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TO WHAT EXTENT MAY STATES DEROGATE FROM THE FUNDAMENTAL RIGHT TO LIBERTY IN ORDER TO PROTECT THEMSELVES AGAINST TERRORISM

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CONTENTS

I INTRODUCTION

> They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.[1]

Reconciliation of the fundamental right to liberty with safety or security concerns has become a topic of serious debate in recent years in a world facing what has been described as a war on terrorism.[2] Indefinite detention of persons for reasons of safety and security (including of suspected terrorists) was recently the subject of decisions from each of the pre-eminent courts in the United Kingdom, the United States of America (the United States) and Australia. In the United Kingdom and the United States this issue arose in the context of legislation implemented in response to the terrorist attacks on the United States on 11 September 2001. In Australia this issue arose in the context of the detention of a non-citizen who arrived in Australia without a passport or a visa and who could not be deported because no other state was willing to accept him. In the Australian case there was no evidence before the court that the appellant posed safety or security concerns.

In New Zealand recently, the Supreme Court (NZSC) considered the issue of detention for security reasons in proceedings concerning Ahmed Zaoui. One issue before the court was whether Mr Zaoui could be lawfully detained while challenges to the state's assessment of whether he posed a security threat (which if such an assessment was made could result in him being deported under the Immigration Act 1987 (NZ) (the Immigration Act)) progressed through our court system. Mr Zaoui was detained in prison for nearly two years without charge during the process of various proceedings challenging both his detention and classification as a security threat until the NZSC granted him bail in November 2004.[3]

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[1] Benjamin Franklin cited in John Bartlett *Familiar Quotations* (10th edition, 1919).

[2] Though this term has been described as not a legally useful notion certainly in the European context and it is suggested that there is not much evidence that post-September 11 conditions are regarded as of a wholly different order such that the orthodoxies of human rights analysis cannot be applied to them: Colin Warbrick "The European Response to Terrorism in an Age of Human Rights" (2004) 15 EJIL 989, 992.

[3] *Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison* [2005] 1 NZLR 577 (SC).

This paper concludes that none of the superior courts in the four jurisdictions under discussion gave sufficient consideration to the permissible limits on the right to liberty contained in the International Covenant on Civil and Political Rights[4] (ICCPR). If they had done so, in at least the case from the United States, this could have made a difference to the substantive result.

The right to liberty includes freedom from arbitrary detention. This right has been an important feature of the legal systems of the United Kingdom, the United States, Australia, and New Zealand for hundreds of years.[5] The legal systems of the latter three states were developed from the legal system in the United Kingdom which protected the fundamental right to liberty by way of the writ of habeas corpus.[6] This procedure continues to be available in all four jurisdictions under discussion.

The right to liberty is only effective if those in detention can have speedy recourse to the courts; though the circumstances in which such recourse should be available and the nature of the review exercise undertaken by the courts have given rise to continuing disputes in a number of jurisdictions.[7] Such disputes are seen in the five cases under discussion.

The fundamental right to liberty has more recently been affirmed, as well as circumscribed by specific internationally agreed limits, in article 9(1) of the ICCPR which has been ratified by all four states under discussion.[8] As well, the United Kingdom is a party to the European Convention on Human Rights[9] (ECHR) which affirms the right to liberty in article 5(1) of that Convention.

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[4] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 172.

[5] Traceable back to Chapter 39 of the Magna Carta 1215 which provides: no freeman shall be … imprisoned … save by the lawful judgment of his peers or by the law of the land; discussed in *Re S-C (Mental Patient: Habeas Corpus)* [1996] QB 599, 603; referred to in Richard Clayton & Hugh Tomlinson *The Law of Human Rights* (Oxford University Press, Oxford, 2000) 449–450.

[6] Habeas corpus was originally a procedural mechanism of the common law adopted by the courts to bring someone before a superior court so that the court could exercise jurisdiction, both civil and criminal, over them, in particular to assess the validity of the detention: *Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison*, above n 3, para 39; the right to habeas corpus was first recognised in legislation in the Habeas Corpus Act 1679 (UK).

[7] Clayton & Tomlinson, above n 5, 449.

[8] By the United Kingdom on 20 May 1976; by the United States on 8 June 1992; by Australia on 13 August 1980; and by New Zealand on 28 December 1978.

[9] Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) 213 UNTS 222.

The social and political context in which the ICCPR and the ECHR were both drafted is important. This was following a time of world wide war involving extensive military action, loss of life and destruction of property. This experience is accepted as being a primary motivation for the creation of the United Nations and the international treaties affirming fundamental human rights. With that recent experience the states who drafted the ICCPR considered it important to provide recognition for a universal right to liberty subject only to narrow limits. It is important to bear in mind a comparison of the state of affairs experienced by many states during the second world war with the recent war on terrorism which some now claim requires substantial infringements on the right to liberty for reasons of security. This paper takes the view that the circumstances facing the world currently do not justify the infringements on the right to liberty being claimed as necessary to fight this war.

At the international level the means of promoting compliance with international treaties include recommendations from treaty monitoring bodies following receipt of regular reports from party states.[10] As well, the (first) Optional Protocol to the International Covenant on Civil and Political Rights[11] (Optional Protocol) provides a complaints mechanism for particular cases where domestic remedies have been exhausted. Where states have ratified the Optional Protocol the United Nations Human Rights Committee (UNHRC) will, in cases brought before it, be the ultimate evaluator of a state's compliance with the ICCPR.[12] Because of this, in states subject to the Optional Protocol process, the UNHRC's jurisprudence should be persuasive in cases before the domestic courts involving consideration of rights recognised in the ICCPR.[13]

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[10] For example the UNHRC said in respect of New Zealand's 4th periodic report it was concerned that the impact of legislative measures taken in response to the events of 11 September 2001 and Security Council resolution 1373 on New Zealand's obligations under the Covenant may not have been fully considered, there were possible negative effects of new legislation on asylum seekers, and there was an absence of monitoring mechanisms with regard to the expulsion of those suspected of terrorism which could pose risks to their personal safety: UNHRC "Concluding observations of the Human Rights Committee: New Zealand" (26 July 2002) CCPR/CO/75/NZL para 11.

[11] Of the states under discussion only Australia and NZ have ratified the Optional Protocol though the United Kingdom is subject to the jurisdiction of the European Court of Human Rights by way of a similar complaints mechanism under the Protocol to the ECHR (20 March 1952) 213 UNTS 262.

[12] For example: "... since New Zealand's accession to the Optional Protocol the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it": *Tavita v The Minister of Immigration* [1994] 2 NZLR 257, 266 (CA).

[13] For example: " ...while in no way binding, the Committee's approach to the concept of discrimination is of direct relevance to New Zealand jurisprudence on the subject": *Quilter v Attorney-General* (1997) 4 HRNZ 170, 227 (CA).

However, these international mechanisms do not alone provide a sufficient check on failures by states to comply with the ICCPR. Because a fundamental human right is at issue, domestic courts also need to play a role in respect of state compliance with the ICCPR. This includes acting to uphold the rule of law and human rights while countering terrorism.[14] Domestic courts can in their interpretation role ensure that legislation is strictly construed when determining whether any particular instance of detention is authorised by that legislation. Legislation needs to expressly permit detention claimed to be necessary to address security concerns so that such detention is clearly authorised by Parliament. This is necessary to ensure democratic legitimacy and accountability in this important area. Courts should not endorse executive action which infringes the right to liberty pursuant to generally worded legislation.

Where specific remedies including habeas corpus are not available to the courts, including for the reason that legislation authorising detention is clear, it is suggested that courts can at least play a role in monitoring state practice in terms of compliance with international treaty obligations by way of providing an analysis and comment upon these obligations. It is within domestic jurisdictions that fundamental rights are either respected or not. It is therefore in domestic jurisdictions where there needs to be at least some monitoring of states' compliance with treaties ratified by states. This role it is suggested is consistent with the historical role of common law courts as guardians of liberty.

Part II of this paper discusses the right to liberty as defined and circumscribed in both the ICCPR and the ECHR.

Part III discusses recent international expressions of concern about the use of administrative detention for dealing with threats to security. Some of these expressions of concern include discussion of what role domestic courts should undertake in relation to such detention. The suggestion is made by some that domestic courts cannot ignore this widespread concern.

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[14] International Commission of Jurists "The Berlin Declaration" (2005) 27 HRQ 350, 355.

Part IV of this paper discusses the role domestic courts can and should play to at least monitor and provide guidance for state practice in terms of compliance by states with their obligations under the ICCPR (and the ECHR) and the various legal bases which provide the opportunity for this.

Part V contains an analysis of five recent decisions concerning the right to liberty in the context of challenges to administrative detention from each of the pre-eminent courts in the United Kingdom, the United States, Australia and New Zealand. As well, part V provides an assessment in each case of the extent to which the four courts considered their respective states' compliance with the ICCPR.

This paper concludes on a somewhat pessimistic note because although views will differ on whether in any of the cases discussed in this paper detention was justified (though in the cases from the United Kingdom, the United States and New Zealand it is difficult to make this assessment because only limited information was provided concerning the security threat said to be posed by the individuals concerned because of a claimed interest in protecting classified security sources[15]) none of the courts dealt comprehensively with the requirements of the ICCPR in relation to detention. In not doing so all four courts missed an opportunity to at least provide guidance for future state practice and to contribute to wider political and public debate concerning this fundamental issue.

One positive result of the House of Lords decision is that consistent with the view of the UNHRC[16] and while acknowledging the real security issues posed by terrorism, the court indicated that it favoured security concerns being met by means other than detaining persons on mere suspicion, without trial and perhaps indefinitely. This paper takes the view that detention should not be and should not become a default option or even a

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[15] United Kingdom: see Warbrick, above n 2, 1013 discussing *A and others v Secretary of State for the Home Department* (30 July 2002) SIAC, SC/1-7/2002 (CA); United States: *Hamdi v Rumsfeld* <http://straylight.law.cornell.edu/supct/search/display.html?terms=hamdi&url=/supct/html/03-6696.ZS.html> (last accessed 2 October 2005) (SC) 4-6 O'Connor J; New Zealand: *Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison*, above n 3, paras 62-65.

[16] The UNHRC has made clear that detention pursuant to legislation can be or become arbitrary if a state party cannot show there are less invasive or intrusive means of achieving the same ends such as reporting obligations, sureties or other conditions: *C v Australia* ICCPR 900/1999 (28 October 2002) para 8.2, *Baban et al v Australia* ICCPR 1014/2001 (6 August 2003) para 7.2 and *Bakhtiyari v Australia* ICCPR 1069/2002 (29 October 2003) para 9.3.

common place means of protecting security while this unconventional[17] and to some extent Orwellian[18] war on terrorism is pursued.

II RIGHT TO LIBERTY UNDER THE ICCPR AND THE ECHR

Following the creation of the United Nations the Universal Declaration of Human Rights (UDHR) and the ICCPR which both affirm the right to liberty were developed.[19] All four states under discussion have ratified the ICCPR.[20] Only the United Kingdom has entered into a reservation concerning the right to liberty under the ICCPR.[21] However, this reservation is not relevant to the present discussion as the appellants in the House of Lords case discussed below were not in the United Kingdom unlawfully. The United Kingdom is the only state under discussion which is a party to the ECHR which was developed as a regional initiative under the auspices of the United Nations.[22]

Concerning the human rights standards contained in the UDHR it has been said:[23]

> These standards relate to the rights of men and women everywhere, and they restrict the rights of governments even in relation to their own subjects. That is undisputed law, derived from the Nuremburg doctrine of crimes against humanity and from the human rights provisions of the United Nations Charter. It is also a radical departure from the older tradition of international law, which was concerned only with the regulation of relations between the states.

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[17] *Hamdi v Rumsfeld,* above n 15, 12 O'Connor J.
[18] See Warbrick, above n 2, 996; who comments in relation to a discussion about Camp Delta at Guantanamo Bay: we have been promised by those who would wage war against terrorism an Orwellian world of perpetual conflict against an elusive enemy.
[19] UNGA Resolution 217A(III) (10 December 1948) arts 3, 9 and 13 and ICCPR above n **??**, arts 9 and 12.
[20] For respective dates of ratification see above n 8.
[21] "The Government of the United Kingdom reserves the right to continue to apply such immigration legislation governing entry into, stay in and departure from the United Kingdom as they may deem necessary from time to time and, accordingly, their acceptance of article 12(4) and of the other provisions of the Covenant is subject to the provisions of any such legislation as regards persons not at the time having the right under the law of the United Kingdom to enter and remain in the United Kingdom. The United Kingdom also reserves a similar right in regard to each of its dependent territories"; entered into by the United Kingdom upon its ratification of the ICCPR on 20 May 1976.
[22] For ratification date see above n 21.
[23] R Q Quentin-Baxter "International Protection of Human Rights" in K J Keith (ed) *Essays on Human Rights* (Sweet & Maxwell (NZ) Ltd, Wellington, 1968) 132, 144.

The essential purpose of the ICCPR was to become an indispensable legal means for securing worldwide respect for, and observance of, fundamental human rights.[24] In drafting the ICCPR the United Nations Commission on Human Rights (UN Commission on Human Rights) drew upon the experience of regional efforts that paralleled codification of human rights by United Nations members in particular the ECHR.[25] As well, the American Bill of Rights (contained within the United States Constitution (US Constitution)) was one of the inspirations for United Nations activity in the field of human rights.[26]

The ICCPR was adopted by unanimous vote in the General Assembly on 16 December 1966.[27] It thus provides unanimous international affirmation of particular narrow permissible limits on the right to liberty, building upon previous legal understandings in this area.

A ICCPR

1 Article 9(1) ICCPR

Article 9(1) ICCPR provides:

> Everyone has the right to liberty and security of the person. No one shall be subject 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.

In 1982 in General Comment 8[28] the UNHRC pointed out that article 9 "is applicable to all deprivations of liberty including immigration control etc".[29] Further, that: "if so-called preventive detention is used, for reasons of public security, it must be

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[24] Vratislav Pechota "The Development of the Covenant on Civil and Political Rights" in Louis Henkin (ed) *The International Bill of Rights: the Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981) 36.
[25] Pechota, above n 24, 40.
[26] Quentin-Baxter, above n 23, 132.
[27] Pechota, above n 24, 64.
[28] UNHRC "General Comment 8: Article 9: Right to Liberty and Security of Persons" (1982) A/37/40 95.
[29] General Comment 8, above n 28, para 1.

controlled by these same provisions, ie it must not be arbitrary, and must be based on grounds and procedures established by law".[30]

Another affirmation of the right to liberty is contained in article 12(1) ICCPR which affirms the right to liberty of movement within state territories. Similarly to the right to liberty in article 9(1) the ICCPR provides that article 12(1) can be subject only to restrictions provided by law.[31] However, article 12(1) provides for other limits which are not contained in article 9(1). These are that measures which restrict this right must be necessary to protect national security, public order or the rights and freedoms of others and must be consistent with the other rights recognised in the ICCPR.[32] The particular limits in article 12(1) will not be considered further because to some extent they mirror the limits contained in the derogation provision in article 4(1) ICCPR.

2 *Derogation under article 4(1) ICCPR*

The ability of states to derogate from article 9(1) is limited by article 4(1) ICCPR which provides that derogation from a state's obligations under the Covenant, including in respect of the right to liberty, is permissible only "in a time of public emergency which threatens the life of the nation". The qualification that the public emergency must threaten the life of the nation was intended to limit the possibility of abuse by states.[33] As well, when this threshold is met any measures which may be taken are limited "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

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[30] General Comment 8, above n 28, para 4.
[31] ICCPR, art 12(3).
[32] ICCPR, art 12(3).
[33] Dominic McGoldrick "The interface between public emergency powers and international law" (2004) 2 JICJ 380, 393.

3 *Optional Protocol*

Both Australia and New Zealand have signed the Optional Protocol to the ICCPR which means that any challenges in respect of detention in these two states can ultimately be considered by the UNHRC.

B ECHR

Of the states under discussion only the United Kingdom is a party to the ECHR.

1 *Article 5(1) ECHR*

Article 5(1) ECHR provides:

> Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ....(f) the lawful arrest or detention of ... a person whom action is being taken with a view to deportation....

Article 5(1) is thus similar to article 9(1) ICCPR except that it lists specific areas in which the right is able to be limited.

2 *Derogation under article 15(1) ECHR*

Article 15(1) ECHR provides that a member state can derogate from its obligations under the ECHR "in time of war or other public emergency threatening the life of the nation". When this threshold is met the measures taken which derogate from the ECHR are limited "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with [the state's] other obligations under international law".

Thus permissible derogation under article 15(1) is substantially similar to that under article 4(1) ICCPR.

3 European Court of Human Rights

The United Kingdom is also subject to review of its compliance with the provisions of the ECHR in particular cases by the European Court of Human Rights (ECtHR) under the Protocol to the ECHR.[34]

The provisions of the ECHR and jurisprudence from the ECtHR will not be considered separately again in this paper except when discussing the United Kingdom. In terms of the general discussion below where the ICCPR is referred to it is considered that the discussion applies to the respective ECHR provisions.

C Commentary on article 9(1) ICCPR

Article 9(1) contains both a procedural requirement and a substantive requirement. These are now discussed in turn.

1 Procedural requirement of article 9(1) ICCPR

Article 9(1) ICCPR contains a procedural requirement that detention can occur only on such grounds and in accordance with such procedures as are established by law. The UNHRC has said that this requires detention to be clearly authorised by legislation.[35] Further, the UNHRC has said that executive or administrative detention violates the principle of legality where it is not specifically authorised by clear legislation.[36]

It is important to distinguish between the will of Parliament and action taken by the executive pursuant to legislation.[37] Courts are obliged to apply the will of Parliament as expressed through legislation. However, it is uncontroversial that courts also have a role to play in ensuring that executive action in relation to detention is authorised by legislation.

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[34] See above n 11.
[35] See for example: *McLawrence v Jamaica* ICCPR 702/1996 (18 July 1997) para 5.5.
[36] *McLawrence v Jamaica* above n 35, para 5.5.
[37] See Lord Steyn's extra-judicial comments in *Democracy Through Law, Occasional Paper No 12* (New Zealand Centre for Public Law, Wellington, September 2002) 9–10.

Separate to the question of legality, only where legislation is crystal clear in authorising detention, can states claim democratic legitimacy in respect of any infringements on the right to liberty. Where legislation is not clear executive action may be arbitrary. In this sense the procedural and substantive requirements of article 9(1) overlap.

In two of the cases under discussion (from the United States and Australia) a primary issue was whether the legislation in question was sufficiently clear to authorise state authorities to indefinitely detain particular persons. For the judges who considered that the legislation in question was sufficiently clear to authorise indefinite detention the result was to endorse continued detention of the appellants in recognition of Parliamentary sovereignty. This reflects a formalist view that the appropriate role of courts is to interpret and apply legislation without straying into policy or political decisions concerning the substantive result. In the New Zealand case the interpretation issue was whether the legislation which clearly authorised detention of Mr Zaoui was also sufficiently clear in its terms to override the inherent jurisdiction to grant bail.

The procedural requirement of article 9(1) ICCPR sits comfortably with the role of judges to interpret and apply legislation including to check the legality of executive action pursuant to legislation. Thus whether the procedural requirement of article 9(1) is specifically incorporated into domestic law or not, it is in effect considered by courts in this interpretation role.

An issue which arises in respect of this point is to what extent a state's wider treaty obligations, which have not been incorporated into domestic law, are relevant to the court's interpretation exercise.

2 Substantive requirement of article 9(1) ICCPR

Article 9(1) also requires that detention not be arbitrary.

The term 'arbitrary' for the purpose of article 9(1) was discussed during the process of drafting the ICCPR. Views differed between states as to whether this term

meant simply illegal or whether it included concepts such as justice and reason.[38] There was little support in the Third Committee of the General Assembly (Third Committee) for the view that the term illegal should be used instead of the term arbitrary because the term arbitrary was too wide and too indefinite.[39] The discussion of the Third Committee included comments that: an arbitrary act was any act which violated justice and reason and the use of this term was a safeguard against the injustices of states because it applied to laws and to acts performed by the executive.[40] Paragraph 1 of article 9 in its current form was adopted by the Third Committee by 67 votes to none, with five abstentions.[41]

More recently the UNHRC has said that "arbitrary" 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.[42] This means that remand in custody pursuant to lawful arrest must not only be lawful but be reasonable and necessary in all the circumstances.[43] The element of proportionality is relevant in this context.[44]

Further, the UNHRC has said that detention can also become arbitrary when it continues for a lengthy period and it should be open for review periodically so that the grounds said to justify detention can be assessed and so that it not continue beyond the period for which the state can provide appropriate justification.[45]

Detention may be arbitrary in terms of executive action where it is not clearly authorised by legislation. As discussed in the above section courts are generally comfortable making such assessments.

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[38] Marc J Bossuyt *International Covenant on Civil and Political Rights: Guide to the "travaux preparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: M Nijhoff, 1987) 201.
[39] Bossuyt, above n 38, 199.
[40] Bossuyt, above n 38, 201.
[41] Bossuyt, above n 38, 201.
[42] See for example: *Mukong v Cameroon* ICCPR 458/1991 (21 July 1994) para 9.8; and *A v Australia* ICCPR 506/1993 (3 April 1997) para 9.2.
[43] *Mukong v Cameroon,* above n 42, para 9.8; and *A v Australia,* above n 42, para 9.2.
[44] *A v Australia,* above n 42, para 9.2.
[45] *A v Australia,* above n 42, para 9.4; *C v Australia,* above n 16, paras 8.2 & 8.3; *Baban et al v Australia,* above n 16, para 7.2; and *Bakhtiyari v Australia,* above n 16, para 9.2.

In terms of the further substantive requirement of article 9(1), namely whether clear legislation (as opposed to executive action pursuant to legislation) is or is not arbitrary, the formalist view is that courts have no role to consider such aspects unless these have been incorporated into domestic law. This substantive requirement of article 9(1) has not been incorporated into domestic law in either the United States or Australia. This issue is discussed further below in relation to the role of the courts.

D Commentary on article 4(1) ICCPR

Article 4(1) ICCPR provides further limits on when, and to what extent, legislation can derogate from the right to liberty as defined in article 9(1).

Some commentators differentiate between the limits contained within particular provisions in the ICCPR and the separate derogation provision in article 4. The logic of the ICCPR is that, if possible, states should limit rights rather than derogate from them.[46] But rather than there being hard and fast boundaries between limitations and derogations, there tends to be an overlap with similar principles, for example proportionality and non-discrimination, being applicable.[47] The lack of clarity about the relationship between limits within articles and the derogation provision is noted, however this issue will not be considered further in this paper.

Comments made by members of the UN Commission on Human Rights during an early part of the process of drafting article 4(1) included:[48]

> It was also important that States parties should not be felt free to decide for themselves when and how they would exercise emergency powers because it was necessary to guard against States abusing their obligations under the Covenant.

Further:[49]

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[46] McGoldrick, above n 33, 384.
[47] Iain Cameron *National Security and the European Convention on Human Rights* (Iustus Forlag, 2000) particularly sections 4.5, 4.6 and 4.10; referred to by McGoldrick, above n 33, 383–384.
[48] Bossuyt, above n 38, 83.
[49] Bossuyt, above n 38, 83-84.

> Reference was made to the history of the past epoch during which emergency powers had been invoked to suppress human rights.

The inclusion of the derogation provision in the ICCPR was not controversial.[50]

In 1984 the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles) were developed.[51] These provide persuasive guidance on the meaning of the derogation provision in the ICCPR. Paragraph 39 of the Siracusa Principles requires that measures derogating from rights under the ICCPR be taken "only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation". A threat to the life of the nation is defined as one which affects the whole of the population and either whole or part of the territory of the state; and threatens the physical integrity of the population, the political independence or territorial integrity of the state or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognised in the Covenant.[52] Paragraph 70(b) states, "no person shall be detained for an indefinite period of time, whether detained pending judicial investigation or detained without charge".

In 2001, two months prior to the terrorist attacks on the United States, the UNHRC adopted General Comment 29 which also provides guidance on the meaning of article 4.[53] General Comment 29 stated that measures derogating from the provisions of the Covenant must be of an "exceptional" and "temporary" nature and the state must have officially proclaimed a state of emergency.[54] States must be able to justify not only that such a situation constitutes a threat to the life of the nation, but also that measures derogating from the Covenant are strictly required.[55] States may in no circumstances invoke article 4

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[50] McGoldrick, above n 33, 387.
[51] "Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights" 4 HRNZ 753; which were developed by experts in international law from various organisations including the International Commission of Jurists at a meeting in Siracusa, Italy in 1984.
[52] Siracusa Principles, above n 51, para 39.
[53] UNHRC "General Comment 29: States of Emergency (Article 4)" (31 August 2001) CCPR/C/21/Rev.1/Add.11.
[54] General Comment 29, above n 53, para 2.
[55] General Comment 29, above n 53, para 5.

as justification for acting in violation of humanitarian law or peremptory norms of international law for instance through arbitrary deprivations of liberty.[56]

It is clear that a high threshold applies to when derogation is permissible and as well it is clear that a test of strict necessity applies in respect of any measures taken which derogate from the right to liberty.

The earlier discussion in respect of the substantive requirement of article 9(1), concerning the appropriate role for domestic courts in relation to the provisions of international treaties which have not been incorporated into domestic law, also applies to the derogation provision in article 4(1) ICCPR in respect of the United States, Australia and New Zealand. This issue is discussed further below in relation to the role of the courts.

E Conclusion

The analysis this paper undertakes in terms of the requirements of article 9(1) ICCPR is that the limits contained within the article raise both procedural and substantive legal issues. The procedural requirement of article 9(1) is that detention must be expressly authorised by legislation. The substantive requirement of article 9(1) is that the detention must not otherwise be arbitrary.

The analysis this paper undertakes in terms of the requirements of the separate derogation provision in article 4(1) ICCPR is that this article provides both a threshold for when detention contrary to article 9(1) is permissible, including in relation to addressing security concerns and including where this is expressly authorised by legislation, as well as a restriction on the extent to which detention can be employed to address such concerns. The threshold in article 4(1) requires there to be a public emergency threatening the life of the nation. The extent to which detention is permissible even in such circumstances is limited to measures strictly necessary and which are consistent with other international obligations including not being discriminatory.

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[56] General Comment 29, above n 53, para 11.

The issue of whether such limits need to be specifically incorporated into domestic law as a prerequisite for consideration of these by domestic courts has been mentioned above and is discussed further below in relation to the role of the courts. As discussed above even where treaty obligations under the ICCPR in respect of the right to liberty have not been incorporated into domestic law, in effect the procedural requirement of article 9(1) is available to all domestic courts because of their role to interpret legislation and thereby check the legality of executive action pursuant to this. It is suggested that even where a treaty has not been incorporated into domestic law, where it has been ratified by a state, this at least warrants the content of these being considered by courts by way of the monitoring role suggested by this paper.

An associated issue in respect of the role of domestic courts concerns the weight which should be given to opinions and comments made by international bodies. This paper relies heavily upon such material as did Lord Bingham in the House of Lords decision discussed below. Such material must be at least persuasive in relation to the work of domestic courts similarly to cases from overseas jurisdictions which while not binding are increasingly used for guidance by domestic courts.

As well, all four states under discussion continue to play an active role in the United Nations including by way of membership of various committees. The United Kingdom and the United States are members of arguably the most powerful body within the United Nations, the United Nations Security Council (UNSC). Domestic courts cannot ignore this reality. As will be seen however, the United States Supreme Court (USSC) and the majority of the High Court of Australia (HCA) continue to do so.

Before discussing in more detail the role domestic courts can and should play in monitoring states' compliance with the ICCPR limits on detention some recent expressions of concern about the use of administrative detention in the war on terrorism are set out in part III below.

III RECENT EXPRESSIONS OF CONCERN ABOUT DETENTION FOR THE PURPOSE OF COUNTERING TERRORISM

In 2004 the UNSC reminded states that any measures taken to combat terrorism must comply with all their obligations under international law including international human rights law.[57]

That same year the United Nations General Assembly (UNGA) reaffirmed that any measures derogating from the ICCPR while countering terrorism must be in accordance with article 4 in all cases.[58] UNGA Resolution 191 emphasised the "exceptional and temporary nature of any such derogations".[59] Similar comments had also been made earlier that same year by the UN Commission on Human Rights.[60]

A report of the United Nations High Commissioner for Human Rights in December 2004 stated that the Office for the Commissioner for Human Rights found strong support for the view that terrorism can and must be dealt with effectively while fully respecting international human rights norms and upholding the rule of law.[61]

In A More Secure World: Our Shared Responsibility, Report of the High-level Panel on Threats, Challenges and Change, the Panel records that throughout its regional consultations it heard concerns from both governments and civil society organisations that the current war on terrorism has in some instances corroded the very values that terrorists target: human rights and the rule of law.[62] The Panel recommended that a comprehensive strategy be developed to counter terrorism and that this strategy include development of better instruments for global counter-terrorism cooperation, all within a legal framework that is respectful of civil liberties and human rights.[63]

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[57] UNSC Resolution 1566 (8 October 2004) S/RES/1566 preamble.
[58] UNGA Resolution 191 (20 December 2004) A/RES/59/191 para 2 and UNGA Resolution 195 (20 December 2004) A/RES/59/195 para 8.
[59] UNGA Resolution 191, above n 58, para 2.
[60] UN Commission on Human Rights Resolution 2004/87 (21 April 2004) E/CN.4/2004/127 317, para 1.
[61] UNHRC "Promotion and Protection of Human Rights Protection of human rights and fundamental freedoms while countering terrorism, Report of the High Commissioner for Human Rights" (16 December 2004) E/CN.4/2005/100, para 19.
[62] UN High-level Panel "A more secure world: Our shared responsibility Report of the High-level Panel on Threats, Challenges and Change" (2004) 48.
[63] UN High-level Panel report, above n 62, 49.

In March 2005 the Secretary-General of the United Nations reinforced the need to defend human rights in the fight against terrorism.[64] His report included the statement:

> In our struggle against terrorism, we must never compromise human rights. When we do so we facilitate the achievement of one of the terrorist's objectives. By ceding the moral high ground we provoke tension, hatred and mistrust of Governments among precisely those parts of the population where terrorists find recruits.

The United Nations Economic and Social Council (ECOSOC) has issued several reports in the past year relevant to the present discussion. One of these was a Report by the Working Group on Arbitrary Detention.[65] For the period under report the working group considered cases involving 18 persons in five countries.[66] The working group considered that detention of 12 of these persons was arbitrary. No opinion was offered in respect of the remaining six persons as they had been released at the time of the adoption of the working group's opinion. The working group expressed its concern about the frequent use of administrative detention (by the executive) and the expanse of emergency legislation diluting the right to habeas corpus in the context of the fight against terrorism.[67] It noted that several states had enacted new anti-terror or internal security legislation allowing for persons to be detained for an unlimited time, without charge, without the detainees being brought before a judge, and without a remedy to challenge the detention.[68] It is also noted that this type of administrative detention aims at circumventing the legal time limits governing police custody and pre-trial detention and at depriving the persons concerned of the judicial guarantees recognised to all persons suspected or accused of having committed an offence.[69] The working group was clear that even though such detention was occurring pursuant to legislation it raised issues of arbitrariness.[70]

The working group also assessed several court decisions, including cases from the United Kingdom and the United States. It criticised one case from the United Kingdom,

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[64] UNGA "In larger freedom: towards development, security and human rights for all, Report of the Secretary-General to the General Assembly" (21 March 2005) A/59/2005 para 88.
[65] UN Commission on Human Rights "Report of the Working Group on Arbitrary Detention" (1 December 2004) E/CN.4/2005/6.
[66] UN Commission on Human Rights, above n 65, para 60.
[67] UN Commission on Human Rights, above n 65, para 61.
[68] UN Commission on Human Rights, above n 65, para 61.
[69] UN Commission on Human Rights, above n 65, para 61.
[70] UN Commission on Human Rights, above n 65, para 63.

which was the decision at Court of Appeal level of the United Kingdom decision discussed in this paper, where the Court of Appeal had allowed the use of secret evidence to justify indefinite detention.[71]

In its recommendations the working group called for states, when taking legitimate measures to counter terrorism, to ensure there were effective safeguards against arbitrary deprivation of the right to liberty. In particular it recommended effective judicial control over detention orders including by way of habeas corpus and ensuring that measures restricting resort to judicial control are strictly proportionate to the legitimate need to fight against terrorism.[72] It stated further that the use of administrative detention under public security legislation or migration laws for unlimited time or long periods, without effective judicial oversight, as a means to detain persons suspected of involvement with terrorism is incompatible with international human rights law.[73]

Authoritative bodies outside of the United Nations have also discussed the importance of upholding human rights in combating terrorism. For example, the International Commission of Jurists (ICJ) meeting in August 2004 adopted the Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism (Berlin Declaration).[74] The meeting consisted of 160 jurists from all regions of the world. The ICJ recorded in the Berlin Declaration that since September 2001 many states have developed new counter-terrorism measures that are in breach of their international obligations; in adopting measures aimed at suppressing acts of terrorism states must adhere strictly to the rule of law, including the core principles of international law and obligations of international human rights law; and these principles and obligations define the boundaries of permissible and legitimate state action against terrorism.[75] The Berlin Declaration states that states must ensure that any derogation from a right during an emergency is temporary, strictly necessary and proportionate to meeting a specific threat.[76] Further, that administrative detention must remain an exceptional measure, be

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[71] UN Commission on Human Rights, above n 65, para 64; referring to *A and others v Secretary of State for the Home Department,* above n 15.
[72] UN Commission on Human Rights, above n 65, para 75.
[73] UN Commission on Human Rights, above n 65, para 77.
[74] The Berlin Declaration, above n 14, 350–356.
[75] The Berlin Declaration, above n 14, 351.
[76] The Berlin Declaration, above n 14, 353; compare the Siracusa Principles, above n 51.

strictly time-limited and be subject to frequent and regular judicial supervision.[77] The Berlin Declaration emphasises the importance of an independent judiciary and its role in reviewing state conduct.[78]

The Berlin Declaration describes the judiciary as the protector of the fundamental rights and freedoms and the rule of law and as the guarantor of human rights in the fight against terrorism.[79] It calls on judges to ensure that national laws and the acts of the executive relating to counter-terrorism conform to international human rights standards and in particular requests judges to wherever possible apply international human rights standards and to ensure that judicial procedures such as habeas corpus are implemented.[80]

IV THE ROLE OF DOMESTIC COURTS

A Incorporation of International Obligations into Domestic Law

One view of the appropriate role for domestic courts in relation to international human rights obligations, including those entered into by states by way of international treaties, is that these are only relevant when they have been incorporated into domestic law. This view is evident in several of the judgments in the decisions from both the USSC and the HCA discussed below. However, this view has been questioned[81] including in some of the judgments in the decisions from the HCA and the NZSC discussed below.

Of the states under discussion only the United Kingdom and New Zealand have incorporated recognition of the right to liberty as affirmed and circumscribed by the ECHR and the ICCPR, respectively, into domestic legislation.

The United Kingdom's obligations in respect of the right to liberty under the ECHR and therefore in general effect its obligations in respect of the right to liberty in the

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[77] The Berlin Declaration, above n 14, 353.
[78] The Berlin Declaration, above n 14, 352.
[79] The Berlin Declaration, above n 14, 356.
[80] The Berlin Declaration, above n 14, 356.
[81] See for example Lord Steyn, above n 37, 8; Sir Geoffrey Palmer "Human Rights and the New Zealand Government's Treaty Obligations" (1999) VUWLR 10; and comments *Tavita v The Minister of Immigration,* above n 12.

ICCPR were incorporated into United Kingdom domestic law via the Human Rights Act 1998 (UK) (UKHRA).

This has two consequences. First, section 3 UKHRA directs courts to wherever possible interpret enactments to be consistent with the ECHR.[82] Although as discussed below the United Kingdom case did not have to undertake this exercise as the words in the relevant legislation were very clear. Second, the UKHRA provides the remedy of a declaration of incompatibility which involves determination by the courts of whether state action, including by way of legislation, is compatible with the United Kingdom's obligations under the ECHR.[83]

New Zealand's obligations in respect of the right to liberty under the ICCPR have been incorporated to some extent into domestic law through the New Zealand Bill of Rights Act 1990 (NZBORA). The preamble to the NZBORA specifically recognises the Act is enacted to affirm its commitment to the ICCPR. The right to liberty is contained in section 22 which provides that everybody has the right not to be arbitrarily arrested or detained. The derogation provision in article 4(1) ICCPR is not referred to in the NZBORA. Rather the right to liberty in domestic law in New Zealand is subject to the general limitations provision contained in section 5 NZBORA which provides for rights to be subject only to reasonable limits, prescribed by law and demonstrably justified in a free and democratic society.[84]

Similarly to section 3 UKHRA, section 6 NZBORA directs courts to wherever possible interpret enactments consistently with the rights contained in NZBORA. No specific remedy is provided for in the NZBORA for breaches of the Act.[85]

The importance of the incorporation of international obligations under the ICCPR (or ECHR) into domestic law is that the courts are given a specific mandate from Parliament to review (at least to some extent) the relevant state's compliance with these. In the United Kingdom this review extends in effect to both the procedural requirement of

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[82] UKHRA, s 3.
[83] UKHRA, s 4(2).
[84] This formulation is also seen in the Canadian Charter of Rights and Freedoms, s 1, Part I of the Constitution Act 1982 (Canada Act 1982 (UK), Sch B).
[85] Though a declaration of inconsistency is now available for a breach of s 19 NZBORA relating to discrimination pursuant to s 20L and s 92I Human Rights Act 1993 (NZ).

article 9(1) ICCPR and the derogation provision in article 4(1) as these are similar to the requirements of the corresponding provisions in the ECHR. The substantive requirement of article 9(1) is not specifically incorporated as the concept of arbitrariness is not referred to in the ECHR in relation to the right to liberty. However in relation to the United Kingdom, following the enactment of the UKHRA which incorporated the provisions of the ECHR into the United Kingdom's domestic law, Warbrick has said the human rights components of the rule of law include the protection against the arbitrary exercise of power, even if that power has a formal legal base[86] and Clayton and Tomlinson have said that even where detention is clearly authorised by legislation this also needs to be justified on a substantive legal basis.[87]

In New Zealand the review specifically mandated by the NZBORA extends to both the procedural and substantive requirements of article 9(1) but does not include the derogation provision in article 4(1).

Though the obligations of the United States under the ICCPR are not incorporated by specific reference into United States domestic law, relevantly the US Constitution provides that treaties entered into by the United States are the "supreme law of the land".[88] Although some commentators have suggested that this does not mean that international treaties can be applied by the courts in the United States.[89] Even if this is correct, the presence of such a clause within the US Constitution supports domestic courts in that country giving somewhat more attention to international treaties than appears to have occurred to date.

In terms of a formalist view of the role of courts, as has been discussed above, the courts in the United Kingdom, the United States and New Zealand have a specific statutory or Constitutional (in the case of the United States) mandate to in effect consider some of the requirements of the ICCPR in relation to the right to liberty. Only in the

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[86] Warbrick, above n 2, 1013.
[87] Clayton & Tomlinson, above n 5, paras 10.90–10.92.
[88] US Constitution, art VI cl 2.
[89] Noah S Leavitt "The REAL ID Act: How It Violates US Treaty Obligations, Insults International Law, Undermines Our Security, and Betrays Eleanor Roosevelt's Legacy" <http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/leavitt/20050509.html> (last accessed 27 September 2005) 2.

United Kingdom does this extend to all requirements of the ICCPR, in effect by reference to the ECHR.

B Other Domestic Means of Protecting the Right to Liberty

Neither the United States nor Australia have specifically incorporated any aspect of their obligations under the ICCPR relating to the right to liberty into domestic legislation (though the US Constitution provides some authority for considering treaty obligations). In the United States the fifth and fourteenth Amendments to the US Constitution provide for the right not to be deprived of liberty without due process of law. This to some extent mirrors the procedural requirement of article 9(1).

The US Constitution also recognises the "Privilege of the Writ of Habeas Corpus" and specifies that this shall not be suspended unless when in cases of rebellion or invasion the public safety may require it.[90] This provision thus imposes similar limits on the suspension of habeas corpus to those in the threshold test contained in the derogation provision in article 4(1) ICCPR.

Legislation in the United States which does not conform with the Constitution can be ruled as unconstitutional and thus of no effect. In theory the United States thus has the strongest remedy available in respect of legislation which infringes the fundamental right to liberty though not as this is defined and specifically circumscribed in the ICCPR.

The Commonwealth of Australia Constitution Act 1900 (the Australian Constitution) does not contain any provision relating to fundamental rights including the right to liberty. Nor is there any specific reference to the right to liberty in legislation enacted since the formation of the Australian Commonwealth. However, Australia is a common law country with an historical recognition of the right to liberty. Where legislation is not sufficiently clear Australian courts could follow the NZSC decision discussed below and grant bail on the basis of the inherent jurisdiction to do so.[91] Of

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[90] US Constitution, art I 9 cl 2.

[91] *Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison*, above n 3.

course the protection of liberty at common law or via the inherent jurisdiction to grant bail will not prevail over clear legislation infringing upon this right.

This paper does not at all discount the importance of the recognition of the right to liberty both at common law and under the US Constitution. However, this paper suggests that the collective affirmation of the fundamental importance of the human right to liberty in the ICCPR (and also in respect of the United Kingdom, the ECHR) as well as agreement as to particular and narrow permissible limits on this right, by the international community following the second world war, provides an important an persuasive benchmark for the assessment by domestic courts of any limits placed on the right.[92]

C Habeas Corpus

The writ of habeas corpus was originally a common law mechanism specifically established to allow challenges to detention by state authorities.[93] It gives detainees the right to be brought before a court to have the legality of their detention assessed by a court. Where the detention at issue was not found to be authorised by law the court could order that the detainee be released. Each of the states under discussion have all now provided for this procedure in legislation.[94] Because habeas corpus is primarily a mechanism for testing the legality of detention it in effect permits courts to consider the procedural requirement of article 9(1) ICCPR.

D Suggested Role for Domestic Courts

As has been seen, in terms of a formalist view of the appropriate role for courts, there are several legal bases, including habeas corpus, for challenging detention within the four states under discussion. As will be seen in the case analyses below a number of superior court judges in some jurisdictions (notably New Zealand where the majority

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[92] "Rightly or wrongly, the ICCPR is regarded as the primus inter pares of the universal international human rights treaties. It has been widely ratified by states from all continents. As of November 2, 2003, there were 151 states parties. For those states it creates a binding treaty obligation,"; McGoldrick, above n 33, 381.

[93] See above n 6.

[94] Habeas Corpus Act 1679 (UK); US Constitution, art I 9 cl 2: Judiciary Act 1903 (Cth), s 39B in combination with Federal Courts of Australia Act 1976 (Cth), s 23: and Habeas Corpus Act 2001 (NZ), s 6.

takes this view) consider that incorporation of international obligations into domestic law is not required for these to be relevant to, persuasive or even determinative in respect of, the court's consideration of legislation claimed to authorise detention.

This paper does not argue either that courts elsewhere should or should not follow this lead. That is a subject for another paper. However, it is suggested that even where legislation is sufficiently clear to authorise detention (thus on a formalist view of the court's role preventing remedies such as release through the habeas corpus procedure to be granted) and even where a specific power of review for compliance with international obligations and/or a remedy such as the declaration of incompatibility have not been made available to domestic courts, courts should provide an analysis and assessment of whether the particular legislation under consideration complies with international treaty obligations in respect of the right to liberty. This role comports with the historical role of the courts as the guardians of liberty.

In playing this monitoring-type role domestic courts can provide guidance to Parliament and the executive in respect of future state practice and may also assist to inform wider public debate about the fundamental right to liberty. All four states under discussion are democratic states and limits on fundamental rights such as the right to liberty and the reasons for these should be openly discussed and debated. Any infringements on the right should be authorised by the express will of Parliament through clear legislation promoting democratic legitimacy and ultimately accountability. Courts can assist with ensuring that infringements on the right are carefully considered and democratically mandated.

It is in domestic jurisdictions that detention occurs and where challenges to this are made at least in the first instance. Domestic courts have a responsibility, in the writer's view, to at least monitor states' compliance with the internationally agreed limits on detention contained in the ICCPR. As discussed above there is wide support for domestic courts to take a role in at least monitoring states' compliance with international treaties including in particular in relation to detention for the purpose of addressing security concerns. Domestic courts cannot ignore the actions of their states within the international arena, including in relation to security concerns raised by the international phenomenon of

the war on terrorism and the increasingly strict measures being taken worldwide to address these concerns.

V CASE ANALYSES

This paper now considers five recent decisions from the pre-eminent courts in the United Kingdom, the United States, Australia and New Zealand. The decisions from the United Kingdom, the United States and New Zealand considered issues around administrative and indefinite detention of persons assessed as posing security concerns. In the decision from Australia the appellant had been detained under immigration legislation for the reason that he was not a desired immigrant, failed to achieve refugee status and was not able to be deported elsewhere. The Australian decision however, provides an indication of the HCA's view of the relevance of international obligations in relation to the court's consideration of a challenge to administrative and indefinite detention.

The four cases reviewed below are not the only cases in recent times in the four jurisdictions under discussion to consider the right to liberty and its reconciliation with measures taken to deal with security or immigration concerns. All four cases do, however, illustrate the varying approaches taken in domestic courts (including between judges within the same jurisdiction) to the relevance of international obligations in domestic law. As discussed above, this paper does not attempt to resolve this issue in terms of a formalist view of what material courts can and cannot consider. Also, as discussed above, it is suggested that international treaty obligations are certainly relevant in an area such as the right to liberty with which the courts have played a central role for hundreds of years and are persuasive. Further, putting aside constitutional issues concerning the formal role of courts, these do not prevent courts from playing the monitoring role suggested by this paper. Superior courts in particular must play this role in respect to the fundamental right to liberty.

The analysis in each case will consider in turn the procedural limit contained in article 9(1) ICCPR, the substantive question of arbitrary detention in article 9(1), and in respect of the derogation provision contained in article 4(1) ICCPR, the threshold requirement as well as the limit on the extent of measures which can be taken in contravention of article 9(1).

A A and others v Secretary of State for the Home Department

1 Facts and findings

The United Kingdom's obligations under the ECHR were incorporated into United Kingdom domestic law under the UKHRA by way of specific reference to provisions of that treaty, including that in article 5(1) concerning the right to liberty, as well as that in article 15(1) permitting derogation from the right. The UKHRA thus explicitly provides for review by the United Kingdom courts of the United Kingdom's compliance with its international obligations under both (in effect) treaties including specifically in respect of legislation. The remedy available following such a review is a declaration of incompatibility.[95]

Recently in *A and others v Secretary of State for the Home Department*[96] the House of Lords was called upon to undertake such a review in relation to the right to liberty in respect of a group of persons who had been certified as "suspected international terrorists" by the Home Secretary under section 21 of the Anti-terrorism, Crime and Security Act 2001 (the ATCSA).[97] None of the appellants faced criminal charges and in no case was a criminal trial in prospect. Deportation was also not an option for any of the appellants for various reasons. The consequence for the appellants was that they were then detained indefinitely pursuant to section 23 of that Act.[98]

Section 23 ATCSA specifically permitted indefinite detention of suspected international terrorists even where deportation or removal from the United Kingdom was not able to proceed for either legal or practical reasons.

Section 23 ATCSA specifically applied to foreign nationals present in the United Kingdom and not to United Kingdom nationals. Prior legislation had allowed for

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[95] UKHRA, s 4(2).
[96] *A and others v Secretary of State for the Home Department* [2004] UKHL 56.
[97] Now repealed and replaced with the Prevention of Terrorism Act 2005 (UK).
[98] *A and others v Secretary of State for the Home Department*, above n 96, para 14; see also a summary of protections in the ATCSA for reviewing detention under that Act, para 15.

detention of foreign nationals only for such time as was reasonable to allow deportation to be carried out.[99]

Shortly prior to the enactment of the ATCSA, the United Kingdom executive made the Human Rights Act 1998 (Designated Derogation) Order 2001 (the Derogation Order). This recognised that the power under the ATCSA to indefinitely detain a person against whom no action was being taken with a view to deportation may be inconsistent with article 5(1)(f) ECHR. Notice of the steps taken to derogate from article 5(1) was also given to the Secretary-General of the Council of Europe and corresponding steps were taken to derogate from article 9(1) ICCPR.[100]

The Derogation Order referred to a "Public emergency in the United Kingdom" in respect of the attacks of 11 September 2001 and to UNSC resolutions recognising those attacks as a threat to international peace and security and requiring all states to take measures to prevent the commission of terrorist attacks.[101] The Derogation Order also referred to a terrorist threat in particular from "foreign nationals present in the United Kingdom" who are suspected of being involved in acts of terrorism, of being members of groups involved in acts of terrorism, or having links with such groups.[102]

In terms of compliance with the derogation provision in article 15(1) ECHR there were two issues before the court. These were first whether the threshold for derogation had been met, namely whether there existed a war or any other public emergency threatening the life of the nation; and second whether the detention of the appellants derogated from article 15(1) only to the extent strictly required by the exigencies of the situation and further whether this was inconsistent with other obligations the United Kingdom had under international law.

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[99] *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704, para 8.
[100] *A and others v Secretary of State for the Home Department*, above n 96, para 11.
[101] Schedule to the Derogation Order; referred to in *A and others v Secretary of State for the Home Department*, above n 96, para 11.
[102] Schedule to the Derogation Order; referred to in *A and others v Secretary of State for the Home Department*, above n 96, para 11.

2 Whether there was a public emergency threatening the life of the nation

The key judgment of the court is given by Lord Bingham. Lord Bingham concluded on the question of whether there existed a sufficient emergency by deferring to the judgement of the Home Secretary.[103] However, before doing so he reviewed a substantial number of authorities on point including international treaties and opinions.

Lord Bingham also referred to several cases concerning measures taken in respect of the Irish Republican Army (IRA). In *Lawless v Ireland (No 3)*,[104] upon which he places heavy reliance, the ECtHR considered that the threshold would be met if there was "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".[105] This test was found to be met in that case in that there existed in the territory of the Republic of Ireland a secret army engaged in unconstitutional activities and using violence to attain its goals; this army was also operating outside the territory of the state thus seriously jeopardising the relations of the Republic of Ireland with its neighbour; and there had been a steady and alarming increase in terrorist activities for a period of months.[106] In the other IRA cases discussed by Lord Bingham the threshold test was also found to have been met.

In another case referred to by Lord Bingham, the *Greek Case,*[107] the European Human Rights Commission (European Commission) considered that the test required the emergency to be "actual or imminent", to affect "the whole nation", to threaten "the continuance of the organised life of the community", and to be "exceptional".

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[103] *A and others v Secretary of State for the Home Department*, above n 96, paras 28, 29, 118, 119 and 154.
[104] *Lawless v Ireland (No 3)* (1961) 1 EHRR 15.
[105] *Lawless,* above n 104, para 28; referred to in *A and others v Secretary of State for the Home Department*, above n 96, para 17.
[106] *Lawless,* above n 104, para 28; referred to in *A and others v Secretary of State for the Home Department*, above n 96, para 17; also see *Ireland v United Kingdom* (1978) 2 EHRR 25 where 17 years later both the ECtHR and the European Commission again found the test was met in respect of the threat posed to the United Kingdom by the Irish Republican Army; referred to in *A and others v Secretary of State for the Home Department*, above n 96, para 18.
[107] *Greek Case* (1969) 12 YB 1 (European Commission); referred to in *A and others v Secretary of State for the Home Department*, above n 96, para 18.

Lord Bingham also refers to the Siracusa Principles.[108] He accepts that valid derogation under either the ECHR or the ICCPR requires the threat to be imminent.[109]

Lord Bingham's judgment thus provides some guidance on this first question by way of review of relevant authorities which all strongly suggest that a high threshold applies though he then defers to the Home Secretary to decide whether the threshold has been met. The key reason in Lord Bingham's view for deferring to the executive was that, in his view, the question of whether a sufficient public emergency exists is one at the political end of the spectrum and that this question raises issues of relative institutional competence.[110] Such a consideration did not prevent the ECtHR and the European Commission considering this same question in the cases referred to. As well, the domestic courts in the United Kingdom now have clear jurisdiction to do so through the incorporation of the relevant provisions of the ECHR into domestic law via the UKHRA. It is also noted the court may not have been in a position to complete such an analysis, at least in any detail, given that it had not seen certain secret information which had been assessed at first instance by the Special Immigration Appeals Commission.[111]

3 Whether the measures were strictly required and whether these were consistent with other international law obligations

The second question under the derogation provision in the ECHR relates to the extent of the measures taken which derogate from the right to liberty. Article 5(1)(f) ECHR permits derogation by a state only to the "extent strictly required by the exigencies of the situation" and "provided that such measures are not inconsistent with its other obligations under international law".

Lord Bingham described the applicable test as one of "strict necessity" which he said was in Convention terminology a "proportionality test".[112] He also mentions the concept of arbitrariness in conjunction with this test.[113] He described the applicable proportionality test as requiring consideration of whether the legislative objective is

[108] *A and others v Secretary of State for the Home Department*, above n 96, para 19.
[109] *A and others v Secretary of State for the Home Department*, above n 96, para 21.
[110] *A and others v Secretary of State for the Home Department*, above n 96, para 29.
[111] *A and others v Secretary of State for the Home Department*, above n 96, para 27.
[112] *A and others v Secretary of State for the Home Department*, above n 96, para 30.
[113] *A and others v Secretary of State for the Home Department*, above n 96, para 30.

sufficiently important to justify limiting a fundamental right (in this case the appellants accepted that to some extent it was[114]), whether the measures are rationally connected to the objective and whether the means used impair the right or freedom do so no more than is necessary.[115]

Lord Bingham appeared particularly concerned in his discussion that there was evidence before the court that similar threats were posed by many United Kingdom nationals who were not subject to indefinite detention under the ATCSA.[116] Thus he said the legislation was discriminatory and discrimination was prohibited under the ECHR as well as the ICCPR.[117] He noted that the derogation provision in article 4 of the ICCPR specifically did not permit measures derogating from the Convention which were discriminatory.[118] Further, nor had the United Kingdom followed the derogation process under the ECHR relating to the discrimination issue.[119] Because of the discriminatory effect of the legislation the decision suggests that it was therefore not rationally connected to its objective which was presumably to counter terrorist threats.[120] Further, there were other means available for dealing with such threats as such measures had been employed against United Kingdom nationals who were considered to pose similar threats.[121] It was therefore questionable as to why detention was required in respect of foreign nationals.[122]

His Honour concluded that the decision to detain one group of persons considered to be security threats but not another could not be justified.[123] The discrimination issue was clearly of concern to a majority of the other Judges.[124] Lord Scott also considered that the government should have to show that monitoring arrangements or less severe movement restrictions would not suffice.[125]

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[114] *A and others v Secretary of State for the Home Department*, above n 96, paras 30 and 32.
[115] *A and others v Secretary of State for the Home Department*, above n 96, para 30.
[116] *A and others v Secretary of State for the Home Department*, above n 96, para 32.
[117] *A and others v Secretary of State for the Home Department*, above n 96, para 63; art 14 and art 26 respectively.
[118] *A and others v Secretary of State for the Home Department*, above n 96, para 60.
[119] *A and others v Secretary of State for the Home Department*, above n 96, para 47.
[120] *A and others v Secretary of State for the Home Department*, above n 96, para 33.
[121] *A and others v Secretary of State for the Home Department*, above n 96, para 35.
[122] *A and others v Secretary of State for the Home Department*, above n 96, para 44.
[123] *A and others v Secretary of State for the Home Department*, above n 96, para 68.
[124] *A and others v Secretary of State for the Home Department*, above n 96, paras 84, 132-138, 158, 159, 188, 189, 231 and 236.
[125] *A and others v Secretary of State for the Home Department*, above n 96, para 155.

Lord Walker (in a minority of one) concluded that this second limb was also a matter for governmental discretion.[126]

4 Analysis

The House of Lords has a clear mandate under the UKHRA to review the detention provisions in the ATCSA for compliance with the ECHR in respect of the right to liberty specifically including, unlike the other states under discussion, the derogation provision. The statutory mandate of this court in respect of international obligations is thus the widest of the four courts under discussion.

Of the legislation under discussion the ATCSA most clearly permitted indefinite detention in certain circumstances for reasons of security. Thus the question did not arise in this case as to whether the procedural requirement of provision protecting the right to liberty in the ECHR (or in effect article 9(1) ICCPR) was met. In other words, in terms of there being clear legislation authorising the detention of the appellants, it was in accordance with law. In this circumstance release through the habeas corpus process may not have been available and presumably this is why this was not dealt with in any detail by the court. However, concerns have been raised about the authority of the executive to indefinitely detain persons under the ATCSA. On this point Warbrick has commented:[127]

> But the seriousness of what is involved in the Part 4 scheme can be lost in the details of the process. It authorises indefinite detention of persons on executive say so, on a low burden of suspicion, which can be justified in partly secret proceedings, *inter alia,* relying on intelligence material, including information which the Government might know had been obtained by torture. I go back to the beginning – the human rights components of the rule of law include the protection against the arbitrary exercise of power, even if the power has a formal legal base.

The substantive requirement of article 9(1) ICCPR that detention not be arbitrary is not specified in article 5(1) ECHR. However, some commentators have said that article 5(1) is subject to this requirement.[128] Lord Bingham does not deal with this point. If he

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[126] *A and others v Secretary of State for the Home Department*, above n 96, paras 217 and 218.
[127] Warbrick above n 2, 1013.
[128] Clayton & Tomlinson, above n 5, paras 10.90-10.92.

had done so, he may have concluded that habeas corpus was available. The derogation requirements of article 15(1) ECHR are the focus of Lord Bingham's judgment.

Lord Bingham's review of the relevant case law and other authorities concerning the threshold test for derogation, namely whether a sufficient public emergency existed, is thorough. Implicit in this decision is an acceptance that while much of the international material referred to is not legally binding on the United Kingdom it is both relevant to the court and persuasive.[129] However, there is no analysis by him of precisely what factors in the then situation in the United Kingdom indicated that the test had been met. By comparison the *Lawless v Ireland* case relied on by Lord Bingham contained such an analysis.

In respect of the threshold required for derogation it was considered by the majority that deference be shown to the executive in making the Derogation Order because it was said to be a question at the "political end of the spectrum".[130] It is suggested that even if it is appropriate to defer to executive on this issue it would have been useful for future guidance concerning a fundamental human right, for the court to have clarified precisely what, in the circumstances facing the United Kingdom at that time, amounted to an emergency involving actual and imminent danger threatening the life of the nation.

Bearing this in mind it is of concern that Lord Bingham goes further than simply deferring to the executive and endorses its view that the threshold question had been met. He concludes that if the situation in most of the cases he had referred to, in particular the *Lawless v Ireland* case amounted to such an emergency, then clearly the current situation following September 11 must do so.[131] It is noted that the *Lawless v Ireland* case involved what was described as "low-level terrorist activity".[132] Although, the threats facing the United Kingdom from the IRA at that time were apparently more extensive than those facing the United Kingdom in its home territory at the time this case was heard (as well as at present notwithstanding the recent bombings in London). In respect of the other cases reviewed by Lord Bingham he said: "[I]n each case the member state had actually

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[129] *A and others v Secretary of State for the Home Department*, above n 96, for example para 63.
[130] *A and others v Secretary of State for the Home Department*, above n 96, para 29.
[131] *A and others v Secretary of State for the Home Department*, above n 96, para 28; see also para 44.
[132] *A and others v Secretary of State for the Home Department*, above n 96, para 17.

experienced widespread loss of life caused by an armed body dedicated to destroying the territorial integrity of the state.[133] This was not the case in the United Kingdom at the time this decision was released. As well, the long periods for which derogation was deemed acceptable with respect to Northern Ireland-related violence has been criticised.[134]

When compared with these cases, including *Lawless v Ireland*, as well as given the high threshold which must apply based upon the cases and the other material referred to by Lord Bingham, the conclusion that the situation facing the United Kingdom following 9 September 2001 meets the test of being a sufficient public emergency is unsatisfactory. Further, the conclusion is questionable because Lord Bingham did not have full information before him concerning the nature, extent and imminence of terrorist threats to the United Kingdom. This information had been withheld from the Court.[135] It is thus difficult to see how the Court was in a position to assess whether the threat facing the United Kingdom met the high threshold the Court appeared to agree was required.

It is suggested that rather than approving the decision of the Home Secretary, in particular without explaining the reasons why a sufficient public emergency existed in the then existing situation, if deference to the Home Secretary on this first question was appropriate the preferable course would have been to simply defer without also approving the decision.

Better still however, it is suggested, Lord Bingham ought to have followed his fellow judge Lord Hoffman who commented: "Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community".[136] The UKHRA gives the United Kingdom domestic courts clear jurisdiction to assess this question despite its political nature. Of all the courts under discussion the House of Lords had clear authority to go further than it did in monitoring the compliance of the United Kingdom with the specific limits which apply to the right to liberty under the ECHR (and effectively the ICCPR). This would have at least provided guidance for future state

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[133] *A and others v Secretary of State for the Home Department*, above n 96, para 28.
[134] Gross "Once More into the Breach: the Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies" (1998) 23 YJIL 437; referred to in Warbrick, above n 2, 1006.
[135] Though such information appears to have been available at first instance.
[136] *A and others v Secretary of State for the Home Department*, above n 96, paras 89 and 96.

practice and provided information for wider political and public debate on this important issue.

Concerning the second limb of the derogation test as to the permissible extent of any measures derogating from the right to liberty, it is suggested that contrary to what Lord Bingham appears to be saying, a proportionality test does not entirely equate with a test of strict necessity. The words strict necessity logically arise from the words: "the extent strictly required by the exigencies of the situation". Although as the court was not aware of the full extent of the threat facing the country, because it did not have before it all the material the executive claimed to have to support the existence of a significant threat (as discussed above in respect of the first threshold test of whether a public emergency exists), it would have been difficult for it to assess whether the detention authorised by the ATCSA was strictly warranted or required by the exigencies of the situation.[137] The Court somewhat compromised its ability to assess the relationship between the claimed public emergency and the measures taken for dealing with it in terms of a strict necessity test by not being fully informed in respect of the whether a sufficient public emergency existed. The Court effectively ignored this issue and focused instead upon a proportionality test.

Proportionality tests are commonly used for assessing the justification of infringements on human rights. In this case a declaration of incompatibility was granted by the court because of the discriminatory nature of the detention provisions which applied only to foreign nationals.

The question arises as to whether if the legislation had not been discriminatory, in other words if it had provided for both United Kingdom and foreign nationals to be detained following bring assessed as a security risk, would the detention have met the test of strict necessity.

The courts in the United Kingdom may soon be asked to consider this issue following the enactment of the Prevention of Terrorism Act 2005 (Prevention of Terrorism Act) which replaced the ATCSA. This new legislation is not discriminatory but provides for the making of "control orders" by either the Secretary of State, or in the case

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[137] Warbrick, above n 2, 1014.

of what are termed "derogating control orders", by the High Court.[138] Derogating control orders can place obligations upon an individual even though these may be incompatible with the right to liberty under article 5 ECHR.[139] A person can be arrested and detained for up to 48 hours pending the making of a derogating control order by the High Court.[140] The High Court can extend this period.[141]

Obligations which may be imposed by a control order include restrictions on movement within the United Kingdom[142] which can include a requirement to remain at or within a particular place or area.[143] Breach of such obligations is an offence punishable by up to five years imprisonment.[144]

The obligations which may be imposed upon individuals by these orders are clearly draconian though the discriminatory aspects of the ATCSA have been removed. The questions still remain as to whether the substantive requirement of arbitrariness is infringed or not and whether the test for derogation has been met justifying such measures in the current war on terrorism.

While the new legislation does provide for some court oversight, when considering these new orders the High Court will be bound to accept the House of Lords decision under discussion on the wider questions concerning whether such detention is strictly necessary in the current circumstances. The bombings in London earlier this year can only strengthen the view that what are draconian measures are justifiable. But it is not clear at all, in the writer's view, that a sufficient public emergency exists and that such powers are necessary. One incident, said to be the work of the terrorists with whom the United Kingdom and the United States are currently are war, has occurred on each of the territories of these two states. While both these incidents were completely unjustifiable, neither are on the scale of the threats faced by many nations in the second world war or by the United Kingdom during the years of regular attacks by the IRA. If any case concerning

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[138] Prevention of Terrorism Act 2005 (UK), s 1(1) & (2).
[139] Prevention of Terrorism Act 2005 (UK), s 1(2)(a).
[140] Prevention of Terrorism Act 2005 (UK), s 5.
[141] Prevention of Terrorism Act 2005 (UK), s 5(4).
[142] Prevention of Terrorism Act 2005 (UK), s 1(4)(g).
[143] Prevention of Terrorism Act 2005 (UK), s 1(5).
[144] Prevention of Terrorism Act 2005 (UK), s 9(4)(a).

these new orders reaches the House of Lords it will also be constrained to a significant extent by its failure to deal with such issues in the present case.

The House of Lords considered that deference to the executive was not appropriate concerning the discrimination issue because of its role under the UKHRA and the historical role of the courts in protecting liberty.[145] It is not clear why these factors do not support the justiciability of the remainder of the derogation test particularly given the clear mandate in the UKHRA. Discrimination issues, important as they are, have in effect been given some precedence over the fundamental right to liberty by this decision.

Because of express authorisation by way of the UKHRA the United Kingdom's international obligations in respect of the right to liberty were relevant to the court's consideration of legislation permitting indefinite detention. Despite this mandate, by failing to assess the derogation tests fully, the House of Lords has in effect conceded that it has only a limited role in respect of executive compliance with the ECHR. Although it is positive to note the encouragement given by the court to the use of means short of detention for dealing with security issues.

B Hamdi v Rumsfeld and Rasul v Bush

1 Facts and findings: Hamdi v Rumsfeld

The petitioner in *Hamdi v Rumsfeld*[146] was the father of an American citizen (also Mr Hamdi) who had been captured in Afghanistan and had allegedly taken up arms with the Taliban. Mr Hamdi (junior) was being detained in the United States after being removed from Afghanistan. He had been classified as an "enemy combatant"[147] and had been detained for over two years as at the date of the decision of the USSC. The United States government provided the court at first instance with a declaration from a government official stating that Mr Hamdi had been affiliated with a Taliban unit which had engaged in hostilities with Northern Alliance forces in Afghanistan and when the

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[145] *A and others v Secretary of State for the Home Department*, above n 96, paras 36 and 42.
[146] *Hamdi v Rumsfeld,* above n 15.
[147] *Hamdi v Rumsfeld,* above n 15, 8 O'Connor J; this categorisation appears to be accepted by the majority though it is noted in the judgment that the government has never provided any court with the full criteria it uses in classifying individuals as such.

Taliban unit surrendered to those forces Mr Hamdi had surrendered to them a Kalishnikov assault rifle.

The majority accepted that there was sufficient authority for Mr Hamdi's detention as an enemy combatant pursuant to a Congressional resolution, namely the Authorization for Use of Military Force (AUMF),[148] which allowed the President to use all necessary and appropriate force against persons he determines planned, authorised, committed or aided in the September 11 attacks.[149] The majority said that the AUMF permitted detention only of the "narrow category" of individuals determined to be enemy combatants.[150] The decision also appears to be limited to those who are United States citizens.[151] Souter J (dissenting in part) and Scalia J (dissenting) both concluded that the AUMF was not sufficiently clear to permit detention.[152]

The majority also noted that the "war on terror" was an "unconventional war" and seemed to accept the possibility that Mr Hamdi's detention could last for the rest of his life.[153] This raised the issue of indefinite detention to which the majority's answer was that detention of such individuals could "last no longer than active hostilities".[154] The purpose of detaining enemy combatants was described by the majority as an incident of war with the purpose of preventing captured individuals returning to the field of battle.[155]

This case differs from the other cases under discussion in that the majority of the USSC explicitly accepted that the government was engaged in a war. The majority also accepted that active combat operations against Taliban fighters were ongoing in Afghanistan.[156] Thus the war which could justify detention was not necessarily the wider war on terrorism.

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[148] Authorization for Use of Military Force 115 Stat 224 (2001).
[149] *Hamdi v Rumsfeld,* above n 15, 8–12, 14 and 16 O'Connor J.
[150] *Hamdi v Rumsfeld,* above n 15, 9, 10, 12 and 16 O'Connor J.
[151] *Hamdi v Rumsfeld,* above n 15, 9 O'Connor J.
[152] *Hamdi v Rumsfeld,* above n 15, 9-13 and 22-26 respectively.
[153] *Hamdi v Rumsfeld,* above n 15, 12 O'Connor J.
[154] *Hamdi v Rumsfeld,* above n 15, 12 O'Connor J; several authorities for this proposition are referred to including the Geneva Convention (III), art 118.
[155] *Hamdi v Rumsfeld,* above n 15, 10 O'Connor J; though the majority stated that there were limits on what could occur during detention for example interrogation was not permissible, 13 O'Connor J.
[156] *Hamdi v Rumsfeld,* above n 15, 13 O'Connor J.

The majority held that, even as an enemy combatant, because Mr Hamdi was a citizen he was entitled to due process rights under the fifth Amendment to the US Constitution namely to have a meaningful opportunity to contest the factual basis for the detention before a neutral decision maker.[157] It was on this basis that the decision below was vacated. The majority also notes that the parties agreed that the writ of habeas corpus remained available to individuals detained within the United States.[158]

The government argued that a challenge to Mr Hamdi's detention should proceed on the basis of the finding of the Fourth Circuit Court's holding at first instance that it was "undisputed" that Mr Hamdi was seized in a combat zone, or on the basis of a "very deferential "some evidence" standard".[159] The majority did not accept this. However, in respect of the latter the majority accepted that aside from core elements, enemy combatant proceedings may need to be tailored in order to alleviate their uncommon potential to burden the executive at a time of military conflict.[160] The court was firm that during the process of challenging his detention Mr Hamdi "unquestionably has the right to access to counsel".[161]

The majority accepted that the US Constitution gave the executive and the legislature control over war making but rejected a heavily circumscribed role for the courts saying:[162]

> We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.

And further:[163]

> …the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions.

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[157] *Hamdi v Rumsfeld,* above n 15, 17, 24 and 26 O'Connor J.
[158] *Hamdi v Rumsfeld,* above n 15, 18 O'Connor J.
[159] *Hamdi v Rumsfeld,* above n 15, 19–26 and 30 O'Connor J.
[160] *Hamdi v Rumsfeld,* above n 15, 27, 28 and 29 O'Connor J.
[161] *Hamdi v Rumsfeld,* above n 15, 32 O'Connor J.
[162] *Hamdi v Rumsfeld,* above n 15, 29 O'Connor J.
[163] *Hamdi v Rumsfeld,* above n 15, 29–30 O'Connor J.

The majority referred to the Geneva Convention (III). None of the judges referred to the ICCPR though arguably the latter is as relevant to the issues before the court as the former.

Souter J (dissenting in part) discusses the test for limiting the right to liberty under the US Constitution. He did not accept that there was evidence that Hamdi posed an "imminent threat" or that there was a sufficient "emergency" permitting his detention to continue.[164] Scalia J (dissenting) cites from Blackstone who opined that executive detention may be necessary when the state is in "real danger" and Parliament can suspend the habeas corpus but only in a case of "extreme emergency".[165] Scalia J's view was that that the AUMF did not amount to the latter and that Mr Hamdi was therefore entitled to a habeas corpus decree requiring his release.[166] Thus without resort to article 4(1) ICCPR Souter and Scalia JJ require similar limits imposed by this on any action by the executive detaining a United States citizen.

2 Facts and findings: Rasul v Bush

Mr Rasul was a foreign national who was being held in Guantanamo Bay. This decision did not address the reasons for his detention as these were not at issue. The decision simply addressed a jurisdictional point, namely whether habeas corpus was available to aliens detained outside of the United States. Though the United States has complete control of an area of land in Guantanamo Bay pursuant to a lease with the Cuban government it does not have sovereignty over that area.

The majority held that habeas corpus was available to aliens detained at Guantanamo Bay and the case was remanded back to the Federal District Court for hearing of the habeas corpus application.[167] Scalia J (dissenting) concluded that the detainees were not located within the territorial jurisdiction of any federal court and thus habeas corpus was not available.[168]

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[164] *Hamdi v Rumsfeld,* above n 15, 14–15 Souter J.
[165] *Hamdi v Rumsfeld,* above n 15, 9 Scalia J.
[166] *Hamdi v Rumsfeld,* above n 15, 21 Scalia J.
[167] *Hamdi v Rumsfeld,* above n 15, 6-8 O'Connor J.
[168] *Hamdi v Rumsfeld,* above n 15, 10 Scalia J.

3 Analysis

In neither case do the judges refer to the limits on the right to liberty contained in the ICCPR despite the United States having ratified this treaty and despite article VI clause 2 of the US Constitution which provides that treaties made by the United States shall be the supreme law of the land. The failure to at least recognise the international obligations of the United States is startling in the context of the international nature of the war on terrorism.

The Geneva Convention (III) is mentioned in the majority judgment. It is unsatisfactory for a court to pick and choose what material it will consider. If international treaties are considered relevant then all relevant treaties should be considered. Even though the court in this case accepted that the state was at war and therefore the treaty referred to by it is directly relevant to such circumstances, the UNHRC has made clear that the ICCPR applies to all forms of detention. The ICCPR is clearly also relevant particularly concerning the category of enemy combatants which may not be covered by the Geneva Conventions.

The procedural requirement of article 9(1) ICCPR was in effect considered by all the judges deciding Mr Hamdi's case in the determination of whether the AUMF was sufficiently clear to authorise his detention. There were differences of opinion on this point though the majority considered it was. UNHRC jurisprudence suggests that detention contrary to the requirements of the ICCPR must be clearly expressed in legislation.[169] Consideration of the UNHRC's jurisprudence may have made a difference to the majority view on this point.

Even if the AUMF provided sufficient legislative authority to detain Mr Hamdi, it is suggested that given the provision in the US Constitution concerning treaties and given the fundamental nature of the human right to liberty, the Court should have at least acknowledged the international obligations of the United States under the ICCPR. Further, the court should have provided some guidance as to whether, in its view, the circumstances the United States faced fighting the war on terrorism met the required tests,

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[169] Refer above n 35 and n 36.

both in terms of the substantive requirement of article 9(1) and the derogation provision in article 4(1). If domestic courts do not at least play this monitoring role political and public debate about this important issue is impaired and ultimately the accountability of the legislature.

The US Constitution protects the right to liberty. It might be suggested that this is sufficient and that the protection of this right under the ICCPR thus does not need to be incorporated into United States domestic law. Further, that legislation which is inconsistent with this right can be ruled as unconstitutional by the courts and this remedy provides significant protection of the right. The answer to this view is that the ICCPR was ratified by the United States more recently and it provides agreement by it as to specific and narrow limits which are permissible when restricting the right to liberty. Such limits are not provided for in the US Constitution. The ratification of the ICCPR with its specific limits on the right to liberty is at least worthy of comment by the court even if in its view the AUMF is sufficiently clear to authorise detention and thereby implicitly removing the possibility of release via the habeas corpus procedure.

The decision in Mr Rasul's case is positive, setting aside the debatable legal issue concerning whether territorial limits apply to domestic courts, in that it supports the concept of the universality of human rights by extending habeas corpus to aliens. However, should he make an application for habeas corpus it is unlikely he will succeed, as similarly to Mr Hamdi, he is being detained pursuant to the AUMF and the USSC has decided that this provides sufficient authorisation for the lawful detention of enemy combatants.

A key element missing from the decision relating to Mr Hamdi is comment by the court that other means could have been employed to ensure that he did not either return to the field of battle pose security risks within the United States. This omission does not sit well with the court's historical role as the guardian of liberty.

C *Al-Kateb v Godwin*

1 Facts and findings

The appellant in *Al-Kateb v Godwin*[170] arrived in Australia in mid-December 2000 without a passport or a visa. Section 189 of the Migration Act 1958 (Cth) (Migration Act) describes such persons as unlawful non-citizens and provides for mandatory detention of such persons. Section 196 of the Migration Act provides that the detention shall continue until one of three options occurs. These are removal, deportation, or the granting of a visa. The appellant had been refused a visa and had been detained for two years while the authorities made attempts to remove or deport him from Australia. During this time the authorities had been unable to find a country willing to take him. His release had then been ordered by the Federal Court prior to the appeal to the HCA. There was no evidence before the court that the appellant was suspected of involvement in terrorist or other criminal activities or otherwise posed safety or security concerns.

McHugh J, Hayne J and Callinan J (all in the majority) considered that the words in the relevant provisions of the Migration Act were clear and unambiguous and should not be read as subject to fundamental rights.[171] Further, that the detention authorised by the Migration Act extended to indefinite detention in the circumstances of being unable to remove a person from the country.[172]

The second issue of concern to the majority was whether the legislation had been lawfully enacted. McHugh J finds that the Migration Act was enacted within the legislative power under the Australian Constitution.[173] He then makes clear his view that the Australian Constitution cannot be read by reference to the provisions of international law.[174] Further, he says, because these have been accepted since the Australian

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[170] *Al-Kateb v Godwin,* [2004] HCA 37.
[171] *Al-Kateb v Godwin,* above n 170, paras 33, 35, 231, 241 and 298.
[172] *Al-Kateb v Godwin,* above n 170, paras 31, 33, 35, 240, 241, 297 and 298.
[173] *Al-Kateb v Godwin,* above n 170, paras 44-46 and 48; referring to Australian Constitution, s 51(xix) which provides Parliament with the power "to make laws for the peace, order, and good government of the Commonwealth with respect to …… aliens".
[174] It is clear from the context that McHugh J is referring to international law rules concerning human rights.

Constitution was enacted in 1900, taking account of them would amount to the courts amending the Constitution under the guise of interpretation.[175]

McHugh J says that rules of international law, which existed at the date the Australian Constitution was enacted, might in some cases throw some light on the meaning of a constitutional provision.[176] Further, that where the language of a statute permits, it should be interpreted and applied in conformity with long established rules of international law for the reason that the legislature is taken not to have intended to legislate in violation of international rules existing at the time the statute was enacted.[177] However, he says, Parliament may legislate in disregard of this implication.[178] McHugh's view was that it is not for courts to determine whether the course taken by Parliament is unjust, unwise or contrary to basic human rights.[179]

Hayne J (also in the majority) notes that article 9 ICCPR only requires detention to be in accordance with a procedure established by law and that the detention be able to be readily tested in a court.[180]

Gleeson CJ (dissenting) considered that the correct approach was to apply a fundamental principle of interpretation which was not to impute an intention to abrogate or curtail certain human rights or freedoms (of which he said liberty was the most basic) unless such an intention is clearly manifested by unambiguous language which indicates that the legislature has directed its mind to the rights or freedoms in question and has consciously decided upon abrogation or curtailment.[181] Gleeson CJ considered there was a gap or silence in the Migration Act concerning the possibility of indefinite detention.[182] Gummow J (dissenting) agreed stating that if a point has been reached where removal is not reasonably practicable then the Act no longer mandates detention.[183] Kirby J

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[175] *Al-Kateb v Godwin,* above n 170, paras 62 and 74.
[176] *Al-Kateb v Godwin,* above n 170, para 62.
[177] *Al-Kateb v Godwin,* above n 170, para 63.
[178] *Al-Kateb v Godwin,* above n 170, para 66.
[179] *Al-Kateb v Godwin,* above n 170, para 74.
[180] *Al-Kateb v Godwin,* above n 170, paras 238 and 297.
[181] *Al-Kateb v Godwin,* above n 170, paras 18 and 19.
[182] *Al-Kateb v Godwin,* above n 170, para 21.
[183] *Al-Kateb v Godwin,* above n 170, paras 121–125.

(dissenting) agreed that a point had been reached where detention was no longer "Parliament's command".[184]

Kirby J also stated that the Migration Act can be construed to not permit unlimited executive detention and that this is consistent with the principles of the international law of human rights and fundamental freedoms.[185] He said that courts have a duty, as far as possible, to interpret constitutional texts consistently with these.[186] He suggests that it is important to recognise that both the common law and international law have a presumption in favour of personal liberty.[187]

2 Analysis

The majority decision of the HCA found that the Migration Act was sufficiently clear to permit the detention of the appellant, that the legislation had met Constitutional requirements, and that this was the necessary end of the court's enquiry.

Similarly to the United States decision, if it is correct that the legislation was sufficiently clear to authorise even the indefinite detention of Mr Al-Kateb, it would have met the procedural requirement in article 9(1) ICCPR that limits on the right to liberty be established by law. Hayne J appears to take the view that this requirement had been met. He does not refer to the other requirements of the ICCPR in relation to the right to liberty. He does refer to the Convention Relating to the Status of Refugees[188] (Refugee Convention). As suggested in respect of the United States decision above, it is unsatisfactory for a court to pick and choose which international treaties it will consider. If it is considered permissible to consider these at all then all relevant treaties, in particular the ICCPR in relation to the right to liberty, should be considered.

The judges in the minority considered the words in the Migration Act relied upon by the executive were not sufficiently clear to authorise indefinite detention. These judges also considered that in these circumstances the Act should be interpreted on the basis of a

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[184] *Al-Kateb v Godwin,* above n 170, para 149.
[185] *Al-Kateb v Godwin,* above n 170, para 193.
[186] *Al-Kateb v Godwin,* above n 170, paras 175 and 180.
[187] *Al-Kateb v Godwin,* above n 170, para 150.
[188] Convention Relating to the Status of Refugees (1951) 189 UNTS 150.

presumption that Parliament would not have intended to legislate in non-compliance with its international obligations.[189] However, Australia does not have a statutory equivalent of section 3 UKHRA requiring this analysis by the courts. Where judges find a gap in legislation of course the common law protection of the right to liberty is a legal basis upon which to not mandate the legality of detention.

None of the judges in this case considered either by direct reference or in effect the substantive requirement of article 9(1) (prohibition against arbitrary detention) nor the derogation provision in article 4(1) ICCPR.

Australia has signed the Optional Protocol. It has been the subject of a number of cases before the UNHRC concerning the Migration Act.[190] In these decisions Australia has been criticised in respect of both the procedural and substantive requirements of article 9(1).

Four decisions of the UNHRC have specifically considered the issue of mandatory detention under Australia's Migration Act. In all four cases the detention of the applicants, in each case for over two years including in respect of children, was found to be arbitrary and contrary to article 9(1).[191] The UNHRC said that Australia had not demonstrated that less invasive means could not be used to achieve the same ends, for example, by the imposition of reporting obligations, sureties and other conditions.[192]

Of the states under discussion Australia has the least formal legal basis for courts to look to international law for interpretation purposes. Australia's international obligations have not been incorporated into domestic law and it does not protect the right to liberty by way of the Australian Constitution, a Bill of Rights or other legislation. Protection of the right at common law can be overridden by legislation.

The bases on which international obligations are considered to be relevant by Kirby J are in his view that: constitutional law cannot be isolated from international law,

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[189] *Al-Kateb v Godwin,* above n 170, paras 19 and 150.
[190] See above n 16 and n 42.
[191] *A v Australia,* above n 42, para 9.4; *C v Australia,* above n 16, para 8.2; *Baban et al v Australia*, above n 16, para 8.2; and *Bakhtiyari v Australia*, above n 16, para 9.3.
[192] *C v Australia,* above n 16, para 8.2; *Baban et al v Australia*, above n 16, para 7.2; and *Bakhtiyari v Australia*, above n 16, para 9.3.

the understanding of the former is constantly changing, and through the process of interpretation courts can adapt the law for changing times.[193] While this view has support elsewhere (such as in the NZSC), in the Australian context it is not as compelling given the lack of any statutory basis to do so. Though this does not prevent the monitoring role suggested by this paper.

It is not sufficient for the majority judges in this decision to ignore Australia's treaty obligations as well as the directly relevant jurisprudence from the UNHRC. Recognition should have been given to these if only by way of the monitoring role suggested by this paper, as being the least domestic courts can do to provide guidance to the legislature and the executive and to assist informed debate amongst the public of Australia, on a question of fundamental human rights.

D Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison

1 Facts and findings

The decision in *Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison*[194] included consideration of the court's inherent jurisdiction to grant bail or order release through the habeas corpus process. This case was most similar to the Australian case concerning Mr Al-Kateb in that Mr Zaoui arrived in New Zealand without a valid passport, claimed refugee status and was detained while his claim to that status was considered. However, as with the cases in the United Kingdom and the United States, in the New Zealand government's view Mr Zaoui was a security risk. Before an appeal against an adverse determination of refugee status could be heard the Director of Security issued a security risk certificate based upon classified security information under section 114D of the Immigration Act.[195] The Minister of Immigration then made a preliminary decision to rely upon the certificate. Mr Zaoui sought a review of the certificate and an interlocutory decision was issued. Mr Zaoui filed judicial review

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[193] *Al-Kateb v Godwin*, above n 170, paras 169, 170, 178 and 190.
[194] *Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison*, above n 3.
[195] The criteria for issuing of a security risk certificate relating to suspected terrorists or those who are otherwise a danger to security or public order are contained in s 114C(2).

proceedings in respect of that decision seeking clarification as to whether the review of the certificate should include consideration of relevant human rights concerns.

During the course of those proceedings Mr Zaoui was detained in prison pursuant to a warrant of commitment issued by a District Court judge under section 114O of the Immigration Act. That provision requires a judge to issue the warrant of commitment unless the judge is satisfied that the person before the court is not the person in respect of which the certificate was issued. The section therefore requires mandatory detention similarly to the Australian legislation discussed above. Mr Zaoui's detention continued for nearly two years as proceedings concerning both the review of the security risk certificate and the lawfulness of his detention progressed through the court hierarchy. During that process the Refugee Status Appeals Authority determined that Mr Zaoui was a refugee.[196]

The NZSC held that the part of the Immigration Act relevant to Mr Zaoui's detention was not sufficiently clear to have the result that the inherent jurisdiction of the High Court to grant bail[197] was excluded.[198] The court was further of the view that where statutory provisions appear less than comprehensive the courts must do their best to give them a workable meaning and that any powers of detention should be approached in light of the fundamental right, long recognised under the common law, of liberty for all persons subject only to such limits as are imposed by law.[199]

The NZSC said there was a presumption that legislation was to be interpreted consistently with New Zealand's obligations under international law and refers to the Refugee Convention.[200] The ICCPR is not referred to at all in the judgment.

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[196] *Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison,* above n 3, para 9.

[197] The power to grant bail to someone detained is an ancient common law jurisdiction exercised by superior courts in England in both civil and criminal cases and which jurisdiction became part of New Zealand law in 1840 pursuant to the English Laws Act 1858; the power has devolved in New Zealand on the High Court pursuant to s 16 Judicature Act 1908 preceded by the Supreme Court Ordinances of 1841 and 1844 and the Supreme Court Acts of 1860 and 1882: *Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison,* above n 3, para 34.

[198] *Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison,* above n 3, paras 36, 37, 44 and 69.

[199] *Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison,* above n 3, paras 32 and 52.

[200] *Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison,* above n 3, para 44.

Concerning national security, the court said that this may be one reason for continuing detention, but that it cannot provide a basis for blanket exclusion of entitlement to challenge detention.[201] Further, the court said that strong statutory language is required to defeat the entitlement to challenge detention.[202]

2 Analysis

The ICCPR is not mentioned at all in the New Zealand decision. However, section 22 of the NZBORA, which incorporates the right to liberty as defined and limited in article 9(1) ICCPR (including the substantive requirement that detention not be otherwise arbitrary), is referred to. Even on a formalist view of the courts' role under the NZBORA, similarly to the courts in the United Kingdom, New Zealand courts have a statutory mandate to review compliance with article 9(1) ICCPR.

The decision does in effect consider the procedural requirement of article 9(1) although it does not consider at all either the concept of arbitrariness or the derogation provision in article 4(1).

The derogation provision in article 4(1) ICCPR is not incorporated into New Zealand's domestic law. Nevertheless, this aspect is clearly relevant to courts in New Zealand given the statement by the NZSC that there is a presumption that legislation is to be interpreted consistently with New Zealand's international obligations. The NZSC has not limited this to those aspects of New Zealand's obligations which have been incorporated into domestic law by way of legislation.

New Zealand, like Australia, is a signatory to the Optional Protocol and thus decisions by our courts concerning rights recognised within the ICCPR are able to be further considered by the UNHRC. The resulting persuasive nature of UNHRC jurisprudence has been recognised in comments by President Cooke (as he then was) and Justice Tipping concerning the UNHRC being in effect part of New Zealand's judicial

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[201] *Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison,* above n 3, paras 44 and 51.
[202] *Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison,* above n 3, para 44.

structure (mentioned above).[203] However, none of this jurisprudence was discussed by the NZSC.

By the time the NZSC heard Mr Zaoui's application for bail and habeas corpus he had been found to be a refugee by the Refugee Status Appeals Authority. The NZSC may have considered that in these circumstances the Refugee Convention was directly relevant and there was therefore no need to consider the ICCPR. However, as has been discussed above the UNHRC have made clear that both article 9(1) and article 4(1) ICCPR apply to all forms of detention including where this is for the purpose of controlling immigration or in respect of security concerns.[204]

Mr Zaoui was released on bail because the Immigration Act was not in the NZSC's view sufficiently clear to displace its inherent jurisdiction to grant this. Although the court recognised that its inherent jurisdiction to grant bail can be displaced by clear legislation.[205] For Mr Zaoui and his supporters the correct result was reached by the NZSC. However, it is suggested that the court missed an opportunity to provide guidance concerning the specific limits on detention contained within the ICCPR. Such guidance would have been valuable for future state practice including the drafting and enactment of legislation (which it is suggested is one likely result of this decision), as well as to both the High Court and Court of Appeal who may need to consider similar issues in the future. But also importantly, this would also have been valuable for informing wider public debate at a time where the right to liberty is under increasing challenge in New Zealand and around the world.

Habeas corpus was not discussed in any detail by the NZSC presumably because this remedy was unnecessary given the finding that bail was available.

VI CONCLUSION

The international obligations under the ICCPR of each of the four states need to be given greater recognition by domestic courts even where these have not been incorporated

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[203] See above n 12 and n 13 respectively.
[204] See above n 28.
[205] *Zaoui v Attorney-General and the Superintendent, Auckland Central Remand Prison,* above n 3, paras 36 and 41.

into domestic law, either in part or in full, and even where no specific remedy is available in terms of release of detainees either because the legislation authorising detention is clear or where other alternative remedies have not been provided to the courts. Domestic courts have played a role for hundreds of years as the guardians of liberty and for the reasons discussed above cannot simply ignore the treaty obligations entered into by their respective states. Certainly when superior courts are called on to consider legislation which does not comply with the requirements of the ICCPR a thorough analysis and assessment of these is warranted despite constitutional issues which arise concerning the role of the courts vis a vis Parliament.

Legislation claimed to authorise executive detention needs to be clear in order that such detention is the will of Parliament. It is debatable, for example, whether the AUMF was sufficiently clear to authorise indefinite detention in comparison with the ATCSA and Australia's Migration Act. Though even in respect of the latter some judges considered there to be a gap in the legislation. The court's interpretation role is important to ensure that executive action in respect of detention, in the circumstances discussed in this paper, is specifically mandated by the legislature. This is recognised by both Lord Bingham and Scalia J.

Courts should not endorse executive action which infringes the right to liberty pursuant to generally worded legislation. It is permissible for domestic courts to challenge the executive in this respect, even on a formalist view of the appropriate role for courts, as the issue of legality of executive action has been the proper concern of courts for hundreds of years including in this important area.

Where words in legislation are sufficiently clear to authorise detention in circumstances such as in the cases which have been discussed domestic courts must play a role of at least recognising the existence of both the internationally agreed substantive limit on detention (that it not be arbitrary) as well as the permissible derogation (that a high threshold applies to when the right to liberty can be limited and to what extent it can be limited) contained in the ICCPR. These matters are at least worthy of comment by judges consistent with the historic role played by judges in this area. Lord Bingham's judgment provides a model for courts to follow in this respect. Although in the United Kingdom as well as in New Zealand, courts have been given a statutory mandate to do

this, article IV clause 2 of the US Constitution also provides some legal basis for this role in the United States. Even in Australia a monitoring role is warranted even though the substantive result of particular cases will be unchanged given the lack of specific remedies available to the Australian courts where legislation is clear in authorising detention.

This monitoring role is important, even where it does not make a difference to the substantive result of particular cases, as it at least provides guidance for state practice as well as assisting informed debate within democratic societies about any limits placed on the right to liberty.

The concerns expressed during the drafting of the ICCPR and more recently by various human rights bodies about the increasing use of detention to manage security concerns cannot be ignored by domestic courts. Though mechanisms exist internationally for challenging detention (including pursuant to clear legislation) which does not conform with the requirements in the ICCPR, it is in domestic jurisdictions where detention occurs and domestic courts must play a role in ensuring that infringements on the right to liberty are democratically mandated through clear legislation and that Parliaments who choose to legislate in contravention of their international obligations do so openly and are thus are democratically accountable for such decisions.

The current war on terrorism does not require the substantial infringements on the right to liberty which are seen in the cases which have been discussed. Following the second world war the then members of the UNGA unanimously agreed to narrow limits on this fundamental right allowing only for derogation in a time of public emergency. Some of the judges in the cases under discussion accepted that we are currently facing such an emergency. This is clearly not the case. None of the states under discussion has declared a state of emergency as required by the UNHRC's General Comment 29. The threshold for derogating from the right to liberty has not been met. As serious as terrorism is, it is not threatening the existence of the four states which have been discussed, or even causing serious inconvenience to the day to day lives of the people within these states. We are not at war. We are facing increasing incidents of serious criminal activity which states rightly are concerned about and need to counter.

The more serious threat facing the four states under discussion, compared to the current levels of terrorist activity in the world, is the undermining of the rule of law and democratic and human rights principles which have become central to both the legal and ethical underpinnings of our societies. Domestic courts need to play a role in challenging the current perceived need to infringe on fundamental human rights including the right to liberty in the war on terrorism. As part of this role domestic courts need to give increased recognition to the internationally agreed limits which are permissible in respect of the right to liberty even where they do not have the formal legal means to release detainees or to declare legislation permitting indefinite detention, on mere suspicion, without trial as incompatible or inconsistent with the right to liberty as this is defined and circumscribed by the ICCPR.

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