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# Detention without Trial: Historical Evolution, International Law and States' Authority

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## **Abstract**

*In the wake of the US detention policy in the aftermath of the 9/11 attacks, the practice of detention without trial has gained a degree of attention unparalleled in the history of common law tradition. Legal analyses of all kinds have ensued, and countless policy plans and guidelines have been created. Yet, despite the pedigree of detention without trial, the historical dimension to the practice of detention without trial has not been invested with the scrutiny that it deserves. Drawing on the history of detention without trial in Britain, this research seeks to draw a roadmap for the evolving features of detention without trial. It will be argued that it is by virtue of this historical understanding that we can make sense of the modern laws governing the practice of detention without trial and its associated features.*

***To My Parents***

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## Introduction

### 1. Background

The problem of detention without trial has become so enlarged today that it is no longer of interest to only detainees, lawyers, judges and the executive. This problem and its associated features have gone so far and wide as to become a component of modern popular culture. If the shocking pictures of the September 11 attacks on the Twin Towers can be said to occupy an ever-lasting and traumatic presence in our imaginations, the disturbing footage emerging from Guantanamo Bay and Abu Ghraib also serve as some of the most vivid signifiers of the opening chapters of the twenty-first century. It is largely because of the documentation of these abuses by visual means that the practice of internment<sup>1</sup> most readily presents itself as one of the horrors of the twenty-first century. However, a closer look at the problem at hand reminds us of a truth, too bitter to accept, and yet, too obvious to disregard, and that is, the history of civilisation in its entirety is filled with outrageous practices of detention without trial, ranging from the famous story of internment of the Hebrew slave Joseph for an indefinite period of time by Potiphar, as recounted in the book of Genesis<sup>2</sup>, to the continuing internment of the remaining detainees in Guantanamo Bay.

However, it would be unfair to say that detention without trial has been a constant struggle in the history of civilisation without adding that, at least as soon as an institutionalised practice of internment took shape in modern history, attempts were made to curtail or remove the unlawful – or, as it was later recognised, arbitrary – forms of this practice. For example, in the context of internments exercised in England, the earliest manifestations of these attempts took place in the course of such valuable documents as the Magna Carta 1215,<sup>3</sup> and the Petition of Rights 1628, which banned the imprisonment of a free man, except for when 'the lawful judgement of his peers or the

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<sup>1</sup> The terms 'detention without trial', 'internment', and preventive 'detention' are used in a synonymous manner in this thesis. For definition of internment, refer to section 2.

<sup>2</sup> V. P. Hamilton, *The Book of Genesis: Chapters 18–50* (Michigan: Eerdmans Publishing Co., 1995) at 475.

<sup>3</sup> *Magna Carta Libertatum* 1215, *The New Encyclopaedia Britannica*. 15th ed. 1998.



law of the land necessitates it'.<sup>4</sup> Another example of attempts to put restraints on the powers of the executive in England stems from a series of habeas corpus acts passed by Parliament in the seventeenth century onwards.<sup>5</sup> The strongest wave of protecting the right to liberty arrived with the advent of the post Second World War era, when it was recognised that the issue of detention without trial had long since become a worldwide phenomenon. In this era, significant moves towards limiting *some* particular forms of internment were made by the international community via the regimes of international human rights law and humanitarian law.

Yet despite the historical pedigree of detention without trial, fundamental disagreements among academics and legal practitioners remain as to the question of how to deal with this problem. In fact, a high degree of controversy emerging from the policies of the Bush Administration in its so-called 'war on terror' was yet another strong reflection of these fundamental disagreements.

### 1.1. *Detention and necessity*

For the proponents of the sweeping powers of the executive in resorting to detention without trial, necessity is the principal factor, which is echoed in a different voice of law in times of crisis.<sup>6</sup> In response to the sharp criticisms directed towards his one-sided action in suspending the writ of habeas corpus at the peak of the American civil war, Lincoln asked, 'Are all the laws but one to go unexecuted, and the Government itself go to pieces, lest that one be violated?'<sup>7</sup> These assertive words of Lincoln have, over time, become something of a mantra for those making a case for the priority of necessity over the laws of liberty. The exact same logic was employed by Justice Robert Jackson in his famous dissenting opinion in a freedom of expression context:

The choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper

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<sup>4</sup> House of Commons, Petition of Rights, 3 Car. I, c. 1, 1628.

<sup>5</sup> We will examine some of the habeas corpus acts in the said periods in chapter I, section 4.1.

<sup>6</sup> W. H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (New York: Vintage Books, 1998), at 225.

<sup>7</sup> Full text of 'A compilation of the messages and papers of the Presidents, 1789–1897' available at [https://archive.org/stream/cu31924092593353/cu31924092593353\\_djvu.txt](https://archive.org/stream/cu31924092593353/cu31924092593353_djvu.txt).

its doctrinaire logic with a little practical wisdom, it will convert *the constitutional Bill of Rights into a suicide pact*.<sup>8</sup>

That the constitution is not a suicide pact has also turned into a kind of catchphrase for some authors. This is particularly true for those scholars who find themselves in a relative degree of agreement with the formulation of detention powers in a broad manner, with particular reference to the US detention policy in the wake of the September 11 attacks.<sup>9</sup>

When placed in a detention without trial context, the foregoing arguments purport to create the following general pattern for the exercise of detention without trial: the executive must have the latitude to suspend such judicial remedies as the writ of habeas corpus; the executive can single-handedly articulate the grounds for detention without trial; there must be no time limit for the suspension of habeas corpus, or more practically, there must be no time limit on the duration of detention; the judiciary must either refuse to intervene in such cases, or in the case of intervention, its level of intervention must be limited, and shall not amount to a strict scrutiny of the executive's decisions and conduct; the executive bodies must be put in place to take on the role of the judiciary; and finally, some of the safeguards afforded to detainees, such as access to lawyers or evidence brought against them, must be limited or adjudicated against the needs of different situations, whilst the executive can appoint hearsay evidence or refuse to disclose some or all evidentiary grounds against detainees, once again in accordance with the variances of a particular situation.<sup>10</sup>

As will be explored in the historical investigations of this thesis, the British executive must be credited with employing the initial steps in creating the first constituent parts of the pattern mentioned above. However, as will be argued in due course, the different

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<sup>8</sup> *Terminiello v. City of Chicago*, 337 U.S. 1, per Justice Jackson dissenting.

<sup>9</sup> R. Posner, *Law, Pragmatism and Democracy* (Cambridge: Harvard University Press, 2003) at 293 or B. Wittes, *Detention and Denial: the case for condor after Guantanamo* (Washington, Brookings Institution Press, 2010) at 37. For a great critique of using such rhetoric and language in this context refer to, T. Corcker, 'Still Waiting for the Barbarians' (2007) 19 *Law and Literature* 303.

<sup>10</sup> For sources from which this pattern can be extrapolated, M. Malkin, *In Defense of Internment: The Case for 'Racial Profiling' in World War II and the War on Terror* (Washington: Regnery Publishing, 2004), B. Wittes, *Detention and Denial: the case for condor after Guantanamo* (Washington, Brookings Institution Press, 2010), S. C. Blum, 'The Necessary Evil of Preventive Detention in the War on Terror: A Plan for a More Moderate and Sustainable Solution' (New York, Cambria Press, 2008).

varieties of this pattern became a worldwide phenomenon largely owing to its export by means of colonialism.

### 1.2. *Persistent problems associated with detention*

Throughout the history of detention without trial, a constant and consistent opposition to some forms of this practice has been formed. One of the earliest examples of a serious dislike for this practice can be found in parliamentary records of England in the seventeenth century. As will be seen *infra*,<sup>11</sup> this was the age in which some significant doubts had been sparked as regards the nature and scope of the sovereign power in England. Such doubts mounted, when five members of Parliament in England were interned as part of Charles I's broad detention policy.<sup>12</sup> When the matter reached the attention of the House of Commons, it was viewed with a great degree of fury and revulsion. Accordingly, a number of MPs elaborated on the evils of detaining subjects without specifying their charges or a time limit for their internment. For example, Sir Edward Coke noted that in order for a given instruction to become law, determinacy of its terms is a necessity. This determinacy is non-existent in the case of indefinite detention of subjects, 'for had the law intended such a thing it would have named a time'.<sup>13</sup> Others embarked on the value of liberty, and that the sovereign's power cannot and must not curtail what was then perceived as the subject's most precious inheritance, namely, liberty.<sup>14</sup>

Moreover, additional concerns have come into existence since the end of the seventeenth century. For example, at the time when Charles I impulsively resorted to the practice of detention without trial, there was no perception of the separation of

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<sup>11</sup> Refer to chapter I, sections 4 and 5.

<sup>12</sup> Proceedings on the Habeas Corpus, brought by Sir Thomas Darnel *et al* at the King's-Bench. Charles I A. D. 1627 in A Complete Collection of State Trials (1816).

<sup>13</sup> R. C. Johnson *et al*, Commons Debates 1628 Volume II: 17 March–19 April 1628 (London: Yale University Press, 1977) at 195.

<sup>14</sup> *Ibid.*, at 199.

powers. Even though the legislature and the judiciary were present, they were viewed as branches flowing from the same fountainhead that was monarchical power.<sup>15</sup>

As will be seen in the next section, detention without trial is exercised by the executive. In so doing, the executive operates in an independent manner, and does not concern itself with the question of whether there is a judicial indictment or a prosecuting order in place.<sup>16</sup> Moreover, the executive often tends to establish barriers against the possibility of judicial review of internment.<sup>17</sup> Terms such as 'extra-judicial detention', 'semi-judicial detention', 'administrative detention', and 'executive detention' are often used interchangeably with detention without trial or internment, and are indicative of a phenomenon not so sensitive and responsive to the requirements of the separation of powers. Here, the opponents of the practice of detention without trial argue that by obscuring the principle of the separation of powers, internment serves as either a step towards tyrannical governance or a means to sustain an unjust order.<sup>18</sup> In the historical part of this thesis, many examples will be provided to signify how the practice of detention without trial is an indicator of the existence of an unchecked and unbalanced mode of authority. In one of the most broadly invoked cases concerning detention without trial in history, this aspect of the problem of emergency powers and detention without trial was captured in the words of Attorney Dudley Field:

Is it true, that the moment of declaration of war is made, the executive department of this government, without an act of congress, becomes absolute master of our liberties and our lives? Are we, then, subject to martial rule, administered by the President upon his own sense of the exigency, with nobody to control him, and with every magistrate and every authority in the land subject to his will alone?<sup>19</sup>

Finally, it is said that detention without trial often falls a long way short of providing justice to the individuals subjected to it. When the executive is placed as the sole

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<sup>15</sup> P. Halliday, *Habeas Corpus from England to Empire* (Cambridge: Harvard University Press, 2010), at 25–27 and 163.

<sup>16</sup> For a description of this process, see, for example, D. Bonner, *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed* (London: Ashgate Publishing, 2007).

<sup>17</sup> Two recent examples of this trend consist of the military detentions exercised by the American executive in Guantanamo Bay and Bagram detention centres.

<sup>18</sup> P. Margulies, 'True Believers at Law: National Security Agendas, the Regulation of Lawyers and the Separation of Powers' (2008) 68 *Maryland Law Review* 1, at 68.

<sup>19</sup> U.S. Supreme Court, *Ex Parte Milligan*, 71 U.S. 2 (1866) 71 U.S. 2 (Wall.).

operator and judge, whilst exercising detention, detainees cannot but find themselves at the mercy of their captors. So often, detainees of this kind are held without having any information on such crucial issues as the cause of their internment, the possibility of their release, or their access to a lawyer, judge or any other agent of the justice system. The denial of such elementary rights to detainees is often coupled with other forms of injustice, such as withholding evidence from them, subjecting them to prolonged and coercive interrogations, producing them before either administrative or military bodies, and refusing their right to appeal.<sup>20</sup> In such an environment, the level of distress weighing on the administrative detainees simply goes beyond imagination.<sup>21</sup>

## 2. Definition of internment and the issue of terminology

There is no treaty-based definition of detention without trial. Even in the world of legal academia, it is relatively rare to witness a scholar venturing to provide a definition for the concept of 'internment'. A rare and brief description of internment can be found in the Commentary on Protocol I relative to international armed conflicts. Therein, the ICRC Commentary provides a meaning for the term 'interned':

'Interned': this term generally means deprivation of liberty ordered by the executive authorities when no specific criminal charge is made against the individual concerned.<sup>22</sup>

Two particular elements stand out in the above description. First of all, the detaining authority in the case of internment is the executive. Secondly, when a person is interned, there exists no criminal charge against him. Therefore, interments must never be confused with penal imprisonments or, more importantly, prolonged pre-trial detentions.<sup>23</sup> For example, in the last decade, due to the collapse of many civic institutions in Haiti, the courts of this country have not been able to process a

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<sup>20</sup> See, for example, R. Murphy, 'Prisoner of War Status and the Question of the Guantanamo Bay Detainees' (2003) 3 *Human Rights Law Review* 257.

<sup>21</sup> See, for example, M. Begg, *Enemy Combatant: A British Muslim's Journey to Guantanamo and Back* (Britain: Free Press, 2006).

<sup>22</sup> C. Pilloud *et al*, *Commentary on the Additional Protocols of 8 June 1977* (Geneva: International Committee of the Red Cross, 1987) para 3063.

<sup>23</sup> Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its interaction with international human rights law* (Hague: MNP, 2009) at 484.

substantial number of cases involving individuals held in pre-trial detention.<sup>24</sup> This has prolonged the duration of pre-trial detentions, which must under normal circumstances be served for a short period of time by detainees. However, this should not mislead one to conclude that when a pre-trial detention is prolonged, its *status* will be transformed into internment, for the former is practised on the basis of some *prima facie* criminal charges, and the latter involves no charge at all. It is thus that some authors use the term 'detention without charge' as a synonym for internment.<sup>25</sup>

Another conceptual issue surrounding internment is the issue of fragmented terminology, which may at times act as a source of confusion. This is because different actors and authors have employed different words to refer to this practice. Some of these varying terms are: preventive detention, administrative detention, executive detention, extra-judicial detention, non-criminal detention, military detention, security detention, detention without trial, administrative internment and finally, internment. In general, it must be noted that the scope of the term 'detention' is much broader than internment. The term 'detention' is frequently used in the context of criminal law.<sup>26</sup> This is why in order for the term 'detention' to wield the same meaning as internment, it must always be coined with a descriptive attribute such as administrative or preventive. However, even then, caution is called for, since the term 'preventive detention' can also be used to imply a type of detention serving a preventative purpose, without implicating national security in the sense that is implied in the usage of internment. For example, in a criminal law context, the term 'preventive detention' often alludes to the detention of mentally disabled individuals or particular forms of quarantine.<sup>27</sup>

For the purposes of determining the scope of this thesis, it is of vital importance to discern that there also exists a special type of internment for those referred to in the laws of armed conflict as Prisoners of War (POWs). This type of detention is governed by

<sup>24</sup> A. Fuller *et al*, 'Prolonged Pre-trial detention in Haiti' Research Paper (Vera Institute of Justice, 2002).

<sup>25</sup> J. Goldsmith, 'Long-Term Terrorist Detention and a U.S. National Security Court' in B. Wittes (ed) *Legislating The War On Terror: An agenda for reform* (Washington: Brooking Institution Press, 2009) at 77.

<sup>26</sup> F. Bouchet-Saulnier *et al*, *The Practical Guide to Humanitarian Law* (Maryland: Rowman and Littlefield Publishers, 2007) at 226.

<sup>27</sup> See, P. H. Robinson, 'Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice' (2001) 114 *Harvard Law Review* 1429.

the Third Geneva Convention, and must be distinguished from the practice of security detention in the sense employed in this thesis. Of course, whenever the need arises, we will speak of the relevant rules governing the special regime of PoW internment. But in general, the internment of PoWs goes well beyond the focus of the present research. This brings us to clarification of the scope of the term 'internment' or its other synonyms as described in this thesis. The utilisation of the terms 'internment'/preventive detention/detention without trial or the similar concepts in this thesis only points to the type of detention without charge ordered by the executive for preserving national security.

### **3. History of detention without trial: a lost dimension**

For most of the twenty-first century, the analysis of internment has been couched in such terms as 'post-September 11 detention policy', 'post-September 11 detention powers' and many other similar concepts taking September 11 as the starting point of analyses of internment.<sup>28</sup> At the heart of this language lies a presupposed dichotomy in the mode of practice, structure and purpose of internment between the pre- and post-September 11 eras. Of course, no one can deny that internment, as exercised in the aftermath of 9/11, carries some unique features. At the same time, it is definitely wrong to divorce the post-September 11 detention policies from the history of internment in general and view it in a secluded manner from the rest of the history of internment. Such an isolationist conception of detention disregards the evolving features of internment through a very complicated historical process. Once this historical sight is lost, one inevitably seeks dysfunctional and short-lived answers to some of the problems associated with internment.

It seems that in the midst of the authorities' and analysts' haste to find an answer to the question of how to deal with internment, one must pause and turn to the history of

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<sup>28</sup> See, J. M. Chacon, 'The Security Myth: Punishing Immigrants in the Name of National Security' in A. C. d'Appollonia (ed), *Immigration in Integration, and Security: America and Europe in Comparative Perspective* (Pittsburgh: University of Pittsburgh Press, 2008) at 158.

detention without trial, instead of creating endless policy plans for potential implementation in an indefinite future. It is only by this turn to the history of detention without trial that we can discern how we arrived at this point, which in turn helps us to gain a better view of what is at stake now. In the same way, while a historical enquiry does not necessarily administer immediate prescriptions to the uncertainties and maladies at hand regarding internment, it assists us in asking the right questions. For example, it is by dint of a return to the historical lessons of detention without trial that one could ask why the drafters of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) chose to use the term 'arbitrary detention', when they could easily have set out a prohibition of 'unlawfulness' rather than 'arbitrariness'.<sup>29</sup> Moreover, a historical examination of the concept of internment makes us more familiar with the origin and the original functions of many features associated with detention without trial. Some of these concepts follow as: the writ of habeas corpus, administrative boards, military courts, alien enemies, alien friends, and enemy combatants.

Furthermore, the importance of gaining a historical insight into the subject of internment is amplified in common law jurisdictions such as the UK and the US, where in order for common lawyers 'to make sense of case law, and eschew codification, they must look to the past.'<sup>30</sup> An example of the importance of such historical materials in the context of internment is the case of *Ex Parte Quirin*, which conjured the language of 'enemy combatants' and linked it to indefinite detention.<sup>31</sup> Later, this decision came to set a precedent for the Bush Administration's detention policy.<sup>32</sup> However, a common lawyer with an invested interest in legal history would first contextualise the decision of the US Supreme Court in its historical setting and posit whether that setting bears some relevance to the present situation. The next task is to go further back in time and see

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<sup>29</sup> Article 9, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999.

<sup>30</sup> M. Lobban, 'Introduction: The Tools and the Tasks of the Legal Historian' in A. Lewis and M. Lobban (eds), *Law and History* (Oxford: OUP, 2003) at 14.

<sup>31</sup> *Ex parte Quirin*, 317 U. S Supreme Court.

<sup>32</sup> S. I. Vladeck, 'The Detention Power' (2004) 22 *Yale Law and Policy Review* 153, at 168.



what historical background lies behind a decision like *Quirin*. The ultimate point of this multi-layered journey is to realise how our contemporary understanding of the relevant concepts and practices have been fashioned, and where a particular line of legal conception has gone in a misguided direction. The reach of this logic is not only confined to common law courts. Rather, it can encompass any court in any given system, since after all, '[e]very trial constructs a history, and marshals evidence to answer a particular question, and for the purpose of a public resolution'.<sup>33</sup> This includes international and regional tribunals associated with the different regimes of international law. Such tribunals constantly refer to their past rulings on particular subject-matters. However, in so doing, they occasionally make interpretative mistakes in their reconstructions of past judgments.<sup>34</sup> Here, a lawyer with an interest in internal and doctrinal historical enquiry can at best detect the mistakes of these jurisdictions, and supply an account of the changing interpretations of different concepts over time.

#### 4. Historical enquiry and methodology of this research

The present research takes the historical enquiry of internment as one of its three constituent themes. The other two are: the international law standards governing internment, and how history is factored into today's practice. These three dimensions are deployed to supply a comprehensive vision of exercising internment in the past and present. Little will be said on what internment could or should look like in the future, and the reason for this lack of view on internment is that it is impossible to predict the future of this practice or even formulate a direction for it, unless we (and not even fully) become sufficiently aware of the particularities of the roadmap that has taken us thus far.

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<sup>33</sup> Lobban, above note 30, at 31.

<sup>34</sup> A clear example of these interpretative mistakes in the context of internment stems from the Strasbourg Court's dealings with its own very first judgment, namely, the *Lawless* case. In its reconstruction of the *Lawless* case, the Strasbourg Court has repeatedly stressed that this judgment takes Article 5(1)(c) to have entailed a prohibition of detention without trial in times of non-emergency. However, as shown in chapter III, neither Article 5(1)(c) nor the *Lawless* case prohibits the use of detention without trial as such. Rather, what they prohibit is internment without judicial review. For a detailed discussion, refer to chapter III, section 4.1.

As can be gathered from the title of this thesis, its underlying purpose is to trace an evolving thread of the practice running through modern history into contemporary practice. For our purposes, however, it is vital to remember that the lens through which we conceive the history of internment is predominantly a positivist one, with the focus on the legal dimensions to the historical narrative. This is how our analysis can be differentiated from a strict historiography of internment, or what, in the language of legal historians, is called external legal history.<sup>35</sup> It must be noted that there is no scarcity of legal literature on the subject of detention without trial in domestic and international law. Both the exponents and proponents of the practice of detention without trial have produced voluminous books and articles on the subject of detention along the divisions of the different legal canons. The interest in this topic particularly increased in the aftermath of 9/11, when hardly a day went by without headlines about the Guantanamo Bay, Abu Ghraib and Bagram detention camps, or even the alleged CIA unacknowledged detention sites in Europe and elsewhere. Accordingly, different scholars have subscribed to different points of view, and have scrutinised the practice of detention from a host of perspectives. These divergent approaches range from doctrinal analyses to pure policy arguments and legal philosophy, and have even spread to the field of international relations.<sup>36</sup> To the extent that the copious scholarly academic pieces have focused on creating a perceived ideal for the future of detention, there is a general tendency on their part to be more prescriptive in terms of law and policy rather than descriptive of what we already have at our disposal. As has been remarked before, this inattention towards description can lead to radical misperceptions and ill-funded conclusions. Yet, a constructive turn to description cannot be made possible without taking account of the history of a given subject. In the particular case of detention, there also exists a good breadth of historical literature. Notably, Simpson has authored scores

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<sup>35</sup> D. Ibbeston, 'What is Legal History a History of?' in A. Lewis and M. Lobban (eds), *Law and History* (Oxford: OUP, 2003) at 33.

<sup>36</sup> In different sections of this thesis, various examples of literature will be provided and analysed on their merits.

of valuable historical findings on the subject of detention.<sup>37</sup> To this must be added the historical excavations of the habeas corpus historians, who have embarked on the subject of detention due to its close proximity to habeas corpus.<sup>38</sup> However, the work of legal historians on the topic at hand has mostly been concerned with the external dimensions of history. This has created a discord between the historical studies of detention and the abounding doctrinal analyses of this matter. One of the premises of this research is to bridge this gap, and form a historically informed doctrinal analysis. Crucially, this is not an endeavour alien to the common law tradition. As Poole has argued with rigor:

Constitutional argument often involves consideration of the past, a fact to which British constitutional lawyers are of necessity well attuned. Absent a constitutional text, the past becomes the main repository of constitutional principles, principles that need almost continual updating and refinement by means of a process of sifting through the historical material.<sup>39</sup>

The great advantage of undertaking a historically informed analysis is that through discovering the threads of continuity and points of departure inherent in the evolution of a legal subject, some patterns can also be speculated to govern the future direction of a practice. For this to happen, one needs to read between the lines of history and law with a view to drawing the frames of practice, whose sufficient repetition and return in history has turned them into dominant legal patterns. Thus, by having run the themes of law and history together, this research seeks to advance the thesis of the subjective and objective systems of determination, and clarify its many aspects.

The historical queries of this thesis are focused on the practice of detention in England, and the British Empire from the early seventeenth century to the end of the Second World War. Here, we must briefly state the reasons for our choice of place and time. As will be shown, the evolution of the practice of detention without trial has constantly

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<sup>37</sup> A. W. B. Simpson, 'Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights' (1996) 41 *Loyola Law Review* 630. A. W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: OUP, 2001), A. W. B. Simpson, *In The Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford: OUP, 1992).

<sup>38</sup> P. D. Halliday, *Habeas Corpus: From England to Empire* (Boston: Harvard University Press, 2010), A. D. R. Zellick *et al*, *The Law of Habeas Corpus* (Oxford: OUP, 2011).

<sup>39</sup> T. Poole, 'Judicial Review at the Margins: Law, Power, and Prerogative' (2010) 60 *University of Toronto Law Journal* 81, at 91.

revolved around two central themes: order/power/authority versus liberty (or, as it will later be discussed, subjective system of determination versus objective system of determination). The former has been deployed behind all practices of internment couched in the language of necessity, and the latter has been used to constrain the powers of the executive by such means as varying safeguards manifesting themselves in the language of checks and balances. At the same time, the same two themes have acted as the driving forces of modern constitutional development.<sup>40</sup> Drawing on this undisputed assumption, it is reasonable to conclude that the history of internment is closely tied to the history of modern constitutional development and reform.<sup>41</sup> No wonder, then, that one of the earliest and most serious modern constitutional crises occurred in the context of the King's *prerogative* to intern subjects, and that was the dispute between Charles I and Parliament in the early 1620s. The struggle between authority and liberty is extremely visible in the constitutional history of England, and has been acknowledged, and elaborated in detail, by such writers as Skinner,<sup>42</sup> Halliday,<sup>43</sup> Simpson,<sup>44</sup> Loughlin,<sup>45</sup> Philip Reid,<sup>46</sup> and many more prominent writers taking on the constitutional history of England.

This visible tension between authority and liberty in the constitutional history of England has influenced the evolution of detention without trial in two major ways: 1) the mode in which the power of internment is exercised; 2) the mode in which the power of internment is constrained.<sup>47</sup> The former entails such essentials as the assertion of a constitutionally driven authority to intern, and a regulatory framework by which this authority comes to manifest itself. The latter consists of the institutional framework by which the authority to intern becomes channelled and limited.

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<sup>40</sup> M. Loughlin, *Foundations of Public Law* (Oxford: OUP, 2010) at 313.

<sup>41</sup> For proving this point for yourself, you can see, N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Michigan: University of Michigan Press, 2003).

<sup>42</sup> See, Q. Skinner, *Liberty Before Liberalism* (Cambridge: CUP, 1998).

<sup>43</sup> See, P. D. Halliday, above note 38 (Boston: Harvard University Press, 2010).

<sup>44</sup> See, A. W. B. Simpson, above note 37 (Oxford: OUP, 2001).

<sup>45</sup> See, Loughlin, above note 40.

<sup>46</sup> See, J. Philip Reid, *The Concept of Liberty in the Age of American Revolution* (Chicago: Chicago University Press, 1988).

<sup>47</sup> This will be evidenced in chapter I.

Due to the predominance of the authority versus liberty theme in its power politics, England pioneered in developing an institutional framework for either exercising or limiting the power to intern subjects. For this claim, there exist a number of examples, which we shall briefly enlist here, and address in detail in the ensuing parts of this thesis: the ban of imprisonment without a prior conviction as early as 1215 in the Magna Carta; the emergence of the writ of habeas corpus as an instrument for the judiciary to keep an account of the causes of detention; the opposition of Parliament to the authority of Charles I and the issuance of the Petition of Rights; the emphasis of the Petition of Rights on the prohibition of detention without a stated cause; the enactment of a series of habeas corpus acts in 1641 and 1679; the emergence of the practice of parliamentary suspension acts in the late seventeenth century and its continuance through the eighteenth century; formalising methods other than the suspension of habeas corpus in the aftermath of the eighteenth century; the use of the concept of necessity in a legal sense for the purpose of authorising internment; developing a rather sophisticated legal framework for the internment of aliens; and, finally, creating administrative bodies for making decisions on the release of internees.<sup>48</sup>

The importance of a historical study of internment in Britain will be increased, when it is considered that internment in the form developed in the realm was exported to a host of other parts of the world by colonialism.<sup>49</sup> Many of the former British colonies continued to exercise internment after their independence.<sup>50</sup> What is interesting, are the similarities of their post-independence exercise of internment to the original mode of internment, as introduced to them by Britain. Taking this into account, one could say that taking on the history of internment in Britain does not confine us to the particularities of this practice within the geographical demarcations of the realm. Rather, it also helps us to understand the practical foundations of internment in many states to its colonial root.

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<sup>48</sup> All of these historical companions of the practice of internment in Britain will be discussed in detail in chapter I, section 10.

<sup>49</sup> See, Simpson, 'Round Up the Usual Suspects', above note 37.

<sup>50</sup> For the most detailed account of internment in the post-colonial states, see, A. Harding and J. Hatchard (eds), *Preventive Detention and Security Law: A Comparative Survey* (Hague: MNF, 1993).

These different sub-pieces of the practice of detention without trial as orchestrated by the British practice also shaped a considerable part of the background against which the post Second World War movement of internationalism codified *new* standards governing the subject of internment. This is not to conclude that the adoption of the new laws on the matter of internment was a direct reaction to the modalities of internment as practised throughout the British Empire. However, as will be examined in the respective chapters, the exercise of internment in the British state definitely influenced the course taken by the regimes of international human rights law and international humanitarian law. This brings us to the second theme of this thesis, which will be expressed below.

## 5. International law and internment

The second central theme of this thesis follows the changes made by the two main sub-branches of international law, namely, international human rights law and international humanitarian law. Such changes, for the largest part, occurred in the aftermath of the Second World War. This was when the passion for limiting the subjective political authority of states, and replacing it with (in an idealistic manner) objective, normative and concrete rules of international law, was at its greatest.<sup>51</sup> Of course, to the extent that international law developed in the immediate wake of the Second World War, a new capacity was recognised for international law to come to grips with the rights of individuals as opposed to states. This primarily manifested itself in the legal regime of international human rights law, and later came to open a new era of humanitarianism in the laws of armed conflict as well.<sup>52</sup> One of the primary reasons for this revolutionary change was that the conception of the rights of individuals in times of peace or armed conflict was no longer confined to scholarly treatises on the laws of nature, or contrasting declarations on the rights of man.<sup>53</sup> Rather, in this new era, there was an increase in the written embodiments of international law dealing with individuals in the

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<sup>51</sup> M. Koskeniemi, *The Politics Of International Law* (Oxford: Hart Publishing, 2011) at 38–39.

<sup>52</sup> See, T. Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239.

<sup>53</sup> This point will be analysed in detail in chapter II of this thesis.

form of international treaties.<sup>54</sup> These treaties contain a wide range of international law prescriptions as to when and how states must exercise internment. However, the answers provided by international law to the questions of how and when to intern are relatively different in its two branches of human rights and humanitarian law. For example, the human rights instructions on internment are cast in the language of arbitrariness, about which we will supply a detailed analysis in chapter III.<sup>55</sup> This is whilst international laws of armed conflict entail no reference to the language of arbitrariness. Equally true is the obligation of judicial review of internment imposed by such treaties as the International Covenant on Civil and Political Rights.<sup>56</sup> However, the laws of armed conflict include no such obligation.<sup>57</sup> The point is, that even decades after the adoption of the relevant treaties, some important parts of their content and their interaction with the other regimes of international law remain contested. The second theme of this thesis is composed of its commitment to discuss what these international law obligations were in their historical context, what they are in their contemporary understanding, how they have contributed to the existing legal dialectic surrounding internment, and how states have received or otherwise resisted them.

Another purpose of locating our focus on international law is to highlight the conflict of interests between states and international law. To elaborate more on this point, it must be said that there is a natural tendency amongst states to take matters at their own discretion, and to use their own subjective judgement on such questions as who to intern, when to intern and how to intern. At the same time, international law, whilst recognising states as its principal actors, aspires to regulate the activities of states when they adversely affect the rights of individuals.<sup>58</sup> Such contrasting trends of international

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<sup>54</sup> Chapters III and IV will enlist and analyse these treaties in detail. Here, it must briefly be mentioned that in our analysis of international law, our focus will be placed on treaty-based international law, as dealing with the issues of customary international law goes beyond the limited space of this thesis. That said, whenever questions of custom arises, such as whether the obligation of judicial review must be treated as *jus cogens*, they will, albeit very briefly, be dealt with in this thesis.

<sup>55</sup> Article 9, ICCPR, above note 29.

<sup>56</sup> A detailed discussion of such issues can be found in chapter IV, section 9.

<sup>57</sup> Compare and contrast Article 9 of the ICCPR to Articles 43 and 78 of GC IV (Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287).

<sup>58</sup> On the point of this conflict between international law and states, M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: CUP, 2001) at 360.

law and states at times become very visible on the front of internment. For example, the heavy reliance of the US executive on the constructed category of 'enemy combatants' was done only to create a unique grey space insulated from the reach of international law. As will be seen in the example of 'enemy combatants', states often resort to very sophisticated mechanisms disguised by an appearance of law precisely to circumvent the international rule of law. Here, an added dimension for studying the legal history of internment can be recognised, and that is, the legal history of internment can reveal a lot about the techniques and the mechanisms states have used on the subject of internment to supersede their legal obligations under domestic and international law, and this automatically directs us to the third theme of this thesis.

## 6. How the history of internment informs contemporary practice

Even though the advent of the post Second World War era signifies a ground-breaking point of departure in the history of internment, it is very important to trace both the places in which contemporary practice can be dichotomised from historical practice, and in what areas there is a thread of continuity between historical and contemporary practice. Without realising and distinguishing these points of departure and continuity, we are likely to create mistaken and misleading classifications. Once again, a perfect example of these historical and analytical mistakes stems from the claims of the Bush Administration in the aftermath of the September 11 attacks, that countering terrorism in this new age requires new weapons and new laws,<sup>59</sup> whilst, in effect, the Bush Administration employed very old techniques and laws, such as the language of the 'enemy combatants' emerging from the *Quirin* case in its so-called 'war on terror'. Therefore, in dealing with the contemporary issues in chapters III, IV and V, we make the linkages between past and present exercises crystal clear whenever the need arises. Here, we have put forward some contemporary concepts regarding internment for

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<sup>59</sup> Secretary of Defense D. H. Rumsfeld, 'A New Kind of War' published in the *New York Times*, September 27, 2001.



understanding, which is necessary as well as useful in going back to the history of internment.

- 1) The meaning of the test of arbitrariness as laid down in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.
- 2) Understanding the difference between objective judicial review of internment, and sham reviews deferring the powers of the executive under any circumstances and at any cost.
- 3) The persistence of some post-colonial states such as India in exercising internment and their interaction with the contemporary human rights standards.
- 4) Understanding the emergency clauses of the international and regional human rights treaties.
- 5) Detecting the origin of the language employed in some of the relevant articles of the Fourth Geneva Convention relating to internment.
- 6) Tracing the origins of creating categories for different internees, such as 'disloyal citizens', 'unlawful/enemy/unprivileged combatants'.
- 7) Detecting the origin of such features as military commissions and advisory boards in the practice of internment.

## **7. Research questions and the structure of this thesis**

Drawing on the central themes of this thesis, the primary questions underlying this research are as follows:

- 1) What were the first regulatory methods of authorising internment in the common law tradition, and how were such methods exported to other parts of the world? What were the legal thresholds moving the authorities to resort to internment, and how was the conflict between the subjective discretion of sovereigns and the requirements of the rule of law in interning individuals mediated in the common law tradition? These questions will be examined in chapters I and II.

- 2) Did international law play any role in regulating the law of internment before the emergence of international human rights law, and what was the role of the sovereign prerogative in interning aliens? These questions will be answered in chapter II.
- 3) How did human rights law contribute to the humanisation of the rules associated with internment? What is the meaning of the test of arbitrariness on the prohibition of arbitrary detention, and how can this be applied in different cases of internment? Do the standards of human rights on internment change in the cases of emergency, and how does this affect the test of arbitrariness? These questions will be addressed in chapter III.
- 4) What were and are the legal bases for internment under the traditional laws of war and the contemporary international laws of armed conflict? In what ways and to what extent can the human rights law standards governing internment be exploited to govern internment in armed conflict situations? Such questions will be explored in chapter IV.
- 5) How did the history of internment in the common law tradition, the legal standards arising from international law and the natural tendency of the executive to tip the balance in favour of its discretion, factor into the American 'counter-terrorism' response? This will be our concluding question for chapter V.

Finally, on account of addressing and analysing the questions posed above, the concluding remarks of this thesis draw a summary pattern for the evolution of detention without trial, which links the historical investigations of this thesis and the practice of detention without trial as it is known and exercised today.

## Chapter I

### **The Historical Evolution of the Practice of Detention without Trial in the Common Law Tradition**

#### **1. Introduction**

The many constitutional crises which occurred in England in the seventeenth century, required a theoretical revision of a number of concepts in the political discourse. The effects of this revision did not only occur at theoretical levels. They were also visible at the level of political decision-making.<sup>1</sup> In the seventeenth century, when arbitrary uses of the prerogative by Charles I, Charles II and James II in order to exercise detention without trial were criticised by Parliament, there emerged an implicit review of the contours of arbitrary power in the political discourse requiring an articulation of the boundaries of the use of prerogative. It was by the virtue of such boundaries that the scope of deference to liberty or the measures aimed at containing licentiousness would be determined.<sup>2</sup>

Two opposing practices in the modern history of England would determine the limits of liberty in a confrontation against licentiousness and these were habeas corpus and detention without trial. The former was tasked to ensure that the subjects' loss of liberty was undertaken on the basis of reasons standing compliant to the known law of the realm. The latter was, however, a legal vehicle generated by necessity, specifically utilised for depriving subjects of their physical liberty. That is to say, when licentiousness was to gain ground, necessity would force authorities to resort to detention without trial for containing the liberty of individuals.

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<sup>1</sup> G. Robertson, *Crimes against Humanity: The Struggle for Global Justice* (London: Penguin books, 2006) at 4-16.

<sup>2</sup> See, J. Philip Reid, *The Concept of Liberty in the Age of American Revolution* (Chicago: Chicago University Press, 1988) at 33-36.

This chapter starts its quest of determining the conceptual and practical components of 'the law of the land' with the Magna Carta. It briefly describes the role of the Magna Carta in shaping the discourse governing the issue of detention without trial. Gaining an appreciation of this role is particularly important in that it aids us to set the context for the constitutional crises of the seventeenth century, which led to an institutionalisation of the practice of detention without trial, as we recognise it today. Accordingly, the second section of this chapter will illustrate how the practice of detention without trial in the early seventeenth century became linked to the writ of habeas corpus. In so doing, a heavy reliance is made upon the historical findings of the major historians of habeas corpus. Having done that and drawing on the valuable scholarship of the legal historian A.W.B. Simpson on detention without trial,<sup>3</sup> this chapter identifies three primary methods for authorising detention without trial from the eighteenth century onwards. These methods are suspension of habeas corpus, martial law, and special regulations. It must be noted that the British experiences of colonial governance (from mid eighteenth century to the end of the Second World War) is essential in terms of appreciating the evolving methods of detention without trial. It was in the context of colonial uprisings that the British counter-insurgency methods developed. Some authors have even gone as far as contending that colonies more often than not served as 'constitutional test grounds' for many practices that Britain favoured to put in place.<sup>4</sup> It is safe to argue that colonialism played a vital part in terms of promoting different devices for dealing with emergencies. Given this importance, this chapter is divided into two different parts. The first part (which follows a strict chronological order in the seventeenth and

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<sup>3</sup> For example, A. W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: OUP, 2001).

<sup>4</sup> See, for example, P. Costa, D. Zolo, *The Rule of Law, History, Theory and Criticism* (Dordrecht: Springer, 2007).

eighteenth century) pays regard to detention without trial in England and the second part combines the experiences of emergency situations in England with those of the colonies.

## 2. Magna Carta: Where it all began

As is widely known, the Magna Carta came into existence as a result of a long-lasting conflict between King John and the barons,<sup>5</sup> and it was a direct response to the crimes of King John as well as the entire tradition of 'Angevin Kingship'.<sup>6</sup> The ultimate value of the Magna Carta was to enforce the idea that 'the king was not above the law.'<sup>7</sup> In so doing, the content of the Magna Carta was directed by its authors to put particular limits on the powers of the King, when infringing upon the liberties of subjects. Among these restraints was the freedom of subjects from seizure or imprisonment, 'except by the lawful judgments of his equals/[peers] or by the law of the land.' Of course, the notion of importance here is 'the law of the land.'<sup>8</sup>

Despite its clear purpose of placing some rudimentary restraints upon the freedom of the King, the phrase 'the law of the land' was not susceptible to precise meaning. It was thus that the definition of 'the law of the land' became a moving target over the centuries. Many questions persisted. To state a few of these questions, what if a seemingly 'illegal order' by the King took the form of written law? Was 'the law of the land' to be understood in the light of its pair term 'lawful judgments of peers' or vice versa? Were the phrases 'the law of the land' and 'judgement of peers'

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<sup>5</sup> See, D. Levy, *The Signing of Magna Carta* (United States: Twenty-First Century Books, 2008).

<sup>6</sup> N. Vincent, *Magna Carta: A Very Short Introduction* (Oxford: OUP, 2012) at 35-36.

<sup>7</sup> C. Daniell, *From Norman Conquest to Magna Carta: England 1066-1215* (Abingdon: Routledge, 2003) at 51.

<sup>8</sup> *Magna Carta Libertatum* (1215), chapter 29.

meant to convey an equivalent meaning?<sup>9</sup> What about the occasions, on which the King alleged to be the victim of treason himself? What about the time of war in which laws were considered to fall silent?<sup>10</sup> Questions such as these invariably determined the trajectory of the concept of the rule of law in the common law tradition. More particularly, they punctuated the evolving process of the laws governing the practice of internment.

As 'the law of the land' proved to be far from representing a concrete concept, different attributes in separate periods stood out to signify the meaning and scope of 'the law of the land.' For example, Thompson has argued that the notion of *lex terrae*/the law of the land was used in a synonymous manner with 'due process of law' in the fourteenth century.<sup>11</sup> It was this emphasis on 'due process of law' that increased the importance of the common law writs in general, and the writ of habeas corpus in particular. However, as Thompson has remarked, the fact that the connection between 'the law of the land' and 'due process of law' was highlighted from the fourteenth century onwards did not mean that there immediately emerged a set of rules and procedures set in stone for the purpose of realising where the king could exceed its authority. Accordingly, Thompson has provided many examples through which, one could see invocations of dubious procedures to the benefit of the king in the name of law.<sup>12</sup> Some common law historians have argued that *lex terrae*, when translated into 'due process' did not intend to hint at any form of standard procedure. Rather, so long as there existed a procedure or process for a given action of the King, no matter how minimal, that

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<sup>9</sup> R. Turner, *Magna Carta: Through the Ages* (Edinburgh: Pearson Education Limited, 2003) at 71-72.

<sup>10</sup> F. Thompson, *Magna Carta: Its Role in the Making of the English Constitution 1300-1629* (London: the University of Minnesota Press, 1948) at 72.

<sup>11</sup> *Ibid.*, at 68-69.

<sup>12</sup> *Ibid.*, at 74.

action could be considered as being compatible with 'the law of the land.'<sup>13</sup> In other words, it was 'not the manner of judicial procedure, but the complete absence of it,'<sup>14</sup> which formed an anti-thesis to requirements of 'the law of the land.' This might well have been the initial impression left by the test of *lex terrae* in the first few centuries succeeding the issuance of Magna Carta. However, in the first half of the seventeenth century, there emerged signs of change in the predominant legal conceptions of the day, as King Charles I learned in the dispute caused by the *Five Knights* case, which will be considered in greater detail later in this chapter.<sup>15</sup>

### 3. The emergence of habeas corpus

As already mentioned, the fourteenth century witnessed an amplification of legal procedures and new legal institutions in England. Among the institutions added to the law enforcement machinery of England in the fourteenth century were the Justices of the Peace (JPs). These were appointed as a replacement for *custodias pacis*, or conservators/keepers of the peace, whose powers were generally more limited than the JPs.<sup>16</sup> In general, the JPs possessed very broad arresting powers.<sup>17</sup> In short, the broad powers of the JPs offered a route to their abuse of power. What was at stake in the JP's abuse of discretion was something extremely valuable in the realm of English politics and law, namely, the liberty of the bodies of subjects. To understand the importance of the physical liberty of subjects, we must look to an important attribute of subjecthood which has been described by Halliday as 'a condition one entered by coming into a

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<sup>13</sup> W. S. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John with an Historical Introduction* (Glasgow: Maclehouse, 1914) at 447-448.

<sup>14</sup> C. H. McIlwain, 'Due Process of Law in Magna Carta' (1914) 14 *Columbia Law Review* 27, at 30.

<sup>15</sup> Section 4.

<sup>16</sup> See, B. Putnam, 'The Transformation of the Keepers of the Peace into the Justices of the Peace 1327-1380' (1929) 12 *Transactions of the Royal Historical Society* 19.

<sup>17</sup> W. Blackstone, *Commentaries on the Laws of England* (New York, E. Duycknick et al, 1827) at 260.

particular kind of relationship with the king: his protection.<sup>18</sup> However, the protection of the king could only be spread to subjects, if they would in turn commit their bodies to protect the king.<sup>19</sup> The meaning of this formula was that a jailed subject by the arbitrary imprisonment orders of the JPs could not commit his body to protect the king. Thus, it was the king's need to have an account of the cause of his subjects' deprivation of liberty that gave rise to the writ of habeas corpus as an instrument by which judges could enquire into the cause of subjects' detention.<sup>20</sup>

However, no matter what motives were deployed behind the formulation of habeas corpus, the writ of habeas corpus, even in its *ad subjiciendum* form, changed the practice of confinement in ways never witnessed before. Firstly, on the return of the writ of habeas corpus to judges who issued it, jailers were to express the cause of confinement. This in turn reduced the ability of actors such as sheriffs and justices of the peace to resort to false imprisonments. As a result, the emergence of habeas corpus certainly necessitated strong evidentiary grounds for such actors to invoke their detention powers.

However, one question persisted to create a slight sense of unease among the judges, who issued habeas corpus; what about the imprisonment orders made by the King or the King in council (Privy Council)?<sup>21</sup> In such situations the courts would continue to issue habeas corpus for the imprisonment orders made by the King's officials. However, some of these writs would return to the judge, who issued the writ, without mentioning the cause of detention in them. When faced by the return of habeas corpus without a cause, the courts would exercise judicial deference to the

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<sup>18</sup> P. D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge: Harvard University Press, 2010) at 35.

<sup>19</sup> *Ibid.*, at 74-84.

<sup>20</sup> Halliday, above note 18, at 9.

<sup>21</sup> Privy Council was the main body of government, which served as the historical antecedent to cabinet government.



will of the detaining power.<sup>22</sup> It is fair to say these types of detentions without an alleged cause are the true *modern* ancestors of the practice of detention without trial, as we know today.<sup>23</sup> The practice of returning the writ of habeas corpus with no stated cause for the detentions exercised by the Privy Council seems to have been quite acceptable at least by the end of the first quarter of the seventeenth century. So much so that Sir Edward Coke (who later joined on the forefront of criticising Charles I for the same practice) had argued at one point that the cause of detention, when not stated by the detaining power on the return of habeas corpus must be assumed to be '*arcana imperii*' or 'secret of empire'.<sup>24</sup> This resort to the excuse of '*arcana imperii*' was usually used by the detaining authority in the early seventeenth century in cases involving the crime of treason.<sup>25</sup>

#### 4. The case of *Five Knights* and differing conceptions of the powers of the sovereign

In 1626, King Charles I found himself in the middle of a serious financial crisis caused by his aid to his relative and strategic ally, Christian IV of Denmark. The situation rapidly worsened, as Charles' allies suffered consecutive defeats, and therefore, he was compelled to seek an urgent way of raising revenues. This finally resulted in Charles' imposition of his forced loan policy upon his subjects. Knowing that there was no real prospect of a repayment of their paid loans to them, many subjects, and

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<sup>22</sup> Halliday, above note 18, at 154, and M. Kishlanski, *Tyranny Denied: Charles I*, Attorney General Heath, and The Five Knights' Case (1999) 42 *The Historical Journal* 53, at 57-58. For the opposite view, see, J. A. Guy, 'The Origins of the Petition of Rights Reconsidered' (1982) 25 *The Historical Journal* 289.

<sup>23</sup> The ancient ancestors being detention of the followers of Christ such as Paul and Peter, *Apostles*, Acts 25:27

<sup>24</sup> Bod. Rawlinson C. 382 cited in Halliday, above, at 398.

<sup>25</sup> For example, *Countess of Shrewsbury's Case*, (1612) 12 Coke Reports 94 77 E.R. 1369 and *Blanchflower v Atwood*, (1607) Yelverton 107 80 E.R. 73.

particularly most English elites resisted the forced loan policy.<sup>26</sup> In response to this resistance, by the King's commandment, many individuals were detained. Among such individuals were the five knights, who requested the issuance of the writ of habeas corpus for enquiring into the lawfulness of the cause of their detention. The writ was issued. However, instead of specifying the cause of their detention, the Privy Council briefly posited that the detentions in question had been exercised by the king's 'special commandment.'

With one of the knights having withdrawn from the case, the other four remaining plaintiffs requested the grant of bail on the basis that they must be informed of the cause of their detention in accordance with the law of the land.<sup>27</sup> This case renewed the old confusions about the meaning of 'the law of the land' as articulated in Magna Carta. Accordingly, both parties invoked Magna Carta for their own cause. The defence for the plaintiff drew on Magna Carta, and argued, 'If this return [without specifying any cause for detention] shall be good, then his imprisonment shall not continue on for a time, but forever.'<sup>28</sup>

At the other end of the spectrum was Attorney General Heath, who was of the opinion that 'the law of the land' recognises the absolutism of the King's powers with regard to particular matters:

[T]here is a great difference between those legal commands and that absoluta potestas that a sovereign hath, by which a king commands. However, when I call it absoluta potestas, I do not mean that it is such a power as that a king may do what he pleaseth, for he hath rules to govern himself by, as well as your Lordships, who are subordinate judges under him. The difference is, the king is the head of the same fountain of justice, which your Lordship administers to all his subjects.<sup>29</sup>

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<sup>26</sup> See, R. P. Cust, *The forced loan and English politics* (Oxford: OUP, 1987).

<sup>27</sup> Proceedings on the Habeas Corpus, brought by *Sir Thomas Darnel et al* at the King's-Bench in Westminster hall: Charles I A. D. 1627 in *A Complete Collection of State Trials* (1816).

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

On close scrutiny, one can identify striking parallels between the language employed by Heath and the words of Gentili in his famous piece, the 'Absolute Power of the King.'<sup>30</sup> To tip the balance of power in favour of the monarchy in its continued clashes with religious institutions, Gentili aligned himself with the concept of the absolute power of the sovereign, and thereby he argued,

Sovereignty is absolute and perpetual power[...]. This sovereignty means that the prince never finds anything above him, neither human being, nor law... This power is absolute and without limitation... That the 'Prince is not bound by law' is law, as is also that 'Law is what pleases the prince.' And this is no barbarian law but Roman law, the first and foremost among human laws... And so, what is called regal prerogative in England is absolute power.<sup>31</sup>

Although Heath's defence of the King's prerogative was captured in a much more constraining fashion than that expressed by Gentili, the ultimate result was somehow the same as that which Gentili intended to deliver, namely, reserving the absolute power of the sovereign in certain domains such as detention.<sup>32</sup>

#### 4.1. *Detention without trial in Parliament*

The controversies in Parliament surrounding detention without an alleged cause, and its underlying justification, namely *absoluta potestas*, gathered pace in the politically charged atmosphere of the 1620s. This particularly holds true in the aftermath of the decision made by the King's Bench in the *Five Knights'* case in which the judges approved the implementation of imprisonment at the discretion of the King and did so in order 'to strengthen the prerogative.'<sup>33</sup> Chief Justice Hyde, who delivered the opinion of the court in the case in question, mapped out broad areas of

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<sup>30</sup> Cited and analysed in M. Koskeniemi, 'International Law and raison d'état: Rethinking the Prehistory of International Law' in B. Kingsbury, B. Strauman (eds), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: OUP, 2010).

<sup>31</sup> Ibid.

<sup>32</sup> C. W. Brooks, *Law, Politics And Society in Early Modern Europe* (Cambridge: CUP, 2008), at 162.

<sup>33</sup> R. P. Cust, above note 26, at 238.

judicial deference to the King's commands. His widely cited words in this regard were, 'if no cause of the commitment be expressed, it is to be presumed to be for matter of state, which we cannot take notice of.'<sup>34</sup>

The result of the precedent established by Hyde was simple: when a detention was exercised by the King's officials, the writ could still follow. However, if on the return no cause was expressed, prisoners could still be held. Therefore, the final judgment of the court did not favour the request of the four knights. Observing fairness in analysing the judgment delivered by Hyde has historically proved to be a difficult task, and it goes far beyond the scope of this thesis. In short, if we accept that the term 'the law of the land' required compliance on the part of the King or his privy council with some form of standard procedure, the inevitable conclusion would be that Hyde was mistaken in making a judgement in favour of the King. However, as mentioned above, most historians seem to suggest that there did not exist a standard procedure for the purposes of determining what *lex terrae* meant. In any case, the decision of Hyde did not specify what meaning could be assigned to 'the law of the land' either.

All the imprisoned loan refusers were released in the last days of the year 1627, but too late for the monarchy as the debates of Parliament in 1628 were centered on the issues surrounding imprisonment without a cause shown. The greatest concern of many MPs in this respect involved the excessive power of the King in his evocation of the prerogative to indefinitely detain subjects without charge.<sup>35</sup> Unsurprisingly, MPs in the House of Commons were divided on the matter. However, the majority of MPs opposed the stance that gave more weight to the prerogative of the

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<sup>34</sup> *Five Knights Case*, above note 27, at 57.

<sup>35</sup> See, S. Willms, 'The Five Knight's Case and Debates in the Parliament of 1628: Division and Suspicion Under King Charles I' (2006) 7 *Constructing the Past* 92.

King than the liberties of English subjects and argued, '[l]iberty is the subject's inheritance.'<sup>36</sup> Sir Edward Coke took a more legal approach and argued that *inter alia* the element of indefiniteness inherent within the detentions ordered by the King would place such exercise outside the bounds of law, 'for had the law intended such a thing it would have named a time.'<sup>37</sup>

All in all, the debates in the House of Commons finally led to the adoption of the Petition of Rights 1628, which banned the exercise of detention without any cause shown. Nevertheless, the Petition of Rights entailed the same vague references to 'the law of the land.' In other words, the Petition of Rights did not specify whether its limitations restrained the King or his officials, when they exercised detention under the auspices of the prerogative. Of course, the context in which the Petition of Rights was adopted encourages one to conclude that 'even the qualified suggestion of such a supra-legal prerogative was strenuously opposed by the commons.'<sup>38</sup> However, what happened in practice seemed to be quite different.<sup>39</sup>

The King's impulse in continuing the detention of subjects, especially the Members of Parliament without an alleged cause moved Parliament in 1641 to adopt the Habeas Corpus Act of 1641.<sup>40</sup> The Habeas Corpus Act of 1641 in general entailed more precision than the Petition of Rights. It aimed to eliminate the delays made by the judges of King's Bench in issuing the writ of habeas corpus.<sup>41</sup> More importantly, this statute was

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<sup>36</sup> R. C. Johnson *et al*, *Commons Debates 1628* Volume II: 17 March-19 April 1628 (London: Yale University Press, 1977) at 199.

<sup>37</sup> *Ibid.*, at 195, even though as mentioned above, it appears that Coke had expressed legal opinions in favour of detention with no alleged cause, when exercised by the king's officials during the reign of Charles' father.

<sup>38</sup> L. J. Reeve, 'The Legal Status of the Petition of Right' (1986) 29 *The Historical Journal* 257, at 271.

<sup>39</sup> Halliday above, at 139.

<sup>40</sup> Charles I, 1640: An Act for the Regulating of the Privy Council and for taking away the Court commonly called the Star Chamber.', *Statutes of the Realm: volume 5: 1628-80* (1819) Sec 8.

<sup>41</sup> *Ibid.*

explicitly addressed to the Privy Council, and stipulated that detention orders issued by the Privy Council could not be placed beyond judicial review.<sup>42</sup> The result of this process was 'a transformation in the conception of 'lawful imprisonment for reasons of state.'<sup>43</sup> From 1641 onwards, one witnesses a practice of parliamentary detention orders for reasons of state. The meaning of this transformation was that parliamentary detention orders were to be considered as being insulated from judicial review.

## 5. Parliament assumes the detention powers of the King

In the wake of the civil war in the 1640s, Parliament, and more specifically Cromwell, the Lord Protector, resumed all the powers of the King for their own cause. The extensive use of imprisonment orders by the Protector was intertwined with undermining the independence of the courts issuing habeas corpus and requiring its return expressing the cause of detention. Similarly, in a case concerning detention, Cromwell blatantly dictated that the judges should remember 'who made them judges [and] whether they had any authority to sit there, but what he gave them.'<sup>44</sup> Cromwell did everything in his power to circumvent the judicial scrutiny of the detentions ordered by him. Throwing the prisoners into overseas places was one of the innovations created by Cromwell's council in order to block the reach of habeas corpus.<sup>45</sup> Parliament questioned the legality of placing the prisoners outside the jurisdiction of English courts, and consequently, Parliament was dissolved.<sup>46</sup> Cromwell's tactic of using places

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<sup>42</sup> See also, E. Jenks, 'The Story of the Habeas Corpus' (1902) 18 *Law Quarterly Review* 64.

<sup>43</sup> Halliday, above note 18, at 226-227.

<sup>44</sup> E. H. Clarendon, *The History of the Rebellion and Civil Wars in England, Volume III*, Part 2 (London: Clarendon Press, 1807) at 986.

<sup>45</sup> P. Gregg, *Free-Born John: A Biography of John Liburne* (London: Dent, 1961) at 244-2456.

<sup>46</sup> E. Bernstein, *Socialism and Democracy in the Great English Revolution* (London: Frank Cass, 1963 first published in 1930) at 156.

outside the reach of habeas corpus was continued after his death and after the restoration of the monarchy.<sup>47</sup>

The limited space of this research prevents us from tackling the wide political and legal disagreements over the destiny of the writ of habeas corpus, and its role in supervising such imprisonments exercised in this period. In short, after a laborious conflict between Parliament, the courts and the Crown, Parliament enacted the Habeas Corpus Act of 1679.<sup>48</sup> The Habeas Corpus Act of 1679 was an achievement only in the sense that it clarified some jurisdictional and procedural matters concerning the operation of habeas corpus. Furthermore, it included an exclusionary clause which prevented the return of habeas corpus detained on the suspicion of 'felony or treason plainly expressed in the warrant of commitment' and 'persons convicted or in execution by legal process.'<sup>49</sup> In the wake of the political chaos of the late 1680s, Parliament would itself pioneer the suspension of habeas corpus in 1689. This suspension of habeas corpus provided the Privy Council with the power to pursue arrests, and detentions without any legal obstacle.<sup>50</sup>

At the time of introducing the bill of the suspension of habeas corpus in May 1689, Parliament engaged in more serious debates as to whether an act of suspension was really required by the grievances of the situation. In this regard, one MP stated, '[w]e are in war, if we make only use of that remedy as if we were in full peace, you may be destroyed without remedy.'<sup>51</sup> On the other hand, the opposition put greater emphasis on the Habeas Corpus Act, and argued, 'If we part it twice, it will become quite a

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<sup>47</sup> Halliday above note 18, at 193-198.

<sup>48</sup> Parliament of England, 31 Car. 2, c. 2 (1679).

<sup>49</sup> Ibid.

<sup>50</sup> See, D. H. Oaks, 'Legal History in the High Court- Habeas Corpus' (1965-1966) 64 *Michigan Law Review* 451.

<sup>51</sup> W. Cobbetts, T. C. Hansard, *Parliamentary History of England* Vol. V (London: R. Bagshaw. 1809) at 267.

common whore. Let us not remove this land-mark of the nation, for a curse attends it.<sup>52</sup>

Two features in the debates of Parliament stand out as most interesting; 1) the role of Parliament in forming a framework for the suspension of habeas corpus and 2) the debate on the impact of the urgent situation on the resort to detention upon the suspension of habeas corpus. As regards the former feature, some speakers insisted that a balanced action of receding from subjects' liberties would be justifiable if it is done through a parliamentary intervention. That would in effect provide legitimacy for the suspension of habeas corpus.<sup>53</sup> Parliamentary intervention for enacting emergency laws turned out to be a credible justification for the suspension of habeas corpus upon which the authorities in England relied for subsequent centuries to justify their departure from normal procedures of law. As regards the latter feature, the difference between the governing legal imperatives in the time of peace and war found a great expression in the arguments of both groups of speakers, namely, the advocates of a further suspension of habeas corpus and the opposition to it. For example, Capel argued, 'it is the wisdom of all governments not to be strait-laced upon any emergency.'<sup>54</sup>

The debates generated in Parliament in May 1689 on the suspension of habeas were the earliest of their kind in modern history and reveal how the severity of the situation in times of political discomfort can make an impact on the resort to detention without trial. Despite the controversies generated by the parliamentary suspension of habeas corpus, there were a couple of advantages in employing the particular method of suspending habeas corpus by Parliament for authorising detention without trial. First of all, suspension of the writ of habeas corpus would help reduce some of

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid., at 270.



the confusion about the implications of 'the law of the land' in the context of detention. This would be made possible by introducing the test of 'necessity' as a prerequisite for departing from some of the normal procedures inherent within the 'due process' component of 'the law of the land'.<sup>55</sup> That is to say, the parliamentary suspension of habeas corpus was a move towards the institutionalisation of the idea that in times of crisis, the requirements of 'the law of the land' may be changed. Equally important was that of the suspension of habeas corpus as Parliament could articulate the degree to which a departure from the known norms of 'the law of the land' was permissible. The following sections will explore the specific features of the suspension of habeas corpus as well as other subsequent regulatory frameworks aimed at authorising detention without trial.

## **6. Early Years of the eighteenth century and the use of suspension technique in home and the colonies**

The opening years of the eighteenth century signified a period in which England was at the brink of many political crises. The post-revolutionary divisions of the English society showed no signs of disappearance. On many levels, rebellion, treason and plots which had overshadowed England in 1688 continued to exist.<sup>56</sup> The frightening possibility of a Catholic uprising against the sovereign was still present. Although James II died in 1701, his allies inside, and outside the realm were still alive, and presented challenges to the sovereign institutions. Furthermore, the Eighteenth century Jacobitism was, for example, a great generator of anxiety among the authorities. Under these circumstances, patience for the operation of habeas corpus would not last for long. In 1707, the Treaty

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<sup>55</sup> Halliday, above note 18, at 247.

<sup>56</sup> See, J. H. Plumb, *The Growth of Political Stability in England* (London: MacMillan, 1967).

of Union between England and Scotland gave rise to a new wave of unrest in Scotland.<sup>57</sup> In the same year, Parliament enacted legislation titled 'an act to empower her Majesty to secure and detain such persons as her Majesty shall suspect are conspiring against her person and government.' The year 1707 signified the start to a long-lasting wave of parliamentary suspension acts in the first half of the eighteenth century running through the years for separate incidents, 1715, 1716, 1722, 1744, 1745, 1746, 1747. There are two important points, which must be clarified regarding the suspension of habeas corpus and the practice of detention without trial in the said periods. The first important factor is that although each law for the suspension of habeas corpus had different factual surroundings, the underlying theme for the suspension of habeas corpus in all these periods remained the same, namely, perceived necessity. As Halliday has articulated in his account of habeas corpus:

From 1689 to 1747, Parliament followed a formula, whether the necessity occasioning suspension was a "*detestable conspiracy*" by papists and other rebellious persons for invading the realm from France to the utter subversion of the protestant religion and the laws and liberties of this kingdom.<sup>58</sup>

References to 'conspiracy' for justifying the suspension of habeas corpus began in 1696, when King William III brought the attention of Parliament to the discovery of an assassination plot against himself. On the 24<sup>th</sup> of February 1696, King William made a speech in Parliament, informing Peers and Commons of 'the discovery of the assassination plot against himself' and also, the threat of 'a sudden invasion' from the enemies of the realm. The evidence enclosed with the King's address showed that the assassination of the King and the threat of invasion were linked.<sup>59</sup>

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<sup>57</sup> See, A. I. Macinnes, *Union and Empire: The Making of the United Kingdom in 1707* (Cambridge: CUP, 2007).

<sup>58</sup> Ibid.

<sup>59</sup> W. Cobbett, *Cobbett's Parliamentary History of England*, Vol. V. (London: T. C. Hansard, 1809) at 987.

Also, one of the features of the suspension acts was that they would determine a time limit for the suspension of habeas corpus. However, this time limit could be extended if the members of Parliament felt a need for doing so. Therefore, the suspension of habeas corpus in some years was not exercised by separate suspension acts. Rather, suspensions were often extensions of the previous suspension acts. The standard time frame for the suspension of habeas corpus was five months.<sup>60</sup> This changed in 1722, and again by certain appeals to the magnitude of conspiracies threatening the Kingdom, Parliament decided to suspend habeas corpus for one year.<sup>61</sup>

## 7. The rise of executive power

The many crises which punctuated the first half of the eighteenth century required concrete state machinery for efficient responses. As time went by (and with an increase in foreign and internal conflicts), the executive branch too came to accumulate more powers. As Harris notes:

The wars saw a major transformation in the machinery of executive government: a dramatic expansion of administrative personnel, the creation of new government departments, professionalization and a more scientific approach of government.<sup>62</sup>

This transformation of the executive government also manifested itself in a dramatic increase in arresting and detention powers. As regards the arresting powers, it must be noted that such powers were more related to the general policing of the society.<sup>63</sup> The effects of the transformation of the executive power were even more visible on the front of detention without trial. Over time, as Halliday notes, 'suspension operated not by

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<sup>60</sup> Halliday, above note 18, at 249.

<sup>61</sup> *Cobbett's Parliamentary History* Vol. VIII (London: T. C. Hansard, 1811) at 39-40.

<sup>62</sup> T. Harris, *Revolution: The Great Crisis of British Monarchy, 1685-1720* (London: Penguin Books, 2007) at 492.

<sup>63</sup> F. McLynn, *Crime and Punishment in the Eighteenth Century England* (Oxford: OUP, 1992) at 19.

suspending habeas corpus, but by expanding detention powers.<sup>64</sup> We can spot the dramatic increase of detention powers in two separate bills. The first bill was passed in 1777 for allowing the king 'to detain and secure persons charged with/or suspected of high treason committed in North America or on the high seas, or of piracy.' The second relevant document was the Aliens Act of 1793.

### *7.1. Detention against Revolutionary Americans 1777*

For a long time, the British government was determined to levy duties in America on the same materials charged with tax in Britain. However, due to the lack of enough information as to the consequences of this new economic policy in America, the proposals for introducing new duties were delayed. Finally, the Stamp Act was passed in 1765 by Parliament.<sup>65</sup> Over the years in which Parliament and the British government were involved in drafting new taxation policies, the debate both in the minds of colonial authorities and population shifted to something much more fundamental. The principal question among the American colonists somehow became whether Parliament had a right to tax colonies or not?

Such questions on the authority of the British Parliament were immediately taken to new levels, such as the conflict between the metropolitan and colonial privileges or the extent of Crown's prerogative in the colonies and these all became new subjects of dispute.

The tensions concerning the Stamp Act was nothing short of a constitutional crisis. In fact, the main theme of the colonists' resistance

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<sup>64</sup> Halliday, above note 18, at 249.

<sup>65</sup> P. D. G. Thomas, *British Politics and the Stamp Act Crisis: The first phase of the American Revolution 1763-1767* (Oxford: Clarendon Press, 1975) at 85-100.

was based on constitutional contentions. This at least held true of the American resistance until 1776.<sup>66</sup>

A new wave of draconian measures arrived in the early 1770s.<sup>67</sup> These measures radicalised colonists to the point that their constitutional defiance was transformed into a full-scale revolution. This finally in the mid-1770s resulted in the American war of independence. Right from the early stages of war, detention without trial was found to have overwhelming use as a war tactic. The impetus driving this tactic was to put pressure on American detainees, especially those of captive seamen, such that they will be faced with the dilemma of either remaining in detention or assenting to join the Royal Navy. In so doing, by building treason and piracy into the mould of the 1777 suspension bill, any prospect of providing American detainees with POW *status* was ruined. This suspension bill indicates one of the most important examples of employing crimes such as treason or piracy which can deprive one of his prisoner-of-war *status*. The suspension bill of 1777 signified some wide-ranging changes in the practice of detention without trial. Above all, unlike other suspension acts, it did not define a time frame for its functions.<sup>68</sup>

As mentioned above, the parliamentary suspension acts sharply determined the duration in which habeas corpus could not operate. However, the new suspension bill clearly retreated from the well-established custom of Parliament concerning the time frame for the suspension of habeas corpus. Interestingly, some MPs applied a great amount of caution and at the same time, revolt towards the very possibility of executive privilege which had the effect of diminishing the

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<sup>66</sup> C. H. McIlwain, *The American Revolution: A Constitutional Interpretation* (New York: Great Seal Books, 1956) at 2.

<sup>67</sup> J. Grahame, *The History of the United States of North America: from the Plantation of the British Colonies til Their Assumption of National Independence Vol II* (Philadelphia: Lea and Blanchard, 1848) at 451.

<sup>68</sup> W. Cobbet et al, *The Parliamentary History of England from the Earliest Period to the Year 1803 Vol XIX* (London: T. C. Hansard, 1814) at 6.

liberties of subjects. One MP argued, 'if the present Bill was to have no other evil than establishing a precedent for future ministers to come to Parliament on the same errand, I should be against it.'<sup>69</sup>

Secondly, having stated that its reach only extends to those captured 'out of the realm,' the suspension bill of 1777 placed great emphasis on where capture takes place. As a result, the bill evidently contained a discriminatory view of the detainees arrested in America, or on the high seas. An interesting aspect of this discriminatory practice is that the basis of discrimination on this exceptional occasion did not turn on the nationality of the detainees, since an emphasis on the idea that the American rebels were indeed enemy aliens (for the purposes of denying habeas corpus to them) would imply the recognition of American independence, an essentially damaging act in the process of reclaiming America. Of course, the same would be true if the Pow status was given to them.

Finally, the most obvious characteristic of the 1777 suspension bill was its heavy reliance on suspicion. In fact, the bill elucidated no criteria for making a suspicion reliable. Accordingly, questions concerning 'the degree of probability attending the suspicion', 'the degree of guilt', and 'the mode of redress' remained unanswered in the bill. Similarly, no threshold was defined as to the admissibility of the evidence presented to the 'magistrate of competent authority' so as to order detention.<sup>70</sup>

Great numbers of civilians were detained. This aroused the opposition of the revolutionary leaders. The only solution proposed by British officials was the exchange of the American non-combatants with the British military officers. This proposition was immediately declined by the

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<sup>69</sup> Ibid., at 8.

<sup>70</sup> Ibid., at 18.

American war leaders. However, it is clear that British authorities were not legally restrained in confining civilians.<sup>71</sup> This was in fact the tactical advantage of employing treason in the 1777 legislation.

### 7.2. *Detention of Aliens 1793*

Under different pretexts, detention without trial was exercised in the last decade of the eighteenth century. Although once again the exercise of detention without trial in the 1790s was motivated by necessity of the kind caused by the threat of war, the role of confinement in managing the internal politics became more visible in this period. On this note, Halliday writes, '[b]eginning in the 1790s, suspension became just one part of the wider statutory campaigns against political dissent in all forms.'<sup>72</sup> The French Revolution in particular gave rise to paranoia on the part of the British nobles.<sup>73</sup> Moreover, the flow of French immigrants was becoming an increasing source of concern.

The issue of the legal position of aliens will be discussed in detail in the next chapter.<sup>74</sup> In short, insofar as the position of aliens in the common law tradition was concerned, an important precedent had been established by a ruling of the King's Bench in 1702.<sup>75</sup> According to the ruling of the court in this case, 'alien' is a specific legal *status* and there were two kinds of aliens, alien enemies and alien friends. The former referred to foreigners, whose nation of origin was in a state of war with England, and the latter consisted of those whose home state was at peace with the realm. After this fundamental classification, the Court ruled, 'If an alien enemy come into England without the queen's protection, he shall be

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<sup>71</sup> E. G. Burrows, *Forgotten Patriots: The Untold Story of American Prisoners during The Revolutionary War* (New York: Basic Books, 2008) at 80.

<sup>72</sup> Halliday, above note 18, at 255.

<sup>73</sup> A. Goodrich, *Debating England's Aristocracy in the 1790s: Pamphlets, Polemics and Political Ideas* (Woodbridge: Boydell Press, 2005) at 5.

<sup>74</sup> Refer to chapter II.

<sup>75</sup> *Sylvester's case* (7 Mod. 152), 1702.

seized and imprisoned by the law of England, and he shall have no advantage of the law of England.’<sup>76</sup> Needless to say, the kind of imprisonment in question is basically no different from detention without trial, since ‘no advantage of the law of England includes an explicit exclusion of alien enemies from the writ of habeas corpus.’<sup>77</sup>

In the light of the arrival of French immigrants to England from 1789 and the threat of post-revolutionary France, the first modern legislation regarding the treatment of aliens, namely, the Aliens Act was passed in 1793. The primary aim of this act was to deal with the threats posed by the French Revolution. The fear of French revolutionary spies in particular led to the restrictive measures enshrined in the act.<sup>78</sup> Under the provisions of the Aliens Act, foreigners were prohibited to arrive in England without prior permission and had to declare their arrival to the alien-office so as to be provided with an area of residence, outside the limits of which, they could not travel without a passport. Detention and transportation were laid down as immediate sanctions for a breach of the Act’s provisions. Although the term ‘suspension of habeas corpus’ did not appear in the final Act (as some opposers of the Act discerned), this Act of 1793 brought with it a suspension of habeas corpus.<sup>79</sup>

The Aliens Act signified a sweeping enhancement of the powers of the executive. In fact, the Aliens Act unequivocally expanded the scope of the prerogative. It captured a use of ‘the prerogative power to bar and deport political undesirables.’<sup>80</sup> Even those legal scholars defending the

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<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> S. Urban, *The Gentleman’s Magazine and Historical Chronicle For the Year MDCCXCIII* Vol LXIII (London: John Nichols, 1793) at 240.

<sup>79</sup> J. Debrett, *The Parliamentary Register or History of the Proceedings and Debates of the House of Lords* Vol. XXXVI (London: M.DCC.XCIII) at 41.

<sup>80</sup> P. Polden, ‘John Reeves as Superintendent of Aliens’ (1982) 3 *The Journal of Legal History* 31, at 32.



prerogative of the Crown to 'exclude and expel' aliens, have criticised the extent of the use of prerogative in the aliens act.<sup>81</sup>

### *7.3. Suspension of habeas corpus: Beyond 1793*

As was stated above, the French Revolution awakened the enthusiasm of many for political reform in England. Innumerable reformist and revolutionary societies were formed in this period throughout Britain. Nevertheless, the political establishment in Britain was not side-lined by the increase of opposition in Britain. The hold of laws on treason and sedition were stretched. Also, a parliamentary committee of secrecy was founded. Soon, trials for treasonable and seditious acts ensued and considerable numbers of dissidents were produced before such trials.<sup>82</sup> In the view of judicial complicity with the endeavours of government, there was no need at first to suspend habeas corpus, as any prosecution would meet with success.

In May 1794, the Parliamentary Committee of Secrecy presented its first report to Parliament 'respecting seditious practices.' In this report, the Committee expressed great concern towards the activities of the two of most prominent societies, namely, the society for Constitutional Information and the London Corresponding Society. The Committee of Secrecy was of the opinion that the ultimate purpose of the societies in question was 'to supersede [Parliament] in its representative capacity' under the guise of parliamentary reform.<sup>83</sup> Immediately after the delivery of the report of the Committee, the executive's pleas for taking concrete actions started.<sup>84</sup> Some important members of Parliament, such as Burke, lent their full support to the enactment of this new suspension bill. For all

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<sup>81</sup> T.W. Haycraft, 'Alien Legislation and the Prerogative of the Crown' (1897) 13 *Law Quarterly Review* 165, at 181.

<sup>82</sup> See, A. Wharam, *The Treason Trials 1794* (Leicester: LUP, 1992).

<sup>83</sup> W. Cobbett *et al*, *The Parliamentary History of England* Vol. XXXI (London: T. C. Hansard, 1818) at 496

<sup>84</sup> *Ibid.*, at 505.

such supporters, necessity was once again the principal factor for justifying another departure from the writ of habeas corpus.<sup>85</sup> Therefore, the 1794 bill 'to empower his Majesty to secure and detain such persons as his Majesty shall suspect are conspiring against his person and government' was passed.<sup>86</sup> Once again, the 1794 suspension bill established a direct linkage between the suspension of habeas corpus and treason.

This suspension bestowed enough time upon government agents to collect as much evidence as possible to secure a conviction for the popular leaders of the society for Constitutional Information, and the London Corresponding Society, namely, Horne Tooke and Thomas Hardy. They were held for six months. Thomas Hardy in his famous trial made a complaint about his detention;

We have been six months in close confinement, without being able yet to imagine what was the nature of the charges to be brought against us, nor have we been able to discover it from the indictment found against us.<sup>87</sup>

All in all, the assessment of the British executive turned out to be wrong. The trials of Hardy and Tooke were conducted in fairness and they were accordingly acquitted from the treason charges by juries' verdicts. As a result, the failed prosecution of the figures in question moved the authorities to broaden the definition of treason. The suspension of habeas corpus and detention without trial remained as credible measures by which to circumvent the judiciary.<sup>88</sup> As Halliday puts it:

'[s]uspension by many names, in many forms, proliferated, in England and beyond, now in combination with other measures:

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<sup>85</sup> Ibid., at 520.

<sup>86</sup> House of Commons, An Act to Empower His Majesty to Secure and Detain Such Persons as His Majesty Shall Suspect Are Conspiring against His Person and Government, 1794.

<sup>87</sup> *Hardy's case 1794*, in *Cobbett State Trials* Vo. 24 (London: T. C. Hansard, 1818).

<sup>88</sup> F. McLynn, *Crime and Punishment in Eighteenth Century England* (London: Routledge, 1989) at 335-336

“coercion acts” in Ireland; “sedition acts” at home; and acts for “preserving the peace” across the empire.”<sup>89</sup>

To conclude this section, it must once again be remarked that the suspensions of habeas corpus, as analysed above, point to the earliest modern examples of a regulatory framework designed to deal with emergencies. One implicit realisation underlying all of the suspension acts was that the requirements of ‘the law of the land’ can change *pro tempore* in times of crisis. Notably, the difference between detentions ordered by the King (ingrained by returning the writ of habeas corpus with no expressed cause) and parliamentary suspension acts was that the former would justify detention without trial by referring to the absolutism of the powers of the King and the latter would authorise detention without trial as a matter of emergency. The following section will explore other methods of detention without trial with a stronger focus on the colonies.

## **8. How detention without trial was exported to colonies: General observations**

As some modern historians of the British colonialism have argued, the techniques employed by the British Empire in its colonies consist of diverse measures adjusted against the different requirements of localities in which the empire was operating.<sup>90</sup> Nevertheless, there are undoubtedly some practices, which find similar expressions in nearly all colonies. Detention without trial can definitely be characterised as one of the measures, which in such major colonies as Ireland, India, Kenya, Egypt, South Africa, Malaysia, Burma and Palestine was used.<sup>91</sup>

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<sup>89</sup> Halliday, above note 18, at 256.

<sup>90</sup> See, R. Hyam, *Understanding the British Empire* (Cambridge: CUP, 2010).

<sup>91</sup> See, Simpson, above note 3 (Oxford: OUP, 2001).

For the sake of clarity, one can classify the modes of the authorisation of detention without trial in colonies into three main groups: 1) detention by the parliamentary suspension bills; 2) detention by declaration of martial law; and 3) detention by special provisions. As was often the case, different modes of authorisation could be implemented in one colony in different periods, and we shall now turn to consider each of these possibilities in some detail.

### 8.1. *The Parliamentary Suspension of Habeas Corpus and its decline*

Exporting habeas corpus in new dominions of the Crown was an important part of the extension of English common law. As a consequence, even 'the old exempt jurisdiction, the Cinque Potts, Counties Palatine, and Berwick-upon-Tweed, were not exempt from the writ of habeas corpus.'<sup>92</sup> Soon, ranging from Ireland, to the Channel Isles, to New Virginia, to Calcutta, to Quebec, the writ of habeas corpus was exported to all lands acquired/conquered by England. Nevertheless as Halliday notes,

But as the Habeas Corpus Act passed into the law of new dominions in various forms, so too did suspension and other statutory practices that constrained the writ by restraining the judges who used it.<sup>93</sup>

The typical example for the authorisation of detention without trial by the suspension of habeas corpus in colonies is Quebec. Nonetheless, in the wake of the French Revolution, when the revolutionary divisions had reached as far and wide as Quebec and in the very same period when the fear of the French aliens had haunted the political environment in the mother country, the Legislative Council passed an alien act of its own in 1794. Widely modelled upon the English Alien Act of 1793, the Quebec Alien Act bestowed an expanded detention and deportation power upon

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<sup>92</sup> A. D. R. Zellick *et al*, *The Law of Habeas Corpus* (Oxford: OUP, 2011) at 206.

<sup>93</sup> Halliday, above note 18, at 257.

the executive, and as such, suspended habeas corpus.<sup>94</sup> As Greenwood reports, '[f]rom May to November 1794 fifty and one hundred persons were imprisoned for varying periods.'<sup>95</sup> Many were not tried at all. Quebec's suspension continued until 1812, when the authorities were convinced that the threat of a French invasion had significantly diminished.<sup>96</sup>

For a long time, the suspension of habeas corpus served as the principal way by which detention without trial could be authorized. However, it seems that by the end of the eighteenth century the suspension technique lost much of its appeal both in England and the Empire. Consequentially, new techniques emerged as more speedy and efficient alternatives. It must once again be noted that the leading factor in rendering these alternatives more viable than the legislative suspension of habeas corpus was the sweeping increase in the executive powers.

Expansive powers were often conferred upon the executive in the light of emergencies arising from the political disturbances. For example, in the first decades of the nineteenth century in Ireland, the use of the legislative suspension steadily declined, and instead, coercion and insurrection acts,<sup>97</sup> of which one side-effect was the dismantling of habeas corpus, were increasingly employed.<sup>98</sup> The same pattern unfolded elsewhere in the Empire too. Paramount among the new set of measures to replace the suspension of habeas corpus was martial law. The Petition of Rights in particular showed a very strong hostility to the idea of martial law as a

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<sup>94</sup> Ibid., at 116.

<sup>95</sup> F. M. Greenwood, *Legacies of Fear: Law and Politics in Quebec in the era of the French Revolution* (Canada: The Osgoode Society, 1993) at 121.

<sup>96</sup> Ibid., at 256.

<sup>97</sup> According to the Historical Dictionary of British Empire, 'coercion acts is a general phrase referring to various legislative acts providing the authorities with augmented and usually temporary powers found necessary, or at least expedient, for maintaining order in Ireland.' J. S. Olson, R. Shadle, *Historical Dictionary of British Empire* (Westport: Greenwood Press, 1996) at 311-312.

<sup>98</sup> See, V. Crossman, 'Emergency Legislation and Agrarian Disorder in Ireland 1821-41' (1991) 27 *Irish Historical Studies* 309.

substitute for 'the law of the land,' *when the civil courts were in operation.*

Blackstone concisely explained the reasons for the disavowal of martial law in the British legal tradition:

For martial law, which is built upon no settled principles, but which is entirely arbitrary in its definitions, is, as Sir Matthew Hale observes, in truth and reality no law, but something indulged, rather than allowed as a law.<sup>99</sup>

It must be borne in mind that disagreements as to the meaning of martial law persist as late as the twenty-first century. Nevertheless, based on the historical exercise of martial law, Simpson provides a summary description of the core functions of martial law,

Martial law necessarily suspends habeas corpus. Martial law belongs to a world in which, in effect, government makes war on those who do not accept its authority and makes no bones about what it is doing.<sup>100</sup>

In this view, the suspension of habeas corpus in the nineteenth century was for most parts replaced by martial law, employed in such colonies as Jamaica, Barbados, India, South Africa, Canada and so on.

## **9. Martial law and detention without trial**

Beginning from the early years of the nineteenth century, a significant number of Lower Canadians started to reflect on the virtues of the British constitution, and the liberties of subjects. Drawing on their experiences with the American colonists and different reform societies in England, British colonial authorities were familiar with this political language. Nevertheless, using the language of constitution to their advantage, some political parties succeeded in securing a prominent majority in the Lower Canada House of Assembly. The demands of the Assembly gradually became radicalised in the 1830s. Mass meetings for constitutional reform

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<sup>99</sup> W. Blackstone, *Commentaries on the Laws of England (1765-1769)*, Book I, at 400.

<sup>100</sup> A. W. B. Simpson, 'Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights' (1996) 41 *Loyola Law Review* 630, at 634.

was organised by the Assembly. After the failure of a series of mediations by Britain, the situation became more hostile than ever. British troops were deployed to counter the emerging threats. In the summer of 1837, tactics of the colonial opposition groups shifted from boycotting the British products to mass rallies and from political rallies to armed rebellion.<sup>101</sup> Governor Gosford remained reluctant for some time to appoint the executive emergency power.<sup>102</sup> However, finally he imposed martial law in December 1837. Shortly after the declaration of martial law, many were imprisoned without trial, since the suspension of habeas corpus was inherent within the imposition of martial law.

Not long after the suppression of first wave of rebellions in Lower Canada, martial law was again imposed in November 1838. Although martial law would in effect erect a barrier to the exercise of habeas corpus, authorities imposed a 'provincial ordinance' suspending habeas corpus for such cases as 'suspicion of high treason, misprision of high treason, and treasonable practices.'<sup>103</sup> Nevertheless, this Ordinance by The Special Council made the matters all the more complicated, for references to treason would bring the detention of suspects within the provenance of criminal laws. Some judges' understanding of the operation of habeas corpus in criminal cases was strictly contrary to that of the executive. One of these judges was Vallieres de Saint-Real, who upon a request for the issuance of habeas corpus by a detainee named, Clestin Houde ruled,

It suffices in the present case, to adjudge that notwithstanding the suspension of the Provincial Ordinance [...], they are still existing in the province by force of the British statute of 1774, laws in which subjects of the Queen, being deprived of their liberty on criminal accusations.<sup>104</sup>

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<sup>101</sup> A. Greer, *The Patriots and the People: the Rebellion of 1837 in Rural Lower Canada* (Toronto: University of Toronto Press, 1993) at 121-144.

<sup>102</sup> J. G. Bourinot, *Canada under British Rule 1760-1905* (Cambridge: CUP, 1900) at 135.

<sup>103</sup> Greenwood, above note 95, at 172.

<sup>104</sup> *Judicial Decisions on the Writ of Habeas Corpus Ad Subjiciendum, whereby the habeas corpus ordinance of 1794 has been suspended*, at 10.

The defence of Vallieres de Saint-Real of the writ of habeas corpus was directed on several fronts. First, as it is clear from the above quotation, he was of the opinion that a 'Provincial Ordinance' to the effect of suspending habeas corpus was not compatible with the constitutional criteria. He noted that The Special Council, as a legislative authority, could not go beyond the substance of the British statute of 1774, according to which the issuance of habeas corpus for criminal cases is taken for granted.<sup>105</sup> More importantly, the judge in question implied that that his district was not affected by rebellions and the courts in his district were functioning attested to the fact that habeas corpus could not be suspended by the claim that the Lower Canada was in its entirety under martial law. It is vital to notice that the judgement of Vallieres de Saint-Real was delivered in a context permeated by martial law. His judgement had all the potentials to revive a serious discussion about the true nature of martial law in London. Nevertheless, the subject of martial law did not attract a full-scale scholarly attention until the Jamaica affair.

In the history of colonialism, Jamaica is often cited as one site, which at times, suffered from all the colonial problems combined.<sup>106</sup> This took a fatal toll in October 1865, when a black peasant was found guilty of 'trespassing on the property of an absentee plantation owner.'<sup>107</sup> This resulted in a violent protest of almost three hundred black men led by Paul Bogle. An arrest warrant was issued for Bogle, and many other protestors. When policemen proceeded to arrest such figures, they were confronted with hundreds of black protestors armed with 'sticks and cutlasses, prepared to assist those charged in resisting arrest.'<sup>108</sup> The encounter soon turned into a violent one. Troops opened fire on the rioters, the crowd was

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<sup>105</sup> Ibid., at 4.

<sup>106</sup> M. Taggart, 'Ruled by Law' (2006) 69 *Modern Law Review* 1006, at 1007-1009.

<sup>107</sup> A. B. Bakan, *Ideology and Class Conflict in Jamaica* (Canada: McGill-Queen's University, 1990) at 79.

<sup>108</sup> Ibid., at 80.



driven to 'the courthouse amidst cries of 'War', and the building was set on fire.'<sup>109</sup>

When the word of the uprising was given to the Governor Eyre, he, upon the advice of the Council of War, proclaimed martial law.<sup>110</sup> The exercise of martial law in Jamaica lasted for a month. During this period, executions after summary trials, and extra-judicial killing were common place.<sup>111</sup> So high was the death toll of the events in Jamaica that the exercise of detention without trial by the troops was hardly noticed by the critics of the Governor Eyre. Also, it is fair to say that compared to other emergencies faced by other colonial governments, the number of people detained by the colonial government of Jamaica was relatively lower. This low deployment of detention without trial was not, of course, motivated by humanitarian incentives. Rather, two key factors played a major role in the decline of detention without trial in Jamaica. The first factor was that the widespread use of firearms had practically rendered targeting of suspects a measure of first resort. In the second place, the jurisdiction of military tribunals during the emergency in Jamaica was broadened so as to try every suspect, be that an active armed rebel, or an ordinary subject.<sup>112</sup> In fact, as Townshend has argued, the Jamaica affair set the precedent for a legal decision in 1902 'which removed a major restriction on the exercise of martial law powers by declaring that the fact of the ordinary courts being open did not of itself bar the trial of civilians by military tribunals.'<sup>113</sup> In the rulings of military tribunals, nearly all suspicions resulted in great convictions. In such an atmosphere, detaining suspects for prolonged

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<sup>109</sup> Ibid.

<sup>110</sup> R. W. B. Kostal, *A Jurisprudence of Power: Victorian Power and the Rule of Law* (Oxford: OUP, 2005) at 13.

<sup>111</sup> Ibid., at 29.

<sup>112</sup> C. Townshend, 'Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800-1940' (1982) 25 *The Historical Journal* 167, at 182.

<sup>113</sup> Ibid.

periods seemed to be a waste of the already limited sources of government.

Nevertheless, the Jamaica affair caused the foremost jurists of the nineteenth century to strive for mapping out the contours of martial law. There once again stood ambiguities about the meaning of such key concepts as 'the law of the land' or 'due process of law'. Could martial law be considered as part of 'the law of the land'? Or it was merely an extra-legal practice committed to protect it at times when no one could practically make any bones about 'the law of the land.'<sup>114</sup> Of course, none of these uncertainties about the lawfulness of 'martial law' found a concrete resolution or a consistent model in the legal thinking of the day. As late as the early twentieth century, Dicey was famously of the opinion that martial law is 'unknown to the law of England.'<sup>115</sup> Therefore, for Dicey, the only response surviving the test of lawfulness was the temporary suspension of specific legal norms, such as habeas corpus.

Dicey failed to take an account of the colonial reality. Furthermore, his writings would be of little help to colonial authorities, who did not wish to fall into the same trap as Governor Eyre once did. For such authorities, the matter of special interest was a guide to the question of necessity, and other practicalities surrounding martial law. That said, some efforts had been made by the authorities in Britain to clarify the threshold of necessity for the proclamation of martial law. Townshend reports that the fourth Earl of Carnarvon, the Secretary of State for Colonies, strived to clarify the imperatives of martial law more than once. Of particular importance in this regard was the supplementary letter of Carnarvon containing 19 rules governing martial law. As Townshend writes,

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<sup>114</sup> Kostal, above note 110, at 16.

<sup>115</sup> A. V. Dicey, *Introduction to the Study of the Law of Constitution* (London: Macmillan, 1915) at 283-284.

[the governor] must be satisfied that there was armed resistance which could not be dealt with by troops acting merely in aid of the civil power in the ordinary manner and that martial law should not be proclaimed over a wider district than the necessities of public safety require.<sup>116</sup>

There are two points in the passage reported by Townshend. First of all, Carnarvon's specifies a qualifying criterion for necessity of the kind rendering a situation liable to the application of martial law and the criterion in question is very clearly stated to be 'armed resistance'. Not only does Carnarvon's letter define a criterion for necessity, but also it specifies a threshold for the translation of necessity into martial law. That is to say, armed resistance must reach a level, in which civil machinery, and mainly ordinary courts are the most important example, is totally dismantled. Putting an emphasis on this threshold was in fact a reiteration of the principles manifested in the Petition of Rights for determining whether a given situation would amount to war. However, whether the executive officers, especially colonial authorities complied with this formulation of necessity is another question.

#### *9.1. Martial law and detention beyond Jamaica*

Perhaps, the largest scale of the imposition of martial law in the nineteenth century occurred in South Africa, annexed as a colony of Britain in 1877. This was a period in which conflicts between the expansionary interests of the European empires was becoming more visible than ever before. Given this, the imbalanced division of population in South Africa had in effect rendered this region one of the main forefronts of the European clashes. On one hand, there were British subjects (including many Indian workers) labouring in South Africa. On the

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<sup>116</sup> Townshend, above note 112, at 174.

other hand, there were whites of Dutch origin, who viewed the growth of British enterprise in South Africa as a disruptive rival.<sup>117</sup>

Unlike other colonial disturbances, the Anglo-Boer war was not only an unrest caused by sporadic rebellions, it was a regular war.<sup>118</sup> Martial law was declared in the conquered territories immediately after each annexation by colonial governors. Under martial law, military officers were provided with such powers as restriction of movement, issuance of passes, detention of individuals, forced removal of people from their farms, and confiscation of properties.<sup>119</sup>

An interesting aspect of the operation of martial law in South Africa was that civil courts remained in operation. This was clearly contrary to the doctrine that, as argued above, instilled in the letter of Carnarvon that martial law could only be resorted to if the civil machinery was inept to operate as a result of given exigencies. Nevertheless, during the conflict in South Africa, courts continued to function. However, the functioning of courts did not mean that detentions exercised by the military officers could be subjected to judicial scrutiny.<sup>120</sup> Therefore, the threshold for applying martial law virtually became a concept without substance, subject to change, if desired so by sovereign. The contradiction arising from the imposition of martial law in South Africa was raised in a case, produced before Privy Council. According to this case, David Francois Marais, a subject of the Crown, was arrested without charge and warrant by military officers in Paarl. He was then transferred to Bedford West, and detained there. After an unsuccessful application for release in the Cape Supreme

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<sup>117</sup> Ibid.

<sup>118</sup> Simpson, above note 100.

<sup>119</sup> J. Wasserman, 'Corporation and Conflict – The British Army, the Natal Government, and the Prosecution of Natal Rebels During the Anglo-Boer War' Online Paper, available at <http://www.ajol.info/index.php/smsajms/article/viewFile/42657/9525> at 71.

<sup>120</sup> C. Fairman, 'The Law of Martial Rule and the National Emergency' (1942) 55 *Harvard Law Review* 1253, at 1255.

Court, the applicant reached out to the Privy Council.<sup>121</sup> The Privy Council ruled in the *Marais* case:

Martial law had been proclaimed over the district in which the petitioner was arrested and the district to which he was removed. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging.<sup>122</sup>

The implications of the *Marais* case were twofold. The first implication was for the meaning of necessity. First of all, according to this ruling, the condition of necessity exposing a particular situation to martial law was no longer contingent upon the inability of ordinary courts. The second implication was that the undertakings of military during the reign of martial law could not become susceptible to judicial scrutiny.

As regards the first implication, the decision of The Privy Council generated a wide range of scholarly opinions.<sup>123</sup> The primary question posed after the ruling of the Privy Council was whether the functioning of ordinary Courts would preclude a given situation to be classified as war. After that The Privy Council delivered its decision in the *Marais* case, Cyril Dodd wrote in the *Law Quarterly Review*,

The argument that, because for some purposes the Courts are permitted to sit and perform their functions they must be permitted by the military authorities to perform all functions, even those injurious to public safety, seems hardly to appeal to modern ideas.<sup>124</sup>

The missing point in the analysis of many authors delivering their opinions on the *Marais* case in 1902 was that the operation of martial law was not necessarily contingent upon the existence of a regular war. The situation in Canada and Jamaica would drive this point home. In general, a

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<sup>121</sup> D. Webster, 'Martial Law at the Cape' (1901-1902) 1 *The Canadian Law Review* 148, at 149.

<sup>122</sup> *Ex Parte D. F. Marais* [1902] A.C. 109.

<sup>123</sup> These scholarly opinions were published in the eighteenth volume of *Law Quarterly Review*, which was exclusively focused on the issues arising from the Anglo-Boer War. Some of these pieces will be described and analysed here.

<sup>124</sup> C. Dodd, 'The Case of Marais' (1902) 18 *Law Quarterly Review* 143, at 146.

proposition made by Hussain seems to have captured the essence of the ruling on the *Maraïs* case regarding the condition of necessity; '[t]he case of *Maraïs* [...] continues a tendency in English law from the mid-nineteenth century onward to widen the scope of the condition of necessity.'<sup>125</sup>

As was argued above, the *Maraïs* case also entailed the implication that the validity of the decisions of military commanders could not be subjected to the examination of courts. This was indeed a reiteration of the words of Justice Hyde, as mentioned above in the *Five Knights* case. The result of this deference to the decisions of military authorities was the recognition of an absolute and unchallengeable authority for the detaining power in its practices of detention. Erle Richards, *inter alia*, provides an important reason for the exclusion of military undertakings from judicial intervention. According to Erle Richards, it is basically beyond the capacity of ordinary courts to interfere with the decisions of military nature in times of crisis. Not least, because secrecy more often than not is an inherent component of such decisions, and judicial interventions *per se* run against the element of secrecy.<sup>126</sup> Drawing on the sweeping powers of military officers, Erle Richards concluded that civil courts in times of war lack efficiency even in terms of civil matters.<sup>127</sup> The overarching contradiction here is that in the view of the absurdity (in the view of Erle Richards) of the judicial performance in times of war, why the absolute closure of courts could not be evoked as an objective test to ascertain the existence of war or the condition necessity for imposing martial law, as was enunciated in the Petition of Rights. Again, Hussain has provided a persuasive counter-argument to the defence of the ruling in the *Maraïs* case, as made by Erle Richards,

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<sup>125</sup> N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Michigan: the University of Michigan Press, 2003) at 117.

<sup>126</sup> H. Erle Richards. 'Martial Law' (1902) 18 *Law Quarterly Review* 133, at 138.

<sup>127</sup> *Ibid.*

[f]or Erle Richards, war is self-evident and the fact that courts may continue to sit cannot prevent the existence of war. Reading the case, however, it would seem that war is anything but self-evident.<sup>128</sup>

The *Marais* case also determined the destiny of habeas corpus in the context of the imposition of martial law. The answer to the question of whether detainees were entitled to employ habeas corpus for their release lied in the general formula, on which the Privy Council observed: 'no doubt has ever existed that where martial law prevails the ordinary courts have no jurisdiction over the action of the military authorities.'<sup>129</sup>

Inasmuch as the expanded contours of necessity and the increased powers of military were foreshadowed by the theoretical uncertainties, their effects were far too real for the inhabitants in the Cape colonies. The severe imposition of martial law in South Africa was even by the standards of the nineteenth century unprecedented.<sup>130</sup> The confinement of individuals in mass numbers proved to unfold a new style of the deprivation of liberty, which became one of the defining factors in the most tragic atrocities of the twentieth century. The use of concentration camps in South Africa is one of the most severe examples of such camps in history.<sup>131</sup>

Despite the mal-functioning effects of martial law in South Africa, 'the English political class remained broadly disengaged from the problem of martial law.'<sup>132</sup> Martial law continued to be a measure by which to quell unrest in the colonies. This was further reinforced by World War I, when some colonies such as Egypt were immediately targeted by martial law.<sup>133</sup> Nevertheless, this disengagement from the problematique of martial law

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<sup>128</sup> Hussain, above note 125, at 118.

<sup>129</sup> See, Zellick *et al*, above note 92, at 116.

<sup>130</sup> Simpson, above note 100, at 635.

<sup>131</sup> A. D. Cooper, *The Geography of Genocide* (Maryland: University Press of America, 2009) at 152.

<sup>132</sup> Kostal, above note 110, at 459.

<sup>133</sup> K. Jeffery, *The British Army and the Crisis of Empire 1918-22* (Manchester: MUP, 1984) at 110.

was again to be a source of embarrassment for the Empire in 1919, when, in Punjab, it led to what Simpson has characterised as 'the most notorious of all imperial massacres,' namely, the Amritsar massacre.<sup>134</sup>

In the aftermath of the great embarrassments caused by the Amritsar massacre, one once again witnesses a growing distaste for the use of martial law in colonies, in much the same way that martial law was criticised after the Jamaica affair.<sup>135</sup> In consequence, British policy makers arrived at the conclusion that so many confusions surrounding martial law left any commander or soldier on the ground bewildered regarding a proportionate response in times of necessity. This is why, according to the French, senior soldiers were far from wanting [martial law].<sup>136</sup> With the antipathy for martial law on rise, its importance was reduced to merely a symbolic one.<sup>137</sup> However, such practices as martial courts or military commissions associated with martial law remained alive, especially in the former British colonies, including the United States of America, to which we shall return in the final chapter of this thesis.<sup>138</sup>

## 10. Special Regulations

Special regulations for authorising detention without trial could take the form of a provision in a broad statute, or a statute squarely devoted to the matter of detention without trial. The earliest example of the former is the East India Company Act of 1793. This act was part of a chain of attempts by the central government in England to specify and also restrict the powers of the East India Company, a 'one body politic and corporate', titled the East India Company and empowered by such means as 'benefit

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<sup>134</sup> Simpson, above note 3 (Oxford: OUP, 2001) at 64.

<sup>135</sup> Ibid.

<sup>136</sup> D. French, *The British Way in Counter-Insurgency 1945-1967* (Oxford: OUP, 2011) at 75.

<sup>137</sup> Simpson, above note 3, at 68.

<sup>138</sup> Refer to chapter V, section 3.2



of trade, powers, privileges and advantages' for 'trading into the East Indies'.<sup>139</sup>

According to the 1793 Act, the Governor-General was authorised to order detention against those responsible for 'illicit correspondence or activities prejudicial to the interests of British Settlements and possessions in India'.<sup>140</sup> The Act did not set out a time limit for suspect detentions. However, detainees could be informed of their charges and produce a defence before the Governor-General. Some of these remedies were eliminated in the subsequent acts.<sup>141</sup>

The mode of confinement manifested in the East India Company Act of 1793 was followed by such regulations as the Bengal Regulation III of 1818, which for more than a century became the main legal source of detention powers.<sup>142</sup> Simpson notes that the Bengal Regulation is the earliest example of free-standing provisions. The authorisation of detention without trial in the Bengal Regulation was not part of a broader emergency code and as such 'the [detention] power conferred was not limited to times of emergency, it was a permanent feature of the legal landscape.'<sup>143</sup>

The Bengal Regulation left no space for judicial proceedings, and instead put in place an executive board to review the detention orders twice a year.<sup>144</sup> This statutory authorisation of using executive boards as an alternative to judicial proceedings was one of the earliest examples of building administrative reviews into the pillars of detention without trial. In fact, one can conclude that the enactment of Bengal Regulation III of 1818

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<sup>139</sup> *A Collection of Charters and Statutes relating to the East India Company* (London: 1817) at 37.

<sup>140</sup> U. Kumar Singh, *Political Prisoners in India* (Oxford: OUP, 1998) at 26.

<sup>141</sup> See, F. Hussain, *Personal Liberty and Preventive Detention* (Peshawar: 1989).

<sup>142</sup> See, R. Kumar, *Selected Works of Vithalbhai J. Patel* (New Delhi: Publishers, 1995) at 552.

<sup>143</sup> Simpson, above note 3, at 76.

<sup>144</sup> Kumar Singh, above note 140, at 27.

can be taken as the beginning of an era in which the primitive characteristics of confinement implicit in our imagination of ancient, medieval and pre-modern Black Holes are apparently transformed into a practice legalised, legitimised and rationalised by administrative/institutional semi-remedies such as review boards. However, in an overwhelming majority of cases, such measures have served as an apology of circumventing an independent judicial review, thereby becoming a prelude to increasing the severity of detention conditions. Executive boards became one of the least efficient methods of providing checks and balances against the arbitrary exercise of detention without trial. One of their mal-functioning side-effects was to deprive civil courts of their supervisory role without having to proclaim martial law.<sup>145</sup>

The model of freestanding provisions, as built in the Bengal Regulation, was used in a number of other colonial sites for different reasons. Major examples of similar provisions are Madras State Prisoners Regulation II of 1819, and the Bombay State Prisoners Regulation XXIV of 1827, Native Courts Regulations of East Africa 1897, and Political Prisoner's Detention Ordinance of 1922 in Egypt.<sup>146</sup>

#### 10.1. *Special Regulations and Emergency Legislation in England and the colonies during the First World War*

The pattern of special regulations in the early twentieth century took a departure from the direct involvement of Parliament in enacting emergency regulations. In the words of Simpson:

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<sup>145</sup> French, above note 136, at 87. As French writes, '[t]hey were not bound by the procedures and rules of evidence that applied in courts of law, and their proceedings were not open to the press or public. Detainees were usually given very general indications of the grounds upon which they had been detained, and they were not permitted to cross-examine witnesses.'

<sup>146</sup> Simpson, above note 100, at 639.

The regulations would become law through Orders in Council, authorised by a parent Act of Parliament, which would confer upon the executive to legislate in this way.<sup>147</sup>

The end result of this process was the Defence of the Realm Act (DORA) passed by Parliament without debate in August 1914. Ranging from the authorisation of detention without trial to provisions aiming at alcohol consumption, the inroads made by DORA to the normal course of British life were by all means unparalleled in the history of Britain.<sup>148</sup> Regulation 14B of DORA concerned detention without trial. According to this regulation,

Where, on the recommendation of a competent naval or military authority or of one of the advisory committees hereinafter mentioned, it appears to the Secretary of State that, for securing the public safety or the defence of the realm, it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person, forthwith or from time to time, either to remain in, or to proceed to and reside in, such place as may be specified in the order and to comply with such directions as reporting to the police, restriction of movement and otherwise as may be specified in the order or to be interned in such place as may be specified in the order.<sup>149</sup>

Again, great weight was given to the executive boards entrusted with supervisory and advisory roles regarding detentions. These boards were under direct control of the Secretary of State, who had the ultimate say over the exercise of detention and the release of detainees.<sup>150</sup>

It must be noted that regulation 14B provided a legal tool by which to detain the British subjects. Before the inclusion of this regulation in DORA in 1915, there was no such tool. On the other hand, there were a set of

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<sup>147</sup> A. W. B. Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford: OUP, 1992) at 6.

<sup>148</sup> R. Tucker (ed), *World War I: A-D* Vol. I (California: ABC-CLIO, 2005) at 342, and A. McNair, *The Legal Effects of War* (Cambridge: CUP, 1966) at 97.

<sup>149</sup> For an extensive discussion on this, see, C. T. Carr, 'Regulated Liberty' (1942) 42 *Columbia Law Review* 339, at 344.

<sup>150</sup> Simpson, above note 147, at 15-20.

aliens acts, authorising the internment of enemy aliens, which will be scrutinised in the next chapter.<sup>151</sup>

Habeas corpus did not have a fixed *status* in regulation 14B. The question was if the detention scheme as built in regulation 14B was authorised by a simultaneous suspension of habeas corpus. The case of *R v. Halliday* 1917 represented an occasion on which the judiciary was to provide authoritative answers to the uncertainties involving the question of detention without trial.<sup>152</sup>

The applicant in *R. v. Halliday* challenged the legality of regulation 14B. He argued that the authorisation of regulation 14B was beyond the authority of the executive. Furthermore, such settled requirements as the reasonableness of suspicion and the standard of proof held no place in regulation 14B. Having circumvented these requirements, the regulation also entailed a reversal of the burden of proof.<sup>153</sup>

It is interesting to note that the defence for the appellant in *Ex parte Zadig* did not argue that the power to detain subjects without trial was *per se* unlawful. Rather, the argument was that 'if the power of imprisonment is to be conferred at all it ought to be conferred by express words.'<sup>154</sup> Drawing on this consideration, the defence concluded that such express limits were present in the suspension acts of Parliament in the eighteenth century largely due to the time limits inherent in most of these suspension acts. However, such acts as DORA could not be considered as putting express limits on the power of the executive to detain, in that they delegated broad powers to the executive to regulate its own conduct. This argument, however, did not appeal to the law Lords, as they said that

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<sup>151</sup> Refer to chapter II, sections 5-6.

<sup>152</sup> *R. (Zadig) v. Halliday*, [1917] A. C. 260.

<sup>153</sup> R. Powell, 'Human Rights, Derogation and Anti-Terrorist Law' (2006) 69 *Saskatchewan Law Review* 79, at 83.

<sup>154</sup> *Ex parte Zadig*, above note 152, at 262.

DORA simply represents another method by which Parliament has opted 'for achieving the same purposes' as the suspension acts.<sup>155</sup> Underlying this conclusion was a very far-reaching conception of the powers of Parliament with regard to the constitutional laws of England, or in the words of Magna Carta, 'the law of the land', Lord Dunedin made clear what this underlying perception was:

But the fault, if fault there be, lies in the fact that the British constitution has entrusted to the Houses of Parliament, subject to the assent of the King, an absolute power untrammelled by a written instrument, obedience to which may be compelled by some judicial body.<sup>156</sup>

One can only be struck at the level of similarity between the words of Lord Dunedin about the absolute powers of Parliament, and those expressed by the Attorney-General Heath and Chief Justice Hyde about the powers of King in council in the case of *Five Knights*. As regards the question of habeas corpus, the court was of the view that while habeas corpus was not suspended by regulation 14B, this could not affect the lawfulness of detentions exercised under regulation 14B.<sup>157</sup> This was also similar to what happened in the case of *Five Knights*, in which the writ of habeas corpus could be issued without making any change in the internment of detainees. Lord Shaw noticed this fallacy inherent within the context of detentions exercised in the First World War, and in his dissenting opinion criticised the danger of evacuating such procedural safeguards as habeas corpus out of their substance by showing deference to the detention powers of the executive,

It is not that the habeas corpus has been repealed; it is not, as in so many varying periods of history, that it has been suspended. There is a repeal and a suspension much more drastic than that. There is a constructive repeal which has, so far as I am aware, no parallel in our annals – a getting behind

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<sup>155</sup> Ibid., at 270.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

the habeas corpus by an implied but non the less effective repeal of the most famous provision of habeas corpus itself.<sup>158</sup>

We must repeatedly return to this point in the following sections of this chapter and the subsequent chapters of this thesis to expand on this particular mechanism of upholding minimal procedural safeguards in detention cases without placing any substantive restraints on the powers of the executive.

The pattern used in DORA and regulation 14B came to constitute a standard emergency scheme for other colonies. British India was the first colonial site at which this new emergency scheme was deployed. Accordingly, legislations such as the Ingress into India Ordinance (1914) and the Defence of India Act (1915) were passed. The Ingress into India Ordinance came into operation to deal with Indians returning to India in the wake of war. Under the authority of this act, the governor-general assumed 'certain general powers of control over all persons entering India.'<sup>159</sup> Internment and confining persons to reside and move in a designated area were among such powers.<sup>160</sup> The Defence of India Act was cast in relatively broad terms. Section 3 of this Act invested local governors to detain 'any person reasonably suspected of being of hostile origin or of having acted, acting or being about to act, in a manner prejudicial to the public safety or interest or to the defence of British India.'<sup>161</sup>

## 10.2. *Special Regulations and Emergency Legislation during the Second World War*

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<sup>158</sup> *Ex Parte Zadig*, above note 152, at 262.

<sup>159</sup> B. Pati, *India and the First World War* (New Delhi: Atlantic Publishers and Distributors, 1996) at 117.

<sup>160</sup> M. O'dwyer, *India As I Knew It 1885-1925* (New Delhi: A Mittal Publications, 1988) at 196.

<sup>161</sup> V. G. Ramachandran, *Fundamental Rights and Constitutional Remedies* Vol II (New Delhi: Eastern Book Company, 1964) at 667.

Less than two decades after the expiry of defence regulations in Britain, World War II gave rise to the enactment of similar regulations by Parliament. Here, we must point to some of the important features of the detention powers in this period. The main source of emergency powers in Britain of World War II was the Emergency Defence Act 1939. The first section of this statute posited that:

Subject to the provisions of this section, His Majesty may by Order in Council make such regulations (in this Act referred to as "Defence Regulations") as appear to him to be necessary for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty may be engaged and for maintaining supplies and services essential to the life of the community.<sup>162</sup>

Therefore, once again, one witnesses a broad use of delegation power in order that the regulation could not become subjected to judicial intervention, a fact which was in part due to the result of the case of *R v. Halliday*. At the same time, the language manifested in some of the regulations had left the potential prospect of judicial intervention fairly open. Of special importance in this regard was regulation 18B of the Emergency Defence Act 1939 concerned with detention of citizens. According to regulation 18B,

Where it appears to the Secretary of State with respect to any particular person as to whom the Secretary of State is satisfied (a) that he is a person of hostile origin or associations; or (b) that he is concerned in the preparation or instigation of acts prejudicial to the public safety or the defence of the realm that is necessary, for the purpose of preventing him acting in any manner prejudicial to the public safety or the defence of the realm, the Secretary of State may make an order.<sup>163</sup>

The subject of the Secretary of State's orders could vary from prohibition of the possession of 'specified articles' by suspects to their detention.<sup>164</sup> Some parliamentary members later became worried about the loose terms upon which the regulation 18B was laid. Therefore, 18B was modified by

<sup>162</sup> 2 & 3 GEo. VI, c. 62, § 1(1) (1939).

<sup>163</sup> S. R. & O. 1939, No. 978, revoked by S. R. & O. 1939 No. 1681, I p. 811.

<sup>164</sup> Simpson, above note 147, at 67.

the instillation of the phrase, 'reasonable cause' in order for a suspicion to result in detention.<sup>165</sup> The alterations, especially the new introduction of the term 'reasonable cause to believe' were enough to give rise to a new wave of judicial questions Cotter summarises these new questions and writes,

Was the changed wording intended to introduce an objective criterion to guide executive action, and could the courts measure the degree to which the executive adhered to this objective criterion? If "reasonable cause to believe" introduced the obligation upon the part of the executive to meet an objective standard enforceable by the courts, then the courts must determine not only the reasonableness of the executive's cause to believe certain factually ascertainable things such as hostile origins, associations or actions, but also the reasonableness of the belief that it was necessary to detain the individual as a security risk.<sup>166</sup>

In other words, a strict reading of 'reasonable cause' could be taken as a restricting factor in terms of the *vires* assigned to the executive.

Such matters were posed to the House of Lords in *Liversidge v. Anderson*.<sup>167</sup> In this case, the applicant chose to bring an action for damages for false imprisonment. This could help Liversidge better in his cause, namely, challenging the grounds on which he had been detained (and of which he was not informed while in detention). Therefore, the applicant based his arguments on the test of 'reasonable cause,' and as such, the court was compelled to allocate a major portion of its arguments to the question of 'reasonable cause'.

The main opinion in the *Liversidge v. Anderson* refused to entertain the claims of Liversidge, and it held that the test for determining the legality of detentions on the basis of 'reasonable cause', as set out in regulation 18B, was merely subjective. That is to say, the court did not possess the

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<sup>165</sup> Ibid., at 63.

<sup>166</sup> C. P. Cotter, 'Emergency Detention in Wartime: British Experience' (1953-1954) 6 *Stanford Law Review* 238, at 243.

<sup>167</sup> *Liversidge v. Anderson* [AC] 1942 206.



power to enquire into the objective reliability of the grounds rendering a cause for suspicion as reasonable cause. One of the reasons for giving countenance to this subjective decision was said to be that the person entrusted with detention was the Secretary of State (and not ordinary constables), who could benefit from the recommendation of advisory committees. Also, the Secretary of State was compelled to send monthly reports to Parliament regarding the particulars of detention cases under his purview.<sup>168</sup> Neither the decisions of advisory boards, nor parliamentary opinions could have a binding effect on the Secretary of State's discretion in detention cases. Such excuses for assigning unchallengeable credibility to the subjective decisions of the executive showed how the incomplete and ineffective safeguards such as advisory boards, and routine reports to Parliament could justify the inroads into individual liberties and settled principles of common law. Emphasis should be made on the fact that it is the Secretary of State, who is entrusted with such powers and he did not have a significant part in the real process of decision-making as to detention cases. In fact, as Allen pointed out in *The Times*,

[s]ince it is absurd to suppose that a Minister has time or opportunity to examine personally 1,700 cases in all their details, it follows that the detentions under Regulation 18B are matters of Departmental routine and are administered with neither more nor less wisdom than other matters of routine.<sup>169</sup>

According to the ruling of the court in *Liversidge v. Anderson*, the only grounded proposition which could challenge the subjective decisions of the Secretary of State on the detention matters was to show that such decisions were not taken in good faith, a test which in effect made the challenging of the exercise of detention impossible.<sup>170</sup> Therefore, this

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<sup>168</sup> *Ibid.*, at 212.

<sup>169</sup> *London Times*, Jan. 8, 1942, p. 2, col. 4.

<sup>170</sup> *Liversidge*, above note 167, at 216.

decision indeed deprived the judiciary of its supervisory role insofar as the wartime executive measures were concerned.<sup>171</sup>

### 10.3. *Regulation 18B, conditions of detention, and Bureaucratic duality*

Pursuant to the passing of the Regulation 18B, some procedural rituals in the practice of detention were specified. One striking ritual was to have official and unofficial standards of treatment for detainees. In the context of the Regulation 18B, this divide was manifested in the issuance of the propagandistic White Paper of the Home Office on the conditions of detention, and Emergency Orders of the Prison Commissioners. According to the former, 'as persons detained in pursuance of Regulation 18B are so detained for custodial purposes only and not for any punitive purpose, the conditions of their confinement will be as little as possible oppressive, due regard being had to the necessity for ensuring safe custody and maintaining order and good behaviour.'<sup>172</sup> Furthermore, '[t]he White Paper contained no more than administrative departmental instructions which could not, and were not, intended to confer any rights on persons. There was no obligation to communicate them to Parliament, still less to the prisoner.'<sup>173</sup> However, the unofficial and more assertive standards of the detainees' treatment were those substantiated by the Prison Commissioners through their secret Emergency Orders. As Simpson reports, 'these secret orders were in force when the White Paper was issued, and thereafter. *It was simply propaganda.*'<sup>174</sup> Therefore, as witnessed in the case of detentions exercised under the auspices of regulation 18B, one can spot the rise of a bureaucratic duality aiming to divert the attention of public from what actually occurs in the course of

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<sup>171</sup> See also, N. Bamforth, P. Leyland, *Accountability in the Contemporary Constitution* (Oxford: OUP, 2013) at 49.

<sup>172</sup> Simpson, above note 147, at 80.

<sup>173</sup> See, *The Law Times Reports* (1943) Vol. 168, at 29.

<sup>174</sup> Simpson, above note 147, at 81.

detention. To make it clear, on one hand, authorities would issue reassuring, and yet unenforceable documents fleshing out high standards of treatment, and on the other hand, would issue secret orders in the form of emergency orders, or secret memorandums, they would take the question of detainees' treatment into their own hands.

The same technique somehow holds true for the upholding of habeas corpus. As it was noted in the case of *R v. Halliday*, the court enthusiastically held that regulation 14B could not affect the operation of habeas corpus. However, at the same time, detention powers assigned to the executive were high such that habeas corpus could not question their legality. In much the same way, regulation 18B did not rule out the possibility of submitting a writ of habeas corpus to courts, but framed 'the manner of the [detention] exercise' in a form that made challenging the legality of detentions nearly impossible. When seen in this light, one is to ask if this was not keeping the appearance of the rule of law and subverting it in substance. Interestingly, this minimal understanding of the rule of law did not remain hidden from the eyes of Lord Shaw, the dissenting judge in *R v. Halliday*. Accordingly, he argued, that broadening the discretionary powers of the executive in the context of detention without trial, and at the same time, leaving the possibility of the resort to such judicial remedies as habeas corpus meant to 'give due formal respect to the procedure of the remedy, but to deny the remedy itself by infecting the repeal of those very fundamental rights which the remedy was meant to secure.'<sup>175</sup> That is to say, by allowing the judiciary to reconsider the reach of judicial remedies in the context in question, the procedural dimensions to the rule of law were somehow honoured. Yet, the hesitation of the House of Lords to monitor the performance of the executive caused

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<sup>175</sup> *Ex Parte Zadig*, above note 152.

the law lords to fall short of a substantive engagement with the questions of the rule of law and liberties. Lord Atkin drives this point home in his dissenting opinion in *Liversidge*:

I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. Their function is to give words their natural meaning, not, perhaps, in war time leaning towards liberty, [...]. In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.<sup>176</sup>

The construction of the judicial deference to the actions of the executive subsequently became something of a mantra for many different legal systems in the post-World War II era and the post-colonial world. The development of this theme in the context of detention without trial will particularly analysed in the so-called 'war on terror' in the final chapter of this thesis.<sup>177</sup>

#### 10.4. *Special Regulations in Colonies During and After WWII*

At the time when World War II was spreading fast-forward in Europe, some colonies were on the path of decolonisation and insurrections were becoming common place in such colonies. Once again, India was the first recipient of special regulations. The Defence of India Act, 1939 was in effect a copy of its British counterpart, Emergency (Defence) Act of 1939. Rule 26 roughly resonated the words of regulation 18B of ..., with the difference that in Rule 26 the mere satisfaction of Government and there was no requirement of 'reasonable cause' for detention. However, the mere satisfaction of the executive was not *ab initio* the test for making detention orders. In the first draft of the Rule 26, the test for detaining suspects was stated to be that individuals subjected to detention must be 'reasonably suspected' of having hostile links to the safety of the empire.

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<sup>176</sup> *Liversidge*, above note 167, at 243.

<sup>177</sup> Refer to chapter V, section 3.4.

This in the watershed case of *Keshav Talpade v. King Emperor* was interpreted as a limitation to the executive powers by a Federal Court in India.<sup>178</sup> The ruling of the Indian Court led to a great anxiety on the part of the British government. In this regard, De writes:

The British government presented the view that the Federal Court had merely pointed out a legal technicality which would be corrected by subsequent amendment. [...] the viceroy issued an ordinance amending the legislation to make the subjective satisfaction of the official the only requirement to justify an order of detention.' 'Fates of political liberalism in the British post-colony'<sup>179</sup>

In the aftermath of this amendment detention powers were again challenged in a very similar case to *Liversidge v. Anderson*. The arguments of the Indian Court mirrored the arguments of the House of Lords in the *Liversidge* case. Hence, the result was that 'the Court was not competent to investigate the sufficiency of the materials or the reasonableness of the grounds of *satisfaction* of the Government for detaining a person under Rule 26.'<sup>180</sup> It must be noted that the use of detention powers in India were by and large more severe than their parallel powers in Britain. According to Simpson, 'the peak total of detainees was 15,200, and the peak number of those in prison was 29,043, the number of detention orders was around 18,000.'<sup>181</sup>

Palestine provides another example which was repeatedly subjected to special regulations since 1936. The severity of emergency laws put in place by British authorities came to border on the imposition of martial law. However, martial law was never imposed. Instead, the Palestine

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<sup>178</sup> *Keshav Talpade v. King Emperor*, 30 A.I.R, 1943, Federal Court.

<sup>179</sup> R. De, 'Emasculating the Executive: The Federal Court and Civil Liberties in Late Colonial India: 1942-1944' in T. C. Halliday *et al* (eds), *Fates of Political Liberalism in the British Post-Colony: the Politics of Legal Complex* (Cambridge: CUP, 2012) at 64.

<sup>180</sup> I. Omar, *Rights, Emergencies, and Judicial Review* (Hague: Kluwer Law International, 1996) at 46

<sup>181</sup> Simpson, above note 3, at 87.

Martial Law (Defence) Order in Council 1936 was passed. The appearance of the term 'martial law' merely had a symbolic significance.<sup>182</sup>

The result was the establishment of what Townshend has characterised as 'statutory martial law'.<sup>183</sup> Hence, from 1936 onwards, one statute after another increased the powers of High Commissioner in Palestine to deal with rebellions, or the threat of rebellions.<sup>184</sup> The regulation 17 of these regulations authorised detention without trial, and at the same time, regulation 17B conferred the power of detaining enemy aliens upon the High Commissioner. The reason for preserving a distinct category for enemy aliens in Palestine was that Palestine had been made an ideal destination for Arab workers from other states, and more importantly, the large-scale flow of Jewish emigrants, which went far beyond the British emigration control.<sup>185</sup> There is not much written on the administration of these two regulations. However, it is clear that the primary difference between regulation 17 and regulation 17b lies in the exclusion of habeas corpus for enemy aliens.<sup>186</sup>

In the immediate aftermath of the conclusion of the British mandate in Palestine, British military and civil officers were recruited in other colonies such as Malaya, Nyasaland, Cyprus, and Kenya.<sup>187</sup> What all these colonies had in common was a broad-ranging division among their inhabitants. As a result, the pattern established by special regulations in Palestine was set as the standard emergency model for such colonies. The pattern was to create a set of regulations amounting to 'statutory martial law', which 'gave the security forces most of the advantages of martial law' with

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<sup>182</sup> Ibid., at 88.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid., at 81.

<sup>185</sup> N. Shepherd, *Ploughing sand: British rule in Palestine, 1917-1948* (London: John Murray, 1999) at 77-125.

<sup>186</sup> *Nathan v. Inspector General of Police* in H. Lauterpacht (ed), *International Law Reports: Annual Digest and Reports of Public International Law Cases 1941-1942 Vol. 10* (London: Butterworth, 1942) at 450.

<sup>187</sup> French, above note 136, at 249.

higher exactitudes regarding their powers.<sup>188</sup> Needless to say, the particularities of special regulations for each colony had manifest differences. Nevertheless, all of them shared the commonality of 'the power to detain individuals.'<sup>189</sup>

## 11. Conclusion

This chapter considered the history of detention without trial in England, and assessed the chronological and thematic evolution of this practice from the adoption of Magna Carta to the end of the Second World War. It was argued that many constitutional questions as regards the practice of detention without trial emerged soon after the adoption of Magna Carta. As argued above, the chapter twenty-ninth of Magna Carta sought to limit the detention authority of the King by references to 'the law of the land.' One potential reading of this restraining clause was that in terms of the constitutional order of England and for the purposes of protecting the liberties of subjects, 'the law of the land' occupied a more privileged place than the King. That is to say, the King in person or in council could under no circumstances part with the 'due process' of law. That is why the practice of detention without trial in England was not only a simple or exceptional legal practice, but also one directly tied with the constitutional order of England. It was thus that the crisis caused by the case of *Five Knights* promptly turned into arguably the most significant political and legal dispute in the history of England. The so-called *Five Knights* case was only a beginning to a long-lasting series of disputes between the King and Parliament. Such disputes in the short term resulted in the restriction of the powers of the King, and the entrenchment of the right to liberty through legislation such as Petition of Rights of 1628 and the Habeas

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<sup>188</sup> Ibid.

<sup>189</sup> A. W. B. Simpson, 'Emergency Powers and Their Abuse: Lessons from the End of the British Empire' (2004) 33 *Israel Year Book of Human* 219, at 220.

Corpus Act of 1641. After the victory of Cromwell in the civil wars however the pattern was once again reversed towards the absolute power of the sovereign in their authority to confine individuals without charge. Once again, confinement was used as a technique by which to eliminate the political dissents. Additionally, it was in this period that authorities systematically used overseas locations to detain individuals in order to erect a barrier to the reach of habeas corpus; a technique which finds interesting parallels in the twenty-first century. However, for all the broad-ranging political and legal conflicts generated by the practice of detention without trial, the relationship between the sovereign's authority and 'the law of the land' was never clarified. Did 'the law of the land' derive its force from the authority of sovereign? Did the alleged absolutism of the prerogatives of the sovereign place it in a higher hierarchy than 'the law of the land'? Was there one concrete 'law of the land' or were there different laws for emergencies? Every now and then, these questions would come to pose a great degree of discomfort to the sovereign in England and the colonial governors. The authorisation of martial law, for example, represented one of the challenging concepts with regard to which no legal scholar or practitioner could with great certainty assert what the correct position was under 'the law of the land.'

In general, both at home, and in colonies, the history of detention without trial in Britain was caught in the middle of two different endeavours. The first endeavour was the liberty of subjects. As one colonial authority in British-America stated, '[I]et an Englishman go where he will, he carries as much of law and liberty with him, as the nature of things will bear'.<sup>190</sup> No surprise then that the term 'the empire of liberty' was among the most all-pervading self-constructed images by the British ruling elites. Habeas

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<sup>190</sup> *The Calcutta Monthly Journal* (1836) at 184.



corpus which was more often than not referred to as 'the palladium of liberty' had long since become the most prominent indicator of the sovereign's care for the liberty of subjects. Due to the role that habeas corpus played in the political uprisings of the seventeenth century, it had a nostalgic dimension to it in Britain too. In colonies, however, habeas corpus was a prominent part of projecting the image of imperial benevolence so as to gain legitimacy.

The other side of the coin of the British rule was the problem of public order. Insofar as the politics of the realm was concerned, post-revolutionary political alliances, territorial reunions with Scotland and Ireland, the Catholic suppression, the elites centered political structure and the potential prospect 'contagion' of the French Revolution provoked a wide-range of dissents posing real challenges to the sovereign establishment in the eighteenth century. The answer to these challenges lied in compromising the liberty of subjects with the requirements of the public order. Thereafter, it was easy to argue that to uphold the essentials of public order, the sovereign is on some occasions pressed to take a departure from normal standards.

Especially in the first half of the eighteenth century, authorities would consult great caution in their resort to detention without trial. As a result, detention powers could not be recalled, unless there was an explicit parliamentary suspension of habeas corpus. Parliamentary suspension acts would erect some rudimentary limitations on the detention powers of the executive, such as a limited time frame for the suspension of habeas corpus. However, in the second half of the eighteenth century, Parliament shifted from its timeworn convention regarding the suspension of habeas corpus. Suspension acts became more ambiguous in their wordings. Time limits disappeared and the executive powers were enlarged.

However, one of the premises of this chapter was to demonstrate that the utility of instruments such as habeas corpus or detention without trial was not contingent upon their objective value, but the context in which they were resurrected. More importantly, the vital pillar of the context which would determine the prevalence of either habeas corpus or detention without trial was the conception of necessity. The formulation of necessity proved to be fluid, situational, and subjective. Even when there were attempts to define objective criteria and thresholds for the translation of necessity into the suspension of certain norms, officials did not remain loyal to those conceptions.

Martial law in particular required a categorical clarification of necessity. It was demonstrated that martial law could not necessarily be tantamount to the existence of a war. Rather, martial law was regularly invoked for suppressing uprisings and rebellions. From the beginning of the nineteenth century, there were attempts to clarify the tenor of necessity justifying the functioning of martial law.<sup>191</sup> When seen in the light of the Petition of Right, this meant that the closure of courts was a prerequisite to the introduction of martial law. Nevertheless, there were many inconsistencies with this threshold. Even in Britain's shift towards emergency regulations as a primary counter-insurgency method, expediency played a much more prominent part than genuine concerns for 'the law of the land.' Ultimately, the result for the population affected by emergency regulations was not so different. Such colonial catastrophes as civilian slaughters in Mau Mau detention camps can well attest to this fact.

It was also argued that in the wake of World War II, the administrative machinery revolving around the practice of detention without trial came to represent a higher importance than ever before. As a result, varying set of

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<sup>191</sup> Fifth Report on the Affairs of the East India Company, House of Commons (London: Black, Parry, Co, Booksellers, 1812) at 106.

commissions and boards emerged to govern the exercise of detention. The administrative complex surrounding detention without trial bestowed legitimacy upon the executive circumventions of constitutional norms. As such, they played a key role in terms of justifying extended durations of the governance of emergency regulations. Finally, it was by dint of such machinery that the doctrine of judicial deference, as manifested in cases of Halliday and Liversidge, took shape. In other words, such institutions as advisory boards came to ease the judicial conscience so as not to embarrass the executive by its consecutive interventions. This pattern was swiftly exported to other colonies too, and remained alive in the post-colonial world. As a result, the standard understanding of the rule of law in times of necessity merely became procedural. That is to say, insofar as procedural remedies are upheld, the executive actions can be dismissed from judicial scrutiny. One consequence of this was that in the most modern instances of the exercises of detention without trial, the prior suspension of habeas corpus would not serve as a necessary prelude to the lawfulness of detention without trial. We must return to this question, whilst outlining our analysis of detention without trial with a view to the so-called war on terror.

## CHAPTER II

### **Detention of Aliens: The Interaction between the prerogative and international law in Britain prior to the age of human rights**

#### **1. Introduction**

After considering the early modern accounts of detention without trial, one may ask the question whether international law could have any role to play at all in determining the boundaries of detention powers. Before answering this question, one must make a distinction between two different classes of people. The first class consisted of the nationals of a state. Insofar as the nationals of a state were concerned, it was undisputed that international law could not undertake any restrictive view towards the behaviour of states. In this regard, it must be borne in mind that the era in question is the one prior to the emergence of human rights law as a distinct legal regime within public international law.<sup>1</sup> In this era, even the so-called concept of 'rights of man' (which was developed by the Institute of International Law as early as 1929) was not accorded any official significance in international law.<sup>2</sup> As a result, the only recognised legal authority to deal with the rights and wrongs of nationals was the sovereign. However, the same formula did not strictly prove to be consistent for the second class of persons composed, namely, aliens. The fact that aliens owed allegiance to different sovereigns and the subjection

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<sup>1</sup> S. Moyn, *The Last Utopia: Human Rights in History* (Cambridge: Belknap Press, 2010) at 176-180.

<sup>2</sup> E. Bourchard, 'The Minimum Standard of the Treatment of Aliens' (1940) 38 *Michigan Law Review* 445, at 458.

of them to ill-treatment could potentially provoke the protest of their sovereigns gave rise to an interstate dimension, which was of a potentially restrictive function to the authority of sovereigns receiving aliens. This dimension gave rise to an international law concerning treatment of aliens.<sup>3</sup> Nevertheless, the practical impacts of international law on the rights of aliens prior to the age of human rights remain the subject of controversy as late as the twenty first century. The main premise of this chapter is to discover the role of international law in governing the states' conduct in a manner which influenced the rights of aliens.

Naturally, if international law fully submits to the powers of states for the purposes of detaining aliens, it follows that states can establish means of control, exclusion and expulsion at their own discretion. If domestic law too refrains from any further restraints on these powers, the predictable result is the flow of certain discretionary powers, which are not susceptible to judicial control. In the context of the treatment of aliens, these discretionary measures normally consist of detention of aliens, restrictions on aliens' freedom of movement and their forced removal.<sup>4</sup>

We cannot fully appreciate the link between the authorities of international law and sovereign powers without having first established how international law was invoked in the domestic jurisprudences apropos the sovereign prerogative. It is for this purpose that after describing the doctrines of international law on the point of the treatment of aliens, we shall refer to the laws and practices in Britain prior to the emergence of the human rights law regime. Since the reign of Charles I, the scope of the royal prerogative particularly for the purpose of detaining individuals had signified one of the most prominent pre-occupations of the legal

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<sup>3</sup> A. H. Roth, *International Law Applied to Aliens* (London: University College London, 1949) at 23.

<sup>4</sup> I. A. Shearer, *Extradition in International Law* (Manchester: University of Manchester Press, 1971) at 76.

establishment in England. However, the reach of the prerogative as regards aliens was hardly an issue of legal clarity. This generated lengthy legal discussions, parliamentary debates and many disputes in Britain.<sup>5</sup> By subjecting these historical materials to a legal scrutiny, this chapter intends to outline the evolving contours of the prerogative, its interaction with international law and the effect that this interplay brought about for the exercise of detention.

## 2. Why the scope of states' authority matters: Authority and Internment

It is tautological that maintaining independence and sovereignty of states requires the concession of certain exclusive powers to the central establishment of states, also referred to as the sovereign establishment. In most states, written constitutions usually serve as documents embodying these powers in an enumerated fashion.<sup>6</sup> In other states such as Britain, which lack a codified constitution, it is not always easy to assert the precise scope of these powers and the extent to which they are bound by what the contemporary lawyers characterise as 'the rule of law'. This point was in particular highlighted in the previous chapter in our discussion of 'the law of the land.'<sup>7</sup> To gain a better understanding of this issue, it is useful to assess some of the attributes of the powers of sovereign.

The choice of terms employed to hint at the exclusive powers of sovereignty is broad and may differ in accordance with the context in which such terms are utilised. For example, in the context of the powers of the American political branches, the term 'plenary powers' has more frequently been referred in a synonymous manner to the exclusive

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<sup>5</sup> Refer to chapter I, section 4.

<sup>6</sup> See, for example, *Marbury v. Madison*, the U.S Supreme Court (1 Cranch) 137 (1803).

<sup>7</sup> Refer to chapter I, sections 1 and 8.1.

sovereign rights.<sup>8</sup> In Britain, the usage of such terms as the royal prerogative, the prerogative of the Crown or simply the prerogative has gained more frequency in the legal literature.

Again, depending on the context, the meaning of these terms can vary. Therefore, sovereign rights can be invoked for exclusive, pre-emptive, controlling or regulating purposes.<sup>9</sup> They can also be used for the assertion of particular rights in an absolute manner. However, all sovereign rights share a common characteristic, that is, they must pertain to the matters of public interest.<sup>10</sup>

From the characteristics described above for the powers of sovereignty, it is logical to assume that the issue of aliens is a perfect fit for falling under the auspices of the authority of states. Therefore, for example, insofar as the conception of the prerogative in the laws of Britain was concerned, Chitty wrote in 1820:

[a]lien friends may lawfully come into the country without any licence or protection from the Crown, though it seems that the Crown, even at common law and by the law of nations possesses a right to order them out of the country, or prevent them from coming into it, whenever his majesty thinks proper.<sup>11</sup>

This language of reference to the issue of control of aliens is of great significance for us in order to come to grips with the different components of the state's authority in dealing with aliens. Ordering them out of the country refers to the measure of expulsion and preventing them from an entrance into the country hints at the measure of exclusion.<sup>12</sup> The main components of expulsion were deportation, removal of aliens and

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<sup>8</sup> For the use of the concept of plenary powers in the context of aliens immigration control, see, T. A. Aleinikoff, 'Detaining Plenary Power: The Meaning and Impact of *Zadvydas v. Davis*' (2001-2002) 16 *Georgia Immigration Law Journal* 365.

<sup>9</sup> D. E. Wilkins, *American Indian Sovereignty and the U.S Supreme Court* (United States: the University of Texas Press, 1997) at 25-26.

<sup>10</sup> J. Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (London: Law Booksellers, 1820) at 163.

<sup>11</sup> *Ibid.*, at 49.

<sup>12</sup> Shearer, above note 4, at 76.

internment/detention without trial. The latter was a component of exclusion, in that it would exclude an alien detainee from entering into the borders of his destination.<sup>13</sup> However, internment could also serve as a supplementary practice to expulsion in the form of detention pending deportation.

As regards the measure of internment of aliens, it must be stated that the language of detention in the context of the treatment of aliens did not gain sufficient traction, since detention was a subsumed part of the bundle of the prerogative. Therefore, whenever there is the talk of exclusion and expulsion in the context of the treatment of aliens, the authorisation of internment is implied. The clearest proof of this statement is the ruling of the U.S. Supreme Court in the case of *Wong Wing v. United States*<sup>14</sup>, in which the validity of internment for the purposes of exclusion and expulsion was in question. Accordingly, the Court posited that:

We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.<sup>15</sup>

As it will be seen in the subsequent sections,<sup>16</sup> the same argument found expression in the U.K courts. As it is clear from the argument of the U.S Supreme Court, once used for the purposes of exclusion and expulsion detention without trial loses its penal character. It becomes a means of control for other measures, or as the U.S Supreme Court vividly put it, 'the means necessary to give effect to the exclusion or expulsion [of aliens].'

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<sup>13</sup> C. Vincenzi, *Crown Powers, Subjects and Citizens* (London: A Cassell Imprint, 1998) at 95, naturally, however, the terms exclusion and expulsion have been used interchangeably. The reason for this manner of using the two term is that there is an exclusion implicit in any act of expulsion and the end result of many of the acts of exclusion has been expulsion.

<sup>14</sup> *Wong Wing v. United States* - 163 U.S. 228 (1896).

<sup>15</sup> *Ibid.*, at 163.

<sup>16</sup> Sections 5-6.



Prior to the emergence of the human rights regime as one of the main departments of public international law, individuals could not be considered as direct subjects of the laws of nations. This rendered states' authority as the only medium through which international law could grapple with the rights of individuals, which meant that the liberties of individuals (in this case) aliens could only emerge at the point that there was a restraint placed on the authority of states. The immunisation of aliens from internment was no exception to this rule. However, neither in principle nor in practice, did there exist a clear-cut conception of the powers of states with regard to aliens in the domain of international law. For example, in a nonbinding resolution regarding the international regulations governing the admission and expulsion of aliens, the Institute of International Law stipulated in 1892 that, in principle, a state cannot restrict access to its territory to certain kinds of immigrants, particularly stateless persons.<sup>17</sup> This was quite inconsistent with an earlier resolution adopted by the same Institute of International Law, in which no duty had been conferred on states to admit aliens and by which the absolute power of states in excluding and expelling aliens had secured an official recognition in international law.<sup>18</sup> It was most probably due to these broad confusions and contradictions, that whilst being presented with an opportunity of making clarifications on the scope of the states' authority, the Permanent Court of International Justice chose not to touch upon this matter.<sup>19</sup>

In the absence of a coherent and consistent doctrine governing the states' authority regarding aliens, selective invocations of different passages

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<sup>17</sup> Institute of International Law, 'International Regulations on the Admission and Expulsion of Aliens' (1892) Art. 2.

<sup>18</sup> Institute of International Law, 'Projet de Déclaration internationale relative au droit d'expulsion des étrangers' (1888) Article 1.

<sup>19</sup> *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory, Advisory Opinion*, 1932 P.C.I.J. (ser. A/B) No. 44 (Feb. 4), at 42.

became common place in different jurisprudences. A general inquiry of the practice in Britain can highlight that the acceptance of the absolutism of the rights of states by the law of nations was taken for granted and how this acceptance of absolute authority came to justify the wholesale detention of aliens.

### 3. From Doctrine to Practice

The norms governing the treatment of aliens in Britain were predominantly occupied by the distinction between war and peace. This can be proven by a number of important cases, of which *Sylvester's case*<sup>20</sup> in the early eighteenth century would determine the path for others.

The importance of *Sylvester's case* for our purposes is that it shows that the entitlement of aliens to the sovereign's protection is intertwined with his/her *status* as an alien enemy or alien friend when in the territory of another sovereign.<sup>21</sup> While the state authority over alien enemies is applicable in an absolute capacity, the alien friend can enjoy the protections embodied in municipal laws. However, even the absolute authority of states, as applied against alien enemies could be restricted by deeds of international law such as mutual agreements or letters of safe conduct.<sup>22</sup> The ruling in *Sylvester's case* was consistent with the dominant opinion of some jurists in international law. On this point, Bynkershoek argued in his treatise on the law of war that unless protected by a mutual agreement or a letter of safe conduct, an alien enemy possesses no '*persona standi in judicio*.'<sup>23</sup> That is to say, alien enemies cannot produce

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<sup>20</sup> *Sylvester's case* (7 Mod. 152), 1702.

<sup>21</sup> In the legal literature, the phrases 'alien enemies' or 'alien friends' have also been referred to as 'enemy aliens' and 'friendly aliens'. In this thesis, both forms are used interchangeably.

<sup>22</sup> *Sylvester's case*, above note 42. Also, J. Chitty, *A Treatise on the Laws of Commerce and Manufactures* Vol. III (London: Strahan, 1824) at 59.

<sup>23</sup> C. Van Bynkershoek, *A Treatise on the Law of War* (New Jersey: The Lawbook Exchange Ltd, 2007) at 55 and 191.

a case in the courts of the country at war with their home state.<sup>24</sup> Also, enemy aliens have an absolute lack of legal persona. This absolute lack of judicial persona justifies extra-judicial actions, of which the first one is detention without trial.

The precedent established by *Sylvester's* case was followed by British courts for many years<sup>25</sup> and it was accepted as a natural part of the sovereign's war powers to deal with such matters as hostile entry, aggression and alien spies. However, in the course of scrutinising these cases, one can discern that the role of international law in determining the extent of state power did not always remain at an impotent level. In an interesting case concerning a Hollander aligned with France in a war against Britain in 1797, the court of King's Bench invoked customary international law arguments to grant fair treatment to this detainee, '[t]his defence is founded on an idea of a right in the conqueror to reduce his prisoners to slavery, which is contrary to the law of nations.'<sup>26</sup>

There were also other customary practices putting explicit limits on the authority of states. In this regard, some international customs as to the protection of the POWs stood as an example in which the wholesale denial of rights to alien enemies could not have been good policy. This is mainly because subjecting POWs to ill-treatment by British authorities could endanger the lives of British subjects held captive by the adversaries. The solution was to bring POWs under the protection of the laws of the realm.<sup>27</sup> This generous approach towards the rights of the POWs marked an important privilege that they held over other classes of interned aliens. They could sue and be sued in the British courts and held all the

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<sup>24</sup> Ibid.

<sup>25</sup> See, *The King v. Superintendent of Vine Street Police Station* [1916] 1 K.B. 268.

<sup>26</sup> *Sparenburgh v. Bannatyne* 126 E.R. 837 (1797), 839.

<sup>27</sup> Halliday, *Habeas Corpus: From England to Empire* (Cambridge: Harvard University Press, 2010) at 172.

protections that subjects of the Crown were entitled to including the right of habeas corpus. Nevertheless, since most prisoners of war were likely to be exchanged quickly, the tendency among them to use the remedy of habeas corpus remained slim.<sup>28</sup>

### 3.1. *The legal position of alien friends: confusion escalates*

The issue of the norms governing states' conduct regarding alien friends was much more unsettled. This controversy was largely due to the fact that within the ambit of war powers, suspension of legal norms such as habeas corpus could be justified. However, when it came to the treatment of aliens, the norms were by no means transparent. Arguments in international law normally ranged from the existence of an absolute state authority to exclude aliens to the strictly controlled powers of state.<sup>29</sup>

Insofar as the scholarly opinions were concerned, some prominent British authors in the eighteenth century supported the absolute authority of states to exclude aliens, be those alien friends or enemies. For example, Blackstone placed the protection of aliens at the state's mercy and considered the prerogative of the King as extending to the exclusion of alien friends in an absolutist version ('whenever the king sees occasion').<sup>30</sup> The identification of such an alleged constitutional authority in the laws of Britain was essential. If it existed, this authority, would serve as a bar to any legal action by a perceived excluded alien.

However, in one of the most forceful queries of the position of the laws of Britain on alien friends, Craies noted that the Crown held no prerogative

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<sup>28</sup> Ibid.

<sup>29</sup> See, J. R. A. Nafziger, 'The General Admission of Aliens under International Law' (1983) 77 *American Journal of International Law* 804.

<sup>30</sup> W. Blackstone, *Commentaries on the Law of England* Vol. I (Oxford: Clarendon Press, M.DCC.LXV) at 251.

by the law of constitution so as to detain or deport alien friends.<sup>31</sup> The lack of the prerogative in question meant the availability of habeas corpus and other judicial remedies for aliens. This meant that alien friends could not be barred from judicial remedies -- most importantly, the writ of habeas corpus, which significantly reduced the scope of the permissibility of internment against alien friends, insofar as the constitutional limits in Britain were concerned. Referring back to the international law argument even Craies concluded that international law did not refute the right of sovereigns on taking exclusionary measures against aliens.<sup>32</sup>

One may argue that this understanding of international law was strictly confined to the late nineteenth century, since as Nafziger has shown, 'before the late 19th century, there was little, in principle, to support the absolute exclusion of aliens.'<sup>33</sup> However, Craies' essay can be invoked to exemplify a significant shift towards the recognition of the absolutism of states' authority by international law regarding aliens in the second half of the nineteenth century.<sup>34</sup> This shift of perception signified confusions and inconsistencies in the conceptions of the legal position of aliens in different frames of time, which begs the question of how detention without trial could operate in the view of such divergent perceptions of the exclusive jurisdiction of sovereigns.

#### **4. The contested reach of the prerogative in Britain, and the renewed waves of exclusion and expulsion**

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<sup>31</sup> W. F. Craies, 'the right of aliens to enter British territory' (1890) 6 *Law Quarterly Review* 27, at 34-37.

<sup>32</sup> *Ibid.*, at 36-37.

<sup>33</sup> Nafziger, above note 29, at 808-809.

<sup>34</sup> It must not be neglected that the second half of the nineteenth century signifies a period in which positivist schools of law, which took a maximalist approach to the powers of sovereigns were on a very speedy rise. See, H. Lauterpacht, *The Function of Law in the International Community* (Oxford: OUP, 2011).

To understand the imperatives governing the protection of aliens, it is necessary to deviate from our chronological order and shortly move back to the late seventeenth and fifteenth century. Holdsworth noticed the effect of the expansion of industries on the rights of aliens, as Britain was on the verge of entering into the era of industrial revolution and explained that 'at the close of the seventeenth century the more elaborate organisation of commerce' necessitated moderations and modifications in the treatment of aliens, especially alien enemies. Holdsworth also noted that the rights of alien friends followed progressive milestones from the fifteenth century onwards and identified a very important connotation originating from such changes:

This admission of the capacity of alien friends to bring personal actions for torts has had one very important consequence in our constitutional law. It follows that they have gained the same as that accorded to subjects, not only against private persons, but also against the king and his servants.<sup>35</sup>

The protection against the king and servants points to the sanction of the arbitrary use of the prerogative against alien friends. However, even the rights of alien friends in Britain were not as settled as they would appear in the words of Holdsworth. The issue of the prerogative of the Crown regarding the expulsion of aliens remained a matter of controversy for many decades and the practice remained far from clear. For example, as early as 1824 and upon the introduction of modifications for the 'peace' Alien Bill of 1816, Home Secretary Peel and the dominant opinion in Parliament held that 'it mattered little what the prerogative of the Crown was, since it had at present no power but that which it received from Parliament.'<sup>36</sup> In fact, the power in question constituted a statutory prerogative, a prerogative conferred and approved by parliamentary statutes. However, this statutory prerogative could hardly resolve the

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<sup>35</sup> W. Holdsworth, *A History of English Law* Vol. IX (London: Sweet and Maxwell, 1972) at 97-98.

<sup>36</sup> *Cobbett's Parliamentary Debates*, 1362.

confusions arising from taking exclusive measures against alien friends in peace time.<sup>37</sup> The retreat of the Secretary Peel from the view that the Crown possessed a prerogative to exclude and expel alien friends regardless of a parliamentary affirmation was indeed a step forward. This restrictive reading of the prerogative dominated the legal mind-set for much of the nineteenth century.<sup>38</sup>

Towards the end of the nineteenth century, some judicial decisions reformulated the prerogative in an expansive mould and threw renewed confusions into the reach of the prerogative of expulsion. Accordingly, in 1891, the Lord Chancellor of the Privy Council in his passing remark concluded that the Crown had possessed a prerogative to prevent aliens from landing in Britain and its dominions.<sup>39</sup> The act of exclusion in this case took the shape of detention on a board ship.<sup>40</sup> This *obiter* of the Lord Chancellor came to establish a precedent for a number of subsequent decisions, which took the existence of the prerogative of expulsion for granted. Most notable among such cases was *Canada v. Cain*. In delivering the judgment of the court in this case, Lord Atkinson postulated that 'the Crown undoubtedly possessed the power to expel an alien.'<sup>41</sup> Moreover, this power could be delegated to colonial governors, 'which include[d] and authorise[d] them to impose such extra-territorial constraint as is necessary to execute the power.'<sup>42</sup> To justify the validity of the prerogative of the Crown, Lord Atkinson gave great weight to international law arguments. In this regard, he argued:

But as it is conceded that by the law of nations the supreme power in every State has the right to make laws for the

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<sup>37</sup> Ibid.

<sup>38</sup> C. H. R. Thornberry, 'Dr Soblen and the Alien Law of the United Kingdom' (1963) 12 *International and Comparative Law Quarterly* 414.

<sup>39</sup> *Musgrove v. Chun Teeong Toy* [1891] A.C. 272.

<sup>40</sup> Ibid., at 276.

<sup>41</sup> *Attorney-General for the Dominion of Canada v Everett E. Cain* [1906] A.C. 542, at 543.

<sup>42</sup> Ibid.

exclusion or expulsion of aliens, and to enforce those laws, it necessarily follows that the State has the power to do *those things* which must be done in the very act of expulsion.<sup>43</sup>

As Lord Atkinson explicitly acknowledged, one measure falling within the ambit of 'those things' was detention without trial for the purpose of exclusion:<sup>44</sup>

The Crown had power to remove a foreigner by force from the island of Mauritius, though, of course, the removal in that case would necessarily involve an imprisonment of the alien outside British territory, in the ship on board of which he would be put while it traversed the high seas.

Lord Atkinson's arguments with regard to the close tie between the powers of detention and the powers of removal is very illuminating, in that they make it explicit that exclusion and expulsion often go hand-in-hand. This was the core of Lord Atkinson's next argument:

If entry be prohibited it would seem to follow that the Government which has the power to exclude should have the power to expel the alien who enters in opposition to its laws.<sup>45</sup>

Insofar as the invocation of international law for the approval of exclusion and expulsion was concerned in this case, it must be noted that this understanding of international law in the late nineteenth and the early twentieth centuries was not uncommon. Even, in the case of *Musgrove v Chun Teeong Toy*,<sup>46</sup> there was an explicit recognition by all parties involved in the case that international law had mapped out a great margin of deference to the absolute authority of states in dealing with immigrants. However, there was one major difficulty undermining this argument.

The first problem with an absolute deference to the prerogative of sovereigns by international law was that there was no consensus on the

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<sup>43</sup> Ibid, at 547.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> *Musgrove v. Chun Teeong Toy*, above note 39.



part of international legal scholars. As it was argued above,<sup>47</sup> even, Vattel, who was regularly invoked by the British courts to justify the prerogative of expulsion, had accounted for some exceptions with a restrictive effect on the rights of sovereign in expelling and excluding aliens.<sup>48</sup>

Interestingly, some British authors in the late nineteenth century were quite conscious of the contradictions arising from the international law analysis on the issue of aliens. Haycraft in particular provided a constructive interpretation of Vattel's writings, which was quite consistent with the case-by-case approach to the admission of aliens. He wrote:

The principle laid down by Vattel is so consistent with common notions of justice as to be acceptable to every kind of rational mind and leaves us only to inquire, not whether exclusion of any kind is justifiable, but whether the grounds of exclusion proposed are such particular and important reasons as would justify legislation.<sup>49</sup>

Specifying explicit grounds for exclusion would necessitate legislation, of which one implication was to limit the prerogative. The only exception to the limiting effect of legislations for the prerogative would occur if such legislations brought within their fold delegation of powers to the executive. However, the judicial approach in the leading cases regarding the prerogative of expulsion was only predicated upon general, vague and misconstrued readings of the authority of states in international law. This acceptance of the absolute prerogative of the Crown meant that legislations would only carry a supplementary weight to the perceived pre-existing executive authority for excluding aliens.

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<sup>47</sup> Section 2.1.

<sup>48</sup> As Nafziger has reflected on the views of Vattel, '[t]he exceptions to the right to exclude aliens include such Grotian principles as the right of procuring provisions by force, the qualified right of making use of the things that belong to others, the right of passage and for those exiled or banished from their own country, the right of dwelling in a foreign country. All of these are premised on the notion of a primitive state of communion and the Grotian right of necessity.' Nafziger, above note 29, at 813.

<sup>49</sup> T.W. Haycraft, 'Alien Legislation and the Prerogative of the Crown' (1897) 13 *Law Quarterly Review* 165, at 170.

## 5. The effect of absolute authority on the exercise of detention without trial

If the possession of absolute authority is recognised, the natural conclusion will be that the exercise of such powers cannot on any grounds be challenged in the form of lawsuits brought by aliens. In other words, the acts of officials with regard to aliens are protected by an absolute impunity from the judicial scrutiny, insofar as they relate to the expulsion and exclusion of aliens. The Lord Chancellor referred to this precedent in the case of *Musgrove v Chun Teeong Toy*:

Their Lordships cannot assent to the proposition that an alien refused permission to enter British territory can, in an action in a British Court, compel the decision of such matters as these, involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament and the relations of this country to her self-governing colonies.<sup>50</sup>

Therefore, an act of state automatically negates the right of aliens to judicial remedies, which is a conclusion supported by the case of *Poll v. Lord Advocate*.<sup>51</sup> This indeed precluded the criminal justice system from having any say on the detention of aliens. Therefore, detaining aliens could not have been possibly exercised as a punishment against the infringement of particular rules by such people. Rather, the exercise of detention without trial was deemed to only serve exclusionary, preventive and administrative purposes.

The real character of detaining immigrants in the early twentieth century assumed confusion in Britain. This confusion primarily stemmed from the vague wording of the Royal Commission report on the exclusion of undesirable aliens. According to this report:

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<sup>50</sup> *Musgrove*, above note 39.

<sup>51</sup> *Poll v. Lord Advocate* (1899) 1 F. 823.

Provision should be made for the immediate determination of any proceedings taken before a court of summary jurisdiction on the arrival of the immigrant pending which the immigrant may be placed on the suitable charge.<sup>52</sup>

It is not clear that the decisions of this court of summary jurisdiction would afford a punitive character to the measures of exclusion and expulsion and if so, how this would affect that nature of detention arising from such decisions. This complication could be intensified by paying attention to the fact that the measures suggested by the Royal Commission were to inform an alien bill for regulating (or restricting) the entry of Jewish immigrants from the Eastern Europe. A note made by the Secretary of State in 1905 upon the introduction of the alien bill is of some relevance:

[t]he second part of the Bill deals with the expulsion of undesirable aliens in our midst. To secure this the Secretary of State may make an expulsion order requiring an alien to leave the United Kingdom within a time he fixes and thereafter to remain out of it. But the Secretary of State can only act on the certificate of a court of summary jurisdiction.<sup>53</sup>

More or less, the same terms were employed in the 1905 alien bill for outlining the process of expulsion:

The Secretary of State may, if he thinks fit, make an order (in this Act referred to as an expulsion order) requiring an alien to leave the United Kingdom within a time fixed by the order, and thereafter to remain out of the United Kingdom.

(a) If it is certified to him by any court (including a court of summary jurisdiction) that the alien has been convicted by that court of any felony of any felony, or misdemeanour, or other offence for which the court has power to impose imprisonment...<sup>54</sup>

The decision of this court of summary jurisdiction served as an administrative prerequisite for the expulsion of aliens either enemy aliens or alien friends. Given such state of affairs, one may ask if the type of questions arising from the decision of the summary court of jurisdiction

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<sup>52</sup> The Report of the Royal Commission on Alien Immigration Appointed (August, 1903) at 31.

<sup>53</sup> *Cobbett's Parliamentary Debates 1905*.

<sup>54</sup> An Act to Amend the Law with Regard to Aliens 5 EDW 7 CH. 13.

was administrative or penal. Referring to the words of the Royal Commission, Wilsher elaborates on the nature of such a detention:

This is the first official mention of a system of *administrative detention* for immigrants in UK law. The reference is oblique and the Commission did not explore the justification for such custody in legal or political terms. Nor was there any attempt to reconcile such administrative detention with traditional concepts of habeas corpus and judicial control. Detention was conceived as an inevitable part of the mechanism of control rather than a distinct measure.<sup>55</sup>

It is not certain why the executive were so determined to establish an elaborate administrative complex for the exclusion and the final expulsion of aliens, while they could utilise a claim of having absolute authority over aliens for the authorisation of detention without trial in the 1905 alien's bill. One can only speculate that using such bureaucratic methods as the court of summary jurisdiction could tame the worries of the strong liberal opposition to the 1905 alien's bill and lead to their subsequent pacification in Parliament. Furthermore, admission of the jurisdiction of a court for the purpose of exclusion and expulsion of aliens could temporally impede more questions as to the prerogative of the Crown from being raised. Therefore, caution called for not spoiling the royal prerogative by a bill, whose success was by no means guaranteed.<sup>56</sup> It was against this background that Oppenheim wrote:

The British Government had, until December 1919, no power to expel even the most dangerous alien without the recommendation of a court, or without an act of Parliament making provisions for such expulsion, except during war or an occasion of imminent national danger or great emergency.<sup>57</sup>

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<sup>55</sup> D. Wilsher, *Immigration Detention: Law, History, Politics* (Cambridge: CUP, 2012) at 37.

<sup>56</sup> See, J. Pillaw, 'The Home Office and the Aliens Act 1905' (1989) 32 *The Historical Journal* 369.

<sup>57</sup> L. Oppenheim, *International Law: A Treatise* Vol. I (New Jersey: The Law book Exchange, 2005) at 498

## 6. The Prerogative and the Wholesale Detention of Aliens: Where did alien enemies stand?

In the aftermath of 1905, anti-alien sentiments gathered pace in British society.<sup>58</sup> In 1909, Secretary of State for War, in an 'inaccurate and alarmist' report, commented that 'no doubt that an extensive system of German espionage existed in this country.'<sup>59</sup> Similar reports could be found in all sectors of the intelligence community in Britain.<sup>60</sup> Such misperceived beliefs had rendered people of German origin the main target of public hysteria. In the wake of World War I, the public hysteria was translated into coercive legislation. The Aliens Restriction Act<sup>61</sup> and the British Nationality and Status of Aliens Act 1914<sup>62</sup> came to represent the primary legal reactions to the perceived enigma of aliens.

The Aliens Act enabled the executive by order in council to impose such restrictions as 'prohibiting aliens from landing,' 'embarking in the United Kingdom,' and 'prohibiting [them] from residing and remaining in any areas specified in the Order'.<sup>63</sup> Moreover, this act conferred powers of detention, deportation and assignment of areas of residence to the executive.<sup>64</sup> The scope of the act covered all aliens and it reversed the burden of proof so that 'the onus of proving that [a] person [was] not an alien' lay upon that person.<sup>65</sup> Furthermore, in order to confirm the

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<sup>58</sup> A. W. B. Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford: OUP, 1992) at 9.

<sup>59</sup> C. Andrew, 'Secret Intelligence and British Foreign Policy,' in C. Andrew and J. Noakes (eds) *Intelligence and International Relations 1900-1945* (Exeter: University of Exeter, 1987) at 13.

<sup>60</sup> Simpson, above note 58, at 9.

<sup>61</sup> An Act to enable his Majesty in time of war or imminent national danger or great emergency by Order in Council to impose restrictions on aliens and make such provisions as appear necessary or expedient for carrying such restrictions into effect. 4&5 Geo. 5, Ch. 12.

<sup>62</sup> An Act to consolidate and amend the enactments relating to British nationality and the status of aliens. 4&5 Geo, Ch. 17.

<sup>63</sup> An Act to enable his Majesty in time of war or imminent national danger or great emergency, 1 (a)(b)(c).

<sup>64</sup> *Ibid.*, 6.

<sup>65</sup> *Ibid.*

comprehensive substance of the prerogative, the act emphasised its own auxiliary character:

Any powers given under this section [...] shall be in addition to and not in derogation of, any other powers with respect to the expulsion of aliens, or the prohibition of aliens from entering the United Kingdom or any other powers of his Majesty.<sup>66</sup>

After establishing the fact that detention powers could come into operation as a synthesis of the royal prerogative, the immediate question would be if such groups as alien enemies and alien friends could be entitled to the writ of habeas corpus. In this regard, there was a great deal of ambiguity among the practices of the British courts. *Ex parte Weber* signified the test case for habeas corpus insofar the people of German origin were concerned.<sup>67</sup> In this case, the judges discerned that all individuals of German origin, including those who have lost the protection of German laws by their absence in Germany were to be considered as enemy aliens and therefore, they could not be entitled to the writ of habeas corpus.<sup>68</sup> This established a precedent for one of the most striking decisions in the legal history of Britain, namely, *The King v Superintendent of Vine Street Police Station Ex Libmann*.<sup>69</sup> This case concerned the interment of a denationalised person from Germany, who had not acquired the *status* of a naturalised British subject. The court approved his detention and denied his entitlement to the writ of habeas corpus on the basis that he remained an enemy alien. Furthermore, the court equated the constructed *status* of the detainee as an enemy alien to that of a prisoner of war. To this effect, the Court provided an argument filled with anti-alien sentiments:

[...] Spying has become the hall-mark of German "kultur." In these circumstances a German civilian in this country may be a danger in promoting unrest, suspicion, doubts of victory, in communicating intelligence, in assisting in the movements of

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<sup>66</sup> Ibid.

<sup>67</sup> *Ex Parte Weber* [1916] 1 A.C. 421.

<sup>68</sup> Ibid., at 422.

<sup>69</sup> *The King v. Superintendent of Vine Street Police Station* [1916] 1 K.B. 268.

submarines and Zeppelins - a far greater danger, indeed, than a German soldier or sailor.<sup>70</sup>

General conclusions drawn from an earlier case in 1915 concerning the right of alien enemies to sue in British courts helped the judges to construct a formula for determining the entitlement of such persons to habeas corpus. According to this case, the legal protection of aliens was contingent upon the licence of residence bestowed upon them by the Crown. Although granting the licence of residence was a product of the prerogative, the question was how judges could ascertain the revocation of such licence by the Crown. Judge Low in *Ex p. Liebmann* found an easy way out for this question. He briefly argued that the internment order was to be considered as an implicit revocation of the licence and all the privileges coming with it.<sup>71</sup> This formula entailed many contradictions, and as such, did not appeal to the legal minds of some other judges. Therefore, in an important case, Lord Cozens-Hardy ruled that:

The restraint which is imposed upon the personal movements of an interned German does not deprive him of civil rights in respect of a lawful contract entered into by him before the internment.<sup>72</sup>

Nevertheless, even the judges in this case who showed their commitment to deliver a balanced judgement, were of the opinion that although internment could not be taken as a just cause for stripping aliens of all their protections, it certainly disqualified them from an entitlement to the writ of habeas corpus.<sup>73</sup>

#### 6.1. *Where did alien friends stand?*

The Aliens Restriction Act had made it clear that there was no limit upon the prerogative of the Crown to detain or deport alien friends. The

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<sup>70</sup> Ibid., at 275.

<sup>71</sup> Ibid., at 279-280.

<sup>72</sup> *Schaffenius v. Goldberg* [1916] 1 K.B. 284, at 302.

<sup>73</sup> Ibid., at 295.

government's view was that this conferring of detention powers upon the executive would automatically abate the issuance of habeas corpus for alien friends. The judicial view, however, took the most ambiguous shape in *The King v Governor of Brixton Prison*.<sup>74</sup> According to this case, habeas corpus could in some cases be issued for alien friends, but a writ of habeas corpus could not suspend the legality of any given interment, unless there was an abuse of detention powers.<sup>75</sup> However, the court did not specify any criteria as to how to measure an abuse of detention powers. Furthermore, the practice of detention pending deportation was approved by this case and as was made clear in some subsequent case, there was no substantive, procedural or time limit as to the detention of alien friends, whilst waiting for deportation.<sup>76</sup>

## **7. The continued detention of aliens after war and the transformation of war powers into alien powers**

In general, the absolute nature of the Royal prerogative had doomed almost any vision of its meaningful justiciability to absurdity. The rule was the full approval of the executive's subjective determination as to who was a danger to its security and who was not and the discharge of aliens from the discretionary practices was an exception. With the deference of the judiciary to the endeavours of the executive, the only hope for many detainees was a remedy of administrative nature, namely, the exemption orders of the advisory committee, 'an advisory body of a judicial character ... by which applications for exemption from the general rule of internment [could] be considered.'<sup>77</sup> Here too, the exemption of aliens from detention

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<sup>74</sup> *The King v. Governor of Brixton Prison* [1916] 2 K.B. 742.

<sup>75</sup> *Ibid.*, at 743.

<sup>76</sup> *The King v. Secretary of State for Home Affairs* [1917] 1 K.B. 922.

<sup>77</sup> D. Foxton, 'R. v Halliday ex parte Zadig in retrospect' (2003) 119 *Law Quarterly Review* 456, at 466.



orders was an exception. More importantly, the procedures followed by the advisory committee by no means amounted to a fair hearing.<sup>78</sup>

Some may argue that the total support for an absolute state authority during World War I was a by-product of war powers of the state in order to maintain security and public order. However, as was argued above,<sup>79</sup> an extensive understanding of the prerogative was not merely cantered on the old distinction between war and peace. Rather, the official appraisal of the prerogative of the Crown as an absolute power was in operation irrespective of the state of war and peace. This conclusion is most clearly seen through the continuation of the powers of detention in the aftermath of World War I. The legislative scheme for these continued powers was the Aliens Restriction (*amended*) Act, 1919 (an extension of emergency powers conferred by the Aliens Restriction Act). This act specifically eliminated the importance of the war context in the exercise of the prerogative and made provisions for the deportation of every former alien, not exempted from internment or repatriation. If one desires to echo this state of affairs in terms of the standards of the Grotian principles of the laws of nations, it will follow that the Grotian distinction between war and peace for the purposes of legitimising certain acts had lost its significance in domestic jurisdictions. This disregard towards the distinction between war and peace for the purpose of deciding on the permissibility of certain acts such as detention was the result of the absolutism that the legal establishment in Britain attributed to the sovereign powers.

As it became clear through the case of *The King v. Secretary of State for Home Affairs, Ex parte Same*, the susceptibility of alien friends to the measures of detention without trial and deportation was no less than alien

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<sup>78</sup> Ibid.

<sup>79</sup> Section 5.

enemies. The court concluded in this case that detention and deportation powers of the Secretary of State against alien friends were *intra vires* and the judiciary was in no position to comment on whether the orders of the Secretary of State were conducive to the public good.<sup>80</sup> With a view to the continued detention of aliens, regardless of the state of war and peace, Wilsher posits that with the advent of the twentieth century, what was previously known as the concept of war powers transformed itself into alien powers.<sup>81</sup> Wilsher explains that the renewed use of detention in the post-war era in Britain had an important meaning, which was '[d]etention was now seen as ancillary to the power to control alien entry and residence over which the government's discretion was maximal.'<sup>82</sup> In other words, detention as a means of control could only be justified through maximum government's discretion, an acute synonym for the absolute prerogative of the Crown.

## **8. The Absolute prerogative, detention, and the international responsibility of states**

By the early decades of the twentieth century, the issue of the responsibility of states, as a result of its treatment of foreign nationals, had a matter of principal importance in the public international law. This was a period pervaded by the repeated acts of nationalisation and large quantity of expropriations of properties belonging to foreign nationals in developing countries.<sup>83</sup> Interestingly, the issue of the liberties of foreign nationals never assumed the same degree of importance, as much as the expropriation did. Nevertheless, as the issue of the international

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<sup>80</sup> *The King v. Secretary of State for Home Affairs, Ex parte Same* [1920] 3 KB 72.

<sup>81</sup> Wilsher, above note 55, at x and 57.

<sup>82</sup> Wilsher, above note 55, at 54.

<sup>83</sup> Roth, above note 3.

responsibility of states was gaining momentum, the likelihood for a better protection of aliens' physical liberty could become stronger.

There were many attempts to designate criteria by which states could stand responsible for their treatment of aliens. On the practical side, Article 9 of the *Montevideo Convention on the Rights and Duties of States* provided that:

Nationals and foreigners are under the same protection of the law and the national authorities and foreigners may not claim rights other or more extensive than those of the nationals.

This was indeed a short translation of one of the clearest doctrines for extrapolating the responsibility of states, namely, the Calvo Doctrine. The core principle of the Calvo Doctrine was that aliens could not enjoy a better treatment than the nationals of a given state within its territorial jurisdiction.<sup>84</sup> There was nothing inherent in the Calvo Doctrine which would contradict or impede the absolute authority of states. In fact, the Calvo Doctrine placed the municipal law of countries as the only standard of the states' international responsibility.

The real source of contradiction of international law requirements with the prerogative would occur, when states were under treaty or customary obligations. In that view, the primary question was whether the prerogative was capable of superseding the obligations to which the state would assent through explicit terms of international treaties. Again, the views widely differed on the point of the reach of the prerogative. For example, in 1909, Hodgins reported an important incident, in which the use of state authority was not acceptable:

When Russia in 1871 sought to revoke the provision in the Berlin Treaty of 1856, which was in perpetuity to the flag of war the Black Sea and its coasts. The protocol of the signatory

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<sup>84</sup> For a useful guide on this matter, see, A. P. Newcombe and another, *Law and Practice of Investment: Standards of Treatment* (Netherlands: Kluwer Law International, 2009) at 13.

Powers to the original Treaty declared that it is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the contracting Powers, by means of an amicable arrangement.<sup>85</sup>

Here, Hodgins notes that the objections of other contracting parties were well-grounded, since the treaty obligations in questions signified matters of international importance. However, when it came to the use of the prerogative of expulsion, the governing principles appeared to be different. For example, Haycraft was of the opinion that once it is established that the prerogative for the purposes of expulsion and exclusion lies among the full sovereign rights, there will remain no ground for the responsibility of states.<sup>86</sup> This view was somehow quite consistent with the practice developed by U.S Supreme Court touching upon the interaction between the requirements of international law and the authority of states regarding aliens. In 1866, the U.S and China signed an agreement referred to as Burlingame Treaty. Under article 5 of this treaty, the two states recognised

the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other, for purposes of curiosity, of trade, or as permanent residents.<sup>87</sup>

Nevertheless, from the beginning, the American Congress did not favour a generous policy towards Chinese immigrants. After making several unsuccessful attempts to introduce restrictive laws, 'Fifteen Passenger Bill' was enacted by Congress.<sup>88</sup> As President Hayes noticed, this act entailed the abrogation of Article 5 of the Burlingame Treaty.<sup>89</sup> Interestingly, as

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<sup>85</sup> T. Hodgins, 'The Prerogative Right of Revoking Treaty Privileges to Alien Subject' (1909) XXIX *The Canadian Law Times* 105, 106.

<sup>86</sup> Haycraft, above note 49, at 172-173.

<sup>87</sup> See, S. H, J. Dong, *The Rocky Road to Liberty: A Documented History of Chinese Immigration and Exclusion* (Saratoga: Javin Press, 2010) at 154.

<sup>88</sup> *Ibid.*, at 163.

<sup>89</sup> Veto Message of President Rutherford Hayes of the Fifteen Passenger Bill, March 1, 1879, 1879 Congressional Record-House 2275-2277.

early as 1804, the American judiciary had entertained a restrictive view towards the obligations assigned by international law and therefore, Justice Marshall had stated, 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'<sup>90</sup> This was totally disregarded by Congress in the passing of the Fifteen Passenger Bill in 1879. As a result, a new wave of exercises of detention and deportation arrived.

The power of Congress in excluding Chinese immigrants was challenged in *Chae Chan Ping v. U.S.*<sup>91</sup> The U.S Supreme Court in this case posited that an act of Congress which was in contravention of the U.S treaty obligations was valid, since 'The treaties were of no greater legal obligation than the act of congress.'<sup>92</sup> Therefore, the acts of Congress with a repealing effect on the treaty obligation were taken to mean 'the last expression of the sovereign'<sup>93</sup> which must under any circumstances prevail. Thereafter, invoking a ruling in an earlier case (of different nature) the court expressly stipulated the effect of the prerogative upon the treaty obligations:

While it would always be a matter of the utmost gravity and delicacy to refuse to execute a treaty, the power to do so was prerogative, of which no nation could be deprived without deeply affecting its independence.<sup>94</sup>

Again, in the view of the absolute nature of the prerogative, no space could be left for such measures as diplomatic protection or condemnation of the expulsive or exclusive measures against aliens.<sup>95</sup> In this light, the only acceptable form of 'diplomatic remonstrance' was the reciprocal

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<sup>90</sup> *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>91</sup> *Chae Chan Ping v. U.S.* 130 U.S. 581.

<sup>92</sup> *Ibid.*, at 599.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

<sup>95</sup> H. W. Halleck, *International Law or Rules Regulating the Intercourse of States in Peace and War* Vol. I (London: Nostrand, 1861) at 494.

withdrawal of the injured state from the amended/repealed treaty.<sup>96</sup> To justify this line of argument, it was said that concluding treaties with other nations could not amount to a concession of the prerogative powers signifying the very fact of sovereignty. International agreements could not be considered as a superior entity to the inherent powers of sovereignty. According to Hodgins, the superiority of the prerogative holds even more strongly true for the treaties concerning aliens, for that such treaties must be treated as 'secondary class' treaties.<sup>97</sup>

## 9. Conclusion

In the context of the internment of aliens, the invocation of international law could often serve as a double-edged sword. In some cases, the international law arguments were exploited to limit the grip of states on matters relating to aliens. In this sense, the core function of international law was to invalidate the claim that sovereigns could subject aliens to particular measures according to their pleasure. However, this function of international law could not reach so far as to place a ban on the exercise of the prerogative. On this note, one premise of this chapter was to show that highlighting the areas in which the exercise of the prerogative against aliens bordered on arbitrariness was important in the view of the claim of the absolute nature of the sovereign prerogative. This brings us to the second usage of international law arguments. More often than not and far from restricting the states' powers, international law was conceived in a manner such as to support the absolute prerogative of states. So much so, that the express treaty obligations would easily lose their power in a confrontation against the absolute authority of states.

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<sup>96</sup> Ibid.

<sup>97</sup> Hodgins, above note 85, at 129.

Without any restraints on the authority of states, the use of detention powers against aliens was an issue of expediency and not that of principle. The only supreme entity was self-preservation and to that end, every means seemed justified. The limited space of this chapter would not let us reach into the personal profiles of many detainees during World War I and World War II in Britain. However, some authors who have provided more details on the alien detainees of the World Wars have shown that nearly all of them were far from presenting any danger to the security of Britain during great wars. The lesson from these unprecedented exercises of detention powers is easy and significant. When absolute powers came to correspond to the public sentiments, the results were catastrophic.

Did the mode of interaction between international law and the states' prerogative change in the wake of the development of such regimes as international humanitarian law, and international human rights law? This is a question to be answered later in this thesis.

## Chapter III

### Detention without Trial: History and Human Rights Law

#### 1. Introduction

In the wake of the conclusion of the Second World War, international law was subjected to far-reaching reforms and changes. It was no longer an entity solely concerned with governing the relationship between states; rather, in this new era, individuals also occupied some legal spaces within the arena of international law.<sup>1</sup> In fact, two important articles of the UN Charter attest to the fact that from 1945 onwards, individual rights were to be taken more seriously,<sup>2</sup> and to this end a distinct regime dedicated to the cause of individual rights in international law was to emerge.<sup>3</sup> Thus, public international law became home to the new sub-category of international human rights law.

Certainly, the right to liberty was not considered as a valuable commodity by warring states during the Second World War either at home or abroad. The US had the mass internment of the Japanese–American civilians. Britain had frequent recourse to the internment of civilians at home and in

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<sup>1</sup> See, R. Higgins, 'Conceptual Thinking about the Individual in International Law' (1978) 4 *British Journal of International Studies* I.

<sup>2</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Arts 55, 56. As regards the inclusion of these articles within the UN Charter, Benjamin Cohen writes, 'Some of us became concerned that the Charter towards which we were working might, like the Constitution of the United States as it emerged from the Federal Convention, omit any mention of the principles of human rights and fundamental freedoms. We were told, however, that to inject this subject into the Charter would cause the Soviet Union to fear intervention in its domestic affairs. We were told that the British would fear that reference to fundamental freedom would somehow have serious complications for their colonial relationships. However, we persisted and succeeded in incorporating a brief reference in the Charter to the responsibility of the United Nations to promote respect for human rights and fundamental freedoms. The great powers thus became committed. B. V. Cohen, 'Human Rights under the UN Charter' (1949) 14 *Law and Contemporary Problems* 430, at 431.

<sup>3</sup> O. De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge: CUP, 2010) at 11.



its many colonies. The Soviet record was (and continued to be for another decade) filled with the practice of Gulags and finally, Nazi Germany was responsible for one of the most abhorrent forms of deprivation of liberty in the entire history.

In the post Second World War era, the Universal Declaration of Human Rights (UDHR) became the first major international instrument to include the protection of the right to liberty by putting an emphasis on the importance of physical liberty and the prohibition of arbitrary arrest and detention.<sup>4</sup> As the human rights regime thrived in the following decades to the adoption of the UDHR, an elaborate body of human rights standards emerged to govern the issues of the right to liberty and its deprivation in the form of detention without trial. Thus, Article 9 of the International Covenant on Civil and Political Rights (ICCPR),<sup>5</sup> Article 5 of the European Convention on Human Rights (ECHR),<sup>6</sup> Article 7 of the American Convention on Human Rights (ACHR),<sup>7</sup> and Article 6 of the African Charter of Human and Peoples' Rights (ACHPR) have in turn encompassed international and regional standards regulating the matter of deprivation of liberty.<sup>8</sup> Each and every one of these articles is followed by a complex set of principles and interpretive mechanisms developed by the concerned international and regional bodies during the last couple of decades.<sup>9</sup>

This chapter outlines the human rights standards relating to the question of detention without trial and at the same time an attempt will be made to identify the threads of historical continuity and the effects of the history of

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<sup>4</sup> Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 9.

<sup>5</sup> International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 9.

<sup>6</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 5.

<sup>7</sup> American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), 22 January 1969, Article 7.

<sup>8</sup> African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, 21 I.L.M. 58 (1982), Article 6.

<sup>9</sup> See also, A. De Zayas, 'Human Rights and Indefinite Detention' (2005) 87 *International Review of the Red Cross* 15.

detention without trial in shaping the way that international human rights law has regulated this practice.<sup>10</sup> However, the purpose of this chapter is not to become a compendium of all human rights systems' rules on the issue of detention without trial. Rather, our discussions must be focused on the most developed international and regional human rights practices in the context of detention, which have definitely emerged from the jurisdictions of the European Court of Human Rights and the Human Rights Committee. Of course, wherever the need arises, contributions from other jurisprudences (most notably the Inter-American Court of Human Rights) will be recalled.

## 2. UDHR and detention without trial

Insofar as the measure of detention without trial is concerned, three articles in the UDHR bear a particular importance. Article 3 states that '[e]veryone has the right to life, liberty and security of person'. According to Article 9, 'no one shall be subjected to arbitrary arrest, detention or exile', and Article 10 posits that '[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.

In terms of the exercise of detention without trial, Article 9 is more explicit than the two other articles of the UDHR regarding the right to liberty. The central gravity of Article 9 must be located around the term 'arbitrary'. The text of the UDHR does not provide us with a specific meaning regarding the concept of arbitrariness. However, some inexplicable

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<sup>10</sup> Please note that in this chapter, such terms as preventive detention, internment and detention without trial are used in a synonymous manner. For more details on the question of terminology, refer to the Introduction.

properties of the concept of arbitrariness can be identified through the *travaux préparatoires* of the UDHR.

The final text of Article 9 is in fact very different from the initial proposals made for the content of this article. The most elaborate draft of Article 9 was formulated by Professor Cassin, the French representative in the Human Rights Commission's Working Group, who, after a wide range of suggestions made by the delegates of such states as Cuba, Chile and Panama, combined his own simplified version of this article with a proposed draft from President Roosevelt and posited the content of this article to be as follows:

No one shall be deprived of his personal liberty or kept in custody except in cases prescribed by law and after due process. Everyone placed under arrest or detention shall have the right to immediate judicial determination of the legality of any detention to which he may be subject and to trial within a reasonable time or to be released.<sup>11</sup>

Here, Bienenfeld from the World Jewish Organisation insisted on a danger that he perceived to be hidden in an outright invocation of the concept of legality in the UDHR: '[u]nder the Nazi regime thousands of people had been deprived of their liberty under laws which were perfectly valid'.<sup>12</sup> His suggestion was to add a qualification to the concept of law so as to render it 'law conforming to the principles of the United Nations'.<sup>13</sup>

Later on, such respected figures as Malik (the representative of Lebanon) in the Second Drafting Session preferred the term 'arbitrary' rather than a vague appearance of 'the notion of law'.<sup>14</sup> One of the virtues of the term 'arbitrary' was that it could lend itself to an extended understanding of the limits of states' powers. By dint of this broad appreciation of the term

<sup>11</sup> D. Weissbrodt and M. Hallendorff, 'Travaux Préparatoires of the Fair Trial Provisions – Articles 8 to 11 – of the Universal Declaration of Human Rights' (1999) 21 *Human Rights Quarterly* 1061, at 170.

<sup>12</sup> J. Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999) at 50.

<sup>13</sup> *Ibid.*, at 50.

<sup>14</sup> *Ibid.*

'arbitrary', the Bolivian delegate argued that the inclusion of arbitrary as a prohibitive qualification would also add moral weight to this provision, since arbitrariness hints at the state of conscience, and this would elevate the requirement beyond the confines of lawfulness, open to abuse by authoritarian regimes.<sup>15</sup> Once the test of arbitrariness seemed appealing to some of the representatives, its inclusion was advocated for some other articles too. It was in the midst of discussions on the inclusion of the term 'arbitrary' in Article 12 that Malik concluded,

The word 'arbitrarily' was not synonymous with 'illegally'; it had a wider scope. The Commission had wished to use a general term suggesting a criterion above and beyond the laws of States, to which those laws should conform.<sup>16</sup>

Such encounters in the drafting process of the UDHR later came to guide bodies like the Human Rights Committee to give a meaning to the test of arbitrariness (*infra*).<sup>17</sup>

### 2.1. *Understanding the test of arbitrariness in the light of the history of detention in common law*

As was discerned in the historical investigations of the previous chapters, the exercise of detention without trial has, since the beginning of the seventeenth century, been contingent upon the modalities of the relationship between the powers of sovereign and law.<sup>18</sup> With regard to this relationship in the common law tradition in Britain, it was discussed that it hardly became clear whether 'the law of the land' had recognised the absolute powers of sovereign in certain areas or not.<sup>19</sup> These uncertainties on several occasions meant that no one knew what the correct position under 'the law of the land' was as regards the powers and

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid., at 356.

<sup>17</sup> Section 7.

<sup>18</sup> Refer to chapter I, sections 2–4.

<sup>19</sup> Ibid.

rights of sovereign.<sup>20</sup> When the attributes of law in its view of the exclusive rights of sovereign were punctuated by doubt, it could only be natural to expect uncertainty, inconsistency and confusion about the contours of 'unlawfulness' or establishment of unlawful acts as well. Besides, sometimes the manner in which the very term 'law' was employed could become problematic by itself. The clearest example of this was the practice of 'martial law', which commentators ranging from Hale to Blackstone characterised as 'no law, but something rather indulged than allowed as a law'.<sup>21</sup> Here once again, one witnesses a fading line between opposing conceptions of 'law' and, thus, 'lawfulness' and 'unlawfulness'. Given this, employing the test of 'arbitrariness' instead of 'unlawfulness' signifies something more than simply a different choice of vocabulary. Rather, it must be viewed as a response to a long-lasting historical problem of the rule of law, which was the vicious circle created by the conflicts between law and the rights of sovereign. This was especially significant, when one considers that the Nazi regime of Germany had painted an image of lawfulness for its abhorrent practices.<sup>22</sup>

It is useful to note that from the seventeenth century onwards, lawyers and politicians alike in England had abundantly used the adjective 'arbitrary' to point to certain measures or, to put it more correctly, powers which were not in compliance with 'the law of the land'. For example, in the Petition of Grievances of 1610 formulated by Sir Edward Coke, it was stated that English subjects were 'to be guided and governed by the certain rule of law, [...], and not by any uncertain and arbitrary form of government'.<sup>23</sup> On more than one occasion, Parliament had recourse to such phrases as 'arbitrary power' to condemn particular conducts of the

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<sup>20</sup> Ibid.

<sup>21</sup> W. Blackstone, *Commentaries on the Laws of England* (1765–1769), Book I, at 400.

<sup>22</sup> See, W. E. Scheuerman (ed), *The Rule of Law under Siege* (London: University of California Press, 1996).

<sup>23</sup> F. A. Hayek, *The Constitution of Liberty* (London: Routledge, 1960) at 168.

King.<sup>24</sup> Also, ranging from Locke<sup>25</sup> to Dicey,<sup>26</sup> English legal writers preferred to invoke the qualifier 'arbitrary' rather than 'unlawful' to describe certain actions and powers of sovereign. For instance, in the writings of Dicey, arbitrariness was very frequently associated with unfettered discretion of the executive; 'wherever there is discretion, there is room for arbitrariness, and that in a republic no less than under a monarchy, discretionary authority on the part of the government means insecurity for legal freedom on the part of the subjects'.<sup>27</sup> As well as Dicey, other lawyers used such phrases as 'arbitrary power' or 'arbitrary government' to allude to an excessive conception of executive discretion. For example, Lord Shaw in his dissenting opinion in *R (Zadig) v. Halliday* said, 'Insofar as the [executive] mandate has been exceeded, there lurk the elements of a transition to arbitrary government.'<sup>28</sup> Nevertheless, despite the frequent usage of the concept of 'arbitrariness' in the political and legal texts of common law and contrary to what commentators such as Hayek have asserted, it is fair to say that 'arbitrariness' did not amount to a legal concept before the end of the Second World War.<sup>29</sup> In fact, it seems that such phrases as 'arbitrary power' or 'arbitrary government' in the common law tradition were frequently appointed as figures of speech rather than concrete or exclusive legal concepts. At best, they provided a medium through which law could speak to politics or vice versa. Drawing

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<sup>24</sup> P. D. Halliday, *Habeas Corpus: From England to Empire* (Harvard: Belknap Press, 2010) at 244–245.

<sup>25</sup> J. Locke, *Second Treatise of Government* (Raleigh: Alex Catalogue, reprinted in 2001) at 12.

<sup>26</sup> A. V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London: Macmillan, 1885).

<sup>27</sup> *Ibid.*, at 184. In this regard, it is interesting to pay attention to the etymological origin of the term 'arbitrary', which stems from Latin, *arbitrarius* (depending on the will, uncertain), and old French, *arbitraire* (deciding by one's own discretion). No wonder, then, Sir Edward Coke seems to have employed the adjective 'arbitrary' in a synonymous manner to 'uncertain' in the Petition of Grievances and Dicey has often squared his use of arbitrary by discretionary power. Another way of putting this is to argue that discretionary power can frequently be equated to uncertain rules and consequences. For tracing the etymological root of 'arbitrary', refer to, <http://www.etymonline.com/index.php?term=arbitrary>.

<sup>28</sup> *R. (Zadig) v. Halliday*, [1917] A. C. 260.

<sup>29</sup> For how legal concepts can be distinguished from non-legal ones, refer to A. W. B. Simpson, *Legal Theory and Legal History: Essays on the Common Law* (London: The Hambledon Press, 1987) at 347.

on this background, an additional layer of importance must be ascribed to the appearance of the adjective 'arbitrary' in the UDHR, and that is the formalisation of the test of 'arbitrariness' as a *legal* concept at an international law level. The best proof for this is that (as will be seen *infra*)<sup>30</sup> the test of 'arbitrariness' as used in Article 9 of the UDHR has become susceptible to having certain legal characteristics. The following sections for the most part purport to outline the different characteristics of 'arbitrary' and 'non-arbitrary' detention, as used in the relevant human rights documents.

### 3. Adoption of the ECHR and formulation of Article 5

Article 5 of the ECHR signified one of the locations in which civil and common law traditions went hand in hand in order to provide a rather detailed framework for freedom from arbitrary arrest and detention.<sup>31</sup> It is essential to note that in 1949, the European authorities had the draft Convention of the Human Rights Covenant before them,<sup>32</sup> and they were able to foster their own preferences for the ECHR on the basis of their reservations towards the relevant articles of the draft Covenant.

Many states were not pleased with the wording of Article 9 of the draft Covenant, which concerned the right to liberty. Britain (as it will be argued *infra*),<sup>33</sup> in particular, echoed its dissatisfaction with the first two paragraphs of Article 9 of the draft Covenant, which read as follows:

1. No one shall be subjected to arbitrary arrest or detention;

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<sup>30</sup> Sections 7–12.

<sup>31</sup> A. H. Robertson, 'The European Convention for the Protection of Human Rights' (1950) 27 *British Yearbook of International Law* 145, at 151–152.

<sup>32</sup> Although the Covenant draft was ready as early as 1949, the objections of the US, UK, USSR, China, Iran and Egypt over the inclusion of a right of individual petition were serious, such that reaching an agreement with the delegations in favour of this right could not be made possible. There were also other points of substantial disagreement such as 'derogation in time of war'. See, A. W. B. Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: OUP, 2001) at 494.

<sup>33</sup> Section 7.

2. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as established by law.

The objections to this choice of language were that, first of all, the term 'arbitrary' lacked precision.<sup>34</sup> Secondly, the first and second paragraphs did not seem compatible. That is to say, it was not clear whether 'paragraph 2 repeats, expands or limits paragraph 1'.<sup>35</sup> Finally, it was stated that the qualification of 'as established by law' may offer justification to dictators for their impingements upon Article 9.<sup>36</sup> On the basis of these perceived inadequacies, Britain pressed for a more detailed framework on the right to liberty by the ECHR and in particular, it took a leading role in introducing exceptional grounds to the right to physical liberty<sup>37</sup> and hence Article 5 as it stands today.<sup>38</sup>

### 3.1. *Analysing the meaning of lawfulness under Article 5 and the inevitable use of the test of arbitrariness*

<sup>34</sup> Simpson, above note 32, at 518.

<sup>35</sup> Council of Europe, *Preparatory Work on Article 5 of the European Convention of Human Rights*, DH 56(10) at 6.

<sup>36</sup> *Ibid.*, at 7.

<sup>37</sup> *Ibid.*, at 14.

<sup>38</sup> 1) Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation. Is all of this needed?



The most obvious implication of Article 5 is that it does not view the right to liberty as an absolute right. Therefore, the deprivation of physical liberty on the basis of the grounds enlisted *exhaustively* in Article 5 is permissible. At the same time, the term 'lawful' is an important feature of Article 5, which must be employed as a factor germane in interpreting this article. In this view, it is essential to note how the term 'lawful' has been interpreted by the European Court on Human Rights.

Principally, the requirement of lawfulness implies that the laws regulating detention of individuals must possess the properties of the rule of law in general. One result of this compliance with the requirements of the rule of law is the principle of legal certainty.<sup>39</sup> In the context of the laws governing arrest and detention of individuals, the European Court of Human Rights notes that legal certainty encompasses two crucial features. Firstly, legal certainty requires that sufficient precision be built into 'written' or 'unwritten' laws.<sup>40</sup> Secondly, by dint of this sufficient precision, a citizen is enabled to assess the reasonableness of 'the [legal] consequences which a given action may entail'.<sup>41</sup>

The compatibility of detention with the purpose of Article 5 represents another test for measuring the lawfulness of detention. It has been stated that the purpose of Article 5 is 'to protect individuals from arbitrariness'.<sup>42</sup> It is interesting to see that, notwithstanding the early resistance of the framers of the ECHR, the term 'arbitrary' is very frequently used within the discourse surrounding detention. Of course, the question is if the European Court of Human Rights has used 'arbitrariness' as a synonym for 'unlawfulness', or if 'arbitrariness' implies a broader prohibitive test than

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<sup>39</sup> K. Reid, *A Practitioner's Guide to the European Convention on Human Rights* (London: Sweet and Maxwell, 2012) at 342.

<sup>40</sup> *Steel and others v. United Kingdom* 1998 (67/1997/851/1058) at para 54.

<sup>41</sup> *Ibid.*

<sup>42</sup> See, for example, *Kemmache v. France* 1994, 296-C, para 42.

'unlawfulness'. If interpreted restrictively, the applicability of 'unlawfulness' can only be confined to actions in breach of domestic law. In that sense, 'arbitrariness' signifies a broader notion than 'unlawfulness', since a domestic legislation can, for example, be considered as lawful in terms of its compliance with domestic constitutional requirements and yet arbitrary in that it is underlined by an utter sense of injustice. At the same time, one can define the concept of lawfulness so broadly as to cover national as well as international rule of law. This latter conception of lawfulness conforms more to the Strasbourg Court's understanding of these terms: 'lawfulness is determined by reference to both national and international law'.<sup>43</sup> When conceived in this way, the meanings of 'unlawfulness' and 'arbitrariness' come to be very close together, if not synonymous. There are two important upshots to this broad formulation of lawfulness. First of all, understanding lawfulness with a view to the requirements of international rule of law saves us from the vicious circle created by the conflicts and complexities arising from the relationship between constitutional law and exclusive rights of sovereignty. Some of these conflicts were highlighted by our historical study of detention without trial.<sup>44</sup>

Also, once we appreciate that 'international rules' must play a part in our conception of lawfulness, it will follow that they can also 'reinforce and on occasions [...] institute the rule of law internally'.<sup>45</sup> In the case of detention without trial, this in effect means that international law rules pertaining to deprivation of liberty are part of the applicable law against which the executive must adjust its practice and mode of practice. This conclusion is supported by the European Court in the most explicit terms:

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<sup>43</sup> F. De Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (Cambridge: CUP, 2011) at 57.

<sup>44</sup> Refer to chapter I sections 4–6.

<sup>45</sup> J. Crawford, 'International Law and the Rule of Law' (2003) 24 *Adelaide Law Review* 3, at 8.

the “lawfulness” of an “arrest or detention” has to be determined in the light not only of domestic law but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 par. 1 (art. 5-1)<sup>46</sup>

One of the most significant results of putting this restriction upon the detaining authority is that its powers cannot be deemed to be absolute and therefore free from normative legal constraints. This is particularly true with regard to areas where states have historically reserved exclusive rights of sovereignty for themselves, such as the issue of exclusion and expulsion of foreign nationals.<sup>47</sup> This is an important point, to which we shall return later on in this chapter.<sup>48</sup>

As the years have gone by, the European Court has become more tentative to employ the language of arbitrariness instead of lawfulness in the same mode as used in the ICCPR (*infra*).<sup>49</sup> Thus, the Court in 2009 concluded:

The notion of “arbitrariness” in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.<sup>50</sup>

This inevitable return of the Strasbourg Court to the language of ‘arbitrariness’ once again epitomises the fact that, especially in the context of detention without trial, the adjective ‘arbitrary’ is more accessible and transparent than such terms as ‘unlawful’ or ‘illegal’.

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<sup>46</sup> *Van Droogenbroeck v. Belgium*, Application No. 7906/77, Judgement of 24 June 1982, para 48.

<sup>47</sup> *Amuur v. France*, Reports 1996-111, para 43, Contracting States have the undeniable sovereign right to control aliens’ entry into and residence in their territory. The Court emphasises, however, that this right must be exercised in accordance with the provisions of the Convention, including Article 5.

<sup>48</sup> Section 5.

<sup>49</sup> Section 7 onwards.

<sup>50</sup> *A and others v. United Kingdom* 2009 (Application no. 3455/05) para 164.

#### 4. Preventive detention and Article 5

It is fair to say that the dominant position among scholars of ECHR is not receptive towards the idea that Article 5(1)(c) recognises the legality of the exercise of preventive detention.<sup>51</sup> According to this view,

A person may be detained within the meaning of Article 5(1)(c) *only* in the context of criminal proceedings, for the purpose of bringing him before the competent legal authority on suspicion of him having committed an offence.<sup>52</sup>

The decision of the Strasbourg Court in the very first case brought before it, namely the *Lawless* case, is often cited as authority for this interpretation.<sup>53</sup> The case of *Lawless* concerned an Irish individual who was self-admittedly a member of the IRA and, based on his 'general conduct' and his past criminal record, was subjected to detention without trial for a period of five months. The Irish government argued that Article 5(1)(c) explicitly sanctions preventive detention and, according to them, the nature of preventive detention automatically excluded the obligation of judicial review spelled out in Article 5(1)(3).<sup>54</sup>

The Court did not accept this reading of the interaction between Article 5(1)(c) and Article 5(3), which also ran against the textual interpretation of Article 5(3). Thereafter, the Court explicitly stated that making a disjunction between these two paragraphs of Article 5 'would lead to conclusions repugnant to the fundamental principles of the Convention'.<sup>55</sup>

Some scholars have considered that this ruling of the Strasbourg Court leaves the permissibility of preventive detention out of the scheme of

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<sup>51</sup> See, F. G. Jacobs, *The European Convention on Human Rights* (Oxford: Clarendon Press, 1975), D. J. Harris *et al*, *Law of the European Convention on Human Rights* (Oxford: OUP, 2009), P. Van Dijk and C. Van Hoof, *Theory and Practice of the European Convention on Human Rights* (Netherlands: Kluwer Law International, 1998).

<sup>52</sup> D. J. Harris *et al*, *Law of the European Convention on Human Rights* (Oxford: OUP, 2009) at 146.

<sup>53</sup> *Lawless v. Ireland* 1961, 332/57.

<sup>54</sup> *Ibid.*, para 10.

<sup>55</sup> *Ibid.*, para 14.

Article 5(1)(c).<sup>56</sup> The result of this interpretation is that the exercise of any preventive detention under the ECHR is as such arbitrary. This reading of Article 5(1)(c) is characterised by Macken as a narrow interpretation of this article.<sup>57</sup> In effect, the narrow interpretation of Article 5 takes the second paragraph of Article 5(1)(c), namely, 'when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so', to authorise pre-trial detention.<sup>58</sup>

#### 4.1. *The broad interpretation: Article 5(1)(c) embraces non-arbitrary preventive detention*

The weakest point of the narrow construction is that it runs against the wording of Article 5(1)(c). Accordingly, in this mode of interpretation, the phrase 'when it is reasonably considered necessary to prevent his committing an offence' is totally neglected. This disregard for the textual base obviates the essential rules of treaty interpretation, which afford primacy to the 'natural and ordinary' meaning of treaty provisions.<sup>59</sup> Here, one may again encounter a difficulty in terms of interpretation. That is, the natural and ordinary meaning cannot necessarily be taken as an accurate interpretation of words and phrases in an isolated manner from the rest of a treaty.<sup>60</sup> Therefore, if a 'natural and ordinary' interpretation offers an unreasonable understanding of some elements of a treaty, they must be

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<sup>56</sup> Harris, above note 52, at 147.

<sup>57</sup> C. Macken, 'Preventive detention and the right to personal liberty and security under Article 5 ECHR' (2006) 10 *International Journal of Human Rights* 195, at 201.

<sup>58</sup> For example, in the case of *Ciulla v. Italy*, the European Court of Human Rights said, 'In the Court's view, the preventive procedure provided for in the 1956 Law was designed for purposes different from those of criminal proceedings. The compulsory residence order authorised by section 3 may, unlike a conviction and prison sentence, be based on suspicion rather than proof, and the deprivation of liberty under section 6 which sometimes precedes it (as in the instant case) accordingly cannot be equated with pre-trial detention as governed by Article 5 para 1 (c) (art. 5-1-c) of the Convention.' *Ciulla v. Italy* [1152/84].

<sup>59</sup> C. Macken, above note 57, at 201.

<sup>60</sup> Refer to, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, article 31 (1): [a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

rejected.<sup>61</sup> Does applying this logic lead to a rejection of the acceptance of preventive detention *per se* by Article 5(1)(c)? To answer this question, we must look back to the purpose of Article 5.

As mentioned above, the purpose of Article 5 is stated to be protecting individuals from arbitrariness. The narrow interpretation of Article 5 views preventive detention as necessarily an arbitrary measure. The reason for this presumed arbitrariness is that, based on the *Lawless* case, the narrow interpretation posits that preventive detention inevitably negates judicial review. However, legal history shows that the exercise of preventive detention or internment (detention without trial) in general has not always been espoused by the denial of judicial review. As argued in previous chapters, in England particularly, there were many cases of internment, in which habeas corpus could still issue.<sup>62</sup>

Furthermore, in the *Lawless* case, the Court did not refute the fact that Article 5(1)(c) contemplated the permissibility of preventive detention. Rather, it argued that the denial of judicial review to Mr Lawless opposed the purpose of Article 5.<sup>63</sup> Therefore, the fact that Articles 5(1)(c) and 5(3) form a 'whole' together,<sup>64</sup> does not make preventive detention impermissible. If this formulation is accepted as valid, the normal conclusion will be that preventive detention must be divided into two important categories, arbitrary preventive detention and non-arbitrary preventive detention.<sup>65</sup> What is authorised under Article 5(1)(c) is preventive detention of the kind embracing other guarantees set out by the ECHR. Such detention is considered as being non-arbitrary.

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<sup>61</sup> G. G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points' (1951) 28 *British Yearbook of International Law* 1, at 10.

<sup>62</sup> Refer to chapter I, section 10.1 and chapter II, section 6.1.

<sup>63</sup> Macken, above note 57, at 208.

<sup>64</sup> The *Lawless* case, above note 53, para 14.

<sup>65</sup> De Londras, above note 43, at 56.

Notwithstanding these plausible evidences as to the permissibility of non-arbitrary preventive detention, some inconsistencies continue to foreshadow the jurisprudence of the Strasbourg Court as to the content of Article 5(1)(c). For example, in the famous case of *A and Others v. United Kingdom*, the Court ruled:

The Court recalls that it has, on a number of occasions, found internment and preventive detention without charge to be incompatible with the fundamental right to liberty under Article 5 § 1, in the absence of a valid derogation under Article 15.<sup>66</sup>

Again, *Lawless* served as the immediate case of reference for this conclusion. However, based on the above arguments, it is clear that this reading of the *Lawless* case is not warranted by the reasoning of the Court in that case. Furthermore, this ruling of the Court is in contradiction with its interpretation of Article 5(1)(c) in such cases as *De Jong v. Netherlands*<sup>67</sup> and *Brogan*.<sup>68</sup> In the latter case in particular, the Court consoled itself with the fact that not every detention under Article 5(1) must follow by levelling charges against detainees.<sup>69</sup> This in effect means that punitive and pre-trial detentions are not the only permissible forms of confinement, when it comes to interpreting Article 5(1).

## 5. Clarifying the contours of arbitrariness

When preventive detention is exercised, no charge is brought against detainees. Therefore, the question is how judicial review can take place, when preventive detention often involves no charge. The *Lawless* case also answers this question in the following terms:

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<sup>66</sup> *A and others v. United Kingdom*, above note 50, para 172. The notion of 'derogation' will be dealt with shortly hereinafter.

<sup>67</sup> *De Jong, et al v. The Netherlands* : 'Article 5 para. 1 (c) (art. 5-1-c) sets out three alternative circumstances in which detention may be effected for the purpose of bringing a person before the competent legal authority.' These three modes of detention follow as punitive detention, pre-trial detention and preventive detention.

<sup>68</sup> *Brogan and others v. the United Kingdom*, 11209/84, paras 49–54.

<sup>69</sup> *Ibid.*

Whereas paragraph 3 (art. 5-3) stipulates categorically that “everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge...” and “shall be entitled to trial within a reasonable time”; whereas it plainly entails the obligation to bring everyone arrested or detained in any of the circumstances contemplated by the provisions of paragraph 1 (c) (art. 5-1-c) before a judge for the purpose of examining the *question of deprivation of liberty or for the purpose of deciding on the merits* [...].<sup>70</sup>

According to these words, preventive detention must be made susceptible to judicial review for examining the grounds of detention.<sup>71</sup> Therefore, this type of judicial review is employed so as to examine the need for the continuation of detention on the basis of the grounds alleged by the executive.

It is definitely wrong to conclude that in order for a preventive detention to be viewed as non-arbitrary, it must only be subjected to judicial review in place. In fact, judicial reviews for examining the grounds of preventive detention, if not done with enough caution, can end up justifying the most abhorrent forms of detention. For example, the great lesson of the history of detention without trial in the UK (as it has been examined in the previous chapters) is that judicial reviews could take such a deferential approach that they could completely lose their rationale and meaning.<sup>72</sup> As early as 1917, Lord Shaw discerned that upholding procedural guarantees with taking a deferential approach towards the executive should not be deemed appropriate.<sup>73</sup>

### 5.1. *Judicial review and the two historical obstacles*

Our inquiry of the history of detention without trial makes clear two interconnected barriers blocking the possibility of effective judicial review.

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<sup>70</sup> Ibid.

<sup>71</sup> Macken, above note 57, at 210.

<sup>72</sup> *R. (Zadig) v. Halliday*, above note 28, and also see, *Liversidge v. Anderson* [AC] 1942 206.

<sup>73</sup> *R. (Zadig) v. Halliday* discussed in detail in chapters I and II.



The first barrier is the over-utilised defence of the executive that the issues surrounding security detention are questions for the political branches of government and not the judiciary. As was seen in the first chapter of this thesis, as early as the seventeenth century, Justice Hyde gave legitimacy to this assertion in the case of *Five Knights*.<sup>74</sup> Another historical form of showing deference to the executive by the judiciary in common law was to argue that the reasons for a given detention fell within the ambit of *arcana imperii*, or the secrets of state, and therefore could not be disclosed.<sup>75</sup> Having recourse to these apologetic arguments cannot only be confined to historical cases of detention. In the famous *Belmarsh* case,<sup>76</sup> one of the central arguments of the British executive was that decisions pertaining to the questions of national security such as detention must be considered as 'the discretionary area of judgement' belonging to the executive.<sup>77</sup> In response to the arguments of the British executive in the *Belmarsh* case, Lord Bingham referred to the requirement of the ECHR, and concluded:

The Convention regime for the international protection of human rights requires national authorities, including national courts, to exercise their authority to afford *effective protection*.<sup>78</sup>

Even though this statement is a very general emphasis on the necessity of judicial review, it seems that the 'effective protection' of rights enunciated in Article 5 cannot be fulfilled, unless courts make substantive inquiries in their review of detention cases. This can be verified by the decisions of the

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<sup>74</sup> Proceedings on the Habeas Corpus, brought by *Sir Thomas Darnel et al* at the King's-Bench in Westminster hall: Charles I A. D. 1627 in *A Complete Collection of State Trials* (1816).

<sup>75</sup> Refer to chapter I, section 3.

<sup>76</sup> The *Belmarsh* case concerned the indefinite detention of nine foreign nationals in the UK. The detainees in question had been held under section 23 of the Anti-Terrorism, Crime and Security Act 2001, which authorised the detention of suspect foreigners. In this case, the House of Lords withheld the legality of the detention of foreigners, and at the same time, it issued a declaration of incompatibility as regard the discriminatory scheme built into section 23 of the Anti-Terrorism Act.

<sup>77</sup> *A (and others) v. Secretary of State for the Home Department* [2004] UKHL 56, para 37.

<sup>78</sup> *Ibid.*, para 40.

Strasbourg Court in the case of *Chahal*.<sup>79</sup> This case concerned detention and deportation of an Indian national in Britain, who had been deemed to pose a threat to the security of the detaining power.<sup>80</sup> Even though Chahal had received a writ of habeas corpus, and his detention was subjected to a judicial review, the reviewing court had fully succumbed to the subjective nature of the determination of the executive to the effect of keeping Chahal in detention on the basis that his case involved 'secret matters'.<sup>81</sup> This approach of British courts was criticised by the Strasbourg Court in the following terms:

The Court recognises that the use of confidential material may be unavoidable where national security is at stake. This does not mean, however, that the national authorities can be free from effective control by domestic courts whenever they choose to assert that national security and terrorism are involved.<sup>82</sup>

The second barrier encountered by judicial reviews of detention cases is the invocation of the prerogative for the purpose of justifying detention. As was identified in the previous chapter, practices undertaken within the auspices of the prerogative have historically been espoused by non-justiciability.<sup>83</sup> The reason for this is that the prerogative of states has always been underlined by an absolutism of the kind inherent within the powers of sovereign.<sup>84</sup> It was seen that the common law tradition has normally considered detention and deportation of aliens as practices justified by the prerogative of the Crown. To understand the view of the Strasbourg Court on this issue, we must first establish how this body interprets Article 5(1)(f) of the European Convention.

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<sup>79</sup> *Chahal v. The United Kingdom* [1996] (22414/93), para 131.

<sup>80</sup> One of the distinctive features of the case of *Chahal* was the fact that his detention had been motivated by security reasons, yet he had been held on an immigration detention scheme, which will be analysed *infra*.

<sup>81</sup> Recognising the legality of a detention based on 'secret matters' and 'secret evidence' has served as the modern version of the historical argument of '*arcana imperii*' in the common law courts.

<sup>82</sup> *Chahal v. The United Kingdom*, above note 79, para 131.

<sup>83</sup> Refer to chapter II, section 8.

<sup>84</sup> *Ibid*.

## 5.2. *Article 5(1)(f) and the deferential approach of the Strasbourg Court*

Article 5(1)(f) governs the issue of immigration detention for the purposes of exclusion and expulsion. Accordingly, it authorises detention of aliens for two distinct purposes: detention for the purpose of 'effecting an unauthorised entry' and detention for the purpose of deportation. The former category of immigration detention was considered by the European Court in the case of *Saadi*. Accordingly, in this case the Court elaborated on some of the conditions, which must be observed in pre-admittance detentions:

Such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate.<sup>85</sup>

However, the Court remained silent as to whether necessity could play any role in detention of unauthorised aliens. The position of the Court is clearer, when it comes to detention pending deportation. This position is stated to be that detention of immigrants can continue so long as 'actions are being taken with a view to [their] deportation'.<sup>86</sup> What is striking here is the broad manner in which the Strasbourg Court has interpreted Article 5(1)(f). That is to say, the only condition imposed upon the detaining power for having recourse to detention pending deportation is the existence of deportation proceedings. No other prerequisites, including necessity to effect a detainee's flight, are put in place to limit the authority of states to exercise pre-deportation detention. This loose interpretation of Article 5(1)(f) signifies a turn-back to the broad conception of states' powers to the pre-human rights era.<sup>87</sup> Recall that in that era, the powers

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<sup>85</sup> *Saadi v. The United Kingdom*, Application no. 13229/03, para 74.

<sup>86</sup> Article 5(1)(f).

<sup>87</sup> D. Wilsher, *Immigration Detention: Law, History, Politics* (Cambridge: CUP, 2012) at 148–150.

of states with regard to the issues of exclusion and expulsion would be read in the most expansive form possible.<sup>88</sup>

Obviously, the Strasbourg Court's approach to the matter of pre-deportation detention is in contravention of its attempts to factor arbitrariness or an extensive understanding of unlawfulness in the schemata of Article 5.<sup>89</sup> Even though, as was mentioned above, the Strasbourg Court has put emphasis on the importance of judicial review in this context, it is not clear how judicial review can make a difference in view of such expansive detention powers. The dissenting opinion of six judges in *Saadi* noticed the implication of such a reading of Article 5(1)(f) and reminded the Strasbourg Court about the preferable approach of the Human Rights Committee on this matter.<sup>90</sup>

### 5.3. *Other procedural safeguards*

One of the important safeguards regarding judicial review is explicitly identified in the wording of Article 5(3), and that is, that detainees must be brought *promptly* before judicial tribunals, as undue delays can cause indefiniteness in the exercise of detention. Therefore, the appearance of the term 'promptly' entails a certain degree of urgency.<sup>91</sup> Notably, the ECHR does not impose any criteria in order to specify what is meant by promptness. In fact, the question of time limits on judicial review has been decided using a case-by-case approach by the European Court of Human Rights.<sup>92</sup> The case-by-case appreciation of promptness gives rise to the inclusion of some flexibility, though the European Court has stated, 'the

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<sup>88</sup> Refer to chapter II, section 5.

<sup>89</sup> G. Cornelisse, 'Human Rights for Immigration Detainees in Strasbourg: Limited Sovereignty or a Limited Discourse?' (2004) 6 *European Journal of Migration and Law* 93, at 101-102.

<sup>90</sup> *Saadi v. United Kingdom*, above, per dissenting opinion.

<sup>91</sup> D. Chatzivassiliou, 'The Guarantees of Judicial Control with Respect to Deprivation of Liberty under Article 5 of the European Convention of Human Rights: An Overview of the Strasbourg Case-Law' (2004) 5 *Era Forum* 499, at 505.

<sup>92</sup> *Brogan and others v. the United Kingdom*, 11209/84, para 57.

scope of flexibility in interpreting and applying the notion of promptness is very limited'.<sup>93</sup>

Article 5(3) conveys that detainees 'shall be brought promptly before a judge or other officer authorized by law to exercise judicial power'. Can the meaning of 'other officer' exercising judicial power be extended to include executive boards? The answer to this question is extremely important for many issues associated with detention without trial. From the eighteenth century onward, executive boards mostly with advisory functions have been appointed to substitute the supervisory roles of the common law courts. One of the tactical advantages of these boards was to legitimise the suspension of habeas corpus.<sup>94</sup> Unsurprisingly, these administrative bodies never ceased to arouse suspicion on the part of legal scholars in the history of common law. Dicey, for example, viewed these tribunals as justifications for 'wide, arbitrary, or discretionary power of government'.<sup>95</sup> Nevertheless, these 'alternative adjudicatory mechanisms'<sup>96</sup> continue to appeal to such common law states as Britain and the US for deciding upon detention cases.

In a case that concerned the judicial character of a District Attorney, the European Court was provided with an opportunity to clarify the meaning of 'other officer'.<sup>97</sup> In this case, by a comparison between Article 5(3) on the one hand, and Articles 5(4) and 6 (1) on the other, the Court concluded that the terms 'judge' and 'officer' are not identical, but essentially share

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<sup>93</sup> *Pantea v. Romania* 2003, Application no. [33343/96](#), para 59.

<sup>94</sup> Refer to chapter I, section 10.

<sup>95</sup> P. M. McDermott, 'Internment during the Great War – A Challenge to the Rule of Law' (2005) 28 *University of New South Wales Law Journal* 330, at 334.

<sup>96</sup> J. Hafetz, 'Immigration and National Security Law: Converging Approaches to State Power, Individual Rights, and Judicial Review' (2012) 18 *Journal of International and Comparative Law* 625, at 631.

<sup>97</sup> *Schiesser v. Switzerland* 1979, Application no. [7710/76](#).

some identical characteristics, which, according to the Court, are independence, procedural and substantive requirement.<sup>98</sup>

The Court has strengthened its appreciation of independence so as to disqualify the prosecuting authorities from the scope of 'officer' as laid out in Article 5(3).<sup>99</sup> Even without this expanded interpretation of independence and impartiality, the executive boards could not be considered to be either independent or impartial in their acts of judicial review for the purposes of Article 5(3). Exceptionally, in the case of *Chahal*, once the European Court ascertained the independent setting of a quasi-judicial panel, it discerned that the said review panel provided an important safeguard against arbitrariness. Even in that case, the Court made it clear that due to its advisory character, the panel in question could not 'offer sufficient procedural safeguards' for the purpose of remedying the violation of rights laid down in the ECHR.<sup>100</sup>

It is also necessary to examine what kind of obligations procedural and substantive requirements entail for judges and officers. According to the Strasbourg Court, procedural requirement 'places the "officer" under the obligation of hearing himself the individual brought before him'.<sup>101</sup> As a result, the authorities within the meaning of Article 5(3) do not have any leeway in 'in judging the desirability of hearing the detained person'.<sup>102</sup>

Additionally, the substantive requirement consists of 'obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons'.<sup>103</sup>

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<sup>98</sup> Ibid., paras 32–38.

<sup>99</sup> *Skoogström v. Sweden* (1985) 7 E.H.R.R. CD263.

<sup>100</sup> *Chahal v. United Kingdom*, above note 79, para 154.

<sup>101</sup> *Schiesser v. Switzerland*, above note 97, para 33.

<sup>102</sup> *Winterwerp v. The Netherlands* (Application no. 6301/73) para 63.

<sup>103</sup> *Schiesser v. Switzerland*, above note 97, para 31.

In fact, this substantive requirement overlaps with the obligations laid down in Article 5(4). That is to say, the focus of substantive requirement seems to be placed on the legality of detention and its function is to enable the judicial authorities to assess the cause of detention.

## 6. The derogation system under the ECHR and detention without trial

Various international and regional instruments of the international human rights law regime have recognised and regulated emergencies. Far from undermining the objectives of international human rights law regime, this recognition seeks to 'accommodate' emergencies within the normative framework of international human rights law. The first and most far-reaching consequence of this 'accommodation' is that emergencies cannot be viewed as issues external to law in general and international law in particular.<sup>104</sup> Hence, it is widely accepted in the sphere of human rights law that different determinations of the executive in times of crisis are not generally excluded from legal scrutiny and judicial control. This in itself is a serious antithesis to the doctrines that have sought to establish an extra-legal character for emergencies and the powers of sovereigns. Perhaps, it is fair to say that the seeds of this doctrine were planted by Hobbes and Locke, but its fruits ripened in the writings of Carl Schmitt between the 1920s and 1940s.<sup>105</sup> In this regard, one must not ignore the way Locke defined the prerogative:

The power to act according to discretion for the public good, without the prescription of the law and sometimes even against it.<sup>106</sup>

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<sup>104</sup> O. Gross, F. N. Aolain, *Law in Times of Practice: Emergency Powers in Theory and Practice* (Cambridge: CUP, 2006) at 263.

<sup>105</sup> See, O. Gross, The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency: Powers and the "Norm-Exception" Dichotomy' (1999-2000) 21 *Cardozo Law Review* 1825.

<sup>106</sup> J. Locke, above note 25, at 84.

However, never did law reach such a weakened and ambivalent position as in the work of Schmitt, who based his ideas on the prevalence of the state of exception, and defined sovereign as 'he who decides on exception'.<sup>107</sup> In this model of emergency powers, the law could do no more than indicate 'who can act' in a given case.<sup>108</sup> According to Schmitt, legal norms are far too crippled as well as indeterminate to exercise a restraining effect on the powers of sovereign. In the universe of Schmitt, exception cannot simply be identified against the background of normalcy. 'Exception is everything', and this 'everything' escapes codification in any perceived legal order and by any norms.<sup>109</sup>

Without going into details about the strengths and ills of Schmitt's conception of exception, it suffices to say that his view is not shared by the human rights law regime. 'That which is exception' is named so in human rights law, and points of demarcation have been drawn between normalcy and emergency.<sup>110</sup> This allows for the survival of a rudimentary objective system of determination for recognising, regulating and to some extent terminating emergencies. In this sense, emergencies are both 'shield and sword' within the realm of human rights law.<sup>111</sup> As a result, even though human rights law accepts a degree of flexibility in times of emergency as well as derogations of some of its particular norms, states' actions are still limited by the essential characteristics of human rights law: 'universality, non-discrimination and the rule of law'.<sup>112</sup> This alone gives rise to a modicum of objective rules governing the conduct of states and, as such, limits the subjective discretion of sovereigns. This has the

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<sup>107</sup> C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* translated by G. Schwab (Cambridge: MIT Press 1985) at 5.

<sup>108</sup> J. Frerejohn, P. Pasquino, 'The Law of Exception: A Typology of Emergency Powers' (2004) 2 *International Journal of Constitutional Law* 210, at 226.

<sup>109</sup> Schmitt, above note 107, at 15-20.

<sup>110</sup> See, De Londras, above note 43.

<sup>111</sup> F. F. Davis, F. De Londras, 'Counter-Terrorist Judicial Review: Beyond Dichotomies' (2014) Durham Research Online, at 3.

<sup>112</sup> De Londras, above note 43, at 101.



effect that international human rights law does not view the issue of emergencies as a merely political question alien to the existing legal order. Having this background in mind, we will analyse some of the attributes of laws governing detention without trial and emergencies within the framework of ECHR.

The making of the ECHR was undertaken in an era pervaded by the colonial resistance and the radical problems of the Cold War. In Simpson's words, '[this] suggested that this was not the time for government to weaken the powers thought necessary to contain the threat'.<sup>113</sup> The end result of this pragmatic thinking was Article 15 of the ECHR. With the exception of four articles, Article 15 allowed 'any high contracting party' to derogate from the rights enunciated in the ECHR 'in time of war or other public emergency threatening the life of the nation'. Also, a procedural obligation was directed at states to 'keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor'. British authorities soon found a solution to render ineffectual the procedural obligation of Article 15(3), which required providing the Council of Europe with the measures taken and the reasons for such measures. The solution was to keep these notices as brief and as general as possible so that no one could make a legal enquiry into the particularities of the practices and the reasons underlying such practices.<sup>114</sup> This practice was soon imitated by other governments such as Ireland.<sup>115</sup>

In the 1950s, when Britain was facing a new wave of anti-colonial resistance, its counter-insurgency methods reached a degree of severity

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<sup>113</sup> Simpson, above note 32.

<sup>114</sup> Ibid.

that had hardly been witnessed before.<sup>116</sup> It was in the same period that the sweeping emergency measures in Cyprus aroused fury among some other members of the European Council, notably Greece. The result was a case brought before the European Commission of Human Rights by Greece alleging that the UK was responsible for violating different provisions of the ECHR, particularly Article 5.<sup>117</sup> The Commission was confronted with a question, which could not easily be resolved. On the one hand, offering legitimacy to unlimited powers of emergency would exhaust the ECHR in its entirety in times of crisis. On the other hand, demoralising emergency powers could also increase the risk of the ECHR losing its practical weight and thereby encourage a wholesale non-compliance by the European states. Consequently, the Commission devised a doctrine, which has not ceased to generate controversy since then.<sup>118</sup> The Commission ruled that even though a derogation must be 'strictly required by the exigencies', it turns on the member states to determine 'the extent strictly required by the exigencies of the situation'.<sup>119</sup> This discretion in assessing the extent to which the emergency powers must be employed was referred to as the doctrine of the margin of appreciation.

An important observation needs additional emphasis here. As mentioned above, the phrase 'to the extent strictly required by the exigencies of the situation' refers to the test of proportionality. It must be noted that observing the principle of proportionality for the purpose of temporary departures from certain legal obligations is not an invention of international human rights law. There are ample examples of either direct or indirect references to the requirement of proportionality in the history of common law. In fact, as Townshend has noted,

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<sup>116</sup> See, A. W. B. Simpson, 'Emergency Powers and Their Abuse: Lessons from the End of the British Empire' (2004) 33 *Israel Year Book of Human Rights* 219.

<sup>117</sup> *The Cyprus Case*, (1959) 2 *Year Book of the European Convention on Human Rights* 174.

<sup>118</sup> See, Simpson, above note 116.

<sup>119</sup> *The Cyprus case*, above note 108, at 176.

[a]ll nineteenth-century commentators agreed that the Crown (and indeed all lawful citizens) had under common law the right and the duty to repel force with force. [...]an executive officer was bound to use exactly the degree of force which was needed to terminate the danger – not a jot more or less.<sup>120</sup>

The crux of the issue is that proportionality has served not only as a guide for the executive officers in employing force, but also as an objective test enabling the judicial authorities to establish responsibility for those employing excessive force.<sup>121</sup> However, it taken to its extreme, the doctrine of 'margin of appreciation' can totally undermine the objective function of the test of proportionality. The reason for this is the potentially unchallengeable credibility that 'margin of appreciation' assigns to the subjective discretion of the executive. This unchallengeable credibility may mean the non-justiciability of the executive subjective determinations in practice.

The margin of appreciation in effect creates a positive presumption in favour of the defendant state in terms of assessing first of all whether a public emergency exists or not.<sup>122</sup> If taken to its extreme, the margin of appreciation can also bestow a very broad degree of discretion upon member states in taking counter-emergency measures. The extreme conception of the margin of appreciation transforms the power of derogation to a prerogative, which immunises the government's appreciation of events and its response to a given situation.<sup>123</sup> What is at stake here is exactly a genuine and objective understanding of the test of proportionality deployed in the language of 'to the extent strictly required by the exigencies of the situation'.

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<sup>120</sup> C. Townshend, 'Martial Law: Legal and Administrative Problems of Civil Emergency in Britain and the Empire, 1800–1940' (1982) 25 *The Historical Journal* 167, at 171.

<sup>121</sup> *A v. Secretary of State for the Home Department*, [2004] UKHL 56, para 42.

<sup>122</sup> C. S. Fingold, 'The Doctrine of Margin of Appreciation and the European Convention on Human Rights' (1977–1978) 53 *Notre Dame Law* 90, at 92.

<sup>123</sup> H. C. Yourrow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Dedrecht: Marinus Nijhoff Publishers, 1995) at 20.

However, mapping out a rather unlimited terrain for the reach of the margin of appreciation in the early jurisprudence of the Strasbourg Court carried with it the dangers of debilitating the ECHR as a whole in emergencies. The Court noticed this far-reaching danger nearly a decade after the *Lawless* case, and in the context of surveillance laws in Germany, it said:

The Court [...] affirms that *the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.*<sup>124</sup>

Subsequently, the Court made an attempt to moderate its early conception of the margin of appreciation insofar as the invocation of Article 15 was concerned. Therefore, in the case of *Ireland v. United Kingdom*, the Strasbourg Court concluded,

[...] By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 para. 1 (art. 15-1) leaves those authorities a wide margin of appreciation.

Nevertheless, the States do not enjoy an unlimited power in this respect. The Court, which, with the Commission, is responsible for ensuring the observance of the States' engagements (art. 19), is empowered to rule on whether the States have gone beyond the "extent strictly required by the exigencies" of the crisis. [...] The domestic margin of appreciation is thus accompanied by a European supervision.<sup>125</sup>

Here, the margin doctrine is applied with greater care.<sup>126</sup> In practice, the only difference between the application of the margin of appreciation in *Ireland v. United Kingdom* and the *Lawless* case was that there was a greater emphasis on the factual background justifying emergency powers in the former. In effect, the Court ruled that the factual background in Northern Ireland justified the British government's departure from the

<sup>124</sup> *Klass v. Germany* 1978, (Application no. [5029/71](#)), para 49.

<sup>125</sup> *Ireland v. The United Kingdom*, 5310/71, para 207.

<sup>126</sup> T. A. O'Donnell, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4 *Human Rights Quarterly* 474, at 494.

protections of Article 5. In the case of *Ireland v. United Kingdom*, the Court heavily relied on the factual background, going so far as citing figures provided by the government on the number of terrorist attacks.<sup>127</sup>

The difficulty with this approach, as De Londras has noted, is that:

[it] appears to suggest that emergencies are capable of empirical definition; however, an analysis of cumulative statistics might call into question the requirement that an emergency ought to be 'temporary' in some way.<sup>128</sup>

No wonder, then, that due to its excessive reliance on the margin of appreciation doctrine, the Strasbourg Court has often been very reluctant to impose a 'temporary character' requirement upon emergency measures.<sup>129</sup>

Referring back to the case of *Brannigan and McBride v The United Kingdom*, the Court's conclusions were essentially the same as those in *Ireland v. United Kingdom*. That is to say, member states could enjoy a wide margin of appreciation whilst still being susceptible to the supervision of the Court as to whether 'the States have gone beyond the extent strictly required by the exigencies of the crisis'.<sup>130</sup>

The Strasbourg Court did not change its conception of the margin doctrine in the following years.<sup>131</sup> Perhaps the only notable development as to the formulation of the margin doctrine occurred in the case of *A and others v United Kingdom*, when it stipulated that the meaning of 'national authorities' for the purpose of determining whether an emergency exists or not must include 'the domestic courts' too.<sup>132</sup>

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<sup>127</sup> Ibid.

<sup>128</sup> De Londras, above note 43, at 64.

<sup>129</sup> *A and Others v. United Kingdom*, above note 50.

<sup>130</sup> *Brannigan and McBride v The United Kingdom* (Application no. 14553/89), para 43.

<sup>131</sup> *Askoy v. Turkey* (Application no. 21987/93), *Marshall v. United Kingdom* (Appn No 41571/98), *A and others v. United Kingdom*, above note 50.

<sup>132</sup> *A and Others v. United Kingdom*, above note 50.

## 7. Drafting the ICCPR and the reappearance of the term 'arbitrary'

The drafting of the International Covenant on Civil and Political Rights essentially involved the very same organisations and individuals as the UDHR. Therefore, it should come as no surprise that the term 'arbitrary' once again secured a privileged place in Article 9 of the ICCPR governing the right to liberty.<sup>133</sup> According to Article 9(1) of the ICCPR:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

This formulation of Article 9(1) was concluded to the particular dislike of Britain, which favoured 'a precise drafting'.<sup>134</sup> According to the British representative, the precise drafting would in this context have meant providing a long list of exceptions that justified departure from the right to liberty in a similar mode to the Article 5 of the ECHR. The difficulty with this approach in the context of the ICCPR was that some states were pushing for the inclusion of unjustifiable grounds of exception.<sup>135</sup> Hence, 'it

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<sup>133</sup> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

<sup>134</sup> Simpson, above note 32, at 518.

<sup>135</sup> M. J. Bossuyt, *Guide to the Travaux préparatoires of the International Covenant on Civil and Political Rights* (Dordrecht: MNP, 1987) at 190. For example, see, the grounds that the Union of South Africa sought to include within the text of Article 9.

was said that even if such a list could be made complete, its adoption might not be considered desirable'.<sup>136</sup>

One curious objection of the British representative was that the use of the term 'arbitrary' in Article 9(1) would obscure the relationship between its second and third sentence.<sup>137</sup> In other words, it was not clear whether the meaning of arbitrary is identical with measures going beyond the limitation of 'in accordance with such procedure as are established by law'. The most important note with regard to the meaning of arbitrariness in the drafting history of the ICCPR is the following passage:

By using the word 'arbitrary' all legislation would have to conform to the principle of justice. On the basis of such an interpretation, the third sentence of paragraph 1 would qualify the fundamental idea set forth in the second sentence: the deprivation of liberty should not only conform to the principle of justice, it should also be on such grounds and in accordance with such procedure as are established by law.<sup>138</sup>

Nevertheless, the British objections also targeted the elasticity of the criterion of arbitrariness. However, with the benefit of hindsight, we can reject the British argument on two grounds. The first ground is that the use of any other term/test such as lawfulness, legality, the rule of law, fairness or even legitimacy in the passage of Article 9(1) could carry either the same amount or very possibly a much greater degree of vagueness. One of the significant lessons of the history of internment is that the phenomenon of internment is a symptom of the uncertainties inherent within the concept of the rule of law. As Hassan has written in the context of Article 9(1),

The clear reason for the retention of this sentence was that the majority of the members of the [drafting] Commission had considered that "the rule of law did not provide adequate safeguards against the possible promulgation of unjust laws" and that accordingly, by using the word "arbitrary," the

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<sup>136</sup> Ibid., at 193.

<sup>137</sup> Ibid., 195–199.

<sup>138</sup> Ibid., at 198.

requirement would be added that all legislation must conform to the “principles of justice”.<sup>139</sup>

At the same time, the Human Rights Committee has over time made some efforts to clarify the properties of ‘arbitrariness’.<sup>140</sup> In a case concerning a lengthy pre-trial detention, the Committee ruled:

The drafting history of article 9, paragraph 1, confirms that “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.<sup>141</sup>

On this note, not only do the elements of inappropriateness, injustice and lack of predictability render a given exercise of detention arbitrary, but they also draw some boundaries for the laws authorising detention. Therefore, ‘when the law is vague, broad, or unpredictable’,<sup>142</sup> it will be susceptible to criterion of arbitrariness, as these criteria render the law unjust. To these requirements must be added the element of ‘necessity’, which must lie at the root of each practice of non-arbitrary preventive. Altogether, these requirements are intended to provide qualitative criteria by which the Committee has assessed states’ conduct in its concluding observation and cases produced brought before it.

## 7. Is preventive detention an arbitrary practice under Article 9(1)?

Unlike Article 5(1)(c) of the ECHR, Article 9(1) of the ICCPR does not touch upon the circumstances and motives ascribing lawfulness to particular forms of detention. Rather, it just provides a criterion which

<sup>139</sup> P. Hassan, ‘The International Covenant on Civil and Political Rights: Background and Perspective on Article 9(1)’ (1973) 3(2) *Denver Journal of International Law and Policy* 153, at 179.

<sup>140</sup> R. Pati, *Due Process and International Terrorism: An International Legal Analysis* (Dordrecht: MNP, 2009) at 43–64.

<sup>141</sup> *Womah Mukong v. Cameroon*, Communication No. 458/1991, para 9.8.

<sup>142</sup> Pati, above note 140, at 43.



governs the enforcement as well as the regulatory mechanisms resulting in deprivation of liberty. As elaborated above, that criterion is arbitrariness. The exercise of preventive detention is not necessarily arbitrary under Article 9(1).<sup>143</sup> The Committee also dealt with the question of whether preventive detention falls within the category of arbitrariness:

if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5).<sup>144</sup>

Therefore, in order for preventive detention to be characterised as non-arbitrary, it must conform to the procedural and substantive standards as manifested in the text of Article 9 and other relevant statements and judgments of the Human Rights Committee.

## **8. Substantive requirements**

As argued above, the Human Rights Committee ruled that inappropriateness, injustice and lack of predictability constitute a tripartite pillar for the notion of arbitrariness.

Unfortunately, the Committee has not gone into great detail about the constitutive factors of what practices come to be inappropriate, unjust and unpredictable. In the absence of a list of examples, we must subscribe to a certain degree of legal imagination. It seems that a common thread among all three elements of 'inappropriateness, injustice and lack of predictability' is a lack of legal certainty. As was mentioned above, the principle of legal certainty is one of the most concrete foundations of the

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<sup>143</sup> See, C. Macken, 'Preventive Detention and the Right of Personal Liberty and Security under the International Covenant on Civil and Political Rights' (2005) 25 *Adelaide Law Review* 1.

<sup>144</sup> Human Rights Committee, General Comment 8, U.N. Doc. HRI/GEN/1/Rev.1 at 8 (1994) para 4.

rule of law. In the common law tradition, one of the most serious legal criticisms towards the practice of indefinite detention was made by Sir Edward Coke with a view to the incompatible nature of indefinite detention with the principle of legal certainty; 'had the law intended such a thing [detention without an alleged cause] it would have named a time [for it]'.<sup>145</sup>

It was also discussed earlier that, in its historical understanding, the very term 'arbitrary' used to be employed as synonymous with uncertain and discretionary.<sup>146</sup> As a result, one way of reading such prohibitive qualifications as 'inappropriateness, injustice and lack of predictability' is to say that their prohibition points to a high regard for legal certainty.<sup>147</sup> Based on the recurrent issues in the practice of detention without trial, three areas can be identified in which the application of legal certainty can be said to be at its most paramount: 1) laws authorising detention without trial, 2) period of detention, and 3) specific, genuine and precise grounds for detention.

### 9.1. *Laws authorising detention*

It goes without saying that the way in which law authorises detention has direct implications for how it is exercised. We monitored in the first chapter how different regulatory frameworks for detention impacted the practice of detention without trial in Britain and its colonies. The Human Rights Committee has also attended upon the question of the laws authorising detention. On particular occasions, the Committee has been very explicit that vague formulations of law often result in broad arresting

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<sup>145</sup> Refer to chapter I, sections 8–10.

<sup>146</sup> Section 2.

<sup>147</sup> See also, T. M. Franck, *Power of Legitimacy among Nations* (New York: Oxford University Press, 1990) at 60–80.

and detention powers.<sup>148</sup> This also holds true for legislation, which provides too much latitude for the detaining authority through extremely broad grounds of detention (*infra*) or the power to delay the judicial review of a detainee.<sup>149</sup>

## 9.2. *Period of detention*

There must be a reasonable degree of determinacy in the timeframe formulated for keeping and releasing internees. This is because the measure of internment at its core signifies a temporary practice employed to avert an instant and pressing danger threatening social security. Therefore, by an unreasonable prolongation, the practice of detention without trial must not take the form of imprisonment.<sup>150</sup> More importantly, if there exists no reasonable period for the duration of internment, internees will be held under an unbearable amount of uncertainty and distress.<sup>151</sup> This may well transform the practice of internment to an inhuman or degrading treatment targeting the very mental integrity of internees.<sup>152</sup>

Notwithstanding the importance of having in place a reasonable duration for detention, the Committee is yet to specify a standard timeframe for non-arbitrary practice of detention without trial. The matter assumes some complication when one encounters different approaches of the Committee in different cases.<sup>153</sup> For example, the Committee has often criticised

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<sup>148</sup> Concluding observations of the Human Rights Committee: Trinidad and Tobago, CCPR/CO/70/TTO, para 16.

<sup>149</sup> Concluding observations of the Human Rights Committee: Israel CCPR/C/ISR/CO/3 2010, para 13.

<sup>150</sup> L. Cox, 'The Legal Limbo of Indefinite Detention: How Low Can You Go' (2001) 50 *American University Law Review* 725, at 749.

<sup>151</sup> See, for example, A. Lorek *et al*, 'The mental and physical health difficulties of children held within a British immigration detention center: A pilot study' (2009) 33 *Child Abuse and Neglect* 573.

<sup>152</sup> H. Duffy and S. Kostas, 'Extra-ordinary Rendition: A Challenge for the Rule of Law' in A. M. Salinas *et al* (eds), *Counter-Terrorism: International Law and Practice* (Oxford: OUP, 2012) at 550.

<sup>153</sup> M. Hakimi, 'International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide' (2008) 33 *Yale Journal of International Law* 369, at 391.

states for their resort to 'unspecified'<sup>154</sup> or 'long and indefinite'<sup>155</sup> periods of detention. Yet, in the case of *Ahani v. Canada*,<sup>156</sup> the Committee showed no discomfort with the nine-year detention of Ahani. One may of course say that the approach of the Committee in Ahani was justified due to the peculiar factual surroundings of his case. Ahani was allegedly a member of 'the foreign assassins branch' of the Iranian intelligence service and had admitted to having undergone special training for the purpose of carrying out operations abroad.<sup>157</sup> Another peculiar feature of the case of *Ahani* was that much of the prolongation of his detention had been caused by himself. This was because he had chosen a special route to challenge the authority of the Canadian authorities' determination, namely, contesting the constitutionality of the security certificates issued by the officials.<sup>158</sup> Therefore, it can be concluded that *Ahani* cannot be taken as a standard test case indicating the general view of the Committee regarding the duration of non-arbitrary preventive detention.

Despite the foregoing arguments, it is hard to escape the conclusion that identifying arbitrariness with regard to duration of detention is directly linked to the specific facts underlying a practice of detention.<sup>159</sup> This is one of the inherent ironies of the test of arbitrariness. That is to say, even though the test of arbitrariness is designed to reduce general legal uncertainties associated with detention and subjective discretion of the detaining power, its own application cannot always be accompanied by certain, concrete and objective criteria. Rather, 'arbitrariness' in itself signifies a contextual and fact-specific test, and thereby tolerates some

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<sup>154</sup> Concluding observations of the Human Rights Committee: Dominican Republic CCPR/C/DOM/5, para 20.

<sup>155</sup> Concluding Observations of the Human Rights Committee: Israel 1998 CCPR/C/79/Add.93, para 21.

<sup>156</sup> *Ahani v. Canada*, CCPR/C/80/D/1051/2002(2004).

<sup>157</sup> Ibid.

<sup>158</sup> See also, G. Heckman, '[Commentary on] *Ahani V. Canada*' (2005) 99 *American Journal of International Law* 669.

<sup>159</sup> Hakimi, above note 153, at 388.

degree of uncertainty and subjective determination in its application.<sup>160</sup> However, to make this inherent uncertainty tolerable from a legal standpoint, the Committee has made every effort to limit the degree of states' subjective discretion on the length of detention. As a result, the general rule has been that detention can continue so long as states can provide justification for such a practice. However, according to the Committee, states are compelled to provide credible reasons for the continuation of detention. This approach of the Committee is very visible in the case of *A v. Australia*,

[...] detention should not continue beyond the period for which the State can provide appropriate justification. For example, the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals, such as the likelihood of absconding and lack of cooperation, which may justify detention for a period.<sup>161</sup>

In this particular case, it is also worth attending to the arguments of the detaining power. The detainee in the case of *A v. Australia*, who was an 'illegal immigrant', had endured four years of detention upon his entry into Australia. After his release in 1994, he brought a case before the Committee against Australia, and, *inter alia*, contended for the arbitrary nature of his detention. Australia referred to the constituent elements of arbitrariness and posited that:

detention in a case such as the author's was not disproportionate nor unjust; it was also predictable in that Australian law had been publicized.... [the argument] that it is inappropriate *per se* to detain individuals entering Australia in an unauthorized manner is not borne out by any of the provisions of the Covenant.<sup>162</sup>

Of course, the Committee did not accept the illegality of detention of unauthorized immigrants *per se*. Rather, as was seen above, the Committee placed a necessity requirement for this kind of detention and

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<sup>160</sup> Ibid.

<sup>161</sup> *A v. Australia*, Communication No. 560/1993, CCPR/C/59/D/560/1993 (1997) para 9.4.

<sup>162</sup> Ibid., para 7. 6.

its prolonged duration. The Committee noted that Australia 'had not advanced any grounds particular to the author's case, which would justify his continued detention for a period of four years'.<sup>163</sup> More will be said about both the required characteristics of the grounds justifying detention and the element of necessity in the next two sections.

As will be seen *infra*,<sup>164</sup> these particular limitations are also very relevant to the necessity factor assessments relating to the exercise of detention without trial.

### 9.3. *Specific, genuine and precise grounds for detention*

One of the most vital obligations of the detaining power is to ascribe lawfully sound and precise grounds for its exercise of detention. To begin with, no exercise of detention can survive the test of arbitrariness without having a clear legal basis.<sup>165</sup> As a result, when detainees are held for reasons of illegal nature such as their value as bargaining chips<sup>166</sup> or hostages for ulterior motives of the executive,<sup>167</sup> their detention must undoubtedly be viewed as arbitrary. Furthermore, the legal grounds for detention must not be so overly broad as to be devoid of specificity. Thus, with regard to the exercise of detention in Sudan, the Committee stated in 1997 that it

is particularly concerned that the vague and legally undefined concept of "national security", as applied in the Sudan, is inconsistent with the provisions of article 9 of the Covenant and can be used as a basis for arrest and detention of persons [...].<sup>168</sup>

The Human Rights Committee has as late as 2012 repeated in its Draft Comment No. 35, '[such grounds] should be defined with sufficient

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<sup>163</sup> Ibid., at 9.4.

<sup>164</sup> Section 10.

<sup>165</sup> *Clifford McLawrence v. Jamaica*, CCPR/C/60/D/702/1996, para 5.5.

<sup>166</sup> Concluding Observations: Israel, CCPR/C/79/Add.93 1998, para 21.

<sup>167</sup> *Daniel Monguya Mbenge v. Zaire*, Communication No. 16/1977, CCPR/C/OP/2 at 76.

<sup>168</sup> Concluding Observation: Sudan (1997), CCPR/C/79/Add.85, para 13.

precision to avoid overly broad or arbitrary application'.<sup>169</sup> The importance of assigning specific reasons as grounds for detention can truly be realised at the stage at which detainees purport to challenge the grounds on which their detention has been carried out.

Finally, a cause stated to justify a given case of detention must be genuine. That is to say, the executive must not exploit a particular legal scheme to detain persons for ulterior reasons unknown to the used scheme. This is due to the fact that avoiding the element of 'lack of predictability' in arbitrary detention seems to imply a high regard for the 'genuineness' of grounds put in place to justify a given case of detention. To make this point clear, we must concisely pay attention to the material witness detention scheme of the US executive in the aftermath of 9/11. The material witness detention in principle seeks to secure the detention of 'reluctant' witnesses so that they are forced to appear in courts to testify against others.<sup>170</sup> The Bush Administration, however, employed material witness detention as a cover to hold terrorist suspects.<sup>171</sup> If judged by the words of the Committee on the prohibition of arbitrariness, this pretextual use of material witness detention can and must be liable to have the label of 'arbitrary detention', in that it does not conform to the requirement of predictability. In such cases, a detainee cannot locate the reasons for the continuation of his detention, when he is not called to testify against another criminal suspect. Nor can he take appropriate legal action to challenge the detaining power, when the cause of his detention is not clear to him.<sup>172</sup>

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<sup>169</sup> Draft General Comment 35, Article 9: Liberty and security of person CCPR /C/107/R.3.

<sup>170</sup> 18 U.S. CODE § 3144 – Release or Detention of a Material Witness.

<sup>171</sup> D. Coleman, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: New Press, 2003) at 37.

<sup>172</sup> See also, D. Doeling, 'Ashcroft v. Al-kidd: Troubling Developments in Post-9/11 Fourth Amendment Jurisprudence' (2011–2012) 45 *Loyola of Los Angeles Law Review* 569, and W.

## 10. Necessity

As was observed above, the Human Rights Committee has emphasised that a non-arbitrary 'remand in custody must be necessary in all the circumstances'.<sup>173</sup> This gives rise to an assessment of the necessity criterion in our appreciation of a non-arbitrary practice of preventive detention. In this regard, it is essential to note that the necessity criterion in the sense used by the Human Rights Committee does not merely represent an apologetic plea for the governments to justify otherwise illegal actions.<sup>174</sup> Rather, the Committee seems to have invoked necessity as a test committed to limit the authority of the executive in exercising detention to the cases that such an exercise is necessary. In this sense, necessity becomes an objective and restrictive test, which only allows for the practice of preventive detention, 'when no less restrictive measure is available'.<sup>175</sup> Accordingly, in cases of detention, this configuration of necessity permits the judicial authority to enquire into whether the detaining power could contain the perceived danger emanating from the individual detainees by measures less severe than preventive detention. This mode of applying necessity also requires attention to the specific facts around a given case of detention. As was discerned above, in the cases of immigration detention, unlike its European counterpart, the Committee has used the test of necessity as an objective prerequisite to the practice of detention:

the fact of illegal entry may indicate a need for investigation and there may be other factors particular to the individuals,

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Macneil Oliver, 'Material Witness Detentions After al-Kidd' (2011-2012) 100 *Kentucky Law Journal* 293.

<sup>173</sup> *Womah Mukong v. Cameroon*, above note 133.

<sup>174</sup> See also, B. C. Rodick, *The Doctrine of Necessity in International Law* (New York: Columbia University Press, 1928) at 4-10.

<sup>175</sup> D. Moeckli, *Human Rights and Non Discrimination in the War on Terror* (Oxford: OUP, 2008) at 78.



such as the likelihood of absconding and lack of cooperation, which may justify detention for a period.<sup>176</sup>

Thus, it can be seen that each determination of necessity in cases of detention has two components: 1) evaluating the threat posed by a suspect (including the threat of fleeing in the case of pre-admittance or pre-deportation detention), and 2) the issue of whether the threat can be neutralised by means less restrictive than detention. However, as Hakimi notes, on the point of evaluating the necessity criterion, the Committee has rarely challenged the necessity determinations of the detaining powers.<sup>177</sup> Part of the problem might have been that the Committee has not found many occasions to give content to the modalities of determination of necessity and the technicalities of adjudicating them. Nevertheless, if this reluctance of the Committee turns out to take the form of a systematic judicial deference to the subjective determinations of the executive, it is fair to say that the whole arrangement of non-arbitrary preventive detention will then resemble yet another failure into the overall process of the evolution of laws governing detention without trial.

Once again, it must not be neglected that the history of detention without trial tells us that the most robust anti-thesis to non-arbitrariness is the absolute, subjective and discretionary power of authorities in detaining individuals. Therefore, reluctance and indifference towards the necessity determinations of the executive obviates all that the prohibition of arbitrary detention strives to achieve and that is putting substantive constraints upon the authority of the detaining power.

## 11. Procedural safeguards

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<sup>176</sup> *A v. Australia*, above note 161.

<sup>177</sup> Hakimi, above note 153, at 391.

The first procedural safeguard against arbitrary preventive detention is set out in the first part of Article 9(1), according to which, '[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest [...]'. The Committee has explicitly noted that this part of Article 9(2) applies to all forms of deprivations of liberty.<sup>178</sup> In its Draft Comment 35, the Committee states that the requirements of Article 9 apply to everyone deprived of his/her liberty, 'regardless of the formality or informality with which the arrest takes place and regardless of the legitimate or improper reason on which it is based'.<sup>179</sup>

Unlike Article 5 of the ECHR, Article 9 of the ICCPR does not entail an automatic obligation for the judicial review, where preventive detention is exercised. Nevertheless, the Human Rights Committee has recognised that the means for challenging detention must be made available to the detainees held on preventive detention.<sup>180</sup> If read within the light of the common law tradition, Article 9(4) necessitates the availability of the writ of habeas corpus. However, in different legal traditions other mechanisms with the same function as habeas corpus can be used.<sup>181</sup>

Once again, a return to the history of detention without trial shows that when judicial review is merely treated as a matter of formality, it can provide no efficient guarantee against the exercise of arbitrary detention. The Human Rights Committee has been very cautious about the meaningfulness of judicial review. In *A v. Australia*, the Committee stated that:

While domestic legal systems may institute differing methods for ensuring court review of administrative detention, what is decisive

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<sup>178</sup> For example, *Maral Yklymova v. Turkmenistan* CCPR/C/96/D/1460/2006 (a house arrest context).

<sup>179</sup> Draft General Comment 35, para 24.

<sup>180</sup> *Antti Vuolanne v. Finland*, Communication No. 265/1987, para 9.6.

<sup>181</sup> Macken, above note 143, at 24.

for the purposes of article 9, paragraph 4, is that such review is, in its effect, real and not merely formal.<sup>182</sup>

As a result, such rulings of the Committee signify an increasing tendency towards reading the requirement of judicial review in the light of Article 14 of the ICCPR, which governs the right to fair trial.<sup>183</sup> These standards in effect warrant a meaningful review of the legality of detention.

First and foremost, Article 9(4) states that judicial review of detention must be carried out by courts. When applying the requirement of independence and impartiality to Article 9(4), the result will be that 'the functions prescribed therein can only be carried out by a judicial body and not by quasi-judicial substitutes'.<sup>184</sup> Furthermore, Article 9(4) charges the judicial authorities with an obligation – that is, to decide on the case 'without delay'. Again, an unreasonable delay in delivering the outcome of judicial review may make an exercise of preventive detention vulnerable to becoming indefinite.<sup>185</sup>

## 12. Reservations to Article 9

The ICCPR does not stipulate any limitations as to the issue of reservations. Nevertheless, reservations must be governed by the general rules of the law of treaties, as manifested in the Vienna Convention on the Law of Treaties (VCLT).<sup>186</sup> In this regard the Committee has this to say:

Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human

<sup>182</sup> *A v. Australia*, above note 161, para 9.5.

<sup>183</sup> See, Amnesty International, *The Human Rights Committee's New General Comment on the Right to Liberty and Security of Person: Amnesty International's Preliminary Observations* (London: Amnesty International Publications, 2012).

<sup>184</sup> See, C. Michealsen, 'International Human Rights on Trial – the United Kingdom's and Australia's legal response to 9/11' (2003) 25 *Sydney Law Review* 275.

<sup>185</sup> *Torres v. Finland* CCPR/C/38/D/291/1988, para 7.3.

<sup>186</sup> General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant CCPR/C/21/Rev.1/Add.6, para 6.

rights treaties, which are for the benefit of persons within their jurisdiction.

Accordingly, provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons [...].<sup>187</sup>

The difficulty, however, starts when it is discerned that some countries have entered some reservations upon Article 9, seemingly authorising arbitrary arrest or detention.

Fortunately, reservations against Article 9 have not been made in large numbers.<sup>188</sup> Additionally, most reservations have not targeted the question of arbitrary arrest and detention, but mostly concern procedural incompatibilities between the text of Article 9 and the reserving states.<sup>189</sup> One case of reservation against Article 9 has proved to be extremely controversial, and that is the reservation of India. Upon its accession to the ICCPR, India discerned that:

With reference to article 9 of the International Covenant on Civil and Political Rights, the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of article 22 of the Constitution of India.<sup>190</sup>

It is also essential to point out that in accordance with the Indian Constitution, the authorisation of preventive detention in India is not in any sense dependant on a state of emergency.

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<sup>187</sup> Ibid., para 8.

<sup>188</sup> M. Schenin, 'Reservations to the International Covenant on Civil and Political Rights and Its Optional Protocols – Reflections on State Practice' *online paper* available at [www.nuigalway.ie/sites/eu.../martin%20scheinin-eng.doc](http://www.nuigalway.ie/sites/eu.../martin%20scheinin-eng.doc).

<sup>189</sup> A list of reservations to the ICCPR can be viewed at [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-4&chapter=4&lang=en).

<sup>190</sup> The Indian reservation can be accessed at <http://www.unhchr.ch/tbs/doc.nsf/73c66f02499582e7c1256ab7002e2533/741ca7c28bb52de8802567fc0054c5e9?OpenDocument>.

The constitutional *status* of preventive detention in India has produced more than sixty years worth of cases and statutes, whose consideration goes well beyond the scope of this thesis. Jinks has documented and analysed the case law stemming from Article 22, and has identified some common characteristics underlying the exercise of preventive detention in India. A summary of these characteristics can be described as: 1) detainees are held on broad grounds such as public order and national security, 2) subjective decisions of authorities can form a sufficient basis for the legality of detention, 3) administrative boards have replaced judicial proceedings and 4) detainees are stripped of their right to counsel and finally 'government carries a minimal burden of proof'.<sup>191</sup> The modern practice of preventive detention in India cannot but resonate the most severe forms of colonial detentions. It is as if the Indian detention laws are still haunted by the infamous Bengal Regulation. It was argued in the first chapter that the Bengal regulation introduced detention without trial with very slim safeguards without a need for emergency.<sup>192</sup> The Bengal regulation was the first free-standing provision authorising detention without trial in the history of common law.<sup>193</sup>

The Indian reservation brings within its fold the message that states can, on the authority of their constitution, resort to arbitrary internment without invoking an emergency context. Accordingly, it may send a message to such states as Malaysia and Singapore (who are yet to become parties to the ICCPR and have very similar constitutional provisions to Article 22 of the Indian Constitution)<sup>194</sup> that they can still

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<sup>191</sup> D. P. Jinks, 'The Anatomy of an Institutionalised Emergency: Preventive Detention and Personal Liberty in India (2000–2001)' 22 *Michigan Journal of International Law* 311, at 328–339.

<sup>192</sup> Refer to chapter I, section 10.

<sup>193</sup> Ibid.

<sup>194</sup> S. Barroclough, 'The Dynamics of Coercion in the Malaysian Political Processes' (1985) 19 *Modern Asian Studies* 797, 812–813.

ratify the ICCPR, even though they may continue to exercise arbitrary detention in non-emergency contexts.<sup>195</sup>

Part of the problem is that the real value of the right to be free from arbitrary arrest or detention is not very clear within the hierarchy of treaty-based or customary norms in the international human rights law system.<sup>196</sup> For example, on one hand, the Human Rights Committee puts the prohibition of arbitrary arrest and detention at the same level of importance as the prohibition of slavery,<sup>197</sup> which moves one to consider the prohibition of arbitrary arrest and detention to be immune from limitations imposed by such measures as reservation or derogation.<sup>198</sup> On the other hand, the content of Article 9 is not enlisted as a non-derogable right. One way to mitigate such adverse effects as the Indian reservation to Article 9 is to strengthen a cumulative reading of Article 9 and Article 14 so that states encounter a more tightened space to resort to arbitrary detention. Interestingly, the Human Rights Committee exploited this measure to remind the government of India of its obligation to a fair judicial review for the detainees held on preventive detention.<sup>199</sup> This interpretive method upholds the obligation to judicial review in cases of preventive detention, even though the application of Article 9 may have been rendered limited by virtue of a reservation.

#### 12.1. *The mistaken use of the language of peremptory norms by the Committee*

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<sup>195</sup> See, for example, Human Rights Commission of Malaysia, *Review of the Internal Security Act* (Kuala Lumpur: Cetakan Kedua, 2009).

<sup>196</sup> T. Meron, 'On a Hierarchy of International Human Rights Standards' (1986) 80 *American Journal of International Law* 1, at 15–19.

<sup>197</sup> General Comment 24, above note 186.

<sup>198</sup> It must also be mentioned that some documents of soft law nature such as the Siracusa Principles and the Paris Standards assign a peremptory norm of international status to the right to be free from arbitrary arrest and detention.

<sup>199</sup> Concluding observations of the Human Rights Committee: India CCPR/C/79/Add.81 para 24.

Based on the statements of the Human Rights Committee,<sup>200</sup> there has increasingly emerged a proposition among some legal scholars that the right to challenge the lawfulness of detention or the obligation of *judicial* review as the relevant norm to the prohibition of arbitrary detention must be viewed as the peremptory norm of international law or *jus cogens*, and therefore 'incapable of derogation'.<sup>201</sup> However, it is one thing to say that a particular right under a certain human rights treaty is non-derogable and quite another to assert that that right is a *jus cogens* norm of international law. If one argues that the right to challenge the lawfulness (non-arbitrariness) of detention before a judicial body is *jus cogens*, then, according to the rules of treaty interpretation as articulated in the Vienna Convention, any international law treaty which includes an incompatible provision with Article 9(4) of the ICCPR must be considered void in its entirety.<sup>202</sup> This includes the Fourth Geneva Convention, which allows for review of detention by non-judicial bodies.<sup>203</sup> Needless to say, it is impossible to find an international law body or a legal commentator that would compromise the validity of the Fourth Geneva Convention on the basis of the argument that the Human Rights Committee has impliedly bestowed a peremptory *status* upon the obligation of judicial review. This is not to conclude that Article 9(4) cannot be made a non-derogable provision under the ICCPR. On the contrary, as will be seen in the next section, the Committee has been very clear on the point of non-

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<sup>200</sup> General Comment 24, above note 186.

<sup>201</sup> De Londras, above note 43, at 64 or S. Joseph, 'Human Rights Committee: General Comment 29 (2002) 2 *Human Rights Law Review* 81, at 91-92.

<sup>202</sup> Article 53, Vienna Convention, above note 60.

<sup>203</sup> Here it can be said that this retroactive application of *jus cogens* flies against the non-retroactive nature of VCLT rules, as specified in Article 4. However, it must be noted that this retroactive function 'is, however, without prejudice to the application of any rules set forth in the Vienna Convention to which treaties would be subject under international law independently from the Convention.' C. Kahgan, '*Jus Cogens and the Inherent Right to Self-Defence*' (1996-1997) 3 *ILSA Journal of International and Comparative Law* 767, at 792. This by itself gives rise to very complex discussions on the question of whether a *jus cogens* norm derives its hierarchical force from the VCLT rules or customary international law. It is on the account of these far-reaching complexities that one must avoid assigning a peremptory character to such standards as judicial review.

derogability of Article 9(4). Nonetheless, this does not follow by automatic transformation into a peremptory norm of international law. Some human rights law writers have chosen to refer to the non-derogable provisions of the ICCPR as inalienable rights.<sup>204</sup> This is definitely a much more accurate description of non-derogable rights than describing them as peremptory norms of international law. The reason for this is that the language of inalienable human rights purports to show that some guarantees of human rights cannot be suspended, regardless of the legal context in which they operate. On the other hand, the *status of jus cogens* defines a hierarchical order in the relationship of a particular norm of international law with other norms for the purpose of resolving normal conflicts.<sup>205</sup> This will create many difficulties for Article 9(4) of the ICCPR when its application relates to an international armed conflict context, where the standards of the Fourth Geneva Convention come to govern a given practice of internment and clash with the standards put in place by the ICCPR.<sup>206</sup>

### 13. Arbitrary detention and derogation

In the same manner as all other major international human rights treaties, the ICCPR has put in place a derogation scheme, according to which the application of many rights can be limited or suspended in times of emergency. The derogation regime of the ICCPR is articulated in Article 4, which states that:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their

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<sup>204</sup> C. Olivier, 'Revisiting General Comment No. 29 of the United Nations Human Rights Committee: About Fair Trial Rights and Derogations in Times of Public Emergency' (2004) 17 *Leiden Journal of International Law* 405, at 419.

<sup>205</sup> M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: OUP, 2011) at 104.

<sup>206</sup> This issue will also be dealt with in the next chapter.



other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

As can easily be discerned, with the exception of Article 4(2), which identifies seven non-derogable articles, the text of Article 4 is in general very similar to Article 15 of the ECHR. Nevertheless, there are notable differences between the derogation regimes under the ECHR and the ICCPR, principally because the Human Rights Committee has taken a different approach from the Strasbourg Court.<sup>207</sup> The most notable aspect of the Committee's take on the states resorting to emergency measures is that the Committee does not recognise the margin of appreciation doctrine.<sup>208</sup> In the absence of such recognition, a rigorous reliance is placed on the test of proportionality which, in the words of the Committee, implies:

That [emergency] measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency.<sup>209</sup>

Accordingly, as Joseph has argued, the rigorous emphasis of the Committee on the proportionality test has secured for the Committee a

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<sup>207</sup> For a general and useful comparison of the approaches taken by these two bodies in times of emergency, see, J. M. Lehmann, 'Limits to Counter-Terrorism: Comparing Derogation from the International Covenant on Civil and Political Rights and the European Convention on Human Rights' *Online Paper* available at <http://projects.essex.ac.uk/ehrr/V8N1/Lehmann.pdf>.

<sup>208</sup> See, for example, Joseph, above note 201, at 86.

<sup>209</sup> General Comment 29, States of Emergency (article 4), CCPR/C/21/Rev.1/Add.11 (2001) at para 4.

'stringent degree of supervision over derogations',<sup>210</sup> which, unlike the Strasbourg Court's approach, is not limited to the formalities of the emergencies.<sup>211</sup>

Also, as a result of having a rigorous regard to the test of proportionality, the Committee has concluded that derogation from some safeguards of the ICCPR can never be made 'strictly required by the exigencies of the situation'. The Committee established that these safeguards must be considered as the peremptory norms of international law, even though they are not mentioned as non-derogable rights in the text of Article 4.<sup>212</sup> Once again, the Committee has invoked the peremptory norms of international law argument in a rather misleading fashion. The Committee seems to have assumed that the only channel for rendering such provisions non-derogable is customary international law.<sup>213</sup> From the legal perspective, this cannot but be mistaken, since as mentioned above, giving a *jus cogens* force to the standards of fair trial can have far-reaching and unintended consequences for other treaties. Furthermore, as Milanovic has argued,

Hierarchical rules generally and *jus cogens* specifically are very few in number, and are of little practical relevance. For example, that the prohibition of torture [...] is *jus cogens* does not automatically entail that the *non-refoulement* obligation arising from this prohibition is also *jus cogens*.<sup>214</sup>

Of course, the criticism made above does not necessarily mean that the Committee's turn to the rules of customary international law for the purpose of proving the non-derogability of some provisions is entirely wrong. Rather, the statements of customary law must only be used to prove the non-derogability of certain provisions and not that such

<sup>210</sup> Joseph, above note 201, at 86.

<sup>211</sup> M. Di Bari, 'Derogating from Human Rights Provisions: Comparing State's obligations under Universal and Regional Human Rights Treaties' (2009) *online paper* available at: [http://unipd-centrodirittiumani.it/public/docs/PDU3\\_2009\\_A091.pdf](http://unipd-centrodirittiumani.it/public/docs/PDU3_2009_A091.pdf).

<sup>212</sup> General Comment 29, above note 198, para 11.

<sup>213</sup> Olivier, above note 204, at 408–409.

<sup>214</sup> Milanovic, above note 205, at 104–105.

provisions necessarily epitomise peremptory norms of international law. Given this, assuming that by the statement cited above, the Committee intends to prove the non-derogability of the rights at hand, the question becomes: what implications follow as a result?

In its General Comment 29, the Committee made a statement which means some particular parts of Articles 9 and 14 must remain immune from derogation,<sup>215</sup>

In order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant.<sup>216</sup>

Even though the jurisprudence of the Inter-American Court of Human Rights on detention has not been considered in this chapter, it is fair to argue that in rendering the judicial control of preventive detentions a non-derogable obligation in times of emergency, the Committee has followed the milestones designated by the Inter-American Court. In an elaborate advisory opinion in 1987, the Inter-American Commission ruled that:

[...] the executive branch is under no obligation to give reasons for a detention and may prolong such a detention indefinitely during states of emergency [...] [and] would, in the opinion of the Commission, be equivalent to attributing uniquely judicial functions to the executive branch, which would violate the principle of separation of powers, a basic characteristic of the rule of law and of democratic systems.<sup>217</sup>

On the other hand, the Strasbourg Court has lagged behind both of these jurisdictions. It has been argued that statements such as the advisory opinion of the IACtHR bestow the force of customary international law upon habeas corpus, which must automatically bar states from suspending

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<sup>215</sup> Joseph, above note 201, at 91.

<sup>216</sup> General Comment 29, above note 209, para 16.

<sup>217</sup> Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987) para 12.

their obligation of judicial control under Article 5. However, the Strasbourg Court is yet to recognise such a customary status.<sup>218</sup>

Again, the importance of judicial review must not be overstated, and as such, one must not be deceived by the availability of habeas corpus or other mechanisms of judicial review in times of emergency. What really matters is a substantive and meaningful judicial review.<sup>219</sup>

## 14. Conclusion

The most significant development that the international human rights law regime generated in the discourse on the right to physical liberty was to devise the test of arbitrariness as a definite denominator to the justifiability of various forms of deprivation of liberty. Arbitrariness is not just an insignia of a new choice of words. Rather, it is a test by which to evaluate and question the very authority upon which a given form of deprivation of liberty is predicated. This dimension to the right to physical liberty became clear to the drafters of the UDHR from the very early stages of the consolidation of the human rights law regime.

The term 'arbitrariness' did not, however, appeal as much as the test of 'lawfulness' to the founders of the ECHR in the context of detention. Nevertheless, the Strasbourg Court found it necessary to adopt the prohibition of arbitrariness in view of the emerging deprivations of liberty, which seemed compatible with national laws, but failed to meet the towering standards of human rights law.

Even though the Strasbourg jurisprudence on the permissibility of non-arbitrary preventive detention is extremely vague and inconsistent, it was

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<sup>218</sup> De Londras, above note 43, at 212.

<sup>219</sup> Ibid., at 67.

discussed that a textual interpretation of the ECHR supports the conclusion that preventive detention under the ECHR is not arbitrary *per se*, provided that such a practice is accompanied by a set of safeguards. Here again, the language of arbitrariness is instructive in terms of making an imperative distinction between arbitrary and non-arbitrary preventive detention. In this view, it was concluded that what is prohibited by the ECHR is indefinite detention and a non-arbitrary practice of preventive detention is necessarily devoid of indefiniteness. It is so because the most important component of non-arbitrary preventive is a meaningful and substantive judicial review weighed on the member states of the ECHR under Articles 5(3) and 5(4). However, inasmuch as the inclusion of the prohibition of arbitrariness is a fortunate advancement on the part of the Strasbourg Court, it contradicts with its broad permissive stance towards the emergency measures of its member states under the guise of its widely criticised doctrine of the margin of appreciation. In the narrow case of detention without trial, the combination of Article 15 and the margin of appreciation with a view to derogating from Article 5 signifies a sharp contradiction with the language of 'arbitrariness'. Nevertheless, this dimension of the problem in the European derogation system is not only limited to the human rights order in Europe. Rather, as Jinks has argued, such inconsistency is symptomatic of 'the context as justification problem'. In this regard, Jinks writes that:

In this sense, these "accommodation principles" do not in any way mediate substantive disagreements concerning the content of primary rules. For example, a rule establishing that arbitrary detention may, assuming certain elements are satisfied, be utilized in a formal state of emergency does not provide any assistance in determining the meaning of "arbitrary."<sup>220</sup>

It was also discerned that the Human Rights Committee in a far clearer fashion than the Strasbourg Court recognises the permissibility of non-

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<sup>220</sup> Jinks, above note 191, at 319.

arbitrary preventive detention under the ICCPR. Here again, a practice of preventive detention cannot be made non-arbitrary, unless there exist concrete protections as to the judicial review of preventive detention. It was seen that unlike the ECHR, the ICCPR does not impose an automatic obligation of judicial review compelling authorities to produce detainees before judicial authorities, regardless of their application for judicial review. However, the ICCPR does recognise the right of detainees to challenge their detention by the writ of habeas or other instruments with the same function.

The protection of the right to be free from arbitrary arrest and detention under the ICCPR is also exposed to serious threats, which can exhaust the rationale behind Article 9 in its entirety. As has been said, the Indian reservation to the ICCPR signifies one such threat. The conclusion to be drawn from the case of the Indian reservation is that unless the *status* of the right to be free from arbitrary arrest and detention secures a clear position with the hierarchy of the international human rights order, such threats continue to be posed to this right on a regular basis. Well aware of this fact, the Human Rights Committee has made efforts to attach a more concrete importance to some parts of Article 9 conducive to the prohibition of arbitrary preventive detention. Accordingly, the Committee has rendered the obligation of judicial review of detention a non-derogable entity under the ICCPR, which conveys that the prohibition of arbitrary preventive detention (or indefinite detention) to a large degree remains intact even in times of emergency. Therefore, it seems that whilst the problem of 'the context as justification' is an inevitable challenge in the human rights discourse on the prohibition of arbitrary detention, the Human Rights Committee has managed to do a relatively better job than

its European counterpart in resolving some of the problems arising from 'the context as justification problem'.

## Chapter IV

### The practice of internment in the laws of armed conflict

#### 1. Introduction

In exploring the evolving constituent paradigms of the practice of internment, one must create an important dichotomy between two historical eras: the era preceding the end of the Second World War, and the post Second World War era. The former epitomised a phase in which law could not reach beyond the will of sovereigns, and in any conflict between the rule of law and the sovereign authority, the latter would prevail. Retaining an upper hand over sovereigns over the rule of law was often made possible not merely by the use of brute force, but also by employing the most sophisticated legal techniques to turn around the logic of the rule of law in favour of sovereigns. There is ample historical evidence in different Western states to the effect of proving this point. In Britain and its colonies, it was the elastic concept of the Royal prerogative manifesting itself in such practices as the suspension of habeas corpus. In the US, it was the executive privilege in dealing with crises taking hold in such practices as Lincoln's authorisation of martial law. In Germany, it was the sovereign's decision on exception leading to the total collapse of the Weimar Constitution, and finally, in France, it was an all-inclusive claim of sovereign powers resulting in the creation of the state of siege.<sup>1</sup> What all these explanatory powers shared in common was the temporal or indefinite suspension of normal laws, and the authorisation of new laws

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<sup>1</sup> See, C. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948).



tailored to expand the sovereign powers in times of crisis.<sup>2</sup> Another commonality shared by these examples was that they would often be employed in times of war, where the predominant position among states was that the operation of normal laws would cripple their war efforts.

The second era, however, came into being in the aftermath of the Second World War, when the world at large had witnessed the catastrophic consequences of uncontrolled powers of states. This era was one in which it was conceded that even though states remain the primary actors of international law, their powers cannot be unlimited in confronting individuals. Therefore, a strong shift towards internationalism took shape, as a result of which two different international law regimes came into play: international human rights law and international humanitarian law.<sup>3</sup> The present chapter is focused on the evolving process of international humanitarian law and its specific developments on the subject of internment. The main premise of this chapter will be to show that the laws of armed conflict will on no occasion leave a detainee in armed conflict at the mercy of states. That said, a case will be made to highlight some of the deficiencies of this regime of international law, and, at the same time, it will be shown that the internationalist movement has also confronted some deadlocks of its own, such as the fragmentation of international law which has created some of the most pressing problems regarding the laws of internment. Once again, it must be noted that the purpose of this chapter is not to become a compendium of IHL rules on the subject of internment. Furthermore, it is far beyond the limited space of this thesis to enter into all relevant areas of internment in IHL. Therefore, we must exercise a certain degree of selectivity with the areas that this chapter

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<sup>2</sup> See, N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Michigan: University of Michigan Press, 2003).

<sup>3</sup> Of course, international humanitarian law came into existence before 1948. However, after the Second World War, a revolutionary shift occurred in the pre-existing regime of the laws of war, which significantly transformed the substance of this regime.

intends to explore. This compels us to leave such topics as internments exercised by armed groups and also the modes of regulating the conduct of rebels in international humanitarian law outside the scope of this thesis.

## **2. A brief historical background to the subject of internment and the historical documents of the laws of war: The Lieber Code**

In the nineteenth century, when legal positivism was gaining more currency than ever, the urge for codifying the rules of conducting hostilities became more paramount, and therefore, a positivist move towards documenting the applicable laws of war (as they were then known) came into effect both at national and international levels. In the US, Instructions for the Government of Armies of the United States in the Field, or the Lieber Code as it is famously called, signified the most progressive shift towards setting out a set of binding rules for the conduct of one of the parties to the conflict in the American civil war.<sup>4</sup>

The Lieber Code did not make a distinction between internal and external enemies of the state, and as such, enumerated a category of principles governing the detention of prisoners of war.<sup>5</sup> These protections were rooted in the timeworn customs established over the protection of PoWs, which distinguished the legal regime governing the detention of PoWs from

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<sup>4</sup> Instructions for the Government of Armies of the United States in the Field (Lieber Code) 24 April 1863.

<sup>5</sup> Ibid., Article 49: A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers of whatever species of arms, all men who belong to the rising en masse of the hostile country, all these who are attached to the army for its efficiencies and promote directly the object of the war, except such as hereinafter provided first, all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled for the privileges of a prisoner of war.

Article 50: Moreover, citizens, who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such.

other forms of deprivation of liberty.<sup>6</sup> Some of the essential privileges of this detention system in the Lieber Code were as follows: 1) prisoners of war cannot be subjected to punishment for being public enemies;<sup>7</sup> 2) nor can they be subjected to any mischief motivated by revenge;<sup>8</sup> 3) those who inflict additional wounds upon prisoners of war must be subjected to punishment (in the Lieber Code's case, the death penalty);<sup>9</sup> 4) if prisoners of war are to work for the benefit of their captor's government, such work must fit their rank and condition;<sup>10</sup> 5) prisoners of war cannot be forced to give war-related information to their captors<sup>11</sup>; and, finally, 6) nor can they be punished for providing their captors with false information.<sup>12</sup>

The concept of prisoners of war inevitably creates a *status*-based system of detention, according to which those warring individuals qualified for being prisoners of war are to be subjected to a particular form of detention. However, what was the response of the Lieber Code to non-combatants? A more difficult question then arises, namely how the Lieber Code viewed those who, by way of their conduct, failed to meet the qualifications of prisoners of war, those characterised by Gillespie as 'informal combatants' consisting of spies, assassins, fighters without uniform and, in general, persons engaged in organised violence as a method of warfare.<sup>13</sup>

The main principle of the Lieber Code regarding non-combatants was that these were 'to be spared in person, property, and honour as much as the

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<sup>6</sup> It is imperative to mention that not all provisions of the Lieber Code (especially regarding POWs) bear a humanitarian character. For a detailed analysis of such provisions, see, T. Meron, 'Francis Lieber's Code and Principles of Humanity' (1998) 36 *Columbia Journal of Transnational Law* 269, at 273.

<sup>7</sup> Article 56, *ibid.*

<sup>8</sup> Article 56, *ibid.*

<sup>9</sup> Article 71, *ibid.*

<sup>10</sup> Article 76, *ibid.*

<sup>11</sup> Article 80, *ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> A. Gillespie, *The History of the Laws of War: The Customs and Laws of War with Regards to Combatants and Captives* (Oxford: Hart Publishing, 2011) at 62.

exigencies of war will admit'.<sup>14</sup> It is clear from this statement that the protection of civilians from certain measures of war was not absolute in the Lieber Code, and was dependent upon the requirements of military necessity. This general rule also holds true for the internment of unarmed citizens. Putting an emphasis on military necessity as a precondition for the exercise of internment of enemy non-combatants was a welcome shift in the Lieber Code. However, equally important is the question of how such a power could be exercised.

The Lieber Code entailed an extensive appreciation of military necessity.<sup>15</sup> According to the Lieber Code, the existence of military necessity could only be determined by the subjective assessment of military commanders in charge. The commanders were provided with a large degree of operational freedom, since the concept of balancing the requirements of military necessity against the considerations of humanity occupied a very ambivalent position in the Lieber Code.<sup>16</sup> A point made by Witt reveals a lot about the position of military necessity in the Lieber Code:

Looked at in a different light, Lieber's code seems not so containing after all. It authorised the destruction of civilian property, the trapping and forced return of civilians to besieged cities, and the starving of non-combatants. It permitted executing prisoners in cases of necessity or in retaliation. It authorised the summary field execution of enemy guerrillas and in its most open-ended provision, the code authorised any measure necessary to secure the ends of war and defend the country.<sup>17</sup>

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<sup>14</sup> Article 22, above note 4.

<sup>15</sup> See, T. Meron, 'Francis Lieber's Code and Principles of Humanity' (1998) 36 *Columbia Journal of Transnational Law* 269, at 273.

<sup>16</sup> R. Giladi, 'A different sense of humanity: occupation in Francis Lieber's Code' (2012) 94 *International Review of the Red Cross* 81, at 103. It must be supplemented that Giladi's main argument in this piece is that a very different sense of humanity prevailed in the Lieber Code, alien to the modern conception of humanitarian considerations in the modern laws of armed conflict. According to Giladi, '[e]ven if absolute prohibitions can be identified in the Code, and if lawfulness is cumulative to necessity, nothing in the Code suggests that this is grounded in humanity or human dignity in the sense used today.'

<sup>17</sup> J. F. Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012) at 4.

Apart from Article 15, which allowed the internment of non-combatants in the wake of the existence of military necessity, the Lieber Code established a separate legal identity for spies, war-traitors and war-rebels. None of these categories had been clearly defined by the Lieber Code. Protections afforded to this group were even slimmer than with other groups of detainees, since their exchange could not be made possible by any means other than 'a special cartel, authorised by the government'.<sup>18</sup> Lincoln had in 1862 established a precedent for the non-exchangeability of prisoners characterised neither as prisoners of war nor as loyal citizens.<sup>19</sup> This happened when Lincoln made a decision to release a large group of Confederate prisoners on parole in order for them not to aid the enemy. However, Lincoln also specified that 'the spies and persons, whose release would endanger the public safety, were exempted'<sup>20</sup> from this act of mercy. Therefore, these classes of detainees were likely to remain in detention permanently. How could this be made possible? The historical British response would be the suspension of habeas corpus. Lincoln, too, opted for the same solution. The only difference was that Lincoln as the head of the executive took the initiative, and unlike British practice did not await parliamentary authorisation. This by itself came to open one of the most controversial chapters of the institutional struggle in the political history of the US.

The technique of creating categories of persons lying neither within the definition of PoWs nor within the category of civilians was essentially the same as the British use of treason in the American independence war in 1777.<sup>21</sup> What is important to notice here is that, in the specific context of

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<sup>18</sup> Article 103, above note 4.

<sup>19</sup> S. Halbert, 'The Suspension of the Writ of Habeas Corpus by President Lincoln' (1958) 2 *American Journal of Legal History* 95, at 105.

<sup>20</sup> Ibid.

<sup>21</sup> That said, it is perhaps interesting to see that the American sovereign establishment was very quick to reutilise the British configurations of treason. For example, Jefferson, in

the laws of war, the distinctive use of categories of action such as treason, rebellion, spying or even disloyalty to the ruling power always elevated the degree of discretion conferred upon the authorities. As will be seen in the following sections, much of the focus of this chapter is allocated to this intermediate category of persons.<sup>22</sup> The point is that the Lieber Code as well as the British treatment of the concept of treason constituted a precedent for what later became one of the most troublesome practices in the context of the laws of armed conflict, namely, constructing intermediate categories of 'enemy combatants', 'unlawful combatants' or 'unprivileged belligerents' (*infra*).<sup>23</sup>

It is also essential to notice that the detention regime of the Lieber Code could not operate unless the writ of habeas corpus had been suspended. The Lincoln Administration had, for some years before the issuance of the Lieber Code, employed two essential regulatory techniques by which to eradicate the possibility of judicial review for detainees, namely, suspension of habeas corpus and declaring martial law. Both of these regulatory frameworks for enforcing detention without trial formed the heritage of British colonialism.<sup>24</sup>

## 2.1. *Other historical developments of the laws of war in the nineteenth century as regards internment of non-combatants*

In the international arena, the efforts made by such units as the International Committee of Red Cross (the Geneva Convention), the

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countering a perceived threat from the secessionists in the south-west, referred to an existence of treasonable conspiracy to afford discretion to his military generals. As Dennison describes the situation: "Acting on the assumption that Burr planned to separate the Southwest from the Union and join it with areas conquered from Spain, Jefferson finally proclaimed that a treasonable conspiracy threatened the Union. He ordered the general to proceed on the rule that '*inter arma silent leges*'." While the president never urged a suspension of the regular law enforcement agencies, he clearly expected Wilkinson to act with discretion. G. M. Dennison, 'Martial Law: The Development of a Theory of Emergency Powers, 1776-1861' (1974) 18 *American Journal of Legal History* 52, at 56.

<sup>22</sup> Sections 5 and 5.1.

<sup>23</sup> *Ibid.*

<sup>24</sup> Refer to chapter I, section 7.1.

Institute of International Law (Oxford Manual of 1880) and some states concerned by the speedy advancements in weaponry technology (St Petersburg Declaration 1868<sup>25</sup>) have resulted in a number of documents on the laws of war. Up to the point of the formation of the Tokyo Draft Convention (*infra*),<sup>26</sup> however, none of the international documents of the laws of war touched upon the practice of internment against non-combatants. Possibly the closest that a document got on the matter of detaining persons other than PoWs was Article 21 of the Oxford Manual:

Individuals who accompany an army, but who are not a part of the regular armed force of the State, such as correspondents, traders, settlers, etc., and who fall into the hands of the enemy, may be detained for such length of time only as is warranted by strict military necessity.<sup>27</sup>

By making this statement, it seems that the Oxford Manual approves the detention formula of the Lieber Code, which placed military necessity as the main cause of detention of persons other than the actual warriors. This absence of reference to the permissibility of internment of enemy non-combatants in effect left the matter to the discretion of states. It was discussed in chapter II that many states including Britain viewed the internment of alien enemies as a matter of their sovereign prerogative, and they reserved the right of interning alien enemies for themselves regardless of whether there was an existing military necessity or not.<sup>28</sup>

### **3. Tokyo draft Convention: the first international law instrument to mention internment of non-combatants**

As was seen above, until 1934, no significant effort was made by international law actors to address the issue of internment of enemy

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<sup>25</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.

<sup>26</sup> Section 3.

<sup>27</sup> The Laws of War on Land, Oxford, 9 September 1880.

<sup>28</sup> *Ibid.*

civilians.<sup>29</sup> However, this is not to conclude that there was no awareness on the part of the national authorities of the problem of enemy civilians. In the course of the Hague Conference of 1907, the Japanese delegation sought to include a clause in the Hague Regulations of 1907 that would protect 'civilian inhabitants of territory belonging to an adverse power' from internment:<sup>30</sup>

The ressortissants of a belligerent, inhabiting the territory of the opposing party shall not be interned unless the exigencies of war make it necessary.<sup>31</sup>

The proposal did not appeal to other delegates, apparently because other delegates considered 'principle of non-internment' as too obvious a dictum.<sup>32</sup> For example, the then Minister of State of Netherlands, van den Heuvel, argued:

If the attitude of the foreigner does not constitute a cause of trouble for the State in the territory of which he is a resident, it is evident that no one will think of disturbing him. [...].<sup>33</sup>

The problem with such a statement was that it had totally ignored the practice in such states as the UK and US. In fact, many cases both before and after the adoption of the Hague Conference of 1907 made it clear that in Britain, the sovereign did have 'the most absolute powers to intern all subjects of the adverse party, even the most inoffensive'.<sup>34</sup> In fact, as McNair reflected later in respect of the common law practice on the matter of interning enemy aliens: 'it is common knowledge [...] that the internment of a civilian enemy does not necessarily connote any overt

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<sup>29</sup> Neither the Hague Conventions of 1899 and 1907, nor the Convention of 1929 relating to the Treatment of Prisoners of War mentioned the issue of protecting enemy aliens.

<sup>30</sup> J. Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht: Martinus Nijhoff Publishers, 1985) at 40.

<sup>31</sup> J. B. Scott, *The Proceedings of the Hague Peace Conferences* Vol. III (New York: Oxford University Press, 1921) at 105.

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.



hostile attitude on his part'.<sup>35</sup> Such inconsistent views on the matter of interning alien enemies signifies that the rejection of the Japanese proposal on the basis of the presumed principle of non-internment was totally unwarranted by the practice.

In 1934 the ICRC prepared a draft convention, whose subject matter was the protection of enemy civilians 'who are on territory belonging to or occupied by a belligerent'.<sup>36</sup> This draft was motivated by the severities suffered by civilians during the First World War. However, it never took the shape of an international agreement, since by the advent of the Second World War states had lost all interest in affording protections to enemy nationals. Nevertheless, some of the provisions of this draft convention remained important, insofar as they had a great impact on the Fourth Geneva Convention 1949 (GC IV).<sup>37</sup>

The first important element of the Tokyo draft convention was that it defined the term 'enemy civilians'. The definition of 'enemy civilians' according to this draft was persons 'not belonging to the land, maritime or air armed forces of the belligerents, as defined by international law, and in particular by Articles 1, 2 and 3 of the [Hague] Regulations',<sup>38</sup> who [for the purposes of the draft convention] happen to be in the territory of a belligerent, or in the occupied territories. The Tokyo initiative also dealt with the internment of enemy aliens and posited that such persons can only be detained when they are eligible to be mobilised, when the security of the detaining power is involved and finally, when 'the situation of

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<sup>35</sup> A. McNair, *The Legal Effects of War* (Cambridge: CUP, 1966) at 97.

<sup>36</sup> Draft International Convention on the Condition and Protection of Civilians of enemy nationality who are on territory belonging to or occupied by a belligerent, Tokyo 1934.

<sup>37</sup> For a brief comparison between the Tokyo Draft Convention and the Fourth Geneva Convention, see, J. A. C. Gutteridge, 'The Geneva Conventions of 1949' (1949) 26 *British Yearbook of International Law* 294.

<sup>38</sup> Article 1, above note 36.

enemy aliens renders it necessary'.<sup>39</sup> These grounds for the permissibility of the internment of enemy aliens were broad in the extreme, and provided a great amount of freedom of action to the detaining authorities. For example, there was no particular limitation in the permissible grounds of the Tokyo draft by which (and in retrospect) to make a case against the wholesale detention of citizens of German origin during the First World War, as discussed in chapter II, since the British executive could and did justify such detention on very broad and unsubstantiated security grounds.<sup>40</sup> Also, the Tokyo draft mentions nothing about the obligation of states to review the internment of enemy civilians.<sup>41</sup> This absence by itself is an indicator of the ambivalent position of aliens in international law prior to the emergence of the human rights law regime. Perhaps the most positive contribution of the Tokyo draft was that it articulated that the protection of the PoWs must by analogy be extended to civilian internees.<sup>42</sup> All in all, as the Second World War began, states viewed even the protection offered by the Tokyo draft as harmful to their interests, and the project of protecting civilian enemies was abandoned until the adoption of Geneva Conventions that occurred after the Second World War.<sup>43</sup>

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<sup>39</sup> Article 15, above note 36.

<sup>40</sup> Refer to chapter II, section 6.

<sup>41</sup> Also, as mentioned in chapter II, international law could not establish a responsibility mechanism for states on the basis of their reluctance to provide detainees with judicial review. This was mainly because states viewed the internment of aliens as an inherent part of their exclusive powers of sovereignty, which were by definition non-justiciable. Refer to chapter II, section 8.

<sup>42</sup> Article 17, above note 36.

<sup>43</sup> The most intriguing part of the Tokyo draft is its tacit approval of taking enemy civilians in occupied territories as hostages. Article 19(a) states: In the event of it appearing, in an exceptional case, indispensable for an occupying Power to take hostages, the latter shall always be treated humanely. Under no pretext shall they be put to death or submitted to corporal punishments. However as it is clear from the post-World War II hostage case, the Tokyo draft's authorisation of taking civilians as hostages seems to have signified the law of the time. The Hostage Case, *US v List* (The Hostage Case), Case No 7, 19 February 1948.

#### 4. The paradigm shift of the laws of war in the aftermath of the Second World War

The respective codes of the laws of war in the early phases of the codification of the same left much at the discretion of sovereigns. In this era, there was not even a compelling definition of war that would impose the application of the laws of war upon states. In fact, as Kolb writes,

[t]he system of the law of war in the nineteenth century, and up until 1949, was based on a subjective rather than objective trigger for determining the applicability of that body of the law.<sup>44</sup>

At the same time, the safeguards devoted to the cause of protecting war victims were shallow in contrast to the rights of states.<sup>45</sup> The concern for the civilian was not paramount in the Hague law, for 'it was a law designed for military personnel and their fighting methods'.<sup>46</sup> Given this, in the wake of the Second World War a renewed urge for clarifying the rules of warfare arose. This urge was also coupled with an essential need to strengthen the humanitarian character of the laws of war. The result was the Geneva branch of the laws of armed conflict in 1949, which later also assumed the title of international humanitarian law.<sup>47</sup> The law of Geneva was mainly composed of the four Geneva Conventions of 1949, and was supplemented by the two additional protocols of 1977.

The first major contribution of the law of Geneva was made towards the scope of the applicability of this branch of the laws of war.<sup>48</sup> In terms of application, the law of Geneva must be distinguished from the previous

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<sup>44</sup> R. Kolb, 'HRL and IHL between 1945 and the Tehran Conference' in R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Northampton: Edward Elgar Publishing, 2013) at 31.

<sup>45</sup> See, A. Jochnick and R. Normand, 'The Legitimizing of Violence: A Critical History of the Laws of War' (1994) 35 *Harvard International Law Journal* 49.

<sup>46</sup> R. Kolb, 'The Protection of the Individual in Times of War and Peace' in B. Fassbender and A. Peters (eds), *The History of International Law* (Oxford: OUP, 2012) at 320.

<sup>47</sup> Pictet, above note 30, at 2–3.

<sup>48</sup> See, J. Meurant, 'Inter Arma Caritas: Evolution and Nature of International Humanitarian Law (1987) 24 *Journal of Peace Research* 237, at 242.

international texts on the laws of war, or the Hague law, in the following respects: 1) the application of the law of Geneva is not dependent upon the subjective decisions of states to make a declaration of war, or to give express recognition of belligerency; 2) the Geneva Conventions continue to apply in times of 'partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance';<sup>49</sup> and 3) the law of Geneva stipulates that the scope of the application of humanitarian law is not restricted to the case of international armed conflicts, and some particular fragments of this legal regime must be applied in the course of internal armed conflicts.<sup>50</sup>

One very important factor conducive to the paradigm shift brought about by the Geneva Conventions was the use of a new choice of terminology surrounding the state of war. On this note, the Geneva Conventions employed the term 'armed conflict' instead of 'war'. The phrase 'armed conflict' epitomises a juridical concept which distinguishes the legal appreciation of this phenomenon from other general references to the state of war. In other words, as Kritsiotis has argued, even though 'war remains a condition known to international law, [...] Common Article 2 ensures that it is subsumed as part of a much broader normative phenomenon'.<sup>51</sup> The important term here is 'normative phenomenon', which implies an objective system of determination of when the rights and obligations of international laws of armed conflicts are weighted on states.

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<sup>49</sup> Ibid.

<sup>50</sup> Before the adoption of the Geneva Conventions, there was no international law document committed to regulating the hostilities in intra-state wars. As a result, the only channels through which internal armed conflicts could have possibly been recognised, and thereby regulated in a similar sense to international armed conflicts, were either 'recognition of belligerency' or, in exceptional cases, 'international customary rules governing civil wars'. See, D. Schindler, 'State of War, Belligerency, Armed Conflict' in A. Cassese (ed), *The New Humanitarian Law of Armed Conflict* (Napoli: Editoriale Scientifica, 1979). See, A. Cassese, 'The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts', in A. Cassese (ed), *Current Problems in International Law: Essays on U.N. Law and the Law of Armed Conflict* (Milano: A. Giuffr , 1975), at 293–294.

<sup>51</sup> D. Kritsiotis, 'The War on Terror and the Problematique of the War Paradigm' (2009) 9 *Journal of Human Rights and Human Welfare* 11, at 13.

Before we proceed any further in our analysis of internment, it is necessary to remind ourselves of the importance of this objective system of determination in the context of the laws of armed conflicts, and its relevance to the contemporary practice of internment.

#### 4.1. *Subjective and objective systems of determination*

It can be said with the utmost certainty that international law as a system was in a state of disarray prior to 1945, and the seemingly significant victories of the international community on different fronts such as adopting Covenant of the League of Nations or even the Hague Convention of 1907 were short-lived and relatively limited in their reach.<sup>52</sup> More generally, states would very rarely accept international obligations aiming at regulating common standards of behaviour.

The reason for this limited grasp of international law on different issues of international affairs has been remarked on numerous occasions in this thesis, and that is the dominant position of the sovereign's subjective authority on matters touching upon its vital interests.<sup>53</sup> Lauterpacht was among the very first international law jurists who noticed the shortcomings of the prevailing place of the sovereign authority to the rules of international law. At the very beginning of a book dedicated to analysing this predicament, he wrote:

Within the community of nations [...] the rule of law is constantly put in jeopardy by the conception of the sovereignty of States which deduces the binding force of international law exclusively from the will of each individual member of the international community. This is the reason why any inquiry of a general character in the field of

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<sup>52</sup> See, C. G. Fenwick, 'The "Failure" of the League of Nations' (1936) 30 *The American Journal of International Law* 506, and Jochnick and Normand, above note 45.

<sup>53</sup> Refer to chapter II, section 2.

international law finds itself at the very start confronted with the doctrine of sovereignty.<sup>54</sup>

Therefore, in matters touching upon vital political interests of states, international law was often treated as an issue of second-class importance to the will of sovereigns. Framed in this way, international law often fell short of providing objective criteria, which would bind states to take a particular path corresponding to the legal character of a certain situation. This lack of binding objective criteria would usually be followed by a two-fold process. Firstly, treating a given matter as merely political, sovereigns would make decisions on the basis of their *self-judgement*.<sup>55</sup> Secondly, sovereigns would ascribe a non-justiciable character to the matter in dispute in order to preserve the authenticity of their subjective decision.<sup>56</sup> Thus, as explored in the second chapter of this thesis, in England any matter falling within the ambit of the prerogative would lose its liability to be justiciable.<sup>57</sup> When seen in this light, Locke's characterisation of the prerogative makes perfect sense:

The power to act was according to discretion, for the public good, without the prescription of the law and sometimes even against it.<sup>58</sup>

In terms of the laws of war, this formulation of the interaction between international law and the sovereign authority entailed the following implications: a subjective approach to the existence of war, the broadening of the concept of military necessity, and the exclusion of the

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<sup>54</sup> H. Lauterpacht, *The Function of Law in the International Community* (Oxford: OUP, 1933) at 1.

<sup>55</sup> M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: CUP, 2001) at 358.

<sup>56</sup> M. Koskenniemi, 'Introduction' to H. Lauterpacht, *The Function of Law in the International Community* (Oxford: OUP, 1933, edition 2011) at xxxvii. See, also, C. Gray, 'The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after Nicaragua' (2003) 14 *European Journal of International Law* 867.

<sup>57</sup> Refer to chapter II, section 8.

<sup>58</sup> J. Locke, *Second Treatise of Government*, first published in 1690 (Indiana: Hackett Publishing Company, 1980) at 84.

entrance of civil courts upon matters concerning military decisions.<sup>59</sup> In the particular case of internment, prior to 1945, this meant absolute freedom of sovereigns to intern the subjects of adverse sovereigns, with their decisions on the subject of internment being veiled by a claim of non-justiciability. In such an environment, even when attempts were made to constrain the conduct of sovereigns, the sovereign establishment would find a tactic to curtail or remove the constraints in part or in their totality. The German conception of *kriegsraison* is also an example of such efforts.<sup>60</sup> Drawing on this, one cannot but deduce the following conclusion about the ambivalent position of the laws of war before the Geneva Conventions:

The subjective approach of the nineteenth century augmented the gaps in law. Not only was the law of warfare incomplete in itself (gaps within the law), it was also easy to escape its application [...], thus creating a second type of gap (gaps in the application of the law).<sup>61</sup>

The evolving trend in international law in general in the wake of the Second World War has moved in the direction of leaving a comparatively smaller space for the subjective determination of sovereigns. This was made possible by laying down more objective criteria by the relevant international treaties, and a continuous updating, clarifying and elevating of those criteria by the institutions ruling on different issues arising from international humanitarian law. This move towards laying down an objective system of determination has continued both through the treaty-based law of Geneva and the rulings of such entities as the International Court of Justice and the *ad hoc* tribunals. This is not to conclude that the subjective element present in different spheres of the laws of armed conflict has totally disappeared. However, their mode of practice has

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<sup>59</sup> Hussain, above note 2, at 117, and also refer to chapter I, discussion on the *Marais* case onwards.

<sup>60</sup> W. G. Downey, *The Law of War and Military Necessity* (1953) 47 *American Journal of International Law* 251, at 253.

<sup>61</sup> Kolb, above note 44, at 33–34.

changed. For example, the use of language concerning the exclusive right or rights of sovereign discretion in the context of the laws of armed conflict has significantly decreased. At the same time, on matters where the exercise of subjective decisions is inevitable for belligerents in armed conflict, certain objective criteria have been introduced so as not to leave the decision on such matters only to the good faith of the belligerents. For example, the concept of 'subjective certainty' in identifying the military objectives in an international armed conflict hints at some objective prerequisites guiding the subjective decision of sovereigns.<sup>62</sup> The most important implication of this move towards objective criteria is that states cannot give so much credibility to an outright claim of military necessity as to override their obligations *en bloc*. Furthermore, the political importance of a practice cannot shield it from the scrutiny of supervisory and judicial bodies in domestic and international law.

However, an alarming alertness must be raised on the natural tendency of states to reclaim their absolute power of self-judgement on their obligations under any system of international law.<sup>63</sup> The realist school of international relations clearly tells us why states are preoccupied with the urge to twist the letter of law in a manner paving the way for their subjective judgments, to secure their own interests and ends.<sup>64</sup> Consequently, states tend to exploit certain interpretative means to

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<sup>62</sup> S. Oeter, 'Methods and Means of Combat' in T. Gill and D. Fleck (eds), *The Handbook of the International Law of Military Operations* (Oxford: OUP, 2008) at 209.

<sup>63</sup> In explaining Lauterpacht's contribution to the field of public international law, Koskenniemi reflects on this important dimension of interpreting the rights and obligations of states on the basis of their own self-judgement. 'Law is how it is interpreted. Lauterpacht's modernity lies in his constant stress on the primacy of interpretation to substance, of process to rule in a fashion that leads him into an institutional pragmatism that is ours, too. Such nominalism liberates lawyers to create international order by imagining that it already exists. However, it raises the further question of *power*, about who it is that is invested with the interpreting meaning-giving authority? Thereby it creates what for Lauterpacht became the single most important problem of the existing international legal order, *the problem of self-judging obligations*, the State's ability to interpret for itself what its obligations are.' Koskenniemi, above note 55.

<sup>64</sup> C. J. Dias, 'International Relations and International Law: from competition to complementarity' in T. J. Biersteker *et al*, *International Law and International Relations* (New York: Routledge, 2007) at 279.



circumvent the letter of law to the effect of rendering easier the fulfilment of their self-perceived interests. When read in this light, one can make sense of the many clashes of interpretations and the intended results of such interpretations in certain areas of international law resulting in many cases in a complete dismantling of the application of international law. Throughout the twentieth and the first decade (and half) of the twenty-first centuries, the foregoing pattern has broken loose in encounters as broad-ranging as the Second World War to the American 'war on terror'.

The explanation supplied above sheds light on the recent American experience in its so-called 'war on terror', and decodes the legal strategies of the American executive, summarised by Luban in these terms:

by selectively combining elements of the war model and elements of the law model, Washington is able to maximize its own ability to mobilize lethal force against terrorists while eliminating most traditional rights of military adversary, as well as the rights of innocent bystanders caught in the crossfire.<sup>65</sup>

The intended result of this approach is to establish a sovereign ownership over the entire security apparatus, including the practice of internment.<sup>66</sup>

How precisely does such pattern operate with regard to the practice of internment? In order to answer this question, it is perhaps useful to avail ourselves once again of the lessons of the history of detention without trial, as provided in the previous chapters.

Recall some of the historical enquiries in the first chapter of this thesis. In the eighteenth century, the primary tactic of the British sovereign for establishing monopolistic sovereign ownership on the issue of interning individuals and how to treat them was a high utilisation of criminal notions

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<sup>65</sup> D. Luban, 'The War on Terrorism and the End of Human Rights' (2002) 22 *Philosophy and Public Policy Quarterly* 9, at 10.

<sup>66</sup> A. W. Neal, *Exceptionalism and the Politics of Counter-Terrorism: Liberty, Security and the War on Terror* (London, Routledge, 2010) at 128.

such as 'treason' and 'piracy'.<sup>67</sup> This had the advantage of precluding detainees held on the suspicion of treason or piracy from being entitled to the writ of habeas corpus. Furthermore, if these internments were captured in the course of war, they could not be categorised as PoWs. As explored in chapter I, the sovereign establishment in Britain employed this tactic extensively against American combatants for independence. As mentioned above, the strategy of using such categories as war treason was later developed by the Lieber Code, again with the purpose of placing persons held on the suspicion of treason at the mercy of the sovereign. This would in turn enable the executive to act in an unbridled manner away from the interference of the judiciary or the scrutiny of other legal organs.

With the adoption of the Third and Fourth Geneva Conventions, the tactic of using such labels as treason or piracy encountered a very serious problem. This happened because these two treaties defined two types of protected persons, PoWs and civilians, and nowhere in the respective treaties was it stipulated that the violation of the rules of the laws of international armed conflicts would place the violators outside the protection of the laws of armed conflict. In other words, GC III and IV defined an all-inclusive objective binary between the *status* of PoWs and civilians. It was thus that the law of Geneva limited the discretion of states in treating these individuals by defining a rather detailed set of rules governing their internment. In as much as this was a progressive move, it did not conform to the classic view of such states as Britain and the US. The result was the creation of intermediary categories between PoWs and civilians. The function of these categories would be to juxtapose a person held on the suspicion of violating the laws of armed conflict outside the

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<sup>67</sup> Refer to chapter I, sections 7.1 and 7.3.

protective bounds of Geneva Conventions, and place them at the subjective discretion of the detaining powers. The US Supreme Court had made this possible some years before the adoption of the Geneva Conventions by devising a peculiar category of persons referred to as 'unlawful combatants' (*infra*).<sup>68</sup> Also, in subsequence to the adoption of the Geneva Conventions, the British Privy Council drew on the writings of Baxter, and recognised a very similar concept to that of unlawful combatants, 'unprivileged combatants'.<sup>69</sup> However, the precedent established by the US Supreme Court came to aid the US executive in order to make a case for the existence of a group of detainees not protected by the Geneva Conventions. In other words, the US executive resorted to a constructed intermediary *status* for establishing its self-professed exclusive authority over detainees captured in the context of its counter-terrorism measures.<sup>70</sup> The principal argument on the part of the American executive was that there is a gap in the international laws of armed conflict as to the protection of persons not respecting its requirements. This would mean that the matter of how to deal with this category of persons is bestowed upon the subjective discretion of states.<sup>71</sup> In a moment of frankness, some central legal figures of the Bush Administration acknowledged the recourse of the executive to this strategy:

During the time that we served in government, we believe the United States erred by straining to take advantage of gaps in international law in order to avoid applying

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<sup>68</sup> *Ex parte Quirin*, 317 U. S Supreme Court.

<sup>69</sup> *Mohammad Ali and Another v. Public Prosecutor*, (1968) 3 All E. R. 488.

<sup>70</sup> This self-proclaimed case for the purpose of establishing an exclusive authority over matters already regulated by international law treaties is best echoed in the term 'exceptionalism', which will be discussed in detail in the next chapter of this thesis.

<sup>71</sup> US Department of Justice, Application of Treaties and Laws to al Qaeda and Taliban Detainees, January 2002.

important protections for detainees as elements of its post-9/11 detention policy.<sup>72</sup>

This assumption about the existence of some gaps in the laws of armed conflict really forms the crux of the recent internment practices. Some decades before the advent of the so-called 'war on terror' and in the heat of the European states' preparation for the Second World War, Lauterpacht identified the claim of the existence of gaps in international law as one of the principal methods by which states take the matters to their own discretion, and therefore refute some of the most 'fundamental aspects' of international law.<sup>73</sup> Interestingly enough, in the context of the so-called 'war on terror', hardly any defence of the US executive measures ensue without having first identified some large *lacunas* in international law. These alleged gaps are as broad-ranging as not having a body of law governing the alleged interim states between peace and war in counter-terrorist operations, to the lack of an updated body of law governing the internment of persons falling between PoWs and civilians.<sup>74</sup> The unspoken conclusion implicit in most of such works is that until international law adjusts itself to the newly emerging challenges, it is not only sensible but also necessary to deal with such matters as internment using the exclusive powers of sovereign.

Identifying gaps is not necessarily and analytically misleading. However, identifying gaps with the purpose of creating a 'legal black hole' on a given subject eradicates the very foundations of international law, and of course, internment in the wake of the war on terror came to represent one of the

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<sup>72</sup> J. Bellinger and V. M. Padmanabhan, 'Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and other Existing Law' (2011) 105 *American Journal of International Law* 201, at 204.

<sup>73</sup> Lauterpacht, above note 54, at 89.

<sup>74</sup> See, for example, G. Blum and P. B. Heymann, *Laws, Outlaws and Terrorists: Lessons from the War on Terror* (Cambridge: MIT Press, 2010), C. A. Ford, 'Living in the "New Normal": Modern War, Non-State Actors, and the Future of Law' in C. A. Ford and A. Cohen (eds), *Rethinking the Law of Armed Conflict in an Age of Terrorism* (Maryland: Lexington Books, 2012), C. Blum, *The Necessary Evil of Preventive Detention in the War on Terror: A Plan for a More Moderate and Sustainable Solution* (New York, Cambria Press, 2008).

most notorious practices susceptible to becoming a legal black hole.<sup>75</sup> Taking this into consideration, it is fair to say that the legal battlefield ensuing the abovementioned cycle of arguments was fought between two different interpretations of the laws of armed conflict. This legal battle can be cast in terms of an asserted exclusive authority of states in dealing with a certain type of detainee in armed conflict versus the objective system of determination articulated in the Geneva Conventions on the matter of interning protected persons. The following sections of this chapter purport to clarify the different dimension of this interpretative conflict, and at the same time, a case will be made on the substance of the objective obligations embodied in the Geneva Conventions. In other words, we will consider what the existing laws are, how they have been shaped, how they must be interpreted and where the history of detention without trial stands in all of this.

### **5. The Laws of Internment: International Armed Conflicts: Status-based detention**

Historically, there has existed a distinction between captured combatants and non-combatants. Captured combatants were regarded as prisoners of war, whose internment was governed by a very specific set of rules squarely devoted to this category of internees. On the other hand, non-combatants, who owed allegiance to an adverse party, were characterised as alien enemies (or enemy aliens) and could still be detained at the discretion of sovereigns. Nevertheless, the issue of characterising the *status* of different actors prior to the Geneva Conventions not only resulted in establishing a dichotomy between prisoners of war and alien enemies. As was seen in the context of the Lieber Code, different rules were configured for a 'grey class' of persons, for whom different legal

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<sup>75</sup> F. Johns, *Non-Legality in International Law: Unruly Law* (Cambridge: CUP, 2013) at 71–80.

terms have been applied, namely those whom Gillespie called 'informal combatants'<sup>76</sup> and are normally referred to in modern legal literature as 'unlawful combatants'.<sup>77</sup> These terms continue to be used against individuals who commit or are about to commit acts in violation of the laws of war.

The term 'unlawful combatants' was in the most express manner formalised by the US Supreme Court in the famous case of *Ex Parte Quirin* for proving the legality of internment and military commissions.<sup>78</sup> This case concerned eight German saboteurs (two of whom possessed dual citizenship for Germany and the US), who had illegally entered the US for the purpose of targeting the US military industry (whilst being in civilian dress) in an attempt to exhaust the American war effort during the Second World War. After an incidental encounter between four of the eight saboteurs and an American Coast Guardsman, all eight men were arrested in different places and characterised as 'unlawful combatants' by the US Supreme Court. Crucially, the term 'unlawful combatants' in this case was exploited by the court against the background of the Hague Convention IV 1907, in which the lawful qualifications of belligerents was enumerated:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

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<sup>76</sup> Gillespie, above note 13.

<sup>77</sup> See, for example, C. Jenks, E.T. Jensen, 'Indefinite Detention Under The Laws Of War' (2011) *Stanford Law and Policy Review* 101, S. C. Blum, *The Necessary Evil of Preventive Detention in the War on Terror: A Plan for a More Moderate and Sustainable Solution* (New York: Cambria Press, 2008), S. J. Scholhofer, 'Checks and Balances in Wartime: American, British, and Israeli experiences' (2004) 102 *Michigan Law Review* 1906. More examples of literature will be viewed and analysed shortly hereinafter.

<sup>78</sup> *Ex parte Quirin*, above note 68.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'.<sup>79</sup>

The US Supreme Court understood the terms of this article to specify qualifications for *lawful* belligerency, and it posited that the failure of combatants to meet these conditions would lead to their characterisation as 'unlawful combatants'. According to the US Supreme Court, the offence of violating the laws of war, which led to the characterisation of the detainees in question as unlawful combatants, 'was complete when with that purpose they entered or, having so entered, they remained upon [US] territory in time of war without uniform or other appropriate means of identification'.<sup>80</sup> Therefore, the US Supreme Court postulated that unlawful combatancy would lead to the indefinite internment of the perpetrators in that it suspends their entitlement to the constitutional guarantee of habeas corpus, and at the same time unlawful combatancy brings the military commissions into play.<sup>81</sup> The rationale provided by the US government and the Supreme Court in the *Quirin* case was that protections of the laws of war are only reserved for those who act in compliance with the legal standards of warfare. In the absence of any protections afforded by the laws of war to this category of persons, the US official position was that these persons fell under the full discretion of the sovereign, and the bridge to these exclusive powers was the concept of 'unlawful combatancy'. In asserting the reach of these discretionary powers, the US Attorney General went as far as saying that:

[w]hatever privilege may be accorded to such enemies, is accorded by sufferance, and may be taken away by the President.<sup>82</sup>

The Attorney General further went on to say that:

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<sup>79</sup> Article 1, Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> *Ex parte Quirin* above note 68, at 14.

[t]he President's power over enemies, who enter this country in time of war, as armed invaders intending to commit hostile acts, must be absolute.<sup>83</sup>

Of course, this language bore striking similarities to the decisions of the UK Courts in the 1910s in cases involving alien enemies, which, as in the case of *Quirin*, sought to establish absolutism of the sovereign power against specific categories of persons such as alien enemies (or even alien friends), or as in the case of *Quirin*, unlawful combatants.<sup>84</sup> The difference was, however, that in the case of *Quirin*, the reliance on the alien character was much less, since two of the so-called Nazi saboteurs possessed American citizenship.

Neither the Hague Convention nor any other authoritative documents in the laws of war had mentioned anything remotely close to the term 'unlawful combatants'; for better or worse, the Geneva Conventions also did not touch upon the term. Nevertheless, the precedent established by the *Quirin* case continued to govern the US conception of the rights of a certain category of persons. Most notably, in the aftermath of the September 11 attacks, the Bush Administration relied heavily on the *Quirin* case 'to create military tribunals to try suspected terrorists and the authority to detain 'unlawful' or 'enemy combatants'.<sup>85</sup>

#### 5.1. *Unlawful combatants or 'unprivileged belligerents'?*

In a very important article in 1951, Baxter, a respected legal scholar, argued that 'unlawful belligerency' is not punishable by international law. However, at the same time, 'international law affords no protection' to 'unlawful belligerents'.<sup>86</sup> Thus, the formula proposed by Baxter was altogether not that different from the one adopted by the US Supreme

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<sup>83</sup> Ibid.

<sup>84</sup> Refer to chapter II, section 5.

<sup>85</sup> S. I. Vladeck, 'The Detention Power' (2004) 22 *Yale Law and Policy Review* 153.

<sup>86</sup> R. R. Baxter, 'So-called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs' (1951) 28 *British Year Book of International Law* 323.



Court in *Quirin*.<sup>87</sup> The crux of the issue in Baxter's view is that no matter what *status* is prescribed to belligerents falling outside the scope of PoWs and peaceful civilians, such persons have by their own conduct deprived themselves of the privileges which would have otherwise been afforded to them by international law. Therefore, such individuals are more unprivileged belligerents under international law than unlawful combatants, and consequentially, they are punished on the basis of the municipal laws of the adverse party, in which hands they eventually find themselves and not on the basis of their *status* as 'unlawful combatants'. However, with the hindsight of having the Third Geneva Convention respecting the protection of PoWs before him, Baxter argued that in order for a person to be considered an 'unprivileged belligerent', judicial determination is a necessity, and it is only in consequence to a judicial determination of his *status* that a person can be subjected to the municipal law or discretionary power of the detaining authority.<sup>88</sup> This formulation, in one form or another, found support among different sectors of authority in Britain.<sup>89</sup>

Also, with explicit references to Baxter's article, the British Privy Council applied this formula in 1968 to a case concerning two members of the armed forces of Indonesia responsible for the explosion of a non-military building in Singapore.<sup>90</sup>

The template below enumerates the different legal shortcomings arising from Baxter's formulation of unprivileged belligerency and the *Quirin* case construction of 'unlawful combatants'.

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<sup>87</sup> Ibid., at 343.

<sup>88</sup> Ibid.

<sup>89</sup> The UK War Office, *The Law of War On Land, the Manual of Military Law 1958*.

<sup>90</sup> *Mohammad Ali and Another v. Public Prosecutor*, above note 69, at 494–495.

	Entitlement to judicial determination of <i>status</i>	Entitlement to a presumed PoW <i>status</i> before their judicial determination	Subject to detention without trial after judicial determination of their <i>status</i>	Entitlement to the protection of international law of armed conflict	Penalised by international law on the basis of their prescribed <i>status</i>
<b>Baxter's unprivileged belligerents</b>	Yes	Yes	If the detaining authority desires so	No	No
<b>Quirin's unlawful combatants</b>	No (such determination is made by military commissions)	No	If the detaining authority desires so	No	Yes

Both formulas share the denominator of denying the protection stemming from international law to those who would fail to meet the requirements of belligerency, enunciated in the respective treaties of international humanitarian law. This proposition has not been devoid of support among some international law scholars. For example, Dinstein has argued that:

[a] person who engages in military raids by night, while purporting to be an innocent civilian by day, is neither a civilian nor a lawful combatant.<sup>91</sup>

Based on this assumption, Dinstein concludes that:

[u]nlike war criminals (who must be brought to trial), unlawful combatants may be subjected to administrative detention without trial and without the attendant privileges of prisoners of war.<sup>92</sup>

The question which must be posed to Dinstein is that being subjected to administrative detention is one thing, but being deprived of the protections attached by international humanitarian law to such a practice is quite another. Is the administrative detention of the so-called 'unlawful belligerents' intertwined by their exclusion from the protections of international humanitarian law? It was seen above that the answer of the

<sup>91</sup> Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge: CUP, 2004) at 29.

<sup>92</sup> *Ibid.*, at 31.

US Supreme Court and the UK Privy Council to this question lies in the positive. However, the truth of the matter is, that such exclusion cannot be justified under international humanitarian law unless it corresponds to the views taken by the treaty law governing international armed conflicts.

### 5.2. *Internment of PoWs*

The Geneva Conventions of 1949 do not prohibit the exercise of internment. On the contrary, they explicitly recognise and regulate two different regimes of internment: internment of PoWs, and internment of civilians. The Third Geneva Convention (GC III) is devoted in its entirety to the cause of protecting PoWs, and therefore spells out an ample degree of protection to which PoWs are beneficiaries.<sup>93</sup> As was mentioned above, the purpose and particular protection attached to the detention of PoWs distinguishes this internment regime from other exercises of detention without trial. As Admiral Cannaris noted in the Nuremberg Trials, in order to make a case for penalising the Nazi regulations regarding PoWs:

The purpose of keeping PoWs in captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.<sup>94</sup>

This rationale has clearly manifested itself in different provisions of GC III.<sup>95</sup> The clearest proof that the internment of PoWs cannot assume a retributive character is that, according to Article 118, PoWs 'shall be released and repatriated without delay after the cessation of active hostilities'. At the same time, PoWs' internment must be distinguished from the security internment of civilians, in that PoWs are only obliged to

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<sup>93</sup> Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), adopted on 12 August 1949, 75 UNTS 135.

<sup>94</sup> Cited in T. Meron, 'Geneva Conventions as Customary Law' (1987) 81 *American Journal of International Law* 348.

<sup>95</sup> For the most detailed analysis of the Third Geneva Convention, see, N. Rodley, *The Treatment of Prisoners of War under International Law* (Oxford: Oxford University Press, 2009).

provide their 'names, rank, army regimental, personal or serial number, and date of birth to the detaining power, and no interrogation can be used to 'secure from them information of any kind'.<sup>96</sup>

The GC III enumerates in great detail the different categories of individuals that must be treated as prisoners of war upon capture.<sup>97</sup> In this regard, as Rogers has maintained, 'the general rule is that members of the enemy armed forces, other than medical personnel and chaplains, are entitled to prisoners of war *status* on capture'.<sup>98</sup> However, asserting this entitlement is not always easy. More often than not, groups such as paramilitary fighters, persons with no uniform and armed civilians create difficulty in ascertaining the *status* of belligerents as PoWs. Additionally, sometimes the criteria of membership can itself be troublesome. Here, Article 5 of the GC III provides a supplementary provision to the requirements of Article 4:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.<sup>99</sup>

These requirements of the presumption of PoW *status* and a determination of one's *status* in cases of doubt, as laid down in Article 5, explicitly fly against the formulation of the US Supreme Court in the *Quirin* case, which had advanced no such requirements. This is perhaps why the UK and US at first found it hard to accept Article 5, and 'favoured the withdrawal of Convention protection as soon as a *prima facie* case was made out against

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<sup>96</sup> Article 17, above note 93.

<sup>97</sup> Article 4, above note 93.

<sup>98</sup> A. P. V. Rogers, *Law on the Battlefield* (Manchester: Manchester University Press, 1996) at 59.

<sup>99</sup> Article 5, above note 93.

them'.<sup>100</sup> Nevertheless, the ICRC succeeded in pushing the content of Article 5 into the final draft of the GC III.<sup>101</sup>

Of notable importance in determining the *status* of PoWs is the fact that on some occasions, neither the criterion of membership nor the presumption of PoWs can be very clear. In this regard, some interesting cases arose in England during the Gulf War, when thirty-five Iraqi residents in the UK, who were allegedly members of the Iraqi armed forces, were arrested. Upon the outbreak of military operations against Iraq, these detainees were detained and viewed as PoWs. The Iraqi detainees objected to the prescription of PoW *status*, since they had not been arrested on the battlefield, and more importantly, their subscription to the Iraqi military was seriously disputable.<sup>102</sup> In such situations, the correct position seems to have been illuminated by Article 50 of the First Additional Protocol to the Geneva Conventions (AP I),<sup>103</sup> which stipulates that: '[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.' This principle can be of great guidance in cases where a detainee challenges his *status* as a PoW and his participation in hostilities and membership within the army forces are matters of dispute. As to the fate of the Iraqi detainees, they were divided into five different categories: 1) members of the Iraqi armed forces; 2) ranked officers of the Iraqi armed forces; 3) discharged officers of the Iraqi forces; 4) deserters; and 5) those with no military connections. In short, after considering the cases of individuals belonging to these five categories, the British Commandment with the advice of a board of enquiry decided that

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<sup>100</sup> G. Best, *War and Law since 1945* (Oxford: Clarendon Press, 1994) at 137.

<sup>101</sup> *Ibid.*

<sup>102</sup> See, F. Hampson, 'The Geneva Conventions and the Detention of Civilians and Alleged Prisoners of War' (1991) *Public Law* 507.

<sup>103</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

thirty-three of the detainees were PoWs and therefore must remain liable to the practice of internment.<sup>104</sup>

Interestingly, the GC III stipulates that PoWs found to be guilty of breaching the laws of conflict must still remain entitled to the benefits of the PoW Convention.<sup>105</sup> The effect of this protective provision is that even war criminals must benefit from the same standards of treatment as PoWs in such matters as hygienic requirements, food, accommodation and periodic visits by the ICRC or delegates of a protecting power.<sup>106</sup> Article 85 of the GC III shows that this convention does not leave anyone falling within its subject matter outside its protective measures.

### *5.3. The internment of civilians under the law of Geneva*

The position of civilians in international armed conflicts is regulated by the GC IV, and some parts of the AP I. Crucially, the definition of civilians is of direct relevance to the application of GC IV, and some parts of the AP I. However, GC IV did not supplement a definition for the term 'civilians', since there was a major disagreement among the drafters of GC IV as to those civilians who took up arms or who became involved in sabotage against the enemy state without being entitled to do so, and the effects of such acts upon the protections offered by GC IV. Accordingly, the UK representative in the second meeting of the third Committee mentioned this problem:

[...] there should be laws for combatants and separate laws for non-combatants. The whole concept of the Civilian Convention was the protection of civilian victims of war and not the protection of illegitimate bearers of arms, who could

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<sup>104</sup> G. Risius, 'Prisoners of War in the United Kingdom' in P. Rowe (ed), *The Gulf War 1990–91 in International and English Law* (London: Routledge, 1993) at 296–297, the procedure upon which cases of the Iraqi detainees were decided, were subjected to some serious criticism, illustrated in Hampson's article above.

<sup>105</sup> Article 85, above note 93.

<sup>106</sup> Best, above note 100, at 100.

not expect full protection under the rules of war to which they did not conform.<sup>107</sup>

As it is documented in the Final Record of the Geneva Diplomatic Conference, not all delegates found themselves in agreement with the proposition of the UK delegate. Some insisted on defining 'the civilian population' first, since it was only then that the exclusion of some groups from the scope of GC IV could be made possible.<sup>108</sup> These divisions, in the words of the Australian representative, created 'two schools of thought' among the drafters of GC IV.<sup>109</sup> In such an environment, the only solution left was to reach a compromise. This clearly manifested itself in the silence of GC IV as to the definition of civilians. Another site of compromise is Article 5 of GC IV, which deals with the internment of civilians suspected of engagement in 'activities hostile to the security of the state' or civilians detained as spies or saboteurs.<sup>110</sup>

Finally, the AP I took on what seemed an impossible task in the process of drafting GC IV. That is to say, the AP I provided a definition for the term 'civilians', and in so doing, the drafters of the AP I drew on the model of the Tokyo Draft Convention, namely, defining civilians in negative terms. According to Article 50(1) of the AP I, it is stated that:

[a] civilian is any person who does not belong to one of the categories referred to in Article 4 (A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

In effect, Article 50(1) of the AP I implies that, 'apart from the members of the armed forces, everybody physically present in a territory is a

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<sup>107</sup> Final Record of the Diplomatic Conference of Geneva of 1949 Vol. II, at 621.

<sup>108</sup> Ibid.

<sup>109</sup> Ibid., at 622.

<sup>110</sup> K. Dormann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85 *International Review of Red Cross* 45, at 57.

civilian'.<sup>111</sup> This all-embracing understanding of civilians is of great importance in coming to terms with the particularities of the internment regime designated by GC IV and the AP I for this specific group of protected persons. Equally important are the effects of the momentary transformation of civilians into direct participants in hostilities on their *status* and the protections attached to their internment.

## **6. The involvement of civilians in hostilities and the criterion of direct participation**

It was not until the adoption of the AP I that better clarification was provided with regard to civilians who directly participate in hostilities. The AP I articulated that the ultimate test for realising when civilians can have their immunity forfeited from being targeted by a hostile party is the standard of direct participation. According to the standard of direct participation, civilians must be protected from 'the dangers of military operation', 'unless and for such time as they take a direct part in hostilities'.<sup>112</sup> Therefore, the suspension of the protections attached to civilians cannot be realised without having identified whether the conduct of a civilian amounts to a direct participation in hostilities.

Despite its pressing importance, the AP I did not go further than mentioning the standard as the only criterion, by which to detect the permissibility of targeting some civilians. Thus far, the most important development in terms of decoding the concept of direct participation has come from the ICRC in 2009 through its 'interpretative guidance on the notion of direct participation'. Therein, the cumulative criteria of direct participation consists of the following:

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<sup>111</sup> C. Pilloud *et al*, *Commentary on the Additional Protocols of 8 June 1977* (Geneva: International Committee of the Red Cross, 1987) at 611.

<sup>112</sup> Article 51(3), above note 103.



- 1) The attack must be likely to adversely affect the military operations or military capacity of a party to an armed conflict, or alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
- 2) There must be a direct causal link between the act and the harm likely to result either from the act, or from a coordinated military operation of which that act constitutes an integral part (direct participation);
- 3) The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detainment of another (belligerent nexus).<sup>113</sup>

This understanding of the test of direct participation places a causal relationship and proximity between the acts of civilians and the damage they inflict on the enemy. It is by virtue of discerning this proximity that an essential distinction between direct participation in hostilities and acts in support of war efforts by civilians can be made possible.<sup>114</sup> Civilians taking direct part in hostilities forfeit their immunity from being lawfully targeted and are therefore excluded from the considerations of proportionality in an armed attack. This is while civilians engaged in war efforts still maintain all the privileges of their civilian *status*, except they may expose themselves to the danger of becoming collateral damage to the armed attacks of enemy.<sup>115</sup> One important result of this vital distinction is that direct participation cannot necessarily be defined by either membership in an organisation or even intentional material support for that organisation, whose *modus operandi* is to harm the security of a hostile party to an international armed conflict. As will be explored in the next chapter, this is exactly why the Bush Administration's treatment of the concept of 'enemy combatant' or 'unlawful combatant' was flawed on the point of the laws of armed conflict. As Goodman has noted, the reliance on an all-embracing understanding of the term 'enemy combatant' as with the Bush Administration could not but result in 'a fundamental

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<sup>113</sup> ICRC's Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009) at 46.

<sup>114</sup> R. Goodman, 'The Detention of Civilians in Armed Conflict' (2009) 103 *American Journal of International Law* 48, at 52–53.

<sup>115</sup> *Ibid.*

category mistake', which involved 'grouping different actors under a heading that correctly applies only to some of them'.<sup>116</sup>

Another question that arises regarding the issues surrounding the standard of direct participation is whether a non-combatant who directly participates in hostilities has spontaneously transformed his *status* from a civilian into a combatant. The answer to this question does not bear so much importance for the purpose of targeting as it does for the issues relating to their internment, for it is possible to target a hostile civilian as soon as his direct participation is ascertained in the heat of a conflict. However, it is not so clear what safeguards govern the internment of such persons, whether they are captured on the battlefield or in the course of a belligerent occupation. To repeat some central questions asked previously in this chapter: Is the detention of persons taking direct part in hostilities to be governed by those standards of internment which GC IV devoted to the protection of civilians? If so, what are those standards, and if not, what rudimentary safeguards must replace those standards? Are these individuals, as the Lieber Code and Bush Administration in different periods maintained, placed at the mercy of the enemy in which hands they find themselves?<sup>117</sup>

One must read the relevant terms of GC IV and the AP I in concert. In this regard, Article 5 of GC IV is an indicator of the GC IV treatment of those who could not by their conduct be treated as PoWs. According to the first paragraph of Article 5 of GC IV:

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to

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<sup>116</sup> Ibid., at 60.

<sup>117</sup> Not to mention the British executive bills of treason in the eighteenth and nineteenth centuries, and their 'free-standing' and emergency laws in the colonies.

claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Article 5 relates to the derogation of some of the protections of GC IV for the purpose of interning a 'protected person', insofar as saboteurs, spies and those engaged in activities hostile to the security of a warring party are concerned. To these groups, Article 5 still applies the language of protected persons, and therefore it is clear from the wording of this article that any persons who do not fall within the category of PoWs are considered civilians within the meaning of GC IV. The only groups excluded from the broad auspices of the civilian category are as follows:

- 1) 'Nationals of a neutral and co-belligerent state' which maintain 'normal diplomatic representation in the State in whose territory they are'.
- 2) In the case of occupation, nationals of the occupying power.<sup>118</sup>

Article 5 offered a persuasive compromise between the interests of the parties to a conflict and the status-based protections of the Geneva Conventions. The meaning of this compromise was that such groups of persons as spies or saboteurs must not be deprived of their *status* as civilians, but 'under strict conditions' some of the protections of GC IV can be derogated with regard to the referred categories in Article 5.<sup>119</sup> We will return to these protections to evaluate the modalities governing the practice of internment. However, at this stage, it must be concluded that, unlike the Lieber Code and the historical Anglo-American case law, GC IV does not recognise an intermediary *status* between PoWs and civilians. The ICRC Commentary on Geneva Conventions could not support this conclusion more explicitly than when stating:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by

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<sup>118</sup> Article 4; also the GC IV stipulates that nationals of a state which is not bound by the Convention shall not be included within the definition of 'protected persons'. However, given the universal acceptance of the GC IV, this no longer seems to be possibility.

<sup>119</sup> Dormann, above note 110, at 50.

the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law. We feel that this is a satisfactory solution – not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view.<sup>120</sup>

The same conclusion is supported by the wording of the relevant articles of the AP I. The AP I loosened the scope of categories of PoWs and civilians.<sup>121</sup> This in itself signifies the distaste of the AP I for the possibility of restricting the application of the protections of the laws of armed conflict on the basis of devised intermediate categories such as unlawful and unprivileged combatants.<sup>122</sup> In terms of its view of the category of PoWs, by placing momentum on an expansive understanding of 'combatants' the AP I puts 'regular armed forces of states and the more loosely organized guerrilla or militia armed groups'<sup>123</sup> on an equal footing in terms of their entitlement to the protection of the PoWs.

The AP I adopts the same inclusive view as the scope and meaning of the category of 'civilians'. First of all, the AP I defined the civilian population in negative terms, which implied that anyone who does not meet the required qualifications for being a combatant must be treated as a non-combatant, and therefore is a civilian. The AP I did not stipulate that civilians who directly take part in hostilities lose their civilian *status*. However, it did mention that the immunity of hostile civilians from being targeted is suspended 'for such time as they take part in hostilities'.<sup>124</sup> Nevertheless, since the hostile civilians<sup>125</sup> still maintain their position as

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<sup>120</sup> J. S. Pictet (ed), *ICRC Commentary on Geneva Conventions* Vol. IV (Geneva: International Committee of the Red Cross, 1960), at 51.

<sup>121</sup> See, C. H. B. Garraway, 'Combatants – Substance or Semantics?' in M. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Faultiness, Essays in Honour of Yoram Dinstein* (Leiden, MNP, 2007), at 326–327.

<sup>122</sup> Article 44, above note 103.

<sup>123</sup> R. Murphy, 'Prisoner of War Status and the Question of the Guantanamo Bay Detainees' (2003) 3 *Human Rights Law Review* 257, at 269.

<sup>124</sup> Article 51(3), above note 103.

<sup>125</sup> Once again, hostile civilians are those who directly take part in hostilities without being entitled to do so.

'protected persons' within the meaning of GC IV, upon capture their internment must be governed by the standards of GC IV.

Also, Article 75 sets out a number of standards which directly or indirectly relate to the practice of internment, such as the general prohibition of torture, or that detainees must *promptly* be informed of the cause of their internment. Article 75 in its totality runs counter to the claim that those misguidedly characterised as 'unlawful' or 'unprivileged combatants' have by their conduct placed themselves outside the protective domain of international law in general and the laws of armed conflict in particular.<sup>126</sup>

It must be noted that the authoritative bodies of international law have also made it clear that there cannot be a third alternative *status* to those of PoWs and civilians.<sup>127</sup> In making this argument, the ICTY cited the ICRC Commentary on GC IV,<sup>128</sup> and once again noted that the humanitarian component of the laws of armed conflict must preclude the exclusion of any persons from falling outside its protection by way of designing a separate category other than PoWs and civilians.<sup>129</sup>

## **7. Standards governing the internment of civilians (internment in territory of party to conflict)**

The first question regarding the governing paradigms of internment in international armed conflicts is, under what conditions is the internment of civilians permissible? In answering this question, it is necessary to turn to the wording of Articles 42 and 78 of GC IV. Article 42 relates to the detention of civilians in the territory of a party to the conflict. The first paragraph of this article stipulates that:

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<sup>126</sup> For a general analysis of Article 75, see, W. H. Taft IV, 'The Law of Armed Conflict After 9/11: Some Salient Features' (2003) 28 *Yale Journal of International Law* 319, at 321–322.

<sup>127</sup> *Prosecutor v. Delalic et al*, IT-96-21-T, Decision, 1 July 1998, para 271.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

[t]he internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

The important phrase here is 'absolutely necessary', which implies that the recourse to internment must be reserved as a measure of last resort, or, as Goodman has argued, 'compels the detaining power not only to establish that a given civilian poses a threat to its security, but also to ascertain that detention is the only means available [...] to defend [the detaining power] against the threat posed by the conduct'.<sup>130</sup> It is crucial to note that GC IV places the civilians' conduct as the only prerequisite for the practice of internment, and unlike some of the views at the time of its adoption, it did not consider the national origin of civilians in the territory of a party to the conflict as enemy aliens as plausible grounds for subjecting them to internment.<sup>131</sup> It seems that the requirement of 'absolutely necessary', as built within Article 42 of GCIV, signifies a departure from the classic doctrine (pre-1949) which considered enemy civilians in the territory of a hostile party as ready targets of internment.

Another phrase of interest in the context of Article 42 is 'the security of the Detaining Power'. GC IV did not provide a definition for the term 'security'; nor did it specify authoritative examples through which the tenor of security could be specified.<sup>132</sup> However, a turn to other areas of laws of armed conflict can assist one in coming to grips with some criteria by which to intern civilians. It was mentioned above that civilians' direct participation in hostilities renders them a lawful object of armed attacks. It goes without saying that civilians taking direct part in hostilities can also be interned. In terms of internment, the same principle holds true for those engaged in the war efforts of enemy states, such as those working

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<sup>130</sup> Goodman, above note 114, at 55.

<sup>131</sup> See, Dormann, above note 110.

<sup>132</sup> ICRC Commentary, above note 120, at 51.

in munitions factories, and whose activities adversely affect the security of a warring state. Article 27 of GC IV supports the legality of the detainment of the civilians engaged in the war efforts in armed conflicts by stating that:

[t]he Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war.

One again, it is worth emphasising that the phrase 'as may be necessary as a result of the war' cannot be interpreted so loosely as to imply that alien enemies can be detained in their entirety, or be subjected to other restrictive measures, since their mere presence in the territory of a party to the conflict endangers the security of that state. Such a wholesale deprivation of liberty must be considered as an act of 'collective punishment', which qualifies as a 'grave breach of the laws of armed conflict'.<sup>133</sup>

Also, the ICRC Commentary mentions that membership in particular groups may be considered as a reliable criterion for the practice of internment, since:

[s]omeone may be detained because he is a member of a particular group, regardless of whether he undertakes specific hostile acts that threaten the security of the state.<sup>134</sup>

If membership in a 'group' is considered a plausible trigger for the practice of internment, a clear and narrow understanding of the term 'group' will be of the utmost importance. Membership in a group cannot mean belonging to a particular religious faith. In the same vein, membership in a particular political party (in situations of international armed conflict) cannot by itself result in the internment of civilians. This particularly holds

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<sup>133</sup> J. Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence' (2005) 87 *International Review of the Red Cross* 375, at 381.

<sup>134</sup> ICRC Commentary, above note 120, at 257.

true for states with a one-party political system, since such states usually have a compulsory membership requirement for benefiting from particular social advantages. For example, it is hard to make a case for arguing that membership in a non-military wing of the Baath party in Iraq during Saddam Hussein's reign was sufficient to subject an Iraqi civilian resident in the UK to internment in the course of the Gulf War or the Iraq invasion.

#### 7.1. *Internment in occupied territories*

Another point in which GC IV articulates when a practice of internment against civilians can be permissible is Article 78, which regulates the permissibility of internment in the context of occupation. The first paragraph of this article reads as follows:

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

The language of Article 78 is not exactly the same as Article 42: instead of saying that internment of civilians is permitted when 'absolutely necessary', Article 78 permits internment on the basis of 'imperative reasons of security', and stipulates that the practices of 'internment' and 'assigned residence' must be perceived as the furthest end of the freedom of occupying powers in taking safety measures against protected persons. This threshold for the permissibility of internment is stated by the ICRC Commentary to be higher than that established by Article 42.<sup>135</sup> Notwithstanding the establishment of a seemingly higher threshold for exercising internment,<sup>136</sup> Article 78 essentially suffers from a lack of greater determinacy with regard to the meaning of security, as did Article 42. It is not clear whether the term 'imperative' is intended to deliver the

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<sup>135</sup> ICRC Commentary, above note 126, at 367.

<sup>136</sup> See, for example, A. S. Deeks, 'Administrative Detention in Armed Conflict' (2009) 40 *Case Western Reserve Journal of International Law* 403.



same meaning as 'absolutely' as used in Article 42. One of the very few authorities that noticed this lack of clarity was the Israeli Supreme Court in the case of *Ben Zion v. IDF Commander of Judea and Samaria et al*, in which Justice Shamgar suggested that the adjective 'imperative' be interpreted in a synonymous manner to that of 'absolute' in Article 42:

There is no difference between 'absolute' and 'imperative' security necessity, both terms conveying the same essential meaning, namely granting the Military Commander discretion taking all legal measures he deems necessary for ensuring security and order in an occupied area for which he is responsible.<sup>137</sup>

In other words, and as some authors have argued, such qualifications as 'absolutely necessary' or 'imperative reasons of security' must be understood to have put in place a threshold for understanding 'military necessity' in a specific situation.<sup>138</sup> In this sense, the primary function of such thresholds as 'absolutely necessary' or 'imperative reasons of security' become that military necessity, when concerning the internment of civilians, must be understood and applied with greater care, and this is due to the emphatic nature of criteria such as 'absolutely' or 'imperative'.

## 7.2. *The indeterminacy of the laws of internment in the law of Geneva and its effects in practice*

GC IV does not specify a set of circumstances in which the practice of internment can be justified, and this gave rise to important challenges as to when and for what purposes internment can be justified. For example, it is not clear whether internment for the purpose of intelligence-gathering is a permissible practice under GC IV. On one hand, some authors have argued that internment for intelligence-gathering cannot find a place

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<sup>137</sup> *Ben Zion v. IDF Commander of Judea and Samaria et al*, HC. 369/79 cited in (1980) 10 *Israel Yearbook on Human Rights* 342, at 344.

<sup>138</sup> E. Debuf, *Captured in War: Lawful Internment in Armed Conflict* (Oxford: Hart Publishing, 2013) at 318.

within the scope of Articles 42 or 78.<sup>139</sup> On the other hand, it is not unreasonable to imagine that a practice of internment for the purpose of intelligence-gathering is not in compliance with the language of 'imperative reasons of security'. In this regard, adopting Pejic's article on the procedural protections attached to internment, the ICRC notes that:

Internment [...] for the sole purpose of intelligence gathering, without a person involved otherwise presenting a real threat to state security, cannot be justified.<sup>140</sup>

However, even if one accepts that internment for the sole purpose of intelligence-gathering cannot be justified, states can easily circumvent this obligation by attaching the rationale for a given exercise of internment to a general claim of investigation. It is not uncommon among states to justify internment for the purpose of investigation. For example, the Israeli Supreme Court in the case of *Marab et al* ruled that:

[d]etention for the purpose of investigation infringes the liberty of the detention. Occasionally, in order to prevent the disruption of investigatory proceedings or to ensure public peace and safety, such detention is unavoidable.<sup>141</sup>

In short, without a clear list of lawful grounds for internment, it would be extremely hard to ascertain the purpose underlying a practice of internment. States often assert a variety of vague and general purposes for exercise of internment, and they often hesitate to disclose the grounds of internment in a transparent and specific fashion. Furthermore, in so doing, they frequently invoke the very language of GC IV. A clear example of this approach to internment is the Israeli practice. A clear manifestation of this subjective understanding of the security concerns resulting in internment can be found in the relevant Israeli executive orders and

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<sup>139</sup> *Id* and also see, R. Goodman, 'Rationales for Detention: Security Threats and Intelligence Value' (2009) 85 *International Law Studies* 1.

<sup>140</sup> ICRC institutional guidelines: 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence', *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* 11, 30IC/07/8.4 (Oct. 2007).

<sup>141</sup> *Marab et al v IDF Commander in the West Bank et al*, HCH 3239/02.

legislations relating to the practice of internment in the Palestinian occupied territories. For example, Article 1 of Order Regarding Administrative Detention No. 1591 states:

Where the [military] commander of IDF forces [...] has reasonable cause to believe that reasons of security of the region or public security require that a particular person be detained, he may, by order under his hand, direct that such person be detained for a period not exceeding six months, stated in an order.<sup>142</sup>

Here, a short return to the history of detention without trial cannot be devoid of interest. As was explored in the first chapter of this thesis,<sup>143</sup> the language of having 'a reasonable cause to believe' on the part of the detaining powers predates the adoption of Geneva Conventions 1949, and was commonplace in British legislations regulating the detention powers. It was discussed there that this language was used to formalise and recognise the subjective decisions of the executive without a need to enlist particular grounds for detention on the part of the executive. Another effect of this language in the pre-Geneva Convention era was that it frustrated the judicial intervention, because the judicial authorities at home and in the colonies entertained themselves with the restraint that they could not assert what constituted 'reasonable cause' in the mind of the detaining power, unless the officials' good faith could be called into question.<sup>144</sup> The principal point here is that the broad and undefined security thresholds of GC IV unfortunately make possible very broad resorts to the powers of internment.

Even more interesting is that Article 3 of the Israeli order explicitly employs the language of Article 78 of GC IV by stating that:

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<sup>142</sup> Israel Defence Force, Order Regarding Administrative Detention (Temporary Order) (No. 1591), 5767 – 2007.

<sup>143</sup> Refer to chapter I, section 10.2.

<sup>144</sup> See, *R. (Zadig) v. Halliday*, [1917] A. C. 260 and *Liversidge v. Anderson* [AC] 1942; this is of course an impossible endeavour to be fulfilled by a detainee.

[a] military commander shall not exercise authority under this Order unless he believes that the action is necessary for imperative security reasons.

In practice, one can discern that the only entities relied upon in the said Israeli order are the good faith and conventional wisdom of the military commanders. The question is whether the good faith and subjective decision of a detaining power can be challenged by detainees on account of the procedural safeguards provided by GC IV. This is perhaps why the procedural safeguards of GC IV may provide a better guide on the issue of internment than the legal basis for internment, as articulated in GC IV.

### 7.3. *Case-by-case decision on internment*

Article 78(2) of GC IV explicitly recognises the importance of the procedures leading to a practice of internment. It provides:

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

These procedural safeguards available to individual detainees are meant to guarantee that the internment of each detainee is not part of a broader scheme targeting enemy civilians as a collective entity. Accordingly, the prohibition of the practice of internment as a collective measure or punishment can easily be extrapolated from Article 75(2)(d) of the AP I.<sup>145</sup>

The prohibition of mass internment of civilians has firmly been asserted by international and domestic judicial bodies. In the *Delalic case*, the ICTY ruled that:

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<sup>145</sup> Pejic, above note 133, at 382.

On the other hand, the mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living and is not, therefore, a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures, *the party must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.*<sup>146</sup>

The principal question is how the detaining power supports its claim of having good reason for detaining an individual. Of course, the simple answer is implicit in the passage cited above, by indicating that the detainee's internment is necessitated by his 'activities, knowledge or qualifications'. When seen in this frame, the question becomes: how is the authority tasked with reviewing internment to assign credibility to the claim of the executive? Is the reviewing authority to accept the subjective authority of the detaining power in ascertaining the 'good reason' supporting a practice of internment, or must this be done on the basis of credible evidence presented to the reviewing authority in an open manner? Despite the pressing importance of this question, the governing rules of the laws of armed conflicts are silent on the issue. However, one can take two significant points as to the review mechanism of the practice of internment to extrapolate how a body charged with reviewing internment is to go about assigning plausibility to the claims of the detaining power. First of all, there is great emphasis on the necessity of reviewing internment orders in the laws of armed conflict (*infra*).<sup>147</sup> This emphasis would practically be absurd if the reviewing body were to defer to the subjective authority of the detaining power in its claims as to the security posed by a detainee. Secondly, there is great emphasis on the objectivity of the review mechanism of internment (*infra*).<sup>148</sup> Objectivity must always be viewed as a test purporting to strike a balance between the standard of

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<sup>146</sup> *Delalic et al*, above note 127, para 577.

<sup>147</sup> Section 7.4.

<sup>148</sup> *Ibid*.

lawfulness and the subjective discretion of authorities in detaining civilians. A deferential view to the subjective authority of an internment power would not take into consideration an internment decision on the merits of law. Therefore, a review embraced by deference to the decisions of authority falls a long way short of objectivity. Once again, the decisions of the British judiciary described in the historical chapters of this thesis form a classic example of internment reviews of the kind untouched by objectivity.<sup>149</sup> The following section provides some further details as to the different features which must govern the issue of reviewing internment orders.

#### 7.4. *Review mechanism for internment*

Articles 43 and 78 put in place an obligation for the detaining power to review the internment of civilians. The importance of having a review mechanism for internment is such that the ICTY noted that the lack of a review mechanism invalidates the legality of an initially lawful internment *ab initio*.<sup>150</sup> This confirms the view of the law of Geneva as to the fact that no internment order can possibly remain unreviewable, even though GC IV did not specify what shape this review must take. This non-specification of the necessity of *judicial* review as the primary and favoured mechanism of review seems to be a compromise made on the part of GC IV to reconcile the necessity of having at least a review mechanism and the exclusive powers of sovereignty.<sup>151</sup> We will consider the effects of this compromise shortly in the analysis that follows. However, in short, this compromise, even with its potential shortcomings at the time, seemed like a victory. This is especially true when one considers the suggestions of the representative of the UK government at the Diplomatic Conference to

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<sup>149</sup> See, C. P. Cotter, 'Emergency Detention in Wartime: British Experience' (1953–1954) 6 *Stanford Law Review* 238.

<sup>150</sup> *Delalic*, above note 127, para 578–582.

<sup>151</sup> ICRC Commentary, above note 120, at 260.

champion a case for the absolute prerogative of the UK sovereign in dealing with internment issues, and to maintain an advisory character for the tribunals reviewing internment decisions of the UK sovereign.<sup>152</sup>

GC IV gives a degree of freedom to choose the channels through which a state's obligation to review the internment of civilians may flow. Nevertheless, it is documented in the ICRC Commentary that:

[t]he Article lays down that where the decision is an administrative one, it must be made not by one official but by an administrative board offering the necessary guarantees of independence and impartiality.<sup>153</sup>

Impartiality implies independence of the supervisory body from the detaining power. At the same time, it seems that objectivity can *potentially* be taken as synonymous to what in the context of the human rights standards governing review of internment is referred to as 'meaningful review'.<sup>154</sup> One of the most important components of objectivity is adherence to the question of whether grounds justifying internment are complicit to the threshold of 'absolutely necessity'. For example, Hampson examined British practice during the Gulf War, when some Iraqi citizens residing in the UK were detained. Britain devised an administrative body characterised as the 'three wise men' panel. This panel was tasked with examining whether the internment of the Iraqi civilians was 'conducive to the public good in the interests of national security'. As Hampson notes, '[t]hat would appear to be less strict than absolutely necessary'.<sup>155</sup> Finally, an objective review cannot merely possess an advisory function. Such review must bind the interning authority to a particular course of action.

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<sup>152</sup> Above note 107, at 660.

<sup>153</sup> ICRC Commentary, above note 120.

<sup>154</sup> See, for example, M. Hakimi, 'International Standards for Detaining Terrorism Suspects: Moving beyond the Armed Conflict-Criminal Divide' (2008) 33 *Yale Journal of International Law* 369, at 403-406.

<sup>155</sup> Hampson, above note 102, at 514.

7.5. *Can martial courts/military commissions be used to review internment orders?*

It seems that there is no explicit prohibition of the use of martial courts or military tribunals/military commissions for adjudication on the internment of civilians. The topic of martial courts necessitates a return to the regulatory mechanisms underlining the practice of detention without trial. It was seen in chapter I that the use of martial courts must not be viewed beyond the essential components of practising martial law in a given area.<sup>156</sup> Even though there existed a great deal of confusion about the practice of martial law in Britain in the nineteenth and early twentieth centuries, the conventional understanding of this subject in Britain defined at least one threshold – the closure of ordinary courts. Unfortunately, the American executive in the nineteenth century consecutively misinterpreted the meaning of martial law and the function of martial courts,<sup>157</sup> as did the British colonial authorities (as argued in the first chapter) in the late nineteenth and early twentieth centuries.<sup>158</sup> However, these maligned resorts of martial law have not changed the contemporary understanding of this concept. Therefore, even today, the twenty-first-century scholars of the laws of armed conflict have argued that:

[m]ilitary trials might be permitted only when civilian courts are closed or unavailable – in circumstances such as occupation or martial law – so that resort to the military system is essentially unavoidable.<sup>159</sup>

If a resort is made to martial courts, structure and judges sitting in this court must be designed and appointed in a way such that the independence of the martial court can be ensured, even though such proposition may seem an unlikely alternative to many because of the poor

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<sup>156</sup> Refer to chapter I, section 9.

<sup>157</sup> See, M. E. Neely, *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (Oxford: OUP, 1991) at 35–36.

<sup>158</sup> Refer to chapter I, section 9.1.

<sup>159</sup> Goodman, above note 114, at 59.



records of martial law in the past. In this regard, the UN Human Rights Committee has on more than one occasion asserted that military tribunals must be treated as a suspect category of bodies with a judicial function, whose use could only be reserved for extremely occasional circumstances.<sup>160</sup> The Inter-American Court of Human Rights has gone a step further and argued that producing civilians before military tribunals violates the human rights principles of the American Convention, in particular Article 27.<sup>161</sup> Finally, the International Commission of Jurists in very concrete terms drew on the incompatibility of martial courts and the standards of judicial review and fair trial stemming from international human rights.<sup>162</sup>

#### 7.6. *Article 5 and the derogation scheme of GC IV*

At the time of its adoption, Article 5 of GC IV seemed to be the only solution for bringing two different schools of thought at the Diplomatic Conference of 1949 to a compromise.<sup>163</sup> The solution built into of Article 5 consisted of keeping the choice of *status* as a binary between PoWs and civilians, whilst providing the parties to the Convention with the freedom to derogate from some provisions of GC IV. The first two paragraphs of Article 5 are as follows:

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

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<sup>160</sup> UN Human Rights Committee (HRC), *General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, CCPR/C/GC/32, para 22, See also, J. Paust, 'Antiterrorism Military Commissions: Courting Illegality' (2001–2002) 23 *Michigan Journal of International Law* 1.

<sup>161</sup> *Castillo Petruzzi*, Merits, Judgement, Inter-Am, CT. H.R., Ser. C. No. 52 (May 30, 1999).

<sup>162</sup> International Commission of Jurists, *Assessing Damage, Urging Action*, Report of Eminent Jurist Panel) on Terrorism, Counter Terrorism and Human Rights, at 59.

<sup>163</sup> See, Dormann, above note 110.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

Right from the beginning of the first paragraph, one can discern the impact of the Anglo-Saxon language pertinent to the matter of internment, and this becomes crystal clear with the phrase 'is satisfied'. As demonstrated earlier in this thesis, the British authorities extensively used this phrase in order to emphasise the subjective authority of the executive when it resorts to detention. For example, recall regulation 18b of the Emergency Defence Act 1939, which conditioned the practice of internment to the subjective satisfaction of the Secretary of State.<sup>164</sup> This language inevitably tips the balance in favour of the subjective determinations of the detaining power.<sup>165</sup> Suppose that instead of the phrase 'is satisfied', the drafters of GC IV employed the phrase 'is able to indicate' or a different conditioning phrase with a similar meaning. In that case, the detaining power would be more compelled to support his subjective determination with some criteria enabling it to indicate the security threat posed by a given detainee. Interestingly, the impact made by Britain and the US in the wording of this article has also been noted by the ICRC Commentary.<sup>166</sup>

In a similar manner to Articles 42, 43 and 78, Article 5 approves the practice of internment under a definite suspicion and only 'where the absolute military security so requires'. However, it also stipulates that civilians who fail to observe their obligations under the law of Geneva have forfeited some of their rights and privileges under GC IV. The scope of

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<sup>164</sup> Refer to chapter I, section 10.2.

<sup>165</sup> Ibid.

<sup>166</sup> More importantly is the fact that this is mentioned explicitly in the article itself. ICRC Commentary, above note 120, at 52.

rights suspended under Article 5 cannot go beyond those rights of detainees, which relate to matters of communication. As mentioned in the ICRC Commentary:

[t]he rights referred to are not very extensive in the case of protected persons under detention; they consist essentially of the right to correspond, the right to receive individual or collective relief, the right to spiritual assistance from ministers of their faith, the right to receive visits from representatives of the Protecting Power and the International Committee of the Red Cross.<sup>167</sup>

In fact, Article 5 upholds the essential obligations of states towards detainees, in particular, the obligation of reviewing internment orders. As a result, no legal loopholes remain as to the essentials of protecting detainees.

The threshold of definite suspicion is also of great importance in considering the requirements of Article 5.<sup>168</sup> This threshold seeks to ensure that an invocation of Article 5 for the practice of internment must be based on the premise that criminal proceedings will follow for hostile civilians.<sup>169</sup> Therefore, the necessity of putting a criminal procedure in place ensures that detainees interned under the authority of Article 5 are not placed at the mercy of the interning power. This obligation signifies one of the major differences of the law of Geneva from its preceding law

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<sup>167</sup> Ibid., at 56.

<sup>168</sup> ICRC Commentary, above note 120, at 58.

<sup>169</sup> This reading is also consistent with the initial draft proposals for Article 5. The first draft of Article 5, which, according to the initial order of drafting was Article 3A, put emphasis on actual proof and presumptive evidence, which may result in criminal charges. 'Where in the territory of a Party to the conflict, there is actual proof or serious presumptive evidence that a given person, protected under the present Convention, is engaged in activities hostile to the security of the State, such person shall not be entitled to claim such rights and privileges under this Convention as would, if exercised in the favour of such person, be prejudicial to the security of such State.'

Where, in occupied territory, an individual protected person is detained on a charge, based on actual proof or serious presumptive evidence, of espionage, sabotage or activity aimed at endangering the security of the Occupying Power, such person may, in those cases where absolute military so requires, be deprived of the rights of communication under this Convention; the notification prescribed in Article 123, second paragraph, and its transmission as provided for in Article 123A may not be delayed beyond a reasonable period.

Such persons shall nevertheless be treated with humanity and in case of trial shall not be deprived of the rights of fair and regular trial prescribed by this Convention. They shall also be granted the full rights and privileges of a protected person under this Convention at the earliest date consistent with the security of the State or Occupying Power.' *Final Record of the Diplomatic Conference of Geneva of 1949* Vol. III, at 102–103.

originating from the Lieber Code. The Lieber Code would accredit the sovereign with absolute latitude in dealing with wrongdoers in times of war; however, Article 5 of GC IV remains mindful of the rule of law, whilst conceding marginal derogations 'to state expediency'.<sup>170</sup>

### **8. The interaction between human rights and laws of armed conflict on the subject of internment: the move towards humanitarianism in the laws of armed conflicts**

Both protocols either implicitly or explicitly embraced the standards of the human rights law regime as a complementary set of rules to the laws of armed conflict. Articles 72 and 75 implicitly recognise the need to refer to other applicable rules of international law in the view of their respective subject matters. More explicit acknowledgement of the operation of applicable human rights norms can be found in the Second Additional Protocol<sup>171</sup> (AP II), where the preamble to the AP II recalls the basic protection offered by the 'international instruments relating to human rights' to all individuals in general, and to the victims of internal armed conflicts in particular.

More recently, extensive use of human rights law in the context of armed conflicts has been made by the international tribunals. The classic examples of making allusions to human rights by an international tribunal are the ICJ's two advisory opinions on the cases of *Nuclear Weapons* and the *Israeli Security Wall*.<sup>172</sup> In the former, the ICJ put emphasis on the continued application of human rights law in times of armed conflict, but it

<sup>170</sup> ICRC Commentary, above note 120, at 58.

<sup>171</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

<sup>172</sup> *Advisory Opinion on the Legality of the Threat or the Use of Nuclear Weapons*, [1996] ICJ Rep. 226, ICJ *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004.

also noted the possibility of norm conflict between IHL and IHRL. To resolve this conflict, the ICJ suggested the doctrine of *lex specialis*, to which we shall return shortly hereinafter. In the same mode, the ICJ supported the application of human rights in times of occupation but in the latter case, and once again put forward *lex specialis* as a solution to the problems arising from the cumulative application of human rights law and laws of armed conflict.

The standards regulating the practice of internment under IHL and IHRL bear notable similarities and differences. Neither human rights law nor the laws of armed conflict prohibit the practice of internment *per se*. Both regimes place necessity as the ultimate generator of internment, and, more importantly, they impose a set of substantive and procedural limits on the power of states to intern.<sup>173</sup> However, at the same time, the differences between the two systems remain significant. Unlike human rights treaties, the authoritative agreements in the laws of armed conflict have not employed a language of 'arbitrariness' to refer to internment. Furthermore, even though GC IV has put in place an obligation for review of internment orders, this, under the laws of armed conflict, does not necessarily have to be judicial. This is in contrast to some human rights treaties and bodies which have stressed that judicial review of internment orders must be considered as an inexplicable component of this practice.<sup>174</sup> The following section takes on these differences and evaluates the suggestions made to reconcile the differences of the legal regimes in question.

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<sup>173</sup> Hakimi, above note 154, at 390–394.

<sup>174</sup> Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) of the American Convention on Human Rights), Advisory Opinion OC-8/87, January 30, 1987, Inter-Am. Ct. H.R. (Ser. A) No. 8 (1987) and Human Rights Committee, General Comment 29, States of Emergency (article 4), CCPR/C/21/Rev.1/Add.11 (2001).

## 9. Test of arbitrariness and the question of *lex specialis*

Unlike human rights instruments, the 'Geneva law' does not touch upon the term 'arbitrary'. Nevertheless, this absence has not prevented the term 'arbitrary' from appearing in legal language associated with the laws of armed conflict.<sup>175</sup> In this view, an important question arises as to whether the term 'arbitrary' bears the same meaning in the laws of armed conflicts as in human rights law. This question in a different context (the right to life) came to the attention of ICJ in the *Nuclear Weapons* case, in which the Court ruled that:

[i]n principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.<sup>176</sup>

The only way to understand the meaning of 'arbitrariness' is to measure a given practice of internment against the substantive and procedural safeguards provided by the laws of armed conflict. However, even having recourse to IHL for understanding the meaning of arbitrariness cannot entirely resolve the problem. First of all, if we base our understanding of arbitrary internment in the context of human rights law on Article 9 of the ICCPR, the Human Rights Committee has stated that the right to 'judicial review of internment' *bit* of Article 9 represents a non-derogable obligation of states.<sup>177</sup> In such situations, the determination of which legal prescriptions are *lex specialis* becomes very difficult, if not impossible. One possible solution is to break a general situation into its underscoring sub-pieces in order to shed light on the legal context for the purposes of

<sup>175</sup> *Customary International Humanitarian Law* Vol. I, at 108, 118, 305, 336, 340, and 344.

<sup>176</sup> *Advisory Opinion*, above note 172, para 25.

<sup>177</sup> S. Joseph *et al*, *The International Covenant on Civil and Political Rights: Cases and Materials and Commentary* (Oxford: OUP, 2004) at 809-810.

applying *lex specialis*.<sup>178</sup> Based on this assumption, let us provide an imaginary scenario. Suppose Australia enters into an international armed conflict against New Zealand. Both states are obligated under Article 9 of the ICCPR to refrain from practising arbitrary arrest or detention. Meanwhile, Australia exploits the derogation scheme of Article 4 of the ICCPR and derogates from Article 9. Additionally, by a plea of military necessity and in compliance with Article 42 of GC IV, Australia interns a large number of New Zealand civilians in Australia, and creates review boards in order to have their internment examined. At the same time, some civilian detainees invoke their non-derogable right of judicial review and apply for the writ of habeas corpus. Can Australia deny issuance of the writ of habeas corpus to the detainees by having recourse to *lex specialis* and honour its obligations under the GC IV? If so, what happens to Australia's non-derogable obligation of judicial review under the ICCPR segment of human rights law? In this light, it seems that a solution to the conflict of norms can hardly go beyond four suggestions:

### **1) IHL rules on internment displace those of human rights**

The most readily available solution is to argue that the laws of armed conflict on internment are *lex specialis* to human rights on the matter of internment. The predictable outcome of this solution is the displacement of certain obligations of states, which are considered non-derogable or inalienable human rights of individuals. A clear example of this approach was set by the US practice of internment in Guantanamo, in which one of the baselines of the US government in denying the right of judicial review to detainees was the *lex specialis* argument.<sup>179</sup> Of course, the continuous

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<sup>178</sup> M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford: OUP, 2011) at 233.

<sup>179</sup> See, the US Government's response to the precautionary measures suggested by the Inter-American Commission on Human Rights, 12 April 2002 available at: [www.ccr-ny.org/v2/legal/september\\_11th/docs/4-15-02GovernmentResponse.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/4-15-02GovernmentResponse.pdf).

outcry of international community<sup>180</sup> against the US government's line of argument on *lex specialis* leaves little room for assigning credibility to this solution. This outcry manifested itself in the report of the UN Group on the situation of detainees at Guantanamo, when it stated that:

[t]he *lex specialis* authorizing detention without respect for the guarantees set forth in article 9 of ICCPR therefore can no longer serve as basis for that detention.<sup>181</sup>

## **2) A combined understanding of IHL and IHRL on the matter of internment**

The second suggestion for reconciling the human rights standards and the laws of armed conflict on detention without trial is to argue that our understanding of arbitrariness in internment practices during international armed conflicts must be predicated upon a combination of some parts of Article 9 of the ICCPR and the relevant parts of GC IV. This suggestion has appealed to some scholars, and the result has been a general emphasis on the complementary nature of the human rights law regime to the laws of armed conflict.<sup>182</sup> However, what really matters is not a generalised characterisation of the interaction between IHRL and IHL, but rather, the modes in which particular conflicting norms supplement or supersede each other. To resolve this problem in a cumulative contribution of IHRL and IHL in understanding the meaning of arbitrariness in international armed conflict, it can only be said that whilst the guarantees of GC IV do not totally displace those of the ICCPR, the only acceptable form of review of internment must be judicial review.

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<sup>180</sup> N. Rodley, 'Detention as a Response to Terrorism' in A. M. S. De Frias *et al* (eds), *Counter-Terrorism: International Law and Practice* (Oxford: OUP, 2012) at 461.

<sup>181</sup> Commission on Human Rights, *Situation of Detainees at Guantanamo Bay*, (sixty-second session) E/CN.4/2006/120, at 14, See also, UN Human Rights Committee, 'CCPR General Comment No. 31: The Nature of General Legal Obligations Imposed on State Parties to the Covenant' CCPR/C/21/Rev.1.

<sup>182</sup> See, V. Gowlland-Debbas and G. Gaggioli, 'The Relationship between International Human Rights and Humanitarian Law: An Overview' in R. Kolb and G. Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law* (Northampton: Edward Elgar Publishing, 2013) at 85.



### **3) Looking at other means for resolving norm conflicts in international law**

The third way of resolving the conflict of norms between IHL and IHRL looks at the general strategies other than *lex specialis* developed by international law to resolve the problematique of conflicting norms existing in its different sub-branches. Milanovic counts four methods of resolving norm conflicts in international law: '1) *jus cogens*; 2) Article 103 of the UN Charter; 3) conflict clauses in treaties; and 4) *lex posterior*.'<sup>183</sup> All of these methods aim to provide one norm with priority over another.

As regards *jus cogens*, we noted in chapter III that there have been some suggestions on the part of the Human Rights Committee and some scholars to the effect of viewing the obligation of judicial review as a *jus cogens* norm of international law.<sup>184</sup> The previous chapter discerned that these suggestions cannot but be considered as misguided, especially when one considers the relevant rules of treaty interpretation. These rules dictate that when a treaty-driven rule is in contrast to a *jus cogens* norm of international law, that particular rule, as well as the treaty giving birth to it, must be considered void.<sup>185</sup> This implies that if we take seriously the proposal that the obligation of judicial review has represented a peremptory norm of international law, GC IV loses its applicability not only with regard to Article 42, but in its entirety. Therefore, among the methods mentioned above, the only one which could hold some currency as regards the relationship between the standards of IHRL and IHL on internment, is Article 103 of the UN Charter, according to which:

[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international

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<sup>183</sup> Milanovic, above note 178, at 237.

<sup>184</sup> Refer to chapter III, section 12.1.

<sup>185</sup> Article 53, Vienna Convention on the Law of Treaties 23 May 1969, United Nations, Treaty Series, vol. 1155.

agreement, their obligations under the present Charter shall prevail.<sup>186</sup>

A practical example has been provided by the SC Resolution 1546, by which even in the aftermath of the termination of the Coalition occupation of Iraq, the coalition forces were authorised to practise internment.<sup>187</sup> This authorisation was treated by the House of Lords, in the words of Baroness Hale, as a *qualifier* to the human rights obligations of the UK under Article 5.<sup>188</sup> Needless to say, in a different scenario such resolutions are perfectly able to give priority to IHRL obligations over those of IHL. A vital point to note here is that the issuance of a SC resolution on a particular issue cannot be interpreted to mean a total displacement of the relevant rules of bodies such as IHL or IHRL. In his reasoning on the case of *Al-Jedda*, Lord Bingham referred to this aspect of SC resolutions:

There is in my opinion only one way in which they can be reconciled: by ruling that the UK may lawfully, where it is necessary for imperative reasons of security, exercise the power to detain authorised by SCR 1546 and successive resolutions, but must ensure that the detainee's rights under article 5 are not infringed to any greater extent than is inherent in such detention.<sup>189</sup>

Therefore, the question is whether a resolution such as SC 1546 'displaces' or 'qualifies' the detaining powers' obligations under international human rights law. Lord Bingham's statement, as mentioned above, as well as implicit statements made by other judges in the case of *Al-Jedda* (notably Baroness Hale), lean towards the qualification of the relevant human rights obligations and not their entire displacement. This view also found support in the judgment of the European Court of Human Rights on the appeal of *Al-Jedda* against some particular aspects of the House of Lords'

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<sup>186</sup> Article 103, Charter of the United Nations 1945 1 UNTS XVI.

<sup>187</sup> UN Security Council, Security Council resolution 1546 (2004) [on formation of a sovereign Interim Government of Iraq], 8 June 2004, S/RES/1546 (2004).

<sup>188</sup> *R (on the application of Al-Jedda) (FC) v. Secretary of State for Defence* 2007 58, para 126.

<sup>189</sup> *Ibid.*, at para 39.

decision.<sup>190</sup> The Strasbourg Court stated that the SC resolution 1546 did not create an obligation for the forces in Iraq to intern suspects without charge, which in turn means no displacement of human rights obligations. On this note, the conclusion drawn by the European Court was that in the absence of a pre-existing derogation, 'the applicant's detention constituted a violation of Article 5(1)'.<sup>191</sup> However, it seems that this conclusion as well as the reasoning behind it cannot but be problematic. That is to say, linking the issue of obligation to the violation of Article 5(1) does not seem reasonable. A state can be authorized to intern individuals and yet, be under no obligation to do so. The question of authorization must distinctively be differentiated from obligation. It seems that the pressing problem with the long internment of Al-Jedda was not whether the detaining power could intern him or not, but that in the view of a pre-existing authorization, what particular safeguards should have been applied to his internment. However, this important question was ignored both by the House of Lords and the Strasbourg Court. In this regard, Messineo writes,

nothing was said of the rest of Article 5. And there is no sufficient information available to evaluate whether his internment violated any other part of Article 5 or other applicable rules of international human rights or humanitarian law. For example, was he promptly informed of the reasons for his internment, as both human rights and humanitarian law provide? Was he allowed a due process of law established by the MNF-I in accordance with Article 78 GC-IV?<sup>192</sup>

On this note, it is preferable for a SC resolution to state not only an existing authority for the practice of internment, but also a set of vital safeguards adhering to a practice of internment. Otherwise, such resolution may carry a danger of being interpreted by states as being so

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<sup>190</sup> *Al-Jedda v. The United Kingdom* (Application no. 27021/08).

<sup>191</sup> *Ibid.*, para 110.

<sup>192</sup> F. Messineo, 'The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to Un-Authorized Forces and the Power of the Security Council to Displace Human Rights' (2009) 56 *Netherlands International Law Review* 35, at 52

broad as to give them licence to practise the most 'odious' forms of internment.<sup>193</sup>

#### **4) Using other creative legal solutions to resolve the problem of norm conflicts**

There seems to emerge an increasing awareness that the *lex specialis* principle does not necessarily guide us towards a more coherent, consistent and constructive solution in many situations.<sup>194</sup> On the specific topic of how to regulate internment, a limited number of proposals have been made by some scholars to discover a unified approach to internment. Some of these proposals swing between political and legal solutions, and have been enshrined against the background of the US detention policy in the 'war on terror'. Also, it must be noted that these proposals have not necessarily been formulated as a direct response to the problem of norm conflict, but they carry the potential to be used in that context as well. For example, Wittes has argued that importing due process from other areas of law (by which he supposedly means human rights or criminal law) serves as an incentive for governments to head towards an increased targeted killing policy.<sup>195</sup> His proposed solution is to rely on the paradigms of military detention, in which 'due process [...] is somewhere between rudimentary and non-existent precisely to ensure that detention is easy'.<sup>196</sup> The truth of the matter is, that it is very hard to assess proposals like the one made by Wittes on their legal merits. One can make a case for their political expediency or otherwise, but insofar as the legal obligations of states are concerned, the utility of such proposals does not count for much.

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<sup>193</sup> Ibid.

<sup>194</sup> L. Doswald-Beck, 'Background Paper: Proceedings of the Expert Meeting on the Supervision of the Lawfulness of Detention during Armed Conflict' (July 2004).

<sup>195</sup> See, B. Wittes, *Detention and Denial: the Case for Candor after Guantanamo* (Washington, Brookings Institution Press, 2010).

<sup>196</sup> Ibid., at 26.

A more serious suggestion has been made by Hakimi. She identifies some of the difficulties in the relationship between IHL and IHRL on the questions of internment and targeting as inherent within 'the domain method' used by states to discern the applicability of different domains such as IHL and IHRL.<sup>197</sup> The domain method, Hakimi explains, is the result of the compartmentalisation of international law, and different domains were originally devised to govern different contexts such as peace or armed conflict.<sup>198</sup> Hakimi argues that the domain method is likely to confuse decision-makers on internment issues, as it hardly provides a unified set of principles. Against this background, Hakimi refers to three maxims that she labels as 'liberty-security, mitigation and mistake',<sup>199</sup> which can potentially resolve the shortcomings of the domain method on internment issues. The liberty-security principle is very similar to what in the literature on counter-terrorism is generally characterised as the balance metaphor.<sup>200</sup> It dictates that in every operation of internment, the costs for security and liberty must carefully be examined. If the freedom of a suspect endangers security such that the liberty costs can be outweighed, only then can internment be authorised. The mitigation principle looks at other less restrictive means of intrusion into individuals' rights, and discerns if their availability overrules the practice of internment. Finally, the mistake principle posits that 'states must exercise due diligence to avoid mistakes and establish a reasonable and honest belief that their conduct is lawful'.<sup>201</sup>

A number of observations can be made on the three maxims mentioned above. In the first place (and this is not meant to represent a counter-

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<sup>197</sup> M. Hakimi, 'A Functional Approach to Targeting and Detention' (2011–2012) 110 *Michigan Law Review* 1365, at 1367.

<sup>198</sup> *Ibid.*, at 1373.

<sup>199</sup> Hakimi, above note 154, at 391.

<sup>200</sup> For a comprehensive survey on the balance metaphor, see, D. Moeckli, *Human Rights and Non-discrimination in the 'War on Terror'* (Oxford: OUP, 2008).

<sup>201</sup> Hakimi, above note 197, at 1396–1397.

argument to the principles mentioned by Hakimi), the dominant legal frameworks in the domain-method already accommodate these maxims in a very explicit manner. For example, the test of 'absolutely necessary' in GC IV by default dictates that internment must as such be a measure of last resort. This automatically reinforces a liberty versus security calculation and entails a mitigation principle as well. More importantly, the three maxims may resolve the problems of the domain method at best in terms of guiding states to understand *when* to practise internment, but they do very little to help them identify *how* to practise it. The fragmentation of international law on the issue of internment, or, in Hakimi's words, the domain method, at least in international armed conflicts creates no difficulty or confusion with regard to the question of *when* to practise internment. This fragmentation, however, becomes troublesome when one is to assess what substantive and procedural guarantees apply once internment is practised.

Suppose that we were to implement the three maxims to the question of whether an internee must become entitled to judicial review. Is it accurate to say that in a given situation, the liberty-security principle dictates that the judicial review of an internment has a higher cost to security than to liberty, thereby denying the issuance of habeas corpus or any other instrument of judicial review to a detainee? Can this argument be accepted as legally sound in the face of a pre-existing obligation of judicial review? Is this argument not already being exploited by the US in several different stages regarding the judicial review of detainees at Guantanamo Bay? Furthermore, which state institutions can be entrusted with the task of making such assessments as liberty-security, mitigation or mistake in the scenario mentioned above? The example of judicial review shows that

at least with regard to some of the safeguards attached to internment, we must inevitably go back to the domain method.

Since one of the cornerstones of this thesis has been the historical analysis of internment, it is of some interest to make allusions to the history of states' reaction to fragmented laws. In the chapter on the internment of aliens, it was mentioned that different bodies and schools of international law had subscribed to very different ideas as to whether aliens could be interned without due process and only on the basis of sovereign powers. The reaction of (most) states to increasingly differing schools was simple – rudimentary references to selective quotations from some authorities in international law and reinterpretation of the question in a manner to tip the balance towards exclusive sovereign powers.<sup>202</sup> In other words, one of the lessons of the history of internment is that when states are exposed to conflicting obligations originating from the varying regimes or bodies of international law, they take the question at their own discretion and opt for a solution which would fit their own interests. Unsurprisingly, such a technique does not remain bound in the history of internment. The US experience in the 'war on terror' is another clear testimony to the classic response of some states to the existing indeterminacies arising from such problems as norm conflict and fragmentation.<sup>203</sup>

## **10. Internment in internal armed conflicts: the silence of Common Article 3 and the AP II on internment**

Common Article 3 stipulates that some minimum humanitarian prescriptions and proscriptions must be extended to conflicts of non-international character, which had previously been viewed as an exclusive

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<sup>202</sup> Refer to chapter II, section 4.

<sup>203</sup> In the next chapter, we will thoroughly examine some of the techniques used by states to question the validity of the explicit obligations arising from the international letter of law governing internment.

internal matter for states. Such qualifications of Common Article 3 has, in the words of the ICJ, rendered this article a living articulation of 'the elementary considerations of humanity', serving as 'a minimum yardstick'<sup>204</sup> for the laws of armed conflict. Also, as an important part of the humanitarian shift in the laws of armed conflict, commenced in the wake of the Tehran Conference in 1968, the AP II came into being in 1977 as the first and thus far only treaty focused on the laws of internal armed conflicts. However, it is common knowledge that neither Common Article 3 nor the AP II entails a comprehensive set of principles for regulating hostilities in internal armed conflicts. Obligations put forward in Common Article 3 lack specificity, and are couched in a very general language.<sup>205</sup> The AP II hardly signifies any more clarity.<sup>206</sup> Notably, both Common Article 3 and the AP II neglect the question of internment in internal armed conflicts. They do not touch upon an acceptable legal basis for internment of non-combatants in conflicts of non-international character.<sup>207</sup> What is more, the Rome Statute of the International Criminal Court does not even include the crime of unlawful confinement in its enlisted war crimes in the course of internal armed conflicts.<sup>208</sup> Of course, this absence of provisions on internment in internal armed conflicts cannot be interpreted as a prohibition of internment in internal armed conflicts. Therefore, an interpretative search for seeking a legal remedy to this absence becomes necessary.

#### 10.1. *Different interpretative methods in internal armed conflicts*

<sup>204</sup> *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. V. US) Merits, 1986 ICJ Rep. 14 (Judgement of 27 June), para 218.

<sup>205</sup> R. Mullerson, 'International Humanitarian Law in Internal Armed Conflicts' (1997) 2 *Journal of Armed Conflict Law* 109, at 113.

<sup>206</sup> D. Forsythe, 'The Legal Management of Internal War' (1978) 72 *American Journal of International Law* 272, at 286.

<sup>207</sup> The AP II comes close to the question of the permissibility of internment in Article 5, but even there, no explicit reference is made to the practice of internment. Rather, at best, a tacit approval of internment can be extrapolated.

<sup>208</sup> UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, Article 8.



Insofar as the interpretative methods for resolving this deficiency go, three immediate solutions stand out: 1) an expansive interpretation of Common Article 3 in light of customary humanitarian law and human rights law standards, 2) a direct import of customary humanitarian law, and 3) reliance on human rights standards.

As regards the first solution, a number of attempts have been made to stretch the scope of Common Article 3.<sup>209</sup> Of direct relevance in this regard are the broad requirements and prohibitions of Common Article 3, which make possible expansive interpretations of this provision. Two of these requirements and prohibitions are the requirement of humane treatment and the prohibition of cruel treatment. With regard to the particular case of internment and the prohibition of unlawful confinement by Common Article 3, the argument is that unlawful confinement is prohibited by customary humanitarian law. This must be used as a guide to interpret 'cruel treatment', in the sense that unlawful confinement constitutes one of the sub-pieces of cruel treatment.<sup>210</sup> The ultimate result of this line of reasoning is that 'unlawful confinement' must be considered cruel treatment, and therefore prohibited by Common Article 3. This approach, even though progressive and useful at times, signifies a laborious and exhaustive interpretative method, in that it necessitates a constant return to customary humanitarian law to guide the interpretation of Common Article 3. As Sivakumaran has pointed out, a direct import of customary humanitarian law is likely to create clearer results 'than to use such

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<sup>209</sup> C. Greenwood, 'International Humanitarian Law and the Tadić Case' (1996) 7 *European Journal of International Law* 265, at p. 268.

<sup>210</sup> J. Dingwall, 'Unlawful Confinement as a War Crime: The Jurisprudence of the Yugoslav Tribunal and the Common Core of International Humanitarian Law Applicable to Contemporary Armed Conflicts' (2004) 9 *Journal of Conflict and Security Law* 133, at 151.

standards as a guide in interpreting the requirements of Common Article 3'.<sup>211</sup>

During the last two decades, customary humanitarian law has been invested with an increasing importance as an alternative to compensate for the deficiency of the laws of internal armed conflict.<sup>212</sup> This emphasis on customary humanitarian law has been channelled through two particular developments in the laws of armed conflict: the jurisprudence of the ICTY and the ICRC study of customary international humanitarian law.<sup>213</sup> As for the ICTY, this tribunal on a number of occasions employed its best efforts to reduce the normative gap between the laws of international armed conflicts and internal armed conflicts by frequently resorting to customary humanitarian law.<sup>214</sup>

Another significant development in the field of customary humanitarian law occurred with the publication of the ICRC study of customary international humanitarian law, in which it was shown that the majority of the rules in international armed conflict apply to internal armed conflict in the form of customary humanitarian law.<sup>215</sup> For example, the Rule 128 (C) of the ICRC study states that:

Persons deprived of their liberty in relation to a non-international armed conflict must be released as soon as the reasons for the deprivation of their liberty cease to exist.<sup>216</sup>

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<sup>211</sup> S. Sivakumaran, 'Courts of Armed Opposition Groups: Fair Trials or Summary Justice' (2009) 7 *Journal of International Criminal Justice* 489, at 503.

<sup>212</sup> J. M. Haneckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflicts' (2005) 87 *International Review of the Red Cross* 175, at 178

<sup>213</sup> S. Sivakumaran, 'How to Improve upon the Faulty Legal Regime of Internal Armed Conflicts' in A. Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford: OUP, 2012) at 528.

<sup>214</sup> *Tadić* Interlocutory Decision (2 October 1995) para 119.

<sup>215</sup> See, D. Kritsiotis, 'Review of Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *International Committee of the Red Cross Study on Customary International Humanitarian Law* (Vol I: Rules, Vol. II: Practice)' (2005) 101 *American Journal of International Law* 692.

<sup>216</sup> ICRC, *International Committee of the Red Cross Study on Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005) at 451.

Nevertheless, none of these bodies of law draws on the customary humanitarian law to provide a legal basis for internment in the conflicts of non-international character. Nevertheless, understanding what the laws of internment could look like by importing the rules of internment in international armed conflicts as customary humanitarian law to shape a legal basis for internment in internal armed conflicts requires no excess of imagination. In fact, the Inter-American Commission hinted at this point in a non-international armed conflict context when it stated:

[i]nternational humanitarian law also prohibits the detention or internment of civilians except where necessary for imperative reasons of security.<sup>217</sup>

One may criticise this formulation of the Inter-American Commission, since the binary of combatants/prisoners of war and civilian/protected persons is non-existent in internal armed conflicts. Yet, the term 'civilians' in the passage mentioned above can easily be replaced by such terms as 'non-fighters', or simply 'persons', and still the test of 'imperative reasons of security' as a legal basis for internment will make sense in internal conflicts. However, it must be noted that once this test is imported in the realm of non-international armed conflicts, all of its associated features mentioned in the ICRC Commentary will follow.

The import of the standards governing internment from international armed conflicts into internal conflicts as customary humanitarian law cannot remain limited to the point of the legal basis for internment. Rather, such obligations as the review of internment orders, periodic reviews and other procedural protections must also be afforded to internees in internal armed conflicts.

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<sup>217</sup> Inter-American Commission on Human Rights, Third Special Report on the Human Rights Situation in Colombia (OEA/Ser.L/V/II.102, Doc. 9, rev. 1 999).

In view of the silence of the laws of internal armed conflicts on some crucial issues, some writers have argued that a reliance on human rights principles in internal armed conflicts is not only desirable but necessary.<sup>218</sup> Also, a turn to human rights for guidance in internal armed conflicts carries with it an additional advantage, which is that the application of human rights cannot be affected by intensity thresholds of the kind triggering the application of IHL. Therefore, human rights standards come to fill the normative gap arising from doubts on whether a given situation meets the thresholds for categorising a certain situation as an internal armed conflict.<sup>219</sup> Shifting to human rights instruments for exploring relevant standards of conduct in internal armed conflicts is welcomed by the AP II preamble.

Naturally, a direct application of human rights standards in internal armed conflicts cannot be accomplished without resolving some important challenges standing in its way. On this note, two pervasive challenges can be identified: 1) the application of human rights will inevitably bring us back to the conceptual and practical difficulties associated with the *lex specialis* principle, and 2) the human rights law regime has traditionally been considered as binding only with regard to states, not armed groups.<sup>220</sup> Due to the limited scope of this thesis, we must place our focus on the first barricade to the direct import of international human rights law in internal armed conflicts.

<sup>218</sup> See, W. Abresch, 'A Human Rights Law of Internal Armed Conflict: the European Court of Human Rights in Chechnya' (2005) 16 *European Journal of International Law* 741.

<sup>219</sup> See, L. Doswald-Beck and S. Vité, 'International Humanitarian Law and Human Rights Law' (1993) 293 *International Review of the Red Cross* 94.

<sup>220</sup> As was mentioned in the introduction of this chapter, scrutinising the mode in which the conduct of armed groups is regulated in internal armed conflicts goes beyond the scope of this thesis, as this research is focused on *states' authority*. On this subject, one can refer to a wealth of literature with very divergent views on the subject. The following books and articles can be of interest to those keen to explore this topic further: N. Rodley, 'Can Armed Opposition Groups Violate Human Rights?' in K. Mahoney and P. Mahoney (eds), *Human Rights in the Twenty-First Century: A Global Challenge* (Dordrecht, Martinus Nijhoff Publishers, 1993), L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge: CUP, 2002), A. Clapham, *Human Rights Obligation of Non-State Actors* (Oxford, OUP, 2006), and S. Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: OUP, 2012).

### 10.2. *Lex specialis in internal armed conflicts*

It was argued in the last section that the conventional law of internal armed conflict has fallen silent on many issues with a prevalent use in such conflicts. This silence, according to some scholars, paves the way for direct reliance on human rights standards in internal armed conflicts and where the relevant treaty law of such conflicts does not provide us with more concrete guidance. Abresch, for example, has argued that:

[t]he rationale that makes resort to humanitarian law as *lex specialis* appealing – that its rules have greater specificity – is missing in internal armed conflicts.<sup>221</sup>

Based on this, he draws the conclusion that the silence and the bitter generality of many treaty-based rules of internal armed conflicts give rise to the appealing possibility of applying human rights norms as *lex specialis*. This argument is shared by some other legal scholars of IHL and IHRL as well.<sup>222</sup> The only serious authority for this proposition has emerged from the jurisprudence of the Strasbourg Court, where a mixed vocabulary shared by human rights law and the laws of armed conflict was used (in the cases of *Isayeva et al v. Russia* and *Isayeva v. Russia*)<sup>223</sup> and at the same time, no direct reference was made to IHL for the court judgments. Nevertheless, the crux of the issue in such cases is that there is no indication on the part of the Strasbourg jurisprudence to signify that it actually viewed the context in which those cases came into being as an internal armed conflict.<sup>224</sup> Certainly, it is hard to argue that an explicit

<sup>221</sup> Abresch, above note 218, at 747.

<sup>222</sup> See, F. F. Martin, 'Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict' (2001) 64 *Stockholm Law Review* 347.

<sup>223</sup> *Isayeva et al v. Russia* Application Nos 57947-48-49/00 February 2005, *Isayeva v. Russia* Application No. 59750/00, February 2005.

<sup>224</sup> S. Sivakumaran, 'Re-envisioning the international law of internal armed conflicts' (2011) 22 *European Journal of International Law* 219, at 235.

preference for human rights law to the laws of internal armed conflict as *lex specialis* could be inferred from the rulings of the *ECtHR*.<sup>225</sup>

Moreover, on the condition of accepting such an argument, one would still be compelled to deal with the relationship between customary humanitarian law as imported from the laws of international armed conflict and human rights law, which would revive the most sophisticated techniques of interpretation to resolve a second layer of questions associated with *lex specialis* as to whether human rights law trumps customary humanitarian law in application or vice versa. Here, Abresch argues that the invocation of human rights law in the AP II preamble discloses the explicit preference of the drafters of the AP II for human rights over customary humanitarian law.<sup>226</sup> Therefore, the brief appearance of human rights law in the AP II creates a hierarchy of norms. In this new order of norms, human rights law is placed above customary humanitarian law. Whilst this argument is both progressive and forthcoming, a question persists: would states accept such a groundbreaking conclusion on the basis of a rudimentary reference to human rights law in the AP II preamble?

A recent document of a soft law nature with regard to the practice of detention as undertaken by 'states or international organisations' in *non-international armed conflicts* has shown a great propensity to use human rights law language regulate the laws of internment.<sup>227</sup> For example, the Copenhagen Principles articulate that detainees must be treated humanely 'without any adverse distinction founded on race, colour, religion or faith, political or other opinion, national or social origin, sex, birth, wealth or

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<sup>225</sup> For gaining some general insight into the Human Rights Committee and Inter-American Court of Human Rights' stance on the subject of *lex specialis*, see, Human Rights, General Observations, No. 31, CCPR/C.21/Rev.21 (2004) and *Velasquez case*, Inter-American Court of Human Rights, No. 70.

<sup>226</sup> Abresch, above note 218, at 749–751.

<sup>227</sup> The Copenhagen Process on the Handling of Detainees in International Military Operations.

other similar status'.<sup>228</sup> The Chairman's Commentary to the Copenhagen Principles becomes even more explicit in terms of their invocation of the human rights rules and concepts governing internment:

As an important component of lawfulness detentions must not be arbitrary. For the purposes of The Copenhagen Process Principles and Guidelines the term 'arbitrary' refers to the need to ensure that each detention continues to be legally justified, so that it can be demonstrated that the detention remains reasonable and lawful in all the circumstances.<sup>229</sup>

Once again, these general emphases on the language of human rights law can only be useful to the extent that they are accompanied by a set of *specific* obligations. For example, even the said document registers no definite answer to the question of whether the importance of human rights law in non-international armed conflicts renders the *judicial* review of detention the only acceptable form of supervising detention orders. It is fair to say that unless a general preference for the direct application of human rights law is intertwined with coherent, consistent and specific content, it does not matter much if one gives more credit to IHRL or customary humanitarian law for the purpose of regulating the law of internment. The reason for this is simple. Both IHRL and customary humanitarian law possess very similar features in their view of the *general* governing paradigms of internment, and it is only with regard to such particularities as the obligation of judicial review that they differ.

Also, an important possibility must not go unnoticed. It has been said that the silence of the treaty laws of internal armed conflicts is not necessarily a weakness. Rather, this silence must at times be seen as a deliberate act so as to give weight to domestic laws of states regarding their conduct of hostilities.<sup>230</sup> Unfortunately, the importance of national laws in internal

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<sup>228</sup> Ibid., para 2.

<sup>229</sup> Chairman's Commentary to the Copenhagen Process: Principles and Guidelines, para 4.4.

<sup>230</sup> Sivakumaran, above note 224, at 241.

armed conflict has largely been ignored in the literature surrounding humanitarian law.<sup>231</sup> It may be argued that these domestic laws cannot be formulated in such a way that they overlook the requirements of human rights. However, it is one thing to say that domestic laws of states must live up to the requirements of human rights and quite another to postulate human rights law as the direct and dominant source for regulating internal armed conflicts. Again, a pre-condition for the validity of domestic laws from the vantage point of international law is at least the observance of the non-derogable core of human rights, and this non-derogable core can differ depending on the human rights treaties ratified by states.<sup>232</sup>

## 11. Conclusion

At the beginning of this chapter, reference was made to an underlying dichotomy between two eras in the history of internment which would help us to come to grips with the evolution of the practice of detention without trial. In a similar manner to other parts of this thesis, an attempt was made to accentuate the differences and similarities of these two different phases in the development of the laws of internment in international law. Therefore, this chapter took the Lieber Code as the starting point of its analysis, as many subsequent advancements in the international laws of armed conflicts took their cue from this. Inasmuch as the Lieber Code had a mitigating effect on some of the extremities of war, it left a very large space for the discretion of the sovereign. One of the sites in which this technique of the Lieber Code could be seen in an explicit manner was the internment of hostile civilians, regarding whom the Lieber Code virtually enumerated no protection. This conception of the rights of some groups of

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<sup>231</sup> On the importance of national laws in internal armed conflicts, see, P. Rowe, 'Is There a Right to Detain Civilian by Foreign Armed Forces during a Non-international Armed Conflict?' (2012) 61 *International and Comparative Law Quarterly* 697.

<sup>232</sup> Refer to chapter III, section 13.



internees was symptomatic of the era in which the Lieber Code came into being. However, as the shift towards internationalism began, this heritage of the older era could not be completely dismantled. As a result, even the 'Geneva law' discerned the possibility of derogation from some of the protections of GC IV, *albeit* to a limited degree. Incidents such as the 'war on terror' and the re-creation of the shadowy category as 'unlawful combatants' are strong indications of the tendency of some states to return to the techniques of the era in which sovereign authority could either trump the rule of law or the rule of law was conceived in such a way that would only benefit the sovereign. The legal antagonists to this thesis have employed every interpretive means in the laws of armed conflicts to strengthen the grip of international law on the protection of civilian internees. However, inasmuch as these efforts have proved admirable and plausible, some areas of the laws of armed conflicts on internment remain unclear and thereby offer a revolving door to the intrusion of sovereigns into civil liberties. Moreover, the fragmentation of international law has itself led to further confusion. This chapter has sought to clarify the standpoints of the laws of armed conflicts on internment, and in so doing has punctuated those areas that may require further attention by the authoritative bodies of international law; at the same time, it has signified the perceived links between modern practices of internment and their historical antecedents.

Based on the queries raised in this chapter, some of the areas which have, since the adoption of Geneva Conventions, served as the Achilles' heel of the laws of armed conflict on the issue of internment can be identified as follows:

- 1) Intermediary *status* between PoWs and civilians.

- 2) The legal basis for internment. That is to say, inasmuch as the phrases 'absolutely necessary' or 'for imperative reasons of security' provide some understanding of the legal basis for internment during armed conflicts, they suffer from a lack of greater specificity.
- 3) The question of what types of derogation from the protections provided by GC IV can be viewed as acceptable, since Article 5 of GC IV is still considered extremely vague on the issue of internment.
- 4) The issue of whether the modern developments of international human rights law on the review of internment render the judicial review the only acceptable form of review in armed conflicts as well.
- 5) The lack of some specific and binding obligations as regards internment in internal armed conflicts.

## Chapter V

### Detention without Trial and the War on Terror:

#### The Experience of the United States

##### 1. Introduction

In the previous two chapters, we examined the meaning and effects of the many objective<sup>1</sup> criteria that international law has recognised and revised through the regimes of IHRL and IHL with regard to the practice of detention without trial. It was emphasised that this objective system of determination points to the normative standards, principles and rules of international law aimed at restraining and regulating the exclusive and subjective discretion of states. This objective system of determination is an anti-thesis to the invocation of sovereignty as the basis of an uncontrolled discretion of states.<sup>2</sup> The scope of this system covers areas as broad as the rules of jurisdiction, thresholds of applicability of different regimes of international law, individual rights, international law checks and balances on the powers of the executive and of course defining standards for states' conduct in different affairs of state. At the same time, one of the central arguments this thesis in its entirety has been that the value of these objective criteria cannot fully be appreciated without realising first that states generally tend to establish a monopolistic ownership in the process of interning individuals deemed to threaten their security. The most remarkable effect of establishing a monopoly over the law of

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<sup>1</sup> Refer to chapter IV, section 4.1.

<sup>2</sup> L. Henkin, 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera' (1999-2000) 68 *Fordham Law Review* 1, at 4-7.

detention without trial has been to create a zone of immunity for the subjective determination of the executive. With the revitalisation of international law in the post-WW II era, there emerged some predictable tensions between the subjective and objective systems of determination. The US counter-terrorism policies signify the latest version of these tensions between the states' predisposition for fashioning a realm of absolute authority with regard to detaining certain individuals and the standards of international law.

One of the implications of the phrase 'American exceptionalism' (which has turned into a term of art in the spheres of international law and international relations)<sup>3</sup> is to capture the tendency of the US executive among others to exempt itself from the burdensome obligations of international and domestic rule of law. Drawing on this background, this chapter denotes the channels through which the US executive has attempted to refute the requirements of international law and the reaction of the US judiciary to these advances. Accordingly, we will endeavour to identify the threads of historical continuity between some of the legal strategies and conceptions described in the first two chapters of this thesis. Discerning these particular threads help us to configure a pattern of behaviour for the US executive, and also the US judiciary.

This chapter is divided into three main sections. The first part explores some of the main characteristics deployed in the narrative of the so-called 'war on terror' proclaimed by the United States, and how such characteristics were employed to construct a particular security apparatus for the sovereign in its encounter against detainees. Having done that, we shall discern how different parameters of this security apparatus have

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<sup>3</sup> See, M. Byers, G. Nolte, *United States' Hegemony and the Foundations of International Law* (Cambridge: CUP, 2003).

manifested themselves in the scheme of 'enemy combatants' detention, which contains two dimensions and for the purposes of our analysis, the subjective element of the practice of detention (decisions of the detaining power on the matters of detaining who and under what conditions) and the objective element (the standards of international law to the effect of denoting who can be interned and under what conditions). The overall aim of this chapter is to highlight how these two elements interacted with each other in the detention practices undertaken in the American 'war on terror'.

## 2. The US 'war on terror' and the problem of narrative

One of the central lines signalled by the US officials in the immediate aftermath of 9/11 attacks was the idea of 'change'.<sup>4</sup> According to President George W. Bush and such figures as Vice-President Cheney, the 9/11 attacks were not only an indicator of a new wave of animosity against the US, but also presented 'a new kind of enemy.' According to the Bush Administration, the 'newness' of this enemy meant that it could not be dealt with by the 'old' measures. Therefore, 'a new type of war' was in the making,<sup>5</sup> one which would change and re-write the rules of game. To the legal mind, these statements were but tantamount to the often exaggerated and dramatically charged political rhetoric, much like those

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<sup>4</sup> See, for example, President Bush remarks on state of union available at <http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/> More explicit in this regard are the remarks of Vice President Cheney, 'And in a sense, sort of the theme that comes through repeatedly for me is that 9/11 changed everything. It changed the way we think about threats to the United States. It changed recognition of our vulnerabilities. It changed in terms of the kind of national security strategy we need to pursue, in terms of guaranteeing the safety and security of the American people.'

<sup>5</sup> 'The mindset of war must change,' Mr Bush said on Wednesday. 'It is a different type of battlefield. It is a different type of war.' The battles, he said, 'will be fought visibly sometimes, and sometimes we'll never see what may be taking place.' See, 'Bush talks of a 'different kind of war' available at <http://www.theguardian.com/world/2001/sep/21/afghanistan.september1113>.

underpinning such phrases as 'cold war' and 'war on drugs'.<sup>6</sup> But soon, these seemingly dramatized political projections came to form a 'law fare'<sup>7</sup> intended to create new concepts, refute a considerable corpus of the pre-existing rules, and deliver results more compatible with the will of the American sovereign rather than the letter of law. To this end, a unique language was devised to describe the counter-terrorism policies of the Bush Administration. New terms came into existence, and on some occasions, the old terms were drained of their previous meanings and new definitions were assigned to them.<sup>8</sup> The invention of these new terms started with 'war on terror', but it did not stop there. It went on to include an entire apparatus full of concepts with a half political and half-legal architecture. This new language was not, however, tasked with the neutral reflection of an outside reality, but to create a discourse of its own. As Jackson has very aptly explained:

The language of the 'war on terrorism' is not simply an objective or neutral reflection of reality, nor is it merely accidental or incidental. [...] Rather, it is a deliberately and meticulously composed set of words, assumptions, metaphors, grammatical forms, myths and forms of knowledge – it is a carefully constructed discourse – that is designated to achieve a number of key political points.<sup>9</sup>

The point here is that this language does not confine itself to the political sphere. Rather, it runs through the realm of the political to create a legal agenda of its own. Of course, the term 'legal' here is not used with the same meaning as 'lawfulness'; rather it is employed in a very similar sense

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<sup>6</sup> See, C. Greenwood, 'Scope of Application of Humanitarian Law' in D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford: OUP (second edition), 2009). Interestingly, not long after the appearance of the rhetoric of 'war on terror,' confusions surfaced as to whether this could mean a declared war, Joan Fitzpatrick, 'Jurisdiction of Military Commissions and the Ambiguous War on Terrorism' (2002) 96 *American Journal of International Law* 345, 350.

<sup>7</sup> R. Jason, *America's War on Terror: The State of the 9/11 Exception from Bush to Obama* (Oxford: Oxford University Press, 2013) at 8.

<sup>8</sup> A good example of a very significant concept, which became empty of its normal legal meaning in the US 'war on terror', is 'combatant' or even more radically, the concept of 'war' itself. Refer to chapter IV, section 6. More on this will be said in this chapter.

<sup>9</sup> R. Jackson, *Writing the War on Terrorism: Language, Politics and Counter-terrorism* (Manchester: MUP, 2005) at 2.

to Hale's and Blackstone's descriptions of martial law, 'in truth and reality no law', but veiled under an appearance of law.<sup>10</sup>

A two-layered implication emerge from the inclusion of this language. First, such concepts present the post-9/11 era as a point of departure in history. As one US official once said, 'there was a before 9/11, and there was an after 9/11. After 9/11 the gloves come off.'<sup>11</sup> According to this narrative, since we are living in 'a new age of terror,'<sup>12</sup> and are fighting 'a different kind of war,'<sup>13</sup> the old rules—whether they are governing armed conflicts or the most fundamental guarantees against torture—lose their relevance as well as normative value. Framed in this way, the new executive rules deployed in the language of 'war on terror' and its surrounding features are taken to be *lex posterior* to the pre-existing international legal obligations of the US.<sup>14</sup> Such sentiments were in the clearest manner manifested in the internal memorandums of the Bush Administration to free the US executive from its international law obligations.<sup>15</sup> To discern this, it is useful to pay attention to the following passage extracted from a memorandum on the 'Application of Treaties and laws to al Qaeda and Taliban detainees:'

Al Qaeda is merely a violent political movement or organisation and not a nation-state. As a result, it is ineligible to be a signatory to any treaty. *Because of the novel nature of this conflict, moreover, we do not believe that al Qaeda would be*

<sup>10</sup> Refer to chapter I, section 8.1.

<sup>11</sup> Citation from D. Luban, 'Eight Fallacies about Liberty and Security' in R. Ashby Wilson (ed), *Human Rights in the 'War on Terror'* (Cambridge: CUP, 2005).

<sup>12</sup> See, for example, B. A. Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Boston: Yale University Press, 2006) at 43, 92.

<sup>13</sup> White House Press Conference, 5 November 2002, 'the President has said to the American people that this is a different kind of war, with a different kind of battlefield, where known political boundaries, which previously existed in traditional wars do not exist in the war on terrorism. The President has talked about a shadowy war where terrorists are going to try to hide, and terrorists will try to -- when they emerge, were going to be on the lookout for them when they emerge. The President has been very up-front about that.' Available at <http://www.presidency.ucsb.edu/ws/index.php?pid=47444>.

<sup>14</sup> See, for example, American Society of International Law, United States: Response of the United States to Request for Precautionary Measures-Detainees in Guantanamo Bay, Cuba (April 12, 2002).

<sup>15</sup> See, K. J. Greenberg *et al*, *The Enemy Combatant Papers: American Justice, the Courts, and the War on Terror* (New York: CUP, 2008).

*included in non-international forms of armed conflict* to which some provisions of the Geneva Conventions apply.<sup>16</sup>

The strategy described above has also been shaped in another narrative less radical in form, but with the same effect. This narrative is focused on some perceived gaps in such regimes as IHL and IHRL, and posits that these regimes did not emerge with having actors such as Al-Qaeda in mind.<sup>17</sup> From there, it only takes a small step to argue that the problem of today's terrorism must be exempted from former legal paradigms, in that the very nature of contemporary terrorism epitomises some unfathomable *gaps* in international law.<sup>18</sup> As explained in the previous chapter, these alleged gaps are in turn used to maximise the powers of the executive with the purpose of rendering the executive the law-maker, the law-executor and the sole judge of its cause.<sup>19</sup> This pattern of interpretation clearly manifested itself in two areas regarding the practice of internment. The first area was bold invocations of the concept of 'enemy combatants,' designed to replace the two categories of detainees, namely PoWs and civilians.<sup>20</sup> The second technique was to make a manoeuvre around the territorial dimensions on the concept of jurisdiction in order for the detaining authority to immunise its practice of internment as well as its treatment of detainees from the reach of courts. The result was the transfer of a large number of detainees to Guantanamo.<sup>21</sup> It must not go unnoticed that these measures were not merely tailored to block the reach of international law protections to the practice of internment. Rather they also meant to insulate the executive detention authority from the

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<sup>16</sup> US Department of Justice, Office of Legal Counsel, Memorandum for William Haynes II, General Counsel, Department of Defense, J. Yoo, R. J. Delahanty, at 1-2.

<sup>17</sup> See, for example, C. E. Hardy, *The Detention of Unlawful Enemy Combatants during the War on Terror* (El Paso: LFB Scholarly Publishing, 2009) at 28.

<sup>18</sup> For a criticism of the perceived gaps, see, for example, F. N. Aolain, 'The No-Gaps Approach to Parallel Application in the Context of the 'War on Terror' (2007) 40 *Israel Law Review* 563, at 584.

<sup>19</sup> Refer to chapter IV, section 4.1.

<sup>20</sup> Refer to chapter IV, section 5.

<sup>21</sup> See, F. De Londras, *Detention in the 'War on Terror': Can Human Rights Fight Back?* (Cambridge: CUP, 2011).



application of the US domestic law. In fact, to borrow a phrase from a famous judgment in 1960s, the Bush Administration did use its alleged 'war powers' 'as a talismanic incantation to support any exercise of [...] power.'<sup>22</sup> It was thus that the 'legal black hole' came to represent one of the nicknames of 'Guantanamo Bay' in the contemporary legal debate on internment.<sup>23</sup>

As was mentioned in the previous chapter, the process described above can also be cast in terms of the move by states from refuting the applicability of the objective system of legal determination to designating a broad apparatus for the subjective decisions of the executive.<sup>24</sup> What happens as a result is the creation of a unique legal apparatus, which totally departs from the objective prerequisites of law. Here, we count some of the most prevalent characteristics of this apparatus, and will later in this chapter draw the historical parallels of such practices based on the previous discussions.

Firstly, the executive authority in building up its own realm is normally driven by the referent or mother legislation, which authorises the executive to take all the appropriate measures to restore security and order. In the common law tradition, the classical examples of these types of regulations stemmed from the British Defence of the Realm Act (DORA) in 1914.<sup>25</sup> Certainly, one can place the US Patriot Act<sup>26</sup> and the AUMF<sup>27</sup> (2001) within the same group as DORA. What these enactments share in common is to either recognise or reaffirm a broad periphery of powers for the executive to act upon its own discretion. Even though such acts are

<sup>22</sup> *United States v. Robel*, 389 U.S 258, 263-264 (1967).

<sup>23</sup> *R (Abbasi) v. Secretary for Foreign and Commonwealth Affairs and Secretary of State for the Home Department* [2002] EWCA Civ 1958, See also, J. Steyn, 'Guantanamo Bay: The Legal Black Hole' (2002) 53 *International and Comparative Law Quarterly* 1.

<sup>24</sup> Refer to chapter IV, section 4.1.

<sup>25</sup> Refer to chapter I, section 10.

<sup>26</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to intercept and Obstruct Terrorism Act of 2001. 115 Stat.272.

<sup>27</sup> Authorisation for Use of Military Force. 115 Stat. 224.

traditionally required to lay down the precise limits of the executive power, the limits, extent, scope and time frame of the executive discretion are often left open.<sup>28</sup> They take an extremely generous approach in specifying the limits of the executive power. Take the AUMF for instance, which authorises the US President to take coercive action against 'nations, organisations, persons, *he determines*, planned, authorised, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organisations or persons in order to prevent any future acts of international terrorism by such nations, organisations, or persons.'<sup>29</sup> Nowhere in the said act is the authority of the US President to make determination and take actions upon such determination, limited or qualified by the relevant rules of international law.<sup>30</sup>

Secondly, the executive security law apparatus does not ascribe itself to one particular legal regime. Rather, it is composed of selective invocations of different legal frameworks. Luban has aptly described the function of these selective subscriptions to different concepts from different areas of law:

By selectively combining the elements of the war model and elements of the law model, Washington is able to maximise its own ability to mobilise lethal force against terrorists while eliminating most traditional rights of military adversaries [...].<sup>31</sup>

The immediate effect of this selective combination of various elements from different models is to devise concepts with innovative linguistic architecture and very peculiar meanings.<sup>32</sup> In order to come to grips with

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<sup>28</sup> See, O. Krichhermer, 'Legality and Legitimacy (1932) in W. E. Scheuerman, *The Rule of Law under Siege* (London: University of California Press, 1996) at 49.

<sup>29</sup> Authorization for Use of Military Force Sep 14, 2001 (107th Congress, 2001–2002).

<sup>30</sup> For a general analysis of this matter, D. Jinks, D. L. Sloss, 'is the President Bound by the Geneva Conventions' (2004–2005) 90 *Cornell Law Review* 90, at 162.

<sup>31</sup> D. Luban, 'The War on Terrorism and the End of Human Rights' (2002) 22 *Philosophy and Public Policy Quarterly* 9, at 10.

<sup>32</sup> See, Jackson, above note 9.

the function of these concepts, it is useful to pay attention to Kritsiotis' analysis of the act of characterisation in law:

Our calling of something might also occur within the context of an overarching judicial framework and vocabulary, so what we are doing is actually arguing for a particular appreciation of events, of a specific legal condition – something that might affect the status of the parties, or their interests, entitlements and obligations, or even the outcome of a given dispute [...].<sup>33</sup>

It will be interesting if we apply Kritsiotis' description of the importance of 'our calling of something' to the term 'enemy combatants'.<sup>34</sup> On the surface, this term presupposes the existence of a legal paradigm emanating from (or at least consistent with) the laws of armed conflict. Yet, the use of this concept in the context of the American exercise of internment does not correspond to a conventional application of the laws of armed conflict. For example, on some occasions, American citizens were designated as enemy combatants.<sup>35</sup> This reading of 'enemy' is not consistent with the laws of armed conflict. Here, one may argue that the concept of 'enemy combatants' is not an armed conflict related concept. Rather, it signifies a criminal title. If this possibility is to be taken seriously, then it will follow that individuals charged with this so-called crime must be subjected to punishment and not internment, which of course has not been the case.<sup>36</sup> Therefore, neither the word 'enemy' nor the term 'combatant' in the construct of 'enemy combatant' were applied in the same sense that these words (enemy and combatant) were separately employed in the Geneva Conventions and the two additional protocols.

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<sup>33</sup> D. Kritsiotis, 'The War on Terror and the Problematique of the War Paradigm' (2009) 9 *Journal of Human Rights and Human Welfare* 11, at 12-13.

<sup>34</sup> For the analysis of the concept of 'unlawful enemy combatants,' refer to chapter IV, section 5.

<sup>35</sup> See Government's Answer in *Padilla v. Commander C. T. Haft* C/A. 02:02-2221-26AJ, 8/30/2004.

<sup>36</sup> See, M. J. Aukerman, 'War, Crime, or War Crime? Interrogating the Analogy between War and Crime' in D. Linnan (ed), *Enemy Combatants, Terrorism, and Armed Conflict Law: A Guide to the Issues* (Westport: Praeger, 2008).

Such terms as 'enemy combatants' represent an amalgamation of words with multiple dimensions aimed at inventing different, all-inclusive and hybrid categories of persons. At the same time, the executive apparatus employs a multitude of different law models in a separate manner to fulfil its purposes in its counter-terrorism operations. As regards the particular case of internment, the US executive has used the three schemes of 'enemy combatants,' 'immigration detention', and 'witness material'.<sup>37</sup> Due to the limited space of this thesis, we must pay attention to the scheme of 'enemy combatants', in that it holds a closer proximity to the historical enquires of this thesis. Through exploring the particularities of these schemes, we will establish a pattern for discerning the historical continuity, and also explore the modes in which the US executive apparatus in counter-terrorism has operated in the last decade.

### 3. Internment of Enemy Combatants

Soon after 9/11, it became clear that the US was intent on pursuing a war/armed conflict approach in its counter-terrorism operations. In legal terms, this meant a marginalisation of the criminal justice system in favour of a security apparatus.<sup>38</sup> Inevitably, this military response to the problem of terrorism had implications of its own. One such implication was that instead of reliance on a system of law enforcement for neutralising criminals, it would subject the perceived enemies/criminals/terrorists to measures such as targeting and internment. This choice of legal framework was by itself problematic, because of the counter-terrorism dimension to the military operations of the US. The problem was that counter-terrorism had always been viewed as a law enforcement issue in

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<sup>37</sup> See, D. Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism* (New York: New Press, 2003) at 18-46.

<sup>38</sup> See, for example, E. P. Myjer, N. D. White, 'The Twin Towers Attack: An Unlimited Right to Self-defence' (2002) 7 *Journal of Conflict and Security Law* 5.

international law.<sup>39</sup> This was not compatible with the view taken by the US officials, since they had by the time of invading Afghanistan made it clear that their counter-terrorism measures was to large degree part of a broader military response model. As Brownlie has pointed out:

There is no law of terrorism and the problems must be characterised in accordance with the applicable sectors of public international law; jurisdiction, criminal justice, state responsibility and so forth.<sup>40</sup>

What this means in the context of 'war on terror' is that no matter how pervasive the American claim of counter-terrorism in places such as Afghanistan, the legal framework governing such matters as internment must be driven from the specific legal model designated to govern specific conditions (IHL in the case of Afghanistan). Unfortunately, the Bush Administration could not give countenance to the idea of bringing its internment operations under the parameters of the laws of armed conflict. This was particularly true for the internees transferred to Guantanamo Bay and assigned with the innovative *status* of enemy combatants. There were a number of reasons for the reluctance of the Bush Administration to submit to the IHL standards on internment. Firstly, the Bush Administration was intent not to include the persons detained in Guantanamo Bay in the categories of persons in the Geneva Conventions. In its view, terrorist suspects with alleged ties to Al Qaeda and Taliban were neither PoWs nor civilians within the meaning of Geneva Conventions. This is a very similar technique as that used by the Lieber Code in order to place those held on the suspicion of 'spying', 'disloyalty' and 'war treason' on the absolute discretion of the American executive.<sup>41</sup>

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<sup>39</sup> See, L. Van Den Herik, N. Schrijver, 'The Fragmented International Legal Response to Terrorism' in L. Van Den Herik, N. Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order* (Cambridge: CUP, 2013).

<sup>40</sup> I. Brownlie, *Principles of Public International Law* (Oxford: OUP, 2008) at 745.

<sup>41</sup> Some writers have gone further to argue that using the language of 'terrorists' or 'unlawful enemy combatants' for the purpose of excluding individuals described as such from the protections of IHL bears a resemblance to a historical point in the US, when the predominant

Also, the fact that these individuals are placed at the discretion of the detaining power and are exempted from particular guarantees of constitutional and international law had explicitly been recognised in the case of *Quirin*.<sup>42</sup> This argument was in different forms made by the Bush Administration in cases emerging from the Guantanamo Bay.<sup>43</sup>

Another reason for the Bush Administration to avoid applying the standards of IHL was that it could give the US executive a freehand on both the interrogation of detainees and detaining individuals on the basis of their intelligence value. In this regard, it is vital to note that IHL puts some concrete restraints on the power to interrogate PoWs.<sup>44</sup> However, the matter of interrogation of civilians in the laws of armed conflict is very ambiguous. The ICRC position, as articulated in the previous chapter, has been that internment cannot be done with the sole purpose of intelligence gathering.<sup>45</sup> In fact, as Goodman has forcefully argued:

the implications of allowing intelligence value as an independent ground for long-term or indefinite detention are intolerable. Doing so might permit the confinement of individuals, such as the children or other family members of combatants, who have no engagement in hostilities but have personal knowledge about the combatants.<sup>46</sup>

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legal debate was 'how to fight savage tribes.' A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP, 2004) at 289.

<sup>42</sup> *Ex parte Quirin*, 317 US Supreme Court. Also, refer to the statements of the US Attorney General in the case of *Quirin* as cited and analysed in the previous chapter.

<sup>43</sup> For example with regard to the entitlement of those characterised as 'unlawful enemy combatants,' the Bush Administration's lawyers argued, 'any suggestion of a generalized due process right under the Fifth Amendment could not be squared with, inter alia, the historical unavailability of any right to prompt charges or counsel for those held as enemy combatants.' *Hamdi v. Rumsfeld* – 7/25/2002: Government's Motion to Dismiss, and with regard the application of Geneva Conventions, the position of the Bush Administration is captured in the following terms, as expressed in the case of *Hamdan (infra)*, '[e]ven if the Geneva Conventions were judicially enforceable, it is inapplicable to the ongoing conflict with al Qaeda and thus does not assist petitioner.' *Hamdan v. Rumsfeld* – 2/23/2006.

<sup>44</sup> Refer to chapter IV, section 5.2.

<sup>45</sup> Refer to chapter IV, section 7.2.

<sup>46</sup> R. Goodman, 'Rationales for Detention: Security Threats and Intelligence Value' (2009) 85 *International Law Studies* available 1, at 8.

Once again, these standards could not satisfy the endeavours of the Bush Administration, since it viewed the issue of interrogation and intelligence gathering as the strongest driving force of many internment practices.<sup>47</sup>

Drawing on this, it is clear that using the IHL schemata would seriously minimise the freedom of the American executive in its resorts to interrogation in general and its peculiar assertion of permissible coercive interrogation techniques in particular. Here, the problem of merging a counter-terrorism framework with that of IHL can clearly be highlighted. The counter-terrorism model is intertwined with the sphere of criminal justice. The reason for this is almost tautological. Terrorism is a crime, and addressing it implies bringing the penal system into play. Under this system, interrogation is a natural means of fighting crime and establishing evidence.<sup>48</sup> On the other hand, IHL is focused on reducing the excesses of warfare, and providing a set of permissible means for conducting hostilities without disproportionately affecting humanitarian considerations. The IHL mechanism hardly has anything to say on either the criminal law issues or the methods of fighting crime. Its concern lies in minimizing the degree of harm inflicted upon civilians, including civilian detainees, whilst at the same time accepting enough flexibility for states to have recourse to particular practices such as internment. Given the somehow incompatible nature of the IHL and criminal justice models, the US executive built its apparatus of detaining authority in between IHL and criminal justice models. To this end, a heavy reliance was made on the concept of 'enemy combatants,' which on the surface resembles a term

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<sup>47</sup> M. C. Waxman, 'Administrative Detention: Integrating Strategy and Institutional Design' (2008) published by the Brookings Institution, at 12.

<sup>48</sup> See, for example, M. C. Waxman, 'Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists' (2008) 108 *Columbia Law Review* 1366, at 1373-1379.

belonging to the realm of IHL, but in practice entails some important elements of criminal law.<sup>49</sup>

To understand this function of the term 'enemy combatants,' it is necessary to see the definition of 'enemy combatants,' as provided by the Military Commission Act of 2006 (MCA):

- (i) a person who has engaged in hostilities or who has purposefully and *materially supported* hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces);
- (ii) or a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.<sup>50</sup>

One of the notes of interest in the above passage is 'material support'. It is noteworthy that neither the treaty-based rules of IHL, nor any authoritative interpretation of such rules has ever linked 'material support' as a qualifier for 'combatancy' in armed conflicts.<sup>51</sup> At the same time, the US Federal Criminal Court's provisions on 'aiding and abetting' in the crime of terrorism bear striking similarities to the element of 'material support' present in the supplied definition of 'enemy combatant'.<sup>52</sup>

Creating this hybrid category of persons could provide the US executive with two distinct advantages. In the first place, on the basis of the close proximity of the conceptual design of the term 'enemy combatants' to the vocabulary of IHL, the US government could assert a broad authority to

<sup>49</sup> See, for example, A. M. Danner, 'Defining Unlawful Enemy Combatants: A Centripetal Story' (2007) 43 *Texas International Law Journal* 1, or J. Griffith, 'The Tensions between 'Criminal' and 'Enemy' as Categories for Globalized Terrorism' (2006) 20 *International Journal of Applied Philosophy* 107

<sup>50</sup> S. 984a, Military Commissions Act Of 2006, Public Law 109-366—OCT. 17, 2006.

<sup>51</sup> In this regard, it is also useful to bear in mind the question of associated forces. See, M. Lederman, 'Associated Forces has a legal meaning...but it's not 'every group that calls itself al Qaeda' available at <http://justsecurity.org/2014/02/04/associated-forces-has-legal-meaning-not-every-group-calls-al-qaeda/>.

<sup>52</sup> Danner, above note 49, at 9-10.



intern individuals under IHL.<sup>53</sup> The assertion of this broad authority under IHL serves multiple purposes. Firstly, it would erect a wall against the possibility of judicial review, since under IHL, there exists no obligation of judicial review. This would in turn give the executive a freedom to put administrative bodies in place for reviewing the necessity of internment practice.<sup>54</sup> The preferred method of the US in this regard was using military commissions. Finally a reliance on the rules of IHL would, according to the US government, result in a displacement of the IHRL based on the US understanding of the principle of *lex specialis*.<sup>55</sup>

The second advantage of having this intermediate area is that bringing criminal law elements with the fabric of 'enemy combatants' facilitates the resort to such measures as interrogation and intelligence gathering. At the same time, this hybrid category broadens the category of persons susceptible to be designated as 'enemy combatants'. Therefore, even US citizens were not exempted from being detained indefinitely and even as

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<sup>53</sup> *Hamdi v. Rumsfeld*, Government's Supreme Court Brief 3/19/2004.

<sup>54</sup> Refer to chapter IV, section 7.4.

<sup>55</sup> De Londras, above note 21. Of course, as was mentioned above, another argument that both the Bush and Obama Administrations have exploited to prevent the application of human rights is the territorial limits of jurisdiction. However, it seems that even some State Department's legal advisers had thrown doubts into the legal accuracy of this argument. For example, it appears from a leaked legal memorandum that Koh had warned the US executive that a distinction must be made between 'respecting' and 'ensuring' the human rights obligations of states. According to Koh, the US may not be in a position to ensure the fulfilment of its human rights obligations outside its territory, but it is certainly obliged to respect them. M. Milanovic, 'Harold Koh's Legal Opinions on the US Position on the Extraterritorial Application of Human Rights Treaties' available at <http://www.ejiltalk.org/harold-kohs-legal-opinions-on-the-us-position-on-the-extraterritorial-application-of-human-rights-treaties/>

More recently, the Human Rights Committee criticised the US government for its view of the extra-territorial inapplicability of international human rights law. In this regard, the Committee noted:

The Committee regrets that the State party continues to maintain its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, despite the contrary interpretation of Article 2(1) supported by the Committee's established jurisprudence, the jurisprudence of the International Court of Justice and state practice. Human Rights Committee

Concluding observations on the fourth report of the United States of America (Unedited Version) March 2014 available at

<http://justsecurity.org/wp-content/uploads/2014/03/UN-ICCPR-Concluding-Observations-USA.pdf>.

being characterised as 'enemy combatants.'<sup>56</sup> Once again, the final outcome of this setting is a sharp increase in the discretion of the US executive at the expense of both IHL and criminal justice systems.

Before ending this section, it is useful to refer to what may well be a historical antecedent to the category of 'enemy combatant' detainees—and that is detainees held on the suspicion of treason. As mentioned on several occasions in this thesis, in the eighteenth and nineteenth century, British emergency legislation made an extensive use of 'treason and coercion acts' to suspend the writ of habeas corpus. However, one particular use of the crime of 'treason' in the eighteenth century bears some similarities with the American conception of 'grey areas' of rules, concepts and persons and that is the suspension bill of 1777, which would authorise the king 'to detain and secure persons charged with/or suspected of high treason committed in North America or on the high seas, or of piracy.' Clearly, Britain was in a war against a former colony purporting to gain its independence. But at the same time, to call the American detainees captured in this colonial war 'prisoners of war' was tantamount to recognising their claim of independence. To avoid this far-reaching consequence, the British colonisers relied on a concept which somehow oscillated between an act of war and a crime, namely that of treason.<sup>57</sup> Also as was examined in the previous chapter, the term 'unprivileged belligerents' as devised by Baxter gained some support in Britain in 1950s.<sup>58</sup> As discussed in detail in the previous chapter, the legal connotations of the concept of 'unprivileged belligerents' was similar to

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<sup>56</sup> M. Henn, *Under the Colour of Law: The Bush Administration Subversion of US Constitutional and International Law in the War on Terror* (Plymouth: Lexington Books, 2010) at 171.

<sup>57</sup> Refer to chapter I, section 3.

<sup>58</sup> R. R. Baxter, 'So-called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs' (1951) 28 *British Year Book of International Law* 323. Also refer to the discussion on this topic in chapter IV.

'unlawful combatants' in some respects and different in others.<sup>59</sup> Interestingly, when criticisms against 'unlawful combatants' mounted, the Obama Administration temporarily used the term 'unprivileged enemy belligerents'.<sup>60</sup> However, this shift to the term 'unprivileged belligerents' did not prove to last long.

### 3.1. *Enemy Combatants in Guantanamo Bay*

In the opening phases of the conflict in Afghanistan, when the first wave of individuals with alleged ties with the Taliban had fallen into the hands of the US troops, the Presidential Military Order on Detention Treatment and Trial of Certain Non-Citizens in the War against Terrorism' was issued.<sup>61</sup> In this order the President reserved for himself the authority to determine which individuals can be subjected to the PMO (Presidential Military Order). Less than three months later, the first group of detainees were transported to Guantanamo, a naval base in Cuba under the control of the US. Much has been written on the legal *status* of Guantanamo and there is no need for us to repeat and analyse this issue again.<sup>62</sup> What is important is the rationale behind the tactical move of transferring detainees to an overseas location, thereby preventing the application of the constitutional guarantee of habeas corpus for Guantanamo detainees.<sup>63</sup>

As mentioned in the first chapter of this thesis, sending detainees to remote overseas areas for preserving the detention authority from the scrutiny of the writ of habeas corpus was an often-used British technique,

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<sup>59</sup> Refer to chapter IV, section 5.1.

<sup>60</sup> National Defense Authorization Act for Fiscal Year 2010, § 948a(7), Pub. L. No. 111-84, 123 Stat. 2190, 2575.

<sup>61</sup> Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism.

<sup>62</sup> See, for example, D. Cole, 'Rights over Borders: Transnational Constitutionalism and Guantanamo Bay' (2008) *Cato Supreme Court Review* 47.

<sup>63</sup> For viewing more details on the historical debate on the concept of territoriality in the American constitutional law, see, K. Raustiala, *Does the Constitution Follow the Flag: the Evolution of Territoriality in American Law* (Oxford: OUP, 2009).

invented by Cromwell's council. The reason for this, as argued in the first chapter, was Cromwell's awareness of the judicial authorities' resistance to his claim of possessing sweeping detention powers.<sup>64</sup> As Halliday has observed, 'Cromwell's protectoral regime had hoped that water and military control of Island castles would put prisoners beyond the court's supervision.'<sup>65</sup> One can replace the phrase 'Cromwell's protectoral regime' in Halliday's description with 'the Bush Administration', and apply the exact same formula to the situation in the Guantanamo Bay. This technique survived after Cromwell,<sup>66</sup> and the Bush Administration's decision to transport the detainees captured in different places to Guantanamo Bay represents the latest version of this tactic to escape from the intervention of the most important writ of common law, habeas corpus.<sup>67</sup>

In America, ranging from the application of the US constitutional guarantees in Philippines in the wake of the American-Spanish War<sup>68</sup> to the habeas corpus cases emerging from the Far-East in the wake of the Second World (*infra*), to the legal situation of American citizens settled in the American military stations abroad,<sup>69</sup> to the legal *status* of Guantanamo detainees, the issue of the extra-territorial coverage of the US constitutional guarantees such as habeas corpus has signified one of the most enduring legal challenges of the twentieth and twenty-first centuries. In short, to understand the legal basis of the policy of the Bush Administration in transporting detainees to Guantanamo, it is vital to pay regard to a case that found favour with the Bush Administration, *Johnson*

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<sup>64</sup> Refer to chapter I, section 5.

<sup>65</sup> P. D. Halliday, *Habeas Corpus: From England to Empire* (Cambridge: Harvard University Press, 2010) at 231.

<sup>66</sup> *Ibid.*

<sup>67</sup> It must not be forgotten that the US Supreme Court had in early 1950s considered the reach of the writ of habeas corpus as extending to American detainees held abroad. See, *Burns v. Wilson*, 346 U.S. 137 (1953).

<sup>68</sup> Anghie, above note 41, at 281-282.

<sup>69</sup> *Reid v. Covert*, 354 U.S. 1 (1957).

*v. Eisentrager*.<sup>70</sup> This case concerned twenty-one German nationals, who had been convicted by military commissions in China 'of violating laws of war by engaging in, permitting, or ordering continued military activity against the United States after surrender of Germany and before surrender of Japan.'<sup>71</sup> The German detainees applied for the writ of habeas corpus in the District Court. Their case finally reached into the Supreme Court of the United States, which refuted the possibility of their entitlement to the writ of habeas corpus, on the basis that petitioners were *non-resident enemy aliens*.<sup>72</sup> In the absence of the existence of the American civil courts' jurisdiction over the internment and punishment of the non-resident enemy aliens, the US Supreme Court concluded that the American military commissions established by the US in China did have jurisdiction 'to accuse, try and condemn' the German detainees.

In the eyes of the Bush Administration, the issue of the availability of habeas corpus to the Guantanamo detainees was governed by the *Eisentrager* precedent. Therefore, in response to the first wave of habeas petitions filed by the Guantanamo detainees, the US executive position was that '*Eisentrager* controls this case and makes clear that there is no basis for invoking federal judicial power in any district.'<sup>73</sup> The difficulty was that petitioners in *Eisentrager* were enemy aliens, whilst many detainees held at Guantanamo were not nationals of a country with which the US was at war.<sup>74</sup> Here, the executive lawyers made an interesting observation: 'The key [in the case of *Eisentrager*] was that prisoners

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<sup>70</sup> *Johnson v. Eisentrager* 339 U.S. 763 (1950)

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Rasul v. Bush*, Government's Motion to Dismiss 3/18/2002, in K. Greenberg *et al*, *The Enemy Combatant Papers* above note 15 (Cambridge: CUP, 2008) at 26-30.

<sup>74</sup> On different interpretations of *Eisentrager*, see, R. H. Fallon, D. Meltzer, 'Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror' (2007) 120 *Harvard Law Review* 2032, at 2056.

before [the Supreme Court] were held abroad.<sup>75</sup> At the same time, the Bush Administration argued that the petitioners were enemy aliens for the purposes of *Eisentrager*.<sup>76</sup> The US executive's claims in the case of *Rasul v. Bush* were entertained by the circuit court.<sup>77</sup> Nevertheless, the Supreme Court took a completely different approach to the question of the availability of habeas corpus to the detainees in Guantanamo. The different approach of the US Supreme Court first and foremost manifested itself in assuming a distinction between the case before it and that of *Eisentrager*:

Petitioners here differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.<sup>78</sup>

Therefore, the US Supreme Court rejected the territorial argument of the Bush Administration and posited that the US exercised 'unchallenged and indefinite control' over Guantanamo Bay.<sup>79</sup> An equally important argument by the Supreme Court rested on the indeterminacy of the *status* of prisoners held in Guantanamo Bay. In the words of Justice Kennedy:

Detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their *status*.<sup>80</sup>

The most significant aspect of *Rasul v. Bush* was the defeat of the US executive on the subject of the territorial limits of habeas corpus. However, it also entailed another consequence that could be read to mean that insofar as no procedure had been established to determine the *status*

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<sup>75</sup> *Rasul v. Bush*, above note 73.

<sup>76</sup> *Ibid.*

<sup>77</sup> Above note 73.

<sup>78</sup> *Rasul et al v. Bush*, US Supreme Court, 03-334-343, 2004, at 2.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

of the Guantanamo detainees, their entitlement to habeas corpus could not have been challenged. The Bush Administration shifted its strategy in the light of the ruling of *Rasul v. Bush*. However, this was also motivated by another decision of the US Supreme Court delivered on the same day as *Rasul v. Bush*, namely, *Hamdi v. Rumsfeld*.<sup>81</sup> Here, we must shortly describe the relevant facts in *Hamdi* to arrive at the rationale behind some of the legal strategies of the Bush Administration.

Yaser Hamdi possessed dual citizenship of the US and Saudi Arabia. In 2001, he was captured in Afghanistan in possession of a Kalashnikov, according to the US government. The US government also asserted that Hamdi belonged to a Taliban unit. He was allegedly determined by 'the US military screening team to meet the criteria for enemy combatants,' and subsequently, was transferred to Guantanamo Bay.<sup>82</sup> Upon learning that Hamdi was a US citizen, The US government transported Hamdi to a naval brig in South Carolina. Hamdi's father filed a petition for a writ of habeas corpus, and asserted that 1) the US executive did not have authority to detain an American citizen and that 2) Hamdi was entitled to challenge the grounds of his detention.<sup>83</sup> After being exchanged several times between the fourth district court and the court of appeal, finally, the US Supreme Court decreed that the US executive possessed the authority to detain citizens. Nevertheless, the Court held that the detained citizens were entitled to the writ of habeas corpus because of the absence of a congressional suspension of habeas corpus.<sup>84</sup>

However, two conspicuous features stood out in the course of the reasoning of the Supreme Court's decision in *Hamdi*. First of all, the Court

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<sup>81</sup> US Supreme Court, *Hamdi v. Rumsfeld*, No. 03-6696.

<sup>82</sup> Declaration of Michael H. Mobbs, Special Advisor to the Under Secretary of Defence for Policy, 24 July 2002.

<sup>83</sup> *Hamdi v. Rumsfeld*, above note 81.

<sup>84</sup> *Ibid.*

did not show any discomfort with the use of the term 'enemy combatants' by the US executive. In fact, the Court did not say anything about the absence of the category of 'enemy combatants' in Geneva Conventions.<sup>85</sup> Instead, the Court in a very vague manner put some emphasis on the standards of the third Geneva Convention governing internment of PoWs.<sup>86</sup> Such emphases made the Court's reasoning all the more confusing, since Hamdi was a US citizen.<sup>87</sup> Of course, this reluctance of the US Supreme Court to question the legality of constructing a category of persons not mentioned in Geneva Conventions and labelling an American citizen as such could and did find favour in the Bush Administration's practice of continuing to invoke the term 'enemy combatants'. At the same time, the US Supreme Court repeatedly invoked its judgment in *Quirin* case, which as some dissenting judges mentioned, 'was not [the] Court's finest hour.'<sup>88</sup>

Secondly, even though the Court accepted the entitlement of Hamdi to the writ of habeas corpus, it also reserved a possibility that 'a properly constituted military tribunal' could provide due process for detainees.<sup>89</sup> This was quite compatible with the ruling of the US Supreme Court in *Rasul*, which emphasised the necessity of having a procedural mechanism to determine the *status* of Guantanamo detainees.<sup>90</sup> However, both in the cases of *Rasul* and *Hamdi*, the Court did not enter into the matter of

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<sup>85</sup> See also, D. Moeckli, 'The US Supreme Court's 'Enemy Combatant' Decisions: A 'Major Victory for the Rule of Law'? (2005) 10 *Journal of Conflict and Security Law* 75, at 81-83.

<sup>86</sup> There also exists another possibility, that is, the US Supreme Court took the *statuses* of PoWs and enemy combatants to have the same meaning, and it was not necessarily interpreting the term 'enemy combatants' in the light *Quirin* terminology, namely, 'unlawful enemy combatants.' See, J. Blocher, 'Combatant Status Review Tribunals: Flawed Answers to the Wrong Questions' (2006-2007) 116 *Yale Law Journal* 667. Unfortunately, the matter was not clarified in the subsequent judgment of the US Supreme Court, and to this date, it remains a subject of confusion.

<sup>87</sup> One possible explanation from this reasoning of the US Supreme Court emanates from its produced jurisprudence in WW II, when some of the US citizens at arms against the United States' were treated as PoWs. S. I. Vladeck, 'A Small Problem of Precedent: 8 U.S.C. 4001(a) and the Detention of U.S. Citizen Enemy Combatants, A Policy Comment' (2002-2003) 112 *Yale Law Journal* 961, at 967.

<sup>88</sup> *Hamdi v. Rumsfeld*, above note 81.

<sup>89</sup> *Ibid.*

<sup>90</sup> Moeckli, above note 85, at 92.



'specifics of the relevant proceedings,' and as such, left a broad space for the peculiar interpretations of the executive. In the following section, we shall examine how the Bush Administration understood this obligation of according due process to detainees.

### *3.2. The response of Bush to the rulings of the US Supreme Court and the issue of military commissions*

Just a few days after the judgment of the US Supreme Court on *Rasul v. Bush*, a memorandum for 'Establishing Combatant Status Review Tribunal' defined enemy combatants in the following terms:

The term 'enemy combatant' shall mean an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.<sup>91</sup>

This was the first response of the Bush Administration to remedy the lack of procedural guarantees for the purpose of determining the *status* of Guantanamo detainees. The procedures built in the Combatant Status Review Tribunal were particularly shaky.<sup>92</sup> According to the order authorising the operation of this tribunal, detainees could only be informed of 'the unclassified basis for their designation as enemy combatant.'<sup>93</sup> Furthermore, this tribunal was bound neither by presumption of innocence (or a presumptive PoW *status*, as required by Article 5 of the GC III), nor by procedures governing the credibility of evidentiary grounds.<sup>94</sup> At the same time, it provided for access to 'personal representative' and not a lawyer, and finally, it only possessed an advisory function.<sup>95</sup> At the same time, another procedure was put in place referred to as 'Final

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<sup>91</sup> Order Establishing Combatant Status Review Tribunal, 7 July 2004.

<sup>92</sup> *In Re Guantanamo Bay Litigation* 355 F.Supp. 2d 443 (DDC 2005).

<sup>93</sup> Order establishing Combatant Status Review Tribunal, above note 91.

<sup>94</sup> *Ibid.*

<sup>95</sup> For the legality of tribunals with advisory function, refer to chapter IV, section 7.4.

Administrative Review Procedures for Guantanamo Detainees.’ This second procedure was tasked with monitoring whether, in the course of time, the threat posed by an ‘enemy combatant’ would continue to exist or otherwise be neutralised.<sup>96</sup> This would complement the Military Commission Order 1 convened in 2002.<sup>97</sup> Together, these parallel systems were appointed to replace the obligation of the US to conduct Article 5 hearings mandated by the GC III to see whether at least some of the Guantanamo detainees could be considered as PoWs.<sup>98</sup>

Immediately after commencing their operations, military commissions became one of the most controversial features associated with the Guantanamo internments. In this regard, it must be borne in mind that in the history of common law, there has always existed a great deal of sensitivity about the topic of military commissions. The principal reason for this sensitivity, as discussed in chapter I, is that the authorisation of military commissions has normally been viewed as a consequence of martial law. In British political culture, martial law evokes discomfiting memories of British colonial encounters in such catastrophes as the Jamaican affair (1865), the Anglo-Boer war (1899-192), and the Amritsar massacre (1919).<sup>99</sup> Also, in the American judicial and political system, the term ‘martial law’ brings to mind Lincoln’s broad assertion of authority to detain and try citizens by military commissions.<sup>100</sup> However in America, martial law also acts as a reminder of a decision of the US Supreme Courts

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<sup>96</sup> Press Release ‘CCR calls Guantanamo Review Policy ‘Inadequate and Illegal,’ in M. Ratner, E. Ray, *Guantanamo: What the World Should Know about* (Canada: Chelsea Green Publishing Company, 2004) at 157.

<sup>97</sup> Although the rules for Guantanamo military commissions had been issued as early as March 2002, their operation was delayed until August 2004. H. Duffy, *The War on Terror and the Framework of International Law* (Cambridge: CUP, 2005) at 389.

<sup>98</sup> J. Blocher, ‘Combatant Status Review Tribunals: Flawed Answers to the Wrong Question’ (2006-2007) 116 *Yale Law Journal* 667, 667-669.

<sup>99</sup> Refer to chapter I, section 9.

<sup>100</sup> See for example, B. McGinty, *The Body of John Merryman: Abraham Lincoln and the Suspension of Habeas Corpus* (Cambridge: Harvard University Press, 2011).

often praised in heroic words, *Ex parte Milligan*.<sup>101</sup> The US Supreme Court held in that case that military commissions cannot operate 'in a state not invaded and not engaged in rebellion, in which the Federal Courts were open.'<sup>102</sup> No wonder, then, when the presidential authority in convening military commissions for Guantanamo detainees was challenged by Hamdan in the US Supreme Court, some legal historians were among the first groups to send *amici curiae* in support of Hamdan.<sup>103</sup> The purpose of these submissions was to convince the US Supreme Court that its decision in *Quirin* must not be relied upon as a precedential case in its view of military commissions. In fact, as some of these historians opined, '*Quirin* is a poisoned precedent.'<sup>104</sup>

*Quirin* was a troublesome case in a number of regards. Apart from constructing the category of 'unlawful enemy combatants,' and taking 'unlawful combatancy' as a basis for a criminal liability,<sup>105</sup> *Quirin* totally departed from the threshold of the closure of civil courts for permitting military commissions to function. Here, one may ask why the Roosevelt Administration was compelled to appoint military commissions in the first place when civil courts were available. The reason was that the executive lawyers had speculated that prosecuting the German saboteurs involved in that case in the civil courts would be faced by a number of difficulties.<sup>106</sup>

The Bush Administration took *Quirin* as something of a mantra both for using the language of 'enemy combatants' and authorising military

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<sup>101</sup> *Ex Parte Milligan* 71 U.S. 2 (4 Wall.) (1866).

<sup>102</sup> *Ibid.*

<sup>103</sup> *Hamdan v. Rumsfeld* No. 05-184 (2006) 415 F. 3d 33, Brief of Military Law Historians - Brief of Legal Scholars and Historians) as *Amici Curiae* in Support of Petitioner\_ Brief of Legal Scholar and Historians on effects of *Quirin*.

<sup>104</sup> Brief of Historians on effect of *Quirin*, *ibid.*, at 15.

<sup>105</sup> M.D. Maxwell, S.M. Watts, 'Unlawful enemy combatant: theory of culpability or neither?' (2007) 5 *Journal of International Criminal Justice* 19, at 21. More importantly, and as was mentioned in the previous chapter, there is no mention of the term 'unlawful combatants' in the IHL treaties. Furthermore, Article 5 of GC IV still employs the language of 'protected persons' for such categories of persons as spies and saboteurs.

<sup>106</sup> See for example, W. H. Rehnquist, 'Remarks of Chief Justice Rehnquist' (2002) 78 *Notre Dame Law Review* 1, at 5.

commissions.<sup>107</sup> *Hamdan* challenged the legality of such measures against the Bush Administration on two major grounds; 1) the principle of the separation of power and its requirements 2) the law of armed conflicts. The US Supreme Court accepted the petition of Hamdan and ruled, the structure and procedures of military commission established to try Hamdan was at odds with both the US domestic law<sup>108</sup> and the Geneva Conventions. However, in its ruling, the US Supreme Court did not repudiate the precedential value of *Quirin*. Rather, it enumerated three separate occasions in which military commissions could be established: 1) as a substitute for civil courts upon the declaration of martial law; 2) as part of temporary military administration of occupied territories, and, finally, 3) 'as an incident to the conduct of war power' for the purpose of punishing those responsible for violating 'the laws of war.'<sup>109</sup> *Quirin*, the Supreme Court argued, is a representative of the third type of military commissions in the order mentioned above. Therefore, the US Supreme Court fully accepted the validity of its judgment in *Quirin*, but, also, it posited that the Bush Administration's military commissions fell a long way short of the standards established by *Quirin*.

In conveying its conclusions in the case of *Hamdan*, the Court drew on two major arguments. Firstly, it said that the crime with which Hamdan had been charged—namely, conspiracy—was not a violation of the laws of armed conflict. This in itself, the court posited, questioned the need for establishing military commissions.<sup>110</sup>

The second part of the court's reasoning was predicated upon the question of procedure. In this regard, the Court focused on both the US domestic laws and the Geneva Conventions. As regards the former, the Court noted

<sup>107</sup> See, S. I. Vladeck, 'The Detention Power' (2004) 22 *Yale Law and Policy Review* 153.

<sup>108</sup> Uniform Code of Military Justice, 10 U.S.C. 47.

<sup>109</sup> *Hamdan v. Rumsfeld*, above note 103, at 32.

<sup>110</sup> *Ibid*.

that military commissions were not meant to signify a miniature version of courts martial, rather as a tribunal of necessity to be employed, when the courts-martial lack jurisdiction. Thus, there was no need to curtail the ample standards of procedure built in courts-martial for trying the suspect military offenders from a logistical point of view. Insofar as the latter source of the law was concerned, the Supreme Court briefly came to grips with the claim of the Bush Administration that al Qaeda fighters are not *fully* entitled to the protections of Geneva Conventions. However, the Court made an interesting assumption. It said that assuming that the Bush Administration assertion to the effect of the inapplicability of Geneva Conventions to al Qaeda fighters holds true, there still remains an Article of Geneva Conventions which must be observed in the conflict against al Qaeda, and this was Common Article 3.<sup>111</sup>

Among the standards of Common Article 3, the Supreme Court paid a special attention to the requirement of establishing tribunals conforming to the test of 'regularly constituted courts.' In defining the content of this phrase, the Court drew on the guarantees articulated in Article 75 of the First Additional Protocol,<sup>112</sup> which even by the Bush Administration's understanding amounted to customary international law.<sup>113</sup> The final conclusion was that:

The Commission that the President has convened to try Hamdan does not meet those requirements.<sup>114</sup>

Since 2006, much has been written on the perceived strengths and fallacies of the US Supreme Court decision in *Hamdan*. Whilst considering many of the legal questions raised by *Hamdan* go well beyond the scope of

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<sup>111</sup> Ibid.

<sup>112</sup> Of course, Article 75 governs the conduct of states in international armed conflicts. However, there is no barrier to prevent the import of this Article as a matter of customary humanitarian law into the realm of internal armed conflicts. ICJ took this view in Nicaragua

<sup>113</sup> W. H. Taft IV, 'The Law of Armed Conflict After 9/11: Some Salient Features' (2003) 28 *Yale Journal of International Law* 319, at pp. 321-322.

<sup>114</sup> *Hamdan*, above note 103, at 7.

this thesis,<sup>115</sup> we must evaluate one very significant aspect of this decision, which in a clear manner fits one of the principal arguments in this thesis, namely, the conflict between the subjective authority of states and the objective requirements of the law. In this regard, the US Supreme Court's reliance on Common Article 3 as a source of law restraining the authority of the American executive is a very strong sign of the importance of having a fundamental objective system for determining the executive obligations. That is to say, even when the application of the laws of armed conflict according to the Bush Administration could not be the case, the Court discerned that the presidential determination of the practicability of certain measures was not absolute and it must be done in compliance with the objective criteria set forth by Common Article 3 at the very least.<sup>116</sup> Seen in the light of objective versus subjective systems of determination, *Hamdan* must be viewed as a landmark decision, in that the absolutism of the subjective decisions of the US executive was challenged not only by reliance on such mantras as the separation of power, but also by a direct reference to international law.

The importance of *Hamdan* decision is multiplied when one considers that it also entailed the implication that the US executive cannot single-handedly purport to interpret its treaty obligations in accordance with its own will. In fact, as Arend has written, '*Hamdan* makes it clear that the final word on treaty interpretation comes from the judiciary.'<sup>117</sup> This in itself highlights another limit upon the subjective determination of the executive. Alarmed with the restraining effect of *Hamdan*, the US

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<sup>115</sup> See, for example, N. K. Katyal, 'Hamdan v. Rumsfeld: The Legal Academy Goes to Practice' (2006) 120 *Harvard Law Review* 65, R. Fitzpatrick, 'Implications for the Geneva Conventions Recent Development' (2007) 20 *Harvard Human Rights Journal* 339, and J. S. Martinez, 'Inherent Executive Power: A Comparative Perspective' (2006) 115 *The Yale Law Journal* 2480.

<sup>116</sup> See also, C. Kannady *et al*, 'The 'Push-Pull' of the Law of War: The Rule of Law and Military Commissions' in A. Maria Salinas De Frias *et al* (eds) at 675-676.

<sup>117</sup> A. C. Arend, 'Who's Afraid of the Geneva Conventions? Treaty Interpretation in the Wake of Hamdan v. Rumsfeld' (2007) 22 *American University International Law Review* 709, at 730.

executive sought to introduce laws which would rule out any possibility of the resort to Geneva Conventions for the purpose of challenging the executive decisions.<sup>118</sup> The US Congress corresponded to these concerns, and the result was the Military Commission Act (MCA) of 2006.<sup>119</sup>

It is fair to say that the most salient feature of the MCA lies in its devotion to reclaim the power of the executive subjective evaluations by imposing an extremely limited interpretation of Common Article 3.<sup>120</sup> Drawing on this premise, the MCA interpreted its own provisions to constitute a military commission of the kind compatible with the requirements of Common Article 3.<sup>121</sup> The only conclusion that can be inferred from this self-referential provision of the MCA is that it had been designated to invalidate potential references to Common Article 3 for challenging the settings of commissions formed under its auspices. In fact, the next provision of the MCA makes this intended aim crystal-clear, as it sought to counter the very invocation of Geneva Conventions by an 'alien unlawful enemy combatant as a source of rights.' This provision, too, marks a distinct hostility towards an international system of objective determination. Of course, this reduction in the value of the objective treaty obligations could not be attained without increasing the areas of deference to the subjective determination of the executive. To this end, section 6(3)(A) of the MCA stipulates:

[...] the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions, and to promulgate higher standards and administrative regulations for violations of treaty obligations [...].<sup>122</sup>

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<sup>118</sup> Ibid., at 711-712.

<sup>119</sup> Military Commissions Act of 2006, 109-366.

<sup>120</sup> J. M. Beard, 'The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counter-Terrorism Operations (2007) 101 *American Journal of International Law* 56, at 66.

<sup>121</sup> 948 b(f).

<sup>122</sup> Ibid., S 5(3)(a).

This would bring us to the point zero in terms of the value of the objective treaty obligations. To make this point clear, it suffices to submit to a rather obvious rationale behind Common Article 3—that is reducing the possibility of resorting to prohibited conducts by the executive. Trusting the interpretation of such rules in the hands of the very institution whose conduct was intended to be regulated by them could only mean providing a *carte blanche* for the executive.<sup>123</sup>

Of course some of the complications associated with the rules of the MCA arises from the status of international law obligations in the US domestic laws. It was seen in chapter II that as early as the nineteenth century, the US Congress passed laws inconsistent with the US-China treaty of Burlingame. The legality of these laws was approved with no difficulty by the US Supreme Court.<sup>124</sup> The *ratio decidendi* behind such an approval was that since international law obligations are applied within the US as domestic law, they can be replaced or repealed by other domestic laws through the 'later-in-time' legislations.<sup>125</sup> This principle, some scholars have argued, sheds light on the validity of the MCA.<sup>126</sup> In other words, the MCA does to the US obligations under Common Article 3, what the so-called 'Chinese Exclusion Act' did to the Burlingame Treaty.<sup>127</sup> However, there is also another reading of the situation, that is, the clash between the MCA and the ruling of the US Supreme Court's decisions in *Hamdan* is not that of laws, but interpretations. As Arend has argued, '[an] implication that can be drawn from the *Hamdan* decision is that it seems unlikely that Congress can impose by a statute a particular interpretation

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<sup>123</sup> C. Manuel Vazquez, 'The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide' (2007) 101 *American Journal of International Law* 73, at 79.

<sup>124</sup> Refer to chapter II, section 8.

<sup>125</sup> See, L. Henkin, *International Law As Law In The United States* (1983-1984) 82 *Michigan Law Review* 1555.

<sup>126</sup> See, C. A. Bradley, 'The Military Commissions Act, Habeas Corpus, and the Geneva Conventions' (2007) 101 *American Journal of International Law* 322.

<sup>127</sup> *Ibid.*



on a treaty.<sup>128</sup> This also makes sense if reads the matter in the light of the Charming Betsy principle, as configured by Justice Marshal, 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'<sup>129</sup> Yet, even this suggestion remains contested.<sup>130</sup> According to the opponents of this argument, the MCA makes it clear that it is a 'later-in-time' law and not merely a particular interpretation<sup>131</sup>. It is difficult to settle for a middle ground in such a peculiar turn of events. However, the MCA is an alarming piece of legislation in that it can form a precedent for overriding not only the US obligations under international law, but also the judicial interpretations of such obligations. In other words, the MCA encapsulates in one piece whatever the wrong that exists with the American 'exceptionalism' through a legalized process.

The shaky rules of the MCA at times resulted in chaos in the procedures governing the trial of Guantanamo detainees, or as some have put it, 'a system in which uncertainty [was] the norm and where the rules appear[ed] random and indiscriminate.'<sup>132</sup> This continued until the Obama Administration brought about a few reforms in the setting of military commissions.

### 3.3. *The fate of Habeas Corpus after MCA and detention in Obama Years*

Both in 2005 through Detainee Treatment Act,<sup>133</sup> and in 2006 through Military Commissions Act, Congress sought to limit the issuance of the writ of habeas corpus for Guantanamo detainees, and, instead, put a greater emphasis on Combatant Status Tribunal Reviews as a substitute measure

<sup>128</sup> Arend, above note 117, at 735.

<sup>129</sup> *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)

<sup>130</sup> Julian Cu, Julian Ku, Why Congress Can Override the Supreme Court's Interpretation of International Law, *Opinio Juris*, (Sept. 7, 2006), <http://www.opiniojuris.org/posts/157605434.shtml>.

<sup>131</sup> Bradley, above note 126.

<sup>132</sup> Kannady, above note 116, at 681.

<sup>133</sup> Detainee Treatment Act of 2005, (H. R. 2863).

for judicial supervision of internments. In 2008, the US Supreme Court ruled that the CSRT process could not be seen as an adequate substitute for the writ of habeas corpus, and therefore, habeas corpus could not be suspended in the absence of the constitutional requirements for doing so.<sup>134</sup> In *Boumediene*, the Court also took account of the location of the Guantanamo Bay, and noted that, '[i]n every practical sense Guantanamo is not abroad; it is within the constant jurisdiction of the United States.'<sup>135</sup> However, notwithstanding this observation, the Court failed to address the issue of the old executive technique of transporting detainees to areas which it thinks are insulated from the reach of habeas corpus.<sup>136</sup> Unfortunately, this left the door open for the US executive to choose sites in which 'applying the Suspension Clause' would be impractical.'<sup>137</sup> Consequently, the focus of the US detention practice during Obama years shifted from the Guantanamo Bay to Bagram.

Very early on after assuming the presidential office, the Obama Administration showed its intentions to the effect of revising the US detention policy.<sup>138</sup> Nevertheless, for the most part, no major change has yet been built in the US detention policy during the Obama years. At times, the Obama Administration continued to invoke the narrative of 'war on terror,' and on particular occasions,<sup>139</sup> claimed the same sweeping powers that the Bush Administration had once accumulated in its

<sup>134</sup> *Boumediene v. Bush*, No: 06-1195.

<sup>135</sup> Ibid.

<sup>136</sup> N. Berardinelly, '*Boumediene v. Bush*: Does It Really Curtail Executive Manipulation' (2011) 37 *Ohio Northern University Law Review* 169, at 178.

<sup>137</sup> Ibid., see also, J. F. Irias, 'Wartime Detention and the Extraterritorial Habeas Corpus Doctrine: Refining the *Boumediene* Framework in Light of Its Goals and Its Failures' (2013) 88 *New York University Law Review* 1348.

<sup>138</sup> Executive Order 13493: Review of Detention Policy Options.

<sup>139</sup> M. Bentley, 'Continuity we can believe in: escaping the War on Terror' in M. Bentley, J. Holland (eds), *Obama's Foreign Policy: Ending the War on Terror* (New York: Routledge, 2014) at 104. Not to mention that the Obama Administration has also devised a peculiar language of its own with phrases such as 'overseas contingency operation,' which on the surface seem to be more susceptible to legal understanding, but are equally indeterminate and indiscriminate as the Bush Administration's 'war on terror'. See, Guardian 25 March 2009, 'Obama Administration Say Goodbye to 'War on Terror'' <http://www.theguardian.com/world/2009/mar/25/obama-war-terror-overseas-contingency-operations>

detention exercises.<sup>140</sup> The occasional continuation of using the language of 'war on terror' by Obama brings to mind a warning made by some scholars, who in the face of an excessive reliance on the terminology of 'war on terror' argued:

[the discourse created by] the 'war on terrorism' has taken on a life of its own and any [A]dministration would find it extremely difficult to unmake or alter to any significant degree, even if they wanted to.<sup>141</sup>

That said, however, it is noteworthy that the Obama Administration withdrew the use of (the language of) enemy combatants for Guantanamo detainees. Instead, after a short while of using the term 'unprivileged belligerents' (above), the Obama Administration introduced the standard of 'substantial support'<sup>142</sup> for such groups as Taliban and Al Qaeda as a qualifier for internment.<sup>143</sup> Even though the test of substantial support seemed more legally sound when compared to the idiosyncratic concept of 'enemy combatants' (and as such, would allow for a more constructive legal enquiry of grounds justifying detention),<sup>144</sup> it essentially shared some of the same ambiguities of the criterion of 'unlawful enemy combatancy'. At the same time, the test of 'substantial support' seems to epitomise a very similar concept to the test of 'material support,' that constituted the core of the Bush Administration's concept of 'unlawful enemy combatants.' As was explained above, the concept of 'material support' played a key role in rendering the term 'unlawful enemy combatant' a hybrid term. The purpose of this hybrid notion was to oscillate between the laws of armed conflicts and criminal laws governing the subject of aiding and abetting with the purpose of exploiting the advantages offered by both of these

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<sup>140</sup> *Hamili v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009).

<sup>141</sup> Jackson, above note 9, at 3.

<sup>142</sup> This test was formalised through the statute of 'National Defence Authorization Act for Fiscal Year 2012' Section 1021 [NDAA].

<sup>143</sup> J. K. Elsea, M. J. Garcia, *Enemy Combatant Detainees: Habeas Corpus Challenges in Federal Court* (2010, CRS Report for Congress) at 3.

<sup>144</sup> R. Chesney, 'Who May Be Held? Military Detention Through the Habeas Lens' (2011) 52 *Boston College Review* 769.

regimes, and upholding the restraints of neither.<sup>145</sup> Furthermore, the test of substantial support carried with it the troubling prospect of being interpreted so broadly as to cover (even American) journalists and writers whose writings could be misunderstood as lending support to the parties in conflict with the US. It was thus that the test of substantial support was challenged by some US political activists, who feared they could potentially be detained under the vague auspices of substantial support.<sup>146</sup> However despite the early promising victory of Hedges in obtaining an injunction against section 1021 of NDAA,<sup>147</sup> the constitutionality of the test of substantial support was stayed by the Court of Appeal,<sup>148</sup> and as late as 2014, the Obama Administration has indicated no intention of introducing a different test.<sup>149</sup>

Notwithstanding Obama's early promises on resuming the criminal justice system for the purpose of prosecuting detainee suspects in Guantanamo Bay,<sup>150</sup> his Administration continued to bring some detainees before military commissions rather than civil courts. Even though the Obama Administration made some reforms to the system of military commissions, it did not supply any legal justification for the operation of this body other than that it would be difficult and burdensome for the US executive to prosecute some of the Guantanamo Bay detainees in the civil courts. What this meant in the words of Hafetz was the following:

[...] when the government believed it could easily convict, it brought charges in a federal court, when the government had some doubts about its evidence, it resorted to the more relaxed

<sup>145</sup> Refer to the arguments of Judge Forrest in *Hedges v. Obama* (*infra*) at 15.

<sup>146</sup> *Hedges v. Obama*, No. 12 Civ. 331(KBF).

<sup>147</sup> See also, C. P. Horowitz, 'Creating a More Meaningful Detention Statute: Lessons Learned From *Hedges v. Obama*' (2012-2013) 81 *Fordham Law Review* 2853, at 2882-2890.

<sup>148</sup> *Hedges v. Obama*, 12-cv-00331.

<sup>149</sup> See, 'DOJ Seeks Dismissal of Case Challenging NDAA Indefinite Detention' 12 April 2014 available at <http://www.thenewamerican.com/usnews/constitution/item/18033-doj-seeks-dismissal-of-case-challenging-ndaa-indefinite-detention>.

<sup>150</sup> See, J. Leopold, 'A Campaign Promise Dies: Obama and Military Commissions' available at <http://www.truth-out.org/news/item/285:a-campaign-promise-dies-obama-and-military-commissions>.

rules of military commissions; and when the government's case was weakest, it disposed with a trial altogether and simply held the prisoners indefinitely under a theory previously unknown to American law: that the prisoners were too difficult to try but too dangerous to release.<sup>151</sup>

The internment of the third category of persons in the text above cannot but highlight one of the most notorious manifestations of the exercise of the subjective assessment of the executive in a manner insensitive to principles and only responsive to expediency.<sup>152</sup> Indeed, the Obama Administration's reliance on its own subjective assessment and protecting its 'say so' has at times been as unfair and arbitrary as its predecessor.<sup>153</sup> It must, nonetheless, be mentioned that in his State of the Union address in January 2014, President Obama renewed his promise to effect the closing Guantanamo Bay by the end of 2014. The speculations are that the US Congress will lift some of the restrictions on the issue of transferring the detainees, and therefore, the closure of Guantanamo becomes possible by the end of 2014.<sup>154</sup> Following an executive order in 2011, the Obama Administration established the Periodic Review Board for those detainees, who, according to its assessment, could not be either tried or released.<sup>155</sup> But astonishingly, the real operation of these reviews began by a two years delay.<sup>156</sup>

After inheriting a very complicated heritage from his predecessor, the Obama Administration made a tactical choice regarding the exercise of internment. It reduced the transfer of detainees into American custody as

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<sup>151</sup> J. Hafetz, *Habeas Corpus after 9/11: Confronting America's New Global Detention System* (New York: New York University Press, 2011) at 242.

<sup>152</sup> Ibid.

<sup>153</sup> L. Hajar, 'Obama inherits and embraces a legal mess' published on *Aljazeera*, Sep. 2011 available at

<http://www.aljazeera.com/indepth/opinion/2011/09/20119108166435928.html>.

<sup>154</sup> <http://www.aljazeera.com/news/americas/2014/01/obama-urges-guantanamo-closure-this-year-20141293324985281.html>.

<sup>155</sup> Executive Order 13567-- Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force.

<sup>156</sup> A. Worthing, 'Guantanamo Secretive Review Boards' *Aljazeera* website, 10 Dec 2013 available at <http://www.aljazeera.com/indepth/opinion/2013/12/guantanamo-secretive-review-boards-201312862820866764.html>.

much as possible,<sup>157</sup> and kept the new detainees in a detention facility, which could be considered as being located in 'a war theatre,' namely, Bagram airbase.<sup>158</sup> In effect, Bagram airbase<sup>159</sup> seemed to become as much of a legal black hole as the Guantanamo Bay.<sup>160</sup> In a similar manner to the detainees in Guantanamo Bay, many of those held in Bagram had been transported to Bagram from different places by the US executive to evade judicial oversight.<sup>161</sup> All in all, the Bagram airbase had the dubious advantage of being in a zone of war, which became the primary base for the D.C circuit court to deny the writ of habeas corpus to the Bagram detainees.<sup>162</sup>

The Bagram detention facility centre has embodied a considerably higher number of detainees than Guantanamo Bay with much less protective procedures at the disposal of its detainees. Apart from the unavailability of habeas corpus to Bagram detainees, many other legal issues in Bagram also remain in a state of disarray. For example, even though the control of the Bagram prison was formally given to the Afghan authorities in September 2012,<sup>163</sup> it is reported that the 'US officials will continue to capture and detain Afghans at Bagram for up to six months at a time, before handing them over to Afghan authorities.'<sup>164</sup> This setting poses

<sup>157</sup> J. Becker, S. Shane, 'Secret 'Kill List' Proves a Test of Obama's Principles and Will, *New York Times* May 29, 2012.

<sup>158</sup> A. Gregory, *The Power of Habeas Corpus in America: From the King's Prerogative to the War on Terror* (Cambridge: CUP, 2013) at 257.

<sup>159</sup> 'The Bagram Theater Internment Facility was located on Bagram Airfield, north of Kabul, the capital city of Afghanistan. The building structure was originally an aircraft hangar-repair shop until it was turned into a 'makeshift military detention center.' Detainees were held in pens fashioned from coils of razor wire piled in stacks reaching above their heads. In 2002, it was used as a military collection and screening center called the Bagram Collection Point or BCP. The name later changed to Bagram Theater

<sup>160</sup> See, *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs* [2012] UKSC 48; [2013] 1 A.C. 614 (SC).

<sup>161</sup> *Maqaleh v. Gates*, District Court, No. 09-5265, 2010.

<sup>162</sup> For a supportive article on the decision of the circuit court, see, M. J. Buxton, 'No Habeas for You: AL *Maqaleh v. Gates*, the Bagram Detainees, and the Global Insurgency' (2010) 60 *American University Law Review* 519 and for a critical view, see, Irias, above note 101.

<sup>163</sup> *Al Jazeera*, 'US hands over Bagram prison to Afghanistan' available at <http://www.aljazeera.com/news/asia/2013/03/201332534437116216.html>

<sup>164</sup> *Al Jazeera*, 'who controls Afghanistan's Bagram Prison' available at <http://m.aljazeera.com/story/20129129242282621>.

important questions as to which state is in charge of providing administrative safeguards for the detainees, insofar as the initial six months of their detention is concerned.<sup>165</sup> In any event, much of the outcry regarding the US detention policy in Afghanistan seems to have been silenced by the agreement between the US executive and its Afghan counterpart.

As was considered above, the US courts denied the issuance of habeas corpus to detainees held in Bagram. However, in a rather exceptional case, the UK courts approved the issuance of habeas corpus for one of the detainees in Bagram. This was the case of *Rahmatullah v. Secretary of State*, which involved the internment of a Pakistani citizen initially captured and detained by the UK troops in an area under US control in Iraq.<sup>166</sup> Subsequently, Rahmatullah was handed over to the US authorities, who unlawfully<sup>167</sup> transferred him to Bagram. Rahmatullah applied for the writ of habeas corpus on the basis that his detention in Bagram breached the Memorandum of Understanding (MoU) between the US and UK. This agreement required the parties involved to observe the relevant rules and regulations of GC III and GC IV as regards the detention and deportation of detainees passed into the hands of the US (the accepting power) from the UK (the detaining power). The UK Supreme Court accepted this argument and established that according to the MoU mentioned above, the UK 'Government had the means of obtaining control over the custody of Rahmatullah'<sup>168</sup> to secure his release. This became the basis for the granting of habeas corpus. Therefore, the

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<sup>165</sup> It must also be mentioned that at one point, the issue of the US detention in Bagram became a major source of tension between the Afghan and US governments. See, M. Rosenberg, 'Karzai Denounces Coalition Over Airstrikes' (New York Times, September 6 2012) available at <http://www.nytimes.com/2012/09/17/world/asia/karzai-denounces-coalition-over-airstrikes.html?ref=bagramairbaseafghanistan&r=0>.

<sup>166</sup> *Rahmatullah*, above note 160.

<sup>167</sup> See also, Z. Deli, 'Overview: International Law' (2014) 3 *Cambridge Journal of International and Comparative Law* 297.

<sup>168</sup> *Rahmatullah*, above note 160, para 60.

court's generosity in the case of Rahmatullah was not predicated upon stretching the territorial limits associated with the writ of habeas corpus, and hence, this decision must clearly be distinguished from the cases brought before the US Supreme Court.

### *3.4. The political question doctrine, the non-justiciability of the subjective assessments of the executive, and the US Supreme Court*

As it was argued in chapters I and II of this thesis, one of the oldest techniques of sovereigns in the common law tradition to escape from judicial scrutiny has been to argue that a given practice of internment concerns an exclusive matter for the executive.<sup>169</sup> Historically, the common law courts have more or less been receptive to such a rationale. For example, as was argued in chapter I in maintaining the legality of detentions exercised by Charles I, and consequently, disarming the possibility of judicial intervention, Justice Hyde argued, 'If no cause of the commitment be expressed, it is to be presumed to be for matter of state, which we cannot take notice of.'<sup>170</sup>

Even though Hyde viewed the presumption of matter of state as one designed for very exceptional circumstances, this defence became something of an ordinary resort to British and, later on, American executive. In practical terms, what this meant was that when it came to the matters pertaining to the sovereign decisions, the judiciary would keep its hands clear off any intervention.<sup>171</sup> As a result, the common law courts would either refuse to issue habeas corpus in the view of a supposed

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<sup>169</sup> Refer to chapter II, section 2.

<sup>170</sup> Proceedings on the Habeas Corpus, brought by Sir Thomas Darnel *et al* at the King's-Bench in Westminster hall: Charles I A. D. 1627 in *A Complete Collection of State Trials* (1816).

<sup>171</sup> A. W. B. Simpson, 'Detention without Trial in the Second World War: Comparing the British and American Experiences' (1988) 16 *Florida State University Law Review* 225, at 266.



suspension, or when they met this procedural regularity, they would challenge the executive solely on its good faith which was the only acceptable ground for confronting the detention power.<sup>172</sup>

Interestingly enough, and as examined in the previous chapter, a particular vehicle for dismantling the judicial supervisory powers permeated to the area of international law, and consequently, a prevailing view among states emerged in the early twentieth century with the purpose of insulating some cases from international legal adjudication. According to this doctrine, when there was an overwhelming political dimension to a case, that case could not in essence be liable to arbitration in its general sense.<sup>173</sup> This doctrine was thoroughly examined and critiqued by Lauterpacht in 1933.<sup>174</sup> However, his views did not inform states' conception and practice of international law until the end of the Second World War.

One of the most ground-breaking results implicit in the revision of international humanitarian law in the wake of the Second World War and the adoption of human rights law treaties was that many of the states' decisions, albeit ingrained with political implications, could not remain immune from judicial scrutiny. This was true at least insofar as they would affect the known standards of such international law regimes as IHL and IHRL.

The precedent-establishing cases emerging in the wake of Guantanamo Bay detentions are a notable signifier of a manifest inclination on the part of the US executive to prevent a judicial review of its powers from taking place. The Bush Administration's lawyers referred to this as 'political

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<sup>172</sup> See, *Liversidge v. Anderson* [AC] 1942 206.

<sup>173</sup> M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge: CUP, 2001) 358.

<sup>174</sup> H. Lauterpacht, *The Function of Law in the International Community* (Oxford: OUP, 1933, edition 2011).

question doctrine.’<sup>175</sup> Accordingly, very early on in the process of challenging the detention powers of the executive, the Bush Administration made a consistent attempt to remind the courts of the ‘sensitive questions’ that their acceptance of habeas petitions would give rise to.<sup>176</sup> Drawing on this assumption, the Bush Administration argued on numerous occasions that the matter of interning individuals in the course of ‘war on terror’ and the determinations surrounding it are ‘left to the President’s sole discretion.’ As argued in various parts of this thesis, whenever the word ‘discretion’ is used in the context of detention without trial, the underlying intention is to cripple judicial review in favour of the subjective determinations of the executive.<sup>177</sup> In different forms, the argument of ‘the President’s sole discretion’ was repeated by the Bush Administration.<sup>178</sup> For example, with regard to the question of determining whether one meets the criteria for being classified as ‘enemy combatants’, the Bush Administration’s lawyers opined:

Given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military’s determination that an individual is an enemy combatant and should be detained as such.<sup>179</sup>

In the case of *Hamdi*, the Supreme Court designated a balance-like test between its obligation of judicial review and the issue of deference to the decisions of the US executive. Consistent with this, the Court posited that deference to the subjective determination of the executive was due when the intensity of matters concerning ‘foreign policy, national security, or

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<sup>175</sup> *Hamdi v. Rumsfeld*, Government’s Motion for Stay Pending Trial 5/31/2002, in *the Enemy Combatant Papers*, above note 15, at 199.

<sup>176</sup> *Hamdi v. Rumsfeld*, Government’s Memorandum of Points and Authorities in Support of Respondent’s Objections to Magistrate Judge’s Order of May 20, in *the Papers*, above note 15 at 189.

<sup>177</sup> In this regard, see, N. Lacey, ‘The Jurisprudence of Discretion: Escaping the Legal Paradigm’ in K. Hawkins (ed) (Oxford: Clarendon Press, 1992) at 373.

<sup>178</sup> See, for example, N. Kassop, ‘A Political Question by Any Other Name: Government Strategy in the Enemy Combatant Cases of *Hamdi* and *Padilla*’ in N. Mortada-Sabah and B. E. Cain (eds), *The Political Question Doctrine and the Supreme Court of the United States* (Plymouth: Lexington Books, 2007)

<sup>179</sup> *Hamdi v. Rumsfeld*, No. 02-6895, Fourth Circuit Decision (*Hamdi II*).

military affairs' so requires.<sup>180</sup> At the same time, it held that the internment of an American citizen fails to meet such an intensity threshold for the purpose of exercising judicial deference. As it can be seen here again, in limiting the scope of the US executive subjective determination, the Supreme Court has followed a pattern symptomatic of almost all the Guantanamo Bay cases produced before it, namely, restraining the powers of the executive in particular respects, and yet leaving a door open for the convergence of exercising those powers in other areas. Based on this judicial conservatism of the US Supreme Court, some scholars have argued that the Court never went as far as it could in putting the rule of law limits on the presidential power.<sup>181</sup> Whilst this opinion holds substantial merits, it is, at the same time, reasonable to argue that compared to its previous decisions in cases such as *Quirin*, *Korematsu*,<sup>182</sup> and *Eisentrager*, the Supreme Court's rulings in the Guantanamo Bay cases entailed a much more condensed version of deference towards the decisions of the executive.

Notably, the US Supreme Court never relinquished the task of reviewing the US executive particularly during the Bush era on the basis of the high political stakes that might have been inherent in the Guantanamo Bay cases. To use human rights vocabulary, it is fair to say that the US Supreme Court reviews of the executive authority in the Guantanamo Bay cases reached the level of meaningful judicial review,<sup>183</sup> *only* insofar as the availability of, the procedural safeguard of the writ of habeas corpus to the so-called 'enemy combatants' detainees was concerned. However, the same does not strictly hold true on the executive determination of the substantive dimensions underlying the practice of internment at

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<sup>180</sup> *Hamdi v. Rumsfeld*, US Supreme Court, above note 81.

<sup>181</sup> See, Moeckli, above note 85.

<sup>182</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>183</sup> Refer to chapter III, section 11.

Guantanamo. Here, the US Supreme Court rather implicitly put a stamp of approval on the assertions of the executive.<sup>184</sup> For example, with regard to the use of the term 'enemy combatants,' the Court refrained from challenging the US executive on the incompatibility of these terms with the Geneva Conventions,<sup>185</sup> and it turned out to use the same vocabulary that had created the frame for many of the confusions inherent in the US detention policy.<sup>186</sup> Another example stems from the validity of *Quirin* appearing as a precedent for establishing military commissions invoked by the Bush Administration despite the wide-ranging criticisms of international and domestic law scholars and some legal historians.<sup>187</sup> In *Hamdan*, the US Supreme Court tacitly accepted the government's assertions to the effect of the inapplicability of Geneva Conventions and its additional protocols to the conflict with Taliban and Al Qaeda. Having done so, the US Supreme Court shifted its attention to the minimal requirements of Common Article 3 to Geneva Conventions without making any clarifications as to what the nature of conflicts with Al Qaeda objectively amounted to be (and not on the basis of the determinations of the Bush Administration).<sup>188</sup> Finally, in *Boumediene*, the US Supreme Court did not make any clarifications as to whether the executive manipulation of detention sites for the purpose of avoiding judicial

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<sup>184</sup> J. S. Martinez, 'Process and Substance in the 'War on Terror'' (2008) 108 *Columbia Law Review* 1013, at 1028-1030.

<sup>185</sup> For the view of the Geneva Conventions on this, refer to chapter IV, section 6.

<sup>186</sup> It must crucially be noted that this reluctance of the US Supreme Court on challenging the subjective determination of the executive was not due to the parties' lack of argument on point. For example, the petitioner in *Hamdan* made a substantial case as to why the designation of Hamdan as 'unlawful combatant' was a mistaken act. 'because Petitioner was captured on the battlefields of Afghanistan and claims PoW protection, the law of war requires that he be afforded the protections provided to an American service member. [...] this case is thus unlike *Quirin*, where the saboteurs did not contest their unlawful combatant status. [...] this case is far closer to that pre-existing law of *Milligan* than it is to *Quirin*. Respondents call Milligan a 'civilian' but the Government told the Court then that he was an unlawful belligerent who 'conspired and armed others.'" Enemy Combatants Papers, above note 16, at 498.

<sup>187</sup> *Hamdan v. Rumsfeld*, above note 103.

<sup>188</sup> *Ibid.*

overview can be considered as a valid hindrance to the issuance of the writ of habeas corpus.<sup>189</sup>

Once again, in terms of legal history, this signifies a familiar approach in the common law tradition. An innate component of this approach is to compromise substance in favour of procedure, or in other words, to use procedure as a cover to ignore substance.<sup>190</sup> We have shown the mode in which this approach has aided the UK courts to avoid the questions of substance. In the US, however, Chief Justice Marshall has been credited with devising this approach for the first time in the case of *Marbury v. Madison*.<sup>191</sup> As Cole has noted, the essence of this judicial tactic is 'to establish review in a case where the result [cannot] be challenged'.<sup>192</sup> Depending on whether a given case concerns the matters of national security, the sovereign prerogative or the political question doctrine, different variations of this tactic have been recalled by the UK and US courts. It is not without interest to conclude this section with a brief analysis of some cases using this judicial technique in the UK courts, and leaving the matter to the reader to draw the obvious similarities between the so-called 'enemy combatants' cases and the cases mentioned hereinafter.

The British judiciary has not always refrained from establishing judicial review over the cases concerning national security or the sovereign prerogative. However, judicial review in the cases of this nature has been 'concerned, not with the decision, but with the decision-making process'.<sup>193</sup> This dictum takes its cue from a judgment by the House of Lords in 1916. In that case, Lord Parker said,

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<sup>189</sup> N. Berardinelly, above note 136.

<sup>190</sup> See, Martinez, above note 184.

<sup>191</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>192</sup> D. Cole, 'Judging the Next Emergency: Judicial Review and Individual Rights' (2003) 101 *Michigan Law Review* 2565, at 2565-2570.

<sup>193</sup> *Chief Constable of the North Wales Police v. Evans* [1982] 3 All ER 141 at 154.

Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subjects of evidence in a Court of law or otherwise discussed in public.<sup>194</sup>

This is in fact a British synthesis of the same judicial tactic that was appointed in the case of *Marbury v. Madison*. That is to say, even in the cases of national security, one can witness the establishment of judicial reviews, but of the kind concerned only with procedure and not substance. Vitally, the subjective determinations of the executive still go unchallenged in these cases, and in any event, the executive does not lose any point of substantive importance to judicial review. One can certainly say that the same observation applies to the cases associated with judicial review of the prerogative. In 1985 some took comfort in the fact that the House of Lords finally ruled that some of the executive decisions deriving from the prerogative of the Crown cannot remain in the shield of non-justiciability.<sup>195</sup> While the limited space of this thesis does not allow us to consider the specific facts of the *GCHQ* case, it suffices to say that the law Lords in that case established that an executive instruction arising from the prerogative powers can be subjected to judicial review. Yet even there, the Court enlisted a host of exceptions that could still be excluded from judicial review. These included powers concerning 'the making of treaties, the defense of the realm, the prerogative of mercy, the grant of honors, the dissolution of Parliament and the appointment of ministers'.<sup>196</sup> To this must be added the limitations that national security requirements impose upon reviewing the executive prerogative.<sup>197</sup> Not infrequently do the

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<sup>194</sup> *The Zamora Case* [1916] 2 AC 77.

<sup>195</sup> *Council of the Service Union and Others v. Minister for the Civil Service* [1985] IRLR 28.

<sup>196</sup> *Ibid*, Lord Ruskil's Judgment.

<sup>197</sup> This has rendered the issue of reviewing the prerogative a particularly complex one, in that there exists no clear judicial principle for discerning when and how a subject matter within the realm of the prerogative powers is apt for judicial control. In a similar manner to its judgment in the *GCHQ* case and in a detention context, the Court of Appeal in the case of *Abbasi* reiterated the House of Lords' formula to the effect of the non-existence of a firm judicial principle governing the review of the prerogative. This was notwithstanding the fact that in *Abbasi*, the Court of Appeal emphasised the necessity of putting some judicial

disputes relating to the prerogative powers bear a national security dimension. As a result, the seeming progress in subjecting the executive instructions imbued with the prerogative to judicial review has turned out to be more of a procedural formality than a substantive actuality. It is with these considerations in mind that, after a careful analysis of the judicial restraints put on the prerogative, Poole has discerned a continuous pattern in the treatment of such matters by the UK judiciary. This pattern, according to Poole, consists of two steps:

Step one, the refusal to allow the operation of a legal black hole. Here, the assertion of ordinary legal principles over prerogative lawmaking. Step two, the accommodation of government security and diplomatic interests, leading to equivocation and uncertainty in the application of those ordinary principles.<sup>198</sup>

By paying regard to the arguments in this section, a simple but vital question needs to be asked: Is this two-step process not just another version of the same old technique that one sees unfolding in the US Supreme Court's handling of the so-called 'enemy-combatants' cases?

#### 4. Conclusion

One of the immediate reactions of the US executive to the horrifying events of 9/11 was to make inflated statements about 'a new kind of war' and 'a new kind of enemy.' As argued in the first section of this chapter, this emphasis on 'newness' was meant to deliver an important message. This message was that the old rules of international law had reached their expiry date on the face of the emergence of actors such as al-Qaeda. The

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constraints on exercising the prerogative in the same vein as the *GCHQ* case. Yet again, the proposition that the powers driven by the prerogative do not necessarily operate with any judicial fetter did not result in a tangible result in the case of *Abbasi* either. *R (Abbasi) v. Secretary of State for Foreign and Commonwealth Affairs* [2003], UKHRR 76, see also, R. Singh, 'The Use of International Law in the Domestic Courts of the United Kingdom' (2005) 56 *Northern Ireland Legal Quarterly* 119.

<sup>198</sup> T. Poole, 'United Kingdom: The Royal Prerogative' (2010) 8 *International Journal of Constitutional Law* 146, at 155.

irony in this assumption of the US executive was that the Bush Administration would not hesitate to resort to the most troublesome precedents stemming from the jurisprudence of the US Supreme Court during the Second World War. Such a resort was by itself a strong indicator of the fact that the so-called 'war on terror' and the new legal issues alleged to have arisen in its wake could not possibly be considered as *the end of legal history* particularly with regard to the question of detention without trial. Therefore, to the extent that the US executive sought to formalise some of its particular practices by revitalising the relevance of such cases as *Quirin* or *Eisentrager*, we have witnessed a reproduction of the earlier history of internment and can testify to the 'sameness' of many components of the internment practices with their counterparts in the history of detention without trial, as recounted in this thesis.

However, the most interesting element in the detentions exercised in the context of the American 'war on terror' is the degree to which the historical precepts are merged with new definitions. Nowhere did this become clearer than in the Bush Administration's invocation of the term 'unlawful enemy combatants.' This term, as argued above and in the previous chapter, had been borrowed from the case of *Quirin*. The linguistic architecture of this term suggests that it shall exclusively be concerned with the laws of armed conflict. However, the definition assigned to this term by the Bush Administration made it clear that it had been committed to form and occupy a space between the laws of armed conflict and the criminal law models. This 'grey zone' was meant to be one in which the subjective determination of the executive operate without any bond to the objective criteria of law in general and international law in particular. Therefore, to refer to some of the arguments mentioned in the



previous chapter, the objective binary put in place by the legal regimes of IHL between civilians and PoWs was totally disregarded in the 'grey zone' of the American internment practices. Additionally, the narrow conceptions of 'combatancy' defined by either membership in the enemy armed forces or the test of direct participation were replaced by an unclear test borrowed from the sphere of criminal law, namely, material support. This amalgamation of notions belonging to different spheres of law constituted the essence of the Bush Administration's substantive determinations in its self-constructed 'grey zone'.

However, this grey zone could not be maintained without the complicity of the US Supreme Court with the substantive determinations of the Bush Administration. As argued above, the US Supreme Court showed a great deal of fortitude<sup>199</sup> in order not to let the Bush Administration establish a monopoly on determining which procedural safeguards were available to the Guantanamo detainees. However, when it came to the merits of the substantive determinations of the Bush Administration, the Court showed much less determination to place restraints on the determinations of the US executive.

Perhaps, it is fair to argue that in terms of their contemporary and historical value, the decisions of the US Supreme Court in the 'enemy combatants' cases ironically construct a judicial 'grey zone' of their own. Martinez has aptly described why such cases lie in a shadowy area in terms of their value:

to call these Supreme Court decisions 'minimalist' both understates and overstates their scope. Re-examining the 'war on terror' cases through the lens of the relationship between

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<sup>199</sup> Once again, this 'fortitude' is *only* visible with regard to the *procedural dimensions* of detention cases.

substance and procedure reveals that many of these decisions do both less and more than they claim.<sup>200</sup>

That is because in terms of their emphasis on such procedural protections as habeas corpus, such decisions have gone far beyond their historical counterparts such as *Quirin* and *Eisentrager*, and yet, they have failed to go far enough to factor the objective requirements of *inter alia*, IHL into the discourse governing the internment of 'enemy combatants.' The meaning of this reluctance to call into question the subjective determination of the US executive by relying on the importance of international law requirements for the Bush and Obama Administration was that they could maintain their own grey area of law, provided that they would comply with very basic procedural requirements. Interestingly enough, the Obama Administration, albeit with a different choice of vocabulary, sustained the model of formulating innovative constructs, which do not belong to any particular area of law. For example, instead of designating individuals as enemy combatants, his Administration used the test of 'substantial support' as a qualifier for detention of individuals. Once again, the test of 'substantial support' is broad enough to exploit the advantages offered by both the law of armed conflict and criminal law models, and yet, the same broadness allows this concept to stay faithful to the requirements of neither models. Whether this relatively new criterion remains the test of time or not, remains to be seen. At the time of writing this chapter, other than a reversed judgment referred to above, there is no indication that the test of 'substantial support' will be aborted in favour of a criterion more consistent with the laws of armed conflict, or any other legal model, based on the context, in which detention without trial is exercised.

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<sup>200</sup> Martinez, above note 184, at 1029.

## Concluding Remarks

### 1. The function of legal history

Among the different departments of linguistics, etymology is focused on identifying the origin of words, their initial meaning, and the process which has shaped the substance and the structure of words as they are understood in their present usage.<sup>1</sup> Naturally, etymology does not and cannot specify a direction for the future evolution of words. As a general rule, it can be said that one of the main tasks of legal history is to apply to legal *practices* what etymology does to words. That is to say, legal history, in the sense invoked in this thesis, draws a map for the evolution of a practice. Through describing an evolving practice, legal history establishes a pattern, which, if repeated sufficiently and in a consistent manner, takes the shape of a rule, a mechanism, or an implicit but determinative assumption. As was mentioned in the introduction of this thesis,

[...] if one merely collects unrelated facts and piles them up in heaps of notebooks, perhaps picking out the colourful or quaint for public display, one has not contributed much, if anything, to history.<sup>2</sup>

Accordingly, one of the most vital contributions of legal history is to highlight how rules took shape initially, where and under what circumstances they were misunderstood and misapplied, and how those historical conceptions and misconceptions inform a certain practice. In this capacity, legal history allows us to revisit the rules and practices, reaffirm them, or, if the need arises, repudiate or rewrite the misapplied parts of the rules through the appropriate legal channels. Beneath all of these acts there lies a continuous need to return to the past constructions of the

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<sup>1</sup> See, P. Dourkin, *The Oxford Guide to Etymology* (Oxford: OUP, 2009).

<sup>2</sup> J. Baker, 'Reflections on "Doing" Legal History' in A. Musson, C. Stebbings, *Making Legal History: Approaches and Methodologies* (Cambridge: CUP, 2012).

rules, judgments, and practices. In other words, no fresh legal formulation can ever emerge without having first realised and acknowledged the modalities of historical continuity in the practice from which we intend to depart. Unless that realisation is made first, any attempt at departing from a certain legal practice amounts to either an unconscious recreation of the same practice, or a repetitive misconstruction of it. These central premises underscored the historical enquiries of this thesis. In the following sections of this final part, we will draw on the foregoing baselines and outline the concluding remarks of this thesis.

## 2. Detention: An issue of the past and present

It is fair to say that no draconian measure exercised by states has gained the attention of legal scholars as much as detention without trial. One of the reasons for this dedication of lawyers to the question of detention without trial is that this practice concerns the most central concept of the legal profession, the rule of law. This is precisely why many of the constitutional crises of the common law world, ranging from the English Civil War to India's decolonisation, have so tightly been tied to the practice of detention without trial. The first chapter discerned that the close proximity of detention without trial and the rule of law has not merely been an issue for the lawyers of the twentieth and twenty-first centuries. Rather, such proximity could be witnessed right from chapters 29 and 39 of the Magna Carta. Of course, the equivalent term for the rule of law in the Magna Carta was 'the law of the land', on the basis of which Dicey later formalised the concept of 'the rule of law'.<sup>3</sup>

Much like the rule of law, no one could pinpoint the precise attributes of 'the law of the land'. Most importantly, it could hardly be said what the

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<sup>3</sup> N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Michigan: University of Michigan Press, 2003) at 8.

modalities of the relationship between the King and 'the law of the land' was. Was the King the guardian of 'the law of the land' and yet bound to its instructions? Was the King considered as the law's guardian but of the kind who could depart from 'the law of the land' for the sake of protecting it? Was the King above 'the law of the land', and was that 'aboveness' of the King guaranteed by 'the law of the land' itself? In the above questions, one can replace the words 'the King' with 'the executive/the sovereign', and 'the law of the land' with 'the rule of law', and arrive at some of the most intriguing legal questions of the twentieth and twenty-first centuries. The purpose of this thesis was not, however, to answer these questions. Rather, it was to describe and formulate the mechanisms through which different conceptions of the exclusive powers of sovereign and law have interacted with regard to the practice of detention without trial, to which we will return shortly hereinafter. Once again detention without trial represented a site through which these questions and differing answers to them manifested themselves. The case of *Five Knights* was the first occasion on which the uncertainties surrounding detention without trial paved the way for a major political transformation in England. The issue at hand was the extent of the authority of the King. The institution of monarchy did not view itself as being bound to 'the law of the land', when the matters of state were in question. At the same time, Parliament opposed the absolute nature of this power, and insisted on the limitations imposed upon the sovereign's authority by 'the law of the land'. Later on, however, Parliament took the same view as the monarchy to the nature of the powers of the sovereign, and its implications for state's detentions. Thereinafter, the issue was what institutions were vested with this absolute power.

We must translate the dispute about the absolute powers of sovereign into the terms employed in this thesis. In this view, the argument of the monarchy in the case of *Five Knights* was that with regard to particular practices, the sovereign's subjective appreciation must fully be respected by the judiciary, for it holds an absolute authority in its resort to certain practices. The court approved this subjective appreciation or determination of the sovereign by showing deference to it. On the other hand, Parliament was of the view that 'the law of the land' had put in place objective limits upon the authority of the sovereign through such laws as chapter 29 of Magna Carta. Therefore, it is accurate to say that if we take the case of *Five Knights* as the starting point of detention without trial in its modern sense, right from the beginning, the crucial dilemma of detention without trial could be cast in terms of the subjective authority of sovereign versus the objective requirements of law/'the law of the land'/the rule of law. The historical investigations of this thesis made clear four channels through which the conflict between the subjective and objective determination of detention powers in *domestic law* were mediated: 1) suspension of habeas corpus; 2) recognition of absolute authority with respect to certain situations; 3) recognition of absolute authority with regard to certain persons; and 4) projecting a procedural understanding of the rule of law.

### **3. Concessions of the rule of law and the emergence of legal disasters**

The categories mentioned above did not necessarily operate in a separate manner from each other, and in particular situations, some of them were lumped together for the purpose of detention. As discussed in detail in chapter I, the suspension of habeas corpus followed the logic that 'as

circumstances alter, things (laws) must alter'.<sup>4</sup> One of the advantages of the suspension technique was that it would not entrap the authorities involved in the detention business in the 'chicken and egg problem' about the superiority of law to the powers of sovereign or vice versa. Rather, the method of suspension would place necessity as a precursor to the temporary cessation of such safeguards as the writ of habeas corpus. The problem was, however, that as time passed, detention was exercised by increase in detention powers and not necessarily the suspension of habeas corpus. This offered a route to a move towards an absolutism of the detention powers of sovereign in particular situations.

Martial law was the most troublesome manifestation of absolutism in the subjective authority of the detaining power. Martial law would authorise the creation of military government, suspension of habeas corpus, and creating new laws by the executive. Therefore, martial law would make inroads into both the substance and procedures of 'the law of the land'. Its severe consequences had moved the drafters of the Petition of Rights to establish a high-intensity threshold for the authorisation of martial law, and that was the closure of ordinary courts. However, colonial governors rarely complied with the requirements of these legal thresholds.

What distinguished martial law from other forms of response to emergencies was the degree to which ordinary laws were totally ignored in favour of a new legal order put in place by military governors. In that sense, all legal checks and balances became secondary to the dictates of the executive. At the same time, martial law created the long-lasting legacy of military tribunals for the purposes of adjudicating on the detention cases. These tribunals lived even longer than British colonialism.

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<sup>4</sup> W. Cobbetts, T. C. Hansard, *Parliamentary History of England Vol. V* (London: R. Bagshaw. 1809) at 270.

Particularly in America, the use of martial courts/military commissions indiscreetly reached beyond the authorisation of martial law. All in all, martial law represented a platform of sovereign's absolutism, in which sovereign could exercise detention with great comfort, whilst making 'no bones about what it is doing'.<sup>5</sup>

Even though the powers of the executive were at their highest in martial law situations, the political risks carried by this form of exercising absolutism were too high. This led to a stronger reliance on emergency regulations. These types of law would normally come into existence with an act of Parliament, which would authorise certain practices, and at the same time, delegate law-making powers to the executive. Two major differences existed between emergency regulations and martial law. First of all, emergency regulations would not create military tribunals for passing judgments on detention cases. Rather, they would often employ administrative boards with an advisory function. Secondly, emergency regulations would not touch upon the issue of whether habeas corpus could be issued by courts or not. In other words, these regulations did not necessarily suspend habeas corpus. This particular aspect of the emergency regulations came to pose important questions in the wake of the First World War, when regulation 14B of DORA authorised detention of British subjects on the basis of their hostile origin or associations. Here, although the courts would have no difficulty with issuing the writ of habeas corpus, the basis for detention of subjects was so broad that habeas corpus could achieve nothing for the purpose of questioning the legality of cause of detentions. At the same time, the British courts were extremely deferential to the determinations of the executive.

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<sup>5</sup> A. W. B. Simpson, 'Round Up the Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights' (1996) 41 *Loyola Law Review* 630, at 634.



The objection here does not lie within the recognition of a subjective judgement or authority. After all, inherent in each act of executing the law is some degree of subjective judgement. What is objectionable is that the courts would not employ any objective criteria to challenge the executive on its determinations. The end result of this cycle was unfettered discretion, which, as examined in chapter III, in the words of common law scholars ranging from Coke to Dicey, was 'the root of arbitrariness.'<sup>6</sup> We shall return to the issue of arbitrariness shortly hereinafter. At this stage, what is important to notice is that over time, there emerged a mechanism, which came to justify the deferential approach of the courts to the executive determinations. The essence of this mechanism, in the apt words of Lord Shaw, was to 'give due formal respect to the procedure of the remedy [habeas corpus], but to deny the remedy itself'.<sup>7</sup> In other words, this mechanism was forged by giving weight to the procedural dimension of the laws governing detention, whilst ignoring the purpose and the content of such laws.

### 3.1. *Detention and procedural understanding of law*

Projecting a procedural understanding of the rule of law was essentially composed of two components: structural and procedural. The structural component highlights the formation of administrative bodies for the purpose of adjudicating detention cases. These parallel structures included administrative/executive bodies to hear the detention cases. Right from their early uses in the Bengal Regulations, these bodies were used as a replacement for rigorous checks and balances on the executive powers. More often than not, these boards employed crude procedures, and only possessed an advisory role. However, since by name the executive boards

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<sup>6</sup> A. V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London: Macmillan, 1885) at 184.

<sup>7</sup> *R v. Halliday*, [1917] A. C. 260 at 262.

carried a supervisory role, they painted a picture of the executive's commitment to the rule of law. It was thus that scholars such as Dicey often cited these administrative bodies as one of the most serious threats to the rule of law.<sup>8</sup>

In terms of their legal function, the administrative bodies would frequently give reassurance to the judiciary for the purpose of submitting to the subjective determination of the executive. The basis of this reassuring role was the fact that the courts could comfort themselves with the assumption that there had already been sufficient checks and balances imposed upon the executive. On this note, the courts would conclude that in the view of the existence of these checks and balances, there would be no need for a robust judicial review of detention powers.

Also, from the beginning of the twentieth century, the British courts would regularly issue habeas corpus for the detention cases. However, this formal respect to the procedure of law would not follow by a substantive inquiry into either the reasons of the executive for its substantive determination or the executive's interpretation of law. What emerged as a result of these mechanisms was a procedural understanding of the rule of law concerned with formalities and detached from substance and purpose of procedures. These developments would affect the practice of internment as well as the very notion of law. Encountered with insufficient checks and balances alongside the deferential approach of the judiciary to the executive, one would struggle with the question of whether these semi-remedies amounted to 'due process of law' or they were merely entities carrying the name of law, whilst purporting to evacuate the 'due process of law' out of its meaning. Once again, this thesis has not claimed to have

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<sup>8</sup> P. M. Mcdermott, 'Internment during the Great War - A Challenge to the Rule of Law' (2005) 28 *University of New South Wales Law Journal* 330, at 334.

an answer for this question. However, one of the most vital promises of this thesis is that it is against this background that we must make sense of post-Second World War developments of international law with regard to the practice of detention without trial.

#### 4. Call it 'arbitrary', not 'unlawful'

It hardly needs to be recalled that the catastrophic events of the Second World War had caused many to view the very notion of law with suspicion. This scepticism was primarily rooted in the Nazis' treatment of the concept of law, where the most abhorrent crimes had been disguised in a legal appearance. In the post-Second World War era, and in the international stage, the suspicion towards the concept of law and its syntheses (such as lawfulness or unlawfulness) rose to the surface in the course of drafting the Universal Declaration of Human Rights (UDHR). This became clear, when some drafters of the UDHR expressed concern to at a draft article which banned the deprivation of personal liberty 'except in cases prescribed by law'.<sup>9</sup> In this regard, the question that some drafters posed was, essentially, which law and whose law with what qualities can justify a parting of states with the physical freedom of individuals?

The experience of all states involved in the Second World War had shown that law can, in times of crisis, be reduced to a cluster of formal procedures devoid of any inclination to erect a barrier against the desires of sovereigns. In other words, the experience of the Second World War had made it clear that law was capable of recognising an absolute discretion for the executive. When viewed in this light, the concept of unlawfulness cannot necessarily be equated with absolute and unjustifiable

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<sup>9</sup> D. Weissbrodt, M. Hallendorff, 'Travaux Préparatoires of the Fair Trial Provisions--Articles 8 to 11--of the Universal Declaration of Human Rights' (1999) 21 *Human Rights Quarterly* 1061, at 1070.

discretion, since even the most all-pervasive discretionary powers can be made lawful. In this sense, the synonym of unacceptable discretionary power is the term 'arbitrary'. It seems that this realisation played an important role in the adoption of the test of 'arbitrariness' in the UDHR in the context of the prohibition of arbitrary detention.

The interesting point is that there is an implicit reference to the issue of subjective versus objective systems of determination in the test of arbitrariness. This aspect of the test of 'arbitrariness' can only be identified by a return to history. The adjective 'arbitrary' entered into the English language in the fifteenth century. As was mentioned in chapter III, the etymological meaning of 'arbitrary' in history has been synonymous to discretionary and uncertain. Common law writers constantly used the term 'arbitrary' in this sense. Another way of putting this is to say that unfettered subjective discretion equals legal uncertainty, and therefore, is, in turn, arbitrary. If one imports this formula into the context of detention without trial, the inevitable conclusion will be that the focus of laws designated to guarantee the freedom of individuals from arbitrary detention without trial must be placed at limiting the discretion of the detaining power. To this end, the prominent human rights bodies such as the Human Rights Committee and the Strasbourg Court seem to have ascribed two dimensions to the test of arbitrariness of an action, both in terms of its substantive and procedural dimensions. According to the Human Rights Committee, as far as the substantive dimension goes, a non-arbitrary practice of detention must be free from 'inappropriateness, injustice, and lack of predictability'.<sup>10</sup> It was argued in chapter III that all of the mentioned three pillars of arbitrariness are underscored by a lack of legal certainty. It was concluded in that chapter that the lack of legal

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<sup>10</sup> *Womah Mukong v. Cameroon*, Communication No. 458/1991, para 9.8.

certainty can manifest itself in the three areas of laws/legislations/executive decrees authorising detention, period of detention, and grounds stated to justify detention. In all of these areas, the test of 'arbitrariness' points to a towered regard for the principle of legal certainty. In other words, this test is committed to reducing the discretion of the detaining authority to the greatest extent possible.

#### 4.1. *The irony of the test of arbitrariness*

Notwithstanding all the foregoing arguments, there is an inherent feature of the test of arbitrariness, which may at times defeat the very cause that this test seeks to promote, and that is, 'arbitrariness' is a fact-specific test, which means arbitrariness tolerates some degree of elasticity in its own application. The reason for this is that necessity is the other side of the 'arbitrariness' equation, and necessity cannot but be evaluated on a case-by-case basis. This is of vital importance in the narrow case of detention without trial. It was seen in chapters III and IV that both IHRL and IHL recognise necessity as a common denominator to the practice of detention without trial. It was also discerned that in the history of common law tradition, parliamentary suspensions of habeas corpus were always legitimised by the claims of necessity, as imprinted in social/political crises.

Given the historical precedents and also the architecture of international legal regimes, it is reasonable to say that the claim of necessity *may* affect internment at two distinct levels, when it comes to the standards of IHRL. The first level of the invocation of necessity operates with regard to the creation of the legal context that may justify 'detention without trial'. As examined in chapter III, this manifests itself through the authorisation of derogations from certain obligations of states. The second level of the

invocation of necessity comes into effect with its overarching role in justifying the resort of detaining powers in the individual cases of detention without trial. As was argued in this thesis, the dominant interpretation of article 5 of ECHR has created a hierarchical sequence between the first level of the operation of necessity and that in the second level. This was referred to as the narrow construction of article 5, according to which, detention without trial can only be exercised in emergencies. Such a sequence does not necessarily hold true for the view of detention without trial under ICCPR. Regardless of the level in which the claim of necessity functions either for the temporary suspension of norms or the authorisation of a particular practice, one feature of necessity cannot be ignored – the decision on the existence of necessity is contextual, and hence, subjective. This was mentioned above, and it is exactly why the evaluation of ‘arbitrariness’ of detention cannot but be evaluated on a case-by-case basis. Here, the IHRL system is presented with an ever-lasting challenge, especially for the purposes of establishing efficiency in the judicial review of detention. The fact that a decision on the existence of necessity is essentially subjective always has the dynamic to tip the balance in favour of the detaining power.

Based on the examinations of this thesis, it must be concluded that there are potential channels through which the reach of the subjective decisions of the executive can be challenged or limited by the bodies in charge of reviewing detention. First of all, as a continuous trend, international law has realised and imposed defined limits on both the nature of necessity and the extent to which it can be employed for authorising a certain practice. For example, Grotius, notwithstanding reserving a very broad margin for the reach of necessity, was of the opinion that inherent in the concept of necessity, there were such limits as: 1) the lack of *means rea*;

2) imminence of danger; 3) the vital nature of danger; and 4) the proportionality considerations as to the aim of actions caused by necessity.<sup>11</sup>

The difficulty with the classic conception of necessity in international law was that states' judgement on the existence of necessity and the actions justified by its invocation were very readily accepted. In the aftermath of its renaissance in the wake of the Second World War, and the emergence of its everlasting tendency to balance the subjective discretion of states with concrete objective limitations, international law has recognised the self-defined limits of the concept of necessity without becoming too submissive to states' self-judgments. As a result, Article 25 of the International Law Commission's Draft Articles on State Responsibility more or less repeats the same limitations that Grotius once enumerated for the function of necessity, whilst reiterating that 'the state concerned is not the sole judge of whether those conditions have been met'.<sup>12</sup> This realisation forms the crux of the issue with regard to the judicial (or other forms of) review under IHRL. That is to say, the supervisory bodies must be willing to challenge the subjective discretions of the executive, and not simply assume that they cannot substantively enquire into the subjective determinations of the detaining power. Unfortunately, this possibility has very often escaped the attention of even human rights bodies. For example, it was shown that when it came to imposing limits upon immigration detention, the Strasbourg Court did not even consider the condition of necessity as a prerequisite for detention. Even the Human Rights Committee, despite its very progressive stance on detention without trial, has hesitated to confront states on their necessity

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<sup>11</sup> B. C. Rodick, *The Doctrine of Necessity in International Law* (New York: Columbia University Press, 1928) at 6.

<sup>12</sup> Article 25, Draft articles on Responsibility of States for Internationally Wrongful Acts, fifty-third session (2001).

determination in the individual cases of detention. Given that, no matter how generously the test of arbitrariness may have been interpreted, by avoiding enquiry into the subjective necessity determinations of states, the respective human rights bodies have inevitably recreated the exact same entity that the test of arbitrariness meant to defeat, that is, unfettered and non-justiciable discretion.

## **5. IHL and the continuity of one legal battle**

The theme of subjective versus objective systems of determination is also present in the legal regime of IHL. Here too, there has existed a long-lasting tendency on the part of states to take the matters relating to their conduct in wars as subjects of their own exclusive authority. This natural desire of states at a certain historical point resulted in the horrors of the Second World War. As a consequence, in the course of revising the law of war in 1949, the rules of warfare were reformulated in such a way that the subjective discretion of states was restrained more by external objective limits. Much like the evolution of IHRL, the move towards strengthening and clarifying objective rules and criteria has been continuous in IHL as well.

In the particular case of internment, there were two areas before the end of the Second World War which most attracted the subjective discretion of sovereigns: internment of enemy aliens, and the internment of persons held on the suspicion of certain crimes such as war treason. With regard to the former, it was discussed in chapter II that the common law tradition had given the sovereign absolute authority to intern aliens owing allegiance to the opposite party in a conflict. In so doing, neither necessity nor the conduct of such aliens was considered a determinative factor in their internment. Rather, it was the sovereign authority and the sovereign



authority alone that sufficed for the purposes of interning enemy aliens. At the same time, since such internments were imbued by a claim of states' exclusive authority, they could not be viewed as justiciable. The second area of subjective discretion, as was mentioned above, concerned persons held on the suspicion of a certain category of crimes.

It was examined in chapter IV that the Lieber Code was one of the first documents that had devised grey categories of persons such as disloyal citizens. However, the most explicit construction of a grey class of persons occurred in the case of *Quirin* and through the *status* of 'unlawful combatants'. This *status* is in fact meant to serve as a bridge to the discretion of sovereign and as an insulating cover against the protections attached to detainees by international law. Furthermore, the question of who can be categorised as 'unlawful combatants' is subjectively determined by the detaining authority. With this background in mind, one must view the objective tests and standards, as put in place by IHL. In this regard, it is vital to notice that the first contribution of the law of Geneva towards limiting the subjective authority of the detaining power was that it placed a strict necessity test as a precondition for the practice of internment. Therefore, it is obvious that in the view of the Fourth Geneva Convention, reliance on the mere nationality of aliens cannot form a sufficient basis for their internment. The second important move on the part of the law of Geneva has been that it has shown no reception to the idea that certain persons by their illegal behaviour open a gap in the protections of IHL. The best indicator of this view of the law of Geneva is Article 5 of the Fourth Geneva Convention, where persons held on the suspicion of having committed such acts as spying are still referred to as 'protected persons'. Chapter IV discussed that the more accurate position under the laws of armed conflict is the one which recognises no

'intermediate group' between PoWs and civilians. This binary of *status* is in itself an anti-thesis to the tendency of states to exploit grey areas of concepts and grey classes of persons for giving more weight to the discretion of the executive in interning individuals.

## 6. 'War on Terror', detention, and redefining an old battle

One of the baselines of this thesis was that the conflict between the subjective and objective systems of determination has been a recurrent theme in the history of law in general and the history of detention without trial in particular. In the history of common law in Britain, the battle was redefined and recreated through such terms as order v. liberty, prerogative v. law, prerogative v. liberties of subjects, and discretion v. arbitrariness. In the history of international law, this conflict has been re-enacted in such terms as law of nature v. sovereigns, external rules of law v. internal rules of law, law v. arbitrariness, sovereignty v. international law, constitutional law v. international law, and even states v. individual rights. The recent experience of the US 'war on terror' is simply another enactment of this conflict, which, albeit in a different form, reiterates the essentials of the conflict between what this thesis has characterised as subjective and objective systems of determination. To identify this pattern, it suffices to recall how in the initial phases succeeding 9/11, the Bush Administration emphasised the 'newness' of the situation facing the US. This, as argued in the last chapter of this thesis, was done with a view to prove a perceived insufficiency, disutility, and irrelevance for particular norms of international law. That is to say, allegations about the 'new' nature of the 'war on terror' aimed at dismantling the normativity of objective rules of international law. The intended result of these allegations was simple and predictable, giving a monopolistic and exclusive

weight to the subjective determinations of the executive. Nowhere does this become clearer than in the explicit terms of the most important counter-terrorism legislation of the US history, the AUMF:

The President is authorised to use all necessary and appropriate force, against those nations, organisations, or persons *he determines*, planned, authorised, committed, or did the terrorist attack that occurred on September 11.<sup>13</sup>

As a result, an innovative apparatus was fostered by the Bush Administration, in which executive discretion was the ultimate rule, and objective standards of law were pushed to the margins. It must be noted that this apparatus possessed all the essentials for expanding the discretion of the executive. First of all, it did not subscribe to the rules of any particular legal model. Rather, it in itself constituted 'a grey area of law', in which different notions and terms of art were borrowed from different areas. It was argued that the concept of 'unlawful enemy combatants', for example, evokes a concept relating to the laws of armed conflict. However, when looked upon closely, it becomes clear that the US officials had loaded this concept with elements of the criminal law model. Not to mention that, according to the queries of this thesis, IHL has not recognised any intermediate *status* between PoWs and civilians. Of course, as was mentioned several times in this thesis, the judicial origin of the nomenclature dates goes back to a ruling of the US Supreme Court in the midst of the Second World War. Here one of the most intriguing aspects of the Bush Administration's treatment of law and legal history becomes clear. That is to say, how it can be possible that the Geneva Conventions are treated as 'the old law' for the purposes of identifying the standards governing the internment of those held on the suspicion of terrorism, and at the same time, the Second World War's jurisprudence of the US

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<sup>13</sup> Authorisation for Use of Military Force. 115 Stat. 224.

Supreme Court *preceding* the adoption of the law of Geneva is meant to hold more currency than this body of law.

It was said that the apparatus built up by the Bush Administration entailed all the essentials of a discretionary system. Another sign symptomatic of this was the invention of a parallel structure of law for the purposes of adjudicating the detention cases. It was argued that from the beginning of the eighteenth century there emerged a tendency on the part of the British executive to relax the legal checks and balances by inventing parallel structures, such as the executive boards and advisory panels, as a replacement for the writ of habeas corpus and judicial intervention.

The US 'war on terror' signifies one of the most excessive invocations of parallel structures of law for the purpose of departure from the normal course of judicial supervision of detention cases. As mentioned above, the main function of these parallel structures was to reaffirm and reinforce the subjective discretion of the executive. On numerous occasions, the Bush Administration changed these alternative bodies and their procedures. However, military commissions and combatant status review tribunals became the two main alternative forms of adjudicating the detention cases. Both of these bodies entailed procedures which fell a long way short of due process of law. Additionally, both were used as covers to exempt the detainees from the writ of habeas corpus.

## **7. The US Supreme Court and the inevitable return to history**

If evaluated collectively, in all the Guantanamo cases, with rendering the writ of habeas corpus the focal point of its arguments, the US Supreme Court employed various objective tests of law to restrain the subjective discretion of the executive. The importance of this repeated emphasis

must not by any means escape our attention. The writ of habeas corpus compels the executive to specify the grounds of detention, and as such, holds the executive accountable to the judiciary. In the common law tradition, the writ of habeas corpus has often served as the first step in countering an untenable degree of discretion for the detaining power. This by itself can explain why the US Supreme Court did not make any compromise as regards the availability of habeas corpus to those characterised as 'unlawful enemy combatants' by the Bush Administration. Nevertheless, as our historical investigations show, habeas corpus is by no means a sufficient safeguard against arbitrariness.

The writ of habeas corpus is only a procedural instrument. In fact, it is fair to say that the writ of habeas corpus is a means to an end. It facilitates a substantive enquiry on the part of the judiciary into the executive's interpretation of law, its authority to detain, and its subjective determinations in each case of detention. If the judiciary upholds the procedural safeguard of habeas corpus without substantively entering into the areas that are meant to be monitored by the writ of habeas corpus, the availability of this writ to detainees becomes not only insignificant, but also counterproductive. The history of common law reveals that the judicial generosity towards the availability of habeas corpus to detainees has often served as a cover to the judicial deference to the subjective determinations of the executive. As was mentioned above, this view can rightly be characterised as projecting a procedural understanding of the rule of law, or giving 'formal respect to the procedure' and neglecting its very essence and purpose. Most intriguingly, this approach to the question of detention without trial was not dismissed by the US Supreme Court. On the contrary, it was to a certain degree embraced by the Court, notwithstanding its eagerness to uphold the writ of habeas corpus.

Often in the 'war on terror' detention cases, the US Supreme Court addressed one particular aspect of the Bush Administration's policy, and refrained from addressing more substantive and problematic dimensions of the US detention policy. It was witnessed in the final chapter of this thesis that despite its occasional invocations of the Geneva Conventions, the Supreme Court avoided challenging the terminology of 'unlawful combatants', which absolutely occupied no place in the language of Geneva Conventions. Furthermore, the US Supreme Court missed a historical opportunity to repudiate one of the most problematic decisions of its history, namely, the case of *Quirin*. As discussed in chapter V, the Court too frequently submitted to the subjective decisions of the Bush Administration. Lastly, the Supreme Court did not mention anything about the US manipulation of detention sites for the purpose of insulating its determinations from judicial overview.

Of course, when the court of highest rank shows reluctance to address the substantive issues at stake, the lower courts are more likely to follow the same pattern if only for the lack of constructive guidance. As a result, being stuck in a procedural understanding of law epitomises a more serious problem in the lower courts. For example, in one case, the circuit court posited that the executive's intelligence reports must be presumed to be accurate, unless proved otherwise by the detainee.<sup>14</sup> As the dissenting Judge Tatel argued in this, such a deferential approach to the subjective 'say so' and determinations of the executive can be equated to the proposition that 'whatever the government says must be treated as true'.<sup>15</sup> Such an approach brings us back in terms of legal view to four centuries ago, when Justice Hyde treated the assertions of the English king in council as true, and said, 'If no cause of commitment be

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<sup>14</sup> *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011).

<sup>15</sup> *Ibid.*, at 779.

expressed, it is to be presumed for matter of state, which we cannot take notice of.<sup>16</sup> These words summarise the essence of judicial deference to the determinations of the executive during the last four centuries. Ranging from the MPs in 1628 in England to Dicey, and to the critiques of the Bush Administration, many have characterised the problem of detention without trial as one pertaining to the issue of absolute executive discretion. Yet, one wonders if that discretion could ever be made institutionalised without the complacency of judicial bodies.

## 8. Exploring the ways forward

If one accepts that the most pressing problem associated with arbitrary detention without trial is the absolute subjective discretion of the executive, then he can by default be guided towards a number of potential solutions. Based on the historical and doctrinal investigations of this thesis, it must be concluded that all the potential solutions to the problem of detention without trial must be underlined by one simple but radical baseline, and that is, constraining the subjective discretion of the executive. The first level of creating a counter-balance to the subjective discretion of the executive must take place at the level of regulating its detention powers. This is extremely important in that it is at the level of legislation that the scope of the powers of the executive is recognised and regulated. The most extreme forms of legislation in terms of conceding a broad margin of authority to the executive are those which provide the executive with the law-making powers. In such situations, the *status* of the executive changes from the subject of law to its author. The most immediate effect of this is an outright shift of checks and balances in favour of the executive. Predictably, in such an atmosphere, *rex* becomes

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<sup>16</sup> *Five Knights Case*, Charles I A. D. 1627 in A Complete Collection of State Trials (1816), at 57.

*lex*, and the ideal of 'government by law' turns into government by institutional discretion, if not 'government by men'. Certainly, the practice of detention without trial, once authorised under wide discretionary powers of the executive, is much more likely to be arbitrary than when its exercise is bound by precise limits imposed upon the executive by the legislature. Hence, the issue of what institution creates the laws of detention always represents the first channel through which the emergence of absolute and arbitrary discretionary powers can be blocked.

Also, the question of how detention powers are formulated bears as much importance as the question of who regulates them. That is to say, the terms on which the authority of the executive to intern is cast, are of vital importance for the purposes of constraining the subjective discretion of the detaining power. In this regard, the choice of words that determine a standard of proof for subjecting an individual to the practice of detention without trial is noteworthy. Historically, the common law regulations have conditioned the legality of detention orders to the satisfaction of the detaining power that there is either a probable cause or 'reasons to believe' that a suspect poses threats to its security. This language shifts the balance of security risk determinations towards the mere subjective appreciation of the executive.

Furthermore, this method of formulating detention powers has historically made it easier for the judicial authorities to defer to the determinations of the executive, on the basis that they do not allegedly possess sufficient means to challenge the subjective satisfaction of the executive. On this note, one way to hold the executive accountable to the rule of law is to change the manner in which the latter of law with regard to detention is drafted. This means that legislation tasked with authorising detention without trial must define clearer and more objective thresholds for the



practice of detention without trial. For example, instead of the satisfaction of the detaining authority to the effect of the existence of a suspicion, the respective regulations can condition the practice of internment to the ability of the executive to indicate that there is a reliable suspicion ordaining one to detention.

This simple reformulation of words can result in far-reaching implications for the practice of detention. First of all, it prevents the executive from creating a zone of immunity around its determinations, in that its subjective satisfaction cannot suffice for a practice of detention without trial. Accordingly, a more demanding threshold for making detention orders forces the executive to pay more attention to the balance of probabilities in determining the security risk that a suspect poses. At the same time, since the executive is compelled to indicate its evaluations of the balance of probabilities in a court of law, the justiciability of its determinations becomes much more feasible. One effect of this is that the judiciary cannot circumvent its task of scrutinising detention orders in the pretext that it cannot enquire into the subjective determinations of the executive.

The importance of international law in the discourse governing detention without trial can by no means be ignored. This role became particularly important in the wake of the so-called 'war on terror', when critiques of the US detention policy with varying political and legal affinities primarily based their arguments on the relevant standards of IHL and IHRL. It is true to say that the enigma of detention practices in Guantanamo Bay renewed the interest of international law bodies and scholars on what international law has to offer on the issue of detention. Many argued, no matter how much complexity the issue of detention has assumed in the decade and a half, international law can yet fight back and mitigate many

of the malfunctioning attributes of arbitrary detention. Yet, in order for international law to survive the many challenges that lie ahead, particular changes and reforms are needed. More determinacy is required for the rules governing detention. On the front of IHRL, for example, the Human Rights Committee still needs to elaborate on the issue of what constitutes arbitrary detention. Such stated characteristics as 'inappropriateness, injustice and lack of predictability' are too general to provide concrete guidance for states, which can turn any form of legal indeterminacy to its own advantage.

As was discussed above, human rights bodies must show more willingness to challenge the executives around the world on their necessity determinations. As argued, the test of arbitrariness cannot be of much help unless the human rights bodies apply a fair amount of scrutiny to the necessity determinations of the detaining power. This last point is equally relevant for the domestic courts. That is to say, domestic courts must not hesitate to substantively enquire into different determinations of the executive. The history of common law is filled with judicial emphases on procedure and disregard for substance. As Justice Jackson pointed out in his famous dissenting opinion in *Mezei*,

Indeed, if put to choice, one might well prefer to live under Soviet substantive law applied in good faith by our common law procedures than our substantive law enforced by Soviet procedural practices.<sup>17</sup>

In the aftermath of 9/11, there was a sharp increase in the invocation of the balance test for regulating the conduct of the executive in different areas. This test addresses a wide area of concepts and practices ranging from the issue of checks and balances imposed upon the executive, to the mode of the executive departures from the normal safeguards of law. Yet,

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<sup>17</sup> *Shaughnessy v. United States ex rel. Mezei*, 2. 345 U.S. 206, 224 (1953).

it seems that the executive must not be considered as the *only* addressee of the balance test. Rather, the judiciary must equally be liable to strike a fair balance between its treatment of procedure and substance. Hence, nowhere in the judicial scrutiny of the practice of detention without trial must the maintenance of procedure be accompanied by indifference to substance of law. Of course, the particularities of designating a balance test between procedure and substance go well beyond the confines of this thesis, and present a future project to this author for formulating the technicalities of this enterprise with a particular regard to the case-law of detention in the last two centuries.

Early in this thesis, it was said that this research holds no ambition as to dictating a *lex ferenda* for detention. Rather, the purpose of this thesis is to describe the historical pattern that has led to the conception of *lex lata*, as it stands today, and to provide an interpretation of *lex lata* on the basis of that historical background. Many general and specific points were made in the course of this research. Yet, one underlying theme seems to outnumber all others, and that is the constant recreation of historical patterns governing detention without trial. It is as if each analysis of detention without trial during the last four centuries constantly returns to the same dilemmas, issues and problems that were once faced by Charles I, Justice Hyde and such so-called libertarians as Edward Coke. It is as if the question of the executive discretion is as much of a problem today as it was at the time of the writings of Dicey. That we seem to have been in a historical vicious circle is not to conclude that no progress has been made on different fronts. One of the pillars of this thesis has been that the evolving standards of international law on detention do signify a point of departure in the history of detention. However, these standards can only assist us when appointed as a serious counter-balance to the subjective

discretion of the detaining power. The truth of the matter is that, unless this view is tightly embraced by the national and international bodies tasked with supervising the conduct of the detaining power, we are doomed to witness the reincarnation of arbitrary discretion in one form or another. This is the most pressing dilemma of detention, and it will most likely continue to be for many decades to come.

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