

## Table of Contents

	<b>Paragraph(s)</b>
<b>Introduction</b>	<b>1-4</b>
<b>1. Government, Law and Justice</b>	<b>5-16</b>
Government, law and justice in the biblical tradition	5-9
The emergence of liberal democracy	10-12
The rule of law	13
Elected legislatures	14
Individual rights	15-16
<b>2. Liberty and Security – General Issues</b>	<b>17-33</b>
Detention without charge in British history	17-20
The right to liberty	21-23
National security and emergency powers	24-29
Reconciling liberty and security – who decides?	30-33
<b>3. Pre-Charge Detention – What Limits?</b>	<b>34-53</b>
Background	34
The law on detention before charging	35-37
The setting of the present 28-day limit	38-39
Beyond 28 days?	40-46
The Government’s current proposals	47-50
Conclusion: Not proven	51-53
<b>4. Guantánamo Bay – A “Legal Black Hole”</b>	<b>54-65</b>
Background	54-55
Neither criminals nor prisoners of war	56-58
Conditions and treatment	59-60
Military commissions	61-62
The attitude of the British Government	63-64
Conclusion: A massive and perilous mistake?	65
<b>5. Control Orders – Taking Liberties</b>	<b>66-82</b>
Background	66
The detention of foreign national suspects	67-69
The Government’s response to the Law Lords	70-71
The meaning of control orders	72-73
The exercise of judicial supervision	74
Imposing “non-derogating” orders	75
Imposing “derogating” orders	76-77
Legal challenges and judgments	78-80
Conclusion: Holding the line	81-82
<b>6. Conclusion: The politics and theology of imperfection</b>	<b>83-84</b>

## DETENTION WITHOUT CHARGE

### Introduction

1. The rise of international terrorism inspired by extreme Islamist ideology and directed against the United States and its allies is one of the major developments of the last twenty years, especially since the watershed events of 9/11. The background to this phenomenon, and possible responses to it, were set out in 2005 in the report from a House of Bishops working group *Countering Terrorism: Power, Violence and Democracy Post 9/11* (GS Misc 805) and the Mission and Public Affairs Council report *Facing the Challenge of Terrorism* (GS 1595). Both reports were discussed during the Synod debate of 15 November 2005 which reflected on the consequences of the London bombings of 7 July 2005.
2. Both reports drew attention to novel features of the current phase of terrorism, in particular the extent of its international networks and its reliance on attacks without warning by suicide bombers. These create new difficulties for the intelligence and security services in seeking to anticipate and prevent terrorist attacks, and accentuate the heavy cost in terms of lives, injury, physical damage and public outrage should major incidents occur. The bombing of trains by Al-Qa'eda in Madrid in March 2004 produced even more carnage and trauma than the horrific events of July 2005 in London (and provoked a robust public demonstration of solidarity and defiance from the Spanish peoples).
3. Both reports also warned against the temptation for democratic governments to meet the legitimate demand for security against terrorist attacks by curtailing fundamental rights and freedoms. Bishop Richard Harries wrote in the preface to *Countering Terrorism*, "All governments have a proper responsibility to take the necessary steps to safeguard their citizens...but citizens need to be vigilant that these steps do not infringe hard won civil liberties, particularly the right to due process of law. The churches have a particular message here based on Biblical insights about fear and how playing on the fears of enemies makes for unwise policies." *Facing the Challenge of Terrorism* argued that "to restrict the rights of citizens in the name of public safety may compromise the openness of society, defence of which is a prime reason for combating terrorism" (para. 24) and observed that "when governments act against a background of fear, there is a danger of ... 'atrocious politics', in which critical questions become muted and the plea of expediency is accepted too readily." (para. 28)
4. This report deals with a limited but vitally important aspect of the larger question of reconciling liberty and security: whether, and if so to what extent, the principle that no-one should be deprived of liberty without due process of law should be modified in order to protect society from the threat of terrorist attack. It examines two contemporary examples of detention without charge – the process in the United Kingdom by which suspected terrorists may be held without being charged while investigations proceed, and the detention camp for suspected terrorists established by the United States at Guantánamo Bay in Cuba – and a third practice which borders on it – the restriction on the liberty of suspected terrorists through the imposition of control orders under legislation passed by the United Kingdom Parliament in 2005. It seeks to evaluate these practices in the light of Christian beliefs about government, law, justice, liberty and security.

# 1: Government, Law and Justice

## Government, law and justice in biblical tradition

5. Both Jewish and Christian theology have a long tradition of understanding government as a divinely instituted activity. Central to the functions of government are the maintenance of order and the administration of justice. In both of these tasks human beings are in some sense reflecting the activity of God, who orders the world for his good purposes through creation and providence, and judges human action according to his righteous character. The biblical narrative bears witness to the corrosive and destructive effects of anarchy and disorder – those periods when “all the people did what was right in their own eyes” because “there was no king in Israel” (Judges 17:6, 21:25) – and the New Testament expresses approval of the peace brought by the Roman empire to the Mediterranean world, enjoining prayer for kings and those in authority “so that we may lead a quiet and peaceable life in all godliness and dignity” (1 Timothy 2:1-2).

6. As well as being a bulwark against disorder, kings in the Old Testament are seen as agents and guardians of the divine order which is established by God’s covenant with his people and articulated in his gift of the law. Central to this order is the activity of judgment, of *doing* justice, which is essentially to distinguish between the righteous and the unrighteous, in order to vindicate the former and punish the latter. The effect of administering justice is that the vulnerable and the needy are defended from oppression and violence (Psalm 72:14). In fulfilling this role, the king acts as God’s servant and makes manifest God’s dealings with his people. The prophet Jeremiah told King Shallum (or to give him his regnal name, Jehoahaz), son of King Josiah, “Did not your father eat and drink and do justice and righteousness? Then it was well with him. He judged the cause of the poor and needy; then it was well with him. Is not this to know me? says the Lord.” (Jer. 22:15-16).

7. Jews and Christians have not always lived in societies where their God and the divine law were acknowledged as the foundation of order and justice. Nevertheless, they have believed the rulers of those societies to possess legitimacy and indeed to be acting as servants of God in administering justice. The classic text in the New Testament is Romans 13:1-7, where St Paul sketches an ethic of obligation to obey “the powers that be” (primarily the Roman empire) and outlines their function of approving good and punishing evil in terms which echo the Old Testament pattern of distinguishing between the righteous and the unrighteous. Paul does however assume that the authorities generally execute that function faithfully, which invites reflection on what may happen if that condition is not fulfilled.

8. The other side of the biblical portrayal of kings and rulers is that they are liable to act unjustly and oppressively, in which case they stand under the judgment of God. The words of Jeremiah to Jehoahaz commending his father Josiah are followed immediately by searing words of condemnation, “But your eyes and heart are only on your dishonest gain, for shedding innocent blood, and for practising oppression and violence.” (Jer. 22:17) The most striking example of the ambivalence of monarchy and government is Solomon, of whom two flatly contrary accounts are given almost side by side: on the one hand a model of humility, wisdom, discernment and justice, and on the other a byword for pride, tyranny, financial exploitation and unfaithfulness to God. Another appalling abuse of power is the wicked conspiracy by King Ahab to pervert the course of justice in order to dispose of Naboth and gain possession of his vineyard (1 Kings 21:1-24). In the New Testament the generally positive estimate of Caesar’s rule in the Gospels and epistles is starkly contradicted by the Book of Revelation’s coded denunciation of the Roman empire as a diabolical instrument of idolatry, violence and persecution.

9. The climactic historical event of the New Testament, the crucifixion of Jesus, was the result of a miscarriage of justice involving doubtful procedures and the presentation of perjured evidence. Jesus Christ in his ministry and “suffering under Pontius Pilate” therefore embodies both the fulfilment of the biblical hope for the exercise of authority in the service of justice and identification with those subject to the processes of criminal justice (whether guilty or innocent). Jesus reminds us that vindication of the innocent is as important as condemnation of the guilty, and that all human judgment is partial, fallible and provisional in contrast to the judgment of God that takes place through him “who will bring to light the things now hidden in darkness and will disclose the purposes of the heart” (1 Corinthians 4:5).

### **The emergence of liberal democracy**

10. These biblical paradigms and stories do not transfer directly to modern societies, but they bear witness to the good and evil propensities of government, to the necessity and yet the corruptibility of coercive power as a central element in the ordering of society. Over the centuries many methods have emerged to criticise, limit or check the abuse of governmental power. Unjust or oppressive rulers were sometimes removed by war, rebellion, assassination or dynastic rivalry – and still are. In modern times, power has become differentiated and a number of non-violent correctives have become embodied in the institutions, laws and practices of developed societies which can be summarised under the heading of “liberal democracy”.

11. The mutual influence of Christianity and liberal democracy is a complex story and is still unfolding. While it is true that churches have often quarrelled with liberal regimes and systems of thought, especially when believing them to be motivated by secularist aims, the history of liberal political thought owes much to Christian teaching first about the dignity and equality of human beings in the sight of God and second about the corruption of human nature. Together these beliefs imply the need both to affirm and limit the powers of government.

12. Another connection often overlooked is the ancestry of modern concepts of human rights in the earlier belief in “natural rights” belonging to all human beings in virtue of their creation by God. The Christian contribution to human rights thinking, both in the 17th and 18th centuries and in the 1940s when the United Nations Declaration of Human Rights was being formulated, stands in danger of being erased by secularist accounts of developments, but has been rediscovered in recent years.

### **The rule of law**

13. The history of liberal democracy is complex, but for the purpose of the present discussion three features may be singled out. The first aspect is the growth of the *rule of law* interpreted and enforced by an independent judiciary. In traditional monarchies, where the Sovereign was the source of law and authority, the judiciary, like the legislature, was seen as the instrument of the Crown. Magna Carta (see para. 18 below) marks a vital moment in the holding of the English monarchy to account. Nevertheless, in early modern Britain judges were known as “lions under the Throne” and while they may have sought to administer justice impartially and without bribery, their independence relative to government was constrained. One of the issues at stake in the 17th century English Civil War was whether the king was accountable not only to Parliament but also to the law (common law as well as statute). Was *rex lex* or vice versa? Since that period, the judiciary has gained thoroughgoing independence of both the executive and the legislature, to the extent that it is now responsible through a variety of routes for adjudicating the lawfulness of the acts of both.

## **Elected legislatures**

14. The second aspect is the gradual development of *elected legislatures* as a check on executive power. In Europe the 17th and 18th centuries saw a transition from monarchies with absolutist tendencies to more popularly-based forms of government. Through bitter struggles it became accepted that legitimate government required the consent of the governed, expressed through their chosen representatives. Assemblies like the English parliament moved from being consultative and deliberative bodies, charged with assisting (and financing) the monarch, to acquiring independent power not only to legislate but to make and un-make governments. The oversight of government and the making of law became the expression of the will of the electorate rather than simply the will of the Sovereign, though in the United Kingdom it was as late as 1928 that the right to vote extended to the whole adult population.

## **Individual rights**

15. The third aspect is the acceptance of *the protection and enforcement of individual rights* as a major function of political and legal institutions. Within this many-sided development we are particularly concerned with recognition of the rights of accused persons. The obligation to judge rightly and impartially has been recognised in legal systems from time immemorial, but the growth of procedural safeguards for defendants is a relatively recent development. In State trials under the Tudors and Stuarts, the odds were heavily weighted against the accused, who was often subjected to pre-trial torture. Over three centuries, through a complex mixture of legal, political and constitutional developments, criminal law has developed sophisticated standards of “due process” and formal provisions for the protection of accused persons, not only at trial but from the point of arrest and detention.

16. In the late twentieth century, the impact of common and statute law was supplemented by the provisions of the European Convention on Human Rights, which were incorporated into domestic law and brought within the jurisdiction of British courts by the Human Rights Act 1998. This marked a decisive shift from the English common law tradition, with its assumption that whatever is not prohibited is permitted, towards a codified and systematic approach to rights.

## **2: Liberty and Security – General Issues**

### **Detention without charge in British history**

17. Imprisonment as a punishment in itself, imposed by a court and specified in duration, is a relatively modern practice. For most of history, detention has been used either as a prelude to trial and punishment or as an alternative to exile, a means of confining people, like Mary Queen of Scots in the reign of Elizabeth I, who would have been dangerous or inconvenient to those in authority if set at liberty. The detention of people with serious mental disorders is the other major example of deprivation of liberty, though this also has the benign purpose of providing a “place of safety”. It is these uses that the Scriptures have in mind when they lament the wretched and hopeless condition of prisoners and praise God as the one who promises release from captivity. One effect of the growth of liberal democracy has been to eliminate, or at least to render exceptional, the practice of arbitrary detention.

18. There is a discernible legal tradition in Britain protecting the freedom and rights of accused persons, but it has evolved spasmodically. The “presumption of innocence” requires that there be justification for arresting, detaining and charging a person. A major landmark is Magna Carta (1215), which resulted from the attempt by a group of barons to limit the powers of King John. In Articles 38 to 40, three momentous statements are made about justice:

In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

To no one will we sell, to no one deny or delay right or justice.

(English translation, British Library)

These stipulations – which may to some extent restate the existing common law – are the assertion of justice in process as well as justice in outcome. As far as detention is concerned, they guarantee the provision of relevant and independent evidence to support a charge, the application of due process, and the entitlement to speedy (but not hasty) justice.

19. Another landmark is the development of *habeas corpus*, which bears directly on the practice of detention. “Habeas corpus (ad subjiciendum)”, meaning “you may have the body (subject to examination)”, are the opening words of a mediaeval writ requiring a person detained by the authorities to be brought before a court in order that the legality of the detention may be scrutinised. Should the court decide that the charge is valid, the person detained must submit to trial; should it rule otherwise, the person must be set free. The substance of the writ has affinities with Article 39 of Magna Carta, and it appears to have been used in the 12th century. In 1679, at a time of considerable political turmoil and instability, Parliament enshrined the writ in statute by passing the Habeas Corpus Act. In 1772 it was used in *Somerset’s* case, in which a black slave from Jamaica applied for *habeas corpus* and Lord Mansfield ruled that slavery had no legal standing in England. It is now rarely used, since detention by the police is governed by the Police and Criminal Evidence Act 1984, but Professor Michael Zander has said that “it stands for the principle that unlawful detention can be challenged by immediate access to a judge – even by telephone in the middle of the night”.

20. Also relevant to the issue of terrorism is the fact that *habeas corpus* has periodically been suspended in times of national emergency. William Pitt the Younger did so in 1793 after France declared war on Britain, and took the opportunity to arrest parliamentary reformers; Lord Liverpool’s government did the same in 1817 at a time of social unrest. At moments of grave crisis governments, here as in other countries, have introduced measures of detention without trial. The Defence of the Realm Act 1914 empowered the Home Secretary to intern British residents (in practice mainly those of German or Irish descent) and the powers were used again during the Second World War against Germans, including Jewish refugees. More recently, in 1971 the then devolved government of Northern Ireland interned hundreds of Republican sympathisers in an attempt to cut off support for the IRA – a measure generally judged to be counter-productive and which was abandoned four years later.

### **The right to liberty**

21. The right upheld by *habeas corpus* is set out in Article 5 of the European Convention on Human Rights, which begins, “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:...” The “following cases” include Article 5.1(c): “the lawful arrest and detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having

done so.” This Article follows directly on those dealing with the right to life, the prohibition of torture and the prohibition of slavery, and therefore stands high in importance.

22. It will be seen that Article 5.1(c) permits the use of preventive detention, but it must be read in conjunction with 5.3 which states, “Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article should be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial.” The equivalent of *habeas corpus* is contained in Article 5.4: “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.” Much in the application of these provisions rests on the interpretation of terms such as “reasonable suspicion”, “reasonably considered necessary”, “promptly” and “within a reasonable time”. The overall intention is to ensure that detention after arrest lasts only as long as is necessary for the police to complete their questioning and other enquiries before deciding whether to bring a charge. But what determines “necessity” in this context?

23. The European Convention makes provision for some rights to be limited in accordance with social needs, but Article 5 rights are not among these. The right to liberty and security of person is constrained only by the terms of the Article itself. There are three ways of avoiding condemnation of a particular measure or action as contrary to Article 5. The first is to demonstrate that it does not constitute deprivation of liberty and therefore the Article is not engaged. The second is to demonstrate that it meets the requirements of the Article, given a proper interpretation of the terms mentioned in the previous paragraph. The second. The third is to invoke Article 15 of the Convention, which provides that “in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

### **National security and emergency powers**

24. The decision to derogate from Article 5 obligations is a serious one, and requires a convincing argument that a particular situation threatens the life of a nation. In the past Christian ethical reasoning has acknowledged that emergency situations, particularly that of war, may call for measures which would not be acceptable in normal times. In those circumstances, internment is quite different from detention before charge, in that its purpose is to keep potentially dangerous people in custody, irrespective of what they may or may not have done and without recourse to normal judicial process.

25. The corollary of emergency measures is the need to define the nature of the emergency, and therefore the conditions under which it could be seen to have passed, as rigorously as possible. As was said in *Facing the Challenge of Terrorism*, “to grant substantial curtailment of rights and liberties in such circumstances would be dangerous, risking a semi-permanent state of repression” (para. 28).

26. The analogy between war and terrorism inevitably involves dissimilarity as well as similarity. Like war, terrorism can not only cause widespread loss of life and damage to the physical and social fabric, but can induce fear in civilian populations (hence the word). Unlike war, which tends to be continuous but of limited duration, the impact of terrorism, though intense, is episodic. Those who feared to travel on the London Underground immediately after the bombings of July 2005 may well feel remote from the threat after the passage of more than three years, yet there is also awareness of the continuing need for

vigilance. To resist the “politics of fear” is not to refuse to assess the threat of terrorism in an informed and cool-headed manner: entering into denial of a threat is no better than capitulating to panic. It is instead to insist on being guided by objective and rational arguments, and to look critically at demands for suspension of liberties or granting of emergency powers.

27. Christian theology and spirituality addresses this situation in awareness of the potential of fear and anxiety to undermine confidence and promote unwise decisions. The prophet Isaiah warned the kings and rulers of his day not to trust in unreliable foreign alliances out of fear of the threat from elsewhere, and instead to seek a policy which grounded national security in the faithfulness, steadfast love and justice of God. His message to King Ahaz in the face of the Syro-Ephraimite coalition was, “Take heed, be quiet, do not fear, and do not let your heart be faint because of those two smouldering stumps of fire-brands...If you do not stand firm in faith, you shall not stand at all” (Isaiah 7:4, 9). The biblical injunction “Fear not!” finds common cause with the recognition that to be led by a spirit of fear to dismantle valuable parts of a liberal democratic order is to grant a victory to terrorism. True national security means honestly confronting the causes of insecurity but looking beyond them to uphold the values and the way of life for which a free and democratic nation stands.

28. It appears therefore that no response to the threat of terrorism can simply give priority to liberty over security, or vice versa. It is an essential part of Christian belief that all people are owed a measure of respect, dignity and freedom by their fellow human beings. As we have seen, the right to liberty is not absolute and changing circumstances can in principle warrant longer periods of detention without charge than was previously thought justified. However, the purpose of such an extension is not to intern potentially dangerous people but to allow the police and other agencies to complete the preliminary stage of a criminal justice process.

29. It is important at this point not to let the argument be shaped by muddled considerations of expediency at the expense of principle. It is important for a society to reflect on what it regards as indispensable to its common life. If the right to liberty is a right of primary importance, it must not be attenuated to a point where it ceases to be meaningful. It is worth asking ourselves where we would locate that point in the argument about detention of terrorist suspects.

### **Reconciling liberty and security – who decides?**

30. In para. 13, the rule of law was identified as a distinctive feature of liberal democracies, and in para. 15 the protection and enforcement of individual rights was said to be a major function of political and legal institutions. This raises the question: who is to decide what constitutes a necessary and proportionate response to the threat of terrorism?

“The traditional doctrine of parliamentary sovereignty holds that such decisions rest with a democratically-elected government legislating through, and answerable to, Parliament. In accordance with this, the courts have tended to be cautious when asked to adjudicate matters of national security. The view that fundamental human rights should be constitutionally entrenched and enforceable by judicial review runs counter to this tradition. When the European Convention on Human Rights was incorporated into domestic law by the 1998 Human Rights Act, parliamentary sovereignty was protected by giving the courts power to declare primary legislation incompatible with the Convention but not to strike it down. The tension between the respective roles of the

executive and the legislature on one side, and the judiciary on the other, remains central to present debates.”

*(Facing the Challenge of Terrorism, para. 31)*

31. These issues were sharply focused in a famous judgment of the House of Lords dealing with detention under emergency powers during the Second World War, *Liversidge v. Anderson*, [1942], A.C. 206. Robert Liversidge was detained in Brixton Prison under Regulation 18B of the Defence (General) Regulations 1939 from May 1940 to January 1942 because the Home Secretary, Sir John Anderson, decided that he was “a person of hostile associations”. No explanation was given at the time of what this meant or what evidence supported it. The Law Lords decided by a majority of four to one that the courts could not enquire whether in fact the Home Secretary had reasonable grounds for his belief. In a much-quoted dissenting judgment, Lord Atkin held that some objective evidence was required to support the Home Secretary’s belief. Contradicting an ancient maxim, he declared that “amid the clash of arms the laws are *not* silent” and upbraided his fellow judges for being “more executive minded than the executive”.

32. Subsequent legal and political opinion has tended to side with Lord Atkin, but there is a case for judicial self-restraint in scrutinising executive decisions relating to national security or the prevention of terrorism. First, the executive possesses information on these matters which it may not be possible or appropriate to disclose to the courts; second, the executive is responsible and democratically accountable for decisions in this area, while the judiciary is not; third, and perhaps most important, issues surrounding the prevention of terrorism which involve assessment and balancing of risk, may not be strictly determinable by judicial reasoning.

“There is a danger of contaminating the criminal justice system itself if legislators stretch it beyond what it can bear. The attempt to give judicial respectability to what are executive actions can be misplaced. There are circumstances in which it is better for the separation of powers and the integrity of the justice system to allow executive detention to stand or fall on its own merits for a limited period, testing the argument that the nation faces a wholly abnormal threat.”

*(Countering Terrorism, pp. 31-32)*

33. With all these considerations in mind, we will review the three contemporary examples of detention without charge and seek to draw conclusions about the bearing of Christian faith on current policy decisions.

### **3: Pre-Charge Detention – What Limits?**

34. The immediate background to this debate is the Government’s proposal, as part of a new Counter-Terrorism Bill, to increase – for the fourth time in eight years – the maximum period for which the police are allowed to hold in custody a person suspected of terrorist activity before bringing a charge against them. The proposal has been advanced as part of a consultative exercise intended to seek cross-party consensus on new legislation, but it has received a poor reception in most quarters – including lack of support from the Director of Public Prosecutions, the previous Attorney General, and (according to press reports) the current Attorney General and Solicitor General.

## **The law on detention before charging**

35. There is a general power under the Police and Criminal Evidence Act 1984 for persons suspected of *any* criminal offence to be held by the police for up to 36 hours before charges are brought. In such cases a magistrate may authorise an extension up to a total of 96 hours. At the end of the 36 (or 96) hours the police have three options:

- if they conclude that there is sufficient evidence, they may charge the suspect and bring them before a court for it to decide whether to remand on bail or in custody ;
- if they conclude that there is insufficient evidence to bring a charge but believe they may need to question the person further, they may release the suspect on police bail;
- in all other cases, they must release the person without restriction (assuming that they are not liable to be detained on any other ground, such as irregular immigration status).

36. Since the 1970s additional powers have been available for the detention of terrorist suspects. In the aftermath of the Birmingham pub bombings committed by the IRA in 1974, the Prevention of Terrorism (Temporary Provisions) Act was passed and thereafter was renewed annually by Parliament. This permitted detention of persons suspected of involvement in acts of terrorism for up to 48 hours (72 hours in Northern Ireland), and for a further period up to a total of 5 days on the authorisation of the Secretary of State.

37. Since 2000, the maximum period has been increased three times and responsibility for authorisation has shifted from Government ministers to magistrates and judges. The Terrorism Act 2000 increased the maximum to 7 days and required application to a judicial authority for a “warrant of further detention” beyond the initial 48 hours. The Criminal Justice Act 2003 increased the maximum from 7 to 14 days.

## **The setting of the present 28-day limit**

38. The London bombings of July 2005 led the then Prime Minister to declare that “the rules of the game have changed”, and to bring forward a new Terrorism Bill which included a provision, on the advice of the police, to increase the maximum time for detention from 14 to 90 days. Beyond 48 hours this drastic extension was to be implemented in stages of 7 days (or fewer, if the police so requested). Up to 14 days, application for extension was to be made to a magistrate; beyond 14 days, to a senior (i.e. High Court) judge. The proposal evoked a storm of protest, including serious criticism in the report *Facing the Challenge of Terrorism* and a call from Synod to political parties “to heed the clear warnings from history about the progressive erosion of fundamental rights in relation to habeas corpus, free speech and religious liberty”. On 9 November 2005, as a result of a sizeable rebellion against the 90-day proposal by Labour backbenchers, the House of Commons voted in favour of an amendment setting the limit at 28 days – itself a doubling of the existing limit, which had been in force for only two years. The new limit came into effect on 25 July 2006.

39. The arguments for an increase beyond 14 days revolved around the increasing threat from international terrorism and the scale and complexity of investigations into terrorist activity, which require the police to deal with vast quantities of data, much of it encrypted, the use of false identities and the existence of extensive international networks. What was not made clear, either by the police or the Government, was why these factors, which clearly deserve serious consideration, necessitated such a huge increase in the time limit. Many people felt that the figure advocated by the police was arbitrary. In its report of July 2006 on *Terrorism Detention Powers*, the Commons Home Affairs Committee concluded that the Government had been at fault in not challenging critically the advice it received from the

police, and that there was a “lack of care” in the way the case was promoted (Fourth Report of 2005/6, para. 31).

### **Beyond 28 days?**

40. The Government has rightly agreed a large increase in the resources devoted to countering terrorism, much of which turns on the effectiveness of intelligence work. By the time of arrest, a suspect may have been the focus of investigation for a long time. Evidence, as well as intelligence, may have been gathered. For an arrest to take place there must be reasonable suspicion of an offence. The key question is: how long should the police be allowed to have for questioning and further enquiries once a person is in custody, and their premises and possessions have been searched, before making a decision to charge or not to charge?

41. Since 2005 the argument of the Government, the police and the independent reviewer of anti-terrorism legislation, Lord Carlile of Berriew QC, has been that a longer period between arrest and charge is required, for two major reasons. First, arrest of terrorist suspects frequently takes place at an earlier stage in the development of terrorist plots than formerly, in order to protect the public. This has been accentuated by the existence of the new offence of “committing acts preparatory to terrorism” introduced in the Terrorism Act 2006. Second, the volume of evidence and information to be processed has increased considerably in recent years, putting investigation teams under greater pressure to find evidence capable of justifying a charge within the 28-day limit.

42. Much argument has centred on the inferences to be drawn from the fact that the operation since July 2006 of the 28-day limit has not prevented anyone from being charged. During this period 204 people have been arrested under the Terrorism Act, of whom 11 were detained for between 14 and 28 days and of those 11, 8 were subsequently charged. In the alleged airline bomb plot of August 2006, 24 people were arrested, of whom 17 were charged. 9 people were detained for between 14 and 28 days, of whom 3 were released without charge (1 on the 24th day and 2 on the 28th) and 6 charged (2 on the 27th day). This seems to show that the 28-day limit was necessary in order to charge some, but that it led to some being held longer than they might otherwise have been. On the basis of this experience, the Director of Public Prosecutions told the Commons Home Affairs Committee in November 2007 that the Crown Prosecution Service was satisfied with the 28-day limit and was not asking for an increase.

43. What makes for difficulty in interpreting the figures is the very existence of the deadline: in the nature of things, the police will tend to use time for investigation if it is available, and many decisions to charge or release will be made close to the deadline. As JUSTICE argued in its submission to the Home Affairs Committee in September 2007, “since there is no natural upper limit to investigations in terrorism cases, arguments for extending pre-charge detention could...run for as long as the police continue to show diligence in pursuing the investigation” (*Counter Terrorism Proposals*, para. 10). Evidence given to the HAC in 2007 by Muslim witnesses claimed that they found the police slow to sift evidence and reluctant to release suspects. This led the Committee to urge the police make greater efforts to show that they were using the detention period effectively. (Home Affairs Committee, *The Government’s Counter-Terrorism Proposals*, First Report of 2007/8, paras. 47-48)

44. A related point arises from the fact that pre-charge questioning is designed to elicit evidence and admissions that would be useable in court in the event of a prosecution. The longer the period of pre-charge custody, the greater the risk from the standpoint of the

prosecuting authorities that a court might eventually conclude that the evidence or admissions offered were not wholly reliable because they were obtained oppressively.

45. The Government and its supporters argue in favour acting on a precautionary basis, since waiting for the maximum period to be shown to be inadequate would allow dangerous people to be released unnecessarily, possibly with tragic consequences. There is nothing inherently implausible in Lord Carlile's estimate that before long 28 days will not be sufficient to bring charges in a small number of cases, but the prospect of a steady upward drift in periods of detention is worrying – not least for its potential to cause deep resentment at injustice on the part of suspects and the communities to which they belong.

46. The principles of the presumption of innocence and the right to liberty suggest that the matter should also be considered from the point of view of the innocent suspect whose life would be overshadowed by a long period of detention. While the law sometimes fails to convict the guilty, it is also true that some whom the police suspect of terrorist activity turn out to be innocent. In relation to that person, what period of disruption, isolation and uncertainty would be justifiable in order to allow opportunity for evidence to be gathered to warrant a charge? Not to put the onus of justification on those who would extend that period would imply an indifference to the dignity of the individual and to the oppressive effects of detention without charge.

### **The Government's current proposals**

47. In July 2007 the Government issued several consultative documents on proposals for a new Counter Terrorism Bill, including a paper on pre-charge detention which advanced four options. These were first, legislation to extend the limit (to an unspecified period) with additional safeguards; second, the further requirement that such legislation would come into operation only after an affirmative resolution by both Houses of Parliament; third, developing a suggestion from the organisation Liberty, the use of powers in the Civil Contingencies Act 2004 to hold terrorist suspects for a further 30 days (58 in all) on the declaration of a state of emergency which would require parliamentary approval within seven days; and fourth, the introduction of "judge-managed investigations", whereby after 48 hours' detention a circuit judge would oversee the pursuit of a case, having regard to both the needs of the investigation and the rights of the suspect(s).

48. In October 2007 the Mission and Public Affairs Council submitted a response to the consultation which argued that a convincing case for the increase in the maximum period had not yet been made out. This was also the conclusion of reports published by the cross-party Commons Home Affairs Committee in July 2006 and December 2007, and by the Joint Parliamentary Committee on Human Rights in July 2007.

49. On 6 December 2007, the Home Secretary announced the Government's decision to ask Parliament to legislate for a maximum pre-charge detention period of 42 days. The proposals are more complex than was expected: they are described by the Home Office as "operationally triggered, exceptional, and time limited...with additional safeguards." The Government was clearly impressed by public anxiety about extension – and the strength of opposition in Parliament, not least among its own backbenchers – and has sought to avoid introducing permanent powers. It has therefore proposed that the decision to bring a higher limit into force would be made by the Home Secretary after receiving a joint report from the police and the Director of Public Prosecutions setting out their belief that in a particular situation there are reasonable grounds for believing that more than 28 days will be required "to obtain, preserve or examine relevant evidence" (the current test under the Terrorism Act) and stating that the investigation is being carried out diligently and expeditiously.

50. The Home Secretary would be required to provide a statement to Parliament within 2 days bringing the higher limit into force. To emphasise its exceptional character, it would remain in force for only 60 days, and would need to be agreed by both Houses of Parliament within 30 days. Under this arrangement, as at present, the 14-day limit would continue to be the norm and the 28-day limit would need to be agreed annually by Parliament. Within the 42-day limit there would continue to be judicial approval of extensions to detention beyond 28 days at least every 7 days, and applications would need the consent of the Director of Public Prosecutions.

### **Conclusion: Not proven**

51. In its Byzantine complexity, this scheme represents an attempt to reconcile the needs of investigators with the recognition that extended detention should not be normalised (the hallowed phrase “triple lock” appears at one stage). In that sense it represents a concession by the Government to its critics. It also seeks to preserve the distinctive roles of the police, the prosecuting authorities, Parliament and the judiciary, allowing operational decisions to be made by those qualified to make them, subjecting the decision to extend the limit to parliamentary scrutiny and leaving the oversight of individual cases to the judiciary. Whether such a complex system would be viable is another matter. The Government has invited discussion with interested parties inside and outside Parliament, but so far the critics seem unimpressed.

52. The announcement signals a significant retreat from the Government’s desire to introduce a 56-day limit – let alone a 90-day limit – which was apparent in the early stages of the consultation. To that extent the proposals represent a victory for principled opposition to the erosion of civil liberties and an acceptance by the Government of the onus of justifying extension in particular, and exceptional, circumstances.

53. Despite this, the proposals still allow for an extension of 14 days in the period of detention – an increase of 50 per cent in the current limit, which many people already regard as the maximum tolerable. Individuals could be deprived of liberty for up to six weeks, six times longer than the maximum temporarily in force during IRA bombing campaigns. From a practical point of view, the scheme is cumbersome, and it is to be wondered what effects the publicity attaching to the process of activating it will have upon the prospects of a fair trial for the suspects to whom it is applied. At this point, the exceptional nature of the process is decidedly double-edged. For these reasons, the proposals seem to be a highly questionable solution to the problem of reconciling liberty and security.

## **4: Guantánamo Bay – A “Legal Black Hole”**

54. While the UK has vigorously debated counter-terrorist measures and their effect on civil liberties, the United States has been dealing with a massive set of problems created by its decision to detain suspected terrorists captured during its military action in Afghanistan and elsewhere following the 9/11 attacks. The choice to locate the detention camp (known as Camp X-Ray) at its naval base at Guantánamo Bay on the south-eastern tip of Cuba appeared curious, but was deliberate. The purpose was to create a system of military detention and interrogation which would be under American control without being subject to the constraints of US domestic law or the 1949 Geneva Convention on the treatment of prisoners of war.

55. Prisoners began to arrive at the camp – which had previously been used to house Cuban and Haitian refugees picked up on the high seas – on 11 January 2002. By November 2002, there were about 750 of them. Since that time, hundreds have either been set free or

handed over to their national governments. There have been no new arrivals since September 2004, and the US Government intends to keep the camp open until all prisoners have been released, handed over or charged and tried. The status of each remaining detainee is reviewed annually by a system of military administrative boards. In March 2006 the US Defense Department released the names and nationalities of prisoners for the first time.

### **Neither criminals nor prisoners of war**

56. On 13 November 2001 President George W. Bush issued a Military Order setting out the conditions under which prisoners would be held and tried under military law. The order specifically excluded the possibility of appeal to any court –state, federal or international – in the United States or anywhere else in the world. Initial challenges to the order in the US federal courts failed, because the prisoners were not US citizens and were not being held on US territory. Eventually in 2004 the Supreme Court ruled that US courts had jurisdiction to consider *habeas corpus* appeals from the Guantánamo detainees, but judicial reviews were not forthcoming.

57. Guantánamo was therefore constituted as (adopting a phrase used in 2003 by Lord Steyn, the now-retired Law Lord) a “legal black hole”. The US Government argued that the detainees were neither criminals facing a charge nor prisoners of war but “unlawful enemy combatants” – a term used in the US during the Second World War to describe German nationals who carried out acts of sabotage in civilian dress. The strategic purpose of their detention was to prevent members of Al-Qa’eda, the Taliban and other organisations from continuing their activities, to allow interrogation with the aim of uncovering terrorist networks and to deter attacks by terrorist groups on US citizens in other parts of the world. It was stated that they would be held in detention until the end of the so-called “war on terror”.

58. The US Government’s contention that Article 4 of the Geneva Convention does not cover the people captured in Afghanistan and elsewhere because they were neither members of militia or volunteer forces, as defined in Article 4(6), nor civilians, as defined in 4(8), may apply to some prisoners, but it seems implausible as a claim about all of them. In April 2003, the British Foreign Office said that the status of the Guantánamo detainees under international humanitarian law was complex, and had to be considered in the light of the facts relating to each individual detainee. However, the denial of POW status sits ill with the rationale for military tribunals, which assumes some kind of participation in war.

### **Conditions and treatment**

59. When challenged, the former US Defense Secretary Donald Rumsfeld asserted that although the prisoners were not protected by the Geneva Convention, the standards of treatment prescribed by the protocols to the Convention were being observed. Subsequently, the International Committee of the Red Cross was allowed to inspect the camp and then to visit prisoners and to arrange the exchange of letters between detainees and their families. Prisoners are held in four camps, in small mesh-sided cells, for up to 24 hours a day. There is little privacy and lights are switched on day and night. Prisoners are allowed half an hour of exercise on 3 to 7 days each week, in a recreation yard measuring 7.6 by 9.1 metres. Many prisoners have gone on protest hunger strikes and in June 2006 three men hanged themselves with bed sheets.

60. There have been persistent reports of abuse and ill-treatment. A United Nations human rights group said in February 2006 that many detainees had suffered mental breakdowns and claimed to have evidence that torture had taken place. It alleged that hunger strikers had been force-fed through nasal tubes and that interrogation techniques had included

prolonged solitary confinement and exposure to extreme temperatures, noise and light. Muslim prisoners have reported that religious abuse and mishandling of the Qur'an are commonplace. Another frequent complaint has been the denial of access to lawyers. All these practices are contrary to the 1988 United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, which applies to the Guantánamo camp whatever may be the case regarding the Geneva Convention.

### **Military commissions**

61. The military commissions originally set up to try the prisoners lacked many of the safeguards employed by both civilian and normal military courts. Although the US Department of Defense's own guidelines on the "war on terror", as well as international human rights conventions, specified that defendants had a right to their own lawyer, the Military Order required lawyers to be nominated by the Department of Defense. The commissions were given power to convict on the basis of hearsay evidence, to reach verdicts by a two-thirds majority, to authorise indefinite detention and to impose death sentences. In June 2006 the Supreme Court ruled that the commissions, as constituted on the authority of the President alone, were unlawful.

62. As a result of this decision, in September 2006 Congress passed the Military Commissions Act. While this Act laid down new standards for interrogation and trial, it reversed the 2004 decision that Guantánamo detainees had the right to appeal to civilian courts for *habeas corpus*, confirmed their exclusion from the Geneva Convention, permitted the use of evidence obtained under duress, and continued to limit defendants' choice of lawyers. In the event, trials have been few, partly because military judges dismissed charges against two prisoners in June 2007 on the ground that (like 520 others) they had been designated "enemy combatants" rather than "unlawful enemy combatants".

### **The attitude of the British Government**

63. Among the prisoners at Guantánamo Bay were nine British nationals, five of whom were released in March 2004 and four in January 2005. While the British Government has worked to obtain the release of its own citizens – and latterly that of nine UK residents – for a long time it adopted a low-key approach to the legal anomalies and human rights violations at the base, claiming that its views were well-known to the US Government. This may have been from a desire not to quarrel publicly with its American ally, and possibly also in awareness that its own anti-terrorist measures were not uncontroversial (see ch. 5). In 2005, the Commons Foreign Affairs Committee concluded that the continued use of Guantánamo Bay as a detention centre diminished the moral authority of the United States and was a hindrance to the effective pursuit of the "war against terrorism". It called upon the Government to make "loud and public" its objections to the regime.

64. In the course of 2006, there was something of a sea-change. In March the Prime Minister, Tony Blair, called Guantánamo an "anomaly" and said that it would be better for it to close. In May the Attorney General, Lord Goldsmith, declared that the camp's existence was unacceptable and that it should close as a matter of principle. He said that the UK was "unable to accept that the proposed military tribunals...offer sufficient guarantees of a fair trial in accordance with international standards". In October the Foreign Secretary, Margaret Beckett, agreed that the continuing detention of prisoners without fair trial was unacceptable. Since then, there appears to have been steady pressure from the British Government to accelerate the process of closure. The US Government agrees in principle, but asks what is to prevent those released from returning to the battlefield or to terrorist activity (assuming that they were involved in those ways in the first place).

## **Conclusion: A massive and perilous mistake?**

65. It is of course easy to judge with hindsight, but it is hard to avoid the conclusion that the opening of the Guantánamo camp, while a clever and improvised solution to the short-term problem of dealing with possible terrorist sympathisers captured on the battlefield, has been in the longer run highly discreditable to the US and counter-productive for the anti-terrorist cause. It was ironic, and cynical, that “the land of the free” should pursue its worldwide campaign to defend democracy by setting up a system of detention which embodied the negation of the rights and freedoms it was professing to champion. Furthermore, the unjust and inhumane treatment of the prisoners of Guantánamo has not only lowered the reputation of the US in the world but has undermined the influence of international law and human rights standards, because the leaders of the most powerful nation in the world have demonstrated their belief that “might is right”. Christians in Britain may feel relief that our nation has avoided such excesses, but as the next chapter will show, there is no place for complacency about our human rights record, and no reason to consider ourselves immune from the temptation to demand security at the expense of liberty.

## **5: Control Orders – Taking Liberties**

66. Another development in preventative counter-terrorist policy, stopping short of detention but raising similar issues of principle, is the system of control orders introduced in the UK by the Prevention of Terrorism Act 2005. Under this regime, persons who are suspected of involvement in terrorist activity and are believed to constitute a serious threat to public safety, but against whom there may be insufficient evidence to mount a prosecution, can be subject to an order by the Secretary of State restricting their activities in specified ways. This approach has caused controversy on two major questions: first, the legitimacy of imposing sanctions of this kind on people who have not been tried and convicted of any offence; and second the process by which such orders are made, including the standard of proof required to impose them.

### **The detention of foreign national suspects**

67. The 2005 Act came into being as an indirect and unintended result of measures adopted in the immediate aftermath of 9/11, in Part 4 of the Anti-Terrorism, Crime and Security Act 2001. This attempted to deal with the problem of foreign nationals suspected of terrorist activity who could neither be prosecuted nor deported to their own country on account of a potential threat there to their life and safety. Historically the United Kingdom had relied on deporting people whose presence here was deemed not to be “conducive to the public good” and the Home Secretary had, in law, enjoyed a wide measure of discretion. However, this reliance on deportation had been undermined in 1996 by the *Chahal* case, in which the European Court of Human Rights held that a suspected Sikh terrorist could not be deported to India because his life there would be in danger.

68. The 2001 Act empowered the Special Immigration Appeals Commission to authorise detention under the 1971 Immigration Act of certified terrorist suspects from overseas on the basis of evidence that they posed a threat to national security. This was a radical extension of the role of the SIAC, which existed to deal with appeals in cases of detention pending removal or deportation from the UK. The evidence, inevitably based on intelligence gathering, was withheld from the defendant but made available to security-cleared Special Advocates employed to present to the Commission the case against detention.

69. Not surprisingly, these arrangements attracted strong criticism as an abuse of the human rights of those proceeded against and detained. Some people were opposed in principle to detention on the basis of suspicion rather than proven terrorist activity, and the process of detention was felt by many to be unfair and inhumane. A Committee of Privy Councillors chaired by Lord Newton of Braintree was set up to review the operation of Part 4 of ATCSA. In December 2003 it produced a substantial report making major criticisms of law and practice, and suggesting possible changes. By 2004 17 suspects had been detained in Belmarsh Prison under Part 4, and the mental health of some of them gave cause for concern. In December 2004, the House of Lords provoked a crisis by finding the detention powers to be incompatible with the European Convention of Human Rights.

### **The Government's response to the Law Lords**

70. Because the detention powers involved deprivation of liberty contrary to Article 5 of the ECHR (see paras. 21 to 23 above), the Government had followed the procedure of derogation from the obligations of Article 5 on the ground of a "public emergency threatening the life of the nation" (see para. 23). The Law Lords found the legislation unsatisfactory on two counts. First, they ruled that the derogation was disproportionate to the threat posed by the people subject to detention, failing to meet the condition of Article 15 that derogation should take place only "to the extent strictly required by the exigencies of the situation". Second, they judged it to be discriminatory, contrary to Article 14 of the Convention, because it was applied to foreign nationals but not to British citizens.

71. In February and March 2005, the Government introduced, and Parliament passed in three weeks, a Bill authorising a new system designed to meet the objections set out in the Lords judgment. This involved the imposition on persons suspected of "terrorism-related activity" of two types of control order: one labelled *derogating* because it would involve deprivation of liberty contrary to Article 5 of ECHR and the other *non-derogating* because it would involve restrictions on liberty falling short of deprivation and thus – it was assumed – would not contravene the Convention. There would be a two-tier process dealing with each type of order (see paras. 75 to 77 below) by which the Government hoped to satisfy the criterion of proportionality. To meet the requirement of non-discrimination, the Bill would apply to UK citizens as well as foreign nationals. It was ironic that in this way a judgment which had condemned the removal of civil liberties for foreign nationals should lead to their further erosion for all.

### **The meaning of control orders**

72. The idea of control orders owed something to the Newton Committee. It had suggested, as one of a number of alternatives to detention of terrorist suspects, restrictions on their movements, financial dealings and association with others. Section 1 of the Prevention of Terrorism Act 2005 defines a control order as an order imposing obligations considered necessary (by the Secretary of State or a court) to prevent or restrict involvement by an individual in terrorism-related activity, and goes on to give 16 examples of types of obligation which are illustrative but not exhaustive. Breach of an order carries a maximum penalty of 5 years' imprisonment.

73. These examples include restrictions on possession and use of articles and substances, use of services or facilities, work or business activities, place of residence and persons given access to it, movements "to, from or within" the United Kingdom; and requirements to surrender passport, give specified persons access to place of residence or other premises, to allow search of those places and the removal of objects found, to co-operate in being photographed or monitored, to provide information when demanded and to report to a

specified person at a specified time or place when requested. This is a wide-ranging and potentially very onerous set of obligations. It was not envisaged that all of them would be imposed simultaneously but that they would be tailored, with judicial supervision, to the circumstances of particular suspects.

### **The exercise of judicial supervision**

74. The most controversial issue during the passage of the Bill through Parliament was the precise role to be played by the courts in adjudicating the Secretary of State's decisions to make control orders. This exemplified the dilemmas about the respective responsibilities of the executive, legislature and judiciary discussed in paras. 30 to 32 above. The Newton Committee had envisaged that restrictions would be imposed as the outcome of an inquisitorial process by an examining judge rather than an adversarial hearing in which the Home Secretary would seek to prove his case and the defendant to resist that case. In the House of Lords, a sharp argument raged not only between the Government and Opposition but between critics of the Bill. Some of these wanted to increase the element of judicial review, while others wished to avoid drawing the judiciary into decision-making on behalf of the executive. The judicial role is, of course, closely related to the overall process and the criteria to be applied in making orders.

### **Imposing “non-derogating” orders**

75. The Act which was passed, after a heated disagreement between the Lords and Commons, provides for the Secretary of State to apply to a court for permission to make a non-derogating control order. The court may give permission unless it considers that the decision to make the order is “obviously flawed” and must arrange for a hearing in relation to the order as soon as reasonably practicable. The court's function is then to review whether either the Home Secretary's decision that the requirements of reasonable suspicion of involvement in terrorism-related activity and risk to the public were satisfied, *or* the decisions on each of the obligations imposed by the order, were flawed. Should the court decide that any of the decisions were flawed, it has power to quash the order or particular obligations imposed by it, or to give directions to the Secretary of State for revocation of the order or modification of its obligations. Should the court uphold the order, it lasts for 12 months and is subject to renewal an indefinite number of times.

### **Imposing “derogating” orders**

76. In the case of a control order including “derogating obligations” depriving an individual of liberty, there are additional safeguards. Power to make an order rests with the court rather than the Secretary of State. The court's duty is to hold a preliminary hearing to determine whether to make a derogating order, and if it decides to do so, to arrange for a full hearing to decide whether to confirm the order. At a preliminary hearing, the court may make an order only if it decides (i) that there is material which provides *prima facie* evidence that a person is or has been involved in terrorism-related activity, (ii) that there are reasonable grounds for believing that the imposition of the obligations is necessary to protect the public from a risk of terrorism, (iii) that the risk arises out of a public emergency in respect of which there is a derogation by the UK from the whole or part of Article 5 of the European Convention, and (iv) that the obligations which it is considered necessary to impose on the individual accord with the terms of the derogation made from Article 5.

77. At a full hearing, the court may confirm the order only if it considers that the second, third and fourth of the above conditions still hold, and in addition that it is satisfied *on the balance of probabilities* that the person is or has been involved in terrorism-related

activities. This therefore allows a limited review of the objective case for depriving the person of liberty. The provision has been criticised on the ground that it would be wrong to detain someone on the basis of the “civil standard” rather than the criminal standard of proof (“*beyond reasonable doubt*”). However, it is hard to see how the criminal standard could be applied convincingly to decisions involving forward-looking assessment, so the argument becomes an objection to preventive detention by judicial rather than executive decision. A derogating order lasts for 6 months, and may be renewed an indefinite number of times, subject to the court’s decision that the conditions for its making still apply. In the event, since the passage of the Act the UK has not derogated, in whole or part, from Article 5, so no derogating control orders have been applied for or been made.

### **Legal challenges and judgments**

78. It might appear that since no derogating control orders have been made, and the courts are involved in reviewing non-derogating orders, that all is well with the Prevention of Terrorism Act. However, a series of judgments by lower courts left the law in some disarray and threatened to undermine the system. In April 2006 the High Court ruled that (non-derogating) control orders were incompatible with Article 6 of the ECHR (the right to a fair trial) though this decision was overturned by the Court of Appeal in August 2006. In a simultaneous judgment the Court of Appeal upheld the High Court’s decision of June 2006 that non-derogating control orders were incompatible with Article 5 because residence restrictions, curfews and tagging amounted to a deprivation of liberty, and quashed control orders imposed on six foreign nationals.

79. The Home Secretary appealed to the House of Lords against the above decision of the Court of Appeal and on 31 October 2007 judgment was given on four appeals in a complex series of speeches. The Lords agreed unanimously that control orders with curfews up to 14 hours did not amount to deprivation of liberty under Article 5, and by a majority of 3 to 2 that orders with 18 hour curfews did so. On Article 6, they held unanimously that a non-derogating order is not equivalent to a criminal charge and therefore does not require open proceedings with a criminal standard of proof. By a majority of 4 to 1, they held that the review procedures for non-derogating orders, and in particular the withholding of “closed” material from the “controlled person”, do not necessarily preclude a fair trial. However, in respect of two appellants they ruled that there had been a breach of Article 6 rights in the withholding of evidence and sent the cases back to be reconsidered by the lower courts.

80. To the relief of the Government, these rulings have restored a measure of clarity and stability to the operation of the system. Their immediate practical force is limited, as a number of control orders had already been modified in response to earlier judgments, and two appellants had absconded. The Government is relieved that strict non-derogating orders have not been equated with house arrest and ruled totally incompatible with Article 5, but is disappointed that 18-hour curfews have been ruled out. It is still not clear where between 14 and 18 hours the limit will lie – the Home Office thinks 16 is acceptable. In the matter of supervision procedures there are still issues to be determined. Meanwhile it is encouraging that the courts have scrutinised the operation of the Act with careful delineation of rights and attention to the details of the controllees’ experience.

### **Conclusion: Holding the line**

81. What can be said in conclusion? The erosion of the traditional power to deport suspected terrorists undoubtedly created a gap in counter-terrorist powers against foreign nationals at a time when it could least be tolerated. In view of this, it is difficult not to feel sympathy for the Government as it has attempted to fashion new legislative solutions. Yet it

must be asked whether the increasingly complex and drastic solutions which have developed have been necessary and proportionate to the objectives they seek to achieve.

82. In December 2007, 14 control orders were in force, 8 against British citizens and 6 against foreign nationals. The relatively small number does not in itself prove anything about the usefulness of the orders. It does show that by comparison with the prosecution of terrorist suspects, this remains a limited tool. Whether it amounts to a regrettable necessity or an intolerable imposition depends on adequate definition and supervision of the line between restriction and deprivation of liberty. What is undeniable is that some control orders have had devastating effects on controllees (who remain legally innocent) and their families. It is essential therefore that the Home Office and the courts should keep the obligations under review in order to ensure that they are necessary and proportionate to their objectives of prevention and protection. It is very much to be hoped that derogating orders will never come into use.

## **6: Conclusion: the politics and theology of imperfection**

83. These three examples show that the dilemmas raised for the principle that no-one should be deprived of liberty except through “due process” by the need for states to defend themselves against planned and indiscriminate mass violence have been greatly intensified by the nature of contemporary international terrorism. However, they also show that in facing and working through such dilemmas liberal democratic societies must remember what it is that they are struggling to preserve. The mesh compounds and legal vacuum of Guantánamo Bay are a grim reminder of what may happen when fundamental values of human dignity and freedom are overlooked or deliberately suppressed. The persistence of protests in the US against Guantánamo, and of soul-searching in the UK about pre-charge detention and control orders, are at least signs that the suspension of *habeas corpus* and the presumption of innocence is felt to be an anomaly requiring justification rather than an inevitability to be acquiesced in.

84. In reflecting on these topics, Christian faith has no privileged insight which circumvents the hard work of analysis and moral deliberation. What it has is an understanding of human nature before God as embracing the best and the worst. On the one hand, it is aware of men and women created in the image of God, carrying a claim to just and respectful treatment which no so-called political necessity or security crisis can abolish. On the other, it is aware – supremely through the event of the crucifixion of the Lord of glory – of the destructive acts of which people are capable when driven by hatred, fear, self-righteousness and self-deception.

85. The biblical story, culminating in the good news of Christ, testifies to the universality of both righteousness and sin: *all* are created by God, *all* have fallen short; and *all* are potentially able to share in redemption. This conviction contradicts the insidious tribalism which attributes all goodness to “Us” and all evil to “Them” and so poisons the springs of thought and action in dealing with terrorism. It also serves as a perennial warning that measures taken to counter horrific evil must contain checks and balances, given the propensity even of those whose intentions are laudable to betray their own lofty principles. This is a necessary starting point for a clear-sighted and morally responsible approach to the questions with which this report deals.

+Thomas Southwark  
Vice Chair, Public Affairs  
Mission and Public Affairs Council