DETENTION IN THE ‘WAR ON TERROR’

Fiona de Londras presents an overview of counter-terrorist detention in the US and the UK and the attempts by both states to achieve a downward recalibration of international human rights standards as they apply in an emergency. Arguing that the design and implementation of this policy have been greatly influenced by both popular and manufactured panic, *Detention in the ‘War on Terror’* addresses counter-terrorist detention through an original analytic framework. De Londras argues that, in contrast to domestic law in the US and UK, international human rights law has generally resisted the challenge to the right to be free from arbitrary detention, largely because of its relative insulation from counter-terrorist panic. She argues that this resilience gradually emboldened superior courts in the US and UK to resist repressive detention laws and policies and insist upon greater rights-protection for suspected terrorists.

**Fiona de Londras** is a lecturer in the School of Law, University College Dublin, where she specialises in the relationship between counter-terrorism, rights and constitutionalism.
DETENTION IN THE ‘WAR ON TERROR’:
Can Human Rights Fight Back?

FIONA DE LONDRA
University College Dublin School of Law
Do mo thuismiteoirí, Siobhán agus Tommy
CONTENTS

Acknowledgements page viii

Introduction 1

1 Panic, fear and counter-terrorist law-making 8
2 The right to be free from arbitrary detention 36
3 Counter-terrorist detention: the executive approach 72
4 Legislating for counter-terrorist detention 116
5 International human rights law’s resilience in the face of panic 166
6 Judicial responses to counter-terrorist detention: rights-based resistance? 214

Conclusion 280

Bibliography 284
Index 303
ACKNOWLEDGEMENTS

Like many other books of its kind, this started life as a PhD. I was greatly aided in doing my PhD by the President of University College Cork who kindly awarded me a President’s Scholarship and the National University of Ireland, which gave me an NUI PhD Travelling Studentship for three years. I am both grateful to and honoured by those awards. I am especially grateful to my PhD (and, incidentally, LLM) supervisor, my former colleague and my friend Siobhán Mullally. Someone once told me that all you need to do a PhD is a good supervisor; a champion and mentor who will push you in the right direction, teach you how to be a scholar, and be generous with her time and networks. In Siobhán I got all that and more. I couldn’t have asked for better.

In the course of working on this as a PhD, I spent time visiting at the University of Peshawar where Javaid Rehman, Kamran Arif and Ahmad Ali were exceptional hosts, and Kamran in particular secured for me access to the Peshawar courts and legal profession that was so important in working through my ideas. I spent some time too as a visitor in Emory University, and more specifically at the Feminism and Legal Theory Project (FLTP). I have been back there many times since, primarily because of the friendship and mentorship that I found there in the form of Martha Fineman. To her, and to the whole team at the FLTP, I am very grateful. I am thankful also to the British Institute for International and Comparative Law where I spent some time as a visiting fellow while working on the thesis.

The examination of a PhD is always a daunting occasion for both the candidate and the examiners. I was fortunate to be examined in a rigorous but friendly fashion by two scholars whose work I had long admired and who have since supported me greatly in my career: Helen Fenwick and Fionnuala ni Aolán. Fionnuala, in particular, has welcomed me in both of her home institutions – the University of Minnesota and the Transitional Justice Institute at the University of Ulster – and given me invaluable...
advice on moving from ‘thesis’ to book with this project. Helen has also – with Gavin Phillipson – indulged me in presenting ideas that appear in this book at the civil liberties section of the Society of Legal Scholars and in Durham University for which I am very grateful. Along the way I also got to discuss these ideas at conferences and colloquia at Aberdeen, Chicago, Cork, Durham, Emory, Hebrew University, Keele, Kent, King’s College London, the London School of Economics and Political Science, Maynooth, Montreal, Oslo, the University of Colorado, University of Ulster (TJI) and Westminster. I am grateful to all the people who organised those conferences and colloquia and provided me with the space to present my ideas and receive invaluable feedback.

Transitioning a piece of work from thesis to book has proved to be an unexpectedly tricky task, but I have been lucky to have been supported (and, sometimes, cajoled along what I hope were the right paths) by colleagues and friends and by my very supportive institution. I must thank the Dean of the School of Law at University College Dublin, John Jackson, and the research committee of the School for giving me four weeks of research leave in 2010 to visit the University of Minnesota and avail of their resources, and for awarding me funding to complete the project. I add to that my thanks to the University College Dublin Seed Fund, which provided further funding for completion. The best colleagues are ones who are also friends. For allowing me to complain about the book-writing process with impunity, as well as for making going to work one of the nicest things I get to do, I especially want to thank Blanaid Clarke, Caroline Fine, Suzanne Kingston, Imelda Maher and Colin Scott. The other group of people that make going to work so much fun is, of course, my students. A special mention must go to the members of my graduate seminar in terrorism and counter-terrorism in 2009 and 2010 on whom some ideas developed in the book were tried out and whose willingness to engage with those ideas helped me to improve them. One of the members of the 2009 seminar was Alan Greene, a fine young scholar now doing a PhD himself, who provided excellent research assistance on this book for which I am grateful. My friends were especially patient and understanding during this process and I feel now, as ever, very lucky to have in my life people as funny, clever and capable of cutting one down to size as Liz Campbell, Máiréad Enright, Cian Murphy, Colin Murray, Tanya ní Mhuirthile, Aoife Nolan, Aoife O’Donoghue and Liam Thornton.

Cambridge University Press has been supportive and helpful at every stage in the process and I especially want to thank Nienke van
Schaverbeke for her endless reserves of good humour, as well as Sinéad Moloney and Finola O’Sullivan both of whom provided support earlier in the process.

If going to work is one of the nicest things I get to do, then the very nicest of all is coming home. My family is so supportive that even saying ‘thank you’ to them seems inadequate. And yet, to fail to do so would be unforgivable. So thank you to Jackie and Alanna; to my favourite small people Cathal, Maia and Lily; and to my beloved grandmother Bridget Carroll. Extra special thanks are reserved for my parents, Siobhán and Tommy Landers, who started all three of us off with a book in our hands and the understanding that all we need ever do was our best. I dedicate this book to them, not just so that they will feel morally compelled to read it but also because it is as much their work as it is mine.

And finally, I have to thank the wonderful Aurélie Gilbert. Anyone whose partner has done a PhD knows it is a joint effort; mine was no exception. Neither was this book, which has separated us on occasion by thousands of miles and more frequently by a closed study door and a vague air of panic. I am so thankful and lucky that Aurélie has always insisted on opening that door and keeping me steady. *Merci mon petit soleil.*