The trial of terrorism
National security courts and beyond

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Introduction

The military commissions scheme established by President George W Bush on 13 November 2001, has garnered considerable national and international controversy.1 Its creation focused significant global attention on the use of military courts as a mechanism to process and try individuals suspected of involvement in terrorist acts or offences committed during armed conflict. However, states have long manipulated the legal process and the courts as means to manage and address exceptional threats and challenges.2 Exceptional courts are found in numerous settings, and have long pedigrees of operation in multiple parts of the world as well as in the international sphere.3 In this chapter we introduce and discuss the multiplicity of phenomena that emerge in the context of the use of exceptional courts to try suspected terrorists and which we broadly umbrella under the notion of ‘due process exceptionalism’.

Violent crises, of which terrorism is an important subset, test the abilities of government to act vigorously and resolutely to overcome a crisis while not intruding unnecessarily on established civil rights and liberties. When faced with acute violent challenges, such as terrorism and armed conflict, democratic states make use of legal and particularly judicial processes and institutions to manage such threats.4 This occurs in part because democratic states, which are

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4 Some commentators use the term ‘national security exceptionalism’. We view national security exceptionalism as being embraced by the concept of ‘due process exceptionalism’ but argue that the latter is a far wider term and has greater ‘capture’.
5 The counter-terrorism theory behind this idea is notably propounded by F Kitson, Law Intensity Operations (Faber, London, 1971) 69–70.
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the focus of this chapter, are constrained in their use of force to respond to such challenges particularly when they manifest as internal armed conflicts or violence above a sporadic threshold. Because democracies are particularly reluctant to cede the ground of combatant or armed conflict status to violent challengers’ legal process becomes an important symbolic, expressive, communicative, operational and legitimacy-creating and maintaining basis upon which to contain the effects and status of conflict. In this respect, Harold Hongju Koh, the Legal Advisor to the US Department of State, enumerated the ‘commitment to living our values by respecting the rule of law’ as one of the four core commitments in what he called the emerging ‘Obama–Clinton Doctrine.’ The point was also made by Attorney-General Eric Holder in a speech delivered on 5 March 2012, in which he took pains to argue that, ‘both [federal civilian courts and the revised military commissions] incorporate fundamental due process and other protections that are essential to the effective administration of justice.’ At the same time, discussing the targeted killing by the US of an American citizen, the Attorney General argued:

[The] Due Process Clause does not impose one-size-fits-all requirements, but instead mandates procedural safeguards that depend on specific circumstances…. Where national security operations are at stake, due process takes into account the realities of combat…. ‘Due process’ and ‘judicial process’ are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process…. The Constitution’s guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use

6 The operation of such courts in non-democratic settings is noteworthy and that exceptional courts can exhibit similar features to and play the same kind of legitimising role for non-democratic regimes as they do for states of a more liberal hue. See L Hilbink, Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile (Cambridge University Press, Cambridge, 2007); T Ginsburg and T Moustafa (eds), Rule by Law: The Politics of Courts in Authoritarian Regimes (Cambridge University Press, Cambridge, 2008).


8 They are sometimes labelled as ‘militant democracies’.


10 ‘The Obama Administration and International Law’. Speech before the American Society of International Law (May 25, 2011). Available at: www.state.gov/s/l/releases/remarks/139119.htm (16 February 2015). See also HC 510(94), Public Committee Against Torture in Israel v The State of Israel, 53(4) PD 817, 845 (Barak, P) (A democracy has ‘the upper hand’ even though it ‘must sometimes fight with one hand behind its back’. This is because ‘[t]he rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties’. For a view of the constraints in what has been called ‘Lawfare’ – the use of law as a weapon of war – see JG Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration (WW Norton, New York, 2009) 53–64.

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force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a US citizen.12

Due process values and their complex role in enabling state management of crises should be uppermost in the minds of government decision-makers utilising legal process to handle the exigency of terrorism. States have long used the legal process and the courts as means to manage and address exceptional threats and challenges. Existing courts have been modified, new courts have been established and jurisdiction for certain offences moved from civilian criminal courts to military courts and commissions or added to the roster of offences with which the latter could deal. This chapter addresses the role of due process with particular emphasis on the role of trial in the management of politically motivated violence. Section 2 starts by addressing why states utilise and modify legal process as a means of managing politically motivated violence. We follow in section 3 by outlining the characteristics that delineate and define exceptional courts, noting that features described as unique to courts processing terrorist crimes are to be found in a range of distinctive domestic courts that are generally not understood to operate exceptionally. Section 4 describes the costs that may follow from reliance on trial as a means to process politically motivated offenders. We conclude with a series of reflections on the complexity of the trial space, and the risks, benefits, and consequences for states of utilising trial to respond to exigency and the challenge of politically motivated violence.

Explaining the resort to due process as a management tool

There are many reasons that states articulate (or not) for using exceptional courts. An overarching theme is framed by perceptions that ‘normal’ criminal justice responses may be inadequate to deal with acute violent crises. The seductive nature of the ‘effective exceptional’ stands in contradistinction to the perceived difficulties and weaknesses of the criminal justice model in dealing with terrorist threats. The arguments in favour of exceptional courts are by now quite familiar: the need for secrecy in respect of ‘sensitive evidence’, the difficulties of criminal prosecutions in open court especially from the perspective of lay participants (jurors and witnesses), the potentially helpful expertise of specially selected judges, and so forth.13 It is generally conceded by proponents and defenders alike that exceptional judicial and military courts make it easier (in the sense of being quicker, less likely to produce security disadvantages, and more likely to result in a result favourable to the state) to try defendants than would be the case in an ordinary civilian court – no matter what state or legal system one operates within. In the context of terrorism, states often claim that the nature of the alleged crimes require particular kinds of security measures that are unavailable to, or unsuitable for, ordinary courts. For example, in the Republic of Ireland part of the stated rationale for the creation and prolonged existence of the Special Criminal Court was the alleged need to protect the safety of judges, witnesses, and officers of the court.14 In Northern Ireland, the abrogation of jury trial for terrorism offences was advanced on the ground that juries could not be ade-

12 Ibid.
13 See D Cole, ‘Military commissions and the paradigm of prevention’ in Ni Aoláin and Gross, Guantánamo and Beyond (a 3) (discussing and rejecting the reasons for the creation of military commissions).
14 See M Robinson, The Special Criminal Court (Dublin University Press, Dublin, 1974).
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quite protected from intimidation and bias within the ordinary criminal courts.\(^\text{15}\) However, in situations where exceptional courts become the subject of protracted litigation and review, a ‘lightening rod’ that concentrates legal challenge to state policies, the perceived advantages of exceptional courts may be overshadowed by legitimacy-undermining challenges that focus on the very exceptional nature of the relevant judicial bodies. This has been demonstrated, for example, by the dialogue in the Supreme Court of Canada and the President around the process and practice at Guantánamo Bay.\(^\text{16}\)

There exist unmistakable linkages between the use by states of exceptional courts and their readiness to apply a plethora of pre-trial measures, such as detention, torture, and rendition. Describing what he calls the ‘paradigm of prevention’ that has characterised much of the War on Terror, David Cole argues, for example, that exceptional courts – in the particular context of the US he refers to military commissions – are created in order to avoid ‘paying the costs of its imprudent resort to illegal tactics’.\(^\text{17}\) Arguing in a similar vein, that the exceptionalism of military commissions cannot be detached from the continuum of modified arrest and detention practices that precedes trial before military officers, Fiona de Londras sheds light on the continuum of exceptionalism pervading the preventive detention paradigm. She charges that the preventive detention of suspected terrorists creates the conditions in which extraordinary courts and prosecutions are almost inevitable and whereby the detention process may itself constitute a type of extraordinary quasi-criminal procedure.\(^\text{18}\)

Finally, an additional possible argument in these situations is that the use of exceptional courts is of mostly communicative and symbolic value as it enables the relevant governments to engage in what Bruce Ackerman has called in a different, yet related, context a reassurance role,\(^\text{19}\) signalling that strong, tough measures are being pursued and that the government is ‘tough on terror’, while, at the same time, maintaining the veneer of legitimacy by pursuing such measures within the strictures of a legal system. Courts and custodial settings are particularly important sites in which the state and non-state actors engage in what Charles Tilly called the repertoire of contention.\(^\text{20}\) To avoid over-simplification, it is important to acknowledge that the continued insistence on ordinary courts as the most appropriate means to manage terrorism and politically motivated offenders also functions to advance symbolic and political goals.\(^\text{21}\) States often view the communicative function of terrorism trials as an opportunity for the executive or national elites to stigmatise or impose sanctions on the identified enemy in highly public ways while establishing a judicially approved narrative on the state’s interaction with particular kinds of

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16 See e.g. El-Masri *v* US, 479 F.3d 296, 313 (4th Cir 2007); *Anar v Ashtari*, 585 F.3d (2d Cir. 2009); *Rasul v Myers*, 563 F.3d 527, 530 (DC Cir. 2009); *Ali v Rumsfeld*, 649 F.3d 762 (DC Cir 2011); *Ali v Rumsfeld*, 649 F.3d 762 (DC Cir 2011); *Lebron v Rumsfeld*, 670 F.3d 540 (4th Cir. 2012); *Padilla v Yao*, 678 F.3d 748 (9th Cir 2012); *Jamko v Gates*, 741 F.3d 136, 141 (DC Cir 2014).
17 Cole (n 13) 99.
21 Cf The insistence (ultimately thwarted by Congressional hostility) of US Attorney General Eric Holder that the Federal Courts of the US were open for business to process Guantánamo Bay detainees, and that fair trial, security and detainee due process guarantees could best be advanced through Article III courts.
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actors and groups.22 This is true whether a trial is conducted in the ‘ordinary’ or ‘exceptional’ courts. In highly contested politics, in contexts where communal contested narratives that implicate nation, territory, and identity drive violence, high-profile trials become an important site of competing histories and memorialisation by both state and non-state actors. As Colm Campbell points out, ‘[i]f trial in the special court amounts to a contest with the state, it is also likely to be a site of interaction and perhaps contest between the open state (typified by the law-based conventional court), and the secret state (partly a zone of anomie).’23 That tension between open and closed state in the context of terrorism trials is further explored below.

Characteristics of exceptional courts

What makes a court ‘exceptional’? We suggest that a number of factors and attributes must be considered when ascribing an ‘exceptional’ or ‘extraordinary’ character to a court. As a definitional matter, most of the courts, tribunals, and other judicial institutions discussed in this chapter perform a criminal justice function. Their role is symbolically and practically punitive with important linkages to an overarching (and ever-growing) preventive paradigm for the management of terrorism and politically motivated violent offenders. Nonetheless, in some jurisdictions and in certain historical junctures one can only identify an increasing creep to exceptional courts functioning in the civil realm, both nationally and internationally. Such phenomenon has been identified and accounted for in bodies ranging from the international, such as the United Nations (Al-Qa’ida Sanctions Committee established by Security Council Resolution 1267) to domestic processes, running the gamut from special procedures (for example, the Justice and Security Act 2013 in the UK) to trial by special tribunals (such as the Special Immigration Appeals Commission in the UK). The range of bodies exercising judicial function is growing and the range of their powers expanding and intensifying. These functional characteristics do not necessarily cut across all such bodies equally, nor are they, as such, presumed to constitute negative descriptors. Rather, the discussion below is aimed at providing some means to categorise exceptional courts and military commissions and draw out their commonalities.

The authorisation basis and political context of a court’s making

Acknowledging distinctions between legal systems, which account for differences in the legislative process or patterns of executive action, it is notable that due process exceptionalism is commonly characterised by short-cutting or circumventing the ordinary law-making process in order to advance the security interests of the state. The rush to legislate and take strong action in the aftermath of terrorist atrocity is one striking feature of distinction, and is applicable to the creation time for exceptional courts and military commissions. Violent crises create immense pressures on all three branches of government to ‘do something’ about the threat. They bring about a broadening of the powers of the executive, in general, and law enforcement agencies in particular.24

23 Unpublished paper, on file with authors (2012).
The need to respond quickly to future threats, frequently results in legislation that is passed without much debate and, at times, forgoing normal legislative procedures and to the adoption of new or revamped tools in the counter-terrorism arsenal without much reflection, even when such measures deviate from otherwise entrenched notions of civil liberties and individual rights. The prevailing belief may be that if new offences are added to the criminal code and the scope of existing offences broadened, and if the arsenal of law enforcement agencies is enhanced by putting at their disposal more sweeping powers, the country will be more secure and better able to face the emergency.

For its part, the introduction of such enhanced measures may be a precursor of turning to exceptional courts and tribunals as the next vital component in the overall paradigm of prevention. As politicians and legislators engage in ‘symbolic alignments’ (in which what counts is not the nature of the target, but rather being seen as taking a position against the devil and on the side of angels), the focus is put on a particular, identifiable, threat (such as terrorism) that is caused by a clearly identifiable group of ‘others’ who can often be described as folk devils. In such circumstances, mapping exceptional measures – legislative, judicial, or executive – which would be activated only against that identifiable group, becomes easier to obtain politically since it carries with it the innate promise (often proven illusory in hindsight) that such measures will, in fact, only be used against ‘Them’ and not against ‘Us’. Thus, for example, the military commission scheme promulgated by President Bush came in the close aftermath of the events of September 11 when the body politic remained traumatised and fearful of further territorial attacks. Rather than being created by an act of Congress, the creation of the military commissions came by way of executive fiat, circumventing the usual process of inter-party negotiation, notice, and as well as (possibly) tempering input from specialised agencies and interests. Moreover, when issued it was understood that such judicial institutions would only have jurisdiction over foreign nationals rather than over citizens of the US, although historically the US has used military commissions to try US citizens, notably during the Civil War and the Dakota wars.

The passage of emergency legislation provides parallel examples. The PTA series is illustrative. Originally introduced in the British Parliament in 1974 as a temporary measure, in response to a series of bombings by the IRA in mainland Britain, it was amended in 1975 and 1983, and re-enacted in 1984. In 1989, the PTA became a permanent part of the statute books

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of the UK. Similarly, Congress overwhelmingly supported the passage of the USA PATRIOT Act only six weeks after the terrorist attacks of September 11th. Congress acted despite claims that it was interfering unnecessarily and excessively with individual rights and liberties. Established legislative procedures such as the committee process and floor debate were abandoned in the name of speed. Within weeks of the passage of this piece of legislation, President Bush issued his executive order creating the next link in the chain of prevention: the military commissions.

The limits articulated to such courts in their operation (including temporal, jurisdiction, and review limits)

As we have noted elsewhere, exceptional powers are often defined along temporal, spatial, and jurisdictional lines of demarcation. Different legal principles, rules, and norms may be applied, for example, in distinct geographical areas that belong to the same ‘control system’, such as Great Britain and Northern Ireland, Israel, and the occupied territories or France and Algeria. One part of such a ‘control system’ – the controlling territory – applies an emergency regime to the dependent territory. At the same time a putative normal legal regime is maintained in the controlling territory itself. The two legal regimes apply contemporaneously. The dependent territory becomes an anomalous zone in which certain legal rules, otherwise regarded as embodying fundamental policies and values of the larger legal system, are locally suspended. Exceptional courts and military commissions are often part and parcel of the different institutional and rule distinctions, with obvious examples such as the Diplock Courts in Northern Ireland and the Military Court system operating in the Occupied Territories underscoring a combination of geographical and institutional distinctions. Temporal distinctions also define these courts and commissions, either by virtue of their birth via time-bounded emergency legislation or the presumption that emergencies will be short lived, and thus the institutions they spawn will also have limited life span.

At the same time, contrary to regular courts, the underlying institutional structure of exceptional courts and military commissions (as distinguished from individual decisions rendered by such tribunals) is, at least in some jurisdictions, subject to various forms of review, both judicial and otherwise. Such reviews are frequently part of an accountability package that accompanies the creation of exceptional courts, intended at reassuring both domestic constituencies in democratic nations and, at times, peer states that the exception is under control. In the context of Northern Ireland, the Diplock Courts were subject to a number of high-profile reviews led by senior judicial figures in the UK including the Baker Committee Report. A

36 Ibid.
similar review process, the Hederman Report, was carried out in the Republic of Ireland in terms of the Special Criminal Court. It should be noted that despite modest proposals to ensure greater compliance with international human rights law norms, these notionally ‘independent’ reviews have invariably sustained the case for the retention of exceptional courts. In the US, the military commissions announced by President Bush in November 2001 have been the subject of much judicial and legislative dialogue with courts, including most notably the Supreme Court, critically assessing the various features of the Commissions and striking several of them as unconstitutional leading to Congress revisiting the legislative underpinnings of the Commissions, the scope of their authority and jurisdiction and the processes that the Commissions may utilise. Despite these contestations the core structure, goals, and perimeters of the Commissions remain intact.

**The range of offences over which the courts have jurisdiction**

Military commissions and exceptional courts exercise jurisdiction over a large swathe of offences. In the US, military commissions have been, traditionally, akin to courts-martial as far as matters such as evidence and procedure were concerned. In their classic incarnation military commissions carry out a range of indispensable functions. As Gary Solis notes:

‘Military tribunal’ is the unifying term for all military proceedings of a judicial nature. Courts-martial, employed in virtually all military legal systems, are a form of military tribunal, as are courts of inquiry, which investigate serious military incidents such as the loss of ships at sea. Provost courts, another form of military tribunal, convene in occupied territory to try offences alleged against civilians. Military government courts and Provisional Courts are additional American forms of military tribunal, both now disused.

The Bush military commissions deviate substantially, as far as subject-matter jurisdiction is concerned, from their historical origins and from contemporary domestic structures. Under jurisdictional rules for contemporary military commissions at Guantánamo, offences must be ‘violations of the law of war [or] other offenses triable by military commission’. Historically, subject matter jurisdiction included war crimes, espionage, and sabotage. Current charges, however, have included passing information between terrorist cells, serving as an Al Qa’ida accountant, being a bodyguard to Osama bin Laden, conspiracy, and assisting bin Laden in avoiding capture. These are not violations of the law of war as they have traditionally been understood. The expansion of charges to include a range of offences not generally considered breaches of the laws and customs of war has created significant legitimacy challenges for the commissions.

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37 Carried out by Mr Justice Anthony Hederman, retired Judge of the Supreme Court and former Attorney General.
39 Ni Aolán and Gross, *Guantanamo and Beyond* (n 3) 74.
40 See, for example, US Department of Defence, *Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism § 3(B)* (March 21, 2002).
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In it also worth noting that the definition of terrorism itself is ‘slippery’ in scope and definition, an ‘essentially contested concept’ in multiple legal and political settings. The term has been frequently under-defined in the authorising statutes or executive orders creating exceptional courts and/or military commissions while simultaneously and paradoxically providing the rationale for the body’s very existence. In parallel, we find a demonstrable elision between the ordinary and the exceptional, and numerous exceptional courts have far too easily slipped into processing ordinary crime in ways that underscore the challenge of separation and the seductive nature of due process exceptionalism in its apparent capacity to speed up or shortcut the requirements of the regularly constituted courts. For example, the practice of ‘scheduling out’ individuals from the Diplock courts in Northern Ireland was the direct result of ordinary (decent) criminals finding themselves by virtue of charging and police process in the non-jury system when their offences ought rightly have been processed in the regular criminal courts.43

Evidentiary and procedural rules used by and in the courts and the extent of their deviation from the rules applied in the ordinary courts’ system

As noted above, lesser fair trial guarantees frequently characterise military and special courts due to prolonged periods of pre-charge and pre-trial detention, with inadequate access to counsel, intrusion into attorney-client confidentiality, and strict limitations on the right to appeal and to bail.44 Compounding these challenges to the integrity of fair trial modified rules about evidence, secrecy, legal access, and public access lessen the burdens on the prosecution and make the task for the defence more arduous. In particular, the procedural and evidentiary shifts deployed by exceptional courts and tribunals with a view to facilitating conviction, while much less discernible to the average observer than the gravity of the crimes charged or the status of the judicial officer presiding (military officer or civilian), may be far more distorting of the hitherto accepted ‘rules of the game’ for criminal trials. Exceptional courts may appear to permit the state to undertake certain measures that it may not otherwise be able to pursue, especially in connection with matters such as admissibility of evidence and the preservation of state secrets. Rule changes may, for example, permit reliance on confessions in circumstances where reliance would normally be impermissible; burdens of proof may be reversed and rules pertaining to admissibility of evidence relaxed; abrogated pre-trial procedures may substantially disadvantage the defendant during trial; definitions of the charged offences may be ‘open-textured’ and ‘catch-all’ smoothing easier conviction; and the trial itself conducted in ways that adversely affect accountability and transparency.

Military commissions at Guantánamo Bay highlight quite substantial procedural distortions. For example, commission hearing may be closed for the usual reasons relating to classified matters and for the safety of participant but they also may be closed to the press and public to meet unspecified ‘national security interests’ and ‘for any other reason necessary for the conduct of a full and fair trial’.45 In courts-martial, the defence may view any prosecution document

related to the charges. For Guantánamo military commissions, that right is substantially circum-
scribed. 46 Defence lawyers of Guantánamo detainees have also charged that constraints on their
access to clients, including assertions of being subject to listening devices, hampered their
capacity to win the confidence of those they represent and provide the most robust defence
possible. Other procedures that differ significantly from standard courts-martial include review
and appeal procedures and limitations on the right to appeal one’s conviction, 47 the right to
face one’s accuser, 48 and protections against unlawful command influence.

The judicial appointment mechanism to such courts

Judicial neutrality and the perception of judicial independence from executive branch interest
remains a persistent problem for military commissions. One finds broad criticism of rule of law
adequacy in such settings, intermixed with claims of court collusion with the state in oppressive
political action by means of law. Context is critical when assessing the perceived legitimacy and
fairness of military commissions and exceptional courts, so in divided ethno-national polities
or majority/minority contexts (South Africa under apartheid), and situations of occupation
(Afghanistan, Iraq, Israel–Palestine), courts are viewed in highly polarised ways by the body
politic. The politics of appointment often involved ‘safe’ judicial appointment, and highly elite-
actor-dominated processes of appointment and tenure. In many jurisdictions, judges to military
commissions and/or special terrorism courts will have served previously in other branches of
government prior to appointment and may not be in practice or identity distanced from the
recent politics of the executive. In the Irish Special Criminal Court, for a considerable time one
of the three judges was a serving military officer, in Turkey the composition of national security
courts trying civilians, which included military officers on the bench, was found to violate
Article 6 of the ECHR. 49 Minority, diverse, or oppositional appointments to these kinds of
Courts are rare.

In addition to judicial appointments, court and administrative personnel associated with
military commissions and special courts are increasingly coming under greater scrutiny. 50 Policy
makers and scholars have a greater appreciation for the totality of the trial process, and the
extent to which a substantial guarantee of judicial independence and the transparent function-
ing of courts/commissions in an operative sense, requires institutional neutrality from political
process and the executive across the institution as a whole. While judges are an integral part of
such ‘arms-length’ operation, all the layers of court personnel from clerks, administrative staff,
and security services constitute part of the apparatus that lends or detracts from the perceived
and actual distance of the court from the political imperatives of the day.

46 Military Commission Order No 1, §6(D)(5).
47 Despite revisions by the 2005 Detainee Treatment Act that provides for some independent review
of military commissions in the US Court of Appeals for the District of Columbia Circuit. This
review is extremely limited.
48 JN Boeving, ‘The Right to Be Present Before Military Commissions and Federal Courts: Pro-
Policy 463.
50 J Jackson, ‘Years On in Northern Ireland: the Diplock Legacy’ (2009) 60 Northern Ireland Legal
Quarterly 213.
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The perceived neutrality, impartiality and independence of such courts from the other branches of government, with special focus on the executive branch

Military commissions and exceptional courts designed to process terrorist offences struggle to demonstrate their neutrality and independence from the various branches of government. The circumstances of creation, including particular whether such courts or commissions operate on the exclusive authority of a President or Executive, can doom the quest for symbolic or actual autonomy to failure from the outside. Such bodies when operationalised on executive authority may undermine the separation of powers and the checks and balances that underpin agreed notions of the rule of law in a domestic legal setting. Apart from process of appointment (and dismissal) of judges there can be multiple layers of perceived and actual conflict of interest, deference to the views of the executive and outright pressure for the courts/commissions to produce punitive outcomes. In the Guantánamo context there is not unreasonable disquiet that the current Convening Authority for commission cases is a civilian political appointee – whose primary role is based in Washington DC and whose day-to-day position is that of General Counsel of the Department of the Navy in the US.

The extent to which trial is viewed as independent of political interference remains intrinsically connected to the conditions and context of detention and a thicker political landscape than the four walls of the courtroom. Thus, harsh detention conditions at Guantánamo Bay including forced feeding, lack of contact with family members, and no prospect of actual release for detainees even when Federal Courts have found no basis to hold due to US Congressional bar on ‘deal-making’ with third countries means that the trials are only part of a broader tapestry of political exchange and profit in which the quality of the trial itself is undermined simultaneously from the collision of internal and external factors.

Sentencing powers

Exceptional courts and military commissions frequently hold the capacity to hand out extended or enhanced sentences for the crimes under their jurisdiction. The most resonant contemporary example is the capacity of military commissions at Guantánamo Bay to deliver the death penalty for persons found guilty of crimes under their jurisdiction. As Jonathan Hafetz has argued, there is a particular revulsion to the spectacle that persons tortured under the jurisdiction and power of the US are subsequently executed by the exceptional courts that try them. 51 No comparative comprehensive empirical data exist on the sentencing patterns in military commissions; nonetheless, anecdotal and case-by-case analysis suggests that such courts have the power to hand out more extensive punishments than the ordinary criminal courts and may be more likely to do so than regular courts.

Case-by-case analysis also suggests a phenomenon of case hardening in such judicial settings. 52 Empirically it appears that the lack of a jury may exacerbate rather than minimise this tendency. Judges in anti-terrorist, exceptional and military courts are often subject to special appointment processes, and are thereby insulated from the kind of scrutiny and transparency that accompanies judicial selection in ordinary courts. They regularly experience direct security threats by virtue of their positions, thus heightening isolation, as well as creating deep allegiances to the security forces that protect them and their families from harm; manipu-

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lations to the rules of evidence distort the regular trial process in ways that unwittingly lead to less-robust procedures, creating for some observers an inevitability to conviction over pardon. There is an awkward reality that the heightened sensitivity to the framing of atrocity crimes like terrorism, emphasising the vulnerability of targets and the harms that they experience as well as the monstrosity of the perpetrators that pre-determines the course of the sentencing phase in ways that make heightened and harsh symbolic sentencing more likely. Living in societies that remain fearful of terrorist attacks, judges may be afraid of being seen as ‘soft on terrorism’, or out of step with the mainstream views of their society on politically motivated violence.

One might assume that a tendency to overreaction by the lower courts would be mitigated by the capacity to appeal convictions. However, appeal capacity is often structurally limited by the legislation or executive orders that spawn exceptional courts. Moreover, even in those cases where lower courts have been prepared to account for the complexity and procedural flaws of the judicial process, we see examples of overruling when sentences are perceived as overly lenient.

Normal versus exceptional

A variety of courts, such as juvenile courts, immigration and asylum tribunals, and social security tribunals, satisfy some of these criteria even within the ‘ordinary’ jurisdiction of the state. Evidently, some courts meeting the criteria of exceptionalism encounter fewer criticisms than others. Yet, exceptional courts are an oxymoron. The closer in attributes and character they are to the ordinary judicial institutions, the more the underlying justification and need for using exceptional structures are weakened. The further removed the exceptional is from the normal, the less legitimacy purchase is the use of exceptional courts going to have. However, legitimacy purchase is also highly dependent on what the public knows (or perceives) about the fairness of such courts and their proceedings. Often, such knowledge is severely restricted and the information placed willingly in the public domain by states is constrained in multiple ways.

Indeed, the lines of demarcation between the ordinary and the exceptional are often blurred. Writing in the context of Northern Ireland, John Jackson identifies a ‘vicious and virtuous cycle in prosecuting terrorism’. On the one hand, the transgressions that characterised the early stages of the conflict in Northern Ireland have, with time, given way to greater emphasis on the rule of law and a reversion to normal modalities, as represented by the latest version of the special ‘Diplock’ courts in the Justice and Security (Northern Ireland) Act 2007. Kent Roach calls this trend ‘the law working itself pure’. At the same time, normality has come at

53 Appeal restrictions may also be tied to other immunities that come with the creation of exceptional courts or military commissions. See e.g. in the US Detainee Treatment Act, PL 109–148, 19 Stat 2680 § 1004(a) (2005) (giving immunity to US personnel who used authorised ‘operational practices’ in the detention and interrogation of detainees alleged to be engaged in terrorist activities); Military Commissions Act, PL 109–366, 20 Stat 2600 § 8(b) (2006).
54 See decision by Federal Judge (Miami) Marcia G Cooke who originally sentenced Mr Padilla to 21 years in prison finding that the original living conditions in which Mr Padilla was held ‘warranted consideration in his sentencing’. The US Court of Appeals for the 11th Circuit found the original sentence too lenient and returned the case for resentencing.
55 J Jackson, ‘The Vicious and Virtuous Cycles in Prosecuting Terrorism: the Diplock Court Experience’ in Ni Aolán and Gross, Guantánamo and Beyond (n 3) 225.
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a price as exceptional anti-terrorism measures, including modifications to the right to silence and to jury trial, have crept into the ordinary criminal justice system, leading to diminution in established rights that have long been a part of the criminal justice landscape.

Two competing narratives may be offered in this context: First, the breaking down of the assumption of separation between the exceptional and the normal has resulted in the former spilling over and tinting the latter, using it, at minimum, to gain legitimacy and justification and in the process potentially subverting some of the rules and procedures that exist in the ordinary, normal sphere. The exceptional is becoming the new normal. An alternative reading regards the interaction between the two spheres as flowing in a reverse direction, in other words, towards the exceptional shedding off its extraordinary traits and assuming the rules and procedures of the normal legal system.39

The costs of the exception

While the attractions of a resort to due process exceptionalism have been succinctly outlined above, there are distinct costs to such a move. Some of these follow from the scrutiny of international law and international judicial process,40 as the actions of democratic states will be measured by the benchmark of international legal norms and may be found wanting.41

For example, in the context of articulating the contours of a right to fair trial, the ECtHR (and, previously, the Commission) has examined the use of Special Courts,42 looking at whether trials involving persons charged with terrorist offences should be public,43 and examining the right to silence and the privilege against self-incrimination for all defendants.44 Here, while there is strong evidence of accommodating the uniqueness of the terrorist challenge as articulated by states, the Court has been robust in its conclusions on the incompatibility of such measures as military trials for terrorist defendants.45 With respect to the right to silence the

58 See in England and Wales the Criminal Justice Act 2003, Pt VII.
59 Cf. C. Walker ‘Terrorism prosecution in the United Kingdom: lessons in the manipulation of criminalization and due process’ in Ni Aolán and Gross, Guantamano and Beyond (n 3) arguing that in common law jurisdictions the ‘normal’ is quite plastic and one can never be quite sure what the ‘normal’ constitutes, with obvious implications for the definition of the exceptional.
65 See also the decision of the UN Human Rights Committee Kassagh v Ireland, Communication No. 1114/2002/Rev 1, UN Doc. CCPR/C/76/D/1114/2002/Rev 1.
ECHR has highlighted the right of access to legal advice and counsel as a key element of a fair procedure where a defendant may incriminate herself by silence.66

The Guantánamo military commissions have elicited almost universal condemnation. Both the Bush and Obama administrations have been roundly criticised for, *inter alia*, authorising and enabling conduct that constitutes torture under international law; failing to criminally investigate acts of official torture; and failure to promptly and impartially prosecute senior military and civilian officials responsible for authorising, acquiescing, or consenting to acts to torture committed by their subordinates.67

Criticism has not only been international but has included the highest judicial officers in US allied states.68 Moreover recent decisions by the ECtHR address torture and the complicity of European states in US CIA led practices of rendering individuals to ‘black sites’ for sustained interrogation interlaced with alleged torture and ill-treatment. The cases shed some light on the European judicial view regarding the compatibility of military commissions with international human rights law norms. In *Al Nashiri v Poland*69 and *Husayn (Abu Zubaydah) v Poland*,70 the Court found breaches of Convention articles 3 (torture), 5 and 6 (liberty, security and fair trial), 8 (family and private life), and article 13 (right to a remedy). On this basis, Jens David Olen speculates that:

The last holding on article 6 required the Court to conclude that the petitioner’s trial before a US military commission would be unfair — which is a substantial legal determination. Unfortunately, the Court’s analysis on this point is incredibly thin, and relies mostly on the US Supreme Court’s determination in *Hamdan* that the creation of the tribunals was procedurally defective and violated Common Article 3 of the Geneva Convention, without much independent analysis.71

While international legal scrutiny is one obvious route to challenge the legality and methods of such courts, many jurisdictions resorting to modified courts doggedly encounter domestic challenge. For example, in the US, detainees held in Guantánamo Bay have made various attempts to challenge the validity and conditions of their detention as well as numerous other challenges to the operations of military commissions and the detention regime they experience. Detainees have broadly offered three basic types of challenges to the Guantánamo

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69 App. No. 28761/11, 24 July 2014. For the case facts, see Chapter 17 (Guild).
70 App. No. 7511/13, 24 July 2014. For the case facts, see Chapter 17 (Guild).
system. First, detainees who have been charged before a military commission have challenged the legitimacy of the commission trial system itself.\textsuperscript{72} Second, nearly every detainee has made a \textit{habeas corpus} petition in the federal court system through a next of kin.\textsuperscript{73} Finally, at least four detainees were American citizens: because these detainees have access to the federal court system, they have made different types of challenges. While the overall success of legal challenges to US military commissions has been very limited,\textsuperscript{74} even patchy success worked to hamper the operating political legal space of the Bush administration, forced some limited legislative and administrative reforms and kept the trials themselves to the forefront of advocacy efforts in the US. In this, the contestation over the trials functioned as a placeholder for sustained challenge to the legitimacy of the so-called ‘war on terror’ itself. Guantánamo Bay implicates two presidential administrations – one through design and implementation and the other, primarily but not exclusively,\textsuperscript{75} through cover-up and obstruction of justice. One conclusion that might be drawn from this is that the sustained support across party political affiliation and administrations to addressing terrorism, has greater and more fundamental consistency that any deep-seated discomfort with due process exceptionalism and all it entails.

Aside from the constraint exercised by international law, there may be unforeseen problems resulting from special courts and their interaction with law’s relative autonomy in a democratic setting. The rationale for special courts is partly to enable convictions in circumstances in which convictions might not have been possible in the ordinary courts. This facet alone in itself might be regarded as repugnant to the rule of law, and creating \textit{de facto} breach of constitutional or international human rights law protections. Special courts therefore tend to be caught between two imperatives. First, since the rationale for their creation is partly to maximise convictions, there are likely to be expectations in some quarters that the expected convictions will ensue, thus narrowing the scope for law’s relative autonomy. Second, because such courts may be seen to function as courts this dimension adds to their legitimacy thereby meeting a key requirement of the democratic state’s own self-definition in the battle of narrative and legitimacy that invariably accompanies exceptional trial. However, an unpredictable dimension of increased legitimacy is the judicial independence and identity that follows whereby domestic judges act to preserve some autonomy, and thus push against easier convictions.\textsuperscript{76}

\begin{itemize}
\item[72] See above, n 18.
\item[73] The first three \textit{habeas corpus} petitions were filed in early 2002 on behalf of two British citizens, two Australians, and twelve Kuwaitis. These three were consolidated and dismissed with prejudice in July 2002 by the DC District Court for lack of jurisdiction over Guantánamo Bay. The Court of Appeals affirmed and the Supreme Court granted certiorari. In June 2004, the Supreme Court ruled that because Guantánamo Bay was effectively under US control, US courts had jurisdiction to decide whether foreign nationals held at Guantánamo should be entitled to habeas relief. \textit{Rasul v Bush}, 124 S Ct 2686.
\item[74] See for example, \textit{Ali v Rumsfeld}, 649 F 3d 762, 774 (DC Cir 2011).
\item[76] A classic example of this was the ‘Supergrass’ trials in Northern Ireland that collapsed for a variety of reasons, but not least because the judges themselves ultimately drew a line at complicity in rule of law abrogation. See SC Greer, \textit{Supergasses} (Clarendon Press, Oxford, 1995).
\end{itemize}
Conclusion: Compulsion to legality or lesions on legality?

There is always paradox and tension in the resort to exceptional measures by democratic states. Diversions from the rule of law are never an entirely straightforward exercise. Specifically, in the operation of terrorism trials, one can see zones of anomie and of juridification co-existing ambiguously in the state of exception. In order to facilitate the range of modifications to enable ‘simpler’, streamlined trials, the state invariably compromises its own rule of law ordering and runs the constant risk of being caught by the inconsistencies that follow. Recognising that there can be variance in state responses to terrorism and that modifications will occur on a spectrum, the state may be forgiven for minor incursions onto liberty and due process. However, if the democratic state profoundly strays from the core of rights protections as part and parcel of the modified trial process (such as by engaging in rendition, torture, forced feeding, and even extra-judicial execution), the costs to the legitimacy, status, and political power of the state may be considerable. Exposure of the state’s transgressions is often, paradoxically, enabled by the very trials that modified due process enabled. As questions over evidence, confessions, detainee treatment, and access to legal counsel surface before and during trial the state may find that the exceptional trial creates unexpected vulnerability as the ‘secret’ state of surveillance, collusion, illegality, and profound rule of law transgression is revealed in ways that cannot be contained.  

A dialectic of sorts can be seen at work in the exceptional court. One result is that in an exceptional court there are always two trials in progress: the first of the defendant; the second of the court, (and ultimately the state itself).