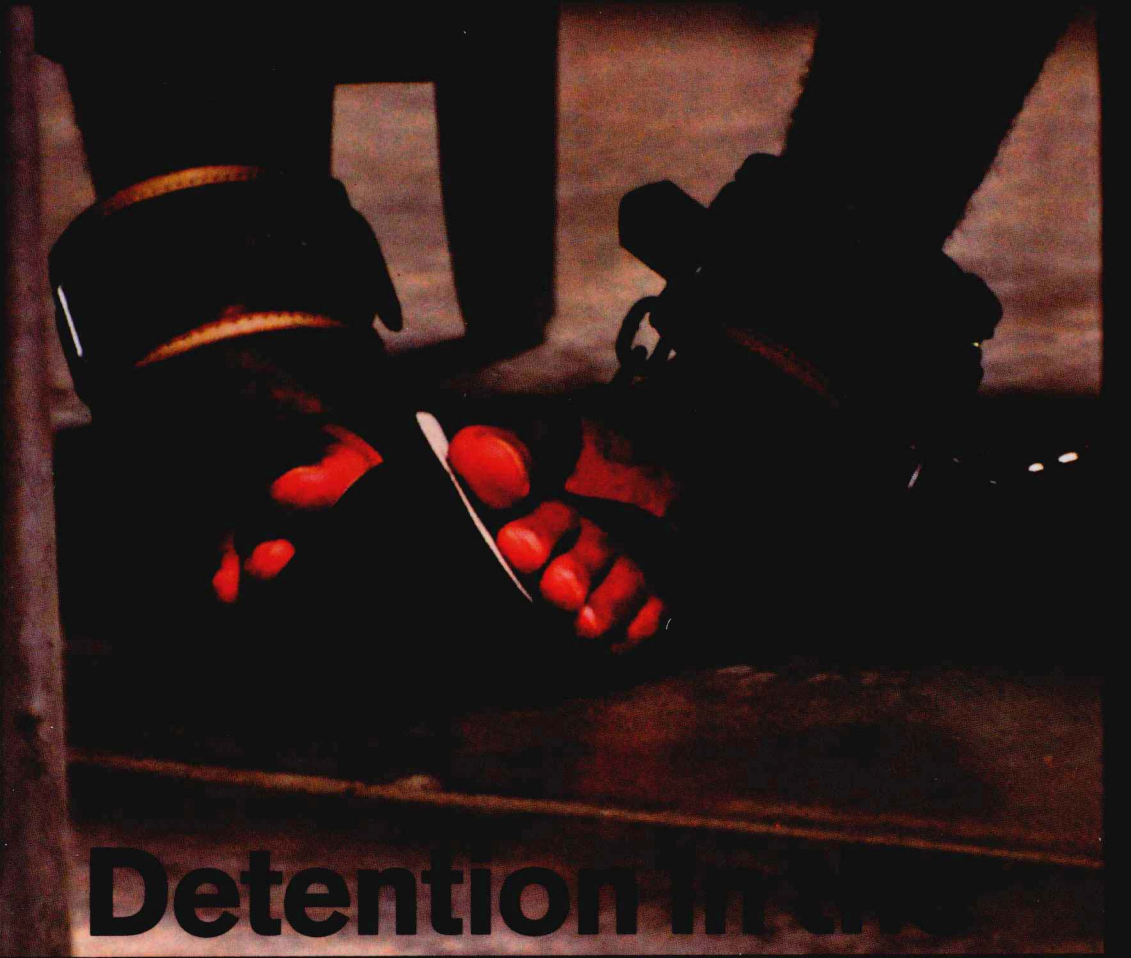

Detention in the 'War on Terror'

Can Human Rights Fight Back?

Fiona de Londras

CAMBRIDGE

DETENTION IN THE 'WAR ON TERROR':

Can Human Rights Fight Back?

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CONTENTS

Introduction

> *It is when the cannons roar that we especially need the laws . . . Every struggle of the state – against terrorism or any other enemy – is conducted according to rules and law. There is always law which the state must comply with. There are no 'black holes'.*[1]

Since the attacks of 11 September 2001, international terrorism[2] has emerged as a dominant concern in both domestic and international law and politics. The scale of the difficult questions that face democracies simultaneously trying to achieve security and maintain the principles of liberal democracy in the light of a significant terrorist attack is reflected not only in the emergence of the concept of the 'War on Terror' but also in the amount of law, literature and reflection that it has espoused. The attacks also ushered in an important change to the American psyche: they made Americans feel vulnerable, and they made American politicians strongly conscious of a popular demand for security to soothe that

[1] *Public Committee against Torture in Israel et. al. v Israel* (2006) HCJ 769/02, *per* Barak CJ, para. 61.

[2] Although there is a great deal of scholarship concerning the meaning and power of the word 'terrorism' and of the use of the term 'War on Terror', I do not engage with that debate here. Instead I take the word 'terrorism' on its own terms, as understood within the 'War on Terror' as violence emanating primarily from Al Qaeda and associated forces. For the scholarship on the concept and label of 'terrorism', see, e.g., R. Higgins, 'The General International Law of Terrorism' in Higgins, R. and Flory, M. (eds.), *Terrorism and International Law* (1997, London; Routledge), p. 14; B. Saul, *Defining Terrorism in International Law* (2006, Oxford; Oxford University Press), esp. Ch. 3; C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Trans. Schwab), (1985, Cambridge, MA; MIT Press); C. Schmitt, *The Concept of the Political* (Trans. Schwab), (1996, Chicago; University of Chicago Press); J. Friedrichs, 'Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism' (2006) 19 *Leiden Journal of International Law* 69; W. Lasser, 'Fighting Terrorism in a Free Society' in Slann, M. and Schechterman, B. (eds.), *Multidimensional Terrorism* (1987, Boulder, CO; Lynne Reiner Publications), p. 111; G. Andréani, 'The "War on Terror": Good Cause, Wrong Concept' (2004–05) 46 *Survival* 31.

vulnerability.[3] Americans were not alone in this: we *all* felt vulnerable in the wake of these attacks. Any of us observing the events of that day unfold would be hard pressed to forget the slow dawn of realisation that nothing would ever be the same again. The US had been attacked on its own soil. It had been rocked to its core and anyone who saw the towers of the World Trade Center fall must surely have been struck by the sheer audacity of the attack; of hijacking civilian aircraft and deliberately flying them into buildings in which people were beginning their working day. How could we possibly protect ourselves from such violence? What divided us from those passengers, those office workers and cleaners, those police and fire officers? Nothing did – nothing more than pure luck.

There is a tendency sometimes for us now, ten years after the event, to subscribe this kind of retelling to a file marked 'gullible melodrama' and instead to focus critically on the nature of the response. But regardless of what has happened since – of which more presently – we should recall the frailty and vulnerability that those events made us feel. This was true whether we resided in the US or not; it was perhaps particularly true for people such as Tony Blair who was Prime Minister of a country that not only had a close relationship with the US but was itself emerging from a long period of terrorist violence. The stage for some kind of action was set. That this action would end up lasting for a decade or more might not have been foreseeable, but that it would involve some kind of counter-terrorist detention perhaps was. After all, internment or preventive detention of suspected terrorists has long been a feature of counter-terrorism and responses to other kinds of violent threat.[4] It is this element of the 'War on Terror' that I am concerned with in this book and, in particular, the models of preventive and interrogative detention

[3] Vulnerability is, of course, a constant and universal state but can be exacerbated by social conditions and events that cause a 'spike'. See M. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008–09) 20 *Yale Journal of Law and Feminism* 1.

[4] D. Cesarani and T. Kushern (eds.), *The Internment of Aliens in Twentieth Century Britain* (1993, London; Frank Cass & Company Ltd.); R. Dove (ed.), *Totally un-English? Britain's Internment of 'Enemy Aliens' in Two World Wars* (2005, Amsterdam; Rodopi); C. Elkner, I. Martinuzzi O'Brien, G. Rando and A. Cappello, *Enemy Aliens: The Internment of Italian Migrants in Australia during the Second World War* (2005, Bacchus Marsh; Connor Court Publishing); K. McEvoy, *Paramilitary Imprisonment in Northern Ireland: Resistance, Management and Release* (2001, Oxford; Oxford University Press), Ch. 8; F. Iacovetta, R. Perin, and A. Principe, *Enemies Within: Italians and Other Internees in Canada and Abroad* (2000, Toronto; University of Toronto Press); R. Cohen-Almagor, 'Administrative Detention in Israel and Its Employment as a Means of Combating Political Extremism' (1996) 9 *New York International Law Review* 1.

introduced in the US and the UK primarily – although not exclusively – under the leadership of George W. Bush and Tony Blair. But if counter-terrorist detention is nothing 'new', what makes the story of its use in the 'War on Terror' worth considering here?

There are a number of factors that distinguish this scenario and make it a worthy locus of study. First is the context in which it has taken place: a context of internationalised security in an age of human rights. The US and the UK embarked upon their counter-terrorist detention policies while bound as a matter of international law by a system of human rights protection more detailed, more sophisticated and (at least rhetorically) more accepted on a normative basis than had existed the last time either state engaged in detention on this scale and of this nature (namely the Japanese-American internment in the US during World War II[5] and internment in Northern Ireland during 'the Troubles'[6]). Second, the world in 2001 was essentially unipolar: the Cold War had ended, the US had achieved a position of great prominence and the 'new' super powers such as India and China had not yet fully emerged. In addition, enormous emerging economies such as India and Brazil did not then (and still do not) hold a permanent seat carrying a veto in the UN Security Council. In this unipolar world the US enjoyed significant prominence and, indeed, would have considered itself able to act in an essentially imperialistic manner as conceived by Hans Morgenthau (i.e. power increasing)[7] with little or no resistance from other states or, indeed, from international human rights law. Third, the coalition of the US and the UK in the context of the 'War on Terror' constituted a powerful hegemon in the highly securitised world. In this context Gramsci's idea of hegemony as a consent-producing process, capable of shaping governing norms such as international laws and standards, explains the nature of this hegemon.[8] As Byers has noted, attempts to

[5] N. Taylor Saito, *From Chinese Exclusion to Guantánamo Bay: Plenary Power and the Prerogative State* (2007, Boulder, CO; University Press of Colorado).

[6] T.P. Coogan, *The Troubles: Ireland's Ordeal 1966–1996 and the Search for Peace* (1997, Boulder, CO; Roberts Reinhart Publishers).

[7] H. Morgenthau, *Politics among Nations: the Struggle for Power and Peace*, 5th edn., (1978, New York; Knopf).

[8] This model has been transposed to the international legal sphere by C. Bell, C. Campbell, and F. Ní Aoláin in 'The Battle for Transitional Justice: Hegemony, Iraq, and International Law' in Morison, J., McEvoy, K., and Anthony, G. (eds.), *Judges, Transition and Human Rights* (2007, Oxford; Oxford University Press), p. 147 at p. 153. Gramsci's original concept of hegemony is perhaps most clearly developed in his Prison Notebooks (1929–35). For a detailed consideration of Gramsci's concept of hegemony see, e.g., D. Litowitz, 'Gramsci, Hegemony, and the Law' (2000) *Brigham Young University Law Review* 515.

change generally applicable rules and norms in order to further state interests is typical behaviour on the part of a hegemon.[9] We will see in this book how the US and the UK have attempted to project their understandings of risk and appropriate state action to transform international human rights law's conceptions of both its applicability and the integrity of its content in relation to the right to challenge the lawfulness of one's detention.

At the beginning of the 'War on Terror' these three factors suggested to one familiar with neo-realist international theory and, perhaps, to the somewhat pessimistic or pragmatic student of international human rights law, that a number of things would happen in respect of counter-terrorist detention. One might have predicted that the US and the UK would either ignore or undermine the rights impacted, especially the right to be free from arbitrary detention and its safeguard right to challenge the lawfulness of one's detention; that they would attempt to project power in a manner that led to the downward recalibration of these rights; and that they would succeed in doing so because of international human rights law's susceptibility to power. One of the main questions I attempt to explore in this book is whether that hypothesis has been borne out in relation to the right to be free from arbitrary detention and, if not, why not.

My starting suspicion was that exploring this hypothesis would reveal a depressing picture of international human rights law bending to hegemonic will. This was not only because of the theoretical predictions that suggested this would happen, but also because of the potency of panic in (counter-) terrorist crises. In times of crisis and fear, panic can play an important and corrosive role in our levels of commitment to liberty and human rights, especially the rights of those considered to be 'other'. On its face, the aftermath of 11 September 2001 had all of the 'vital ingredients' for panic-related repression: a serious but unquantifiable risk, widespread and deeply felt fear, an impulse towards 'security', an 'othered' enemy, a security-conscious populace and a cadre of moral entrepreneurs ready to make the case that increasing their powers would also increase 'our' security. The executive and legislative approaches to counter-terrorist detention in the US and the UK generally displayed a panic-related character. The domestic legal system – or at least what we might term the 'political branches' thereof – had acted more or less as

[9] M. Byers, 'Pre-Emptive Self-Defence: Hegemony, Equality and Strategies of Legal Change' (2003) 11 *Journal of Political Philosophy* 171.

anyone familiar with patterns of counter-terrorist law-making would have predicted. Although there are of course constitutional and political differences between the internal operation of the politico-legal systems in the US and the UK, and indeed these are taken into account throughout this book, there are identifiable commonalities in the ways in which these domestic systems reacted to the perceived or actual terrorist threat that materialised on 11 September 2001. Thus, we will see in Chapters 3 and 4 that extremely repressive counter-terrorist detention measures were demanded by the executive and facilitated by the legislature in both the US and the UK.

Reflecting their hegemonic coalition, the US and the UK attempted to project panic on the international sphere through their representations that Al Qaeda represented a new and uniquely dangerous kind of threat and that international human rights law did not apply at all or, where it did apply, ought to have recalibrated its standards downwards in order to reflect more properly the 'new realities' of global terrorism. Not only, then, was international human rights law to be subjected to exertions of power (as is arguably always the case), but also to exertions of panic intended to achieve a transformative mission of reducing the protection of the right to be free from arbitrary detention and, correlatively, the rights-based limits on the kinds of repressive actions states may engage in under the moniker of 'national security'. The stage was set; but the play that was acted out upon it seems to have been the performance of a different script.

International human rights law did not give in to power or panic when it came to the right to be free from arbitrary detention; it insisted upon maintaining the integrity of this norm and holding states to the pre-existing limits of emergency action (which were in any case already very broad, as outlined in Chapter 2). That is not to say that international human rights law has escaped unscathed; in fact, there are worrisome aspects of international law's reaction to the attacks from a rights-based perspective, but there has been a relatively good recovery and, as we will see in Chapter 5, the norm in question has exerted a great deal of resilience.

For someone who had expected to find the right to be free from arbitrary detention lying in tatters on the floor, this was a pleasant surprise. But it was also puzzling. It seemed to confound the capacity of power and panic to shape international human rights law. It did not disprove the general hypotheses around power and panic – and I do not mean in this book to suggest that it did – but it suggested their shakiness in this particular context; and that required some explanation.

We can begin to shape that explanation by embracing a textured understanding of panic that sees it as a phenomenon that has two dimensions: top-down manufactured (often 'moral') panic and bottom-up popular (genuinely felt) panic. I argue in Chapter 1 that thinking about panic as two-dimensional in this way, and the aftermath of a traumatic attack as a time in which the desires of both the state and the people coalesce to create a politico-legal space within which repression is possible, helps us distinguish between the domestic and international spheres. In contrast to domestic politico-legal systems, the international legal system is relatively insulated from the full brunt of panic. As outlined in Chapter 5, international human rights law enjoys more distance from the people and from panic, along the lines of structure, situation, constituency and constitutionalism, than domestic branches of government. As a result, international human rights law can protect its normative core more successfully than domestic law can, at least in the context of executive and legislative action. The story of international human rights law, then, reveals itself as one of normative resilience to power and panic that, while not absolute, is promising.

Normative resilience does not, however, do much for those individuals who are actually detained under the laws and policies of the US and the UK. Those individuals are essentially reliant on courts to help them secure their liberty from arbitrary detention, usually by means of challenging the lawfulness of that detention. Anyone familiar with the record of courts in protecting personal liberty during a crisis or emergency will know that the levels of optimism on this front would not have been particularly high at the outset. Domestic apex courts in the US and the UK do not have what one might call a glowing record of protecting the right to be free from arbitrary detention in times of violent emergency; rather, they have historically been extremely deferential to executive assertions of necessity. As I outline in Chapter 6, the record of these courts in the 'War on Terror' has, however, been unexpectedly positive. This is not to suggest that it has been perfect – for it has not – but there has been a noticeable reduction in deference that has forced the respective states to rethink and redesign their approach to counter-terrorist detention in a more rights-compliant way. There is at least an argument that this reduction in deference and increase in rights-protection might be a reflection of international human rights law's normative resilience.

That story of normative resilience and judicial resistance, directed towards protecting the right to be free from arbitrary detention and

the important safeguard right to challenge the lawfulness of detention through *habeas corpus* or its equivalent, is the story of detention in the 'War on Terror' that this book aims to tell. It does not purport to be the only possible reading of what has transpired over the past ten years, or to deny the repressive and brutal nature of the counter-terrorist detention that thousands of suspected terrorists have experienced since 2001, but I do think that it is an important and potentially promising one. It is a story of power, panic, resilience and resistance; a story of normative strength.

1

Panic, fear and counter-terrorist law-making

Domestic law-making processes tend not to cope particularly well in times of crisis. Panic, fear and populist impulses can conspire to create an atmosphere where the imperative turns towards combating a risk, and where that risk is presented and/or conceived of as being particularly grave or dangerous. The attacks of 11 September 2001 were without question events of such a magnitude as to strike fear into most people observing, not to mention the political leaders who found themselves faced with an enormous challenge. The immediate response to this challenge was, in some ways, unsurprising given our knowledge of law's lack of coping mechanisms in the context of crisis: the weight of both military and legal force was brought to bear on those considered to be responsible, the world (or at least most of it) rallied in support of the US, and there was a sense of having to communicate in strong and unequivocal terms that such acts of terrorism were entirely intolerable. The more long-term and systematic response, however, was not merely reactive; it also took an offensive and allegedly preventive form with the introduction of laws and policies (domestically and internationally) designed, we were told, to prevent a reoccurrence of such attacks. This book is concerned with one of the central planks of that response: the decision to detain suspected terrorists not only (or even primarily) with a view to preparing criminal charges against them but also as a preventive measure.

The use of detention, or internment, as a counter-terrorist measure was not, of course, an innovation. Internment has long been an important (although not necessarily successful) counter-terrorist tool.[1] That fact does not rid the use of detention in the 'War on Terror' of its importance as a locus of study, for here we had a situation where the

[1] A. Harding and J. Hatchard (eds.), *Preventive Detention and Security Law: A Comparative Survey* (1993, Dordrecht; Martinus Nijhoff); F. Frankowski and D. Shelton (eds.), *Preventive Detention: A Comparative and International Law Perspective* (1992, Dordrecht; Martinus Nijhoff).

governments of the US and the UK were introducing internment and arguing its necessity and legality not only as a matter of domestic law but also as a matter of international law. Where international law – and particularly international human rights law – did not permit of such counter-terrorist action it was, we were told, out of step with the 'new' realities of contemporary terrorism and the requirements of international security. The detention of suspected terrorists in the 'War on Terror', then, not only poses a challenge to the domestic politico-legal structures of the US and the UK but also to the normative fabric of the international human rights regime. Both are considered throughout this book. In this chapter, however, I want to outline the theoretical context within which policies, laws and representations around the detention of suspected terrorists have been advanced by the US and the UK and, especially, to reflect on the important role of panic within this process.

Throughout this book I will argue that in many ways the introduction and design of counter-terrorist detention in the 'War on Terror' reflects characteristics of panic-related law-making in which domestic rights protections, including normal political rigour, can become vulnerable to panic and fear. I argue that in order to understand properly the role that panic played in the creation and introduction of the detention policies of both the US and the UK, and the subsequent resilience of international human rights law against arguments that attempted to legitimate those policies, we need to embrace a thicker conception of panic than what legal theoretical analyses often embrace. While there is a wealth of literature on 'moral panic' – a type of manufactured panic whose effect is to create a swell of *support* for repressive measures – there is more to the story of panic than the manipulation of the people by a confluence of moral entrepreneurs. Rather, it seems to me that there is likely to be a real and genuinely felt panic that exists in the wake of serious terrorist attacks and which creates a *demand* for repressive action such as the detention of suspected terrorists. It is only through developing this thicker conception of panic that we can assess the panic-related characteristics of executive and legislative action on detention in the 'War on Terror' and the serious challenge posed to the well-developed structures of human rights law as these structures apply in emergencies.

Theorising panic

In times of panic or crisis there is a well-documented pattern of the expansion of state powers in order to 'protect' the populace against the

source of this panic.[2] Such patterns have been extensively theorised, particularly in criminology ('moral panic') and risk management scholarship ('risk society') and, when taken together, these theories have the potential to offer an interesting and insightful perspective on our understanding of counter-terrorist law-making. Much writing on panic and counter-terrorism has a tendency to see panic as being 'top-down' or primarily manufactured; a tool of state expansionism and popular manipulation. However, by contextualising 'moral panic' within a 'risk society', we can see that terrorism-related panic is more properly understood as both a bottom-up and top-down phenomenon, i.e. it is both a genuine social experience resulting in political pressure to 'protect' *and* a politically manufactured *milieu* that habitually enables expansions of state power under the banner of 'national security'. The significance of this confluence of interests is that the desires for extensive security measures from both the public and the government are in concert, thus creating a significant political space within which to introduce laws and policies that result in an expansion of state power. While panic theorists working primarily in criminology have long argued that panic-generation is part of a *Culture of Control*[3] in which states wish to introduce repressive measures, on their own these theories 'fail to explain why these politicians customarily get away with it'.[4] It is by embracing this fuller understanding of panic that we can more comprehensively analyse the introduction and execution of detention policies in the 'War on Terror'.

'Bottom-up' popular panic

It seems to me that, in the context of the 'War on Terror', the two states whose behaviour is the focus of this book – the US and the UK – have routinely 'gotten away with it' because their desire for expanded state power is (or, at least, was at one point) compatible with the public's desire for greater security. In this context, of course, we must get to grips

[2] See, e.g., L. Keith and S. Poe, 'Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration' (2004) 26 *Human Rights Quarterly* 1071; K. Mahoney-Norris, 'Political Repression: Threat Perception and Transnational Solidarity Groups', in Davenport, C. (ed.), *Paths to State Repression: Human Rights Violations and Contentious Politics* (2000, Lanham, MD; Rowman & Littlefield), p. 71.

[3] D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001, Oxford; Oxford University Press).

[4] M. Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (2005, Edinburgh; Edinburgh University Press), p. 59.