetext[50]{See Chapter 6 for the government’s very broad interpretation of armed conflicts, which the courts have thus far appeared to accept. See e.g. Hamdan’s acceptance of the relevance of enemy combatants.}
\end{footnotes}
conflict, to the particular circumstances within that conflict, and whether in reality they precluded the application of certain guarantees or not. Also of potential future significance is the fact that the Appeals Court, while denying the right to habeas, acknowledged that its decision may have been different if the applicants had been transferred into Afghanistan deliberately to preclude judicial oversight. The applicants set out to prove just that in subsequent litigation. It remains to be seen whether the courts’ reach may ultimately follow the government, as it seeks to move further offshore and beyond judicial oversight, in its war with al Qaeda of global reach.51

11.2.3 Belmarsh (and from there to Control Orders and Other Measures…)

In 2004 parallel cases made their way through the English courts, resulting in the famous A & Others derogation case before the House of Lords (Belmarsh judgment).52 The case concerned the detention of non-UK nationals in Belmarsh Prison on the basis of their suspected involvement in international terrorism, pursuant to the 2001 Anti-Terrorism, Crime and Security Act.53 In order to allow such a measure, the UK had derogated from its obligations in respect of the right to liberty under Article 5 of the European Convention on Human Rights (ECHR).

The case raised different issues from those before US courts. The UK Act itself provided for regular independent review by the Special Immigration Appeals Commission, which is a court of law, albeit in the context of limited and controversial rules and procedures.54 The right of habeas corpus was

51 Al-Maqaleh case, supra note 38; Chapters 6 and Chapter 7B6 on allegations of on-going proxy detentions and interrogations, further offshore and beneath the judicial radar; see eg A. McCoy, ‘Impunity at Home. Rendition Abroad’, Huffington Post, 14 August 2012, regarding allegations of US supported Somali run prisons.
52 A and others v Secretary of State for the Home Department, X and another v Secretary of State for the Home Department [2004] UKHL 56 (‘A &Ors (Derogation)’).
53 See sections 21 to 32 of the UK’s Anti-terrorism, Crime and Security Act 2001 which: “allow[s] the detention of those the Secretary of State has certified as threats to national security and who are suspected of being international terrorists where their removal is not possible at the present time. These provisions change the current law, which allows detention with a view to removal only where removal is a realistic option within a reasonable period of time...”.
54 Controversial rules related, for example, to access to counsel – the use of special advocates – and to evidence. See e.g. the report of the UK’s Parliamentary Constitutional Affairs Committee “The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates”, Report of Session 2004/5, HC 323-II, available at http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmselect/cmconst/323/323ii.pdf. See also e.g. ‘Ian Macdonald QC resigns from SIAC’, 1 November 2004, available at <http://www.gardencourtchambers.co.uk/news/news_detail.cfm?NewsID=268; see also Chapter 7B.7.3
not, as such, in dispute in the UK and the case that made its way to the House of Lords concerned the lawfulness of the derogation and of the detention itself.

When the matter went before the House of Lords, then the supreme court of appeal in the UK, the court found that the UK’s derogation from the European Convention on Human Rights to enable it to detain people on national security grounds, potentially indefinitely, was not valid. The majority deferred to the government’s assessment of the existence of an “emergency” justifying derogation. However, they found that the detention of non-nationals could not be justified as strictly required by that emergency. The judgment notes: “If derogation is not strictly required in the case of one group [nationals], it cannot be strictly required in the case of the other group [non-nationals] that presents the same threat.”\(^5\)

The court therefore found a violation of the rights to liberty and to non-discrimination, provided for in law in the UK under Articles 5 and 14 of the ECHR.

The positive significance of this decision lies on many different levels. The first relates to the obvious importance of the strict approach to the protection of the right to liberty and the need for careful but challenging judicial oversight. Beyond that, the case did what much of debate and indeed litigation elsewhere – including the US litigation referred to earlier – had neglected to do, in signaling the centrality of the equality issue. This is particularly significant in a context of frequent reliance on divisions and distinctions based on nationality as well as other grounds as a basis for inferior treatment. While nationality does have some significance in the context of the application of certain aspects of international humanitarian law (IHL), it is a critical manifestation of the universality that underpins human rights law that nationals and non-nationals alike are protected.\(^6\) The onus is on the state to demonstrate that discrimination is justified, which it was unable to do in this case.

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

\[\text{\textit{A & Ors (Derogation), Lord Bingham, para. 132: “The distinction which the government seeks to draw between these two groups – British nationals and foreign nationals – raises an issue of discrimination. But, as the distinction is irrational, it goes to the heart of the issue about proportionality also. It proceeds on the misconception that it is a sufficient answer to the question whether the derogation is strictly required that the two groups have different rights in the immigration context. So they do. But the derogation is from the right to liberty. The right to liberty is the same for each group. If derogation is not strictly required in the case of one group, it cannot be strictly required in the case of the other group that presents the same threat.”}}\]

\[\text{\textit{See e.g. UN Human Rights Committee General Comment No. 15: The position of aliens under the Covenant [1986], in UN Doc. HRI/GEN/1/Rev.6 (2003), at 140. See also Inter-American Commission on Human Rights, Precautionary Measures in Guantánamo Bay. See Chapter 7A22 and 7B9.}}\]
“I do not in particular accept the distinction which he drew between democratic institutions and the courts... the function of independent judges... [is] a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself. The Attorney General is fully entitled to insist on the proper limits of judicial authority, but he is wrong to stigmatize judicial decision-making as in some way undemocratic.”

The case has been lauded as “a powerful statement by the highest court in the land of what it means to live in a society where the executive is subject to the rule of law.”57

The case proceeded to Strasbourg,58 and the Grand Chamber of the ECtHR handed down a unanimous decision, significant both for its assessment of issues relating to derogation, the right to liberty and equality, but also for its own role in assessing politically sensitive issues such as those at issue in the case. As a preliminary matter, in a notable inversion of the arguments normally made by applicants and governments respectively, the UK appeared to be asking the ECtHR to overrule its own highest court’s determination on the invalidity of the government’s derogation, and the applicants questioned their entitlement to do so; the ECtHR rejected this and noted that the government, like the applicants, was perfectly entitled to question the determinations of its courts in this context.

As regards the grounds for the detentions in this case, the Court engaged in close scrutiny, considering each case in detail on its facts to reach an assessment of the true reason for the detention. It found the reason (in all but one case) not to be ‘pursuant to deportation,’ as the government argued, but in fact the perceived threat that the individual represented and the prevention of terrorism. As this was not a lawful ground of detention under the Convention, derogation was necessary.

As had been done on the national level, the ECtHR showed particular deference in this case to the national authorities’ determination of the existence of an emergency justifying derogation. It noted:

“it was for each Government, as the guardian of their own people’s safety, to make their own assessment on the basis of the facts known to them. Weight must, therefore, attach to the judgment of the United Kingdom’s executive and Parliament on this question. In addition, significant weight must be accorded to the views of


58 A and others v. United Kingdom, before the App. No. 3455/05. Eleven of the ‘certified’ individuals applied to the ECtHR as, despite their victory at the national level, the House of Lords had issued a ‘declaration of incompatibility’ but the offending legislation had not been struck down and their situation had not changed. See Sangeeta Shah, ‘From Westminster to Strasbourg: A and others v United Kingdom’, Human Rights Law Review (2009) 9 (3): 473-488.
The Role of the Courts: Human rights Litigation in the ‘War on Terror’

the national courts, who were better placed to assess the evidence relating to the existence of an emergency.”

But while deferential on the existence of an emergency and need for derogation, and noting the appropriateness of the national judiciary’s deference, the Court was more rigorous in its approach to the necessity of particular measures taken in response. It rejected the government’s claims of judicial overreach by the House of Lords in this respect. It noted that, “as the House of Lords held, the question of proportionality is ultimately a judicial decision, particularly in a case such as the present where the applicants were deprived of their fundamental right to liberty over a long period of time.” The Court agreed with the House of Lords that as the measures were limited to non-nationals, they could not be necessary and proportionate.

The Court also addressed the content of the right to challenge the lawfulness of detention. The domestic proceedings had been replete with procedural controversies, from use of special advocates to reliance on secret evidence. While acknowledging the need for restrictions on ‘fully adversarial proceedings’, the Court considered whether, in all the circumstances of each case, there was in fact an opportunity to mount a meaningful challenge to detention. This included the extent to which the detainee was given detailed information concerning the evidence, and was subject to procedural safeguards. It was necessary to look at the particularities of each case to determine whether there had been such a meaningful opportunity and sufficient countervailing protections; the court concluded that detention could be justified in five cases but not in another four. Whether or not one agrees with the Court’s conclusions as regards the SIAC proceedings, what emerges is a reinforcement of an approach which embodies a balance between deference to national authorities, notably government and parliament on political assessments, deference to national courts with primary responsibility for weighing up proportionality, with a cautious but fairly robust approach to its own oversight role.

60 Ibid, para 184: “In any event, having regard to the careful way in which the House of Lords approached the issues, it cannot be said that inadequate weight was given to the views of the executive or of Parliament.”
61 The process before the Special Immigration Appeals Tribunal (SIAC) has been much criticized elsewhere, including by the ‘special advocates’ that have sought to work within it. See eg E. Metcalfe, ‘Secret Evidence’, Justice (2009), available at http://www.justice.org.uk/data/files/resources/33/Secret-Evidence-10-June-2009.pdf.
62 A &Ors (Derogation) para 220: It noted that “there may be restrictions on the right to a fully adversarial procedure … There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities.” Among the pre-requisites was that the applicant have ‘sufficient information’ to be able to defend himself and to give instructions to the special advocates.”
63 Ibid, 212–224.
In respect of the Belmarsh litigation in general, the executive’s response to the judicial process is also worthy of note. The UK government changed its law and practice in light of the Belmarsh judgment in the House of Lords. It withdrew the derogation and offending legislation, and adopted new legislation providing, inter alia, for “control orders” rather than imprisonment for persons suspected of involvement in international terrorism.64

These orders spurred their own controversy and their own litigation. Challenges to control orders led to judgments which provide, among other things, an interesting analysis of the stage at which not only physical limits but also the degree of control over aspects of daily life might amount to unlawful “detention”.65 The House of Lords found in one case that those orders that allowed for persons to be confined to specified areas for up to eighteen hours per day and cut off from contact with the outside world amounted to detention by any other name, and required derogation from Article 5 of the ECHR. In other cases, while restrictions on rights, the measures were not held to amount to detention, and could therefore be restricted where necessary in the public interest, in accordance with the adaptability of the human rights framework set out in Chapter 7.66

These cases demonstrated the willingness of the courts to engage, and seek to grapple with, the difficult issue of what balance is an acceptable one in a democratic society facing the challenge of international terrorism. Judicial review of requests to impose or amend control orders did in fact lead to refusals and amendments in many cases, consistently with the view that review ‘though not always prompt, was thorough and careful.’67 The control orders system was repealed and recast into its present form of temporary ‘prevention and investigation measures’.68 While UK policy has rightly been subject to

64 Control orders were preventative measures, intended to protect members of the public from the risk of terrorism by imposing restraints on those suspected of involvement in terrorism-related activity. They have now been replaced with Terrorism Prevention and Investigation Measures (TPIMs). For more on control orders, see Chapter 7B7.2.

65 See e.g. Secretary of State for the Home Department (Appellant) v. J.J and others (FC) (Respondents), House of Lords, [2007] UKHL 45, decided 31 October 2007; and Secretary of State for the Home Department v. AF [2009] UKHL 28 (no3). In some cases control orders were set aside as violation of fair trial rights – see eg AT v. Secretary of State for the Home Department [2012] EWCA Civ 42 – while in others they were held to be lawful despite e.g. the interference with right to family life of relocation – CD v Secretary of State for the Home Department [2011] EWHC 1273 (Admin). On control order litigation in Australian courts, see Thomas v. Mawbrny [2007] HCA 33 (High Court of Australia, 2 August 2007), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2007/33.html>, where, in a 5 to 2 decision, the High Court of Australia upheld the Constitutionality of a criminal anti-terror law under which the judge had issued an interim control order.

66 Ibid. and see Chapter 7A32 for the legal framework.

67 See Independent Reviewer ‘Control Orders in 2011’ above.

68 The PTA 2005 was repealed and replaced by the Terrorism Prevention and Investigation Measures Act 2011, imposing similar but less onerous measures to control orders: see 7B7.2.
much criticism, it has certainly been responsive to, and in significant measure shaped by, the decisions of the courts in this area.

The lawfulness of control orders has been subject to judicial review in Australia also, though perhaps to less effect.69 A constitutional challenge was lodged in Thomas v Mowbray, challenging the legislation enshrining the process for approval of the orders as conferring a ‘non-judicial power’ on a court.70 The courts could not question the validity of the orders on human rights grounds, as UK courts had, given the lack of a bill of rights or constitutional framework enabling them to do so.71 On the question before it, the court upheld the law. The majority found (as other courts have in very different contexts72) that the judiciary was an appropriate forum for assessing ‘risks’ that emanate from terrorism and measuring the necessity and proportionality of the response.73 In a notable dissent, a minority rejected the judicial power of review itself, on the basis that the law in question was so ‘vague and inappropriate’ as not to be susceptible to meaningful judicial application. As they could not strike down the law, they refused to be drawn into the judicial application of it.

The contrast between the UK and Australian litigation is a worthwhile reminder of the perhaps obvious fact that the constitutional or human rights legislative framework will often determine the potential of the judicial role.74 In particular, the dissent prompts reflection on the question of whether at a certain point judicial oversight risks providing a veneer of legitimacy, without the ability to exercise meaningful judicial review.

69 They were introduced in the Anti-Terrorism Act (No.2) 2005 and applied to David Hicks (following the end of his sentence, having been convicted by military commission) and to Jack Thomas – see Thomas v Mowbray, supra note 65.

70 Ibid.


72 See e.g. A & Ors (derogation) and ‘Belmarsh’, above.


74 On Australian control orders and the judicial role see Dezynhaus and Thwaites, ibid. On the suggestions that Australia has lacked effective judicial scrutiny due to the absence of a bill of rights, see B. Saul, ‘Criminality and Terrorism’ in Counter-Terrorism: International Law and Practice, Salinas de Frias, Samuel and White, eds (Oxford: Oxford University Press, 2012) at p. 166-7.
11.2 **ISSUE 2: LIMITING THE APPLICABILITY OF TREATY OBLIGATIONS: EXTRA- TERRITORIAL APPLICATION AND ACTION PURSUANT TO SECURITY COUNCIL AUTHORIZATION**

11.2.1 Extra Territoriality

The rationale behind the Guantánamo anomaly referred to earlier was that, due to its offshore location, the constitutional human rights obligations that normally apply on US soil would not apply there. As a constitutional matter, the fallacy of such distinction seemed to be clarified by the *Boumediene* and *Munaf* cases, but was then brought back into focus in the *Baghram* cases, discussed above. As a matter of international human rights law, the proposition was always straightforwardly wrong.\(^75\)

The complete control exercised by the US over the part of Cuba where Guantánamo lies, as well as over the detainees themselves, meant that the US exercised jurisdiction and control to satisfy the criteria for applicability of human rights treaties.\(^76\) As the Inter-American Commission on Human Rights observed when requesting that the US adopt precautionary measures to protect the detainees (a request ultimately unheeded): “[t]he determination of a state’s responsibility [for human rights violations] turns not on the individual’s nationality or presence within a particular geographic area, but rather on whether, under the specific circumstances, that person fell within the state’s authority and control.”\(^77\)

While the US position is so stark as to provide an easy target, a narrow view of extraterritorial application was mirrored in government positions elsewhere, albeit in slightly less caricatured form. A clear manifestation of this was the case of *Al-Skeini & Ors v. Secretary of State for Defence*,\(^78\) concerning the applicability of the ECHR to the conduct of British troops in Iraq. The case concerned six appellants, the first five of whom had been killed by UK “patrols” in occupied Basra, for example while eating a family evening meal, during a raid on a family member’s house or while driving a minibus. The sixth, Baha Mousa Baha, was tortured and died in UK custody in Iraq. The object of the litigation was to compel the government to carry out an investigation into these violations as required by the ECHR, incorporated via the UK Human Rights Act.

At first the government argued that the ECHR did not apply to its actions in Iraq. In the course of litigation the government’s position changed (providing an example of how the process of litigation can itself quite directly shape policy, and/or articulations of it) and it argued that the ECHR did apply

\(^75\) See Chapter 7A21.

\(^76\) See decisions of human rights courts and bodies in Chapter 7A21 and 7B.2.

\(^77\) See IACHR, Precautionary Measures in Guantánamo Bay, supra note 55.

\(^78\) *Al-Skeini v. Secretary of State for Defence* [2007] UKHL 26, 13 June 2007.
The Role of the Courts: Human rights Litigation in the ‘War on Terror’

to persons in UK custody in Iraq but not to persons killed or injured on the streets of Basra. When the case made its way to the highest UK court, the House of Lords, the court accepted the government’s view. It found that while individuals killed or mistreated within UK “custody” were entitled to the protection of the ECHR, those on the streets of Basra – including those directly shot or mistreated by UK soldiers patrolling streets – were not.

The strength of the Lords Al-Skeini judgment lay in its confirmation that for individuals detained by UK authorities anywhere in the world, the ECHR and the Human Rights Act giving effect to it in the UK apply. This was a step forward from the more restrictive approach argued by the authorities of the US and at an earlier stage of the UK. The House of Lords formalistic distinctions based on custody would, however, have had the somewhat anomalous result that an individual’s ability to achieve redress would depend on whether his abusers were courteous enough to arrest him beforehand, or whether his abuse occurred inside or outside prison walls.

The litigation may reveal a range of policy concerns that creep into judicial consideration, including the desire not to impose unrealistic burdens in the context of a chaotic situation on the ground in Basra. It may also reflect uneasiness as regards the interplay of IHRL and IHL. But in large part, as is clear from the face of the judgment, the British Court’s narrow approach reflected the fact that it considered itself bound by a previous decision of the ECtHR Grand Chamber (in Bankovic v Belgium). In an example of the national to international judicial dialogue, the UK courts called on Strasbourg to clarify the important question of the extra-territorial application of the ECHR.

In a seminal Grand Chamber judgment of July 2011 the ECtHR clarified that the states human rights obligations under the ECHR may arise where it controls territory abroad or where its agents act abroad. It stated that, in the latter case, “what is decisive in such cases is the exercise of physical power and control over the person in question.” The Court underscored the need for a

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79 At all stages the Government denied the extraterritorial applicability of the Human Rights Act (as opposed to the ECHR). The government did not challenge the fact that, if the Convention and the UK Act were applicable, there existed an obligation to carry out an investigation.

80 See Chapter 7B.3 ‘War and Human Rights’ on interplay. Questions of jurisdiction and responsibility (whether rights were in fact violated) have to be distinguished however. The latter may depend on an assessment of whether the quite different IHL rules on lawful killing were respected.

81 See Chapter 7A.2.2. The Court had found the aerial bombardment of the Belgrade TV station not covered by the Convention as it lacked control of the territory of Belgrade, an approach that was effectively departed from in other cases including Al-Skeini and Ors v United Kingdom (App no. 35721/07), ECHR 7 July 2011.

82 Al-Skeini and Ors, supra note 78, para. 136. Even before the Court decided in the Al-Skeini case (and since then) it was broadly recognized – including by the UK government in the Bankovic and Al-Skeini cases and by UK courts (Al-Skeini and Ors v Secretary of State for Defence for the United Kingdom [2007] UKHL 26) – that individuals detained abroad are
purposive approach to interpreting human rights conventions to avoid a ‘vacuum’ of legal protection. As such, the war in Iraq and subsequent litigation has led to clarification of legal standards in respect of when states obligations apply extra-territorially.

Likewise, the Committee against Torture (CAT) has certainly made clear that the Convention against Torture and Cruel, Inhuman and Degrading Treatment does apply extraterritorially, and has been implicitly critical of both the UK and US for taking an approach limiting the Convention’s applicability in Iraq or Afghanistan. The CAT has stated, for example, that “[t]he State party should recognize and ensure that the provisions of the Convention expressed as applicable to ‘territory under the State party’s jurisdiction’ apply to, and are fully enjoyed, by all persons under the effective control of its authorities, of whichever type, wherever located in the world.”

It is increasingly clear that the many operations carried out beyond a state’s borders in the context of the ‘war on terror’ of global reach undoubtedly fall within the purview of the IHRL framework. The global ‘war on terror’, and its myopic approach to national boundaries, has over time lead to clarification as regards the applicability of human rights norms beyond the state’s territory. Early reticence by certain human rights bodies to incorporate proactively such an approach into their everyday work has given way to a series of decisions and reports which have served to underscore the thesis presented years ago,

covered by the detaining states human rights obligations; prior to the Al-Skeini judgment, this scenario was distinguished from the lethal use of force in non-detention settings. See also Al-Saadoon and Mufdhi v United Kingdom (App no 61498/08) ECtHR 02 March 2010 and others at 7A22.

83 Al-Skeini and Ors, supra note 78, para 142.
84 See e.g. Conclusions and recommendations of the Committee against Torture: United States of America, UN Doc. CAT/C/USA/CO/2, 25 July 2006. See also, Conclusions and recommendations of the Committee against Torture: United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, UN Doc. CAT/C/CR/33/3 (10 December 2004).
85 CAT Conclusions, ibid; see also UN Human Rights Committee, ‘Concluding Observations of the Human Rights Committee on the United States of America’ (15 September 2006) UN Doc CCPR/C/USA/CO/3.
86 The ‘global’ character of the war against terror has been underlined by the U.S. administration since 9/11; see Chapter 6B112 ‘The Global War’.
87 Some reports of some human rights bodies and specialists post-9/11 failed to address the question of extra-territoriality (with the exception of the principle of non-refoulement/ extradition): see e.g., Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, 22 October 2002, OAS Doc. OEA/Ser.L/V/II.116; Council of Europe, Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’ Deputies; OSCE Charter on Preventing and Combating Terrorism, 7 December 2002. By engaging on issues in eg Iraq and Afghanistan, the issue has been given greater prominence and developed the jurisprudence.
but more relevant now than ever, that the key factor is not where, but whether, the state exercises its power and responsibility.88

The extraterritorial application of human rights treaties has potentially important implications for accountability in the war on terror, a large part of which is being executed extraterritorially. It is critically important to clarifying the lack of legal voids in the war on terror. A purposive approach, focused on ensuring rights protection rather than strict territorial limits certainly finds support in the spirit of the human rights instruments and their interpretation in this area post 9/11. It is also critical in giving effect to the victims’ right to a remedy. In defence of a restrictive approach to the scope of application of treaties, governments have on occasion argued that states continue to be bound normatively by customary law and IHL in any event, therefore there is no void created by non-applicability of treaty obligations. But, the Al-Skeini case is a reminder that the extraterritorial application of human rights treaties is critically important in practice where this provides the only way of accessing a court of law and ultimately of securing a remedy.89

11.2.2 Applicability of HR treaties and their relationship with Security Council Resolutions?

Just as Al-Skeini raised questions about the applicability of human rights treaty obligations extraterritorially, subsequent cases provoked questions about the impact of such obligations where the state acts under a Security Council resolution. In R (on the application of Al-Jedda) v. Secretary of State for Defence, decided on 12 December 2007,90 a cautious and arguably restrictive approach to human rights protection was again apparent on the domestic level, which led to an important ECtHR judgment.

The case concerned Mr. Al-Jedda, a British national, detained by British troops (acting as part of a UN force) in Iraq, allegedly on the basis of his association with and recruitment for a terrorist group involved in attacks in Iraq. He challenged his detention before British courts on the grounds that it contravened the prohibition on arbitrary detention.91 The first question the House of Lords addressed on appeal was whether the appellant’s allegedly wrongful detention was attributable to the state, as opposed to the United

88 See IACHR, Precautionary Measures in Guantánamo Bay, supra note 55; see also early extraterritoriality cases at Chapter 7B.2
89 In the UK, human rights protections are part of domestic law. The lack of an enforcement mechanism for IHL violations, and the fact that neither the US nor the UK have made the declaration required for individual petitions under CAT are both relevant to the significance of the applicability of the ECHR.
90 R (on the application of Al-Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent) judgment of 12 December 2007, [2007] UKHL 58.
91 European Convention on Human Rights, Article 5.
Chapter 11

Nations, as a result of Security Council resolutions authorizing the Multinational Force in Iraq. The Lords, and the ECtHR in turn when the case proceeded internationally, determined that the relevant question of fact was whether the UK, or the UN, exercised ‘effective control’ over the conduct in question. The court had no difficulty in distinguishing this mission from previous (controversial) cases where states actions had been held attributable to international organisations, on the basis that the allegedly wrongful conduct was de facto within the control of the UK. The courts refused to accept attempts to hide under the organizational umbrella to shield them from any responsibility or accountability for human rights violations.

The House of Lords was then faced with the more difficult question of whether the UK’s obligations under the European Convention on Human Rights were qualified by those that arise under the UN Charter, particularly under relevant binding Security Council resolutions under Chapter VII. The House of Lords found that as the detention of individuals like Mr. Al-Jedda had been authorized by Security Council resolution, in light of Art 103 of the Charter these resolutions prevailed over any conflicting treaty obligations. It concluded that the authority to detain was not therefore subject to human rights treaty obligations. While cautiously deferential to the Council’s authority, the judgment sought to mitigate the effects of this by noting that the authorities must still “…ensure that the detainee’s rights under Article 5 [the right to liberty under the European Convention] are not infringed to any greater extent than is inherent in such detention.”

This judgment was described as having potentially ‘disastrous results for international human rights law if applied in the future’. If it were to be understood as exempting the whole range of activity carried out pursuant to Security Council resolutions from human rights obligations (or indeed those under IHL), the result could be a serious protection gap, particularly in light

92 As the Lords noted, the UK had never claimed before the case that the UN exercised control over these operations.
93 The majority distinguished the admissibility decision of the Grand Chamber of the European Court of Human Rights in Behrami v. France, Saramati v. France, Germany and Norway (Application Nos. 71412/01 and 78166/01, May 2, 2007), which attributed the acts of KFOR to the United Nations and not to the individual countries that contributed forces to that mission.
94 A purposive approach is apparent in ECtHR decisions interpreted to avoid any ‘vacuum’ of legal protection. The alternative view that responsibility lay exclusively with the UN would have put the issue beyond the jurisdiction of any court or human rights forum.
95 Al-Jedda v. Secretary of State for Defence (Opinion of Lord Bingham), supra note 90, at para. 36. See Chapter 7B1
96 Ibid.
of Council activism post 9/11 discussed in Chapter 7B. But the House of Lords judgment was not the last word and the issue proceeded to the ECtHR, which judgment was handed down on 7 July 2011. Unlike its domestic counterpart, the ECtHR accepted the applicants’ argument that a distinction should be drawn between clear obligations under Security Council resolutions, and other activities that might be authorized by, or indeed broadly carried out pursuant to, such resolutions. It found that as the Security Council resolutions did not oblige the state to detain, and there was a ‘presumption’ of compatibility of legal regimes allowing for harmonious interpretation. As a result, the UN resolutions should, and could, be interpreted consistently with human rights obligations. The case is not uncontroversial on various grounds (including its failure to grapple fully with IHL and the interplay with IHRL), and it certainly falls short of clarifying how any genuine conflict that could not be ‘harmonised’ away might be dealt with by the Court. The case is, however, one of a number in which courts have interpreted human treaties to avoid gaps in protection or accountability, while avoiding the sort of normative conflicts often invoked by states to escape human rights responsibility in the war on terror.

11.3 ISSUE 3: LITIGATING TORTURE PROTECTION: REFOULEMENT AND THE USE OF TORTURE EVIDENCE

Practices of torture and cruel, inhuman or degrading treatment (TCIDT) have come to light in recent years with increasing regularity and, as discussed in Chapter 7, have regrettably been coupled with attempts to redefine torture

98 Lord Bingham noted that while the United Kingdom had the authority to detain the appellant pursuant to Security Council resolutions, despite conflict with human rights treaty obligations, it must still “…ensure that the detainee’s rights under Article 5 [of the European Convention] are not infringed to any greater extent than is inherent in such detention.”
99 Al-Jedda v. United Kingdom, Application no. 27021/08, [2011] ECtHR.
100 Ibid, para. 102
101 Ibid, para. 109: ‘in interpreting its resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations.’
102 As noted in Chapter 7, the Court’s myopic approach to IHL has been criticised: J Pejic, ‘The European Court of Human Rights’ Al-Jedda judgment: the oversight of international humanitarian law’, ICRC Resource Centre, 30 September 2011.Volume 93 Number 883
103 See interrelationship of legal regimes in Chapter 7B.4 The ‘War’ and Human Rights’.
104 On the interpretation of human rights treaties to avoid ‘vacuums’ of protection, see e.g. Al Skeini above and Chapter 7A Conclusion. On potential conflicts with obligations pursuant to peace and security see also 7B1
according to obscenely high thresholds of barbarity, to “justify” it, *inter alia* as a matter of “executive privilege”, or to undermine procedural safeguards associated with it. While much of this practice has been US focused, this section highlights a couple of cases from the other side of the Atlantic that fall into the last category and illustrate attempts to erode, indirectly, the prohibition.

11.3.1 Deportation to Torture or Ill treatment

One of the most voluminous areas of litigation post 9/11 for international courts and human rights bodies relates to the transfer of persons suspected of being in some way prejudicial to national security from one state’s control to another where there is a real risk that they will be subject to torture and ill-treatment. A series of cases that made their way to the European Court of Human Rights (ECtHR), provoking firm responses from governments and at times the public outcry, are worthy of note.

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

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105 Memorandum for Alberto R. Gonzales, Counsel to the President from Jay S. Bybee, Assistant Attorney General, on “Standards of Conduct for Interrogation under 18 U.S.C. Sns. 2340-2340ª”.


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

108 The intervention was presented by the governments of Lithuania, Latvia, Portugal, and the UK. See the ‘refining’ and limiting of the UK government’s position to cruel and inhuman treatment in the Parliamentary Joint Committee on Human Rights Thirty Second report: <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/278/27808.htm>.

109 For the intervention in the *Ramzy* case submitted on behalf of several international NGOs, see <www.interights.org>.
When the case of *Saadi v Italy* case then came before the court addressing similar issues – Mr Saadi claimed that he would be at risk of torture and ill-treatment in Tunisia, where mistreatment of alleged terrorists is well-documented – the UK government again seized its opportunity to argue in favour of the “balancing” test on the same terms as it had in *Ramzy*. The *Saadi* case leapfrogged the *Ramzy* case and the Grand Chamber of the Court handed down judgment on 28 February 2008.

In a unanimous judgment, the European Court remained resolute in upholding the approach established by its earlier decisions and followed by other international courts and bodies. The judgment reaffirmed that the prohibition on transfer of individuals to countries where they face a real risk of torture or other ill treatment is part of the absolute prohibition on torture. The Court was emphatic in recognizing the difficulties states face in countering terrorism, but categorical in its rebuke of the notion that there are exceptions to the absolute nature of the prohibition of torture or ill-treatment or any room for balancing: “States face immense difficulties in modern times in protecting their communities from terrorist violence. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community. That must not, however, call into question the absolute nature of Article 3 [of the European Convention, prohibiting torture and other ill treatment].”

Although unsuccessful, the very fact that governments made these interventions, despite the odds of success being seriously stacked against them (in light of clear and on-point jurisprudence from the Court itself, quite apart from any of the principles at stake), is telling. It may reveal a shift in the approach to rights protection by certain states at least, and a questioning and undermining of even the most sacrosanct human rights protections.

Both governments and courts alike have at times been drawn into using the deceptively attractive notion of striking a ‘balance’ between protecting human security and the rights of those suspected (in the broadest sense) of terrorism. Yet properly understood, balancing is appropriate language in the context of some rights but not in relation to the absolute right to be free from torture. Such a balancing approach is present in the Canadian Supreme Court’s decision in the *Suresh* case, which met with firm criticism from international bodies such as the Human Rights Committee and CAT.

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111 See Ch. 7A52 for the legal framework and 7.B.6 ‘Torture and inhuman treatment’ in counter-terrorism practice.


resolute rejection of this approach by the European Court in the cases addressed above, and others that followed shortly thereafter, is an example of the important role of the courts in reaffirming fundamental principles, in this case the absolute prohibition of torture or ill treatment and transferring an individual to the risk of such practices.\textsuperscript{114}

Although in these and numerous other cases, the ECHR is firm on the founding principles at stake – in this case regarding the absolute nature of the prohibition\textsuperscript{115} – it is more flexible in its approach to the application of those principles in particular situations. One controversial example is the question of whether ‘diplomatic assurances’ – received from the receiving state to the effect that individuals sent there will not be subjected to abuse – can be relied upon in an evaluation of risk, and to what effect.\textsuperscript{116} Courts and bodies have taken different approaches as discussed in Chapter 7B and though there is strong authority in support of the view that where violations are systemic, assurances should not be used, the \textit{Othman} judgment of 2012 exemplifies a more flexible approach requiring the state (and in turn the ECHR in oversight function) to weigh up the reliability of assurances in the particular situation in light of a complex array of factors.\textsuperscript{117} While there is no compromise on the absolute ban, there is considerable flexibility on determining whether there is a risk of such TCIDT in the first place.\textsuperscript{118} It remains to be seen whether such flexibility and accommodation ultimately amounts to a way of circumventing the protection in practice.

The \textit{Othman} case was also significant in other ways, with the Court not only reiterated the principle of the absolute ban on transfer to torture but

\begin{itemize}
\item \textsuperscript{114} See \textit{Othman (Abu Qatada) v. The United Kingdom}, \textit{supra} note 114 and Babar Ahmed & Others v UK, Applications nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, ECHR, 24 September 2012. In the latter case the Court found that individuals could be transferred to the U.S. as there was no established risk of a violation of Art 3.

\item \textsuperscript{115} \textit{Othman}, \textit{supra} note 114, para. 185 “Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion”. Babar Ahmad and Others v The United Kingdom, \textit{supra} note 114.


\item \textsuperscript{117} \textit{Othman (Abu Qatada) v The United Kingdom}, \textit{supra} note 114, at 187-189, asking “whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time (see \textit{Saadi}, at § 148)”. The factors are set out at paras 188-9 of the judgment.

\item \textsuperscript{118} The increasing openness to reliance on diplomatic assurances which is subject to considerable criticism; see e.g. Amnesty International, <http://www.concurringopinions.com/archives/2012/01/echr-on-diplomatic-assurances.html>. See e.g. the suggested high threshold in the interpretation of what amounts to TCIDT in the counter-terrorism extradition or deportation context, in Babar Ahmad and Others v UK, \textit{supra} note 114.
\end{itemize}
progressively developing the scope of the non-refoulement rule. It found that the absolute ban on transfer also applied to transfer to a ‘flagrant denial of justice,’ including (but not limited to) the risk of reliance on evidence obtained through torture in criminal proceedings. While the precise content of the flagrant denial of justice norm will continue to evolve case by case, this contribution to developing or clarifying the refoulement rule through litigation may be one positive by-product of war on terror litigation.

11.3.2 A & Ors – admissibility of torture evidence

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

In the UK again, the issue played out in the case of *A and Others v. Secretary of State for the Home Department (No. 2).*[^119] The case concerned the admissibility, before the UK Special Immigration Appeals Commission, of evidence that may have been obtained through torture by foreign states. The UK government advanced the argument – anomalous perhaps, yet accepted by the Court of Appeal – that evidence obtained through torture at the hand of a UK official would be inadmissible, whereas evidence obtained through torture at the hand of foreign officials, for whom the UK is not responsible, is admissible.

In its judgment of 8 December 2005, the House of Lords rejected this rationale, finding that torture is torture no matter who does it, and that such evidence can never be admitted in legal proceedings. It also noted the link between the safeguards against torture and the incidence of torture, finding that the state “cannot condemn torture while making use of the mute confession obtained through torture, because the effect is to encourage torture.”[^120]

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

[^119]: *A v.SSHD (No. 2) [2005] UKHL 71.*
[^120]: *Ibid,* p. 30 citing McNally J.
risk that such was the case, the court found that evidence could be admitted but afforded less weight.121

Second, the court focused on the issue of admissibility in ‘proceedings’, but in so doing indicated what may be an overly sweeping inclination to accept the lawfulness of the use of torture evidence for other purposes, such as arrest, search or detention. Without grappling with the difficult legal issues this raises, the Court’s judgment has been cited in support of the proposition that reliance on, solicit or trade in evidence obtained through torture for purposes outside the courtroom is not covered by the prohibition.122

This decision was followed by a series of other decisions in recent years on the national, regional and international levels which have affirmed the prohibition on the admissibility of evidence obtained through torture. These include ECHR decision in Othman v UK referred to above and others123, the African Commission HPR decision in Sabbeh & Ors v Egypt, or the Committee against Torture’s decision in Ktiti v Morocco.124 As in the A&Ors case above, some uncertainty around the edges of the prohibition, as regards whether evidence might be admitted exceptionally but afforded less weight for example,125 may over time come to undermine the rule, but there has been a powerful reassertion of principle by courts and bodies across the regional and international spectra in respect of this issue.

11.4 ISSUE 4: DAMAGES LITIGATION FOR RENDITION VICTIMS

The practice of “extraordinary rendition” – kidnapping and transfer of individuals without any process of law to secret detention and torture – is addressed in detail in Chapter 10. The extraordinary rendition programme (ERP) plainly involves the most serious violations of international norms discussed in preceding chapters, including the right to remedy and reparation.126

121 In contrast to the majority finding, see the test proposed by Lord Bingham, according to which evidence should be regarded as inadmissible if the executive had been unable to show that it was not obtained by torture (A v. SSHD (No. 2), paras. 54-56). This has been criticised in the CAT Concluding Observations on the Fifth Periodic report of the U.K., 31 May 2013.

122 While cited in this way in UK courts, as noted in Chapter 10, the issue has been differently considered by UN special rapporteur and other experts who suggest that creating a ‘market’ for torture, like admitting such evidence in proceedings, falls foul of the prohibition. See also Chapter 3 on state responsibility e.g. for aiding and assisting violations.

123 See also e.g. El Haski v Belgium, Chapter 7.


125 Ibid; see also arguments advanced in el Haski, Chapter 7.

As foreshadowed in Chapter 10, rendition litigation poses particular challenges for litigators, which can euphemistically be grouped as “access” issues of various types: access to victims, to evidence and to courts. First and most obviously, the cases often concern disappeared persons. Despite the excellent monitoring work done by NGOs, journalists and investigators, we often do not know who or where the victims are, at least not at the point when they most need protection. While jurisdictions vary, the ability to bring “public interest” cases without identified victims is extremely limited. Secondly, access to information or evidence is inevitably extremely challenging, given the clandestine nature of operations, but made even harder by what has been described as a ‘systematic cover-up’ to preclude such access. The third group of access issues relate to effective access to courts. In the rare situation where a person emerges and is willing to put his or her head above the parapet again despite past abuses, various legal obstacles have presented themselves and often led to the cases being thrown out, as discussed briefly below.

Among the grounds that have led to cases being thrown out in US courts is the doctrine of ‘state secrecy’. A case in point, discussed in Chapter 10, is that of Khalid el-Masri, the German citizen arrested by Macedonia border officials in December 2003, apparently because he has the same name as the alleged mentor of the al-Qaeda Hamburg cell and on suspicion that his passport was a forgery. After over a year of interrogation and torture at several international locations, during which time he was prevented from communicating with anyone outside the detention facility, including his family and the German government, it became apparent to his captors that his passport was genuine and that he had nothing to do with the other el-Masri. He was finally set free but given no apology, help in re-establishing his life or offer of compensation. When questioned in Germany over the el-Masri affair and refusing to comment, the US Defense Secretary Condoleezza Rice stated: “I believe this will be handled in the proper courts here in Germany and if necessary in American courts as well”.

When a suit was brought before a US court, the government invoked the so-called “state secrets” privilege, which applies in US law when there is a ‘reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged.’ The government argued that the “entire aim of the case is to establish state secrets,” and the case was dismissed in its entirety by the US District Court, affirmed

128 The state secrets privilege applies in US law when there is a ‘reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged’ United States v Reynolds 345 US 1, 10 (1953).
130 United States v Reynolds, supra note 128.
by the US Court of Appeals for the Fourth Circuit.\textsuperscript{131} It ruled that the protection against disclosure was absolute, including against in camera or even ex parte inspection, and rejected any role for the Court in balancing of the need for confidentiality against el-Masri’s need for the information and right to a remedy.\textsuperscript{132} In October 2007, the Supreme Court decided, without giving reasons, to refuse to review the case.\textsuperscript{133}

The same approach has been adopted in several other cases since then. One case brought by Binyam Mohamed and four others against Jeppesen Dataplan, Inc, a Company accused of providing false flight plans and other logistical support for the CIA rendition flights.\textsuperscript{134} Although this time in a narrow decision,\textsuperscript{135} the Court held that the Obama administration’s assertion of state secrets privilege required that the court dismiss the case in its entirety,\textsuperscript{136} and the Supreme Court again denied certiorari.\textsuperscript{137}

Canadian Maher Arar’s case followed a comparable pattern.\textsuperscript{138} Although a Canadian investigation exonerated Arar of all wrongdoing and found he had been tortured at US hands, his case before US courts was dismissed on state secrets grounds. The DC Circuit’s decision en banc to dismiss the case has been said to reveal an interesting difference of view between the majority which suggested that the ‘separation of powers’ doctrine required such deference to the executive, and a strong dissenting decision which suggested, on the contrary, that it is because of the separation of powers that courts must uphold the law and challenge the executive in situations such as this.\textsuperscript{139} As Judge Guido Calabresi wrote in his dissent “I believe that when the history

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\textsuperscript{131} El-Masri v United States, No. 06-1667, March 2, 2007 (U.S. Ct. Appeals 4th. Cir.), at 305.
\textsuperscript{132} El-Masri v United States, supra note 131, at 312. 310 dismissal as his claims and the Government’s defenses could not be fairly litigated without disclosure of secrets absolutely protected by the state secrets privilege. In the district court: El Masri v Tenet, Case 1:05-cv-01417-TSE-TRJ.
\textsuperscript{133} In the Supreme Court: El Masri v United States Case No. 06-1613. For details of the petition lodged before the Inter-American Commission on Human Rights: http://www.aclu.org/pdfs/safefree/elmari_iachr_20080409.pdf; see below ECtHR decision 2012.
\textsuperscript{135} Eg: U.S. Court of Appeals for the Fourth Circuit affirmed on January 23, 2012 confirmed the dismissal of Jose Padilla’s civil suit against Rumsfeld and others for their role in his unlawful detention. The U.S. District Court for the District of South Carolina ruled on February 17, 2011 that an American citizen designated an “enemy combatant” by the executive branch and tortured by government officials could not bring suit to vindicate his constitutional rights. See legal documents on <http://www.aclu.org/national-security/padilla-v-rumsfeld-legal-documents>.
\textsuperscript{136} Mohamed v Jeppesen Dataplan Inc., supra note 134.
\textsuperscript{137} See Supreme Court website: <http://www.supremecourt.gov/orders/courtdorders/051611zor.pdf>. The Court declined without reasons to review the Court of Appeals decision.
\textsuperscript{138} On November 2, 2009, the Second Circuit Court of Appeals en banc affirmed the district court’s decision dismissing the case. On June 14, 2010, the Supreme Court denied Mr. Arar’s petition for certiorari. For relevant documents see <http://ccrjustice.org/arar>.
\textsuperscript{139} See Judge Guido Calabresi’s dissent in the Arar case, which was decided one of four.
\end{flushleft}
of this distinguished court is written, today’s majority decision will be viewed with dismay.” The Appeals Court upheld and the Supreme Court once again refused, despite the constitutional implications for human rights and the judicial function, to consider the case.

These are not proceedings in which courts settled on (or even considered) excluding particular documents, evidence or sources, holding parts of the hearing in camera, or taking other special measures. There has been no consideration of underlying material, difficult balancing of competing concerns, but rather the wholesale vacation of proceedings alleging government misconduct, on the basis of the government’s own assessment that those proceedings might per se damage national security. There is no apparent consideration of the rights of victims in the decision to dismiss the case, and no further avenue for redress. Rendition victims are effectively left, once again, beyond the protection of the law.

State secrecy is not the only impediment to judicial review or access to civil accountability for rendition victims in US courts, should any of them ever get past the state secrets barrier. A further problem that has arisen in relation to claims for relief by victims of torture has been functional immunities. For example, in the case of Shafiq Rasul before the US courts, in which several former Guantanamo detainees sued Defence Secretary Rumsfeld and others for alleged torture at Guantanamo Bay, the Courts accepted the government’s argument that torture could come within the scope of employment and as a consequence afforded immunity from civil suit. In this way the court not only precluded access to justice, but lent respectability to the government’s notion that torture can be part of the official functions of a state official, at least in the context of counter-terrorism.

While the US courts approach to these issues has been particularly extreme, they are not the only courts dealing with the handling of claims of national security in the face of victims’ claims for justice or reparation or accountability.

140 Ibid.
142 E.g. In el Masri, the US Court of Appeals held that the information was subject to the privilege on the sole basis of reviewing a confidential government affidavit, without response from El-Masri and without inspecting the privileged information itself. El-Masri v United States, supra note 131, at 305.
144 Rasul v Myers 512 F.3d 644, 660 (DC Cir 2008) (Rasul I), vacated Rasul v Myers 129 SCt 763 (2008), aff’d Rasul v Myers 563 F.3d 527 (DC Cir 2009) (per curiam).
145 Cf Court of Appeals for the Fourth Circuit decision, 2 November 2012 on immunities in another (non-war on terror) context against former Somali General Mohamed Ali Samantar rejecting the absolute deference to the executive branch in determining immunity for “official acts.”
Chapter 11

The Parliamentary Assembly of the Council of Europe report on secret prisons criticizes six European states for undue resort to state secrecy or national security to impede investigations.146 The Italian experience in the criminal case concerning the Abu Omar abduction in Milan exemplified a broad invocation of state secrets and the role of the courts in grappling, not always consistently, with how to balance such concerns in the public interest. The state secrets doctrine was originally invoked to seek the striking out of a rendition investigation in the criminal case. The Constitutional Court allowed the case to continue but struck out certain documents on the basis of their secrecy, and severely limited the scope of criminal prosecutions.147 However, a few years later, Italy’s Court of Cassation reversed part of the decision thereby ensuring that the prosecution of five senior Italian secret service agents can proceed, despite state secrets claims.148

In the UK there is no state secrets doctrine that would bar litigation, but there too concerns about an overreaching approach to national security emerge.149 The introduction of a ‘closed material proceeding’ for civil cases involving classified information raise doubts about the impact on the judicial process, and also illustrate the ancillary negative effects that litigation can have. In the case brought by Bisher Al-Rawi and five other former Guantanamo Bay detainees against the UK government for its role in their overseas torture, the government asked the court to recognise a common-law rule such that all classified information would be heard in a ‘closed material proceeding to which the plaintiffs would not have access’,150 other than through a ‘special advocate’, who at that moment is no longer allowed to have contact with the plaintiff.151 The divisional court held that it is open to a court to order such a procedure152 But the Court of Appeal reversed that decision and the

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146 Marty Report, 11 June 2007, doc. 11302, at p. 1: criticizes the US, Poland, Russia, Romania, Macedonia. Italy, Germany for using national security and states secrets to impede justice.
148 See Chapter 10.
149 Such concerns have been held to justify the refusal to allow the disclosure of information or documents despite the impact on human rights E.g. Binyam Mohamed v. Secretary of State for Foreign and Commonwealth Affairs [2009] EWHC 152.
150 A ‘closed material procedure’ is a procedure in which a party is permitted to rely on pleadings and evidence without disclosing it to the other(s), and the court may hear the party and consider evidence without one of the parties. See Al Rawi & Ors, supra note 19, Justice and Security Act 2013 (c. 18) UK, and Bank Mellat (Appellant) v Her Majesty’s Treasury (Respondent) (No. 1) [2013] UKSC 38 (‘Bank Mellat’).
151 Al Rawi & Ors, supra note 19, para 2.
152 Al Rawi & Ors. supra note 19.
The Role of the Courts: Human rights Litigation in the ‘War on Terror’

Supreme Court upheld the reversal. The Supreme Court ruled that courts could not order a “closed material procedure,” allowing the government to rely on secret material in closed sessions of the court without statutory authority. Just as has been seen in the habeas litigation, cases can act as a catalyst for better and for worse in terms of rights protection. In this case it prompted the executive to seek such statutory authority, and the Justice and Security Act incorporates a broad procedure for closed civil proceedings in national security cases to which only one party has access to the court or to the evidence, and potentially also closed judgments that can be seen only by one of the parties. Such procedures, and the government’s inclination to over-use of what should be exceptional procedures, has been widely criticised, including by the Supreme Court.

Developing practice towards justice and accountability in respect of renditions, set out at Chapter 10, are likely to spawn a more developed body of practice in the years to come. One encouraging example of a decision that served to clarify the true nature of rendition, confronting the government’s dismissal assertions that it was simply a deportation of an unlawful alien, was the case of Khalid Mahmood Rashid before the Supreme Court of South Africa.

In the first few years after victims of the ERP emerged, attention focused on national courts (in a range of states including the US, UK and Egypt), often to no effect. Where rendition cases have failed in domestic courts, notably in the US, or where states have failed to investigate and hold individuals to account as they are required by human rights law to do but as few European states have yet to do, victims have pursued justice elsewhere, using a range of transnational litigation possibilities. Such regional and international

154 See Justice and Security Bill 2013 in Chapter 7B.
155 See Bank Mellat, supra note 150.
158 See in Chapter 10 and stinging criticisms from international human rights experts and bodies. See Ch 10 for detailed examples of what states have and have not done and the range of forms of responsibility by states.
159 Criminal court responses, including initiatives investigating and potentially prosecuting US agents and officials in foreign courts is not addressed here; see e.g. Ch 8 on the role of Spanish and other courts.
cases have begun in earnest in recent years. As noted in Chapter 10, the first judgment was handed down in the *el Masri v Macedonia* case,\(^{160}\) while international proceedings are now pending before most human rights fora, including the Inter-American Commission on Human Rights,\(^{161}\) the African Commission on Human Rights,\(^{162}\) and, in particular volume, the ECtHR\(^{163}\) among others.\(^{164}\) Given the extent of the obstacles in the domestic context, these regional or international bodies may represent a unique opportunity for victims to have their case heard and ultimately to secure some vindication of their rights.

### 11.5 ISSUE 5: LITIGATING ‘TERRORIST’ LISTING AND LABELING

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

Perhaps the most obvious manifestation of this phenomenon are the various terrorism “lists” established at the national, regional and (under the Security Council’s watchful eye) international level. While systems and safeguards vary, key human rights concerns emerge from the lack of transparency around the reasons for inclusion on them, and the lack of meaningful opportunity to challenge such inclusion.\(^{165}\) Litigation has had a crucial role to play in calling governments – and to some degree, at least indirectly, the Security Council – to account and to provide a degree of judicial oversight to this potentially arbitrary practice.

Significant success, with wide ranging impact, was had by litigants before the European Court of Justice (ECJ). In 2006 the Court held that individuals

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163 These include El-Masri’s detention by Macedonian border officials, Abu Zubaydah’s torture at a secret site in Lithuania, Abu Omar’s abduction in Italy, al Nashiri’s detention at the Polish and Romanian secret detention site; *El-Masri v Macedonia* (App no 39630/09) ECtHR 8 October 2010; *Nasr and Ghali v. Italy* <www.interights.org/zubaydah>; *al Nashiri v Poland and Romania*, <http://www.opensocietyfoundations.org/litigation/al-nashiri-v-romania>.


165 See Chapter 7B.1 ‘Security v Human Rights Post 9/11’ or and Chapter 7B.8 ‘Listing and Delisting’.
associated with a banned organization had the right to reasons for their listing, to effective judicial protection and to be heard.\textsuperscript{166} Though disputed by the respondent state, the ECJ confirmed that while the common EU position which had led to the listing in the first place could not be reviewed by the Court, the decision to include a particular organization on the list could. This robust approach was maintained by the Grand Chamber of the ECJ in respect of listings authorized by the Security Council in the seminal \textit{Kadi} decision where the ECJ rejected the argument that it could not review the lawfulness of EU sanctions on the basis that they were intended to give effect to SC resolutions.\textsuperscript{167} The ECJ found that the EU decision to give effect to the SC resolution’s sanctions list, without affording individuals the opportunity to challenge, was inconsistent with fundamental rights of judicial oversight and struck it down.\textsuperscript{168} The Court recognized the need for the judiciary to ‘accommodate on the one hand legitimate security concerns… and, on the other hand, the need to accord the individual a sufficient measure of procedural justice.”\textsuperscript{169}

The \textit{Kadi} case provoked controversy and acclaim in perhaps equal measure for its wide-reaching implications, effectively introducing a measure of judicial review (albeit indirect) of measures taken pursuant to Chapter VII obligations.\textsuperscript{170} A further indirect outcome of the litigation has been the improvement in the delisting procedures,\textsuperscript{171} including the establishment of an ombudsperson to recommend delisting under 1267 sanctions regime. Although her appointment may have been an attempt to avoid further judicial oversight by having an ‘alternative’ mechanism, without judicial powers, she has recom-

\begin{enumerate}
\item \textsuperscript{166} Case T.228/02, Organisation des Modjahedines du peuple d’Iran, v Council of the European Union, United Kingdom of Great Britain and Northern Ireland. Judgment Of The Court Of First Instance (Second Chamber) 12 December 2006.
\item \textsuperscript{167} \textit{Kadi} and \textit{Yusuf} were unsuccessful challenges at first instance, 29 Case T.306/01 \textit{Yusuf and Al Barakaat International Foundation v Council and Commission} [2005] ECR II-3533, (‘\textit{Yusuf}’), paragraph 73, and Case T.315/01 \textit{Kadi v Council and Commission} [2005] ECR II-3649, (‘\textit{Kadi}’). The challenges were won on appeal: Cases C-402/05 P and C-415/05 P, judgment of Grand Chamber 3 September 2008, at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-402/05>. The Court refers to the standards of the ECtHR judgment in \textit{A & Others v United Kingdom} cited earlier to conclude that the applicant was not in a position to mount an effective challenge.
\item \textsuperscript{168} It provided certain benchmarks for ensuring meaningful opportunity to challenge. See paras 342-344.
\item \textsuperscript{170} See Chapter 7B.1, ‘Security v Human Rights Post 9/11’ and Ch 7.B.8 ‘Listing and Delisting’. Note the discussion on Art 103 and the pre-eminence afforded to obligations under Chapter 7 over other obligations under the Charter. This decision appears to require EU states to meet their human rights obligations even where it may conflict with the obligations under SC resolutions by considering the two as separate regimes. For those in favor and against see Rosas in de Frias Samuel and White, supra note 169, at p. 99-100.
\item \textsuperscript{171} \textit{Kadi} also lead to enhancing the ‘de-listing’ procedure, See Ch 7B.1.
\end{enumerate}
mended and brought about significant delistings in practice,\footnote{Chapter ‘Fair process and the Security Council’, a case for the Office of the Ombudsperson’, K. Prost, in Frias, White and Samuel, Counter-terrorism, note 177.} and enhanced transparency considerably.\footnote{See Chapter 7B.1 ‘Security v Human Rights’.} The due process deficit of sanctions regimes remained stark,\footnote{The ombudsperson applies only to the 1267 sanctions list, relevant to counter-terrorism but note that although 1267 has been subject of most debate, other lists have no ombudsperson and less accountability.} however, and when the Kadi case came back before the Court a second time the ECJ had not changed its position that the sanctions orders were invalid, despite certain improvements and the existence of the Ombudsperson’s position.\footnote{See Kadi, C-584/10 P, C-593/10 P and C-595/10 P, ECJ, Appeal Judgment, 18 July 2013.}

The rationale of the Kadi case has been followed on numerous occasions since then,\footnote{On the nature, scope and questionable legitimacy of some of those measures see Chapter 7B.1 and 7.} as similar issues have come before human rights courts and bodies. For example, the case of Sayadi & Vinck before the Human Rights Committee “exposed the problems of wrong listings and the glaring deficiency of the delisting procedure” for the 1267 sanctions regime.\footnote{H. Keller and A. Fischer, ‘The UN Anti-terror Sanctions Regime Under Pressure’, 9:2 H.R.I.Rev. (2009) 257 at 260.} The Belgian couple alleged to have provided financial and other assistance to individuals associated with Al-Qaeda were added to the 1267 sanctions list in 2003 at the Belgian government’s behest, but when the Belgian government requested delisting (in one case following a court order) the request was declined. The matter then went before the HRC, which found Belgium responsible for the action that lead to them being on the list.\footnote{Sayadi v. Belgium, Human Rights Committee, UN Doc. CCPR/C/94/D/1472/2006 (Dec. 29, 2008) The HRC communication following a judicial decision in their favor from the Brussels Court of First Instance and two unsuccessful delisting requests by the Belgian government on their behalf; ibid.}

Most recently, in Nada v Switzerland, the European Court of Human Rights\footnote{Nada v Switzerland, Application no. 10593/08, ECtHR, Grand Chamber Judgment, 12 September 2012.} found that Switzerland had violated a listed applicant’s rights under Article 8 (respect for private and family life and for the home).\footnote{For the majority, the state had discretion in the implementation of the resolution, but this was controversial – see Joint Concurring Opinion of Judges Bratza, Nicolaou and Yudkivska at para. 5 – but not germane to the findings.} The Court found that, despite the Council resolution imposing sanctions on the individuals in question, there were steps the state could have taken to avoid or minimize the violations arising from Council-imposed sanctions and by failing
to do so the state had infringed on rights in a manner that was not necessary and proportionate. It was suggested that Switzerland could have ‘adapted’ the sanctions regime to the applicant’s individual situation thereby mitigating the effects on the applicant. Building on the ECJ case, it found that the state could and should have provided mechanisms for review of the measures and the failure to do was an unlawful denial of the right to a remedy.

Domestic courts have also given insight into the shape of this domestic judicial review, and have on numerous occasions ordered the delisting, or measures to bring about delisting. In 2008 for example the UK Court of Appeal upheld a decision of the Proscribed Organisations Appeal Commission requiring the removal of an Iranian opposition group from its blacklist of terror organizations. The case illustrates the willingness of the courts, assessing in detail the facts and evidence available, to challenge the Secretary of State’s determination that the organization was concerned in terrorism. The Court was satisfied that the organization was no longer engaged in violence, and it confirmed that proscription could not be justified on the basis that an organization had been engaged in violence and might at a future date reacquire the capacity and intent to so engage.

Another national decision that showed the national courts willingness to reject measures despite their having been authorized by the Security Council is Abdelrazik v Canada where a Canadian court found the refusal to allow the applicant to return to Canada a violation of his rights under the Canadian Charter of Rights and Freedoms. One judge was so forthcoming in his rebuke of the UN listing regime as to describe ‘the 1267 Committee regime as a denial of basic legal remedies and untenable under the principles of human rights’, which he described as ‘a situation for a listed person not unlike that of Josef K in Kafka’s The Trial...’ This and other cases provides an example of courts

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181 E.g. the state could have informed other states and the Security Council’s Sanctions Committee that it had closed an investigation years previously concluding that there was no reasonable suspicion against the applicant.

182 Nada, supra note 179, para. 196.

183 Ibid., para. 212: “... there was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions.”

184 The Court criticized the fact that “the applicant did not have any effective means of obtaining the removal of his name from the list ... and therefore no remedy ...” in violation of Article 13 of the ECHR. Ibid., para 213. As noted in Ch7.B.1, it is unclear what will happen if domestic courts find that such a right would in fact conflict with obligations under SC resolutions.

185 On the latter, see Sayadi case discussed earlier where Belgian courts ordered the government to seek delisting at UN level.

186 Secretary of State for the Home Department v Lord Alton of Liverpool and Others, Judgment, 7 May 2008 Court of Appeal, EWCA Civ.

187 Abdelrazik v Canada, 2009 FC 580, (Federal Court of Canada).

188 Ibid, para. 51 and 53; see Rossas, supra note 169, at p. 100.
questioning the necessity of measures, willingness to enter into merits and exposes flimsiness in the basis for listing of individuals or groups or the inadequacies of the listing and delisting system.189

The terrorism label can have other far-reaching consequences beyond listing, not only for the alleged terrorists themselves, but for others associated with them.190 Many manifestations are seen throughout this book. A case already explored is the case of Holder v Humanitarian Law Project, which upheld the notion that providing humanitarian support and education on IHL could constitute ‘material support for terrorism’ – an example of courts applying anomalous laws reaping anomalous results.191

Another unusual illustration is found in a case litigated in the ECtHR on behalf of the family of killed Chechen leader Maskhadov.192 Laws in the Russian Federation that were applied in this case stipulate that if persons deemed to be terrorists are killed by the state in the course of counter-terrorist operations, their bodies will not be returned to their families. This draconian measure targets families who are deeply affected by being unable to duly observe a mourning period, pay their last respects and bury their family member in accordance with Islamic religious requirements, which according to their religious tradition may ultimately lead to the deceased being denied access to heaven. While there is no meaningful relationship between the prevention of terrorism and such a measure, it is justified by reference to the deterrence of terrorism. This case, which has been declared admissible by the ECtHR, provides an example of the blanket use of the “terrorist” label to justify otherwise unacceptable special forms of treatment, and to punish those “associated” with persons accused of ill-defined acts of terrorism.

A positive example of courts curbing the creeping effect of the notion of guilt by association arose in an Australian case of Haneef v. Minister for Immigration and Citizenship (Federal Court of Australia).193 The case concerned Mohamed Haneef, whose visa was revoked by Australian authorities on the grounds that he was the second cousin of one of the men who had crashed a car into Glasgow airport’s terminal building, had stayed in the same hostel and, on leaving the country, had left him his mobile phone.

189 The principles to emerge from the courts’ consideration of these cases are set out in Chapter 7B.1 ‘Security v Human Rights.’
190 See Chapter 4 on human rights issues also arising from attempts to criminalize membership of or association with listed groups or organizations. Criminal responsibility must be individual, not collective or objective. See SC Res. 1390 (2002), 16 January 2002, UN Doc. S/RES/1390 (2002), which modifies the sanctions regime originally imposed in SC Resolutions 1267 (1999).
192 Kusama Yazedovna Maskhadova and Others v. Russia, Application No. 18071/05, Judgment of 6 June 2013 (Final on 10 July 2013). The author is counsel with colleagues at INTERIGHTS on behalf of the family of deceased Chechen leader Aslan Maskhadov.
In the Australian courts the authorities argued that any form of “association” (family or other) with persons accused of this sort of criminal activity was enough to fail the “character test” laid down in Australian immigration law. The courts rejected this contention and provided a fitting rebuke to the spreading notion of guilt by association and the dangers of it. One judge questioned whether he might also fall within the category of persons having associated with terrorists, given his former professional association as a barrister (answered yes). He held that, for the law to apply, the “association” must itself be of a criminal rather than of a family or innocent nature. The need to tighten up the approach to ‘association’ was upheld on appeal.194

Ultimately Mr. Haneef was granted damages, and an enquiry into his case has been launched.195

Examples abound of the misplaced resort to the rhetoric of terrorism and the ‘war on terror’ in the context of a broad range of human rights litigation. Take the observations of the government of Botswana in a case before the African Commission on Human and Peoples Rights:

“We wish to recall here the bombings that occurred in London, Madrid and the 2001 events in NY and more recently Egypt. It is against this background that Botswana reminds the Commission that the declaration of Mr Good as a prohibited immigrant was made ‘in the interests of peace, stability and national security’. (…) We have given examples of traumatic results that occur once there is a lapse in dealing with national security issues (…) If the President visualizes a threat to national security, it is wrong for him to wait for the threat to materialize into a national disaster. It is right to state that decisions whether something is or is not in the interest of national security are not a matter for any organ other than the executive.”196

194 Minister for Immigration & Citizenship v Haneef, [2007] FCAFC 203, Federal Court of Australia – Full Court Decisions, 21 December 2007. In an appeal regarding cancellation of a visa that had been issued to Dr. Haneef permitting him to come to Australia and to work as a doctor. The Full Court has agreed with the lower court that a narrower interpretation of “association” than that applied by the government should be taken and have some bearing upon the person’s character. The Court therefore dismissed the Minister’s appeal.

195 In December 2010, Haneef returned to Australia to seek damages for loss of income, interruption of his professional work, and emotional distress. He was awarded compensation from the Australian government for labeling him a terrorist suspect. On 13 March 2008, an inquiry headed by former NSW Supreme Court Justice, the Hon. John Clarke SC was established into the ‘arrest, detention, charging, prosecution and release’ of Dr. Haneef. See http://www.ag.gov.au/Publications/Pages/AustralianGovernmentresponsetoClarkeInquiryintotheCaseofDrMohamedHaneefDecember2008.aspx.

196 Kenneth Good v Republic of Botswana, Decision on the merits May 2010 (47th Ordinary Session of the African Commission on Human and Peoples’ Rights held from 12 – 26 May 2010), Communication 313-05. The government cites the decision of the Supreme Court of Botswana, the highest judicial authority in Botswana, in Kenneth Good v Attorney General Civil Appeal No. 28/2005. The author is one of Professor Good’s counsel in the case on behalf of Interights; brief available at <www.interights.org/good>. The High Court judgment of Botswana is even more illuminating in this regard, referring directly to the importance
One might assume that this case concerned terrorism. In fact it concerned a professor deported for criticizing presidential succession in Botswana. The facts could not be much further removed from the terrorism context. Yet this case exemplifies the phenomenon discussed in Chapter 7 of the extent to which national security, the global terrorist threat and the exceptionalism of the war on terror are being relied upon to set aside human rights in contexts that have nothing conceivably to do with international terrorism.

### 11.6 CONCLUDING OBSERVATIONS: THE ROLE OF THE COURTS AND IMPACT OF HUMAN RIGHTS LITIGATION

The war on terror has been a trying time for the courts. Judicial independence has been compromised, whether through expansion of military or special terrorism courts, or less directly through pressure and criticism of judges overstepping their role in security related cases. Practical and political challenges facing victims seeking to develop and present a case in a climate of secrecy, couple with legal challenges through changes in laws in the terrorism context, or the limited scope for review in the constitutional order itself, which remove or curtail judicial oversight. The judicial role has been variously stigmatized as ‘undemocratic’ or even as a strategy of the weak. In this context, and absent a national remedy, be it political and/or judicial, the availability of remedies outside national jurisdictions have proved increasingly significant as the only avenue towards a measure of justice and accountability. International litigation processes are replete with their own limitations and challenges, though in some ways their rules are designed to ensure that it is possible for victims to challenge action by the state even in security-related contexts in which violations often arise in practice. Clearly, international litigation is no panacea and no replacement for effective national courts; indeed

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197 These include excessive delays, varying but relatively poor record of implementation, and jurisdictional limitations that mean cases can be brought only against those states that ratify particular treaties or accept the body’s jurisdiction, and in respect of wrongs within that court or body’s jurisdiction. The individual has to be within the jurisdiction or effective control limiting the ability to adjudicate claims against states for ‘aiding and assisting’ violations by other states abroad. The first rendition case brought to that Court by ERP victims was found inadmissible because Bosnia was not a party to the ECHR at the time that six detainees were transferred to U.S. custody: Boumediene and Ors v Bosnia, Appl. No. 38703/06 (Eur. Ct. H.R. 18 November 2008).

198 Legal presumptions and shifting burdens are designed to ensure that litigants can establish their case e.g. where a prima facie case is established but further evidence lies predominantly within the grasp of the respondent state; see for example, Carabulea v Romania (App no 45661/99) ECHR 13 July 2010; Saadi v Italy (App no 37261/06) ECHR 28 February 2008 para 129; Astamirova v Russia (App no 27256/05) ECHR 26 February 2009 paras 70-81. Courts also assess the genuine need for restrictions on national security grounds.
the objective of such litigation is very often, ultimately, to impel the national process.

In recent years, across diverse systems, there has been a burgeoning of human rights litigation on the national and international levels. As rights have been systematically violated and political solutions have proved elusive, it has been to the courts that victims have turned to give effect to their legal rights. Litigation pursues many goals, for the litigants and towards broader social, legal, political or institutional change, some of which may be achieved by the mere prospect of litigation, others in the course of it, while some will only be achieved long after judgment is rendered. While caution is due in trying to draw conclusions from such wide-ranging practice, pursuing different goals and addressing different issues in diverse legal systems and cultures, it is submitted that human rights litigation has had an important impact in the counter-terrorism field in recent years on a range of levels.

Impact may, of course, be positive and negative. If the courts have such a ‘light’ review function that they do not address the substance of the wrong, or meaningfully appraise the facts, the existence of judicial review may run the risk of providing an underserved veneer of legitimacy to governmental conduct, without rigorous judicial consideration or offering real protection. This may be seen most clearly in the cowed approach of the habeas courts in the US in recent years, which have been criticized for creating the impression of judicial review, thereby validating to a degree the detention regime, while failing to provide meaningful review in practice.199 There were shadows of such concern in the dissent in the Australian courts’ control orders case for example200 and criticisms of the cowed approach of the habeas courts in the US in recent years prompt similar questions.201

Likewise, inevitably judges may err in their approach to the law, succumb to pressures referred to, or interpret laws so exceptionally in exceptional circumstances that they erode or set back the protection of human rights for others for years to come. As the President of the Israeli Supreme Court J. Barak has noted:

"a mistake by the judiciary in times of war and terrorism is worse than a mistake of the legislature and the executive in times of war and terrorism. The reason is that the judiciary’s mistakes will remain with the democracy when the threat of

199 Al Adahi v Obama above, supra note 40.
200 Thomas v Mowbray, supra note 65, dissent of J. Kirby
201 Al Adahi v Obama, supra note 40, and subsequent alleged refusal to engage with or challenge the facts, questioning whether the role of the courts is always meaningful or may give false sense of legitimacy to a process.
terrorism passes, and will be entrenched in the case law of the court as a magnet for the development of new and problematic laws.202

For victims too, litigation may be ineffective or counter-productive, simply generating unfulfilled expectations,203 or contributing to the further stigmatization and potential re-victimisation in the politically charged debate on the human rights of ‘terrorists’.204

Despite this, and despite the areas where justice for victims remains elusive, it is suggested that the practice of human rights litigation has reinforced the critical role for the courts in human rights protection in recent years. The following are some of the ways in which litigation may have had, or in some cases may yet have, a positive effect.

First and most obviously, litigation has had a very real effect on individuals’ lives, including cessation or prevention of violations, for example by securing oversight of conditions in detention, preventing transfer to violations or seeking a stay of execution pending consideration of the individuals case.205 The very fact of judicial oversight is a deterrent to abuse,206 just as the mere prospect of litigation has forced governments to drop unfounded and unaccountable accusations made against individuals in the heat of the political moment.207

In this respect, simply taking a human rights violation to court may assist in the framing of an issue as a matter of law, not only politics. As such it reasserts the principle of legality and the rule of law in the highly politicized discourse around terrorism and security. Critically, the cases explored indicate, to varying degrees, the existence of a check on executive action, and the prospect of government accountability. This is seen in reminders that “a state of war is not a blank check for the President” or by the willingness of courts in cases such as Belmarsh or Haneef to subject the determination of what was necessary for national security to close scrutiny. As a rebuke to the executive

203 E.g. this may emerge from unprincipled approaches to denying compensation to victims (eg McCann v UK or Makhadov v Russia) above, or through slow (or no) implementation.
204 On e.g. political backlash towards ‘terrorist’ applicants asserting their human rights that has afflicted some coverage and debate around certain ECHR cases in recent years (see for e.g., Othman v UK, supra note 114).
205 See e.g. Interights and EIPR (on behalf of Sabbeh et al) v Egypt, the Taba Bombings case where Egypt agreed to suspend the death penalty pending IACcommHR proceedings, which ultimately found there had been no fair trial. A retrial is pending.
206 This is reflected in judicial review of detention being treated in international law as a safeguard inherent in the prohibition on torture itself.
207 As noted above, allegations against Abu Zubaydah the ‘number three’ in al Qaeda, yet these were dropped: see e.g. Abu Zubaydah v Lithuania and v Poland, ECHR applications at www.interights.org/zubaydah.
when it has failed in its role as primary protector of rights, this can be critical in reasserting the democratic credentials of the system, which are often lost through the illegitimacy of the conduct impugned. It is in the face of political pressure and public outcry, as has characterized the political debate around terrorism in many states, that a dispassionate judicial response is most needed.

Litigation can also serve as a catalyst to change law or practice. In some cases, such as the changes in law and policy following the Belmarsh judgment, this flows directly from the judgment condemning the violation. In others, it is difficult to tell to what extent, if at all, the irritant effect of litigation contributed to shifts in practice, such as the return of UK nationals from Guantánamo following unsuccessful litigation seeking to obligate the state to intervene on their behalf. Courts may serve as democracy alerters. The interplay between judicial and political branches is such that a signal from the former can be a catalyst to a more proactive approach by the latter. Ultimately, the result may be legislation with a positive or negative human rights impact, as seen in response to the litigation on the UK’s ‘closed material proceedings’ or the right to habeas of Guantánamo detainees, which ultimately prompted rights-unfriendly legislation. Exposing the deficit forces the debate and consideration that is part of the democratic process. Courts can only provide the spectre of further review if the measures adopted go beyond the legal framework. The course of litigation can also be significant in simply exposing the true nature of particular policies and practices, and may lead states to clarify their own policies or articulation of them as litigation unfolds.

Litigation may also prompt or support the work of other complementary independent entities. In one UK case for example victims sought to use litigation to seek to compel the government to conduct an inquiry, ultimately without success. In another German case, however, the court found that the rights of parliamentarians had been violated by the government’s ‘sweeping invocation’ of state interests as a basis to refuse to answer questions of a parliamentary inquiry. Unfortunately (and somewhat ironically), delays

208 Some other systems allow courts themselves to strike down legislation.
210 See e.g. Al-Skeini case, supra note 78, in which the UK government shifted its position in the course of litigation, as regards the applicability of the ECHR to individuals detained by UK officials in Iraq and allegedly tortured in detention.
211 See e.g. Al-Skeini case, supra note 78, in which the UK government shifted its position as regards the applicability of the ECHR to individuals detained by UK officials in Iraq and allegedly tortured in detention.
212 See, e.g., ‘High Court Challenge over Iraqi Civilian Deaths’, The Guardian, 28 July 2004, available at: http://www.guardian.co.uk/Iraq/Story/0,2763,1270930,00.html, where the families of Iraqi civilians allegedly killed by British troops challenged the UK Government’s refusal to order independent inquiries into the deaths.
213 A German Constitutional Court decision which came out on the same day the parliamentary inquiry report, found the German government to have violated the Constitution by failing
in rendering judgment limited any concrete impact on parliamentary access to the information in question, though the impact of the decision may be felt in the future. A different example of the catalytic effect of litigation on other processes lies in the establishment and extension of the of the office of Ombudsperson with powers to review the al-Qaeda Security Council sanctions lists and ‘recommend’ delisting.214

As discussed in Chapter 1, judgments may themselves develop or clarify the law through jurisprudence, for the better protection of human rights, as seen in several if the issues addressed above, such as in relation to the scope of refoulement obligations, extra-territorial application of human rights, or the nature of safeguards against torture. Or, as is often the case in the context of the war on terror, they may simply serve to reinforce established principles that have increasingly been cast in doubt, as in the Saâdi judgment.215 The challenge in many of the cases highlighted has been to hold ground rather than to advance the protection of human rights as such; in other words, to win back gains that were accepted years ago, once thought secure but rendered vulnerable in the course of the war on terror.

Persuasive inter-judicial messages can also be sent transnationally, as seen, for example, in the unusually robust judicial rebukes by the English Court of Appeals, of the US government’s refusal to allow disclosure of information in the Binyam Mohamed case,216 or of Guantánamo Bay detentions in the Abbasi case.217 Litigation also opens legal systems to the cross-fertilization of international and comparative perspectives through amicus interventions, as seen the unprecedented level and nature of interventions before the Supreme Court in the Guantánamo litigation for example.218

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214 The Office of the Ombudsperson was created by SC Res. 1904, adopted on 17 December 2009, and its mandate was extended by Res. 1989, adopted on 17 June 2011. On the procedure and its positive effects, as well as limitations which fall far short of the requirements of human rights law, see Chapter 7B7, ‘Listing and De-listing’, below. Note other sanctions (not relevant to this study’s focus on terrorism) lists have no such built-in process and less accountability.

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

216 The Appeals Court in Mohamed case: “we did not consider that a democracy governed by the rule of law would expect a court in another democracy to suppress a summary of the evidence contained in reports by its own officials or officials of another State where the evidence was relevant to allegations of torture and cruel, inhuman or degrading treatment, politically embarrassing though it might be.”

217 R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs, supra note 19, where the English Court of Appeal criticized the system of Guantanamo detentions in unusually strident terms. See also e.g. the indirect call from UK courts to the ECHR to clarify the law on extra-territoriality in Al-Skeini.

218 Amicus interventions appeared from such diverse quarters as the British House of Lords or Israeli military lawyers.
Moreover, practice in this area facilitates critical assessment of questions regarding the proper rule for the third arm of state on the protection of the rule of law and individual rights. Judicial deference has unsurprisingly been the order of the day, but to differing degrees and effect. One may ask whether the US Supreme Court could and should have decided whether detainees have the basic right to habeas corpus when the matter first came before it in 2004. At what price in terms of judicial efficiency in the administration of justice – and protection of individuals – came the virtue of judicial restraint? But so far as jurisprudence reflects and deliberates on the thorny issue of the role of courts in determining such matters, and on the relationship between political branches and the judiciary, it may ultimately contribute to and enrich our understanding of the separation of powers and the democratic judicial function.

In many other cases too, the judiciary has been deferential, resisting questioning the executive’s determination of the existence of ‘threats,’ as exemplified by the finding that the existence of an ‘emergency’ or of ‘terrorist threats’ is in principle susceptible to judicial oversight, in practice the Courts have generally refused for example to question executive assessment.\(^{219}\) However, when particular practices have come under scrutiny, the courts in diverse systems have often and increasingly proved themselves willing – in some cases promptly, in other cases after painstaking process – to criticize the legitimacy, necessity or proportionality of particular measures.\(^{220}\) These processes have served to realign the balance between security and human rights, as well as between the executive and the judiciary’s democratic functions.\(^{221}\) It has been suggested that litigation of this type provides the ‘potential for judges to educate the public about the real meaning of democracy’\(^{222}\).

Another level on which human rights litigation has had an impact is in securing access to information and in prizing open facts, sometimes in the face of a wall of state secrecy. The right to truth is increasingly accepted in international law, recently described by the European Court in the first extraordinary rendition case to be handed down \((el\ Masri v\ Macedonia)\) as attaching to the individual and to society more broadly.\(^{223}\) Litigation may have this as its goal. This has been the case for example in UK cases pursuing access to military files,\(^{224}\) or confirmation of what the government knew about

\(^{219}\) They have shown reluctance to make determinations that may impact on security, in deference to the political arms better positioning to assess security needs. See for example A&Ors, earlier on the existence of an emergency. Note L.Hoffman’s dissent in the House of Lords that the nation was not under threat from al Qaeda. See Chapter 7B.3 ‘Derogation and emergency post 9/11’. See also Thomas v Mowbray in Australian courts, supra note 70.

\(^{220}\) See discussion under Arbitrary Detention, Control orders, and Listing and Labeling, earlier.

\(^{221}\) See e.g. careful and difficult ‘balancing’ by the judiciary in cases concerning access to secret evidence.

\(^{222}\) Max Du Plessis, EHRLR, supra note 164.

\(^{223}\) El Masri v Macedonia, supra note 168.

operations abroad,\footnote{Cases of Omar Awadh Omar, Habib Suleiman Njoroge and Yahya Suleiman Mbuthia v Secretary of State in the High Court of England and Wales, [2012] EWHC 1737 (Admin), The plaintiffs were rendered from Uganda to Kenya, but the court upheld the UK government’s right not to require its security services to disclose national security information.} and compelling the government to share information with the public\footnote{Binyam Mohamed v Foreign and Commonwealth Office, 30 July 2009, revised judgment and on 16 October 2009, the High Court held that seven retracted paragraphs of their initial judgment containing summaries CIA documents relating to Binyam’s ‘treatment’ should be made public. On the 10th of February 2010, the Court of Appeal dismissed David Miliband’s appeal and ordered the publication of seven paragraphs that the Foreign Secretary had sought to suppress.} or with a criminal defendant.\footnote{In the Mohamed case UK courts required the government to provide Mohamed with information that may have been relevant to any eventual trial by military commission planned at the time by the US.} Particularly noteworthy is the FOIA (Freedom of Information Act) litigation in several states\footnote{See e.g. Romanian FOIA request that elicited important information on rendition flights and the covering up through false flights plans and other means.} including the US which has had a measure of success,\footnote{See e.g. Associated Press v. United States Department of Defense, 498 F. Supp. 2d 707 (S.D.N.Y., 2007) and Center for National Security Studies v. Dep’t of Justice, 331 F.3d 918 (D.C. Cir. 2003) (cert denied, 540 U.S. 1104 (2004)).} and in Romania and Poland for example, which have revealed crucial information on how the CIA operated in close cooperation with other states, including through false flight plans and cover-ups.\footnote{See e.g. official documents disclosed by the Polish government through FOIA requests in Poland. ‘Explanation of Rendition Flight Records Released by the Polish Air Navigation Services Agency’. OSII and HFHR, at http://www.therenditionproject.org.uk/pdf/PDF%20126%20Flight%20data%20Poland%20FOI%20%20HFHR%20Explatory%20document].pdf.} Canadian litigation where the government was compelled to produce information or evidence in relation to proceedings in another state may be another example.\footnote{Canada (Justice) v. Khadr, 2008 SCC 28,23 May 2008; the Canadian Supreme Court ruled that the government had violated Canada’s Constitution and its international obligations by transmitting to U.S. officials information resulting from Canadian officials’ interviews of Omar Kadhir at the Guantánamo Bay detention centre. The Court took the unusual step of ordering Canadian officials to allow Mr. Kadhir access to records of his interrogations with Canadian agents for use in preparing his defense before the Guantánamo Military Commission.} In many other cases this unearthing of information may be a by-product of legal cases, but particularly critical in counter-terrorism where victims may face a wall of secrecy, or indeed ‘concerted cover-ups’ as has been reported in relation to rendition. At a minimum litigation draws out government’s positions – as seen, for example, in the shift in positions of the UK government in the course of the \textit{Al-Skeini} case – as they engage as parties and adjust their positions in the course of litigation.

Attacks on the role of the judiciary, whether in the extreme form of punishing judges that find against the government and replacing them with more compliant variants, or the more nuanced pressure on governments not to
interfere in political or democratic processes despite their effect on human rights, are bad for the rule of law. But with them has come a reassertion of the essential role of the courts, and the importance of judicial independence, in times of crisis or emergency. Likewise one might say that the extent to which judicial review has been denied or curtailed, has led to a reassessment and an outpouring of recognition for the critical nature of judicial review, for the individuals affected and for the rule of law. It may ultimately be the case that the practices and the challenges of the war on terror lead to a reinforcement of the role of the judiciary in times of crisis and emergency.

Ultimately the impact of strategic litigation on human rights issues generally lies in its gradual contribution to social change. This level of impact eludes measurement. There has, for example, been a shift in public opinion (national and international) on Guantanamo, that preceded the policy shift, and it may be that litigation may have been an important contributor to that. What is undoubtedly true is that litigation has to be understood not in isolation but as one small piece of a much bigger and more complex puzzle. If it contributes to historical clarification of facts and responsibility, plays a role in enhancing our understanding of wrongs and enriching the democratic debate it may, if we are receptive to learn, contribute to guarantees of non-repetition in the future.

Finally and perhaps most importantly, real cases serve to tell the victims’ stories. They provide often graphic illustrations of what euphemisms such as “extraordinary rendition” and “enhanced interrogation techniques” mean to human beings like you or I. Judgments validate those stories and experiences. They provide a vehicle for recognition of wrongdoing and ‘reparation’ – long recognized as fundamental yet drastically neglected as too controversial in the terrorism context.232 One of the essential characteristics of the war on terror has been the attempt to put certain people beyond the reach of the law. Litigation can be a tool, as one English judge put it, not for transferring power from the executive to the judiciary, but for transferring power from the executive to the individual.233 If any particular case can bring an individual back into the legal framework, and reassert the individual as a rights bearer and human being, then perhaps that is impact enough.

232 See Chapter 7A on the diverse forms of remedy and reparation, including recognition. In other contexts we hear ‘victims cannot be forgotten,’ yet the stigmatization and the simplistic dehumanization of individuals into ‘goodies and baddies’ post 9/11 has meant that they are – even those erroneously – categorized as associated with terrorism.

233 Dame Mary Arden has stated that “the decision in the A case should not be misinterpreted as a transfer of power from the executive to the judiciary. The position is that the judiciary now has the important task of reviewing executive action against the benchmark of human rights. Thus, the transfer of power is not to the judiciary but to the individual”. (2005) 121 L.Q.R. at pp. 623-624 in A. T. H. Smith, ‘Balancing Liberty and Security? A Legal Analysis of United Kingdom Anti-Terrorist Legislation’, Eur J Crim Policy Res (2007) 15: 75-83.