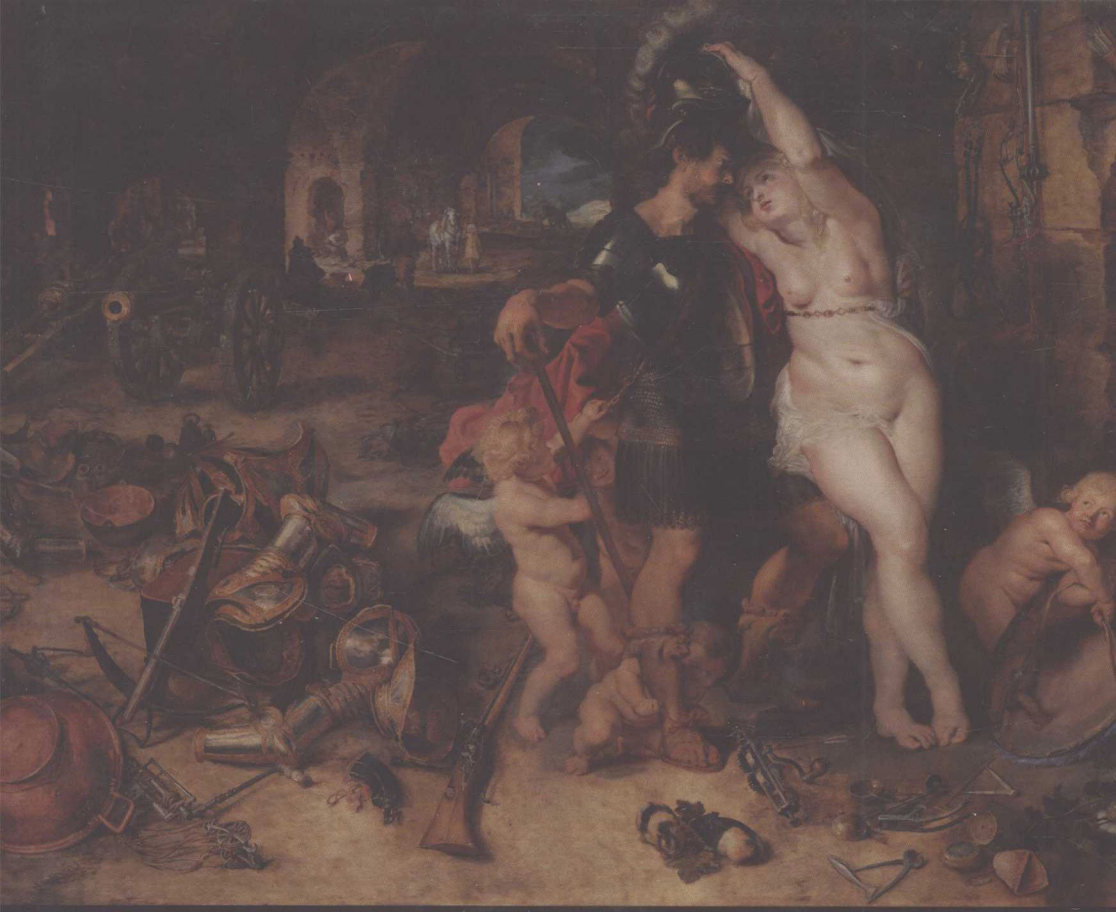

Fighting Monsters

British-American War-making and Law-making

'An exceptional piece of work...deep, broad, rich, original, compelling, and much more.'

RORY BROWN

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FIGHTING MONSTERS

Against the backdrop of the British-American law- and war-making of the first decade of the millennium, Fighting Monsters considers how the way we think about law affects the way we make war and how the way we think about war affects the way we make law. The discussion is founded upon four of the martial phenomena (aggressive or 'pre-emptive' war, targeted killings, torture and arbitrary detention) that unsettle our complacent and flabby understandings of what law is to a liberal democracy.

The author argues, first, that force is a quintessential, albeit ambivalent element of any realistic, serviceable and intellectually coherent concept of law. Second, reappraising the classic question at the intersection of martial doctrine and political philosophy in its contemporary context, the author asserts that we need not, in fighting monsters, become monstrous ourselves; that fighting partisans does not entail our own partisanship; and that we can indeed govern without dirtying our hands.

Seeking to ground a total, essentialist and practical theory of legality's sordid relationship with brutality, the book encompasses language and image; war and crime; liberty, security and rationality; amity, enmity and identity; sex, terror and perversion; temporality, spirituality and sublimity; economy and hegemony; parliaments, the press and the public man.

To those who make Britain Great.

Preface

This book considers how the way we think about law affects the way we make war and how the way we think about war affects the way we make law. The discussion is grounded by using as cornerstones four of the martial phenomena that challenge law, namely aggressive or 'pre-emptive' war, targeted killings, torture and arbitrary detention. By way of explanatory note, I should say something about the timing and scope of this publication.

I finished writing in early 2009. Rather than updating the text at the proof stage, I preferred to leave it substantially untouched for two reasons. First, as will become clear, the events of the last decade have only been referred to in so far as they help to elaborate a theory of law – to that extent any period of history could have been chosen. Second, it seemed disingenuous to pepper the text with 'wisdom' gained after the event.

At the time of writing, it was my hope (albeit not my belief) that, if and when the time came for publication, what with the changes in British and American leadership, this manuscript would have lost some currency. Lamentably, this is not the case. It is therefore worth taking stock of how the picture has changed (where it has), since Brown (and subsequently David Cameron) and Obama took over from Blair and Bush.

Terrorism is vogue. Violent extremism is a scourge on modern society. Only chance intervened to save a plane full of passengers from being blown up by a London student in Detroit on Christmas Day 2009. Moscow's metro was the target of deadly coordinated suicide bombings in March. The UK threat level has returned to severe. In the United States, a congressionally appointed commission warned a bio-weapon attack would occur in the near future that will 'fundamentally change the character of life for the world's democracies'. Home-grown British- and American-born terrorists are giving their lives in support of various of al-Qaeda's causes around the world. Al-Qaeda itself is a massive, complex and flexible ideological network of independent mobile nodes, capable of low-budget, high impact terrorist attacks. It is also capable of sophisticated missions. In January 2010, for instance, an al-Qaeda double agent, having infiltrated American intelligence, blew himself up in an Afghan base, killing one Jordanian and seven American agents.

Iraq is perilously unstable. Since 30 June 2009, when American troops symbolically withdrew from its streets, the preparations for Iraq's March elections were accompanied by a series of not only sophisticated and spectacular car, truck and suicide bombings but also rocket attacks targeting institutions of the embryonic government and turning the capital into nothing short of a bloodbath. The seeming inability of the two political protagonists, Messrs Maliki and Allawi, to jaw-jaw will do nothing to dampen the sectarian violence that

once again threatens to engulf the country. Iran's foray into Iraq's territory and brief occupation of an oil well in the Fakka field betrays its concern about Iraq's ambitious oil production plans. Furthermore, Iran is not the only power interested in Iraq's ongoing instability.

In Britain, the Chilcot inquiry, conducted by a panel selected by the incumbent prime minister including two academics, a former diplomat and a cross-bench peer, seemed less of an inquiry than a platform for those involved to restate their reasons for the Iraq invasion. The proceedings were notable for the absence of lawyers and the predetermination that no fingers would be pointed, matters which broadcast the message that law was irrelevant and that those hoping for some form of accountability would do so in vain. At best then, the inquiry was group therapy for the political class. It will have done little to repair the tattered trust between civilian leadership and armed forces and has done nothing to mend the damaged relationship between those who govern and the governed.

Though there have been modest successes of provincial democracy, we are at war with the Taliban in Afghanistan and Pakistan. The Obama administration's 'new' counter-insurgency strategy of repeated surges, coupled with big cash injections into Pakistan sounds depressingly familiar. In Cuba, Guantánamo Bay's inmates have proven more difficult to dispose of than anticipated by the new President, who has failed to honour his symbolic campaign promise to close the controversial brig. Indeed, rather than drawing a line under the abuses of the outgoing administration, he continues to hold the remaining inmates under the very same, much maligned empowering Act as his predecessor and, to the dismay of the American Civil Liberties community who championed his election, has re-instituted the dubious-sounding Military Commissions to try some of the harder prisoners.

Despite a new 'directive' as to the importance of winning Afghan support by avoiding civilian fatalities and the incoming General McCrystal's request for more boots on the ground to avoid the mortal messiness of aerial warfare, Obama's natural inclination towards a 'take-no-prisoners' approach has led him to prefer local jails, not renowned for their hospitality, as well as the steeply increased use of drone-mounted missile attacks. Though this tactic has had its notable successes, including the killing of Taliban Chief Baitullah Mehsud in August 2009, fatal failures – such as the funeral attack on 3 June 2009, which killed 80 non-combatants – are frequent and disastrously costly. In Pakistan, the frontal in Waziristan has provoked a spate of suicide attacks of unprecedented ferocity conducted by indoctrinated Mehsuds – hundreds of civilians have perished in their explosive ire.

The counter-insurgency abroad is waged against a political backdrop at home of progressively more disturbing revelations about US stewardship of and British complicity in torture of suspected terrorists. In the United Kingdom, in proceedings pertaining to Binyam Mohammed's ordeal at the behest of the US government, purportedly to preserve the sanctity of the British-American

intelligence-sharing arrangements, an inordinate amount of judicial time and public money was spent in the government's attempt to suppress several paragraphs of documents detailing his mistreatment and the nature of the United Kingdom's involvement. In the words of the Lord Chief Justice of England and Wales, though the Foreign Secretary did 'everything he lawfully could' to prevent it, 'the publication of the redacted paragraphs would not and could not, of itself, do the slightest damage to the public interest'. Perhaps the most positive aspect of the related proceedings in the United States was that the administration, rather than attempting to bury the perturbing truth, 'did not deny or challenge the accuracy of Mr Mohammed's brutal treatment'. Nevertheless, the prevailing culture of executive secrecy that characterised counter-terrorism operations and policy meant that this book was written squinting in the shadows of our battle against spectral forms within and without our societies. It is no doubt an impaired interpretation of what was, and an idiosyncratic vision of what ought to follow.

With respect to scope, one limiting factor is that the discussion is constructed within the four afore-mentioned jurisprudential cornerstones. Another is that I have concentrated on the British-American alliance against terror. The reasons I have done so are threefold: My limited knowledge of (and access to) other cultures counsels reluctant critique; the British and American administrations took it upon themselves to 'lead' the war on terror – it therefore seems fitting that they bear the brunt of criticism here. That said, though I have no experience of comparative study, I imagine that governments the world over can be expected to grab for similar tools to fix the terror problem – to that extent, it is hoped that this book contains lessons that stretch beyond its parochial frame.

In short, it seems to me that questions not only as to what ought or ought not to be legal – for example 'pre-emptive self-defence', regime change, torture, targeted killings, arbitrary detention – but also as to how the legality or illegality of such extraordinary measures is constituted and determined, have certainly not diminished but might even have increased in importance over the last few years. This book then, is a modest attempt at beginning to address those questions.

It was myself, after all, whom I have betrayed most basely.
Joseph Conrad, *Under Western Eyes*

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Responsibility for opinions and errors is the author's alone.

Contents

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Fighting Monsters

We cannot determine to what height the human species may aspire in their advances towards perfection, but it may safely be presumed, that no people, unless the face of nature is changed, will relapse into their original barbarism.

Edward Gibbon[1]

GIBBON PRESUMES THAT there are invisible shark's teeth, piercing our flesh, preventing our backsliding into a sea of barbarism, and ensuring our onward progression into the warm belly of civilisation. The disciples of human rights have made similar arguments. Now that we have these principles, they say, we will never succumb to the totalitarian tendencies and again commit the gross infractions of human dignity that darkened the last century. Champions of what is called constitutional or liberal democracy say much the same thing. With these immutable, time-honoured restraints on the democratic process, we are told, our societies will protect not the crude right of the majority to impose its will on the totality, but will forever cherish the a priori precepts that underpin and inform democracy, hallowed values like dignity, agency, liberty and equality.

The Anglo-American attempt, during the last eight years, to combat terrorism makes it worth questioning the safety of these comforting presumptions. As Eric Hobsbawm put it, the 'International Red Cross recognises the rising tide of barbarism for it condemns both sides in the Iraq War'.[2] Are there any shark's teeth preventing our backsliding into barbarism? Are human rights anything other than pleasant-sounding platitudes for talking about power? What is there to stop ancient bills of rights being torn up and torched, in an orgy of populism?

Eight years ago, before September 11, many people enjoyed a clear understanding of what was legal and what was not. This clarity has been muddied by a dirty war on terrorism. We were clear that there was to be no punishment without law, and yet people have languished for years in an American prison camp without charge, without access to their families or lawyers, and without, some would say, any prospect of a fair trial. We understood that torture was

[1] E Gibbon, *The History of the Decline and Fall of the Roman Empire* (Alfred Knopf Inc, 1993) 445.

[2] EJ Hobsbawm, *Globalisation, democracy and terrorism* (Little Brown, 2007) 41.

inimical to legality and antithetical to liberal democracy, and yet the torture meted out by American troops on detainees has been so ferocious and unforgiving that men have died in their custody. We thought that the death penalty was so extreme a punishment that it could only follow trial and conviction in a court of law, and yet extra-territorial, extra-judicial executions of suspected terrorists have become a routine counter-terror tactic. We had been given to understand by international elders that the sovereignty of state territory was sacrosanct, and that force could only be used by a state to defend itself from an imminent attack, or pursuant to the authorisation of an international security council, and yet two states have been invaded pursuant to one terrorist attack, and massive force continues to be deployed eight years on, without any such authorisation.

In sum, it could be and has been said that these tactics, adopted by the Anglo-American counter-terror alliance, were more consonant with our understanding of barbarism and brutality than civilisation and legality. New military technology makes killing possible on a larger scale than ever before and has done much to increase the urgency of investigation into these themes. Was *America Online* right to say September 11 was 'The Day We Changed' and do we have to change our laws or our understanding of law to keep up? For many commentators, nothing has changed: the United Kingdom and the United States, by violating the Charter of the United Nations, disregarding the Geneva Conventions, infringing human rights norms and trampling on their own time-honoured constitutional tenets, have simply broken the law. This might be a perfectly reasonable answer but it does not provide an adequate explanation because, at least on a common understanding of criminal justice, law-breakers are punishable for their transgressions. If crimes have been committed by known offenders, and no one can be held accountable, how can we meaningfully say that the law has been broken? Should we not say instead that the law has changed, or that we never really grasped what it was in the first place? Thinking about terrorism takes place in a conceptual morass.

In this discussion, the war on terror is the factual departure point for a jurisprudential inquiry. Without wanting to introduce unnecessary complexity, this statement must be qualified by the assertion that, according to my understanding of law, on which more immediately, it is a social fact; law is very much a result of what people think and do. So, yes, the war on terror is the departure point, but it is also, in a sense, the destination. What follows is an argument about law before it is an argument about terrorism. Nevertheless, I have chosen terrorism, or rather our response thereto, as the subject-matter because it brings into focus an important philosophical or jurisprudential aporia. The following are foremost amongst the questions I wish to address: What is law? How is it constituted? What is the role of force in law? How is legality related to necessity? Is it true, as Napoleon's General Lefevré had it, that '*il faut opérer en partisan partout*

où il y a des partisans' ('one must fight like a partisan wherever there are partisans'), and if so, does such fighting belong to the realm of law, war, neither or both?[3]

In the next 300 or so pages, in order to attempt to introduce something approximating clarity where there is presently confusion; to help us avoid adopting measures that are more characteristic of brutality than legality; and to increase our chances of effectively combatting terrorism, it will be suggested that we conceive of law in the following way: 'Law is coercion, approved prior to, subsequent to, or in the absence of its exercise, by power'. This definition of law has certain consequences for conventional legal theory and for traditional understandings of what counts as law. These ramifications will and must be elaborated throughout to explain why I prefer this understanding of law, but here, I would like to give an initial indication of where it might seem unusual, or involve a departure from orthodoxy.

The most obvious feature of my definition is that force is integral to law. To my mind, law without force is like a prison without bars. Law has force to back up its assertions. A norm which does not entail the possibility of its own enforcement, though it might qualify as advice, a moral precept or a social convention, is not, as I see it, law. However, this is not to say that the effect of breaching the law is always punishment or coercion. Many infractions of the law go unpunished. For this reason, I included the words 'in the absence of its exercise' in the definition. An attempt is made herein to set aside conceptions of law as it is commonly understood before (but also by) studying what constitutes law – how it is brought about – in order to understand and reduce it to its essence. I try to capture that essence in the definition proffered immediately above. This is perhaps best elaborated with an example.

If, annoyed by a traffic system, which adds 10 minutes to my morning journey to work, I drive down a one-way street the wrong way, infringing the rules of the road, and I manage to do so unseen, this does not signify that the law does not exist. Rather, by virtue of the fortuitous timing of my offence, I have escaped punishment. If, however, I time my infraction of the rules of the road poorly, and am spotted by an oncoming police officer, who flags me down and gives me a stern ticking off, without applying the strict statutory fine, ascertaining the law becomes, to my mind, more complex.

On one view, we could say I broke the law and the police officer decided the best sentence, which, in his discretion, was a dressing down rather than a fine. On another view, we could say, well, the police officer's discretion was not part of the statutory scheme, so I broke the law, and by letting me off substantially unpunished, the police officer broke the law too. On yet another view we could say that I broke the law, but there was a difference between the law as written

[3] For a jurisprudential discussion of the irregular fighter, see C Schmitt, *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political*, trans AC Goodson (Michigan State University Press, 2004).

and as applied. On another view still we could say, well, if one can, with impunity, drive down that one-way street unpunished, then it is not, in truth, a one-way street, but a two-way street, and there is not really any law against me using it as such, whatever the traffic code might say. Finally, it might be that the *real* law is that it is permissible to drive down the street in both directions, but in the event that one is caught by a police patrol, one must listen to a brief dressing down and, in exchange for a polite, solemn and entirely insincere promise of non-repetition, one can continue with one's onward journey. Notwithstanding its disloyalty to the statute book, should I prefer this last interpretation because it is honest and accurate, and as such, in this example, is best suited to assisting me in choosing my route to work in the morning?

I like this example because the fact that one can list (at least) five different interpretations of the law helps one to learn or recall two essential lessons. First, we cannot ascertain the law, in the sense of rules that will faithfully and, where necessary, forcefully be applied to us by the police and the courts by reading from a statute book. Secondly, law is indeterminate and dynamic to the extent that it depends entirely on what common people – citizenry and officers of the law alike – think and do from time to time. Correspondingly, if a statute on the books falls into disuse, becomes moribund, and is eventually flouted with impunity (prohibitions on marijuana and homosexual practices are salient examples), is it still meaningful to speak of the statute as law, except in a narrow, formal and ultimately inaccurate sense? Law is constant revolution.

My infraction of the traffic rules was a long way from the war on terrorism. Let us take another example, which is closer to the case in point. American infantry arrest, detain, torture and eventually, after establishing that he is not a dangerous terrorist but a peace-loving market-trader, release a citizen of Afghanistan. If that citizen seeks justice in Afghanistan but finds it wanting, attempts to get access to the courts in America, has his application barred by the state secrets rule, but finally succeeds in making an application to, and winning substantial damages against America in the Italian courts, what is the status of that judgment? Let us suppose that America then refuses to recognise Italian civil jurisdiction over acts committed by American soldiers in Afghan territory; that, due to their respect for international rules on state immunity, the Italian authorities refuse to lay claim to American assets in Italy in satisfaction of the judgment; and that, consequently, the damages judgment, though it stands as the pronouncement of a court, cannot be enforced by the victim against the tortfeasor. Is the Italian finding in favour of our wronged market-trader law?

In one sense, it *is* law because it is the decision of a venerable Italian tribunal, pronounced, recorded and solemnised in the usual fashion. In another sense, the unorthodox one I like, it is not law, because it does not have the *force* of law. It cannot be enforced by the ostensible beneficiary of the judgment. Such a Pyrrhic victory might be an effective moral condemnation of American conduct, but 'law' it is not.

A plurality of laws, that is, a situation in which different, conflicting norms regulating one issue are all considered law, is an absurdity. I say that although the law might require elaboration, although it might require testing in the courts, there can only ever be one law governing a situation, at any one time. If it turns out that a rule cannot be enforced, for want of social power backing up the use of coercion – like our Italian damages judgment – in my view, it simply is not law. This approach might be considered unrealistic or crude because it denies a welter of rules, hithertofore considered law, the character of law. On the contrary, I consider it realistic and sophisticated, because it allows us to differentiate law – rules backed by force – from other types of norm, the transgression of which carries consequences such as shame, opprobrium and, crucially, the sort of social pressure that can lead to a change in the law. Incidentally, this hard-edged understanding of law is in no way incompatible with the idea of a complex juridical order (*ordinamento giuridico*) in the sense pioneered by Santi Romano.[4] The law advocated here is simply insistent on the hard or cutting edge of a juridical order. This brings me to another point. That I have said coercion is integral to law does not in any way discount, hide or deny that the vast majority of human interactions guided by law happen outside the obvious instances of law, such as the Parliament, the courtroom, the prison and the police station. A key function of law is its role in normalising behaviour. In Britain and America, when we abide by the law, we rarely encounter its powers, though, and I want to emphasise this point, the law, or more precisely, the very possibility of its coercion, exerts a power on us and we, by acting in accordance with norms we perceive as being part of that law, exert a social power that reciprocally reinforces their binding power. The concept of law proffered herein cheerfully accommodates and indeed depends on the quotidian and humdrum. Most behaviour guided by law is not guided with the aid of a bailiff, a baton or a bullet, but these harder things are at the business end of all rules that can be called law.

I am aware that a reductive definition of law, depending on the possibility of enforcement, excludes many norms thought of as international law from its ambit. Indeed, I am mindful that if torture goes unpunished, or the modern *jus ad bellum* is flouted with impunity, according to my definition, torture and aggressive war-making are legal. As will become clear, I consider this an advantage, not a disadvantage of the definition. Suffice it to say here that, at least in part, it is precisely to provide clarity about what we will and will not accept, what conduct will and will not go unrestrained and unpunished, that we create laws in the first place. Indeed, the point made above about the symbiotic

[4] S Romano, *L'ordinamento giuridico* (Sansoni, 1945). Romano summarises his concept in the following terms: 'L'ordinamento giuridico è un'entità che si muove in parte secondo le norme, ma, soprattutto, muove, quasi come pedine in uno scacchiera, le norme medesime, che cosi rappresentano piuttosto l'oggetto e anche il mezzo della sua attività, che non un elemento della sua struttura' (at 13).

relationship between conduct guided by law (outwith obvious instances of law's coercive quality) and law itself is useful in understanding how this definition of law relates to law as a phenomenon on the international plane.

Put simply, where international rules can be enforced, they enjoy the character of law. A great many international rules can be enforced although their mechanisms of enforcement might in the end rely on governmental powers. In these cases it is perfectly consistent to refer to international rules as law. Furthermore, where governments have accepted limitations on their sovereignty in exchange for the benefits of international community, it is perfectly consistent with the definition offered here to speak of international law.

The *Factortame* litigation, in which a UK rule was set aside by a UK court because of a prior and conflicting European regulation, is an example of this revolution.[5] Irrespective of the theoretical ability of the UK Parliament to secede from the European Union, where domestic and supranational rules clashed, the latter overcame the former. This can be explained in the terms of the definition I have suggested by noting that, when the case was decided, the social power which had accumulated behind the idea of the United Kingdom having accepted a provisionally permanent[6] limitation on its powers was greater than that supporting the notion that the UK Parliament could, in any new legislation, alter its prior European obligations without making that intention express. As a result, the European provision trumped the UK rule. This complex divination took place in judicial minds, but we can observe that the divination undertaken took place against the backdrop of the prevailing political thinking.[7] That thinking determined which rule had the character of law.

International rules which do not enjoy their own enforcement mechanisms or which are not enforceable vicariously by states are not, in my view, law. This would include so-called soft-law, many harmonising measures, conventions lacking enforcement machinery, and unenforceable rules of international public law, such as the hallowed rule prohibiting torture. These rules are better conceived of as guidelines or aspirations and there is nothing stopping their maturing into laws proper. However, there is merit in terms of legal certainty, pragmatism and policy-making in distinguishing between rules which have aggregated the requisite social backing and rules which yet lack that body of public approval, which consequently cannot be considered enforceable. An example of this latter category of rule might be (at least in the UK context) the rulings of the European Court of Human Rights in Strasbourg. A declaration

[5] I grossly simplify the protracted proceedings. See for the revolution, *R v Secretary of State for Transport, ex parte Factortame Ltd (No 1)* [1989] UKHL 1 (18 May 1989); Case C-213/89 *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1990] ECR I-2433; *R v Secretary of State for Transport ex parte Factortame Ltd (Interim Relief Order)* [1990] UKHL 7 (26 July 1990).

[6] I use this phrase to convey the ambivalence to the European assumption of permanence expressed in the UK courts.

[7] The similarity here with Hart's famous conceptual device, the rule of recognition is intentional: HLA Hart, *The Concept of Law* (1994, Clarendon Press).