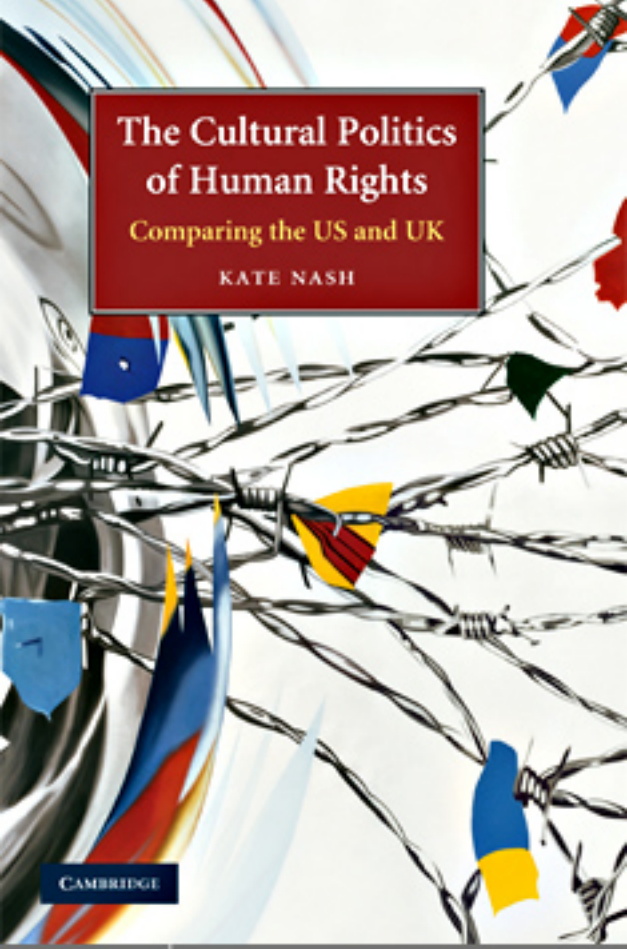

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The Cultural Politics of Human Rights

How does culture make a difference to the realisation of human rights in Western states? It is only through cultural politics that human rights may become more than abstract moral ideals, protecting human beings from state violence and advancing protection from starvation and the social destruction of poverty. Using an innovative methodology, this book maps the emergent 'intermestic' human rights field within the US and UK in order to investigate detailed case studies of the cultural politics of human rights. Kate Nash researches how the authority to define human rights is being created within states as a result of international human rights commitments. Through comparative case studies, she explores how cultural politics is affecting state transformation today.

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The Cultural Politics of Human Rights

Comparing the US and UK

KATE NASH

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Preface

On paper there is, I think, not much to find wrong with the principles of human rights as they are listed in the Universal Declaration of Human Rights: every human being should be equally respected by every other, every human being should be free in their embodied integrity from state repression, and every human being should live in socio-economic, cultural and political conditions in which they might flourish. Nevertheless, human rights have many enemies, from across the political spectrum. Far from effecting the transformation of political questions into legal technicalities, human rights are one of main points at which passionate politics are engaged around topics of belonging and exclusion, equality and difference, freedom and constraint.

Human rights inspire antagonistic political perspectives because – as we shall see in this book – they are inherently paradoxical. In this study I try to be agnostic about the value of human rights, to refuse the blackmail of considering them either as a force for good, as intuitive moral principles which should be above politics, or as a force for evil, as fatally compromised by their association with adventures which actually turn them into their opposite. I try to untangle some of the paradoxes they create to consider what difference human rights are actually making in practice. The argument I offer in this book is a kind of thought experiment based on empirical research: *if* human rights are to be realised in practice, *then* what kinds of conditions do they require, and how close are human rights activists to achieving those conditions? In order to address these questions I assess what human rights mean to different actors in the human rights field in selected, critical cases and whether and how human rights are contributing to the conditions necessary

for their own realisation, especially to the transformation of the state from 'national' to 'cosmopolitan'.

In making this argument I have had the benefit of the help of a number of people – many of whom have been especially generous in reading and commenting on this work as they have suspended their own views on the politics of human rights. A big thank you to Kirsten Campbell for advice on the legal aspects of the cases I studied as well as for many interesting discussions along the way – any mistakes are, of course, my responsibility. Also to Roberta Sassatelli for helping me think about how to structure the book to make it interesting to Sociologists studying issues of culture and cosmopolitanism, not just those already interested in human rights. If I have failed in that task, it is not for lack of good suggestions. To George Lawson for reading a number of chapters, and also the whole draft of the book, for inspiring ways of thinking outside my own discipline, and for helping out with some of the details of the resulting inter-disciplinarity. To Anne-Marie Fortier for helping me to think through some of the paradoxes of human rights in relation to nationalism, drawing on her work in the area and her detailed comments on earlier draft chapters of the analysis. To David Hansen-Miller, Cindy Weber, Anna Marie Smith, Nick Stevenson and Dora Kostakopoulou for wonderfully close readings of particular chapters – David, especially, as he heroically read more than one. Conversations with Marie Dembour, Basak Cali and Paul Stenner have also helped refine my ideas about human rights. Thank you to Alan Scott and Fran Tonkiss for making me think again about the Pinochet case in different ways. And to many people, but especially Clare Hemmings, Monica Greco, Suki Ali, Zee Nash, Chris Alhadeff, Anne Phillips and Amanda Welch just for making me think, about human rights and other things too. I organised symposiums at Goldsmiths with Nancy Fraser and Jeffrey Alexander to discuss their work during the course of writing this book and the talk on those occasions has undoubtedly made its way into the project, not only where their writings are referenced in the text. I also, with John Street, organised a workshop on Cultural Politics

with the European Consortium for Political Research in Granada, which proved very useful to thinking through some of the concepts discussed in these pages. Thank you to those who participated in the discussions that took place over that week. Thank you to Sarah Caro, John Haslam and Carrie Cheek for helpful and sensitive editing. And last but far from least, thank you to Neil Washbourne, wonderfully encouraging, enthusiastic and supportive throughout the long process of researching, thinking, writing and re-writing.

Material from Chapter 3 has previously been published in 'The Pinochet Case: Cosmopolitanism and Intermestic Human Rights', *The British Journal of Sociology* **58**/2, 2007; and from Chapter 5 in 'Global Citizenship as Showbusiness: the Cultural Politics of Make Poverty History', *Media, Culture and Society* **30**/2, 2008. Thank you to both publications for permitting me to reprint portions of these articles.

List of acronyms used in the book

International governmental organisations

EU	European Union
NATO	North Atlantic Treaty Organisation
UN	United Nations

International human rights agreements

ECHR	European Convention on Human Rights
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights

Non-governmental organisations (NGOs)

ACLU	American Civil Liberties Union
CAIR	Council for American-Islamic Relations
CCR	Center for Constitutional Rights
MPAC	Muslim Public Affairs Committee

International non-governmental organisations (INGOs)

AI	Amnesty International
EI	Earthrights International
GCAAP	Global Call to Action Against Poverty
HRF	Human Rights First
HRW	Human Rights Watch

US laws

ATCA	Alien Tort Claims Act

UK laws

ATCSA	Anti-Terrorism, Crime and Security Act 2001
HRA	UK Human Rights Act 1998
PTA	Prevention of Terrorism Act 2005

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1 What does it matter what human rights mean?

The cultural politics of human rights disrupts taken-for-granted norms of national political life. Human rights activists imagine practical deconstruction of the distinction between citizens and non-citizens through which national states have been constituted. They envisage a world order of cosmopolitan states in which the rights of all would be fully respected. How likely is it that such a form of society might be realised through their activities? Is collective responsibility for human rights currently being shaped in cultural politics? If so, how, and with what consequences? If not, how is it that the vision of human rights activists is failing to take effect given the explosion of discourse on human rights in recent years?

A focus on what human rights mean to social and political actors, and on how these meanings impact on their institutionalisation, has been missing from the study of human rights.[1] And yet it is only through cultural politics that the ideals of universal human rights may be realised in practice. What I mean by 'cultural politics' is more or less organised struggles over symbols that frame what issues, events or processes mean to social actors who are emotionally and intellectually invested in shared understandings of the world. But cultural politics is not only the contestation of symbols. Cultural politics concerns public contests over how society is imagined; how social relations are, could and should be organised. It is only through

[1] Fuyuki Kurasawa's study of what he calls the 'ethico-political labour' of human rights is an impressive theoretical advance in terms of establishing the importance of struggles over meaning to the practices of human rights (Kurasawa 2007). Ultimately, however, it is disappointing that Kurasawa does not link this labour to changes in institutions of governance and states, but confines his analysis to movements in civil society.

practices that are meaningful to people that social life is possible at all: the social institutions that constrain our lives are nothing but routinised shared understandings of what is real and what is worthwhile. Although social actors rarely, if ever, imagine a fully formulated blueprint of a new society, even during revolutionary periods, in using or contesting symbols that are meaningful to them they are nevertheless engaged, more or less consciously, either in trying to bring one about, or, just as likely, in defending what already exists.

Human rights are the object of cultural politics concerning global justice. Globalisation raises difficult questions concerning how justice must now be rethought beyond the national frame which successfully routinised shared understandings of justice as relevant only to fellow citizens. Human rights are themselves globalising as they are deployed in strategies to end human rights violations or to condemn states which resist international pressure to comply with human rights norms. In images of suffering in the global media which are framed as issues of human rights, and in responses to violations which seek to extend capacities for global governance, human rights are themselves an aspect of globalisation. However, at the same time, human rights also seem to stand above globalisation, to represent a framework through which globalisation itself might be regulated and global governance organised. The comprehensive schedule of human rights developed by the UN and in regional systems of human rights seem to offer a framework for justice beyond states, a global constitution to guide the political development of the planet. This book is concerned with whether and how globalising human rights may become established as norms of global justice through cultural politics.

Although it is now common to think of human rights as essential to just global governance, it is important to note that it is only through states that human rights can be realised. States do not just represent dangers and obstacles to the realisation of human rights, as sometimes appears to be the case in the literature on human rights violations; they are absolutely necessary for the realisation of

human rights in practice. In this respect, it is particularly important to consider how human rights are contested and defined *within* states. It is only with the collusion of state agents that human rights are violated, and only states can secure and enforce human rights within their own territories.[2] Even at the international level, human rights systems exist only by state agreement; it is states that act together in international organisations to create conditions for the realisation of human rights. States raise taxes to pay for international organisations, authorise personnel to act in them on their behalf, and maintain the military and police force that can, in principle at least, be used to enforce human rights.

States, like all other social institutions, are constituted as routinised social practices which establish that members of society 'know how to go on' in any particular situation. Language, symbolic communication organised into settled patterns of shared understandings as discourse, is the most important structuring dimension of institutions. This is equally the case in formal, bureaucratic organisations, such as those of the law and government, where face-to-face interactions are generally regulated by the tasks at hand, and by written materials that guide what is to be done, as it is in more loosely networked and informal spaces, such as those of social movements. At certain times conflicts arise about 'how to go on' in social institutions, over whether settled interpretations are fair, or accurate, or valuable. These conflicts often begin as a result of the activities of social movements, which challenge taken-for-granted understandings of routinised social life and militate for change in policy and legal documents which share in and reinforce those understandings. During periods of cultural political activity, common

[2] Although, in recent times powerful states have used a rhetoric of human rights to justify military intervention into other states, the legality of such measures is highly contentious, military intervention is never undertaken solely to secure human rights, but always primarily for reasons of security or economic advantage, and – as we have seen in Iraq and Afghanistan – it is also, unsurprisingly, ineffective (Chandler 2006; see also Cushman 2005).

interpretations are disrupted and become open to re-interpretation. Such conflicts may, where authoritative decision-makers allow it, or where they find themselves obliged to respond to contentious re-interpretations, result directly in changes in the law, or in government policy.[3]

'How to go on' in the face of contention over what are clearly stated in international law as universal human rights but which are in practice selectively applied and enforced within national states is currently highly contested. In this book I analyse precisely how cultural politics are constructing human rights in particular forms. I do so through a series of in-depth case studies comparing the US and UK. Both states have been and are currently prominent in extending human rights internationally; in both, within the national arena, the cultural politics of human rights practices is complex and hard-fought. Officials in these liberal-democratic states of long-standing clearly find it difficult, imprudent or unnecessary to adopt universal norms of human rights in practice, despite the fact that leaders of these states have been responsible for developing and promoting them in the international arena. In-depth study of the role of cultural politics is crucial to understanding their reluctance to realise human rights in practice and what it means for their future possibilities.

HUMAN RIGHTS CULTURE AND CULTURAL POLITICS

With the exception of anthropological studies, which are now moving beyond the debate over universalism and relativism in interesting

[3] I developed this understanding of cultural politics in *Contemporary Political Sociology*, where I drew on the work of post-structuralists, especially Laclau and Mouffe, and of sociologists, especially the work of Giddens on structuration theory (Nash 2000). This approach also has a good deal in common with that of American cultural sociologists, though I remain of the view that specifically in order to study social institutions we must understand culture as constitutive (rather than causal): whilst the cultural and the social may be separated analytically, symbolic meaning and social institutions are, in reality, so interrelated as to be indistinguishable. If culture is *constitutive*, it is not possible to identify an independent causal direction to its *influence* (see Alexander and Smith 2003).

ways, the importance of culture to the study of human rights has not been so much neglected as it has been routinely referred to as essential in literature on policy and politics without, however, being given rigorous attention in its own right.[4] It is above all in references to 'human rights culture' that the importance of linking inter-subjective and institutional dimensions of human rights is noted. 'Human rights culture' marks out a fairly well-established understanding that culture is crucial to fostering the realisation of human rights in practice. However, it is invariably used to provide the *answer* to the problem of how human rights might be realised. In this study, in contrast, the concept of 'human rights culture' is the occasion for *questions* concerning the kind of research that is necessary to establish how the cultural politics of human rights is actually engaged. Rather than accepting that human rights culture is the ethical answer to the question 'how can human rights ideals be realised in practice?', it is important to think about how we might study the cultural politics of human rights and their effects on social institutions.

There has been no systematic study of human rights culture. However, the term has been widely used in a diverse set of interventions in policy debates at the international and national level (Lasso 1997; UN 2004; see also www.breakthrough.tv). It has also been discussed by theorists of human rights from different disciplinary backgrounds (Rorty 1993; Klug 2000; Parekh 2000; Mertus 2004, 2005). 'Human rights culture' finds political and theoretical support because it marks the importance of inter-subjective understandings of human rights to their realisation, which are otherwise overlooked in policy debates and in academic studies of human rights. The common theme of the diverse uses of 'human rights culture' is that in order to be successful human rights must win hearts and minds. Mertus puts it well (drawing on the anthropologist Renato Rosaldo's

[4] Anthropological work on the meanings of human rights has been an inspiration for this project, especially for the way in which anthropologists treat human rights *as* culture (Wilson 1999; Cowan *et al.* 2001; Merry 2006).

definition of culture): human rights will only be established once human rights are one of the 'forms through which people live their lives' (2005: 212). Helena Kennedy, in the foreword to Klug's *Values for a Godless Age*, describes human rights culture as involving, 'not just aspirational principles, but a practical code for existence' which should not be left to lawyers, 'a new erudite priesthood, taking the life out of the debates' (Kennedy 2000: xiii).

Though 'human rights culture' is used in many different ways, across all its uses there is a kernel of agreement. What is needed to establish human rights is a shift in public sentiments: every single person must simply be respected and treated as an individual human being with entitlements, regardless of their gender, racial, ethnic or religious background. It should become unthinkable and intolerable that anyone should ever act against human rights, whether at home or abroad. Ignoring human rights must become ethically and emotionally repellent if human rights ideals are to become reality. Only then is there any real possibility of establishing and maintaining institutions that uphold human rights norms.

The concept of 'human rights culture' raises two main problems for investigation in this study. Firstly, supplying an *answer* to the problem of how human rights are to be realised, it tends to suggest an essentialist understanding of culture as a 'way of life' (even where there is the explicit attempt to break with this conception of culture (see Mertus 2004: 212)). Advocates of human rights culture must emphasise the stability and coherence of shared values, understanding and emotional commitments to human rights – even if this is more a future aspiration than a present reality. It is the stability and coherence implied by 'culture' that is precisely the value of human rights culture when it provides an answer to the question, 'can human rights be realised?'. However, there is general agreement amongst cultural theorists that culture is not stable, coherent or enduring in the way that advocates of human rights culture must assume (Cowan *et al.* 2001; Ortener 2006).

Secondly, the concept of 'human rights culture' does not enable the investigation of precisely *how* culture effects change. In particular, it has not been developed to engage with the question of precisely how it is that state officials, who are ultimately responsible for institutionalising and enforcing human rights, might be motivated to put human rights into practice. The answer that 'human rights culture' provides to the question of how human rights are realised seems to assume either that judges and politicians who make effective decisions concerning the realisation of human rights act as a result of cultural norms that are shared by the whole society; or that they act because of public pressure, itself shaped by shared cultural norms that are developed in civil society, the realm of sentiment and ethical values, which may then influence cold-hearted or anxiety-driven judgements of state officials.

In order to investigate the importance of culture to realising human rights ideals, I propose to replace the idea of 'human rights culture' with that of the 'cultural politics of human rights'. It is vital to preserve the insight of advocates of human rights culture that culture *does* make a difference to human rights. My approach is intended to expand and extend that understanding whilst avoiding reliance on a discredited essentialist definition of culture. 'Politics' could be used to sum up the principal theoretical difference between essentialist understandings of culture as a settled way of life and contemporary understandings of culture as inherently ambiguous, contested and structured by power. Cultural theorists have shown how power, and therefore politics, is inherent in all practices of symbolisation through which meaning is communicated. Culture structures institutional positions of authority which validate particular perspectives, creating hierarchies of subordination and obscuring or excluding recognition of differences and inequalities. It is not that there is no consensual stability to culture. To a large extent culture involves the reproduction of traditions, habits, perceptions and understandings. But culture is also inherently fluid and

dynamic, a continually moving and 'changing same' (Gilroy 1993: 101). Constructed in relations of power, culture is always open to political challenge and contestation, whilst at the same time, caught in the inertia of repetition, it is resistant to intentional invention.

From the perspective of contemporary cultural theory, human rights are not just *supported* by culture: human rights *are* cultural. There is nothing meaningful in social life that is outside culture: human rights are cultural insofar as they are meaningful. Furthermore, there is also, then, no absolute distinction between practices of state and civil society: culture is not a distinct arena of society; it does not just involve the media, for example, or education, or religion. Culture, as Jeffrey Alexander puts it, 'is not a thing but a dimension, not an object to be studied as a dependent variable but a thread that runs through, one that can be teased out of, every conceivable social form' (Alexander 2003: 7). In so far as representations of human rights formed in civil society are influential on state practices, this is possible because human rights are meaningful on both sides of the analytic and socially sustained distinction between civil society and the state. What links officially sanctioned state practices and public pressure from civil society is cultural politics.

It is, of course, important to maintain an understanding of the specificity of different institutional practices, including those that are legal or governmental: different spheres of social life are created and sustained by different reflexive practices, including ceremonial rituals, formal and informal codes maintaining the distinctiveness of institutional settings, bodies of regulation that are specific to particular activities and so on. I develop the theoretical importance of these distinctions for the study of human rights in Chapter 2. Moreover, it is not that there is no value in distinguishing between state and civil society. Indeed, I will make use of just such a distinction in this book. But it is important to understand that human rights are not simply adminstered through state procedures, as if they always already existed as clear and distinct aims. As they are enumerated in international human rights agreements, the Universal

Declaration of Human Rights (UDHR), the International Convention on Civil and Political Rights (ICCPR) and the International Convention on Economic, Social and Cultural Rights (ICESCR), and so on, the meanings of human rights are relatively clear, even if their abstract formulations in these agreements allows a good deal of latitude for interpretation. These meanings are not, however, fixed; human rights are defined and redefined as policies are created and administered, legal claims dealt with and so on – both inside and outside state procedures.

FROM THE NATIONAL TO THE COSMOPOLITAN STATE?

Human rights can only be enforced by states. The case studies in this book focus on cultural politics of human rights *within* states as the most important spur to the formal realisation of human rights, at least in the advanced capitalist liberal-democracies with which I am concerned. But human rights are not, of course, solely, or even mainly the business of national states; in fact, it has been much more common to think of human rights as international. Human rights were initially developed in the international arena through diplomatic negotiations which led to the signing of treaties and conventions between states – most notably the UDHR and subsequent conventions derived from it (which we will explore more fully in the following chapter). In recent times, moreover, the networks of intergovernmental and non-governmental actors engaged in trying to bring about human rights in practice has become so significant within and across states that it has become common to refer to human rights as globalising (Brysk 2002; Coicaud *et al.* 2003; Mahoney 2007).

What does it mean to think of human rights as globalising? In one sense, of course, human rights are necessarily global insofar as, universal in form, they involve principles of justice for all human beings. It is with respect to their potential for institutional effectiveness, however, that human rights are increasingly considered to be globalising: the vast majority of states have committed themselves to

precise and detailed international human rights agreements; and, as a result of human rights activism, interpretations of international law may deepen that commitment and at the same time extend it to include even those states that have not formally bound themselves to such agreements. In this respect, we might say that, because human rights are becoming increasingly institutionalised across the world, they now have the potential, historically unprecedented, to become effectively (as opposed to, or as well as, formally) global. For the first time in history human rights may become genuinely effective norms of global justice.

The potential of human rights to become effective norms of global justice can only be realised through state transformation. Although human rights are globalising, the national context is especially significant to the realisation of human rights. In fact it could be that it is *because* human rights are increasingly global that they have become so much more significant within states historically constituted as national. Compared to the international arena, predominantly a sphere of activity for elites, the national arena is much more populist: issues are addressed to 'the people' as democratically entitled citizens as well as to elites. What is important in the cultural politics of human rights – as we shall see very clearly in the chapters of analysis in this book – is how the global and national are entangled in human rights practices. There is (almost) a global human rights regime and state elites are under pressure from above and below to bring policies and practices into conformity with the principles of that regime. What human rights actually mean in practice, however, depends to a large extent on the cultural politics of human rights in the national context.

In order to clarify how the cultural politics of human rights may be contributing to the realisation of global human rights through state transformation, it is useful to make a working distinction between ideal-types of 'national' and 'cosmopolitan' states. Theorists of state transformation now generally take the view that states are not dissolving and nor are they becoming irrelevant in the face of

processes of globalisation. States are rather adapting in order to manage flows of ideas, goods, services and people across their borders, becoming increasingly integrated into international networks that link them together in dense assemblages of shared norms and procedures connecting processes, insititutions and actors. Saskia Sassen analyses such processes of state transformation as 'denationalization'. For example, in specific cases, she says, the work of 'national legislatures and judiciaries' is now caught up in processes of globalisation which 're-orient particular components of institutions and specific practices . . . towards global logics and away from historically shaped national logics' (Sassen 2006: 2). Similarly, Anne-Marie Slaughter argues that states are now disaggregating across borders, as government regulators, judges and legislators network with their counterparts from other states and from supranational institutions like the EU, in order to share information, harmonise regulation and develop ways of enforcing international law (Slaughter 2004; see also Held 1995).

Where, like Sassen, theorists focus on political economy, they are generally critical of state transformation as it is currently being shaped by the de-regulation and re-regulation of national economies that leave workers unable to exercise much, if any, control over multinational corporations and flows of capital (see also Tonkiss 2007: Chapter 3). A focus on human rights, however, gives rather a different emphasis to the study of contemporary state transformation. The cosmopolitan state is a necessary condition of the full realisation of human rights as they are enumerated in international human rights agreements. This is *not* because human rights are inherently neo-liberal. On the contrary, as we shall see in Chapter 5, international human rights agreements actually encode a political order that much more closely resembles global social democracy than neo-liberalism. Moreover, how human rights are realised in practice, the kinds of social forms that are actually enabled by the cultural politics of human rights, is precisely the focus of this study.

The ideal of the national state as the basis of the global order is conventionally dated to the Treaty of Westphalia of 1648, but this is controversial.[5] As Craig Calhoun, for example, argues, nation-states hardly existed at this time, even in Europe; and certainly empires thrived for 300 years after the Treaty (Krasner 1999: 20; Calhoun 2007: 14; Lawson 2008). What we can say with a reasonable degree of historical accuracy is that the national state was hegemonic from the end of the Second World War, which saw the dismantling of formal European empires, until the end of the Cold War. As a political ideal, the national state was immensely significant during this time for anti-imperialist nationalist movements and minority nations who sought liberation from the majorities with whom they shared a state. In the case of established national states in North America and Western Europe, the ideal of the national state functioned more typically as a frame within which political activities were carried out and claims for justice were made. The national state also functioned in academic research, and to some extent also politically, as an ideal-type, a heuristic device against which to assess actually existing states. The ideal-type of the national state involves three main features:

1. Sovereignty – a state is to be free from interference by other states in its policy-making and law enforcement to enable justice as self-determination of the people;
2. For self-determination to be effective, states must have sole jurisdiction over what takes place within their own national territory, where jurisdiction concerns the 'power of the state to affect people, property and circumstances' (Shaw 2003: 574);

[5] Charles Tilly has suggested distinguishing 'nation-states', 'whose people share a strong linguistic or symbolic identity' from 'national states', which attempt to integrate large populations and territories, who do not necessarily share common cultural norms in the same way (quoted in Calhoun 2007: 56–7). Although 'nation-state' is the more common term, as states have generally *made* nations out of a diversity of groups sharing different languages and customs rather than being *found* by pre-existing nations I prefer 'national state'.

3. The political community is the people who make up the nation and, ultimately, they must consent to public policy made in their name – if not through elections, then by not rising up against the government or the state.

In the second half of the twentieth century, the national state was clearly staked out as a political ideal for persecuted and disenfranchised nations, as the taken-for-granted frame of political activities, and as the norm to which actually existing states everywhere should conform or against which their approximations might be assessed and criticised.

In comparison, since the end of the Cold War changes in state structures are evident along all three dimensions of this ideal-type as states become embedded in extended networks of global governance. The possibility that human rights may become effective norms of global justice depends on the direction and extent of these changes. Can the cosmopolitan state now displace the national state to become the ideal, the frame and the norm for political life in the twenty-first century? Drawing on research on changes that are judged to be currently taking place in state formation, and also on the work of political theorists on the progressive potential of those changes, the ideal-type of the cosmopolitan state may be characterised by the following features:

1. State sovereignty is transformed in international institutions of co-operative global governance and this is necessary to meet the policy problems increasingly thrown up by globalisation (Held 1995; Slaughter 2004; Beck 2006; Sassen 2006).
2. The legitimacy of policy actors depends upon the extent to which they conform to norms of international human rights and humanitarian law developed through international state co-operation (Soysal 1994; Jacobson 1996; Crawford and Marks 1998; Beetham 2000; Held 2002).
3. The legitimacy of public policy depends on the appropriateness of the scale at which it is made – from global to local – which in turn depends on the scale of the relevant policy problem and accountability to different political communities according to an 'all affected' rule (Held 1995; Gould 2004; Fraser 2005).

If globalising human rights are to realise their potential to become effective norms of global justice, the cosmopolitan state that puts international human rights agreements into practice must become, like national state before it, the ideal of the persecuted, the taken-for-granted frame of 'normal' political life, and the benchmark against which actually existing states are assessed. At the same time, however, the creation of human rights obligations in law and policy is absolutely necessary to the transformation of national into cosmopolitan states. The realisation of human rights and the formation of cosmopolitan states are mutually dependent, two sides of the same fundamental changes that are necessary to achieve a framework for global justice through human rights.

As we shall see in the following chapters, the cosmopolitan state is an ideal for human rights activists, even if they do not explicitly articulate it as a political goal in the way that nationalist movements invariably aimed (and in some cases still aim) to secure a national state. What part does this ideal play in the cultural political of human rights? Is a clash of ideals perhaps avoided as the cosmopolitan state is built incrementally and relatively unnoticed as an effect of particular legal judgements and government policies within the national state? Or is it rather that the national state remains dominant as the taken-for-granted frame within which 'normal' political life takes place, relatively unaffected by norms of human rights to which no more than diplomatic lip service is paid in international arenas? If so, what effect does this dominance of the national state have on human rights in practice?

The very real possibility that human rights may now play a role in state transformation arises because of their hybrid status as *intermestic*; they are both international and domestic at the same time (see Steinhardt 1999; Rosenau 2003). In conventional legal scholarship, human rights are conceived of as a matter for *either* international *or* national law. However, the reality of human rights practices is now much more complex. The intermestic status of human rights is nowhere more in evidence than the way in which

international law, especially customary international law, is used in *national* courts – as we shall see in Chapter 3. In national courts, decisions that draw on customary international law confirm and extend its status *as* law whilst binding the national state to its observance in the particular case in question. Human rights are not just international: they are not solely the concern of international governmental organisations like the UN or the Council of Europe; nor are they only of value in international courts, like the European Court of Human Rights. Human rights are not transnational either; they are not simply ideas that *cross* national borders. Human rights are intermestic: legal claims to human rights which draw on international law in national courts disrupt and sometimes re-configure jurisdictional borders between the international and the domestic *from within states*.

What is at stake in the cultural politics of intermestic human rights is how conflicts over justice might be re-framed in cosmopolitan rather than national terms. In 'Reframing Justice' Nancy Fraser has analysed how arguments about justice, which until recently concerned only relations among fellow citizens within national states around the established topics of political representation, distribution and, more recently, recognition, are now exploding into debates over the very framework within which justice as such must be considered (Fraser 2005; see also Fraser 2007, 2008).[6] Conflicts over justice, Fraser suggests, always involve first-order questions about the substance of inequalities: representation, redistribution or recognition. But they also now involve second-order, meta-level conflicts over the frames of justice:

[6] Fraser's use of 'frames' involves two dimensions. Firstly, frames are schemas of interpretation that appear obvious, but which allow social actors to attribute relevance to events and persons in ways that are appropriate to their situations. A frame allows people to 'locate, perceive, identify, and label a seemingly infinite number of concrete occurences defined in its terms' (Goffman 1986: 21). Secondly, frames literally exclude some events, persons and processes, whilst including others as significant (see also Snow *et al.* 1986; Snow and Benford 1988).

1. 'What' is at stake in conflicts over justice – distribution of resources, recognition of cultural differences or political representation?
2. 'Who' counts as a subject of justice – now that it is no longer obvious that it is only citizens who count, whose interests and needs deserve consideration?
3. 'How' should conflicts over justice be decided – by what procedures, using which criteria, at what sites and by whom?

Struggles over definitions of intermestic human rights are amongst conflicts over justice that explode the previously taken-for-granted frame of justice as concerning citizens within the national state. In doing so, they potentially open up meta-questions along all three dimensions that Fraser has identified as relevant to issues of global justice. Are we living in a period in which definitions of human rights are being progressively expanded? If not, how is it that human rights, which appear to derive their legitimacy from international consensus on their content and form, are altered, and narrowed, as they become matters of concrete conflict within particular states?

What are human rights?

In conflicts over intermestic human rights the very content of claims for global justice is at stake. International human rights agreements are comprehensive, taking in all the concerns Fraser identifies as crucial to conflicts over justice: they potentially establish a framework for the re-distribution of global wealth; for the recognition of cultural difference within and across states; and for the securing of political rights to democratic participation. In this study we will particularly focus on conflicts over human rights concerning fundamental civil rights to individual freedom. These are very well-established as core human rights in international agreements to which European and North America states subscribe, which leaders of the US and UK were involved in creating, and which they continue to advocate. If *these* human rights are not validated and secured as a result of the cultural politics of intermestic human rights, it is

extremely unlikely that any more extensive definitions of human rights will be possible in the US and UK. Nevertheless, in order to explore a range of questions concerning the 'what' of human rights in the intermestic human rights field in these states, in Chapter 5 we will also look at concrete possibilities of defining global justice in terms of social and economic rights. Social and economic rights are also quite well established in international human rights law though they are more disputed than civil and political rights at the international level.

Who is the subject of human rights?

International human rights agreements are very clear, as we shall see: the subject of human rights agreements is any individual human being in the world; distinctions between citizens and non-citizens with respect to fundamental human rights are not permitted in international law. However, in states historically founded on the distinction between citizens and non-citizens, interpretations of human rights commitments which apparently abolish that distinction in particular cases are highly contested. Again, how are international norms altered in intermestic cultural politics, by whom, and with what authority?

How are conflicts over human rights to be decided?

Conflicts over 'how' definitions of what human rights are to be decided are also highly contested in the cultural politics of human rights. In Chapter 2 we will consider how these conflicts are structured in the intermestic human rights field. They invariably result as challenges to activists' claims that human rights are already clearly established as law in international agreements.

It is through the cultural politics of intermestic human rights that the tensions inherent in the transformation from national to cosmopolitan state may – in principle – be worked out. The ideals of the national and cosmopolitan state are not necessarily contradictory.

Indeed, over 200 years ago, at the beginning of modern state formation in Europe, Immanuel Kant suggested that national states could be transformed into cosmopolitan states, of a kind. Kant proposed that, as a result of the exercise of public reason, states should bind themselves to peaceful co-operation with other states through international law, and cultivate the exercise of hospitality towards individual strangers (Kant 1991). Kant's model of the relations between republics with a 'cosmopolitan intent' is of discrete, sovereign states. Aside from this difference, however, his formulation is not so far from the optimistic solution for ameliorating the tension between the national and the cosmopolitan state that has been proposed much more recently by David Held: 'The principles of individual democratic states and societies could come to coincide with those of cosmopolitan democratic law . . . and democratic citizenship could take on, in principle, a truly universal status' (Held 1995: 232–3).

In her comparative work on post-national citizenship in Europe, Yasemin Soysal has effectively argued that long-term residents of European states who are not citizens and who have won social entitlements by appealing to international human rights agreements have altered national states in a cosmopolitan direction (Soysal 1994; see also Benhabib 2004; Sassen 2006). David Jacobson has made a similar analysis of post-national citizenship in the US in relation to illegal immigrants (Jacobson 1996). Soysal and Jacobson argue that long-term residents in Europe and the US who are not citizens have achieved post-national citizenship status for themselves and their families, thus blurring the sharp legal distinction between citizens and non-citizens within states along some dimensions – notably access to education, healthcare and employment. The status of refugees and asylum-seekers who have rights in the societies in which they are resident *only* as a result of the international human rights agreements is another example of a shift towards post-national citizenship, though they generally have access to minimal entitlements (the right to remain incarcerated, for example, rather than being deported, in the case of many asylum-seekers) compared

to those of long-term 'denizens'. In some respects, then, it is clear that the absolute distinction between citizens and non-citizens is being called into question in practice as a result of uses of human rights within states. However, as Soysal herself argues, as it is states historically constituted on an absolute distinction between national citizens and non-citizens which administer international human rights agreements, progress towards a more flexible citizenship is complex and highly uncertain (Soysal 1994: 156–62; Soysal 2001). There have been changes in the practices of human rights since Hannah Arendt famously argued that human rights are actually enjoyed only by citizens of the most prosperous states, and that, as the end of the First World War indicated, the world finds 'nothing sacred in the abstract nakedness of being human' (Arendt 1968: 299). However, these changes are partial, paradoxical and in principle, and sometimes in practice, reversible (Castles and Davidson 2001). Progress in human rights can not be assumed – *especially* given the fact that the cosmopolitan project, including that of the realisation of human rights, has for so long been associated with the progress of history itself in Western thought.

What human rights actually *mean* in practice matters because it can not be *assumed* that increased activity around human rights, including their expansion in international law, necessarily results in a progressive movement from national to cosmopolitan states. In this study I focus on case studies in which, unlike those studied by Soysal and Jacobson, the distinction between citizens and non-citizens is in sharp relief in the cultural politics of intermestic human rights. These cases are not matters of routine administration concerning long-term residents within states. They are rather high-profile legal and/or media cases concerning a range of different 'non-citizens'. Such cases, I suggest, enable us to study precisely how the realisation of human rights, which would undoubtedly result in transformation from a national to a cosmpolitan state if it were a simple matter of 'applying' international law, are being contested in ways which make that outcome rather less than certain in reality.

COMPARING THE US AND UK

Because this book makes detailed, in-depth analysis of the cultural politics of intermestic human rights in the national context it is only possible to focus on a limited range of case studies. Nevertheless, appropriate comparison across at least two national contexts is necessary if it is to be possible to generalise the findings in any significant way. The US and UK make for a good comparison of the cultural politics of intermestic human rights because they share a number of similarities in terms of intermestic human rights cases. Cross-national comparison is facilitated by the fact that the US and UK are relatively similar along a number of dimensions that are important to human rights. Because of these similarities, the differences between two states are all the more striking.

Domestically, the US and UK have quite similar legal and political systems; they developed historically from the same roots and have continued to influence each other. They share, for example, a legal system based on common law – in contrast to continental Europe, even if the UK has, famously, no written constitution. Internationally, both the US and UK have been global leaders in human rights, and their politicians continue to present themselves as such. The US and UK took the lead in setting up the UN human rights system after the Second World War, and the US remains by far the largest contributor to the UN, even if it sometimes takes this role reluctantly. More recently – and notoriously – the leaders of both countries, key actors in the UN Security Council and allies in NATO, have used the vocabulary of human rights to justify military intervention, claiming to be acting in the name of the rule of law and of democracy in Afghanistan and Iraq. There has also been, and there continues to be, a good deal of exchange between the two countries, both in terms of the diplomatic and military 'special relationship' that is fostered by state elites, and also in terms of popular culture.

In terms of existing conditions for the cultural politics of human rights, however, the US and UK are rather different. In the first place, the US is the sole remaining global superpower (for the

time being). It is embedded in global governance in that it is involved in all the most powerful international networks, but it is far richer and stronger in military and economic terms than any other state with which it shares these networks. This gives it a very particular role. In contrast, the UK, whilst similarly embedded in networks of global governance, is obviously far smaller and less powerful than the US as a state. Moreover, there is another very significant difference of scale between the US and UK with respect to human rights: the UK is networked into the only really effective international human rights system in the world, that of the Council of Europe and the European Union. The regional US equivalent, the Inter-American system of human rights, is practically without influence in US affairs (Moravcsik 1994: 54–5).

The US has long been a world leader in human rights.[7] At the same time, however, the US has also gained the reputation of being an 'outlier' in human rights. This reputation has undoubtedly been exacerbated by the 'global war on terror', but it has a much longer history. The US is an outlier in human rights because of the way in which US state officials resist binding domestic and foreign policy through international human rights agreements, which it nevertheless promotes for others, rather than because it is among the world's worst violators of human rights.[8] As contributors to Michael

[7] In fact, world leadership in terms of human rights dates back to the American Declaration of Independence, which framed the American state as a 'carrier' of liberal democratic norms for humanity before the French Revolution and the Declaration of the Rights of Man to which the origin of human rights is more usually traced (Calhoun 2007: 131; see Woodiwiss 2005 for an alternative account).

[8] This is not to say, of course, that the US has not been involved in human rights violations: as W. E. B du Bois argued in 1947, racial discrimination in the US may very well be understood as involving violations of human rights (Mazower 2004: 395); it is well-known that the US has been indirectly implicated in human rights violations, by supporting regimes that US elites know to be involved in torture and genocide (such as Pinochet in Chile in 1970s and Suharto in Indonesia in the 1980s); and there is also evidence to suggest that the US has been directly involved in such activities, especially through the CIA in Latin America (Chomsky *et al.* 1999). Nevertheless, the US is still by no means the world's worst state for human rights violations.

Ignatieff's collection *American Exceptionalism and Human Rights* show, there is a deep-rooted suspicion of international conventions of human rights in US political culture, accompanied by the belief that the US has a special destiny with respect to the discovery and legitimacy of fundamental rights elaborated by its own courts and institutions (Ignatieff 2005; Kahn 2005; Steiker 2005). US exceptionalism with regard to human rights is more than simply a matter of unilateralism, however, because the US is both a leader *and* an outlier in human rights. The International Convention on Civil and Political Rights (ICCPR) is perhaps the most famous example of US resistance to the human rights standards it recommends for others. The US was closely implicated in drawing up the ICCPR, which largely reflects an American understanding of civil and political rights. However, when the US finally ratified the ICCPR in 1992, almost twenty years after it came into force, it did so only with a reservation that allowed capital punishment, even for juveniles, though 'right to life' is the key provision of the Convention, and Article 6 (5) prohibits the imposition of the death penalty 'for crimes committed by persons below eighteen years of age' (Roth 2000).

The UK also has a mixed reputation in relation to international human rights, which has not been improved by the 'global war on terror' in which it has played the part of the US's closest ally. Nevertheless, as a member of the Council of Europe, the UK is unambiguously situated within the European system of human rights. This system – set up by the Council of Europe after the Second World War – was part of the revolutionary changes in the legal relationship between states and individuals of that period, allowing petitions by individuals against states, as well as by states against other states (Dembour 2006). It enjoys a high level of prestige and its rulings receive a good deal of publicity within member states. In 1998, the European Convention on Human Rights was finally incorporated into UK national law as the Human Rights Act (HRA). The cultural politics of human rights have been especially lively leading up to and since the HRA in the UK, with wide-ranging debate amongst

lawyers, politicians and journalists over how human rights should be understood and enacted legally, morally and politically. It need only be noted here that the same government that has cultivated the 'special relationship' between the UK and the US in the global war on terror was also the government that passed the Human Rights Act.

US exceptionalism with regard to human rights is well-established. This exceptionalism is, however, strongly contested in the cultural politics of intermestic human rights 'from below', within the US. Indeed, I take it that because of its status and power in the international arena it is *only* 'from below' that resistance to human rights on the part of US elites could possibly be shifted at all. In the UK, the liveliness of the cultural politics of human rights in the last few years could result in fundamental state transformation. The UK could become more 'European', tending towards realising and extending global human rights norms in practice. It could, on the other hand, become more 'American', tending towards extending global human rights norms only as long as they have no real effect on domestic or foreign policy. As the following chapters indicate, the fact of being in Europe may not be enough to ensure that it is the 'European' path that is taken.

OUTLINE OF THE BOOK

In Chapter 2, I develop a methodology for the study of cultural politics of intermestic human rights using the concept of 'human rights field'. Cultural politics does not concern free-floating symbolic representations: it takes place in, is affected by and in turn affects the institutions that are constraining of social life. Social institutions are invariably hierarchical, but cultural politics does not necessarily only concern the furtherance of personal power and self-interest. Justifications in the professional settings with which we are concerned here also concern ideals which can, on occasion, be effective because they are persuasive to others within those settings, because they are made by actors with the authority to make effective decisions, or because they are accepted by others who are similarly oriented

towards those ideals. The concept of 'field' enables the study of the cultural politics of intermestic human rights in a variety of settings that are crucial to defining and institutionalising human rights.

In the following chapter, then, I map out in some detail the four domains of the human rights field: juridical, governmental, activist and the mediated public. Law is especially important to human rights. In fact, the study of law and legalisation remains dominant in research on human rights, which is still largely undertaken by legal scholars. In the legal approach, human rights are seen as synonymous with human rights law. Such an understanding is obviously to be avoided, and finding out precisely how human rights are constructed as meaningful across different interrelated institutional settings is precisely the aim of this study. Nevertheless, it is important to note that the most vigorous cultural politics of human rights are very often centred on courts. This is reflected in the case studies chosen for this book, which take seriously legal claims to human rights and the counter-claims of governmental officials and their lawyers, which are also, though not exclusively, couched in legal terms, as a principal means through which human rights are being contested. It is because, as a matter of empirical fact, courts are one of the principal sites through which human rights are being extended that we must study how human rights are contested in law. The other principal site for the contestation of human rights is the media, though this, in contrast, is rarely studied by those researching human rights. In the media, meanings of human rights are often contested in terms other than those of human rights law or official governmental rhetoric. Translated from their legal meanings into popular political ideals, in the mediated public understandings of human rights are far more likely to privilege citizenship than they are to deconstruct it, and this has important implications for the success of human rights claims-making elsewhere.

This map of the human rights field enables exploration of how sites of contestation, which have previously been coded as national, may be transformed by human rights. How human rights are

contested in courts and the media at any particular moment is influenced by professional justifications formed in relation to those settings. Where officials in the judiciary and government exercise state authority, these justifications put limits on what human rights effectively mean in practice, what they can and can not do. Studying cultural political engagements in the intermestic human rights field enables an understanding of how international human rights norms are brought into the national context, what is at stake for different actors in the field, and how human rights become meaningful in very particular ways, which are often rather different from those for which they were developed in institutions of global governance.

Chapters 3, 4 and 5 each take parallel case studies in order to compare the cultural politics of intermestic human rights in the US and UK. These case studies of intermestic human rights in the national setting involve the interpenetration of national and international along *at least one* of the following dimensions: human rights claims are made on behalf of non-citizens who may or may not be resident in the state in which they are made; they are made by organisations supported by transnational advocacy networks; they are addressed to national state elites (in courts or in the government), but they draw on international (as well as domestic) law. Each of the case studies in these chapters concerns the cultural politics of intermestic human rights in relation to state transformation in order to assess the real likelihood of a shift from national to cosmopolitan.

Chapter 3 is an analysis of how state sovereignty is affected by the cultural politics of intermestic human rights. Is state sovereignty being transformed in human rights practices? If so, how? In particular, the chapter examines sovereign decisions to suspend normal law in the name of national security. Both the US and UK have adopted security measures in the 'war against terror' that violate human rights by arbitrarily detaining terrorist suspects who are non-citizens. International human rights law requires that the distinction between citizens and non-citizens should be abolished with respect to fundamental human rights. National states, on the other hand, are

supposed to exist for their citizens, not for humanity. Whilst national states exist to protect citizens' rights, cosmopolitan states are supposed also to provide equal protection for the rights of every individual human being.

Analysing the cultural politics of intermestic human rights in the US and UK around these sovereign decisions, what is most interesting is that in both states challenges to the violations of universal human rights resulting from 'exceptional' security measures were made predominantly in terms of national pride. In the US it might be supposed that this was because there is very little scope for legal challenges to human rights violations in international law within the US state, and to some extent this is the case. However, in the UK, both in courts and in the mediated public, technical *legal* understandings of European human rights law became entangled with sentiments of national pride, expressed by supporters of universal human rights as well as their opponents. Unexpectedly, in these cases universal human rights were defined by their defenders as linked to a properly functioning *national* state, not in terms of cosmopolitan ideals.

In Chapter 4, having identified the importance of national pride to the contestation of human rights in Chapter 3, we continue to explore the complex entanglements of cosmopolitan ideals, nationalism and human rights. Here, in contrast to the cases studied in the previous chapter, we examine the cultural politics of cases that are celebrated by the human rights movement as advancing the realisation of human rights as effective norms of global justice. The analysis particularly concerns how human rights activists and innovators in the judiciary try to effectively imagine a political community beyond the nation in order to realise human rights in practice. In doing so they are attempting to create a cosmopolitan state even if they do not explicitly name it as an ideal, focussing rather on the practical cases in question. In the US activists use the Alien Tort Claims Act (ATCA), which enables cases to be brought against foreign agents for human rights violations committed against

non-American citizens in the national courts. These cases are immensely significant in the US context; drawing on customary international law in national courts, they are effectively the only way to introduce intermestic human rights into US political life. In comparison I investigate the cultural politics of the Pinochet case in the UK, in which lawyers similarly drew on customary international law in national courts, and which has been seen by many as a turning point in the progress of cosmopolitan law.

Around ATCA and Pinochet activists and human rights supporters were engaged in imagining a community beyond the nation, trying to mobilise sympathy in the US and UK for the civil rights of human beings in countries far away, and to gain support for action to realise human rights in practice. Using ground-breaking legal cases they attempted to create excitement and sympathy for human rights, to foster a global political community from within the state which would recognise obligations to realise international human rights encoded in international human rights law. We investigate the terms of this imagined global community, how and where it was justified, and how it was in competition with the visions of more conservative, or simply more cautious, actors in the human rights field. These actors responded in two main ways to the challenge: they either defended the national community along conventional lines, albeit with an emphasis on its place in the international community of states; or they re-imagined the national community in a new, and potentially rather dangerous form, that of cosmopolitan nationalism. What appears to be developing around the contestation of globalising human rights, then, in response to the model of global citizenship proposed by human rights activists and supporters, are varieties of nationalism which are either against or, at the very least, indifferent to the deconstruction of the distinction between citizens and non-citizens in practice, or which are for its deconstruction but in a politically strategic way that is at odds with the spirit of the universalism of human rights as such. The very definition of international law itself, how it is to be interpreted and practised in the

national context, and therefore the possibility of state transformation from national to cosmopolitan, depends on how conflicts between these visions of political community are resolved.

Finally, in Chapter 5, we consider an attempt to construct solidarity through cultural politics. If it is difficult to imagine a community of global citizens, how much more difficult is it to imagine global citizens experiencing solidarity? Solidarity is a vital aspect of national citizenship: national states have enjoyed unrivalled success in organising solidarity as an expectation that material risks and resources should be shared amongst citizens. It is also a vital aspect of any possibility of global citizenship to be realised through cosmopolitan states. As an absolute minimum, global citizenship requires a restructuring of Northern states to allow fairer policies of trade and the re-distribution of wealth between North and South. In this chapter we will explore the prospects of constructing cosmopolitan solidarity beyond the nation in popular campaigns against global poverty: Make Poverty History in the UK and ONE in the US. These campaigns involved activists in powerful states using the media to put pressure on state officials to change international policies that create poverty in other states. However, although there is detailed international human rights law covering the global distribution of economic resources, one of the notable features of these human rights cases, as opposed to those that took place in courts, is that they failed to get recognition as concerning human rights at all within the national settings of the US and UK. While the ultimate failure of these campaigns in terms of ending or even ameliorating global poverty is not attributable to the fact that they were not couched in terms of universal human rights, it is notable that they both failed to engage the structures of global governance in terms of human rights, and they also failed to transform those structures in a way that would alter the conditions of wealth distribution between North and South. Although very successful in mobilising popular support, these campaigns against global poverty have had no effect at all on state transformation.

Processes of globalisation call into question the frame of national justice that has linked states and national political communities. This is problematic when it leads to decreasing popular control over the state procedures through which justice is defined and put into practice. If calling the frame of national justice into question is to be productive rather than simply destructive of democratic gains over the long history of struggles for justice in the name of the nation, questions concerning what justice involves and how it is to be achieved must be extended to include the interests and values of human beings who are not fellow citizens, and who may not even be resident within the same state. There is no doubt that this is a very tall order. Human rights activists are trying to bring it about by piecemeal reform of the state through creative uses of human rights in different campaigns, and especially by bringing test cases in national courts. The success of this project depends on the reform of existing structures of states that have been formed as national, and on the authoritative decision-making of officials empowered to make definitions of human rights that have practical force. It depends on cultural politics.

2 Analysing the intermestic human rights field

Considering human rights in terms of a 'field' enables analysis of precisely how intermestic human rights are contested and defined and with what effects for global justice in practice. It enables the exploration of conflicts over what human rights are and should be, who has which entitlements, and how these conflicts are to be settled within and across relevant institutional settings. Legitimate conflicts in the human rights field are ended temporarily, if not finally resolved, through authoritative definitions that decide the limits and scope of how they are to be administered. As the result of these contestations is often regulation, policy or law, this understanding of the 'human rights field' links micro-social interactions to macro-institutional structures, conflicts over particular human rights cases to fundamental changes in state formation.

AUTHORITY AS POWER: THE INTERMESTIC HUMAN RIGHTS FIELD

Following Bourdieu, a field is a set of regularised social interactions in which the *value* of what is at stake is shared, and there is competition to gain status, power or material gain between actors properly designated as participants in relation to each other. These actors occupy objective positions in structures of power, with varying amounts of capital (economic, cultural, social) whose possession enables access to the specific profits that are at stake (Bourdieu 1977, 1991, 1992). What we are concerned with in this study, however, unlike Bourdieu, is not the outcome of conflict for the stratification of professionals involved in these conflicts, but the construction of *authority*, the ability to speak effectively, to define human rights in ways that impact on state formation. Effective speech is

performative: it involves a particular kind of utterance in which words are also *acts* that alter reality to fit the declaration. The classic example, from the work of John Austin, is the promise; using the words 'I promise' sincerely is at the same time a statement and also the action of making a promise (Bourdieu 1991: 73–4). Effective speech takes different forms in different institutional settings. We will explore this point further in the section that follows on justifications. What is important here is that it is authority, the ability to make effective speech, which is the shared value, the stake of conflicts in the human rights field. It is not that actors in the human rights field share a belief in the value of human rights, or agree on what human rights mean, how they are defined legally, morally or politically. On the contrary, what participants agree on is that being able to decide *what it is that human rights mean* in practice is valuable for all of those involved. Of course, this authority is not definitive; in the human rights field, an authoritative definition of human rights rarely ends conflicts altogether. But the institutionalisation of an authoritative definition, whether in law, policy or in the mediated public, alters the terrain on which those conflicts take place, making it easier or more difficult to assert authority in other ways in the future.[1]

[1] An alternative body of social theory on which I might have drawn for this study is Foucault's work on authority (see Nash 2000: 19–30). I see Bourdieu's concept of 'field' as more useful here mainly because Foucault's critical analysis of power and domination is strongly oriented against any settled form of institutionalised regulation. Anarchism is the only ethical form of politics from a Foucauldian perspective. Foucault's own pronouncements on human rights confirm rather than qualify this conclusion (see Foucault 2000; and Chouliaraki 2006 for an alternative interpretation). In contrast, although I agree with Alexander (1995) that Bourdieu's social theory is similarly deficient in failing to distinguish democratic from authoritarian forms of states, I think the concept of 'field', supplemented with other methdological tools (see pp. 58–70), does allow for an analysis of how symbolic politics constructs authority which is agnostic about the legitimacy of that authority. Obviously, unless we rule out from the very beginning the possibility that realising human rights through state regulation may be desirable, such agnosticism is methodologically necessary.

The intermestic human rights field is made up of four domains: the sub-fields of the juridical, the governmental, the activist and the mediated public. Competition is engaged in distinctive ways within each domain for the authority to decide what human rights mean in practice. Competition is also engaged – often at the same time and in the same strategies – *across* different domains of the field. The most prominent sites for this competition are the media and courts. It is not that these are neutral arenas in which competition is staged. As I will discuss below, journalists and editors have their own stake in competitions over the authority to define human rights that take place in the mediated public, whilst in courts it is clearly the language of the legal profession that is dominant. Nevertheless, other actors in the human rights field have to engage in cultural politics in the media and in courts if they are to win authority over definitions of human rights. In this sense, the juridical, governmental and activist sub-fields converge in courts and in the mediated public.

The juridical sub-field

The juridical sub-field is the site of competition for monopoly over the power to determine law. According to Bourdieu the most important positions in the juridical field are theoreticians of doctrine on the one hand and practitioners on the other (Bourdieu 1987; see also Madsen and Dezalay 2002 for a more complex Bourdieuian analysis of law). In the intermestic human rights field, at least in the Anglo-American context with which we are concerned in this study, competition in the juridical sub-field is, however, most likely to be engaged between judges with different dispositions towards interpreting the law, and between lawyers representing human rights organisations on the one hand, and lawyers representing government on the other.

Law, like any other cultural practice, requires the interpretation of meanings. Like other cultural practices, it is primarily symbolic. The law requires interpretation and decision; it is not

simply a body of texts that transparently leads practioners to a single rational outcome. To a greater or lesser extent in different cases, judges' decisions are underdetermined by legal doctrine (Fish 1994). Judges can legitimately disagree with each other's interpretations of the law even when, sitting together in the same courts or as cases proceed through the judicial system to higher courts, they hear exactly the same case. In this respect the law is different from other cultural practices which involve the re-iteration of meanings *only* insofar as the decisions that judges make are ultimately backed up by the force of the state.

For the sake of simplicity, we can speak of 'legal' and 'extra-legal' cultural politics in the juridical sub-field. Legal cultural politics here concern interpretations of legal doctrine. In the common law system the symbolic codes that are contested are the written texts of legal statute, and the precedents established by previous judgements that have decided what those statutes meant in a particular case. In any legal system, judges in the highest courts of appeal are appointed to have the final authority to determine what the law demands by virtue of their office. It is only when the law changes, or where there are fundamental disagreements about what the law means at the highest levels of the legal system, that those decisions may be revisited.

Extra-legal cultural politics in the juridical sub-field concern the way in which judges and lawyers seek to educate, influence and even to lead the public concerning what human rights mean and should mean *aside* from making legal judgements. For example, judges often accompany their legal summing up of cases with pronouncements on the general principles underlying their decisions, which concern how social life should be organised. Or they may use colourful metaphors or turns of phrase to make a point more vividly than legal language allows. Such declarations and pithy summing up of principles are much more likely to be widely quoted and commented upon in the mediated public than are the legal technicalities of the case. In human rights cases they invariably concern

fundamental issues of definition concerning what, for whom and how human rights are, and should be, relevant, extrapolating from the particularities of the case in question.

Making human rights law

Human rights law is expanding. As it expands, new elements are introduced into the juridical sub-field, creating even greater indeterminacy in legal decision-making: scope for very different opinions concerning how human rights should be interpreted, which body of law is most appropriate to decide human rights cases, and even, on occasion, whether a particular case involves law at all. Because human rights are in the process of *becoming law* in court judgements as well as through legislation at both international and national levels, the stakes of these conflicts are particularly high: a judicial decision which denies that human rights apply, or which recognises only a very narrow definition of human rights, is a serious setback to the project of establishing human rights law, and therefore to the possibilities of realising human rights in practice.

The study of human rights has generally operated with a strict division between international and domestic law. However, intermestic human rights complicate the strategies and decisions of lawyers and judges around this division. Firstly, because human rights are increasingly legalised in ways which make the doctrinal international/domestic distinction upon which lawyers and judges have traditionally relied more complex. It is not that bodies of law have become doctrinally less distinct or discrete. It is rather that in intermestic human rights cases there is a proliferation of possibilities concerning which kinds of law could be applied in practice. State borders no longer mark an opposition between national and international law. Secondly, legal strategies and distinctions become more complex because the status of the human rights law *as law* is sometimes ambiguous or even in dispute for legal experts themselves.

Human rights law is made in three main ways. The first and least controversial is by multilateral conventions which are

signed and then ratified by participating states. The most important international human rights conventions are the ICCPR and the ICESCR, both of which are derived from the UDHR, but there is in addition now a host of conventions which specify more limited aims: the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and so on. In addition to the UN system of human rights which has been set up by these agreements, there are also regional systems, by far the most effective of which is the European. Member states of the Council of Europe have agreed to abide by the ECHR, and to make their national legislation conform to the decisions of the European Court of Human Rights in cases of dispute. Conventions are the least controversial way to make international human rights law, though the extent to which they are then binding on states is not always obvious. For some states, signing a convention involves 'automatic incorporation' into national law; international human rights agreements then become national law for those states and can be heard in national courts. For others, however, the convention must be enacted through the usual legislative methods separately from the signing of the treaty, and states do not always do this. In these cases, it applies to the state in question only as insofar as state officials adopt the application of international law within their states; it does not apply as domestic law (see Steiner and Alston 2000: 1000; Cassese 2001: Chapter 8). However, mechanisms for the enforcement of international law in the UN system are practically non-existent, consisting largely of 'naming and shaming' countries who are not making clearly documented efforts to comply with conventions in reports from UN officials and committees. (International Tribunals and the International Criminal Court do not hear human rights cases; they are set up to hear prosecutions of war crimes, which are related, but not the same.) Even the European Court of Human Rights can not force states to comply with its rulings.

The second main way in which human rights law is made is as customary international law. Customary international law is defined as established state practice, which states understand to be followed

'from a sense of legal obligation' (Steiner and Alston 2000: 70). The sources used to evidence customary international law include such a diverse array as 'newspaper reports of actions taken by states, and from statements made by government spokesmen [sic] to Parliament, to the press, at international conferences . . . from a state's laws and judicial decisions' and from multilateral treaties (Steiner and Alston 2000: 73). They also include judicial decisions and the teachings of highly qualified legal experts, and the resolutions and declarations of international governmental organisations like the General Assembly of the UN (Charlesworth and Chinkin 2000). It is not easy to establish the precise rules of customary international law, and lawyers must draw on these sources in order to do so. It is therefore unsurprising that court cases using customary international law generate acute conflicts in the human rights field about what such law might include or not include, and indeed, over whether it should be considered law at all (see, for example, pp. 121–2).

Clearly, then, international law is different from national law. Law is by definition predictable, equally applicable to all within its jurisdiction and, above all, backed by sanctions. While national law may not always exhibit these qualities fully (transgressors are not always punished, for example), international law is so far from realising them that it is often referred to as a mixture of 'soft' and 'hard' law. We can think of 'hard' and 'soft' law on a continuum, where the hardest law details very precisely what rules apply, specifying very clearly their content and also the degree to which they are obligatory; the hardest law also delegates interpretation and implementation of those rules to a court (Abbott and Snidal 2001). The continuum of international law *may* be shifting from soft towards hard legalisation. Claims for human rights which use customary international law, for example, and which are accepted by judges as involving sound legal reasoning, legitimate, clarify and extend its value *as law* through rigorous legal procedures. International human rights law may be considered as a kind of global constitution of human rights, to be applied across the world. It is, however, a constitution that is

currently in formation, which is highly contested, and which may never function effectively as such.

Finally, human rights become law when they are adopted by states as a national constitution (or, as in the case of the UK Human Rights Act, a kind of quasi-constitution). The adoption of a constitution based on human rights is not always directly connected to signing or ratifying international conventions. In many cases it has been a response to changing political conditions, to national liberation from colonialism or the end of the Cold War, for example. Since the UDHR, however, the form of constitutions that have been adopted have been very much influenced by international human rights agreements (Boli 1987). By the same token, international human rights conventions have themselves been modelled on national constitutions. The form of the ICCPR, for example, resembles that of the US – though it also codifies important differences, as we shall see. Human rights agreements which are adopted as constitutional law are the most secure in legal terms, as 'hard' as national law itself; though they are, of course, still very much open to different interpretations.

We see, then, from this very brief sketch, how human rights law involves the interpenetration of international and national bodies of law in practice, even if they continue to be treated as doctrinally discrete. Lawyers and judges in national courts, with which we are concerned in this study, may refer to the intentions of international actors, to legal doctrine and precedent concerning human rights that has been decided in international courts, or even in other nations. We will be exploring the effects of interpenetration of international and national law in practice, and the conflicts it produces, more fully in the chapters of analysis that follow. Perhaps the sharpest conflicts arise where lawyers draw on customary international law, the most controversial type of international law, in national courts. We consider examples of such conflicts in detail in Chapter 4, in cases brought using customary international law in the US under the Alien Tort Claims Act, and in the Pinochet case in the UK. Conflicts over intermestic rights also arise, however, in human rights cases in national courts of the member

states of the Council of Europe, where judges in courts of appeal must try to avoid decisions that conflict with the ECHR and with the case law of the European Court of Human Rights. In order to do so they make their arguments drawing on European human rights law as well as on domestic legal precedent. The case of the Belmarsh detainees, which we will consider in Chapter 3, involves just such interpenetration of national and international law.

From international to cosmopolitan law

Legal conflicts in the intermestic human rights field are engaged between traditionalists and innovators when innovators bring intermestic human rights cases into national courts. The conflicts are played out in the juridical sub-field, but they engage with wider conflicts over the authority to define human rights between government, human rights organisations and the media. Indeed, lawyers in these cases are generally employed by human rights organisations or by governments to take up their perspective in these legal conflicts. Such conflicts concern the very form that intermestic human rights should take, and sometimes even whether they are appropriately codified in law at all.

Traditionally international law concerned only international relations between states. It has not been concerned with jurisdiction over states' domestic treatment of individuals. In principle this paradigm was complicated after the Second World War, as liberal internationalism challenged the conception of justice on which classic state sovereignty was based. These changes to international law are sometimes known as the 'Nuremberg principles' because they were initially developed in the Nuremberg trials that followed the Second World War. Two major changes in international law came together in the legal aftermath of this war. Firstly, individuals became criminally accountable for violations of the laws of war ('just obeying orders' was no longer a legitimate defence for anyone, however lowly their position in the military or state hierarchy). Secondly, principles of human rights began to be developed, which

prescribed limits to a government's conduct towards its own citizens, to apply in times of peace and war (Ratner and Abrams 2001: 4; see also Held 1995: 101–2).

This second principle was carried forward and extended with the UDHR, beginning international human rights law in the UN human rights system. According to the logic of the UDHR and subsequent international human rights law based on it, though this logic is only now being worked out in practice, individuals have human rights, and also the responsibility to uphold human rights, *regardless of citizenship status or residency*. As Article 2 of the UDHR has it:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

However, with the partial exception of the European system of human rights, the balance of powers until the end of the Cold War meant that international law effectively maintained classic state sovereignty, being overwhelmingly concerned with keeping the peace between states (Held 2002).

Since the end of the Cold War, however, there have been the beginnings of what is sometimes called cosmopolitan law. In contrast to international law, and in conformity with the 'Nuremberg principles', cosmopolitan law reaches inside states, piercing nominal state sovereignty and enforcing claims against human rights violators (see Held 2002; Hirsh 2003). Cosmopolitan law requires states to pursue and prosecute those accused of acting in ways that violate human rights, not only regardless of the national citizenship of the victim or of his/her place of residence, but even regardless of where the violations took place. The practice of cosmopolitan law is most

evident in international tribunals. In national courts too, however, with which we are concerned in this study, human rights lawyers are also working to create interpretations of existing law in order to further cosmopolitan law. According to Article 8 of the UDHR: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating . . . fundamental rights.' Although initially, when the Universal Declaration was made, states tended to interpret human rights obligations as applying only to individuals subject to their own jurisdiction, increasingly, where effective remedies are not possible in the domestic courts in which the plaintiffs are citizens, other states are finding themselves obliged in principle to make legal remedies for human rights violations possible. Juridical innovators in the human rights field try to realise the human right to legal redress on the principle of securing universal norms where fundamental human rights have been violated. They bring intermestic human rights cases in order to create the opportunity for cultural politics, both internally and externally to the legal system, in order to extend cosmopolitan law.

The governmental sub-field

The governmental sub-field involves competition between state officials for power to access and deploy the state's monopoly over legitimate violence: the crude physical forces of the police and the military, and the more indirect forces of economic power, achieved through taxation and regulation. It is difficult to be clear about the precise parameters of the governmental sub-field, as, unlike the juridical sub-field which is focussed on courts as the places where, ultimately, the law is decided, conflicts in the governmental sub-field are not focussed on outcomes in a particular institutional setting. Indeed, it is notable that, although actors in the governmental sub-field of democratic states are ostensibly there to represent 'the people', and this is the general principle that legitimates their authority in a democratic state, conflicts over human rights rarely reach the Legislature. The governmental sub-field is engaged

wherever there are struggles involving government officials, whose objective positions give them the possibility of making effective decisions, whether in their own states or in international governmental organisations. Officials in the governmental sub-field engage in the cultural politics of human rights as the President or the Prime Minister, the Secretary for Defence, the Foreign Secretary and so on, or as political and legal advisors to those who occupy these official roles.

It may seem odd to talk about '*cultural* politics' when we are considering the governmental sub-field, since its business is apparently nothing *but* politics. Competition in this field involves explicit, and unashamed, struggles over power, even if the actors involved invariably clothe those struggles in ideals. However, cultural politics is just as important in the governmental sub-field as it is elsewhere. The word 'politics' has many different meanings. In liberal-democracies it is most commonly associated with the party politics that takes place in formal democratic institutions. 'Cultural politics', on the other hand, concerning more or less organised struggles over what issues, events or processes mean to interested parties, and what these meanings make possible or impossible, is fundamental to all forms of social organisation, including the organisation and conduct of party politics. It is this more fundamental understanding of politics, as the struggle over what human rights mean, with which we are concerned here.

Cultural politics in the governmental sub-field concerns power over two main dimensions of governmental action concerning definitions of human rights. Firstly it involves the power to settle disputes over what form conventions of human rights are to take in discussions in international governmental organisations, and how and when they might be signed or ratified. Even states which have historically taken the lead in human rights, and which generally have the greatest influence over their form in the UN system, have not signed all the most important conventions. And when they do so, it is often on condition that they have been able to make reservations

against certain Articles which effectively alter the form or the scope of the convention. For example, as noted in Chapter 1, the US signed and ratified the ICCPR with a reservation against Article 6(5), which prohibited the imposition of the death penalty for crimes committed by persons below eighteen years of age in order to be able to continue to execute juvenile offenders (see p. 22). A notorious example of a reservation the UK made against a human rights convention, which similarly negated a main purpose of that convention, was to the UN Convention on the Rights of the Child (CRC): it stated that in matters of immigration control, the UK would not be bound by the convention and would, in effect, accept no responsibility for upholding childrens' human rights.

Secondly, disputes in the governmental sub-field involve the authority to decide how far government policy should conform to or ignore human rights law. Of course, we know that many actions taken by government officials which deviate from human rights law do not result in overt or systematic conflict. Actors in the governmental sub-field often gain possibilities for action by *avoiding* conflict over human rights, by simply evading or obscuring their human rights responsibilities. Numerous examples have been discovered, principally by activists and journalists, of discussions 'behind closed doors' amongst government officials and their trusted supporters, which have led directly to human rights violations. Such secrecy is generally defended as necessary by the Executive where national security or foreign policy issues are concerned. The most notorious example in recent years was the discovery of 'the torture memos', initially uncovered by journalists and eventually obtained in their entirety through the actions of the American Civil Liberties Union. They are a series of memos, solicited by President Bush from government lawyers, giving him advice on what American interrogators may do to prisoners in the 'war on terror' without breaching the Convention Against Torture to which the US is a signatory, and on whether the prisoners in Guantanamo Bay are covered by the Geneva Conventions. According to the vast majority of human rights

lawyers, the advice the President was given was wilfully inaccurate, and could only have been given because it was what the officials involved wanted to hear. As long as discussions were under the Executive's control, any, relatively minor, disputes which took place over these memos took place in secrecy, amongst officials of the Bush Administration, without the opportunity for other actors in the human rights field to participate (see Greenberg and Dratel 2005; Campbell 2007). They did not, however, remain secret for long.

In complete contrast, disputes between government officials or with others in the human rights field are sharpest if cultural political struggle comes into the courts. In such cases, government officials are often engaged directly in legal disputes, participating in their official capacities as respondents in cases brought by those with human rights claims against them. We will look at such a case in detail in Chapter 3, which concerns disputes between officials of the Bush Administration and the advocacy groups that took them to court over the arbitrary detention of detainees in Guantanamo Bay, and at the arguments of advocacy groups and the UK government in court concerning the Belmarsh detainees.

In addition, government officials may intervene in court cases in which they are not directly involved as litigants to try to influence decisions as 'friends of the court'. In important cases in appellate courts, 'friends of the court', or 'amici curiae', who are not parties to the case, are generally permitted to submit information to try to influence the court to take into account broader outcomes of the decision. Whilst 'friends of the court' often submit arguments based on legal texts and reasoning they fear may be overlooked by the court, they may also submit any information they feel is relevant. In the case studies researched here, for example, a friend of the court brief was submitted to a US Court of Appeal on behalf of the Bush Administration in *Doe* v. *Unocal*, the ATCA case we will be investigating in Chapter 4 (Brief for the United States of America as Amicus Curiae in *Doe* v. *Unocal*). There, in addition to presenting legal arguments, the Administration also put forward political reasons

why the Executive should be free to pursue foreign policy and to ensure the security of the American people, arguing that it was being compromised by the arguments of human rights advocacy groups. Another example is that of the friend of the court brief submitted by UK parliamentarians in *Rasul* v. *Bush*, a case brought on behalf of Guantanamo detainees of British nationality but which presented arguments in general terms for fundamental human rights not to be imprisoned without a fair trial (Brief of 175 Members of both Houses of the Parliament of the United Kingdom of Great Britain and N. Ireland as Amici Curaie in Support of Petitioners in *Rasul* v. *Bush*).

There are also struggles over human rights law which do not involve the courts, do not take place in secrecy, and which take place entirely within the governmental sub-field. This happens where human rights law is taken seriously as guiding domestic public policy, and human rights are discussed and voted on in the Legislature. The instruments of international human rights law take the form of universal, abstract principles; very few Articles in international human rights agreements are absolutely prescriptive. Richard Bellamy notes that those that are listed in the ECHR and other human rights treaties in the form 'no one shall be' are absolute and unconditional. Many, however, are listed as 'everyone (or everyone in a certain category) shall be entitled to . . .', and these are subject to such limitations and conditions 'as are prescribed by law and are necessary, in a democratic society, in the interests of public safety, the protection of public order, health or morals, or for the protection of the rights and freedoms of others'. In some cases, conditions also include the protection of national security, the economic well-being of the country, and the prevention of crime and disorder (Bellamy 1999: 171). How domestic public policy is to be made in conformity with international human rights law therefore leaves a good deal of latitude for political disagreements and compromises concerning those interpretations.

Cultural politics in the governmental sub-field may be structured by the ritualised, and often ideologically inflected, antagonism

of mainstream institutionalised political parties – the Democratic and Republican parties in the US, the Labour, Conservative and Liberal Democrat parties in the UK. However, there is often cross-party consensus on the fundamental issues that are raised by human rights. As we shall see, in debates over security and human rights, for example, or over state sovereignty, politicians generally judge the political stakes to be too high to allow for party politics.

In all cases, whether or not the usual mechanisms for party politics are available or not, whether struggles over human rights take place in the Legislature, in courts, or behind closed doors, actors in the governmental sub-field invariably *also* engage in struggles *outside* these settings, with each other and with others in the human rights field, in order to gain the authority to act. They make political speeches, lobby colleagues, attempt to influence the gatekeepers of the media, and through them the wider public, so that their interpretation of human rights will prevail. In these ways they engage in struggle to be able to use the authority of the official positions they occupy to confirm their preferred definitions of human rights. In this respect, whilst the possibility of achieving effective power in the governmental sub-field depends to a large extent on the objective positions that officials occupy there, it also depends on cultural politics that take place in the wider human rights field as well.

The activist sub-field

The sub-field of human rights activism differs from the juridical and governmental sub-fields in that it is located outside state structures. Authority in the sub-field of human rights activism is not exercised from official positions, as in the juridical or the governmental sub-field. Human rights organisations rather aim to achieve *indirect authority* when, by their extensive and up-to-date knowledge of human rights law, or their accumulated experience with international governmental organisations and with state actors at the international and domestic level, they are able to convince actors who do occupy positions of authority to speak effectively *following*

activist interpretations of human rights. Human rights organisations exercise authority indirectly when they have been able to convince judges and politicians to resolve conflicts by adopting their understanding of how human rights should be put into practice.

Human rights organisations are seen as the main actors propelling the progressive realisation of human rights in the research on how human rights norms are expanding. According to the findings of those who work in this area, they achieve their aims by establishing transnational advocacy networks which influence the ideas, emotions, and therefore, eventually, the identities and practices, of state elites (Keck and Sikkink 1998; Risse *et al*. 1999). The constructivist premises of transnational network analysis are consistent with those of this study: human rights organisations contribute to the realisation of human rights by successfully contesting what human rights mean in a given situation, thereby achieving influence over the particular definitions of human rights that are put into practice. Moreover, theorists of transnational advocacy networks have accumulated some evidence for what they call the 'spiral model', which outlines a series of stages through which human rights organisations influence states to implement international human rights norms (Risse *et al*. 1999). However, as the name of the model itself suggests, this analysis tends towards rather a mechanistic view of change. According to the 'spiral model', recalcitrant members of state elites are 'socialised' into accepting international human rights norms by international society. The most common way the spiral begins is when domestic human rights organisations bypass their own repressive states and search out international allies – INGOs, international governmental organisations, and/or 'great powers' – by means of which pressure can be brought to bear on state elites from above and below. According to the 'spiral model', progress is made through a series of stages, and may fail at any point: states elites move from repression of dissent, through denial of human rights absuses, to tactical concessions and acceptance of the validity of international norms, until, eventually,

their behaviour is altered to comply with international human rights norms.

The theoretical model of the human rights field is preferable to that of the rather mechanistic 'spiral model' because the latter downplays how competition over the authority to determine human rights is *intrinsic* to human rights practices. Firstly, the theory of human rights field, unlike the 'spiral model' is open-ended, and does not specify a single, progressive, direction of change. Although theorists of transnational advocacy networks provide empirical evidence to support the 'spiral model' in the cases studied, it is far from clear that states which reach its highest stage will *always* act in accordance with international human rights norms. As we have noted, practices of human rights are *necessarily* subject to interpretation. It is true that there are gross violations which clearly transgress *any* interpretation of human rights norms, and it is with ending such violations by repressive states that theorists of transnational advocacy networks have been concerned. However, as we shall see in detail in Chapter 3, for example, Western states – which the model supposes are the leaders of international society in terms of expanding global human rights – do not have an 'all or nothing' approach to the adoption of international human rights norms. The arbitrary detentions in Guantanamo Bay, now in their seventh year, are challenged by human rights organisations as gross violations of human rights on the part of a state which prides itself on its exemplary status for the world as a human rights leader. Similarly, fundamental human rights have been violated in the UK in policies adopted in the name of national security. In focussing exclusively on how what they call 'repressive states' are transformed, theorists of transnational advocacy networks have not considered what happens in states that largely respect human rights when elites are tempted by what they perceive as new threats to their security. Then the contestation of what human rights might mean, which is intrinsic to human rights practices, and competition for the authority to determine what they *do* mean, becomes absolutely crucial.

Secondly, use of the theory of the human rights field enables the study of competition *between* state officials in the different sub-fields of the government and judiciary. Empirical analyses using the 'spiral model' consider the crucial roles that individuals in state elites often play in the successful institutionalisation of human rights: considering the evidence for such influences on their behaviour as fear for their reputation, moral conscience and so on. In this respect, these empirical analyses using the 'spiral model' do not treat the state as a black box. However, theoretically, the 'spiral model' itself does not direct attention towards the systematic and endemic conflicts between governmental and juridical officials over human rights, which are formative of the human rights field as such, and of definitions of human rights in practice.

My interest in this study is in how human rights organisations intervene in competitions over authority in the other sub-fields of the human rights field. I am, therefore, concerned with a more limited set of activities than those analysed by theorists of transnational activist networks, with struggles that take place in the human rights field *within states*. The narrower focus enables a detailed analysis of the cultural politics of these struggles in the particular case studies chosen; and also of what is at stake for human rights and for state transformations in terms of pressure from below. I take it, however, that the methodology could be extended to study the international human rights field.

Human rights organisations are especially active in the juridical sub-field. There are both human rights organisations which specialise in the domestic arena (Liberty, for example, in the UK, and Human Rights First in the US), and those that are international (of which Amnesty International and Human Rights Watch are the best known). In the juridical sub-field they are able to claim indirect authority over human rights because of their their national or international prestige and the thorough knowledge and experience of human rights law they bring to bear. As well as actively bringing human rights cases, the advice of human rights organisations is

sometimes also directly solicited by lawyers representing victims of human rights cases. In addition, they also invariably submit 'friend of the court' briefs in important cases in which they do not appear as litigants. Taking a wider perspective and with more expertise and experience than many of those involved in these cases puts them in a good position to exercise indirect authority relative to other actors in the human rights field once human rights cases come to court.

In the governmental sub-field, human rights organisations try to exercise indirect authority through government officals. They do so using a variety of means: through consultation documents that are requested by the government, for example; by producing independent reports on government policy to create conflicts between actors in the governmental sub-field that will open up debate and might enable them to influence its outcome; or by directly contesting existing policy in particular cases. In addition, international human rights organisations may also contribute to the monitoring procedures of international governmental organisations, in order to bring pressure to bear on governmental officials who are embedded in the extended networks of global governance.

Finally, human rights activists also try to exercise indirect authority in the intermestic human rights field through the media. In the first place they do so in order to make issues visible; to demonstrate that human rights violations are taking place that are of public concern. Then, using moral, as well as legal and political arguments, human rights organisations try to influence public opinion and to bring pressure to bear on juridical and governmental officials not to ignore or to continue to perpetuate those violations. In other words, human rights organisations use the media to create overt conflict in governmental and juridical spheres, or to intervene in conflicts that are already public in order to try to influence their outcome.

The mediated public

It is unusual to consider the media in relation to human rights (see Apodaca 2007). In some respects this is surprising: the media is

obviously very important as a symbolic space for the struggle over human rights. This is immediately evident if we consider how actors in the human rights field strategise in relation to the media. Human rights organisations and political parties do so openly, employing professional press officers to enable them to create stories, present contributions to debates and 'spin' issues. All actors in the human rights field are, however, to some extent oriented towards the media. Even judges can not help but be aware of the impression they are making in the media. In the Pinochet case, for example – admittedly extreme in terms of the media attention it received – the Law Lords' decision was broadcast live on television for the first time, the judges' photographs and short biographies were published in newspapers, and there was intensive and extensive speculation in the papers and on television and radio, especially throughout the first year Pinochet was imprisoned in Britain, about whether they would send him to Spain for trial, or back to Chile to be freed.

In another respect, however, it is unsurprising that the importance of the media is under-theorised with respect to human rights: the media is now so hugely complex and pervasive, and its effects are so far-reaching, that it has become virtually indistinguishable from the social as such. Indeed, as Nick Couldry has shown, the media itself promotes its own centrality, paradoxically disappearing from the scenes it represents as if to reveal them as unmediated (Couldry 2000, 2003a). In addition, although it appears to be obvious that the media *does* have important social and political effects, precisely what they are has proved extremely difficult to pin down.

In this study I conceive of the media as an important space of symbolic struggle within the intermestic human rights field in which what is at stake is *influence* over other sub-fields, especially those of the state. News media – television, radio, newspapers, and increasingly the Internet – bring human rights issues into what John Thompson calls 'mediated publicness', the only kind of public life and public debate possible in complex societies (Thompson 1995). In the mediated public, human rights are contested and definitions of

what human rights are or should be are introduced and consolidated, or emerge and then disappear, or are quite simply rendered invisible and therefore irrelevant. Although it would seem to be more consistent with the theoretical framework proposed so far to consider the media as a sub-field of journalistic practices, such an understanding is too narrow for my purposes here (Couldry 2003b; Benson and Neveu 2005). It is more useful to think of the media as forming a 'mediated public' because, as a space for the cultural politics of human rights, it provides a kind of 'meta-field' in which struggles for human rights are played out and in which all the actors in the human rights field are engaged. It is, however, much less than a 'meta-field' in that the actors who compete there understand that media practictioners themselves are involved in the struggle over the authority to effectively define human rights in practice. The mediated public is not democratic: conversations take place in the media amongst those whose voices are represented there, and they are represented in very particular ways. The concept of the 'mediated public' captures both dimensions well – the commonality of the symbolic space provided by the media, as well as the way in which journalistic practices structure media debates and frames issues and events within it. In addition, because of its link to Habermas's historically informed, but ultimately idealist, theory of the public sphere, the concept of the mediated public also directs us to pay attention to the influence of struggles in the media over authoritative definitions of human rights by state officials.

The mediated public is not the only symbolic space in which the cultural politics of human rights takes place between all the key actors involved in the human rights field. Courts have a similar, if more rigidly structured, function. The mediated public is, however, absolutely crucial in complex, large-scale modern societies. Most people do not themselves encounter or make claims for human rights, and no one has direct access to all the institutional places where human rights are discussed or decided face-to-face. The media is therefore an important source of information and understandings

about human rights for everyone. It is obviously the most important source for those who are not professionally or personally engaged in the human rights field, the 'general public'. But it is also an important source of knowledge about how others understand human rights for those professionals involved in competitions for authority in the human rights field whose expertise and up-to-date knowledge is limited to one of its sub-fields.

The most obvious way in which media make issues of human rights public is literally by making them visible. The mediated publicness of different perspectives and of the actors who are engaged in promoting them is unequally distributed and of different value to different groups. In the case of human rights (as for other topics in which the state is implicated), the media routinely turn to actors in the governmental and juridical field in order to report on issues, frequently quoting them directly and offering analyses which treat them as authoritative in this area. In this way, by translating professional usages of the vocabulary of human rights into terms that are more easily and willingly grasped by readers and viewers, they reinforce the status quo. On the other hand, where issues have been raised by advocacy groups, or where their specialist knowledge and experience makes them especially valuable to journalists, human rights activists gain the opportunity to appear in public debate, and potentially to influence it, that is disproportionate to the power and influence otherwise wielded by 'ordinary people' in civil society, even when they have organised to bring about change (Thompson 1995: 247–9). By determining which perspectives on human rights are made visible, which 'voices' are heard, and which are given credibility, journalists and editors set agendas and frame human rights issues in ways that may influence the outcome of struggles over human rights.

The symbolic space the media provide for cultural politics of human rights is not, of course, simply there, blank and neutral, ready to be filled with the intentions of media practioners concerning human rights. Nor does the media simply relay messages to an

already constituted public, existing in reality somewhere waiting for communication. The space of the media is itself structured. News media bring publics into existence by the way in which they frame news: 'we' find ourselves addressed by the way themes and topics are offered for our understanding and emotional response. In order to do so the media rely on general conventions of newsworthiness: which people and events are most interesting to their readers, listeners and viewers. In general terms – though the details may shift historically according to journalists' judgements – newsworthy events are those, for example, which concern powerful nations, and political elites or celebrities, which are anticipated and desired, and which promise disaster (Negrine 1989). To get our attention (and increase sales of media products or advertising), journalists and editors working in news media select and interpret from the uses of human rights elsewhere, and organise them into stories and staged rhetorical battles which they expect, on the basis of their expertise and experience in using those conventions, to inform, entertain, or merely distract us for a moment (Silverstone 1999). In this way, popular news media may create drama, emotion and interest out of (otherwise dry, abstract and boring) human rights issues, potentially constituting a public that might find human rights relevant, possibly even important.

However, a public is not simply the same as an audience. Following Daniel Dayan's definition, a public involves relative sociability and stability over time, commitment to internal debate, self-presentation in relation to other publics, a shared worldview, the possibility of translating desires and tastes into demands, and a reflexive awareness of the criteria establishing who belongs (Dayan 2001; see also Livingstone 2005). A public may overlap with an audience for a particular media output, or it may be formed across different audiences who nevertheless understand themselves to be sharing in debates which are addressed to elites who have effective authority and who are to be held accountable for their decisions by that public. News media constitute such a public where there is a consistency within the range of stories that are reported, within

what is considered news, and also within the range of how they are reported across the media; and where there is the attempt to represent the interests and views, however imperfectly, of the public to elites.

The possibility that journalists may make human rights important in the mediated public gives those who create the news media a stake in competitions for authority in the human rights field. Like the other non-state actors with which we are concerned in this study, human rights activists, editors and journalists engage in cultural political struggles that *may* influence effective interpretations of human rights on the part of government officials and judges, so realising those interpretations in practice. Unlike human rights activists, influencing the state is only a secondary aim of media practitioners: the first aim is undoubtedly to create audiences. Nevertheless, traditionally in liberal-democracies the media has formed itself as 'the Fourth Estate': the watchdog for the people over state activities, and the forum within which public criticisms of the state are rehearsed. Thus, the media protects, represents and advocates the people's interests in relation to the state (see Keane 1991). Regardless of the individual intentions of a particular journalist or editor – and there are many who believe in it still (see Kovach and Rosentiel 2001) – this representation of the media as 'the Fourth Estate' gives a particular inflection to journalists' factual reporting as well as to journalists' arguments (in newspaper editorials, for example) which overtly argue in favour of or against government policies. On the one hand the media is there to educate and inform the public and to provide a platform for public debate. On the other hand, media practioners are bound, by the very form of news media itself, historically constructed as 'the voice of the people', to represent their unbiassed factual reporting as well as their arguments *as if* they were the peoples' protectors and advocates.

Conceptually the influence of the media is different in its effects from the authority of state officials, and also from the indirect authority of human rights activists, which depends on expertise and

experience in the human rights field. It is influence which is indeed difficult to discern. It is not that social theorists should, or indeed do, naively take media producers at their word, and surmise that the media does, or has done in the past and could therefore in the future, represent 'the people' to the state. Let us take the example of the most influential theorist of the media in this respect, Habermas, who is often criticised for his idealist view of the public sphere. In fact, Habermas has shifted his view of the media from the critical comparison he made with the eighteenth century ideal of the public sphere in *The Structural Transformation of the Public Sphere* to a hugely complex account of the media and public in *Between Facts and Norms* (Habermas 1989, 1996). In his recent work Habermas sees the contemporary public sphere as *potentially* democratic and ethical: it is possible that mediated debate could – and it ought to – test the generalisability of solutions to conflicts in the court of public opinion; and these solutions could then – and they ought to – be filtered through the procedures of parliament and courts. For his theory of democracy to be anything more than a normative ideal, Habermas has a great deal theoretically invested in the claim that the media *could* enable the public to influence governmental policy, administration and legal judgement. Nevertheless, he is forced to conclude that precisely how and under what conditions the public using the media as a vehicle *is* actually able to influence state actors not only has not been established, but it is virtually impossible to establish using the current theoretical tools and methodologies available for the study of political communication.

What is clear is that, if we are not to think of people as the 'cultural dopes' of the media, we should not think of media influence as *causal*, but rather in terms of the 'reflexivity' of actors who interpret media representations and act according to their own understandings and judgements. Rather than thinking in terms of the causal influence of the media on the state, it is more useful to think in terms of how state actors reflect on what they think and do in the light of their own judgements concerning media practioners' – equally

reflexive – self-representations as 'the people's advocate'. As media practioners try to influence the authoritative definitions of state officials, so too do other actors in the human rights field try to influence how the media represents their office, organisations or 'personality' and their perspectives on human rights. To investigate how actors in the juridical, governmental and activist sub-fields of human rights reflexively act upon media framing of issues, events, actors and processes concerning human rights – in their own sub-fields, in conflict with other actors across sub-fields, and by intervening in the mediated public – would, however, involve a research project which goes far beyond that in which I am engaged here.

For this study I have focussed on two much more modest tasks. In the first place, given that the media is the source of most people's information on how human rights are defined, I am interested simply in mapping how struggles over human rights which take place in and between the juridical, governmental and activist sub-fields are represented in the mediated public in ways which *create* meanings of human rights. The media arranges dominant and challenging perspectives on human rights – those of the traditionalists and the innovators engaged in the juridical sub-field, for example. In its factual reporting, the media *translates* definitions of human rights from the more or less technical ways in which they are used in other sub-fields into language which their readers, viewers and listeners will find interesting. In addition – in editorials and opinion pieces in newspapers, for example, or through TV documentaries or challenging interviews – media practioners also *evaluate* their own translations. They thereby potentially create a situation in which actors in the human rights field may have to respond to media representations of human rights, as well as to the technical definitions of other sub-fields.

Secondly, I am interested in mapping how closely dominant representations of human rights in the media *correspond* with authoritative definitions of human rights. The extent to which they correspond indicates a degree of influence, but it is not always clear

in which direction, nor how that influence has been exercised. The clearest example of this – and it is one which exercises many theorists of the relation between media and politics (see, for example, Street 2001) – is where the strategies of populist politicians coincide with a media framing of events or persons. This is especially the case where it is a matter of new or unexpected stories, such that we would expect more conflict over how issues should be framed and discussed. An excellent example is analysed in Chapter 3. It concerns the way in which Prime Minister Blair – who led the government in passing the Human Rights Act – captured and led the conservative media agenda on human rights, whilst conceding practically all that was demanded by its campaign against human rights; and the way in which this was subsequently taken up by the new Conservative leader of the opposition who has gone still further in declaring himself in favour of restricting human rights. Was the Prime Minister influenced by the media to deny the validity of universal human rights in conditions of heightened security? Or were the media and leading politicians in both parties simply in agreement about their relative value in such conditions?

Alongside the courts, then, the media is absolutely crucial to how the meanings of human rights are contested, settled and insitutionalised. Using the idea of 'field' opens up the study of the cultural politics of intermestic human rights to encompass the cultural politics of human rights in the media, not simply in terms of cultural representations which affect those who directly view or listen to them but in relation to different institutional settings where what human rights mean, what they can do, is decided. The cultural politics of human rights does not take place in a homogenous and uniform space. It takes place rather across a range of heterogeneous and instititutional settings which are nevertheless interrelated through their focus on the same object, the authoritative definition of human rights. Actors pursue possibilities of institutionalising human rights, or resist their institutionalisation with means that they are partially formed by the contexts in which they act, and

which differ across the human rights field. Most importantly, the human rights field works across the divide between state and civil society, with important practical consequences in terms of the possibilities of authoritative speech that differ from setting to setting. The outcome is not rational consensus but authoritative settlement that is more or less acceptable to those involved in the conflicts.

CULTURAL POLITICAL STRATEGIES: JUSTIFICATIONS OF HUMAN RIGHTS

Mapping the parameters of the intermestic human rights field enables analysis of the relevant actors engaged in the cultural politics of intermestic human rights and identification of the settings at which cultural politics is engaged. Use of Bourdieu's concept of 'field' does not, however, help us to analyse the *content* of the strategies that are used by interested parties engaged in the cultural politics of human rights.[2] Moreover, my use of the concept of 'field' for the study of globalising human rights makes for rather a different perspective on the social world than that for which Bourdieu intended it. Whilst Bourdieu is concerned with social stratification above all, with how social actors compete with each other to accumulate economic, social and symbolic capital, I am interested in the cultural politics of the authoritative decisions that are the *object* of competition in the human rights field; with the meanings of human rights that are produced in the competitive processes that take place there, and with their effects on the formation of social structures. According to my understanding, cultural politics allows for reciprocal persuasion, the construction of shared ideals and the imagining of a common political community, even across professional differences, possibilities for which Bourdieu's understanding of power, capital and class struggle arguably does not allow (Alexander 1995).

[2] Although good for 'thinking with' Bourdieu's cultural practice theory lacks methodological tools for analysing how the cultural politics of a field actually work in practice (Ortener 2006; Sewell 1992).

In order to pursue my analysis of the cultural politics in the human rights field, I therefore supplement Bourdieu's cultural practice with the idea of 'justification', drawing on the work of Boltanski and Thevenot. Boltanski and Thevenot developed the concept of 'justification' in order to analyse the rationales that actors use to end conflict, reach agreement and realise their aims in conditions of uncertainty. Justifications create symbolic equivalences between classifications of people and things and relate them to something general, 'common to all the objects brought together' (Boltanksi and Thevenot 2006: 32). They involve appeal to already existing mutual understandings of how things and people should be arranged, in order to extend that understanding to new situations. In this respect justifications are like frames: they simplify the world by encoding and patterning events, experiences and objects in particular ways. Justifications are necessary to co-ordinate collective behaviour once disagreements arise, but they are also necessary because such disagreements are an inherent possibility in ongoing social life.

Justifications are always strategic in that they are used as instruments to achieve agreement. This does not necessarily mean, however, that justifications are used strategically to achieve ends that are set in advance of the conflict in which they are engaged. Justifications *may* be manipulated in this way to defend and advance interests that are established and maintained prior to particular conflicts over the meaning of human rights. However, in appealing always to existing understandings, justifications often also involve the contention of fundamental values and interests.

Boltanski's and Thevenot's concept of 'justification' is compatible with Bourdieu's understanding of field in that justifications are used by actors to compete for authority in social settings. However, Boltanski and Thevenot break with Bourdieu in that they understand justifications to be free from particular institutional settings. In contrast, I follow Bourdieu in emphasising the importance of institutional settings. Whereas Boltanski and Thevenot are interested in constructing a complete typology of justifications

across the social field, my aim is not to detail the entirety of justifications that are possible for human rights but rather to analyse the justifications that were *regularly* used in struggles for authority between significant groups of actors in the intermestic human rights field. It is Boltanksi's and Thevenot's methodology, rather than the conclusions of their investigations, that is useful to this study.

I found it useful to analyse justifications along two main dimensions (which may be more or less explicit in any particular case) (see Favell 2001). Firstly, the *value* of human rights must be justified: an answer must be given to the (implicit or explicit) question, why are human rights so signficant that they must override all other values in this particular case? Secondly, the use of human rights must be *explained*: claims about the 'facts of the matter' relevant to human rights have to be made, and some background must be supposed or elaborated about how those facts have come into existence and who is responsible for human rights violations. In addition, explanation is required to show how the normative value that is given to human rights might realistically be achieved; who is responsible for ensuring that human rights are respected in the future, and that justice is done for past wrongs.

Boltanski and Thevenot are certainly right that justifications as such do not rely on institutional settings. A good example of this in the cultural politics of intermestic human rights is the way judges make extra-legal justifications for their decisions in terms of general principles, as well as justifying those decisions in terms of legal reasoning. However, *successful* justifications in institutional settings are partially formed by the requirements of such settings, which prescribe appropriate 'tests of worth' for facts and values. Justifications gain authority by conforming to those requirements, and at the same time they reproduce the logics of the institutional settings within which they are made. Although judges may make extra-legal justifications for their decisions, it is on conventional legal reasoning as well as on their occupation of legitimate office that they rely for the authority of those judgements.

As we have seen, the intermestic human rights field encompasses a number of institutional settings in which the cultural politics of human rights are engaged. The way in which actors frame human rights as meaningful for their interlocuters tends to vary according to the institutional context in which they are situated, and the resources they have at their disposal because of that situation. Justifications are not entirely determined by institutional setting; the uncertainty inherent in any meaningful practice means there is always some ambiguity and play of interpretive possibilities. This is true even where it is a question of legal judgement: as we have already noted, the law is always open to more than one interpretation. Moreover, some institutions are more open to a plurality of types of justification than others: the legal setting appears to constrain the range of possible justifications more narrowly than does the media, for example.

Finally, it is also important to note that, although the concept of 'justification' may sound rationalist, justifications do not only work through their appeal to reason, but also through appeal to, evocation of, and indeed, creation of, emotion. Reason and emotion are not opposites. Reason as such requires certain emotions: calm, for example, and confidence in one's abilities to think something through. Practical reasoning requires other emotions as well; for example, trust in the actions of enabling others, and the ability to motivate co-operation (Barbalet 2002; Young 1996). Indeed, theorists of emotion have also shown how judgements of value are always suffused with emotion: what is considered an appropriate response to a particular situation or event is situated within ethical discourses that structure not only how we should *think* about that situation or event, but also how we should, and generally do, *feel* about it (Harre 1986; Nussbaum 2003). As well as depending on emotions to persuade, then, justifications which situate human rights, showing their relevance and value in a particular case, at the same time evoke emotions that are conventionally oriented towards the judgements they state or imply. As we shall see in the chapters of analysis that

follow, national pride and shame are especially potent emotions in the cultural politics of human rights.

To summarise, then, competition within and between different arenas of the field of human rights is joined in justifications which explain and attribute value to human rights in different ways according to different institutional settings. In order to do so, they also draw on ethical 'emotional vocabularies'. In the following subsections I will briefly describe typical justifications in the field of intermestic human rights, and outline how I accessed them in the case studies that were analysed for this research. Although I have outlined what was distinctive about the justifications in each case, it should be borne in mind that, as the analysis detailed in the following chapters will show, they are not discrete areas: competition is engaged between, as well as within, these different domains of the human rights field. Justifications in one domain of the human rights field engage justifications in another, especially in courts and in the mediated public, which are the privileged sites of the human rights field.

Juridical justifications

As we have noted, the cultural politics of the juridical sub-field involves interpretation of the law and also extra-legal commentaries on those interpretations. In legal interpretations, the reality of human rights is explained and the ideals of human rights are defended or revised in terms of legal orthodoxy. Justifications for human rights must conform to conventional standards of legal reasoning in order to be authoritative. The 'tests of worth' demanded of authoritative actors are those of principle and precedent as set out in the texts that make up the law. Despite all the differing interpretations of these texts, the authoritative decision of judges as to what the law says is final. As Bourdieu points out, in no other setting is authoritative speech quite so effective. In making their decisions judges literally make the world according to their classifications (Bourdieu 1987: 838). The law allows for different interpretations, but once a

judgement has been made in court, unless that decision is overturned by a higher court, it is the law.

In their extra-legal commentaries in juridical settings, judges use rhetoric that is not so closely tied to legal reasoning. Accompanying an authoritative statement of what the law requires, judges quite often also justify their decisions in terms of the general principles underlying that decision. Where intermestic human rights are concerned, such justifications are often strategic interventions for or against their globalisation through the procedures of national states. There is an excellent example of this kind of rhetoric, which was widely taken up in the media, in Chapter 3. In a case which challenged the arbitrary detention of terrorist suspects, Lord Hoffman resoundingly described the European Convention on Human Rights as simply reflecting 'quintessentially' British values of liberty. This was clearly an attempt to make human rights more appealing in a case in which national security was being opposed to international law in a national court (see pp. 97–8). In another example, analysed in Chapter 4, that is much more low-key and subtle, Justice Souter's opinion in *Sosa* v. *Alvarez*, described 'the door' as 'still ajar subject to vigilant doorkeeping', with reference to the possibility of using customary international law in ATCA cases in US courts in the future. In this case, the legal judgement *for* the obligation on US courts to enforce international human rights norms was accompanied by a metaphor that suggests that such human rights should nevertheless be viewed with suspicion by judges in national courts (see p. 116).

Analysis of justifications in the juridical sub-field was carried out on legal materials from the highest appellate courts involved in each case study, generally the Supreme Court in the US and the Law Lords in the UK. In *Doe* v. *Unocal*, which did not reach the Supreme Court, I analysed materials from the Court of Appeals for the Ninth Circuit and the Californian Supreme Court. I analysed the judges' decisions, legal arguments for the prosecution and defence, and 'friend of the court' briefs. I also analysed speeches made by

judges outside the court where they were widely reported in the media and used by human rights activists (for example, the speech by Lord Steyn in which he described Guantanamo as a 'legal black hole' (Steyn 2003)). I was especially interested in the struggles between traditionalists and innovators in international law, and these sources proved rich sources for charting them in the juridical sub-field.

Governmental justifications

Government officials are, in principle, answerable to the electorate. As Bourdieu argues, political rhetoric therefore aims to gain the consent of the people to whom politicians are responsible as their elected representatives. In order to achieve their aims, however, politicians commonly present policies as if they *already* have that agreement or, even better, as if they were directly expressing the will of the people. Again authoritative political rhetoric is *performative*, bringing about the representation of the people it presupposes (Bourdieu 1991: 190–1).

As representatives of the people, governmental officials justify their actions 'in the name of the people'. The test of worth of such justifications may be evidence of popular support for their arguments (from opinion polls, for example). On occasion, however, the fact of having been elected is used as evidence that government officials represent the people; for example, against the claims of activists, lawyers and judges. However, the justifications of politicians for their actions may also have their worth tested in reference to international human rights norms to which the state has committed itself and to which government officials are supposed to be legally bound. In such cases justifications that they are 'acting in the name of the people' must take into account, and work between, national and international institutions. Elected politicians are first and foremost answerable to national voters; adherence to international norms is secondary. It is therefore relatively easy ordinarily for government officials to justify actions in the name of the (national) people which are at odds with the international norms of human rights. However,

if challenged in intermestic human rights cases, governmental officials may also have to show why state commitments to human rights, which have also been made by elected politicians who act 'in the name of the people', must now be ignored or overruled.

In order to create an archive for analysis of justifications in the human rights field generally, I first created a timeline for each case study. In each case this included the most important dates of legal cases: the dates on which they were first brought, and of key judgements as the cases made their way through the courts of appeal. It also included, in each case, key dates for other elements of the human rights field. In the case of the governmental sub-field these were: dates of important political speeches that were widely reported in the media; of Executive orders and official announcements; dates between which legislation was debated and at which it was enacted; dates of relevant meetings of international governmental organisations in which officials participated; and of government reports concerning human rights in the particular case at issue. I then conducted a search around each signficant date in the relevant documents for the governmental sub-field, in the week on each side of the key date. These materials included: legal representation and friends of the court briefs submitted in court cases; speeches by government officials; government reports and consultation documents; press releases and articles written for newspapers by government officials.

Activist justifications

Human rights organisations generally do not seek to monopolise a specialist technical language, like law, nor to occupy existing official positions, like political parties (though individuals involved with organisations may build careers that lead them to official positions). They do, however, compete very energetically with other actors in the human rights field to achieve the authority to define human rights. Indeed, this is their primary reason for existing. In order to do so, human rights organisations use legal, political and also moral justifications to explain the reality of human rights and to promote

and defend their value. Human rights activists in international organisations *invariably* justify human rights as *global* against the justifications of other actors in the human rights field for whom the national scale is almost always the most relevant to test their worth. As we shall see, this is not necessarily the case for those activists who work in national rights organisations even where human rights law is available to them.

Internationally, Amnesty International and Human Rights Watch are by far the largest human rights organisations, with the greatest credibility across the world. In the US, the Center for Constitutional Rights and Human Rights First (formerly known as Lawyers for Human Rights) have been crucial to legal strategies of the human rights movement. In addition, other national organisations are now beginning to use international human rights norms to put pressure on the US government, most notably the American Civil Liberties Union. In the UK, national organisations for civil liberties use European and domestic human rights law. Liberty (formerly the National Council for Civil Liberties), which is linked to the ACLU, has been very influential in this respect. In addition, for this research it was also important to study justifications produced by other, smaller organisations for specific case studies. For Chapter 3, I studied materials produced by the Council of American-Islamic Relations and the Muslim Public Affairs Committee, to find out if organisations set up to represent Muslims and to pursue Muslim civil liberties used human rights to contest the arbitrary detentions in Guantanamo Bay and Belmarsh. Earthrights Interrnational was key to the *Doe* v. *Unocal* case analysed in Chapter 4. The coalition campaigns against global poverty, Make Poverty History and ONE were compared with each other and with Jubilee 2000 UK and Jubilee 2000 USA in Chapter 5.

In order to create an archive for analysis of justifications produced by human rights activists I collected all the reports produced by each organisation relevant to the case studies selected for this research. I also analysed the legal materials they produced in each

case. Finally, I collected and analysed press releases produced by human rights organisations in relation to the key dates of legal cases and of the governmental sub-field in the timeline created for each case study, as well as newspaper articles written by members of these organisations in their official capacities.

Mediated justifications

Journalists and editors have their own justifications for how they select and frame news stories about human rights, which have been formed, and are authoritative, within their professional field. As we have noted in Chapter 1, because the media has been historically constructed as the Fourth Estate in liberal-democracies, journalists are professionally positioned as the watchdogs and advocates of 'the people'. As well as providing entertainment, then, they also see themselves as informing both the public and government of the facts, and the values, at stake in cultural–political conflicts.

However, informing the public and government in the news media largely involves *reacting* to news that is made elsewhere. In factual reporting, as Herbert Gans put it, news stories tend to 'follow power' in that the most newsworthy sources, and generally the easiest for journalists to access, are those that make quotes available from government elites (Gans 2003). In 'informing' the public about human rights, the media tends to quote justifications of human rights made by a few government officials, who are widely known as 'household names'. In the case studies of intermestic human rights with which we are concerned here, journalists did, however, also draw on the expertise of human rights activists, who made themselves equally readily available for comment and analysis. Both in accessing 'official' and 'alternative' views, news articles tended to be constructed around quotes from individuals, with minimal analysis of institutional processes and wider political agendas. In this way, news items were invariably presented in realist terms, as a 'window' on what happened, whilst the criteria by which quotes and evidence were selected were obscured.

By comparison, in actively *creating* public opinion and influencing government elites, journalists often do offer their own explicit justifications for selecting evidence and subjecting statements concerning human rights to 'tests of worth' in terms of facts and values. There are two main ways in which journalists create news. The first, by investigative journalism, is quite rare. Investigative journalism uncovers and demonstrates elite hypocrisy, deceit and even criminality, and therefore contributes to demands that state officials should be genuinely accountable to citizens or to the law. Secondly, and much more commonly, news media try to influence both the public and elites through opinion columns and editorials. In both cases – unsurprisingly, given the time constraints under which news media operate, the lack of technical expertise of most columnists, and the number of different topics they must cover on a regular basis – these justifications are generally selected from those that have already been made by other actors in the human rights field, and reworked in more accessible and 'interesting' ways for the mediated public.

Both in producing information and influence, then, news media tend not to originate justifications for human rights but rather to *translate* the justifications of other actors into media products, representing them in the mediated public as 'neutral' information or in strongly worded and emotive arguments explicitly intended to influence the public and government officials. In this way, the news media do not simply stage the cultural politics of human rights, they also contribute to those cultural politics. They give greater weight to the perspectives of some actors over others in ongoing conflicts of cultural politics; and they alter justifications in 'translation' – simply by putting them into a new context, or by literally altering some of the terms and arguments of the debates.

The focus of this analysis is on newspapers as representative of the cultural politics of human rights in the mediated public. Newspapers had a number of advantages for this analysis: they share a similar agenda to national news broadcasting but their coverage of news tends to be more in-depth; they aim at niche markets so allowing analysis of a diversity of political perspectives on human

rights; and they have the great advantage of being relatively easy to collect and to analyse.

However, comparing US and UK newspapers did present some difficulties. Journalists in the US tend to see themselves as bound by their professional code to avoid bias and to strive for an ideal of objectivity. Although, of course, journalists can not really be 'objective' – they can not provide a 'mirror' representation of the world – overt evaluation of events and figures in US newspapers is much more strictly confined to the opinion pages and to anonymous editorials than in the UK. In comparison with the UK press, US reporting balances perspectives to a far greater extent, avoids the use of sensationalist headlines and uses far fewer adjectives. Predictably perhaps, debate over the supposed neutrality of the press is also highly politicised in the US, with Republicans accusing the media of liberal bias, while commentators on the Left find the media guilty of conservatism. As a result, journalists and editors in the US are proud to be seen as taking a centrist line, even if this actually privileges the status quo (McChesney 2004). In contrast, the UK is notorious across the world for its sensationalist tabloids: populist mass circulation papers which barely gesture towards objectivity in news reporting, treating it largely as entertainment. Even journalists and editors on the quality newspapers in the UK, however, are not ashamed to be seen as politically partisan. Though the quality press in the UK also clearly works with some ideal of 'objectivity' in news reporting, even in the elite newspapers evaluative language is quite common in news stories, and headlines tend towards the sensational.[3]

[3] My aim in sampling media representations was to capture the *range* and regularity of justifications available in the mainstream of each respective mediated public. It was not to assess their quantity or dispersion, or their reception. I began the research looking also at Left-wing magazines in the US (*Mother Jones*, *Dissent* and *The Nation)* as the best way to access left, as opposed to liberal, contributions to the US debate, which were more likely to be included in the UK selection by virtue of differences between mainstream US and UK newspapers. In fact, however, I found: a) that these journals generally replicated the arguments of human rights advocates; b) as there was no direct comparison in the UK, it was difficult to situate them in the research as a whole. However, I may, as a result, have skewed my analysis, giving the impression that there are fewer occasions on which

In order to compare US and UK papers I made a selection from across the range of what was available in the mainstream, trying to balance like with like as much as possible, even where there were no direct equivalents. I analysed the news stories, editorials and commentaries around the key dates of the timeline created for the juridical, governmental and activist sub-fields. In addition, I also included dates at which news was created: when the detainees returning from Guantanamo to the UK were interviewed by journalists in March 2004 for example; and when the *New York Times* confirmed that detainees were being tortured there by interviewing officials at the prison in October 2004.

In the US newspapers, I analysed materials a week either side of each date in the timeline in the nationally distributed, agenda-setting the *New York Times* (the most liberal in the US by reputation), the *Washington Post* and the *Los Angeles Times* (liberal-centre), the *Wall St Journal* (conservative and finance-oriented), and the more popular (liberal-centre) national daily *USA Today*. In addition, as there are no national tabloids to compare with those of the UK, I also studied the mass circulation local papers the *New York Post* (conservative) and *New York Daily News* (liberal-centre). In the UK, I carried out the same analysis on national papers: the quality broadsheets the *Guardian* and the *Observer* (liberal), the *Daily Telegraph* and the *Sunday Telegraph* (conservative) and the *Financial Times* (similar to the *Wall St Journal*); and the tabloids the *Daily Mail* and the *Mail on Sunday* (conservative) the *Mirror* (centre-left) and the *Sun* (Murdoch-owned like the *New York Post*, and similarly sensationalist).

left-wing justifications of human rights are made in the US media, as they largely appear in these journals rather than in the mainstream (my thanks to David Hansen-Miller for this point). Another way to build on the research in this study would be to add broadcasting media to the sample of media analysed. In the UK news broadcasting standards tend to be set by the BBC, and therefore other TV and radio stations tend towards replicating its model of impartiality. In the US, on the other hand, Fox TV news has taken a considerable share of the market, as have right-wing 'shock jocks' on the radio.

3 Sovereignty, pride and political life

Sovereignty is central to national state formation, and to the possibility of its transformation; it is, therefore, crucial to the realisation of human rights. As we noted in Chapter 1, the understanding of sovereignty as the freedom of a state from interference by other states is a significant dimension of the ideal of the self-determining national state. By the same token, the transformation of state sovereignty in international institutions of co-operative global governance is seen as necessary to address policy problems that increasingly arise in globalisation.

There is a popular view, shared by theorists of human rights and others, that human rights are, as a matter of fact, *eroding* state sovereignty. For example, David Forsythe has said that human rights law is 'revolutionary because it contradicts the notion of national sovereignty – that is, that a state can do as it pleases in its own jurisdiction' (quoted in Krasner 1999: 105). Similarly, David Hirsh says that 'human rights are instruments that seek to limit the scope of state sovereignty' (quoted in Sznaider and Levy 2006: 659). Alternatively, it is argued that because sovereignty is not 'indivisible, illimitable, exclusive and perpetual' (Held, quoted in Bickerton *et al*. 2007: 5), but rather socially constructed, historically specific and mutable (see Biersteker and Weber 1996), it is better understood as transformed by human rights. Whereas sovereignty was once justified as the ultimate guarantee of state security, it is now justified only insofar as it provides the potential to protect human rights (see Montgomery 2002: 3; Sznaider and Levy 2006; Bickerton *et al*. 2007).

In the ideal-type of the national state, sovereignty is what authorises the state to have the 'last word' (Montgomery 2002: 5). Sovereignty is the ultimate authority: there is no authority over the

sovereign which it must obey. On the contrary, sovereignty is obeyed *because* it is sovereign. Sovereignty is nowhere more in evidence, then, than in the state prerogative to suspend law in order to take action that would not ordinarily be legally permitted. Immediately following the events of 9/11, both the US and UK declared a state of public emergency.[1] A declaration of public emergency suspends the normal juridical order for a state to adopt exceptional measures. After declaring a state of emergency, US and UK authorities detained terrorist suspects who were not citizens without charge for an indefinite period – overriding fundamental rights to individual liberty that are foundational to the rule of law, and to global human rights.

Carl Schmitt is the theorist par excellence of sovereignty as the 'last word'. According to Schmitt's famous formulation, sovereignty is *created* by the decision that there is a state of exception: 'Sovereign is he who decides on the exception' (2005: 5). Following Schmitt's understanding, sovereignty is what states *do*; it is not something states *have*. Sovereignty cannot, therefore be eroded. The conditions under which sovereignty is exercised, and the way in which it is practised, can, however, be transformed. In the human rights field, the effective authority to have the 'last word' is precisely what is in question, disputed between the juridical, governmental and activist sub-fields and rehearsed 'on behalf of the people' in the mediated public. In the ideal of the national state, a distinction is made between internal sovereignty – the organisation of public authority in a state – and external sovereignty – the organisation of the international system to prevent unwelcome interference in states' affairs. As we have seen, a clear distinction between the external and internal affairs of states becomes very difficult to maintain where it is a matter of intermestic human rights. Contestation in the human rights field is at its most acute when state prerogative is used to

[1] The President declared a public emergency on 14 September 2001 (Proclamation 7463). In the UK, the government declared a public emergency in order to derogate from the ECHR on 11 November 2001.

declare a state of emergency that overrides fundamental human rights which are now, on the face of it, a matter of global concern.

The sovereign decision is taken from within the juridical order: the law specifies – more or less clearly in the case of different states – legitimate procedures that must be followed in order to declare a state of emergency. In the US, Article 1 of the Constitution permits the President to suspend *habeus corpus* – the fundamental individual right not to be detained without trial – 'when in Cases of Rebellion or Invasion the public Safety may require it' (see Ackerman 2004: 1041). The US Supreme Court may then choose (it does not have to) to hear cases which subject the sovereign decision of the President concerning fundamental individual rights to judicial review, to determine its legality. There is debate over precisely what the Executive powers are according to the US Constitution. One interpretation of the Constitution is that the Legislature should be involved in deciding when the President is entitled to declare a state of emergency. It has not always been involved in the past, however, and it was not involved in President Bush's decision to declare a state of emergency following 9/11 (Ackerman 2004: 1053). In the UK the Executive must formally derogate from (opt out of) those Articles of the ECHR which specify the individual rights it wishes to override. It must inform the Secretary General of the Council of Europe, giving reasons for its decision, and there are a number of Articles from which it is not possible to derogate. In the European system of human rights, the sovereign decision may then be subject to judicial review by domestic courts (if a successful appeal is launched), and eventually, if no satisfactory conclusion is reached, the European Court of Human Rights may decide to hear a case in order to determine the legality of the sovereign decision.

However, as it creates measures which suspend 'normal' law, the sovereign decision is not *determined* by law or legal procedures. It is, as Schmitt says, at the limit of law and politics. It is extremely rare that there is a *total* suspension of the juridical order. Schmitt calls this 'an extreme exception' (Schmitt 2005: 7). Even in much less

extreme situations, however, it is clear that sovereign prerogative of a state ultimately involves a particular person or group of people exercising the power to decide: (a) that a state of emergency is warranted; (b) what form suspension of the law will take. Where this sovereign power is located may be in question in principle, but insofar as, in the cases we are dealing with here for example, the Executive takes the prerogative, which is certainly legally and politically possible, it effectively acts as sovereign. Where the Executive exercises state prerogative in practice, it is only *after* the sovereign decision is made that the other branches of the state may question whether or not it is within the limits allowed by the law, and try to alter it procedurally.

Cultural politics is inherent to any sovereign decision. The fact that a sovereign decision ultimately depends on the will of the sovereign – in that it is not determined by bureaucratic procedures or legal reasoning – does not mean that it is not determined at all. *Before* the decision is taken to suspend certain features of the law, the sovereign Executive must evaluate the objective conditions that make exceptional measures desirable, if not necessary. In part this evaluation depends on how cultural politics have already structured those conditions: which actors and perspectives are most prominent; and how, therefore, the sovereign decision is likely to be received. In the cases we are dealing with here, for example, the Executive's evaluation of the objective conditions that made a sovereign decision desirable would undoubtedly have concerned not only the risks of *not* adopting exceptional measures (appearing weak in the face of security threats), but also the potential political *costs* of adopting those measures (how might doing so help political adversaries?), and also the political advantages of doing so (how might doing so strengthen the government's position in relation to its political enemies?). In addition, once the decision is taken, it must be publicly *justified*. The sovereign may decide when, where and how this justification will be made, but in liberal-democracies justification of the sovereign decision is impossible to dispense with altogether.

Evaluation before a sovereign decision must, therefore, also involve assessment of the relative difficulties of sustaining a policy which overrides fundamental human rights if there is sustained challenge to that policy. Since the very purpose of a sovereign decision is to override individual rights, it is only in the most repressive states that such challenges can be expected not to follow.

What form do the cultural politics of human rights take in cases in which sovereign decisions have been taken that violate fundamental human rights? How do human rights affect the conditions in which sovereign decisions are made and defended? In this chapter I explore the cultural politics of human rights around the sovereign decisions to suspend the fundamental rights of non-citizens suspected of terrorist activities in the US and UK. I focus on sovereign decisions which affect the rights of non-citizens in order to study the question 'who is the subject of human rights?' in concrete case studies of the cultural politics of intermestic human rights which problematise the distinction between citizens and non-citizens.

International human rights law requires that the distinction between citizens and non-citizens be abolished where fundamental human rights are concerned. In contrast, national states, ideally, have existed to serve citizens. What is most striking about challenges to the sovereign decision to suspend fundamental rights in the US and UK, however, is that they tended to be made using the rhetoric of nationalist pride rather than in universalist terms. Even supporters of human rights rarely offered a forceful cosmopolitan defence of international human rights. They tended not to justify human rights using arguments concerning humanity and the value of each and every human being, nor the fact and legitimacy of international human rights agreements. In both the US and UK – though in different ways – the value of human rights as a framework of universal principles regulating political life was secondary to the value of national pride in contestations of the sovereign decision to suspend fundamental rights for both defenders and opponents of human rights.

Nationalism is usually seen as intractably opposed to, and problematic for, cosmopolitan norms of human rights, to the point where nationalism and human rights are virtually never discussed together. The importance of nationalism is occasionally mentioned by theorists of transnational advocacy networks (Keck and Sikkink 1998: 202; see Jetschke 1999 for the most considered study of nationalism in relation to human rights I have come across), but its importance is rather implied than discussed in this literature. In this respect it is shame, the reverse of pride, which is the emotion that has been most frequently commented upon. It is assumed that shame accompanies the institutionalisation of human rights ideals by state elites where this is undertaken for principled rather than instrumental reasons (Keck and Sikkink 1998: 23; Risse and Ropp 1999: 245). The argument is as follows: if it can be shown that state elites accept that human rights norms are the right way to behave, rather just the most prudent, it must be because they have experienced the shame of being the leader of a 'pariah' state. In this understanding, shame operates at the international level: it is in what Keck and Sikkink call 'the world political system' that shame – implicitly national shame – is felt on the part of the leaders of states who then act according to norms of international rights rather than calculating the advantage they may gain by ignoring those norms.

Surely, however, it is unsurprising, given the historic identification of states and nations, that nationalist feelings are important in persuasive strategies to end human rights violations from within states? I found that national pride, far more than shame, played a crucial but very complex role in the cultural politics of human rights in relation to sovereign decisions to suspend the rights of non-citizens suspected of terrorism from within the US and UK. Both in justifications of the sovereign decision and in challenges to it, emotions of pride in the ideal nation, which is founded on the rule of law and which therefore respects and upholds fundamental individual rights, were entangled with fear for the bodies of the people of the real nation.

Georgio Agamben's famous distinction between *zoe*, or 'bare life' and *bios*, 'political life' is useful here to explore the cultural politics of national pride and fear that was evident in the case studies researched for this chapter. Inspired by Hannah Arendt's work on human rights, Agamben analyses how bare life and political life are collapsed in human rights, where the mere fact of having been born, as a human animal that is exposed to death, is supposed to be enough to give one entitlements in the political community of humanity (Arendt 1968; Agamben 1998). Both Agamben and Arendt are sceptical of this possibility, seeing no prospect of a political community of humanity. On the contrary, they argue that human rights are dangerously deceptive for just this reason, exposing those without state to persecution and destruction. What is useful here, however, is Agamben's distinction between bare and political life. What we see in justifications of the sovereign decision that opposes security and rights is the *separation* of bare and political life *both inside and outside the state*. Outside the state, those who are accused of threatening it may be reduced to nothing more than bare life, which, according to Agamben, can be killed without sacrifice (Agamben 2005: 4). What has been less remarked upon, however, is that *inside* the state, the sovereign decision to suspend fundamental rights creates a temporary separation of bare and political life in order to *protect* bare life: the cultivated ideals of political life are to be set aside to protect the vulnerable flesh and blood of the nation with which it is ordinarily entwined.[2] Through this separation, the sovereign decision promises to preserve both bare life and, ultimately, political life too. Following this logic, suspending fundamental individual rights is, ultimately, the only way to protect the very possibility of exercising rights at all. Externalising the bare life of non-citizens, and protecting

[2] Of course, deployment of the distinction between bare and political life, and, on occasion, its collapse and conflation, is strategic. The less than urgent response to the devastation of Hurricane Katrina is a good example of the separation of bare and political life *within* citizens. Thank you to Anna Marie Smith for prompting me to clarify this point.

the bare life of citizens, is ultimately the only way to secure the political life of the national community.

The following analysis charts the way in which sovereign justifications which separate and conflate the bare life and the political life of the nation were deployed and challenged in the cultural politics of human rights. In the US activists have found it virtually impossible to bring any significant pressure using human rights law to bear on the Executive. It is only by finding obscure national law concerning *habeus corpus* that activists have been able to challenge the sovereign decision legally. In the mediated public, supporters of human rights have tried to mobilise national pride and shame concerning international human rights. The national pride that has made a difference, however, is pride in the core values of America and the American constitution. It is not shame for the way in which the US fails to uphold international human rights norms but pride in the US as a political community founded on the rule of law, itself dependent on the lives of the American people, which has been effectively mobilised to challenge human rights violations.

In the UK, by comparison, because of the way the state is embedded in the European system, human rights have been relatively more effective legally in challenging sovereign justifications for arbitrary detention. However, although human rights are thoroughly institutionalised in the UK, the mobilisation of national pride has also played an important, though ambiguous, role in challenging the sovereign decision. Supporters of human rights have tried to mobilise national pride, to show how central human rights are to the political life of the nation. But this strategy, paradoxically, has had potentially dangerous effects for human rights as deconstructing the distinction between citizens and non-citizens in practice in the context of fears for national security.

AMERICAN EXCEPTIONALISM

Guantanamo Bay was *designed* to fall outside both international and national law, although this is not to say that it falls outside law

altogether.[3] It is rather that in anticipation of legal and other challenges, the Executive decision to create a camp for arbitrary detention in Guantanamo deliberately carved out a space which law can not easily regulate precisely because it is exists in the interstices of international and national rules. Guantanamo Bay has been described by one senior judge as a 'legal black hole' (Steyn 2003). It is a black hole that exercises a gravitational pull on law, tying lawyers up in legal pedantry as they try to capture the sovereign decision to suspend the normal rule of law.

Guantanamo Bay was created outside international law. The White House announced shortly after the first wave of prisoners were taken there that they were not to be treated as prisoners of war under the Geneva Conventions since they were not conventional soldiers of a national state, but as 'unlawful' or 'enemy combatants' captured on the battlefield in Afghanistan. The policy had apparently been agreed as a result of secret memos, signed by the President in February 2002, that the Geneva Conventions would not apply in the war in Afghanistan, or in the global war on terror generally (Hersh 2005: 5). (It subsequently emerged that many had not reached Guantanamo from Afghanistan, but had been 'captured' elsewhere in the field of the 'war against terrorism'.) The Geneva Convention entitles individuals captured in war to give only their name, rank and serial number. Guantanamo Bay was designed as an interrogation camp. It was also created outside national law. There is provision in the Geneva Conventions for the treatment of 'illegal combatants', civilians who engage in armed conflict: they should be tried for crimes under domestic law, as common criminals, or for international war crimes (see HRF 2000: 9). However, as the camp was set up on territory that legally belongs to Cuba, from which it is leased by the US, the Bush Administration claimed that it was

[3] Guantanamo Bay was also a site of struggle over law. In this sense Guantanamo was both inside and outside law (Johns 2005; see also Comaroff 2007).

outside US jurisdiction. The prisoners were not, therefore, to have access to the US courts.[4]

Approximately 750 men and boys have been held in Guantanamo Bay since January 2001 (some 200 of whom have disappeared), without charge, without knowing the evidence against them, and without access to anyone outside the institution, including civilian lawyers, until 2004. At the time of writing, it is estimated that about 350 men remain. From the accounts of some of those released we know that many, if not all, have been tortured (see CCR 2004; HRW 2004a; Begg 2006).

Security vs. rights in the global war on terror

The US Executive constructed the sovereign decision that created Guantanamo Bay, in terms of a *choice* between national security, the prevention of further attacks, and the rights of terrorists guilty of the attacks. In the Military Order of November 2001 the President declared his intentions to identify, pursue and detain any non-citizen involved with Al-Qaeda who had been involved in terrorist activity against the United States. The Order stated that, given the 'extraordinary emergency', 'the principles of law and the rules of evidence generally recognised in the trial of criminal cases in the United States' should not apply to such individuals (Presidential Military Order 2001). Instead captured terrorists were to be tried in secret by military tribunals with greatly reduced standards of due process (including reliance on evidence that might have been gathered by torture, and which the defendant would have no right to see). A

[4] In the US there were two cases of 'accidental' citizens who have also been detained without charge and without trial: Yasser Esam Hamdi and Jose Padilla. The expression 'accidental' was used of Hamdi to justify treating him with less than full citizenship rights, even though he was formally a US citizen (see Nyer 2006). Both Hamdi and Padillo were accused of terrorist activities and imprisoned without charge as 'enemy combatants', but not in Guantanamo Bay. Hamdi eventually agreed to give up his US citizenship in return for deportation to Saudi Arabia in 2004. Padilla was found guilty of terrorist activities in a federal court in 2007. Their stories are outside the scope of this study, which focuses on the detentions of non-citizens in Guantanamo Bay.

guilty verdict could mean execution. The secrecy of the tribunals was justified in terms of security. It would be too dangerous to deal with such individuals in open court: intelligence sources would be compromised and judges who delivered 'guilty' verdicts would live in fear for their lives (see, for example, 'Bush Signs Executive Order Establishing Military Tribunals to Try Terror Suspects', *Wall Street Journal*, 14 November 2001). The necessity for summary justice at Guantanamo was justified, then, in terms of a choice between (our) security and (their) rights.

In his 'Address to a Joint Session of Congress and the American People' on 20 September 2001, the President announced a global war on terrorism. This war concerned both the real and the ideal nation. The sovereign decision to suspend law in the case of terrorists was justified on the basis that the ideals of the political life of the nation, America, lives only secondarily, as it were, through the bare life, the flesh and blood of vulnerable, frightened Americans. The test of worth of this justification appears self-evident after 9/11: terrorists have succeeded in their ongoing attempts to kill large numbers of Americans, striking with such force and cunning that much worse to come must be anticipated.[5] The Executive justified the global war on terrorism as necessary, not just for national security, but in order to safeguard civilisation itself. In the Address, the President said: 'Americans are asking, why do they hate us. They hate what we see right here . . . a democratically elected government . . . They hate our freedoms – our freedom of religion, our freedom of speech, our freedom to vote and assemble and disagree with each other' ('Address to a Joint Session of Congress and the American People', www.whitehouse.gov/news/releases/2001/09/20010920–8.html, last accessed 29 December 2007). The global war on terror, which precedes and exceeds any actual military conflict, is a war against those who hate America for exactly the same reasons that Americans are

[5] The possibility of future nuclear, chemical or biological weapons attacks was widely feared immediately following 9/11.

proud of and value 'our state': it is the very embodiment of civilised political life.[6]

Patriotism was also very much to the fore in the arguments, widely rehearsed in the mediated public, for the Military Order. Emphasis on protecting the 'flesh and blood' nation *avoided* rather than confronted the clash between the reality of arbitrary detention in Guantanamo and the ideal America, though it seems that it did not always do so with good conscience. This quote, for example, from Deputy White House Counsel Timothy Flanigan, reported in the *Wall Street Journal*, is more than a little defensive: 'The order's signed and nobody's ashamed of it' ('Bush Signs Executive Order Establishing Military Tribunals to Try Terror Suspects', *Wall Street Journal*, 14 November 2001). Discussion of the clash between the reality of Guantanamo and the ideal America as 'a nation of laws' was avoided by detailing the practical reasons why it was impossible to try terrorists in normal courts – the need for secrecy, and also the large numbers of prisoners who would need to be tried – but also by the judgement that, as those who would attack and destroy America, they are undeserving of the protection of its laws. As Vice President Cheney put it, 'They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process' ('Bush Plans for Terrorism Trials Defended', *Washington Post*, 15 November 2001). This perspective is summed up in the words of the widely circulated phrase of venerable and uncertain origin, 'the Constitution is not a suicide pact' (see Barbara Ehrenreich's 'Our George and Theirs', *New York Times*, 20 December 2004).

America: 'a nation of laws'

Nevertheless, from the very beginning of the declaration of an emergency that suspended due process rights for suspected terrorists,

[6] It is because the global war on terror is so open-ended, without a clear enemy or goal, that critics fear that it – and therefore also the state of exception – is potentially unending, in time and space (Butler 2004; Agamben 2005).

the ideal of America as governed by the rule of law was the basis of challenges from across the political spectrum to the sovereign decision to suspend law. The defence of political ideals through the protection of bare life outlined in the Executive justification of the sovereign decision did not mean that political life of the nation simply vanished into bare life. Criticisms of the Military Order from legal experts and members of Congress were widely cited in the mediated public – although reporting was invariably balanced by arguments that such measures were required by the emergency situation. Interestingly, most of these challenges were not made on a strictly legal basis; the Military Order had clear precedents in US law, most recently dating from the Second World War, and it was widely argued in the mediated public that it was almost certainly technically lawful.[7] The objections to the Order were rather *moral*; finding their basis in intuitions of natural justice that imprisonment and execution without trial *must be* unconstitutional. They were also *political*, arguing that in making the Order the Executive was disregarding the separation of powers that is fundamental to American democracy, thereby acting unconstitutionally. Finally, they were geo-political; arguments concerned the security of American soldiers abroad if the Geneva Conventions were ignored.

It was the persistence of the activist organisation the Center for Constitutional Rights (CCR) that eventually led to a legal challenge to arbitrary detention at Guantanamo. In February 2002, CCR filed petitions for *habeus corpus* in *Rasul* v. *Bush* (Ratner and Ray 2004). After being defeated in the lower courts, *Rasul* v. *Bush* eventually reached the Supreme Court in 2004. The common law of *habeus corpus* (literally 'You have the body') is ancient, somewhat obscure, but absolutely fundamental; it stipulates that a prisoner must be

[7] Most prominently, in 1942 the Supreme Court affirmed the death sentences of six German saboteurs designated 'unlawful combatants' and captured on US soil during the Second World War which had been imposed by a secret military tribunal (Ex parte Quirin, *317 U.S. 1 (1942)*). This was widely reported in newspaper coverage of the Military Order.

brought to the court when ordered, and their detention must be legally justified, or they must be released. The Supreme Court decided against the Bush Administration that Guantanamo Bay was effectively under the jurisdiction of the US and that the prisoners did have *habeus corpus* rights in US courts. This decision was initially celebrated by lawyers as confirming that the US Constitution protects the fundamental rights of non-citizens, as well as of citizens (CCR, 'Supreme Court Rules Detention of Guantanamo Detainees can be Reviewed', 28 June 2004, http://ccr-ny.org; press release, last accessed 29 December 2007).

The Administration, however, was able to interpret the Supreme Court ruling as granting the prisoners *formal* but not *substantive* rights to bring *habeus corpus* petitions to US courts (Amnesty International 2005a: 45). As the Supreme Court had offered no advice to lower courts on how to treat those petitions, federal judges could simply throw them out. In fact, in January 2005, two judges in the same federal court passed completely contradictory judgements concerning *habeus corpus* petitions from Guantanamo prisoners. The Bush Administration appealed for a final decision to have the contradiction settled in its favour, and the Court of Appeals for the District of Columbia obliged in 2007 (following the Military Commissions Act), ruling that the detainees had no rights to *habeus corpus* relief in federal courts (*Boumediene* et al. v. *Bush* 2007).

In the other important Guantanamo case to reach the Supreme Court, *Hamdan* v. *Rumsfeld* in 2006, the Court found that, contrary to the arguments of the Bush Administration, it did have jurisdiction over military tribunals. It did so despite the wording of the very particular Graham-Levin amendment to the Detainee Treatment Act 2005, which had been passed in response to the judgement in *Rasul* v. *Bush*, to the effect that '[N]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of *habeas corpus* filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba' (Section 1005, Detainee Act 2005). The Geneva Conventions did play a part in this decision: the

Court found that the military tribunals satisfied neither US nor international military standards of due process.

However, the decision in *Hamdan* v. *Rumsfeld* was also weak and ambiguous insofar as the Supreme Court did not rule that the detainees must be granted prisoner of war status, or that they should be brought within the US legal system. It required only that Congress should determine the form the trials for enemy combatants should take. Congress passed the Military Commissions Act in 2006 which explicitly stated that detainees deemed to be 'unlawful enemy combatants' should *not* be permitted to challenge their detention in US courts. In April 2007 the Supreme Court put off considering an appeal against the decision in *Boumediene* et al. v. *Bush* that the Military Commissions Act is unconstitutional, but it reversed itself and in June 2007 it announced that it would hear the appeal in the 2007–2008 Term. At the time of writing it has not been heard.

Guantanamo detainees now appear to have two routes to judicial review of their detention. The majority of the detainees must appeal to a military-only Combatant Status Review Tribunal. Set up following *Rasul* v. *Bush*, these tribunals have been widely criticised as governed by unacceptable standards of due process and as heavily biased towards determining that a suspect is an 'unlawful combatant' (Amnesty International 2005a: 47–51). If detainees do not appeal, or are unable to appeal, their cases will be heard by an Administrative Review Board each year to determine whether they should be released, transferred to the custody of another country, or continue to be detained (pp. 64–6). The minority of Guantanamo detainees, those who have been or will be charged with war crimes under the Military Commissions Act, must go through Military Commission Trials. These have been highly criticised on the basis that they allow evidence (including evidence gained by torture), procedures and broad and vague definitions that would not be permitted in any normal court of law, military or civilian (Amnesty International 2006a; Human Rights First 2007).

International human rights norms in America

What difference would international human rights have made to the prisoners in Guantanamo had they been applied? Prohibitions against arbitrary detention are fundamental to international human rights law. The President's declaration of a 'global war against terrorism' which justified the sovereign suspension of fundamental rights has created a context in which the laws of war have appeared more appropriate than international human rights law.[8] As we have seen, the disputed status of the prisoners under the Geneva Conventions has provided some basis for challenging arbitrary detentions in the US. However, it is hard to believe that court rulings in these cases would not have been much more straightforward and conclusive had they been judging the lawfulness of Executive measures according to the International Convention on Civil and Political Rights. Article 2 of the ICCPR states: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind'. Article 9 states: 'Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.' Moreover, the Human Rights Committee has stated that rights to minimal due process rights, such as *habeus corpus* and presumption of innocence, can *never* lawfully be suspended, even in states of emergency (Amnesty International 2002a; Human Rights Watch 2006; UN Human Rights Commission Report, 15 February 2006). As human rights pertain to

[8] This is despite the fact that terrorism is not a violation of military law or the laws of war (Ratner and Ray 2004: 71), and the armed conflict in Afghanistan ended with the establishing of a Transitional Authority in 2002 (Amnesty International 2005a). Moreover, according to Bruce Ackerman, the 'war on terrorism' is of doubtful legal meaning (Ackerman 2004: 1032–4). It does, however, have a cultural political meaning. The 'war paradigm' and the powers granted to the President following 9/11, when the country did appear to be literally preparing for war though war was never officially declared, have become very well entrenched in US political life.

human persons, in principle there is no detention anywhere, for anyone, to which international human rights do not apply (see Butler 2004: 98–9).

However, international human rights law was of no practical use to lawyers for the prisoners in Guantanamo Bay. The US ratifies human rights treaties, including the ICCPR, with the proviso that they are not *self-executing*; that is to say, they do not create rights directly enforceable in US courts (Buergenthal *et al*. 2002: 371). Officials justify this with the somewhat contradictory arguments that it would be undemocratic simply to import international law directly into US law, and, at the same time, that is unnecessary as US law already includes all the rights it covers except those against which there are reservations. As a result, it was deemed unnecessary for the ICCPR to be endorsed by the Legislature and there are no mechanisms for its enforcement in the domestic legal system of the US (Roth 2000). The ICCPR is of no use in providing *legal* checks on sovereign power in the United States; it can only be used to put *political* pressure on the Executive and Legislature to adjust policies to conform to international human rights. On the occasions when the Administration has felt it necessary to address its obligations under international human rights law, it has argued that they are irrelevant to Guantanamo because it concerns wartime detentions (Amnesty International 2005a: 32 and 37–8). However, not only is the legality of the 'war on terror' dubious in the extreme, but the ICCPR does not cease in times of war; it runs alongside international humanitarian law (p. 43).

Of course, human rights organisations, especially Amnesty International and Human Rights Watch did try to bring pressure to bear on the US government using arguments in international human rights law against arbitrary detentions and torture in Guantanamo Bay. They presented these arguments in 'friend of the court' briefs to the Supreme Court, in letters and memoranda to the US Executive and Legislature, directly to the public in press releases and reports, and in reports to international organisations, including the

Inter-American Commission for Human Rights, the EU and the UN Committee for Human Rights. National advocacy organisations also used arguments from international human rights law. In fact, the ACLU actually *increased* the resources it dedicates to international human rights during this time, employing more staff to work on human rights and preparing a shadow document for the UN Human Rights Committee on US violations of the ICCPR (ACLU 2004; ACLU 2006a). All the NGOs involved appealed to America's role as a *leader* of international human rights, as an example that other, presumably less principled regimes, would be tempted to, and actually had followed 'under cover' of the 'war on terrorism'; and to prudential arguments concerning the risks American soldiers would be likely to face if the US persisted with its policies at Guantanamo.

However, with the exception of Amnesty International and also, though to a lesser degree, Human Rights Watch, organisations campaigning for the civil rights of the prisoners in Guantanamo Bay, including the Center for Constitutional Rights, Human Rights First and the American Civil Liberties Union, relied much more on arguing from the 'core values' of American democracy and law, on the separation of powers and on fundamental rights to due process. For the most part arguments from international human rights and humanitarian law were secondary (see for example, CCR 2002; Human Rights First 2002, 2003a, 2003b; ACLU 2002, 2004, 2006b). On the rare occasions on which they engaged debate on Guantanamo, this is also true of Muslim Associations CAIR and MPAC which invariably represented their members and supporters, understandably, as good and loyal Americans. Amnesty International positioned itself much more as an outsider, as an international witness and advocate for the prisoners. Following a press conference accompanying the launch of its annual report in 2005 at which Irene Khan, Amnesty's General Secretary compared Guantanamo to the Soviet gulags as global symbols of human rights abuses, Amnesty was criticised by

President Bush and others as anti-American, and became an object of hate for the Right (see, for example, 'Amnesty's Amnesia', *Washington Post*, 9 June 2005). Even Amnesty did, however, on occasion appeal to national pride. Khan, for example, declared in response to the outcry over her comments that the US should: 'Reassert the basic principles of justice, truth and freedom in which Americans take so much pride. Make the USA a true force for good in a divided, dangerous world' (Irene Khan, 'Close Guantanamo and Disclose the Rest', 22 June 2005, press release, http://web.amnesty.org/library/Index/ENGAMR511012005?open&of=ENG-USA, last accessed 29 December 2007; see also Amnesty International 2005a, 2005b, 2005c, 2005d, 2006a; and Human Rights Watch 2004b, 2004c).

What is it to be American?

There is no doubt that the cultural politics of the mediated public in the Guantanamo case turned far more on national identity, on 'what it is to be American' than on human rights. In populist and Right-of-centre arenas of the mediated public, the choice presented by the sovereign decision between 'our' security and 'their' (lack of) rights continued to be justified (see, for example, 'Terror and the Court', *Wall Street Journal*, 29 June 2004; 'Supreme Foolishness', *New York Post*, 29 June 2004; 'Supreme Court goes Overboard', *New York Daily News*, 30 June 2006). It was justified with reference to the ever-present danger faced by Americans, despite the lack of further attacks on US soil. In a speech on passing the Military Commissions Act, President Bush declared that 'It's important for Americans and others across the world to understand the kind of people held at Guantanamo . . . we have in place a rigorous process to ensure those held at Guantanamo Bay belong at Guantanamo . . . They are held in our custody so they cannot murder our people' (White House press release, 'President Discusses Creation of Military Commissions to Try Suspected Terrorists', 6 September 2006, www.whitehouse.gov/news/releases/2006/09/20060906–3.html, last accessed 29 December

2007). We can call this the 'pride in our strength' position: America is great because it protects American lives and therefore, secondarily, American political life which depends upon it.

At the other end of the political spectrum, the liberal 'pride in our values' position is justified by the direct aim of preserving American political life. Increasingly, especially following the Military Commissions Act, criticising Guantanamo as unconstitutional led to accusations that the President was anti-American. The Center for Constitutional Rights, for example, was involved in a serious campaign to impeach President Bush, arguing that there are no other legal avenues to pursue against an Executive that will not accept the proper checks and balances of the democratic American system. The President is dismantling the American Constitution and must be stopped (CCR 2006a). Clearly, the strategy here is to encourage US elites to uphold values and principles of American political life by publicly disassociating themselves from the 'few bad apples': President Bush and his closest advisors.

Somewhere in between these two political positions is a straightforward belief and pride in America, virtually no matter what the government does. It is well summed up in the view of a columnist for the *New York Daily News*, who situated himself 'squarely in the middle' between conservatives and liberals following the *Rasul* v. *Bush* decision in the Supreme Court: 'We're Americans and we believe in laws, even for mad-dog killers' ('Top Court Right to Make US Play by its Own Rules', *New York Daily News*, 30 June 2006). This position – let's call it 'pride in our country because we are right' – is, of course, very far from guaranteeing that the highest principles of judicial procedure will be safeguarded. On the contrary, it may rather foster the complacency that assumes that 'we' don't violate human rights. However, in a relatively open and pluralist public this position does enable contestation of what *is* right, what 'America' means in terms of the core values of political life. 'Pride in our country because it is right' was, for example, explicit in the comments of Republican Senator for Arizona John McCain in

relation to his Amendment to the Detainee Act which defined and listed permitted interrogation techniques, to give US troops clear guidelines and to show the world that the US does not practise torture. McCain justified his intervention in terms of national pride, arguing that 'it's not about who they are, it's about who we are' and 'we are better and different from our enemies' (quoted in 'Looking at Abu Ghraib's "Painful" Question', *New York Daily News*, 18 October 2005; and in 'Senate Supports Interrogation Limits', *Washington Post*, 6 October 2005).

Even when it has worked to challenge the cruelties and injustices of arbitrary detention and torture, however, there is generally a very clear limit to invocations of national pride as a way of securing rights for non-citizens. National pride, as we might expect, tended to reproduce a strong sense of the division between 'we Americans' and 'the rest of the world' in the mediated public. Challenges to the sovereign as a result of national pride did not lead to any sustained discussion of the logic of human rights: that there should be an end to discrimination between citizens and non-citizens in respect of fundamental rights; that all human beings should be treated equally before the law. A striking example of the limits of nationalism as a means of mobilising support for the rights of non-citizens comes from an editorial in the *New York Times* putting the case against the Bush Administration's position on Guantanamo as legally and morally wrong in the run up to the Supreme Court hearing *Rasul* v. *Bush* ('The Court and Guantanamo', *New York Times*, 19 April 2004). The *New York Times* is seen as ultra-liberal, even anti-American on the Right, and this article is one of the very rare occasions on which the ICCPR was cited in the mediated public as relevant to Guantanamo Bay. What is striking, however, is how the *New York Times* nevertheless strongly separates what is due to Americans and what is due to non-citizens, arguing that the prisoners are not claiming rights to have American courts review their cases but are, rather, 'seeking only the most basic elements of due process' and would be satisfied with a military tribunal. Not only is

this inaccurate, given the form of military tribunals set up to try prisoners in Guantanamo, it is also surprising: why should it be necessary to insist that the rights of Americans and non-Americans are *not* identical, given that the whole purpose of the ICCPR is to insist that all individuals, regardless of nationality, are entitled to the same respect for fundamental freedoms?[9]

As we have seen, the legal judgements of the Supreme Court have made very little substantive difference to the detainees in terms of gaining them rights to a fair trial, and nor has political opposition to arbitrary detention in Guantanamo Bay had any real effect so far. On the contrary, at the time of writing those detainees who have not been released without charge or disappeared remain mired in legal pedantry as the Executive treats Supreme Court rulings as no more than tactical uses of the law which they must evade or combat. Many of the prisoners have taken their fate into their own hands, taking part in hunger strikes and riots and refusing to engage at all with the processes that have been put in place to judge them. There have been numerous suicide attempts; three of them successful so far. Where US law has made so little difference to the practical situation of the prisoners, it is perhaps unsurprising that international human rights have made even less difference. International human rights have virtually no legal purchase in the US courts, and nor have they proved effective in rousing public outrage or creating the political will to put pressure on the Bush Administration to act within international norms in granting prisoners a fair trial. Even where human rights *are* invoked in the mediated public sphere in the US they tend to be understood as 'special rights' for non-citizens, a set of second-class rights of last resort rather than the framework of universal principles of global justice within which the business of state should

[9] In fact, as Howard Friel and Richard Falk clearly demonstrate in their study of how the paper has reported issues of international law in relation to wars in which the US has been engaged – from Vietnam to Iraq – misunderstanding international law is the rule rather than the exception in the pages of the *New York Times* (Friel and Falk 2004).

be conducted. Guantanamo Bay is undoubtedly an international human rights scandal, and, for sections of the mediated public, an embarrassment and a blow to American national pride. It has not, however, led to serious, sustained discussion in the mediated public of what human rights mean, or to an understanding of the United States of America as bound by global standards of human rights.

HUMAN RIGHTS AT HOME IN THE UK[10]

In the UK, arbitrary detentions of suspected terrorists at Belmarsh and Woodhill prisons were comparable to those in Guantanamo in that the sovereign decision to suspend fundamental rights similarly created a space that was designed to fall outside national and international law. This was absolutely explicit in the UK Executive's declaration of 'a public emergency facing the nation' in November 2001 in order to be able to derogate from Article 5 of the European Convention on Human Rights. Article 5 forbids arbitrary detention, requiring that proper procedures of law should be followed if a person is detained, including telling them the reasons for their detention, charging them and bringing them 'speedily' before a judge. The declaration of a public emergency accompanied the 2001 Anti-Terrorism, Crime and Security Act (ATCSA) in order to detain around twelve men suspected of terrorism. Several more were subsequently added to the list, bringing the total to seventeen.

International human rights in the UK

As we noted in Chapter 2, in Europe human rights are far more thoroughly institutionalised than in any other system, including the UN: many of the member states of the Council of Europe have incorporated the ECHR into domestic law, and the European Court of Human Rights is effectively 'the constitutional court for civil and

[10] The phrase is that of the UK government, introducing the Human Rights Act 1998 (United Kingdom Government, 1997, *Rights Brought Home: the Human Rights Bill*, Cm 3782, London: TSO).

political rights' in Europe, hearing complaints from individuals as well as from member states (Buergenthal *et al*. 2002: 172).

This institutionalisation of global human rights certainly made one very clear difference between the conditions, and therefore the consequences, of the sovereign decision to declare a state of emergency in the US and the UK: the UK Executive was bound by an international human rights convention, the ECHR, even as it opted out of certain key Articles of the Convention. Firstly, when the UK incorporated the ECHR into domestic law as the Human Rights Act, the Law Lords (the UK Supreme Court) became legally bound to judge whether the Executive decision to declare a state of exception was justified. Secondly, derogation from the ECHR must be lawful according to the ECHR itself: the measures that are put in place to deal with the dangers presented must be *proportionate* to the situation; and they must be *compatible* with other human rights obligations under international law (Article 15, ECHR). The Law Lords were also, therefore, legally bound to judge whether the exceptional measures the UK government put in place were proportionate and consistent with the UK's other human rights obligations.

In December 2004 the Law Lords heard the 'Belmarsh detainees' case' on appeal against the decision of a lower court that their detention was lawful, despite the fact that none had been charged or had any prospect of being tried (*A and others* v. *Home Secretary* 2004). The Lords addressed whether the declaration of a state of emergency was justified, as they were legally bound to do. However, although all but one of the panel of judges were sceptical that there was a public emergency threatening the nation that would make such exceptional measures as arbitrary detention necessary, ultimately they declined to rule on the Executive's decision. Their principle justification for this reluctance was the 'traditional deference' of the courts to an Executive decision to declare a public emergency, given that such a decision is 'a pre-eminently political judgement' (Lord Bingham in *A and others* v. *Home Secretary* 2004, p. 17). For the most part the Lords in this case agreed that, as the

European Court has in the past accorded a large margin of appreciation to member states of the Council of Europe in their assessment of whether they face a public emergency, it was incumbent upon the UK court to respect the proper political functions of the Executive in making such a decision.

Although they refused to judge the declaration of public emergency as such in *A and others* v. *Home Secretary*, the Lords nevertheless ruled that the detentions were unlawful. In other words, they refused to rule on the state of emergency, but they did rule on the state of exception. They found that ATCSA was disproportionate – arbitrary detention was a poor solution to the threat posed by the suspected terrorists; and discriminatory because it targeted only non-citizens. In this sense, the logic of human rights was effective: all the judges agreed that it was not legal for the Executive to treat non-citizens differently from citizens, even when 'normal' law was suspended. In order to arrive at their decision, the judges referred to the case law of the European Court of Human Rights and to other international human rights law. They saw an important part of their task in reviewing a sovereign decision made by the UK Executive as anticipating what the European Court would have decided had it heard the case.

Sovereignty is not directly at stake in the Law Lords' ruling on whether the arbitrary detention of suspected terrorists in the UK is lawful. Unlike other Supreme Courts, the Law Lords have no authority to strike down law made by parliament. Nor, like other Supreme Courts, can they interfere directly with the prerogative powers of the Executive. Sovereignty is indirectly at stake, however, insofar as the UK Executive is required as a result of this ruling to review measures taken as a result of suspending the rule of law. Although the Law Lords can not strike down law that has been passed by the UK parliament, it is generally agreed that no Executive or Legislature would happily ignore a judgement from the highest national court that it was making law that is unlawful. Indeed, on introducing legislation to parliament, ministers are bound to declare that, in their opinion, it conforms to the ECHR.

In response to the Law Lords' ruling, the UK government did pass new legislation. The Prevention of Terrorism Act (PTA) 2005 granted the Executive the power to keep suspected terrorists under 'control orders' based on 'reasonable suspicion' founded on secret evidence. (At the time, the UK did not rule out the use of evidence extracted by torture, though it has now been officially banned following a ruling from the Law Lords (*A and others* v. *Home Secretary* 2005).) Whilst some of the control orders – amounting to house arrest – require derogation from the ECHR, so far the government has relied on those which appear not to require derogation, including curfews, electronic tagging, restrictions on communication and so on. The government declared its belief that the PTA is within the letter of the ECHR. However, far from the sovereignty of the Executive being checked, the opportunity presented by the new legislation has been taken to encroach still further on individual rights in the name of security. The PTA *extends* the powers of the Executive, whilst observing the letter of human rights law that there should be no discrimination between citizens and non-citizens: the control orders it has designed may equally be imposed on *citizens* as well as on non-citizens.[11]

The UK Executive has shown itself as determined as the US Executive in maintaining a policy of arbitrary detention that suspends key dimensions of the normal juridical order. Nevertheless, in so far as the Lords' decision did alter the terms of the sovereign suspension of normal law in the UK, it was as a result of international human rights norms. Technical, legal uses of human rights are cosmopolitan in so far as they abolish the distinction between

[11] The government has appealed various High Court rulings that control orders are not compatible with human rights, depriving individuals of liberty and of rights to due process that require derogation from the ECHR (Joint Committee on Human Rights Eighth Report 2007). On 31 October 2007, the Law Lords basically endorsed the control order regime, though they set limits to the curfews that could be imposed and ruled that suspects should have access to 'key evidence' against them (*JJ* v. *Home Secretary* and *Home Secretary* v. *E and others*). There will undoubtedly be further legal challenges to those rulings.

citizens and non-citizens in respect of fundamental rights. It is notable that, in contrast to the US, human rights norms were publicly justified by governmental officials as well as by human rights organisations and lawyers. At the same time, however, both in the US and UK, opponents and supporters of human rights share a similar orientation towards political life as based in the nation. In the UK, in court and in the mediated public, technical uses of human rights became entangled with, and eventually compromised by, sentiments of national pride.

European human rights and British liberties

The most striking instance of the entanglement of sentiments of national pride and of the vocabulary of human rights was the changing relationship between uses of the terms 'human rights' and 'civil liberties'. 'Human rights' made sense of the law in technical terms, and it was used in the mediated public to explain legal obligations and constraints which the UK Executive should respect, but from the very beginning of the case, when the Executive decided to derogate from the ECHR and ATCSA was passed in parliament, it was not the term 'human rights' but rather 'civil liberties', sometimes qualified as 'British civil liberties' or 'centuries-old liberties', that mobilised passionate defence. Opposition to the Executive decision to suspend rights was very frequently made, across the political spectrum, in terms of the glorious history of British freedoms. Such sentiments were resoundingly invoked in arguments by political opposition to Executive measures by both parties, by the leader of Liberty (e.g. Chakrabarti 2003) and most notably, and at some length, by Lord Hoffman in the 'Belmarsh Detainees' Case'. In what one commentator (Poole 2005) has described as 'tabloid history', Lord Hoffman constructed the European Convention as a modern-day protection of ancient British liberties, arguing that:

> Freedom from arbitrary arrest is a quintessentially British liberty, enjoyed by the inhabitants of this country when most of the

> population of Europe could be thrown into prison at the whim of their rulers. It was incorporated into the European Convention in order to entrench the same liberty in countries which had recently been under Nazi occupation. The United Kingdom subscribed to the Convention because it set out the rights which British subjects enjoyed under the common law.
>
> (*A and others* v. *Home Secretary* 2004: 50)

We see here a strategy on the part of human rights supporters to join human rights and British traditions together in an appeal to national pride. This strategy can be understood as an attempt to translate human rights into the vernacular of British political life. Sally Engle Merry has shown how cultural politics are necessary to bring human rights from the transnational sphere of global elites into local, everyday life. Merry describes processes by which 'human rights' can become political and legal tools in societies in which they have previously had no resonance. In order for human rights to make sense to ordinary people in a society, they must be translated into terms that make sense to them, that enable them to judge their situation in human rights terms, to see it as unjust and to take action against that injustice. Merry calls this process of translation and framing, 'making human rights vernacular'. One of the main roles of human rights activists is to mediate between legal understanding of human rights encoded in conventions, treaties and declarations and the language ordinary people use to understanding their own situation (Merry 2006).

In this case, the cultural political strategy to make human rights vernacular through an appeal to national pride was not successful. By the time of the Law Lords' judgement on ATCSA and debates over the PTA, rather than meaning the same thing, 'human rights' and 'civil liberties' had been quite clearly separated and opposed in many sections of the mediated public. Outside liberal and legal circles, in fact, European human rights were increasingly understood as *threatening* the ancient civil liberties of British citizens. They were

understood to threaten both the bare life of British people and British political life by refusing to allow discrimination between terrorist suspects and British citizens. On the one hand human rights were seen as responsible for letting terrorist suspects loose in the country because the government was not allowed to deport them; on the other, human rights were seen as responsible for overturning centuries of entrenched liberties for British citizens.

Predictably opposition to human rights came from conservative sectors of the mediated public. However, it also came from the Prime Minister. In a speech following the terrorist attacks of 7/7 in which Tony Blair told the country that 'the rules of the game have changed', he also declared that human rights were creating obstacles to safeguarding national security and that it might be necessary to amend the Human Rights Act (Prime Minister's press conference, 5 August 2005, www.number10.gov.uk/output/Page8041.asp, last accessed 12 June 2007). In particular he proposed that foreigners suspected of terrorism should simply be deported. It is in contravention of European human rights law to send a person to a state where they are at risk of torture (*Chahal* v. *UK* 1996). Blair's suggestion that human rights law must be altered so that Executive measures to deal with terrorist threats will not be judged to be in violation of human rights has been widely taken up. Reforming or 'scrapping' the Human Rights Act, which incorporates the ECHR into British law and which was passed by the Labour government in 1998, became part of the Conservative Party's election manifesto in 2005. The *Sun*, the newspaper with the widest circulation of any paper in the UK, went so far as to run a campaign soliciting readers' votes to demand that the HRA should be repealed ('Time to Stop the Madness', *Sun*, 12 May 2006).

Although parliament can, in principle, repeal or alter the HRA, the UK must still comply with the ECHR, from which the HRA is derived. It would therefore be extraordinarily difficult even to alter the HRA, precisely because of the way the UK state is networked into the accountability structures of Europe. To avoid European censure for not complying with the ECHR, the UK would have to leave the

forty-seven states of the Council of Europe and also the European Union (because signing the ECHR is a condition of joining). The UK would effectively become a pariah state in Europe (Bognador 2006). This seems a very unlikely course of action for any government. What the newly revived, and oft-repeated, opposition between 'our' security and 'their' rights does mean, however, is that although intermestic human rights are embedded in law in the UK, they are far from becoming part of the vernacular of political life. Human rights are themselves now in need of defence, as well as those unpopular non-citizens accused of terrorist activities whom human rights are supposed to protect.

Human rights have become highly politicised in the UK as a result of the Executive decision to suspend fundamental rights to liberty in the name of national security, and this makes their use as legal, technical instruments increasingly contentious. The government's problematisation of human rights, strongly supported in the mediated public by significant sections of the press, works to reinforce the sovereign decision of the Executive by devaluing the authority of the courts that judge intermestic human rights cases. It is a strategy of cultural politics which has been more successful than that of human rights supporters to link traditional civil liberties with human rights through national pride. By devaluing the authority of legal justifications that challenge the sovereign decision to suspend normal law, the Executive gains political support for policies which undermine human rights, and at the same time wins political popularity.

LEARNING FROM GUANTANAMO AND BELMARSH

Sovereignty is socially constructed: it is historically specific and justified differently according to the challenges which make political elites decide that exercising sovereignty is both desirable and possible. Sovereignty is always, however, by definition, effective: it is the authority to have the 'last word' where there is no higher authority. Threats to national security which justify sovereign

decisions are surely the most difficult test of universal human rights applied to non-citizens: it is when 'we' feel threatened that 'their' fundamental rights are most likely to be violated. In the case of the sovereign decision to suspend fundamental rights in the US and UK because of the threat to national security of the 'war on terror', the viability of human rights to challenge that decision has been tested to the limit. In the cases we have examined in this chapter, far from state sovereignty being eroded or transformed so that it is only legitimate where it is couched in terms of the protection of fundamental human rights for all individuals equally, sovereignty is being exercised in ways that conform very closely to the ideal of the national state, discriminating between citizens and non-citizens in the name of the security of the nation.

In relation to the cultural politics of the human rights field, the research carried out for this chapter confirms that legal differences between the US and UK do make a difference. In both the US and UK there has been an Executive determined to use powers created by the declaration of a public emergency and willing to ignore the spirit of judicial rulings in order to do so. Moreover, in both cases the highest national courts have deferred to the Executive. Ackerman sees this as the historical norm when a public emergency has been declared (Ackerman 2004). However, American exceptionalism with respect to the significance of international human rights norms has been confirmed. Although advocacy organisations like the ACLU are now more than ever equipped to address domestic issues in terms of international human rights law (see also Mertus 2005: 328–9), human rights have only a very weak standing in US domestic courts. The only exception to this rule is cases brought under ATCA, which we will look at in the next chapter.

In contrast, in the UK, although the Law Lords were deferential to the Executive, and the Executive resisted the spirit of the juridical rulings, the deference was not so marked, and neither was the defiance. Whilst the terrorist suspects now under control orders in the UK have not been charged or tried – and this is certainly a violation of

fundamental human rights – they are nevertheless living under a far less restrictive regime than that of imprisonment (which has, in Guantanamo Bay, been accompanied by torture, as arbitrary detention and secret trials very often are). The UK Executive was arguably more responsive to the rulings of the Law Lords, which was certainly bolder than the Supreme Court in its judgement that the sovereign's suspension of fundamental rights was unwarranted, because its authority is in part derived from the way it represents the European Court of Human Rights in the national context. In the UK the European Court of Human Rights functions as a constitutional court beyond the national. It is very unlikely, in a situation in which no other European state derogated from the ECHR because of threats from Al-Qaeda, that the European Court of Human Rights would support the UK Executive's decision to suspend fundamental human rights over the decision of the UK's highest court that such measures were warranted. Although this does not mean that the UK Executive has *less* sovereignty – the authority to have the 'last word' is not divisible in this way and, as we have already noted, neither the Law Lords nor the European Court of Human Rights have the power to strike down legislation made by the UK government – it does transform the conditions in which sovereignty is exercised. Authority is dispersed and decentred in the human rights field in the UK because of the way it is dispersed and decentred in the European system of human rights. There are more legitimate sites at which a sovereign decision to suspend fundamental human rights will be challenged, a further layer of courts beyond the national. As cosmopolitan political theorists argue, sovereignty is transformed in Europe as the Council of Europe and the European Union together create an overlapping 'set of interlocking institutions each responsible and accountable to each other' (Held 2003: 168; Benhabib 2007: 31).

It is only in the juridical sub-field, however, that differences between the US and UK were significant. In the governmental sub-field, the Legislature was similarly deferential to the Executive in both the US and UK. Although, in both cases, there was political

opposition to the sovereign decision to suspend fundamental individual rights, in the end the Legislatures were fearful of appearing weak on terrorism and passed laws which have effectively legalised, consolidated and even extended the extraordinary powers taken by the Executive. Again, according to Ackerman, in terms of historical precedent, this is unsurprising (Ackerman 2004: 1047). As we noted above, in the UK the PTA allows control orders to be imposed on citizens as well as non-citizens. In the US, the Military Commissions Act has been widely criticised for stripping courts of fundamental powers, including suspending *habeus corpus*, and also for extending Executive powers to detain US citizens as well as non-citizens if they are designated 'unlawful enemy combatants' (CCR 2006b; HRF 2007).

In the mediated public, what was most interesting in both the US and UK was how sentiments of national pride were invoked. In both cases it proved possible to mobilise feelings of pride for the political life of the nation to defend the protection of rights for non-citizens as *individuals*, even when national security was felt to be threatened. The political life of the nation was accorded value and importance, even if the bare life of the nation was paramount. What proved very much more difficult, however, was harnessing feelings of national pride to realise global human rights that should be secured by a cosmopolitan state. It was practically impossible to represent the fundamental rights of non-citizens on an equal basis with the rights of citizens in conditions of heightened fears for security in the mediated publics of the US and UK.

Although human rights law abolishes the distinction between citizens and non-citizens in certain fundamental respects, what these case studies suggest is that nationalism continues to structure the cultural conditions within which sovereign decisions are made. In terms of Fraser's conception of frames of global justice, the meta-question of whose interests and rights are at stake is contested in these case studies, but only within limits that are firmly established by pride in the nation and national belonging. As we have seen in this

chapter, invocations of national pride have come from judges committed to international human rights norms as well as journalists, from human rights activists as well as politicians. Nationalism is the norm for both defenders and opponents of human rights. Even within a member state of the European system of human rights, supporters of human rights judge that human rights will be better served if they are directly linked to nationalist rather than to cosmopolitan justifications. In actual fact, such strategies prove very problematic. In the UK, the successful use of human rights in the juridical sub-field has contributed to the abolition of the legal distinction between citizens and non-citizens following the letter rather than the spirit of international human rights law: the UK's control orders on terrorist suspects now apply equally to citizens and non-citizens alike. However, as we have seen, nationalist justifications of human rights as age-old British liberties have become entangled with demands for abolishing what are seen as the restrictions of European human rights on the popular will of the national political community, which would put public safety above the individual rights of terrorist suspects.

Although issues of national security surely raise the most difficult dilemmas where the guarantee of fundamental rights is concerned, human rights are supposed, in principle, to protect vulnerable people precisely when they are faced with state persecution, which is most likely when concerns for national security are heightened. As we have seen in the case studies analysed here, it is precisely when fundamental civil rights are most needed that they are most highly politicised. Moreover, the entanglement of human rights and nationalism is far from unique to cases in which the sovereign decision constructs a choice between national security and the fundamental human rights of terrorist suspects. As we shall see in Chapter 4, justifications for cosmopolitan norms, nationalism and human rights are entangled in complex ways in intermestic human rights cases even when such cases are celebrated by human rights activists as imagining a community of global citizens beyond nationality and beyond national borders.

4 Imagining a community without 'enemies of all mankind'

For cosmopolitans, we are human beings over and above anything else: nationalism is limited intellectually, morally and politically, and must be transcended, if not completely abolished. A diversity of identifications is possible for every individual – including those previously 'captured' by national identification, ethnicity, gender, sexuality and so on – so that a celebration of hybridity and intermingling is not only morally better than focus on national identity, it is also more satisfying and more enjoyable (see Phillips 2007: 68). In terms of claims for justice, cosmopolitanism begins from the idea that the national frame of politics is too parochial in a globalising world in which economic, social and cultural processes, and people and problems, cross territorial borders so readily (Held 1995; Beck 2006).

Cosmopolitanism is an attractive theory for our times. However, in comparison with nationalism it can convincingly be argued that it is rather elitist, an ideal for 'frequent flyers' who are able to transcend the social and cultural ties of locality and nation (Calhoun 2003). It is for this reason that Craig Calhoun has set out to explore the continuing importance of nationalism. In *Nations Matter*, Calhoun's stated aim is to escape from the opposition of nationalism and cosmopolitanism, which he sees as damaging to those gains that have been made for ordinary people in the name of the nation, but also to the cosmopolitan ideal of the equal value of all human beings (Calhoun 2007: 24–5).

Calhoun argues that cosmopolitanism and nationalism share common roots in the liberal individualism that developed with the

modern state.[1] Calhoun sees nations as collectivities of individuals (as we can see from the way statistics are gathered), who do not – at least in principle – require the mediation of family, community, region or class in order to be members of a society. This marks a significant break with feudal understandings of loyalty and honour in which there was no political identity outside immediate social relations. It is generally agreed that nationalism became a force in the world with the American and French Revolutions, which created modern states based on individual rights. However, Calhoun makes much of the fact that the political revolutions which officially inaugurated political modernity, breaking with imperialism in America and absolute monarchy in France, actually shared elements of both nationalism and cosmopolitanism. In America and France, states were established explicitly to guarantee 'the rights of man', especially to equal treatment before the law and to political representation.

Civic nationalism and cosmopolitanism differ, in Calhoun's view, only in terms of their respective evaluation of particularism and universalism. Nations are explicitly exclusive. This is clear in the great eighteenth-century declarations of the 'rights of man', which, having resoundingly called for the recognition that 'all men are created equal', born with inalienable natural rights, then go on to make it quite clear that by 'man' they mean the citizen of the national state.[2] Calhoun argues that cosmopolitanism begins from

[1] Calhoun prefers the formulation 'nation-state' over that of 'national state', presumably because he is precisely interested in the way in which nations are imagined in terms of a relatively coherent shared identity in relation to states. I prefer the latter, only because it seems to suggest better the view that states *make* nations, a view that Calhoun also shares.

[2] This is especially, and notoriously, evident in the formulation of the Declaration of the Rights of Man that followed the French revolution.

> Article 1. Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.
> Article 2. The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.
> Article 3. The principle of all sovereignty resides essentially in the nation.

the failure of civic nationalism in its own terms: if 'the right to rights' is that of all human beings by birth, why should citizens receive different treatment from non-citizens? Why should French or American citizens be privileged to live in societies that respect and uphold rights, while others are condemned to repression and destruction? However, if civic nationalism has a blind spot with regard to the putative universalism of the nation, Calhoun argues that cosmopolitanism has a similar blind spot with regard to particularism, being suspicious, and often dismissive, of relationships which appear to work against the formation of a world in which the rights of all human beings will be respected. This is especially true of the political community attached to the modern state, the nation.

The formation of the national political community, according to Calhoun, has been hugely significant in terms of the leverage it enables ordinary people to exercise over state elites concerning the conditions of common social life. Nationalism is a form of identification which has reinforced social bonds, produced deep experiences of belonging with strangers outside one's immediate circle, and mitigated the development of selfish individualism which is otherwise such a prominent feature of modernity. Of course, community here clearly does not involve anything like face-to-face relationships. Political communities are imagined communities (Anderson 1991). They involve a mediated sense of belonging amongst those who find themselves, through imaginative identification, to be in a particular

> We move very rapidly here from abstract statements of the universal rights of man, to an assertion of the sovereignty of the nation, which is empowered to make such social distinctions as are deemed necessary for the good of all.
>
> The move from universal to particular is perhaps less obvious in the wording of the American Declaration of Independence, which begins: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.' What is important here is the 'we', which – though it is not specified – is that of the American nation. The American Declaration presupposes rather than explicitly states that it is individuals who are members of the nation who are in possession of the universal rights of man.

community. A feeling of belonging to a national community of citizens is not 'natural', and nor does it relate only to the possession of citizenship rights. On the contrary, the national state has continually engaged in cultural projects to create and sustain a nation: through education, especially the teaching of a national language, in media communications, supporting arts, festivals celebrating national achievements, national museums and monuments and rituals and so on. As a result, as Calhoun argues, civic nationalism has become inextricably intertwined with ethnic nationalism – even if one or the other tends to dominate in different places at different times (Calhoun 2007: 117–46). Feelings of belonging to a nation, and citizens' sense of their entitlements and obligations in relation to national states, are not rationalist: they are always entangled with a sense of the nation as distinctive and special in respect of the geographical origin of its founders, its territorial base, its religion, language, food.

Imagined communities involve a shared understanding of the symbolic meanings around which they are organised, and they also involve practices that make the community a reality insofar as 'we' feel ourselves to be participating in it. The national community has been spectacularly successful. Far from involving a thin sense of belonging compared to some original notion of community as involving face-to-face relationships, the nation inspires an incredible degree of emotional attachment that has made extraordinary sacrifices quite customary. It is not so much, as Anderson points out, that citizens are prepared to kill for the nation that is astonishing; what is remarkable is how willing they have been to die for it (Anderson 1991: 7).

Although not necessarily impossible, it is difficult to see how a cosmopolitan project could replace such passions and commitments, even where what inspires attachment is predominantly civic nationalism which is halfway towards cosmopolitanism. In part this is because, in the absence of a world-state, cosmopolitanism lacks institutions which are uniquely dedicated to promoting cosmopolitan feeling in the world. The United Nations, which comes closest to a world-state, is actually – as its name suggests – created out of

national states. The UN is based on 'the sovereign equality of all its Members' (UN Charter, Article 2). These states may now be undergoing transformation in so far as they are bound into structures of global governance in which, eventually, public policy may be made for the world (Held 2003: 167). However, such states have very little incentive to drop the symbols and routine turns of phrase that Billig identifies with 'banal nationalism', which routinely 'flag' the nation, and which help form a political community amongst citizens (Billig 1995). The emotional content of nationalism is closely linked to its particularism. It is not necessary to agree with Schmitt that 'whoever invokes humanity wants to cheat' to find his argument that where everyone is in principle a friend, where there are no enemies, it is far from obvious that there can be a political community at all (Schmitt 1996: 54). How can humanity inspire ongoing passionate attachments to rival the nation where every single human being would be equally entitled to call themselves a citizen of the world? With no 'them', where is the emotional attachment to 'us'?

The problem, then, is that in transcending nationalism, there is a risk of dissipating political community altogether, leaving individuals exposed, as it were, without experiencing social ties to strangers as in any way meaningful or valuable. However, despite the difficulties of imagining a global community of citizens, there is no doubt that the frame of justice that tied the state and nation together in a national political community is being disrupted. The question of how community may be formed if state and nation become detached is not only of interest to those engaged in normative political theory; it is also of pressing concern as a result of ongoing changes that are already taking place in the relationship between state and nation. It is just the way in which intermestic human rights are disrupting the national frame of justice that is the topic of this study. Besides the evident attractiveness of the way in which it takes modern universalism seriously – the claim that every single human being matters equally – these disruptions to the national frame of politics are what make cosmopolitanism especially relevant today.

HUMAN RIGHTS AGAINST 'ENEMIES OF ALL MANKIND'

In this chapter we will study two cases in which activists aimed directly at creating a community of global citizens around human rights cases. They aimed to mobilise sympathetic supporters of human rights in the US and UK for the civil rights of human beings in countries far away, supporters for whom such rights are not just morally relevant, but also important and compelling reasons for action. Using ground-breaking legal cases they attempted to create excitement and sympathy for human rights, to foster a global political community which would recognise obligations to realise international human rights encoded in international human rights law. Inevitably, however, because activists had to use the machineries of states which have historically been formed as national in order to further the project of creating a global community, the cosmopolitan justifications of human rights they mobilised had to compete with more conservative or simply more cautious actors in the human rights field, who defended the national community.

The Pinochet case has been celebrated by many as a turning point in the law of human rights (Habermas 1999; Sands 2005; Beck 2006: 223). It was the first time a former head of state was (almost) held internationally accountable for crimes against humanity committed during peacetime. Arrested in 1998 with a warrant from a Spanish magistrate demanding his extradition for crimes against humanity, including torture, hostage-taking and genocide, committed whilst he was President of Chile following a military coup, Pinochet was put under house arrest in the UK until he was finally declared medically unfit for trial and flown home to Chile in 2000. The case was ground-breaking because the highest court in the UK confirmed the principle that Pinochet's position as a former head of state did not legitimate his actions where they conflicted with human rights norms, nor protect him from prosecution for such crimes as torture and murder.

Uses of the Alien Tort Claims Act (ATCA) in the US have also been crucial to the human rights movement (Steinhardt and

D'Amato 1999; Stephens 2002; Earthrights International 2003). As noted in Chapter 2, ATCA is an obscure law from 1789, which has become hugely significant in the last twenty-five years because it allows foreigners to sue in federal courts for human rights abuses committed abroad using customary international law. I chose *Doe* v. *Unocal* as an example of the use of ATCA because it was roughly contemporaneous with the Pinochet case. Beginning in 1996 Burmese villagers sued the oil company Unocal for complicity in human rights abuses committed by the Burmese government and military during the building of the Yadana pipeline. Unocal finally settled out of court after a federal court had decided the case could go before a jury in 2003. As it made its long and complex way through the courts, *Unocal* was linked into a case heard in the Supreme Court, *Sosa* v. *Alvarez-Machain*, in which ATCA was tested against the opposition of the Bush Administration that it was unconstitutional and damaging to American national interests and security.

In both cases the defendants were referred to as 'the enemy of all mankind', '*hostis humani generis*'. Originally applied to pirates and the owners of slave ships, 'enemy of all mankind' is an 'extra-legal' term; it is used rhetorically to support legal arguments for universal jurisdiction, the pursuit and prosecution of those accused of committing offences so serious that any state is authorised to punish them. In modern times it was first used by a judge in the landmark Filartiga case in 1980 in which the family of a victim killed by state-sponsored torture in Paraguay was permitted to sue the perpetrator in the US (*Filartiga* v. *Pena-Irala*). According to this understanding, if Pinochet and Unocal are guilty of torture, genocide, slavery and other international crimes, they are 'enemies of all mankind'. They have put themselves outside the global community of civilised human beings, and they should be prosecuted for those crimes. Use of the term 'enemy of all mankind' vividly raises questions concerning what exactly the formation of a global community of justice might involve and what it means in relation to other, already-existing political communities.

Pinochet and ATCA cases were understood broadly – in the media, in subsequent commentaries by the legal profession, and by human rights organisations – in terms of human rights, though neither involves conventional human rights, law.[3] In terms of the effects of justifications that are made using human rights, ATCA cases and the Pinochet case are exemplary. They enable the study of how uses of the vocabulary of 'human rights' expand understandings of human rights, *exceeding the legal framework*, even when it is legal issues that are at stake. Besides their importance to the human rights movement, the cultural politics of Pinochet and ATCA cases are exemplary because both involve the use of customary international law in domestic courts to extend civil rights to distant others. In fact, it is this use of customary international law that makes ATCA so significant to the human rights movement in the US: it enables the introduction of human rights law into US courts, which is otherwise virtually impossible. Through ATCA, customary international law effectively becomes part of US law. The relevant section of the Judiciary Act of 1789 states that: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United

[3] As we noted in Chapter 1, the question of what kind of law covers what kinds of human rights claims is increasingly complex (see Steinhardt 1999; Ratner and Abrams 2001; Mekled-Garcia and Cali 2006). Moreover, intermestic human rights cases inevitably differ from country to country, and draw rather unconventionally on different bodies of law. In this respect, ATCA cases and the Pinochet case are actually *representative* of the peculiarities of intermestic human rights cases even though neither actually involve human rights law. Normally it is only states that are responsible for human rights. However, in cases brought under ATCA, very unusually, private individuals are sued for gross violations of human rights, thus allowing corporations to be found liable for human rights abuses (Meckled-Garcia and Cali 2006: 16). Such civil cases are very unlikely to be possible elsewhere in the world because US law, and indeed the US legal culture which favours civil suits as political tools, is unique in this respect (Stephens 2002). The Pinochet case was also not a conventional human rights case, which would normally involve only civil remedies in public law. Pinochet was actually arrested for extradition hearings to find out if he could legally be tried in a criminal court in Spain. However, the UK courts involved drew widely on interpretations of customary international law in order to present and judge the case. In this way, it becomes legally possible to find those who violate human rights criminally responsible.

States' (The Alien Tort Statute, 28 U.S.C. § 1350). Since the *Filartiga* case, the 'law of nations' has been interpreted in US courts as equivalent to customary international law. In the *Unocal* case the plaintiffs claimed that Unocal, through the Burmese military and police forces, used violence and intimidation to enslave villagers living in the area of the pipeline, and to commit rape, torture and murder. US federal courts were thus required to judge whether or not international crimes against humanity had been committed. In *Sosa* the Supreme Court confirmed that this was indeed the proper role of the federal courts.

Customary international law also played an important role in what was innovative about the Pinochet case. The initial finding by a Divisional Court that Pinochet was entitled to diplomatic immunity as a former head of state was appealed in the House of Lords where there were then three judgements by the Law Lords concerning the case, though only one legal decision. In the first judgement (Pinochet 1) the majority of the Lords found that Pinochet should be extradited to face criminal charges in Spain because customary international law, which would otherwise have prevented prosecution of a head of state for acts whilst committed in office, could not be understood to sanction crimes against humanity. This judgement was then set aside for reasons of alleged bias on the part of one of the judges (Pinochet 2), an unprecedented decision. Finally, the Lords decided that Pinochet should be extradited (Pinochet 3), but on much narrower technical grounds than Pinochet 1, based on national rather than international law.

IMAGINING A COMMUNITY OF GLOBAL CITIZENS

In the Pinochet and ATCA cases a global community formed by international law was imagined by human rights activists and innovative lawyers. In fact, international law in this conception becomes *cosmopolitan law*, which reaches inside states to create rights and responsibilities for everyone, regardless of nationality or place of residence (see pp. 38–40). A community of global citizens

was imagined as 'always already' existing as a consequence of cosmopolitan law, even though the interpretation of international law on which this understanding of law depends is, in fact, contentious and, at best, in development. According to human rights activists and legal innovators, each and every individual in the world has the responsibility to avoid actions which contravene international human rights law, even if those actions might otherwise be considered a matter of internal domestic politics, and even if they are legal in national law. In addition, international human rights law requires states to pursue and prosecute those accused of acting in ways that violate human rights.

Cosmopolitan law therefore creates a global community of citizens. Global citizens happen to be resident in particular states, because there is no world-state. Their rights and responsibilities are nevertheless created by cosmopolitan law. Cosmopolitan law embodies universal moral principles of human dignity and autonomy, but it is also genuinely positive law, applicable and enforceable in national and international courts.

In the Pinochet case, activists and lawyers justified their use of human rights as if a community of global citizens already existed. In this way they attempted to imagine it into being. Advocates of global citizenship acted as if the UK state were a neutral political and legal apparatus – a carrier for global values of cosmopolitan law. The justifications for action produced by human rights organisations, especially Amnesty International (AI), represented their 'clients' (those who had been tortured and the relatives of the disappeared), as if cosmopolitan law defending individual entitlements regardless of national boundaries already existed. For example, in a report immediately following the Divisional Court's decision (before the case went to appeal), that Pinochet had diplomatic immunity from prosecution, AI stated that 'The UK *cannot* refuse to implement the rule of international law' in extraditing Pinochet to Spain for trial (Amnesty International 1998). In fact, however, precisely what was actually demanded by the rule of international law was highly contentious in the Pinochet case.

An imagined community of global citizens did gain a good deal of credibility with the Law Lords' decision in Pinochet 1, especially because of the unprecedented media coverage of the case. The judgement articulated a community of global citizenship insofar as it held that Pinochet's position as (former) head of state did not trump the legal entitlement of individuals to have their case heard in court, regardless of their nationality or residence. Thus all individuals are constituted as global citizens in customary international law which here upholds the norm of universal jurisidiction. However, the Law Lords' interpretation of customary international law actually came as a surprise to international lawyers, even if they hoped for this outcome (Bianchi 1999; Sands 2005). Pinochet 1 was decided by a majority of just three to two and justifications for majority and dissenting opinions turned to a large extent on different interpretations of international law, with dissenting Lords taking the traditional view that it regulates relations *between* sovereign states so that former heads of state *are* immune from prosecution, even in the case of crimes against humanity. The Lords staged a clash between fundamental principles of international law itself and Pinochet 1 was a landmark decision because it might so easily have gone the other way.

An imagined community of global citizens is also well-supported by ATCA law. This is directly as a result of the cases brought by legal advocacy organisations since 1980.[4] Human rights organisations see ATCA as contributing significantly to the 'worldwide movement to end impunity and hold human rights abusers accountable' (Brief of Amici Curiae International Human Rights Organisations and Religious Organisations in *Sosa* v. *Alvarez-Machain*, p. 1). Supporters of ATCA amongst human rights organisations and legal advocacy groups interpret international law as containing a cosmopolitan core which absolutely prohibits some crimes, including genocide, slavery, summary execution and torture, and

[4] See, for example, CCR 2003; Green and Stephens 2003; Earthrights International 2004; HRF 2004.

requires all states to exercise universal jurisdiction where these crimes are at issue, pursuing and prosecuting perpetrators and offering redress to victims. In *Sosa* v. *Alvarez-Machain*, the Supreme Court judgement confirmed this interpretation of a cosmopolitan core of international law, stating that it was clear that some norms of international law are 'specific, universal and obligatory', and that they must be enforced by US courts where remedies in the claimants' domestic courts have been exhausted. The Court also, however, strongly advised judicial caution (apparently accepting many of the (inter)nationalist arguments we will review in the next section). As Justice Souter put it in his writing up of the court opinion:

> [J]udicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.
>
> *(*Sosa *v.* Alvarez-Machain, *p. 35)*

Whilst the Supreme Court and human rights activists and lawyers agree, then, in their interpretation of ATCA as cosmopolitan law, the Court's caution, and the metaphor, suggest that 'the door' to hearing claims for damages in cases of the violation of even those human rights norms which enjoy the most deeply and widely held consensus could be closed in the future.

Although the discourse of global citizenship is primarily produced by and for legal professionals and human rights activists, it does create responsibilities for ordinary, individual citizens: we must avoid violating human rights if we act 'under colour of law' as state agents or in the name of the state (in the police force, for example, or the military). Also, more mundanely, but much more commonly, we are called on to support a state's pursuit and prosecution of those who have made themselves into 'the enemy of all mankind'. Global citizenship involves more than adherence to legal procedures in so far as it creates an affective community with which individuals identify, regardless of their citizenship status or where they live. As well as in activist interventions in courts, the

imagined community of global citizenship was represented in the mediated public in the liberal media, principally in op-eds and expert opinions by activists and legal innovators and very occasionally in editorials.[5]

A phrase which sums up this affective identification and illustrates how ordinary people in the US and UK are called on as

[5] In the US it was represented in the *New York Times*: Dolly Filartiga, the brother of the young man tortured to death in the famous Filartiga case, wrote in impassioned support of ATCA in 'American Courts, Global Justice', 30 March 2004; Barbara Ehrenreich argued against the popular view that the 'constitution is not a suicide pact' and that the founding fathers *did* put principles before prudence, in 'Their George and Ours', 4 July 2004; the point of view of the *Center for Constitutional Rights* was represented in 'American Justice Tackles Rights Abuses Abroad', 3 September 2000. In the *Washington Post*: there were two articles sympathetically telling the story of Ka Hsaw Wa, Director of *Earthrights International* and his organisation's campaign in 'Rights Victims in Burma want a US Company to Pay', 13 April 1999 and 'Pipeline to Justice; a Burmese Activist has the Attention of the White House and, he Hopes, the World', 13 August 1999. In the *Los Angeles Times:* 'Foreign Torture Victims Seek Justice in US Courts', 28 February 1999, told the human stories behind the lawsuits sympathetically, thus 'humanising' the plaintiffs; Lisa Girion, in the news section, wrote several in-depth articles sympathetic to the plaintiffs: e.g. 'Judge OKs Unocal Abuse Lawsuit', 12 June 2002, 'US Ruling Says Firms Liable for Abuse Abroad', 19 September 2002, and, the story of ATCA told from the point of view of Peter Weiss, who led lawyers from the Center for Constitutional Rights in *Filartiga* '1789 Law Acquires Human Rights Role', 16 June 2003; an editorial, written by Michael O'Donnell, an expert in Third World law, argued strongly for ATCA, 'Capitalism vs Conscience; Companies Abuse Human Rights and the Feds don't Care', 9 June 2003; Ka Hswa Wa wrote 'Court is Villagers Only Hope', 9 June 2002; the villagers' stories were told in 'Pipeline to Justice?', 15 June 2003.

In the UK, there are a huge number of examples from the Pinochet case. Examples from the very beginning of the case, which set the tone for subsequent coverage, include: the *Guardian*: 'A Murderer Among Us', 15 October 1998; interview with Carlos Reyes (leader of Chile Democratico), 19 October 1998; letters page, 19 October 1998; the *Observer*: 'The Game is up for Pinochet', 18 October 1998, and an (untitled) editorial in the same edition; the *Mirror:* editorial 'Evil Pinochet Must Now Face Justice', 19 October 1998; letters page, 'The Right and Human Rights', 23 October 1998. Examples from the end of the case include: the *Mirror*: 'Betrayed; Torture Victims Round on Jack Straw after he Allows Chilean Tyrant Pinochet to Fly Home', and 'MP Anne Slams Pinochet Victory', 3 March 2000, after Straw announced Pinochet was unfit for trial; also the *Observer*: 'Only Tough Judicial Action can Halt the Torturer's Roll Call of Abuse' (written by M. Lattimer, Amnesty International's Director of Communications), 24 October 1999; the *Guardian* interview with Claudio Cordone, the leader of Amnesty International's Pinochet campaign on 4 March 2000.

global citizens is 'living amongst us', with reference to 'enemies of all mankind'. A form of words very like this was frequently used by NGO leaders in the mediated public both in the Pinochet cases and in relation to ATCA. It is a phrase which is a kind of performative declaration: ostensibly describing the reality of the community of global citizens it actually offers the possibility of imaginative identification as a global citizen that, potentially, makes such a community a reality: there are 'enemies of all mankind' living amongst 'us', whom, as global citizens, we should not ignore or tolerate.

In the Pinochet case a phrase equivalent to 'living amongst us' was used right at the beginning of the case in a very dramatic way to alert global citizens to the movements of an 'enemy of all mankind', General Pinochet. Hugh O'Shaughnessy, Chairman of the Latin American Bureau, wrote in the *Guardian* on 15 October 1998:

> There is a foreign terrorist in our midst who is in hiding somewhere in London . . . If this man escapes from Britain once again, a great many people here and abroad will want to know why . . . But possibly he may not get away this time. Keep your eyes peeled . . . If you are a patient in the London Clinic be particularly alert. Some people say he's holed up there for medical treatment. I shall be listening to the radio and television news today, waiting hopefully for the arrest of the former dictator of Chile, General Augusto Pinochet.
>
> *('A Murderer Among Us',* Guardian, *15 October 1998)*

According to Geoffrey Robertson, O'Shaughnessy's article actually played a crucial role in Pinochet's arrest, alerting an investigating magistrate in Madrid, Balthasar Garzon, to his whereabouts. Garzon then successfully requested Pinochet's arrest through the Spanish Embassy in London (Robertson 2002: 396).

With reference to ATCA cases, the phrase 'living amongst us' was similarly used to describe how 'enemies of all mankind' should be captured and prosecuted in the US. Beginning their book on litigating international human rights in US courts, Beth Stephens and

Michael Ratner, both of whom have been prominently involved in ATCA cases, write:

> *Living amongst us* are former government officials from many nations who have committed gross violations of human rights. They should not live in impunity. The goal of this publication is to encourage lawyers throughout the country to litigate against human rights violators and on behalf of those murdered and tortured.
>
> *(Stephens and Ratner 1996: 5, my italics)*

Although the book from which this quote comes is aimed explicitly at lawyers, the sentiment is echoed again in the name of the coalition campaign to defend ATCA following the Department of Justice's attempt to limit it which led to *Sosa*: 'No Safe Haven'. Involving Amnesty International, Human Rights Watch, Human Rights First and Earthrights International amongst others, it aimed to prevent human rights abusers fleeing justice in their own countries, or simply ignoring international human rights, from finding a home in the US: those responsible for genocide, slavery and torture should not be 'living amongst us' with impunity (www.nosafehaven.org).

Global citizenship is constituted primarily through international law. It is unsurprising, then, that the leading citizens of the global community are human rights organisations and international human rights lawyers. However, 'we' ordinary citizens are called upon to take responsibility for human rights in the global community. Generally this does not involve avoiding or preventing the violation of human rights, though it does mean that we should be in possession of the knowledge that cosmopolitan law exists and that that everyone is bound to obey it or face punishment. Global citizenship more usually involves actively supporting human rights: by giving money or time to human rights organisations, demonstrating, signing petitions, writing letters, boycotting goods and so on. Or global citizenship may involve taking responsibility more passively, as it were, by simply supporting the extension of justice beyond the

national community, using the resources and procedures of the cosmopolitanising state in order to make the global community of justice a reality. In supporting and upholding the rights and responsibilities delineated by cosmopolitan law *because it is the law*, we become citizens of a global political community.

RE-IMAGINING AN (INTER)NATIONAL COMMUNITY OF CITIZENS

An alternative response to the disruption of the frame which has tied the state and nation together as a political community is the attempt to *re*-imagine the national community and to *re*-fix the parameters of the national state, precisely to prevent their reformation along more cosmopolitan lines. This re-imagining, however, takes place in a context in which intermestic human rights are a reality, even if they are not (yet) routine. The national community is, therefore, re-imagined with an explicitly international inflection, as (inter) national citizenship, around factual and normative challenges to the national community of justice represented in intermestic human rights cases. Of course, as a relational term, nationalism was always international by definition. What is at issue now, however, is not so much the definition of 'the' nation as necessarily one amongst many, but rather the way in which the state is embedded in structures of global governance which impinge upon 'national affairs'. It is to the mobilisation of norms of universal international human rights, which potentially transform the state from national to cosmopolitan, that the re-imagining of the (inter)national community of citizens is a response.

In relation to intermestic human rights cases, the community of (inter)national citizens is re-imagined through the representation of international law as *politics*. Re-imagining the community of (inter)national citizens is led, above all, by conservative politicians. Conservative politicians justify their interventions in these cases by their representation of 'the people' who will suffer if the status quo of the national state is destroyed. In this case, they speak in the name of

'the nation'. They are supported in their efforts by op-eds and editorials in conservative papers. In fact, in the mediated publics of the US and UK the terms of the debate have tended to be set by conservative politicians, to which liberal politicians and liberal sectors of the media have then found themselves obliged to respond. Liberal politicians and journalists might reasonably be expected to be more sympathetic to the universalist claims of advocates of global citizenship. However, liberals often find themselves tempted by a hybrid between nationalism and cosmopolitanism that we will examine in the next section. There is also, moreover, a distinctively liberal version of the imagined community of (inter)national citizens.

In the US, the terms of the debate have been set by the Bush Administration. In the 'friend of the court' briefs which the Administration submitted in *Unocal* and *Sosa*, the justifications for an (inter)national community of citizens are very clearly represented.[6] Above all it is argued that customary international law is not really law at all, so that judicial interpretations that enable it to masquerade as such are simply allowing *Realpolitik* to be conducted by unrepresentative advocacy groups. This is judicial imperialism: it is not the place of the judiciary to conduct politics. Uses of ATCA in US courts to sue for violations of human rights are, therefore, undemocratic. They destroy the democratic separation of powers, usurping the proper role of the Executive to pursue foreign policy, especially dangerous whilst the US is engaged in the 'war against terrorism'. In addition, by depending on interpretations of customary international law involving unratified treaties and other non-binding documents, they also undermine the powers of the Legislature to make law in the name of the sovereign people. Judges should therefore treat ATCA as an historical relic, the origins and intentions of

[6] The relevant Administration legal briefs on which this analysis is based are as follows: Amici Curaie Brief for the United States of America in *Doe* v. *Unocal*; Petition for a Writ of Certiorari to the United Sates Court of Appeals for the Ninth Circuit in *USA* v. *Alvarez-Machain*; Brief for the United States as Respondent Supporting Petitioner in *Sosa* v. *Alvarez-Machain*.

which are obscure. Quoting Justice Story's observation from *US* v. *The La Jeune Eugenie* in 1822, the conservative position is that:

> No nation has ever yet pretended to be the custos morum of the whole world; and though abstractly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy.
>
> *(Brief for the US as respondent supporting petitioner,* Sosa *v.* Alvarez-Machain, *p. 47)*

Conservative justifications of a re-imagined (inter)national community articulate, then, a realist vision of international relations which privileges reasons of state over the universal ideals of liberalism. However, this vision does have a normative dimension which is not typically associated with realism.[7] Conservatives have an alternative vision of global harmony to that of global citizenship based on how they see the facts of the place of individuals and nations in the international community. There is an international community, in which we (US citizens) participate as members of a democratic state within which it is elected politicians who have the responsibility for foreign affairs. Within the international community, good relations are to be promoted between and within states, especially with allies of the United States, but also, with states that maintain repressive regimes if necessary. The US Executive should act to change the internal politics of repressive regimes, but only as long as such strategy retains the primary aim of safeguarding national interests and national security. The proper relation between states is mutually respectful and tolerant pursuit of national interests.[8] Where the

[7] Thank you to George Lawson for pointing out to me that although realist theorists tend to ignore them, ethical dilemmas are nevertheless very important in realist politics (see Lebow 2003).

[8] In the 'friend of the court' briefs submitted by representatives of business, it is argued that commerce is one of the main ways in which national interests are reconciled and repressive states reformed. As well as damaging the US economy, ATCA cases also damage the prospects of states like Burma, to which businesses like Unocal bring the benefits of direct foreign investment and which have so few other opportunities for development (Brief for the National Association of

demands of national security require that other states are dealt with more harshly, as may be necessary in the war against terrorism, this is a decision for elected political leaders.

Conservative justifications of the re-imagined (inter)national community were made in response to intermestic human rights cases in detailed, technical ways to satisfy lawyers and judges in US courts. They were not widely rehearsed in the mediated public in relation to ATCA. In fact, there was not much discussion of the *Unocal* case at all in the US media. With the exception of the *LA Times*, where the story was closely followed from the beginning (Unocal is based in California) and which, by June 2003, was virtually campaigning against Unocal (in a way that is much more common in UK papers), in most papers the case only made it out of brief reports in the financial pages after February 2003 when the Court of Appeals for the Ninth Circuit agreed to re-hear it. It was only once the Supreme Court agreed, at the request of the Bush Administration, to hear *Sosa* that ATCA received mainstream coverage in this case. This lack of interest on the part of the mediated public may indicate that *re*-imagining the (inter)national community is hardly necessary for popular identification, as the contours of the existing national community have hardly been troubled by what are actually quite marginal events in US political life.[9]

The most striking positive indication that the terms of the debate are set by a model of political community that remains

Manufacturers as Amicus Curaie in Support of Reversal, *Sosa* v. *Alvarez-Machain*; Brief for the National Foreign Trade Council and others as Amici Curaie in Support of Petitioner in *Sosa* v. *Alvarezsuch-Machain*). This argument is at odds with that of the Executive, which claimed to be pursuing economic sanctions against Burma 'to promote positive political and economic change' (Brief for the US as respondent supporting petitioner, *Sosa* v. *Alvarez-Machain*, p. 45).

[9] The Bush Administration's arguments against ATCA were rehearsed by Robert Bork, a former federal judge, in the *Wall St Journal*, 'Judicial Imperialism', 12 July 2004, which received a response from Michael Posner, Executive Director of Human Rights First, 'The Use of US Courts for Human-Rights Cases', 13 July 2004. The National Foreign Trade Council took out a large advertisement on the op-ed page of the *New York Times* entitled 'The Business of Human Rights', 5 April 2004.

hegemonic comes from the justifications for pursuing ATCA cases by its liberal *supporters*. In a couple of editorials supporting ATCA from the *New York Times*, for example, it appears to be conceded that foreign policy concerns *do* trump human rights – though it is argued that this is not relevant in the Unocal case:

> As international human rights suits become more common in American courts, there will inevitably be tougher calls. If a court determined that foreign policy concerns were real in some future case, it would have at its disposal a variety of legal doctrines allowing it to avoid deciding the case. But . . . where such extraordinary circumstances are not present, the [court] should make it clear that the Myanmar villagers have a right to be heard.
>
> *('An Important Human Rights Tool',* New York Times, *8 August 2003; see also 'Legal Actions Over Foreign Misdeeds',* New York Times, *30 March 2004).*

What this quotation demonstrates is that even their liberal supporters in the US-mediated public tend to treat ATCA cases as rather ambiguously situated between politics and law. Unlike the activist advocates of global citizenship, they do not demand that courts should decide ATCA cases strictly following international human rights law. They suggest rather that the judiciary should defer to the Executive where there are genuine foreign policy concerns – regardless of the implications for universal human rights. It is sufficient here to compare, for example, the following statement from the lawyers representing the plaintiffs in *Doe* v. *Unocal* which imagines a community of global rather than national citizens in order to understand how much concession this liberal statement of support for ATCA from the *New York Times* makes to the conservative position:

> Even where a case has direct foreign policy impact '[judges] cannot shirk this responsibility [to apply congressional legislation] merely because [their] decision may have significant political

overtones', *Japan Whaling Ass'n v American Cetacean Soc.*, 478 US 221, 230 (1986).

(Plaintiffs-Appellants Supplemental Brief in Opposition to Amicus Curiae Brief Filed by the United States in Doe *v.* Unocal, *p. 28)*

In the UK, justifications for re-imagining the community of (inter) national citizenship were also made in the name of opposition to judicial imperialism. They came primarily from Conservative politicians opposed to Pinochet's extradition, but also, in a somewhat different form, from liberal supporters of the decision to extradite Pinochet.

Conservative re-imaginings of the (inter)national community of citizens in the UK were very similar to those of the Bush Administration in the US. They were exemplified in Margaret Thatcher's dramatic speech to the Conservative Party, which reiterated themes widely covered by the conservative media throughout the case: 'our' obligations are as a nation to foster our 'national interests' rather than to consolidate and uphold universal principles of international human rights.[10] For Conservatives, Pinochet's brutality – and there was no dispute in the conservative media that Pinochet was responsible for torture and the disappearance of up to 4,000 people – is not our concern: the lives of 'our' national fellows are worth far more to 'us' than are the lives of those who belong to other nations. This was made explicit in Thatcher's arguments,

[10] Thatcher's speech to the Conservative Party Conference in 2000, in which she railed against it for abandoning him, produced a storm of media commentary (see www.guardian.co.uk/tory99/Story/0,,202256,00.html, last accessed 29 December 2007). Examples of conservative media defence of (inter)nationalism throughout the case include the *Daily Mail*: 'Jack's all Right . . . what about Chile?', 10 December 1998 and 'Tories and Chileans Pile the Pressure on Straw in Extradition Row', 27 November 1998; the *Sun* editorial, 'Why Has Britain Arrested a Friend in Need?' on 19 October 1998; and a report, 'Pinochet in Tears as He Faces Trial', 10 December 1998. The *Daily Telegraph* generally gave what appeared to be a more comprehensive and balanced account of the case, but it did orient stories towards anti-colonialism, featuring unrest in Chile as a result of Pinochet's arrest, with headlines like 'Tension Turns to Violence on the Streets of Santiago', 22 November 1998 and 'Pinochet's Return Puts Democracy Under Strain', 5 March 2000.

widely rehearsed from the beginning of the case in the conservative press, that Pinochet was entitled to respect and honour in the UK because he had been of invaluable help during the Falklands war, saving many British lives as a result.

In liberal sectors of the mediated public, anti-imperialist justifications of the re-imagined (inter)national community were much more conditional upon the ideal of ethical foreign policy articulated by the Foreign Secretary of the Labour government shortly after it was elected in 1997.[11] These justifications are similar to those expressed in liberal sectors of the US media in response to the Bush Administration that we saw exemplified in the quote from the *New York Times* above. The ideal of ethical foreign policy is that (inter) national citizens should support decisions of the UK state, in voluntary co-operation with other states, which contribute to establishing democracy and the rule of law within national states. If extraditing Pinochet to Spain to be prosecuted furthers this aim, it is the right thing to do. As a matter of ethical foreign policy rather than cosmopolitan law, however, interpretations of customary international law are inherently, and unashamedly, political. International law may form part of a political strategy, but it should not direct state conduct.

In the re-imagined (inter)national community, then, the emphasis is on the responsibilities of political leaders of national states who protect and defend the rights of national citizens to live in

[11] From the beginning of the case writers at the *Guardian* were critical of the British authorities for allowing Pinochet to enter the country (while he was not given leave to enter France); a criticism that assumes proper diplomatic relations between states are more important than the universal justice of international norms. Towards the end of the case there was consideration of how Chile had consolidated itself as a democratic state as a result of the actions of international elites in the Pinochet case to the point where Pinochet might even stand trial in Chile should he be returned. Several reports from Santiago that appeared in the *Guardian* towards the end of the case, for example, suggest that changes had been produced by Pinochet's arrest to make Chile freer and more democratic (e.g. 'People Find the Confidence to Face the Truth but Fear the General's Last Laugh', 16 October 1999, and 'Chilean Calls Grow for Pinochet Trial', 6 March 2000).

peace and prosperity. 'We' ordinary citizens of the (inter)national community have individual rights within national states, and only indirectly at the international level, through our national states. 'Our' responsibilities are to select our national leaders wisely, to ensure that they pursue our national interests prudently but energetically, maintaining good relations with other states wherever possible, but only insofar as peaceable relations are consistent with the overriding aim of national security. The question of how far foreign policy may be ethical requires political judgement; it is, therefore, debatable within the national mediated public. 'We' (inter)national citizens have no direct political responsibilities towards individuals in other national states, though our state may ethically support those states to achieve peace and prosperity for their citizens in so far as this is compatible with our own rights as national citizens.

COSMOPOLITAN NATIONAL CITIZENSHIP

The imagined community of the cosmopolitan nation is a creative compromise between global citizenship and (inter)nationalism, which competes directly with both. The basic motif of this somewhat paradoxical model of a community is that 'we' – who are unquestionably members of a national community first and foremost – take pride in our state in so far as it upholds universal human rights that are applicable across the world. Cosmopolitan nationalism presupposes that we are in a kind of transitional phase, which is moving towards a global community of justice insofar as states are no longer self-contained discrete units of jurisdiction. Gross violations of human rights both will be and should be a matter for international law rather than for politics or diplomacy. International law is both legally and morally just. However, the extension of universal human rights is not unfolding in any clear-cut way, though progress is possible, and it does not therefore constitute a global community of justice in which individuals find themselves to have rights and responsibilities as global citizens. *Some* national states are cosmopolitanising in terms of legal procedures which uphold, and *should*

uphold, international human rights. This is especially the case where they have made international law their own, incorporating it into national law. In so doing, these exceptional cosmopolitanising states have formed exceptional communities of justice, centred within the state itself, which are uniquely able to judge 'enemies of all mankind' and to dispense justice without borders. 'We' cosmopolitan nationals are, therefore, called on to support the extension of international human rights by our cosmopolitan state.[12]

In both the US and UK, human rights organisations and legal advocacy groups justified their understanding of international law in the cases studied here *overwhelmingly*, and in the UK exclusively, in terms of the global community of justice. In the US, I found no unequivocal justifications of ATCA that were genuine expressions of cosmopolitan nationalism. On the rare occasions when NGOs in the US did adopt justifications of intermestic human rights that imagined a cosmopolitan national community of justice, it was a strategic response to attacks on ATCA. A very interesting example comes from the amicus brief submitted on behalf of international human rights organisations in *Sosa* v. *Alvarez-Machain*. The brief, prepared by Deena Hurwitz and Beth Stephens, quotes a senior official speaking on behalf of the Bush Administration, amongst others, to demonstrate that the US government has long been committed to the international effort to bring violators of human rights to justice. The words were clearly originally intended as (inter)nationalist; the argument is for the independence of national states against international institutions. Deployed in advice to the Supreme Court from

[12] 'Cosmopolitan nationalism' has a somewhat paradoxical ring, linking, as it does, two terms which are generally understood to refer to opposing perspectives based on reason and affect, universal morality and particularistic attachments. There are, however, many attempts to show how the two poles might be reconciled or combined anew in some way in contemporary thought; e.g. Appiah's 'cosmopolitan patriots' (Appiah 1998); Habermas's 'constitutional patriotism' (Habermas 2001: 74) (for interesting criticisms of these attempts see Fine 1994; Kostakopolou 2006). Moreover, such attempts may not be so new: it can be argued that Durkheim, for example, developed a conception very like 'cosmopolitan nationalism' based on human rights (Collier 2002).

international human rights organisations recommending that the domestic remedy provided by ATCA is crucial to the international community, however, they take on a much more ambiguous meaning. Deployed against the Administration's own intentions, they justify an imagined cosmopolitan national community:

> Here's what America believes in: We believe in justice and the promotion of the rule of law. We believe those who commit the most serious crimes of concern to the international community should be punished. We believe that states, not international institutions are primarily responsible for ensuring justice in the international system. We believe that the best way to combat these serious offences is to build domestic judicial systems, strengthen political will and promote human freedoms.
>
> *(Mark Grossman, Remarks to the Center for Strategic and International Studies, quoted in Brief on behalf of International Human Rights Organizations and Religious Organizations in* Sosa *v.* Alvarez-Machain, *p. 17)*

Strategically deployed in this context, these words support, not the imagined community of global justice that human rights NGOs articulate as 'always already existing', but rather an imagined community in which America, as an exemplary domestic system of justice, leads the international community towards the punishment of serious crimes against that community. This theme is carried through the document, which ends with the point that, 'Judicial repeal of the ATCA would undercut the US claim of leadership in the struggle to enforce human rights' (pp. 29–30).

At the same time, however, human rights organisations and legal advocacy NGOs were extremely careful to emphasise that ATCA does not involve the application of US law extraterritorially. They argue rather that in ATCA, US federal law provides a vital tool for furthering international human rights. However, it simply allows US courts to apply 'well-established, universally recognised norms of international law', the core of international law that is cosmopolitan, on which there is clearly worldwide consensus (see Brief of Amici

Curiae Lawyers Committee for Human Rights and the Rutherford Institute in *Sosa* v. *Alvarez-Machain*, p. 10).

Cosmopolitan nationalism is nevertheless dangerously close to imperialism, both in sentiment and effect. The imperialist effect of cosmopolitan nationalism is very evident in the Pinochet case. Cosmopolitan nationalism was confirmed in the legal reasoning of Pinochet 3 insofar as it drew on national rather than international law – albeit in such complicated ways as to be virtually unintelligible to non-lawyers. Pinochet 3 was far less dramatic and novel than Pinochet 1, though equally highly publicised in translations of the legal technicalities of the case in the mediated public. The Law Lords granted extradition on narrow technical grounds, allowing only those charges of crimes to stand which were committed after the date at which the Torture Convention was incorporated into English law in the Criminal Justice Act 1988. In this respect the decision was at odds with judges' interpretation in Pinochet 1 that some acts, including torture and hostage-taking, are crimes in international law, wherever and whenever they are committed. The reasoning of Pinochet 3 constructed, then, a much more equivocal endorsement of international customary law, and the enactment of 'quasi-universal' rather than universal jurisdiction, according to which obligations are only accepted by a state on the basis of international treaties in so far as they have become part of domestic law by ratification or incorporation (Shaw 2003: 598).

The consequence of the decision in Pinochet 3 was, therefore, a differentiation between Chilean and UK state sovereignty. Justice apparently required that international law should pierce the Chilean state, disallowing the immunity from prosecution that the democratically elected Chilean government had conferred on Pinochet for alleged international crimes. At the same time the Law Lords relied on traditional understandings of international law to confirm UK sovereignty in allowing only obligations that had been incorporated as domestic law to count as law. It appeared from this judgement that the UK was authorised to uphold justice across borders, reaching into

Chilean domestic politics, not because it was required by international (cosmopolitan) law, but because it was required by national (cosmopolitan) law. As a cosmopolitan state, the UK required its judiciary to disregard Chilean state sovereignty.

Liberal politicians are structurally situated in such a way that cosmopolitan nationalism is a tempting strategy for those who support the extension of international norms of justice but who must, necessarily, appeal to an electorate that is limited to those who posses nationality. In the UK, as we shall see in Chapter 5, it is a strategy that was very much favoured by the Blair government. In the Pinochet case this strategy was muted for technical reasons: ultimately the decision to extradite Pinochet lay with the Foreign Secretary of the UK government and, as this decision was officially 'quasi-judicial', there was a formal ban on speeches and comments on the case amongst members of the government.[13]

In the US liberal politicians have not prominently engaged in the political debate over ATCA. Democrat Senator for California Dianne Feinstein introduced an Alien Tort Statute Reform Act into Congress in October 2005, but it has never been debated in Senate, and nor did it become a topic of debate in the mediated public (GovTrack.us. S. 1874–109th Congress (2005): Alien Tort Statute Reform Act). In the only intervention I found in the US press in favour of ATCA by a politician throughout *Unocal* and *Sosa*, moderate Republican Arlen Specter of Pennsylvania ended his article with the words: 'Our credibility in the war on terrorism is only advanced when our government enforces laws that protect innocent

[13] Those few comments that were made on the case were the topic of enormous amounts of media conjecture and speculation. Widely discussed were those of Peter Mandelson, Trade Secretary, shortly after Pinochet's arrest, that it would be 'gut-wrenching' to see such a 'brutal dictator' like Pinochet escape justice – immediately declared 'emotional and unhelpful' by 'Cabinet sources' but widely suspected to have been made strategically; and Tony Blair's mention of Tory support for Pinochet in a speech to the Labour Party Conference in 1999 (see http://news.bbc.co.uk/1/hi/uk_politics/460009.stm, last accessed 29 December 2007).

victims. We then send the right message to the world: the United States is serious about human rights' ('The Court of Last Resort', *New York Times*, 7 August 2003).[14] Given the structural temptations and the resonance (as we saw in Chapter 3) of American national pride, it is to be expected that in the US, as in the UK, justifications of the use of intermestic human rights by politicians opposing (inter) nationalism would be made in the terms of cosmopolitan nationalism. Since, however, there is no wide-ranging mediated public debate on the use of human rights in US courts, this strategy can only be a matter of speculation here.

In the mediated public of the UK, cosmopolitan nationalism was more in evidence. The cosmopolitan nation was imagined in the populist press that supported Pinochet's arrest and pursuit in the UK.[15] Imagining the cosmopolitan nation was much more muted in the liberal broadsheet press, where it did not appear in news stories, op-eds or editorials, but only in letters.[16] In the US cosmopolitan nationalism was practically non-existent in media coverage of *Unocal* and *Sosa*. There are only a couple of examples where

[14] The *Wall Street Journal* reported that on 29 June 2002, sixteen Congressmen and two US senators asked the State Department not to intervene in the Exxon Mobil case, also filed under ATCA. As in the Unocal case, however, the State Department did intervene, writing a letter warning the Judge of the US District Court for the District of Columbia that the lawsuit against Exxon Mobil 'would impact adversely on the interests of the United States', economically and in the 'war on terrorism' ('A Global Journal Report: Administration Sets New Hurdles for Human Rights Cases', *Wall Street Journal*, 7 August 2002). I found no evidence of any such opposition in the cases with which we are concerned here.

[15] The *Daily Mirror:* 'You can Stick your Justice; Arrogant Pinochet Insults Britain', 12 December 1998; 'British justice can still shine like a beacon across the world', the opening line of an editorial headlined 'No Escape from Justice for Tyrant', 26 November 1998; and, when Straw announced Pinochet was unfit for trial, from a letter under the headline 'Day of Shame', 'It is a sad day for Britain and for justice', 3 March 2000.

[16] '[Pinochet's arrest] gives me hope that Britain can regain its reputation as a leading force for democracy and human rights' (*Guardian*, 19 October 1998); 'Britain can take the lead in providing a clear global signal to those who commit genocide and human rights abuses' (*Guardian*, 24 October 1998); and, when Pinochet was about to be released, 'For the first time in my life . . . I am ashamed of being British' (*Observer*, 12 March 2000).

cosmopolitan nationalism appeared to be strategically introduced, and taken up, in the mediated public by leaders of human rights organisations and human rights lawyers.[17] For the most part, however, cosmopolitan nationalism was remarkable by its absence in these debates, especially when we consider the important role played by national pride in debates over the legal conditions of arbitrary detentions in Guantanamo Bay.

Justifications for intermestic human rights that imagine a cosmopolitan national community of justice are problematic because cosmopolitan nationalism is very difficult to disentangle from imperialism. The superiority of the nation of which 'we' are citizens, who have individual human rights and responsibilities to uphold and support the realisation of human rights, largely through the activities of our state, justifies intervention in the affairs of another. The prominence of cosmopolitan nationalism in the Pinochet case compared to ATCA cases is surely, in part, because of the popularity of the Pinochet case, in that cosmopolitan nationalism was taken up by the populist press. In contrast, the ATCA cases were completely ignored in the populist press in the US. However, the judgement in Pinochet 3 also shows how legal judgements that observe the letter of the law can produce a state-sponsored, elite version of cosmopolitan nationalism. In this respect, taking the wider context of the Pinochet judgement into account, its celebration by the human rights movement should perhaps give us pause for thought.

[17] The examples that may be interpreted as strategically justifying cosmopolitan nationalism are as follows: Paul Hoffman, representing Alvarez, was quoted at the end of a *New York Times* article 'Justices Hear Case about Foreigners' saying: ' "Rather than undermine national security . . . use of the law only affirms the values that have made the country as strong as it is"', 31 March 2004; and Michael Posner in a letter to the *Wall Street Journal*, arguing that '[T]here is simply no evidence that US foreign policy has been adversely affected by any of these lawsuits. To the contrary, America's stature in the world has been enhanced by the availability of our courts to provide a remedy to those victims of gross human-rights abuses, for whom there is no remedy at home' (23 July 2004).

COSMOPOLITANISM-FROM-BELOW

In this chapter we have explored how activists seriously attempted to imagine a global community of citizens around the cosmopolitan law developed in ATCA cases and in the Pinochet case. They attempted to bring cosmopolitan ideals of global citizenship down from the abstract skies of philosophical thought, and also down from an idealised realm of global governance by international governmental organisations as a kind of proto-world state, into courts and mediated publics within states. Human rights activists attempted to imagine a popular global community of citizens that could seriously challenge the norm of national citizenship from within what has been historically constituted as the national state. This community of global citizens was not simply elitist, nor rationalist – though it did manifest elements of both. It is true that it was led by professionals in the human rights field: by activists employed as spokespersons for advocacy organisations, and by lawyers, who obviously have professional stakes in its success. And nor can we say that the global community articulated here received immense popular support. On the contrary, as we have seen, it was strongly contested in nationalist terms, and it was really only supported in some liberal sections of the mediated public. Nevertheless, the way in which the global community of citizens was imagined in these cases marks a different type of cosmopolitanism from that which Calhoun has criticised. It is not the cosmopolitanism of 'frequent flyers', the free-floating elites of global capitalism who are disengaging from nations and who have no interest in building popular support for new forms of citizenship. It is better understood as 'cosmopolitanism-from-below' (Kurasawa 2007).

The cosmopolitan project of imagining a global community of citizens differs from that of 'frequent flyer' cosmopolitanism because it attempted to gain popular understanding and acceptance of cosmopolitan legal norms in the mediated public within states. It tried to establish affective ties between individuals that are much wider than those of the national community, but it did so from within procedures and domains that are central to the political functioning of liberal-democratic states as such. The global

community of citizens was imagined as tied to the legal and political procedures of states, which should be responsive to 'the people'. But 'the people' are now envisaged as cosmopolitans rather than, or perhaps as well as, nationals. Global citizenship is not imagined as something above, outside, or against the processes of liberal-democratic states; it is seen rather as emerging from within them.

Imagining the community of global citizens around Pinochet and ATCA involved modifying national states from below. It aimed to transform the national state into a cosmopolitan state with the consent of 'the people' the national state is supposed to serve. However, this does not mean that there is a seamless continuity between nationalism and cosmopolitanism in these cases, even for supporters of global citizenship. It is not because civic nationalism shares the ideal of equality between individual human beings with cosmopolitanism that passionate attachments to the nation can simply be transformed into ideals of global community. On the contrary, in the Pinochet case we see a direct conflict between nationalism and cosmopolitanism in the operation of cosmopolitan law itself. From the point of view of the national frame of justice, the way in which cosmopolitan law treats violations of human rights as absolute, thereby authorising intervention in the domestic affairs of states, including overriding the decisions of elected governments, is unacceptable. It is especially unacceptable because it is certain that, for reasons of *Realpolitik*, it will invariably be dominant states that will intervene in the affairs of weaker states, even if the intervention is done in the name of universal legal entitlements and obligations. Nationalism and cosmopolitanism contradict each other in cases where democratically elected leaders are tried for human rights violations.[18] The cosmopolitan ideal of multiple identities and scales

[18] This clash is evident in the statute of the International Criminal Court, which came into force in 2002 to try crimes under international humanitarian law. Although its status as an international forum no doubt involves particular cultural politics, it will resemble the cultural politics of intermestic human rights that we are examining here in so far as: (a) not all states will participate in the ICC (with the US leading the way in exempting itself); (b) the court is only authorised to bring cases where the will or the means are judged to be lacking in national

does not preclude, then, serious clashes of principle and interest in which nationalism will play a prominent part.

In the context of intermestic human rights cases, passionate attachments to the nation are in contradiction with cosmopolitanism because they negate the possibilities of international law as such. Politicians and journalists responded to activist imaginings of global community by re-imagining national citizenship in ways that could incorporate the challenges set by intermestic human rights cases to the national frame of justice. They either denied the validity of activist and legal justifications of human rights altogether, relying on the assumption that national citizenship is still paramount and the national frame of justice is still intact. Or they reasserted the primacy of the national frame, accepting that human rights for non-citizens are morally relevant but nevertheless privileging the rights, interests and values of national citizens. In the imagined (inter) national community and the cosmopolitan national community respectively, international law is seen as political; it is not really law at all. These imagined communities are premised on ideas of national superiority which have been so problematic in generating conflict between states and the oppression of minorities within them, and which have contributed to nationalism becoming discredited amongst social and political theorists as a form of legitimate social organisation. In terms of human rights norms, they are premised on the manipulation of ideals of international law in the name of national superiority, whether cynically, for reasons of personal gain or national interest, or for reasons of principle. Where intermestic human rights are seen as really matters of politics that are being speculatively framed as law, any possibility of the rule of international law (whether interpreted by legal innovators or traditionalists) is destroyed. Where international law is treated as an extension of national politics, it does not exist as law.

societies; (c) as a matter of statute the ICC will not recognise amnesties where crimes against humanity may have been committed (www.icc-cpi.int).

5 Global solidarity: justice not charity

The emphasis of struggles over intermestic human rights is on civil rights, and this has also been the emphasis of this study so far. It reflects an historic Western privileging of civil rights as absolutely fundamental, in comparison with social, economic and cultural rights which are often not conceived of as *rights* at all – even if they are enumerated in the UDHR – but rather as political aspirations towards at least minimal conditions of human well-being and flourishing.[1] In this study, however, we are concerned with the *social forms* created by the cultural politics of intermestic human rights. Realising human rights in practice is always a collective endeavour; it is about the creation of new social forms. Human rights as civil rights require courts, education and training, intergovernmental agreements, international policing, communication networks and so on. They also require a cosmopolitan orientation towards justice, a reframing of issues of global justice as concerning citizens and non-citizens alike. In respect of the creation of cosmopolitan social forms, then, although social and economic rights are more explicitly about the

[1] Social, economic and cultural rights are associated insofar as they are included together in the International Covenant on Economic, Social and Cultural Rights. Together with the ICCPR and the UDHR, they make up what is sometimes referred to as 'the International Bill of Human Rights'. In fact, however, cultural rights ('the right to participation in the cultural life of the community' (Article 7, UDHR)) concern quite different matters from those of social and economic rights, and there is no compelling reason to put them all together, nor, indeed, to separate them from civil and political rights (for example, as Donnelly points out, many rights to culture are classic civil rights to freedom of expression and belief (Donnelly 1989: 36)). For the most part campaigns concerning social and economic rights do not directly concern cultural rights and vice versa, even though, in principle, they are indivisible (see Copelon 1998).

collective management and distribution of resources, they are not fundamentally different in kind from civil rights.

Solidarity is a key term in social theory and as a result it has various different uses (see Crow 2002; Kurasawa 2007). For my purposes in this analysis, it is important to distinguish between 'thinner' and 'thicker' solidarity. 'Solidarity' invariably denotes a 'we' who feel ourselves to share common bonds. In the 'thinner' version of solidarity 'we' experience ourselves as sharing common bonds simply as a result of shared social relationships, beliefs and values. This sense of solidarity is actually quite difficult to distinguish from 'community'. The thicker version of solidarity involves experience of 'we' accompanied by the sense that we belong together in a 'community of fate' and that we share a rough cost–benefit analysis (rarely fully calculated, and virtually never aimed at eliminating inequalities altogether) of what we owe each other in terms of a distribution of risks and resources. The difference between thinner and thicker solidarity is not that in the latter version people come together in order to realise rationally calculated aims; on the contrary, the durability of thicker solidarity depends at least as much as does thinner solidarity on affective ties. It is rather that 'our' sense of the 'we' is built in part around the expectation that material risks and resources *will be shared* and the understanding that this may result in greater benefits to some than to others in the community.

Sociologists sceptical of cosmopolitanism have pointed out that national states have enjoyed unrivalled success in organising this thicker sense of solidarity on a society-wide scale (Turner 2000, 2002; Calhoun 2003, 2007). To varying degrees, post-Second World War welfare states built on already established feelings of national belonging to enable re-distribution of wealth between citizens, setting up national systems of education, health, social assistance for those without paid work, and cultural institutions such as national broadcasting systems. Welfare states built on national communities that had long been fostered by states through education and communications media. Common bonds were strengthened as a result of

citizens' mutual efforts, and national identity was consolidated by the military and propaganda battle against a national enemy in the Second World War.

Today, extending social and economic human rights requires something of the same sense of solidarity, but on a global scale. Article 2 of the International Convention on Economic Social and Cultural Rights requires that 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means'. The rights enumerated in the ICESCR include rights to fair wages, to be free from hunger, to an adequate standard of living, to education and to 'the enjoyment of the highest attainable standard of physical and mental health'. Given the overwhelming number of states which have ratified the ICESCR, it is arguable that even those Northern states which have not – most notably the US, which has signed but not ratified it – are bound by customary international law to do all they can to ensure the rights of persons in other states as well as in the US. If this were taken seriously it would mean a massive redistribution of resources from the global North to the South. If it is difficult to imagine a global community of citizens, however, it is even more difficult to imagine the global solidarity that such a redistribution of resources would seem to require as a precondition.

The solidarity on which welfare states built was not only that of feelings of national belonging fostered by the cultural practices of the state and strengthened in opposition to an enemy in wartime. It was also built on the principle of formal membership which excluded non-members. In national citizenship social rights are not simply legal entitlements; they have their corollary in legal *obligations* to contribute to the state for the collective good. When welfare states were established, these contributions were typically gendered: men contributed money through taxation on paid work, and physical

strength if called upon to serve in the military; women typically contributed children and care for the family. The principle of welfare states was that of social insurance: citizens contributed to public goods on the basis that any member of the state would be entitled to access those goods when they needed them. Social insurance is based on a principle of reciprocity, not benevolence: the understanding that we are part of some sort of co-operative system in which each of us is making a contribution to the common good from which we all benefit (Brown *forthcoming*). Turner argues that the principle of social insurance that guided the welfare state has now been largely undermined with the rise of neo-liberal marketisation, the growth of large-scale unemployment, the decline in the need for soldier-citizens as warfare becomes more technical, and the erosion of the classic nuclear family. The principle that welfare states should provide minimum assistance to the very poorest has come to replace the principle that citizens are entitled to access to public goods to which they have contributed. Consequently, solidarity *within* the state is itself in decline (Turner 2000, 2002).

It is clearly not possible that anything like global solidarity will emerge 'all in one piece' as it were, even if national solidarity is in decline. The conditions that enabled solidarity to be fostered in the national state do not exist at a global scale. There is no world state to foster a strong sense of belonging together in a 'community of fate'; and without membership criteria, or clear, regular, social patterns of contribution and allocation, it would seem to be more difficult to establish any sense that each person is contributing fairly, if not equally, to the common good from which we all benefit.

Is it possible, however, that something like proto-global solidarity is nevertheless in the making at more limited scales? Fuyuki Kurasawa argues that this is just what we see in the alternative globalisation movement. He argues that the alternative globalisation movement consists of 'a mosaic of horizontal and transversal struggles' that *can* add up to a mode of social practice which constructs bonds of mutual commitment and reciprocity and which is

oriented towards global justice (2007: 177). Kurasawa is here concerned with thick solidarity, the feeling that global injustice is a pressing issue for everyone involved, rather than with the thinner solidarity of 'planetary consciousness'. He sees solidarity as possibly emerging in discussions at the World Social Forum, and in such practices as the protests against World Trade Organisation in Seattle in 1999, the demonstrations in cities across the world against the invasion of Iraq in 2003, and so on. However, as his frequent use of the words 'can' and 'could' suggest, Kurasawa is more concerned with the theoretical possibilities of the alternative globalisation movement than with the investigation of its empirical successes and failures in relation to the aims and claims of actual participants (344). He does note, however, that the alternative globalisation movement has yet to impact on the formal decision-making of global governance (374).

I agree with Kurasawa that – in the absence of an already existing sense of belonging together and without formal membership in a global community that could only be guaranteed by a world state – if global solidarity is to be possible at all it will have to be built bit by bit from the bottom up. I also think, however, that any such form of proto-global solidarity will impact on global governance *only* if becomes genuinely popular in Northern states. We in the North are implicated in the poverty of people in the South, by structures of production, finance, trade and taxation. The question is whether and how those structures might be made visible, and whether mutual costs and benefits can be made a matter of global responsibility (see Young 2004).

Elected politicians are currently mandated to represent the interests of 'the people' within national states. Combined with the fact that negotiations at the international level are generally thought to be of very little interest to the mediated public, this makes radical global reform to realise universal social and economic rights extremely difficult. Only if popular global solidarity is generated *within* states is it conceivable that politicians and officials will stop treating international governmental organisations as outposts of

national politics, and to begin to see them as making public policy for the world (Held 2003: 167).

POPULAR GLOBAL SOLIDARITY

The aim of this chapter is to explore the possibility of emergent forms of proto-global solidarity in popular campaigns against global poverty in the UK and US. The campaigns 'Make Poverty History' in the UK and 'ONE: the Campaign to Make Poverty History' in the US were both branches of the Global Call to Action Against Poverty (GCAAP) which was created in 2005 when the Millennium Development Goals were due to be reviewed.[2]

The strategy of GCAAP is 'think globally, act nationally'. Engaged in constructing global solidarity from below, it aims to target international governmental organisations through cosmopolitanising states. Different campaigns were launched in different countries with different names: 'Plus d'Excuses!' in France, 'Maak Het Waar' in the Netherlands, 'Zero Pobreza, Ya!' in Spain and so on. Throughout 2005, all the different national campaigns aimed to put pressure on their respective states to address global poverty at the G8 summit in July, the UN summit on Millennium Development Goals in September, and the WTO forum in December. At the G8 especially, pressure was created to force governments to achieve three clear and simple economic goals. Firstly, to increase aid to come close to the 0.7 per cent of GDP target promised in the 1970s. Secondly, to cancel 100 per cent of debt to multilateral institutions for those countries eligible under the Heavily Indebted Poor Country

[2] The UN Millennium Development Goals are concrete, measurable aims agreed at the United Nations Millennium Summit in 2000 to be achieved by 2015. They include: halving extreme poverty and hunger; achieving universal primary education; promoting gender equality, especially in education; reducing child mortality by two-thirds; reducing the maternal mortality rate by three-quarters; combating HIV/AIDS, malaria and other killer diseases; ensuring environmental sustainability; and developing a global partnership for development with targets for aid, trade and debt relief (see www.un.org/millenniumgoals/goals, last accessed 29 December 2007).

rules, to widen the criteria of eligibility for debt cancellation, and to set up fair and transparent processes for cancelling or repaying other debt. Thirdly, to realise 'trade justice', enabling developing countries to take control of their national economies by ending subsidies on Northern agricultural goods, tariffs on importing manufactured goods from the South, and the dumping of surpluses in the South.

Make Poverty History and ONE were intended as campaigns which would mobilise popular support to put pressure on the UK and US governments to address global poverty. To this end they were both very carefully managed media campaigns. All campaigns are necessarily mediated, in order to try to reach people who can make a difference (to persuade them to write letters, demonstrate, to knock on doors to persuade others and so on). But ONE and Make Poverty History were campaigns aimed at mobilising popular support that not only took place *through the media*; to a large extent, they took place *in the media*. For example, both campaigns made extensive use of celebrities to get their message across, culminating in Live8 in July 2005 which involved concerts in ten venues in nine different countries, was broadcast live on television, radio and through the Internet all around the world, and was received, according to the organisers, by three billion people. It would be wrong, however, to conclude that these campaigns created 'psuedo-events' (Boorstin 1992). There is no reason to suppose that the intentions of those involved were to create or to participate in a media event as such, rather than to bring about real change in the world. Indeed, the campaigns were genuinely grassroots insofar as they co-ordinated a number of NGOs in both countries, including many which receive their funding from donations and membership. In the US they included the Grameen Foundation USA, Action Against Hunger and Jubilee USA. In the UK they ranged from the large, international NGOs like Oxfam and Save the Children to smaller, more radical organisations, like the World Development Movement and Womankind.

Make Poverty History and ONE also used similar strategies to create a sense of global solidarity through symbolic politics. The best

example of this was the white wristbands sold to supporters with 'Make Poverty History' or 'ONE' written on them. Wearing these bands was itself a kind of demonstration of global solidarity, of being part of a movement that encircled the globe. In the UK they were ubiquitous in 2005; on everyone's wrists, from those of schoolchildren and celebrities to that of the Prime Minister (in fact, they become so highly sought after that enterprising individuals sold them on eBay at a profit). The symbol of the white band was intended by campaign leaders to become absolutely synonymous with ending global poverty. At the G8 meeting in Edinburgh, marching demonstrators in white t-shirts encircled the centre of the city. Linking individuals wearing a white band across the world, the image of the white band was projected onto the UN General Assembly building in New York at the time of the summit meeting on the Millennium Development Goals on 15 September (www.one.org/node/68, last accessed 28 June 2007). Various other symbolic buildings have been 'wrapped' in the band at different times, including the European Commission building in Brussels. GCAAP plans a continuing programme of White Band Days across the world to keep building the solidarity generated by these campaigns (www.whiteband.org, last accessed 28 June 2007).

Another example of the attempt to build global solidarity symbolically came from Nelson Mandela's speech in Trafalgar Square in February 2005, which was broadcast around the world. In this case, the construction of solidarity was premised on the overcoming of previous injustices, agreed by the world to be insupportable, and the will to overcome the current scandal of global poverty. Introduced by Bob Geldof, the figurehead of the campaign in the UK, as 'President of the World', Mandela exhorted his audience to 'Make Poverty History' declaring that:

> [A]s long as poverty, injustice and gross inequality persist in our world, none of us can truly rest . . . The Global Call for Action Against Poverty can take its place as a public movement alongside

> the movement to abolish slavery and the international solidarity against apartheid.
>
> *(www.makepovertyhistory.org/docs/mandelaspeech.doc, last accessed 28 June 2007)*

Mandela's rhetoric here echoes that of activists working to mobilise supporters of human rights around the Pinochet and ATCA cases. Mandela too is making a performative declaration: mobilising support for the campaign to end global poverty as if worldwide awareness of movements to end injustice has *already* created global solidarity. In Mandela's speech, 'we' are attributed emotions that suggest that 'we' are already involved in the struggle against economic injustice in the under-development of the South. It is not that (as in charitable appeals) 'we' are to feel (or at least not predominantly) compassion. Compassion was an important sub-theme of the campaign, but in general the strategy was much closer to that outlined by Luc Boltanski in *Distant Suffering*: the denunciation of systematic injustice, for which the appropriate emotion is indignation and the desire to bring about change (Boltanski 1999). As Mandela put it, in phrases which were continually repeated throughout the campaign by activists and politicians in the UK:

> Sometimes it falls upon a generation to be great. You can be that generation. Let your greatness blossom . . . Make Poverty History in 2005. Make History in 2005. Then we can all stand with our heads high.
>
> *(www.makepovertyhistory.org/docs/mandelaspeech.doc, last accessed 28 June 2007)*

Make Poverty History was a good deal more successful in the UK in terms of generating interest and popular support than was ONE in the US. From the very beginning of 2005, progressive newspapers in the UK were themselves pledging to engage in the campaign to end poverty ('Africa: a Year for Change', *Guardian*, 1 January 2005; 'White Band Aid: Historic Chance to End Poverty', *Mirror*, 2 February

2005). (In the event, the *Guardian* left overt campaigning to its sister paper, the *Observer* while it ran more analytic, though still supportive, articles throughout the year; presumably advocating direct participation in the campaign was seen as more suitable for a Sunday paper.) As the campaign built towards Live8 these papers went further than just writing editorials in favour of Make Poverty History, urging readers to send emails and letters to politicians, and to join in the demonstrations at the G8 (see, for example, 'Let's Band Together and Make Poverty History', *Mirror*, 22 April 2005; 'Countdown to G8', *Observer*, 15 May 2005). The conservative press was also involved from the beginning, with the *Daily Telegraph* running 'Demand a Better Deal for the Poor' by Bill Gates and Bono on 3 January 2005, and the normally very sober *Financial Times* proposing a virtual demonstration at the G8 to encourage people to get involved ('A Bank of Ideas to End Inertia in the High Street', 3 May 2005). There were a number of articles critical of the campaign in those papers not actively involved in it. But even these tended to be balanced with op-eds admiring the sincerity of Make Poverty History's celebrity leaders and young supporters. 2005 was a General Election year in the UK and all three major parties pledged to work to end global poverty as a plank of their election campaigns. With no party political capital to be made by standing against it, by the time of Live8 even the *Daily Mail*, hitherto the paper which had been most critical of Make Poverty History, ran an editorial in support of the campaign: 'Live8 may not have all the right answers, but it is asking the right question. In all humanity, we can not ignore it' ('A Message that can't be Ignored', 2 July 2005).

In comparison, support for the campaign was far less prominent in US newspapers, where the campaign was not taken up as a set of concrete demands that should be achieved as a priority throughout the year. In part this is surely due to the different nature of newspapers in the US. *USA Today*, which is relatively populist by US standards, came closest to offering the kind of affirmation of the campaign that it received in the UK, mixing coverage of celebrity

endorsement of its message with support for the aims of the campaign (e.g. 'Star Studded One Makes Case for Aid', 7 April 2005; 'After Failures, Backers of Africa Aid Change their Tune', 6 July 2005). The *New York Times* and the *Washington Post* strongly supported debt cancellation and increasing aid in editorials (*New York Times*: 'The Price of Gold', 3 June 2005; 'Crumbs for Africa', 8 June 2005; *Washington Post*: 'Mr Bush and Africa', 7 June 2005). In the populist local New York papers it was covered in the *New York Daily News* with critical distance and in the *New York Post* with overt hostility. A further explanation of the lack of sustained interest in the campaign in the US is that it tended to be seen as British-led, with Live8 also understood as peculiarly British (see 'Musically Saving the World: the dos and don'ts', *New York Times*, 9 June 2005). Indeed, in an interview in the *Washington Post* at the beginning of the campaign, Bob Geldof discussed the lack of brand impact of Live Aid (his previous venture into using celebrities and music to deal with poverty in Africa, in 1985) in the US, suggesting that the campaign would in part be about bringing issues to the awareness of American audiences through the US media ('Live 8 Concerts to Amplify Problem of Global Poverty', *Washington Post*, 1 June 2005). In the end Live8 was quite widely covered in the US, but the campaign was not supported in the US newspapers sampled to anything like the degree of its astonishing popularity in the UK.

US coverage of ONE was clearly not all the organisers had hoped for, then; especially in comparison with Make Poverty History in the UK, which surely exceeded all hopes in terms of the media coverage it received. From the point of view of strategy, however, both Make Poverty History and ONE, as branches of GCAAP, were astonishingly creative and novel campaigns, aiming to displace the taken-for-granted emphasis on 'national interests' in international politics to make genuinely global public policy for the benefit of people structurally disadvantaged by neo-liberal 'business as usual'. In this respect the campaigns aimed to realise a more just form of global governance in terms of the uneven realisation of social and economic rights.

RIGHTS AGAINST POVERTY

Social and economic rights have been part of the core schedule of international human rights since 1948. In Article 22 of the UDHR, it is stated that everyone is entitled to realisation 'through national effort and international co-operation' of his economic, social and cultural rights. In addition, and some would argue more fundamentally, in Article 25 it is stated that 'Everyone has the right to a standard of living adequate for the health and well-being of himself (*sic*) and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control' (Donnelly 1989: 38–41). Nevertheless, a clear distinction was drawn between social and economic rights and civil and political rights from the very beginning of the post-Second World War human rights regime, with socialists and liberals opposed during the Cold War over which set of rights should be ideologically and strategically prioritised (Forsythe 2000).

The contemporary controversy over whether civil and political rights are different in kind from social and economic rights is constitutive of the human rights field itself. Are human rights only and always legal rights? Or do they involve something more, or different from legal rights? Is the legalisation of human rights fundamental to their very nature? If human rights can not be legalised, does this mean that they are not really rights at all? The opposition is primarily between supporters and enemies of social and economic rights. However, supporters of social and economic rights are themselves divided over the relative advantages and disadvantages of conceiving of social and economic rights as either legal or political.

On one hand, in the UN, economic and social rights are understood as international law. In 2000, for example, the UN Development Programme's 'Human Development Report' stressed a human rights approach to development and poverty on the basis that human rights represent accepted international standards, and that

they place concrete claims on individuals and institutions to fulfil their requirements (quoted in St Clair 2006). This understanding of social and economic rights draws on both customary international law and treaty law. It is, however, for the most part, 'soft law'; it is not intended to be adjudicated in court, but rather to influence policy-makers *as if* social and economic rights were law (Forsythe 2000: 12). The fact that international declarations and agreements on human rights have contained provisions for economic and social rights from the very beginning of the UN human rights system is used to argue that they should be treated as customary international law by international institutions and by national states.

On the other hand, there are those who doubt that such entitlements are logically possible. While states accept obligations by ratifying the ICESCR, for example, it is unclear what that might really mean for the hungry or homeless, especially when a state does not have resources to meet basic needs. Is it possible to address social and economic claims to duty-bearers who have clear, detailed obligations to respect and realise them as a matter of universal entitlement? Economic and social rights are often compared to civil rights in this respect: while civil rights also require state structures and resources, they enable the clear identification of specific obligations on the part of specific agents to *stop* acting in certain ways (Donnelly 1989: 33–4). It is argued by their detractors, therefore, that using a vocabulary of economic and social rights is no more than socialist political rhetoric masquerading as law. This argument has become somewhat less compelling since social and economic rights were made justiciable in the South African constitution, and the South African state has been called to account in its national courts for violations of the social and economic rights of people under its jurisdiction. In landmark cases, the Constitutional Court of South Africa has required the South African state to demonstrate that it is committing a reasonable level of resources to housing and health care (Sunstein 2004; Olivier and Jansen van Rensburg 2006). This indicates that social and economic rights are not *necessarily* different in

logic to civil and political rights; they *can* be made into specific entitlements to concrete resources that are binding on states.

However, even if it is not logically impossible, there are no intermestic social and economic human rights of the kind we have explored in previous chapters in either the US or the UK. Even though the UK has ratified the ICESCR, its enforcement is confined to monitoring procedures in the UN. Social and economic rights are not embedded in the European system of human rights. Nor are there any mechanisms to bring cases of economic and social rights to domestic courts in European states. The European Social Charter, signed by a number of the member states of the Council of Europe, including the UK, is enforced only by the submission of periodic reports to the European Committee on Social Rights. It is not possible to use 'hard' law to bring claims for social and economic rights to court in the UK, nor in the US which has consistently refused to ratify the ICESCR at all, even though it was originally influenced by US conceptions of social justice (Sunstein 2004).

Alternatively, supporters as well as opponents of social and economic rights argue that they are better seen as *political* rather than legal. Abdullah An-Na'im, for example, argues that respect for human rights in the postcolonial states of Africa depends on the 'international community' for a radical re-structuring of international economic institutions (An-Na'im 2002). He focuses on structural obligations on the part of Northern states to provide assistance and co-operation, as stated in the ICESCR, to increase resources available to Southern states to meet the needs of their peoples. Similarly, Amartya Sen argues from his capabilities approach that whilst human rights may or may not be legislated for, they cannot be reduced to law. If human rights are understood in terms of actual capabilities rather than as formal or nominal entitlements, and if they are morally valuable, then the real conditions for the enjoyment of human rights must be created and sustained (Sen 1999, 2007). Creating legal entitlements that can be pressed in courts could only ever be *part* of a strategy for realising social and economic rights, since what is far

more important is to ensure that states have the capacities and are directed by the political will to meet the demands placed upon them. The restructuring of international economic institutions is, therefore, a crucial step towards the realisation of universal entitlements to the basic means of life for all human beings.

At the UN Conference in Vienna on human rights in 1993, shortly after the end of the Cold War, it was reaffirmed that:

> All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.
>
> *(www.unhcr.bg/cis/n24.pdf, last accessed 29 December 2007)*

Whether social and economic rights are thought of as legal or political, there is no doubt that they are taken very seriously by the UN as indicating that states have obligations to do everything possible to end poverty – not just for their own citizens, but for those in other states. In addition, social and economic rights are increasingly the focus of human rights NGOs which have traditionally focussed on civil and political rights, especially Amnesty International and Human Rights Watch, as well as of specialist organisations set up to promote adherence to social and economic rights, such as the Center for Social and Economic Rights in New York.

In this context it was surprising to discover that Make Poverty History and ONE did not use a vocabulary of social and economic rights at all. It is still more surprising as the vocabulary of human rights had been used quite effectively in an earlier worldwide movement to address global poverty, the 'Drop the Debt' movement which also had local branches in Jubilee 2000 UK and Jubilee USA as

well as elsewhere. This campaign amassed a great deal of support across the world for demands that the debt owed to wealthy states by poor nations should be cancelled entirely in 2000. 'Drop the Debt' used Christian language and mobilised primarily through networks of religious worshippers. The reference to 'Jubilee' comes from the Biblical injunction to treat each fifty years as 'the Sabbath's Sabbath', and as an occasion on which to free slaves and cancel obligations to repay debts. But in the UK 'Drop the Debt' also used a vocabulary of human rights to stress that cancelling debt was a matter of redressing historical injustice: people in indebted states are locked into paying back 'odious debt' from which they have not benefited, offered by Western banks at outrageous terms, often to leaders known to be corrupt. Attention to the *entitlements* of the poorest should result in sustained attention to how wealth is generated and distributed *within*, as well as *between* states. For example, Ann Pettifor, Director of Jubilee 2000, speaking at a United Nations Development Programme Forum in 2000 noted that:

> It has been the absence of the human rights 'scaffolding' that has resulted in the construction of 'cowboy' development policies that have proved to be both so flawed and exploitative of people in the poorest nations.
>
> *(Pettifor 2001)*[3]

ONE and Make Poverty History did not use the vocabulary of human rights at all. The only reference to social and economic rights I found throughout either campaign was to Bono's use of the UDHR as a backdrop for two songs in the opening concert of his world tour in San Diego ('How to Detonate a World Tour', *Daily Telegraph*,

[3] 'Drop the Debt' had an important impact: changing the argument from *whether* debt should be written off to *when* and *how*, and achieving pledges from world leaders – still so far unfulfilled – for 100 per cent cancellation (Buxton 2004). Unjust debt was also made an issue of social and economic rights at the UN level on the basis that it directly contravenes basic social and economic rights where repayment is made possible only by reducing state provision of essentials like water, food, health care and education (Millet and Toussaint 2004: 124–5).

31 March 2005). In his speech, Nelson Mandela did talk about global poverty as involving 'crimes against humanity'. This is a very interesting example of how legal categories circulate in popular culture, aquiring meanings that may be at odds with how they are used in courts. Describing global poverty as the result of 'crimes against humanity' is to strongly underline that it can be prevented and that not to do so is morally wrong; the description has no direct relevance, however, to how the international law of social and economic human rights is actually developing. There was no attempt at all elsewhere in the campaign, either in the US or the UK, to connect the aims of the campaign – to cancel debt, to increase aid and to restructure trade – to universal social and economic entitlements.

JUSTICE OR CHARITY

The aim of the Global Call to Action against Poverty was justice not charity. It appears, so far, to have resulted in neither justice nor a great deal of charity: whilst a little more money has been found by G8 states for developing countries, nothing at all has been done to restructure economic policies that produce the gross inequalities and suffering at which the campaign continues to aim (see World Development Movement 2006). Even Bob Geldof, slated by NGOs for acclaiming Make Poverty History as a success after the G8 summit in 2005, has since been publicly critical of the outcome (see www.live8live.com/datareport, last accessed 29 December 2007).

In terms of building proto-global solidarity, it is obviously harder to assess the success of Make Poverty History and ONE. However, it seems that the danger of narcissistic sentimentalism, which Boltanski warns is ever-present in the cultural politics of moral condemnation, was not avoided (Boltanski 1999). The creation of feeling for the suffering of distant people, which can generate a collective understanding of moral obligation to act to relieve that suffering, always risks degenerating into an emotionally indulgent admiration of one's own sensitivity, sincerity and strength of will. Make Poverty History and ONE undoubtedly achieved the expression

of public sympathy for the suffering of people in far away countries. It also achieved, to a limited degree, a sense of collective responsibility. However, this fell well short of proto-global solidarity as a sense of mutual commitment and reciprocity oriented towards global justice. What it formed rather was a sense of collective responsibility that empowers and validates 'us': it is up to 'us' to do something for 'them'.

In part, the failure to build solidarity is linked, rather paradoxically, with the campaigns' strength in generating feelings of involvement amongst people in the North. The strategy of both Make Poverty History and ONE was very explicitly to elicit pride and joy, feelings of empowerment, rather than feelings of shame and guilt. As Stan Cohen has shown, the way in which NGOs elicit shame and guilt is often counterproductive: horrific and disturbing accounts produce denial; we'd rather 'not know what we know' (Cohen 2001). In contrast to those Cohen analysed, these campaigns continually emphasised pride: *you* are the one who can make a difference, as a member of a generation that is unique in history. As in the Nelson Mandela speech quoted above, there was a continual and extraordinarily un-ironic re-stating of the uncontested fact that *you* can change the world.[4] Such a strategy is surely effective – it certainly proved to be so in the UK – at mobilising support for short-term action, where the action to be taken is quite clear (wear wristbands, demonstrate, email leaders and so on). A strategy of individual emotional empowerment and pride seems less likely, however, to contribute to long-term reflection and analysis of how 'we' are bound into conditions from which some benefit more than others.

[4] This sentence from the *Mirror*, entreating people to buy a white wristband, symbol of the campaign, well exemplifies the theme: 'Join the celebrities by wearing a white band and help end poverty for ever . . . By wearing a white band, you can be part of the biggest anti-poverty drive, joining forces with 150 million people in 60 countries' ('White Band Aid', 5 February 2005) Again, from the *Observer*, 'In the next 50 days, you can change the world for good' ('Countdown to G8', 15 May 2005). And, from the Make Poverty History website, 'you can be part of it' (www.makepovertyhistory.org, 31 May 2005, last accessed 31 June 2006).

As well as individual pride and joy, eliciting national pride was also a prominent feature of both campaigns. Both in the US and the UK, as an individual 'you' were empowered, according to populist representations, as a member of a powerful and morally righteous nation that has the means, the goodwill and – if 'you' make it happen – the political will to establish global justice. Although Make Poverty History and ONE did not justify global social justice using human rights, they did construct a version of cosmopolitan nationalism. Ending global poverty was self-evidently justified in these campaigns because – for the first time in history – it is really possible, if we make it happen. Identifying with the cosmopolitan nation, 'we' take pride in our state and our nation because it is exercising moral leadership of the world and can, therefore, really end the obscenity of global poverty in an age where it is no longer necessary.

In the UK cosmopolitan nationalism was particularly evident in the speeches of politicians in the Labour government, especially Tony Blair and Gordon Brown. To the consternation of many of the NGOs involved in Make Poverty History, who were often at odds with the government's policies, especially on trade justice issues, the Prime Minister Tony Blair and the Chancellor of the Exchequer Gordon Brown managed to position themselves as the leaders of the campaign and were widely supported as such in the UK media.[5] British politicians certainly did call for global solidarity, and to some extent the Labour government was leading the initiatives at the G8 summit. For example, Gordon Brown proposed a Marshall Plan for Africa, using the response to the tsunami to show how global solidarity is *already* experienced:

> [D]oes not the response to the massive tidal wave in southeast Asia show just how closely and irrevocably bound together today

[5] Blair and Brown were so successful at taking over the campaign in the UK that many critics derided Make Poverty History as a PR exercise for the government. See Ann Talbot 'Live 8: Who Organised the PR Campaign for Blair and Bush', www.wsws.org, 11 July 2005; also Stuart Hodgkinson 'G8? Africa Nil', *Red Pepper*, November 2005).

> and in our generation are the fortunes of the richest persons in the richest country to the fate of the poorest persons in the poorest country of the world, even when they are strangers and have never met.
>
> *(quoted in 'Business: a Moral Crusade – or War of Attrition?',* Observer, *9 January 2005)*

At the same time, however, British politicians also implied that the fact that Britain had the Presidency of the G8 in 2005 meant that the UK was literally leading the world in ending poverty. In fact, there were quite legitimate disagreements over how to cancel debt relief between British and, for example, Scandinavian leaders (who have traditionally taken the lead in the world on financial contributions to development); Britain has been one of the least generous countries with regard to aid, falling far short of its stated objectives; the UK is in a dominant position within the structures of global economic governance, with special voting rights in the IMF and the World Bank, membership of the G8 and so on, and yet trade justice is very rarely addressed in these institutions. In the terms of cosmopolitan nationalism, however, Britain's relative power in this respect is constructed as a matter of national pride rather than of shame; Britain is enhanced by its powerful position, its generosity and its moral righteousness: part of the solution, not part of the problem.

In the US, cosmopolitan nationalism was constructed very self-consciously by the leaders of ONE. Bono, who was behind the campaign in the US, was very clear that he aimed explicitly to appeal to national pride in US leadership of the world. He told *Time* magazine that he was advised not to appeal to the conscience of America, but to America's *greatness* ('Pooh Bahs of Poverty', 27 June 2005). Referring to America as, 'not just a country, but also an idea', that people who want to be free and equal should be 'embraced' ('10 Questions for Bono', *New York Times*, 21 September 2005), he drew on deep-rooted understandings of America as an exemplary nation for the world (see Lieven 2004). The ONE Declaration stated that 'We believe that in

the best American tradition of helping others to help themselves, now is the time to join with other countries in a historic pact for compassion and justice to help the poorest people of the world overcome AIDs and extreme poverty' (www.one.org, last accessed 5 December 2005). ONE's slogan, which appeared frequently in their press releases, was: 'ONE is a new effort by Americans to rally Americans, ONE by ONE, to fight AIDs and extreme poverty'.

In the support they offered for the aims of the campaign to Make Poverty History (though they never explicitly named it as such), editorials and articles in liberal US papers also played on American national pride. In contrast to the official campaign, however, they mobilised shame: US political leaders should be *ashamed* not to be taking the lead in ending global poverty. The *New York Times*, for example, suggested that the President was behaving in a way that was positively un-American by withholding aid for Africa: 'The American people have a great heart. President Bush needs to stop concealing it' ('Crumbs for Africa', 8 June 2005).

In cosmopolitan nationalism, 'you', the empowered individual, are joined with others to create 'we', the powerful and proud cosmopolitan nation. 'We' are empowered because we are a cosmopolitan nation. Cosmopolitan nationalism is a form of narcissistic sentimentalism because it is largely concerned with how well one's feelings, and even one's actions, reflect on one's own self. In this case, it is one's self as a member of a nation to be proud of because of its moral leadership in the world. A good illustration of narcissistic sentimentalism in the context of the Make Poverty History campaign for global justice is this quote from a Scottish student responding to John Kamau, a Nairobi journalist in Edinburgh for the G8 summit, who asked him whether he should be hopeful about the outcome: 'This is not only about you, it is about our humanity' ('Trading Places', *Guardian*, 4 July 2005). Making global poverty history is primarily about how 'we' feel about the way in which we express our global leadership to benefit 'you', African nationals. Obviously such a stance, whilst possibly displaying a strong (if perhaps

fleeting) sense of responsibility for the world, at the same time also displays a self-love that hardly reaches for global solidarity.

Make Poverty History and ONE aimed to build global solidarity in order to realise very specific goals: to increase aid, abolish unjust debt and liberalise trade. Although the goals were not actually realised, it may be that the emotional tone of the campaign was highly suitable for a short, sharp campaign that aimed to galvanise popular public support for those goals. It does also seem to have contributed to feelings that 'we' are part of a wider, interdependent humanity. However, *feelings* that humanity is interdependent are clearly not enough. A longer-term project of building global solidarity would surely also require *understanding* of how social relationships of interdependence amongst us are lived differently and what that means for 'us' as a global community. Global solidarity requires dialogue and in-depth analysis, neither of which is facilitated by narcissistic sentimentalism.

There was a lack of dialogue between Africans and the white Western organisers of Make Poverty History and ONE in the mediated publics of the UK and US (see, for example, 'African British Perspective on the Politics of Live8, G8 and the UK Media', Pambazuka News, 20 October 2005, www.pambazuka.org, last accessed 26 June 2007). Despite the slogan 'justice not charity' Africans were represented in very conventional ways as helpless victims of the calamities of their continent (Stevenson 1999, 2007). To some extent lack of dialogue is the inevitable consequence of existing media structures. Genuine dialogue across continents would surely require a popular transnational media, without which such alternative voices as are allowed to speak in the mediated public are bound to be structured by editorial decisions to fit dominant national narratives. There is generally a dominance of white elite perspectives in the mediated publics of the UK and US. In addition, the absence of African voices in this campaign was in part a consequence of its uncritical, celebratory tone in the UK, which meant that there was very little scope for critical perspectives at all. Those Africans who

were permitted to contribute in the UK mediated public were either leaders of countries allied with the government, or poor villagers who were grateful recipients of the help promised by the campaign. In the US, newspapers' greater commitment to balancing points of view to achieve 'objectivity' might have been expected to create more space for African contributions to the debate. However, I found only one article which covered a range of African perspectives in the US papers ('Among Ordinary Africans, G8 Seems Out of Touch', *Washington Post*, 3 March 2005).

Perhaps even more importantly, however, the campaign's emotional tone of celebration did not facilitate in-depth analysis of the different socio-economic positions occupied in structures of global poverty. Whilst there was a surprising willingness in the UK media to 'educate' the public into some of the technical details of the campaign's demands, evident even in the tabloids, what was significantly lacking was analysis of the structures of global inequality and the way in which they are premised on, and at the same time produce, economic conflict. Make Poverty History and ONE mobilised support for policies *beyond* national interests, but the difficulties of *conflicts* of interests between rich Northerners and poor Southerners was not addressed. Cancelling debt and increasing aid cost very little in proportion to national income in the North. Media coverage focussed *overwhelmingly* on these two demands. Trade justice, on the other hand, would require the end of protectionism in Northern economies and the protection of developing ones to enable them to grow, and this would undoubtedly increase prices and threaten jobs in the North. There was very little consideration of what this would mean in practice, how it might be achieved, or what the effects of such a restructuring might be on workers in the North, either in the UK or the US. Above all, there was certainly no sustained discussion in the mediated public over politicians' responsibilities to citizens as compared to non-citizens where there is a *conflict* of interests between them. There was, therefore, no construction of a consensus on how rights and responsibilities should be

balanced and distributed when it came to making policies on global poverty. And without sure knowledge of such a consensus, which 'world leader' could be expected to put the interests of non-citizens above those of citizens in drawing up or putting into practice such policies? It is in this context that George Bush's announcement on arriving at the G8 summit that, 'I come with an agenda that I think is best for our country' (interview with Trevor McDonald on *Tonight*, ITV, 3 July 2005, www.guardian.co.uk/g8/story/0,13365,1521149,00.html, last accessed 29 December 2007) makes perfect political sense.

CAMPAIGNING FOR SOCIAL AND ECONOMIC RIGHTS

The bold and original attempt to build global solidarity from the 'bottom up' in order to achieve specific goals represented by the Global Call for Action Against Poverty was unsuccessful then, in the case of Make Poverty History and ONE. Would it have been more successful if proposals for structural changes in global governance had been justified in the vocabulary of universal social and economic rights?

It was clearly necessary for GCAAP to challenge (inter)nationalism. In Chapter 4, we saw how (inter)nationalism attempts to re-fix the parameters of the national state which are challenged by structures of global governance – especially by 'intermestic' human rights. Building global solidarity from below in order to challenge international structures of inequality necessarily challenges (inter)nationalism because it involves putting pressure on politicians and civil servants of Northern states to *systematically*, not just occasionally, put national interests to one side in their political negotiations in international governmental organisations for the benefit of those people who happen to live in less powerful, subordinate states.

Claiming universal social and economic rights for all individuals as global citizens, regardless of nationality, is one way to challenge (inter)nationalism. As we saw in Chapter 4, activists imagined the community of global citizens *as if* cosmopolitan law already existed. Arguments for universal social and economic rights on

behalf of global citizens might have been possible in the Global Call for Action Against Poverty campaigns in the US and UK. Although, as we have seen, the international law supporting social and economic rights established in the UN system is 'soft' rather than 'hard', this only prevents cases being brought to court; it does not mean that a rhetoric of human rights could not have been used in the mediated public. Indeed, in the UK at least, the relatively successful 'Drop the Debt' campaign had already used a vocabulary of human rights to make the argument that debt cancellation was a matter of justice, not charity. Make Poverty History and ONE did appeal to some kind of an understanding of global citizenship, the idea of the world as a single place occupied by a single global community of individuals with responsibilities towards each other as human beings. The symbol of the white wristband and the rhetoric of Nelson Mandela's speech were performative declarations of global solidarity in order to bring it into being (see Nash 2008). However, for the most part, both Make Poverty History and ONE imagined cosmopolitan nationalism rather than global citizenship.

One reason for this is surely the structure of the human rights field itself. As we saw in Chapter 4, it was mostly activists and innovative lawyers who imagined a community of global citizens possessing rights and obligations in cosmopolitan law. In the absence of 'hard' law through which cases of social and economic rights can be brought into domestic courts, it is governments who are the direct target of campaigns against global poverty. But politicians are elected to represent the interests of 'the people' within national states. This campaign relied much more directly on the mediated public than the civil rights cases studied in previous chapters. From newspapers to national public broadcasting systems, the media has long been closely tied to the imagining of the national political community (Anderson 1991; Billig 1995).

The mobilisation of sentiments of cosmopolitan nationalism is intended to shift the definition of 'national interest' in a more altruistic direction. Cosmopolitan nationalism can be articulated

around the passionate support of human rights. As we saw in the Pinochet case, where human rights are invoked in cosmopolitan nationalism it is in the name of a powerful and morally righteous nation that acts *on behalf* of victims of human rights abuses. Whereas activists imagine a global community made up of a universal 'we' of individuals who are global citizens, the leaders of populist campaigns conducted in the name of the cosmopolitan nation are far more likely to link, and therefore to distinguish and to separate, 'we' who are actively engaged in the struggle for human rights, and 'they' who are the beneficiaries of our action. 'We' may be prepared to give up our national interest in order to help 'them'; or 'we' may re-interpret our national interests as compatible with helping 'them'. In either case the world continues to be divided along national lines, with some nations more outward looking and willing to take on global leadership than others.

Is cosmopolitan nationalism necessarily articulated, then, around benevolence, around charity, not justice? This quote from Bob Geldof exemplifies the construction of 'we' and 'they' which was prominent throughout both Make Poverty History and ONE:

> It is tempting hubris to say it is actually a Marshall Plan but it is similar to what Marshall asked in 1945. He said 'We are going to give you the money; but you have got to have democracy, and we are giving it for real and we are doing it partly for our national economic and national security, plus we can not tolerate you in poverty'.
>
> *('We've Got the Script, Now Let's Make the Film',* Guardian, *12 March 2005)*

And from Tony Blair (with a similar inflection in terms of combining morality and enlightened self-interest):

> The lesson of the past few years is that we can't, for our national interests, ignore other countries and continents. Famine and instability thousands of miles away lead to conflict, despair, mass

> migration and fanaticism that can affect us all. So for reasons of self-interest as well as morality, we can no longer turn our back on Africa.
>
> *('I Believe this is African's Best Chance for a Generation',* Guardian, *12 March 2005).*

In fact, as these quotes indicate, there is a rough and ready idea of reciprocity at work here. To return to the comparison between global redistribution and redistribution within welfare states, it is as if nations here are counted as individuals. Where individuals contributed to and received from common goods and services in welfare states, here it is nations that both contribute and receive. This is not a straightforward appeal to charity: 'we who are morally superior and powerful do this for them'. There is also an appeal to enlightened self-interest here that makes co-operation 'fair': 'in exchange they will reform their societies in such a way as to increase global security for the good of all'. This version of reciprocity is, however, an attenuated form of justice compared to the far greater egalitarianism envisaged by national welfare states, and by the imagined global community of human rights activists. It does not create concrete obligations on the part of individuals, nor enable the recognition of individual entitlements, nor contribute to the de-legitimation of the structures of production and distribution that create and sustain violations of social and economic human rights.

Given the difficulties of using human rights to end global poverty in formal procedures of the internationalising state, what conclusions can we draw about what difference human rights *rhetoric* might have made to the Global Call to Action Against Poverty in the US and UK? In fact, as we saw in Chapter 4, human rights claims can be mobilised in discourses of cosmopolitan nationalism; they do not necessarily give rise to an imagined community of global citizens in which each individual has equal entitlements and obligations. There is no reason to suppose, then, that human rights would not equally have been mobilised in the populist imagined community of

cosmopolitan nationalism that was the primary orientation of ONE and Make Poverty History.

'Thicker' solidarity requires more than feelings of benevolence towards people suffering disadvantage. It also requires more than a rough and ready model of reciprocity between nations which largely leaves structures that maintain that disadvantage untouched. It requires understanding and acceptance of social relationships across differences which implicate each and every individual in that disadvantage; the shared appreciation of material risks and benefits that are unevenly distributed and yet experienced as of common concern. 'Thinner' global solidarity may now exist. There are mediated experiences that are shared across the world. These largely concern 'aesthetic cosmopolitanism': world music, literature and cinema (Kurasawa 2007). There are also political images that circulate globally: the Berlin Wall being torn down by jubilant crowds, Nelson Mandela walking out of Robben Island, the jet plunging into the Twin Towers. But, of course, such events are seen and discussed, and move people, in quite different ways in different contexts.

What we learn above all from Make Poverty History and ONE as attempts to build global solidarity from below is that a cosmopolitan project that interprets events and images to build global solidarity is in fierce competition with nationalist framings of those same events. These campaigns did begin to challenge the ill-effects of conceiving national interests in excessively narrow economic terms. They did introduce a rough and ready understanding of reciprocity: serious inequalities in global wealth threaten security and well-being in the North now as well as in the South. It is not obvious that use of a rhetoric of human rights would have contributed anything significantly different to the success of GCAAP in the US and UK. Given how universal human rights themselves can become incorporated into cosmopolitan nationalism, it is difficult to conclude with any certainty that a campaign that adopted justifications for action to end

global poverty based on human rights would have fared any better, either in achieving the specific goals of the campaign, or in building popular global solidarity from below. The conclusion seems to be that nationalism can retain its dominance, and at the same time renew its vitality, by incorporating the attractions of cosmopolitanism in a globalising world.

6 Conclusion

Can human rights become a framework for global justice? It is only through cultural politics that human rights might become more than abstract moral ideals, that they might be institutionalised in concrete ways to protect human beings from arbitrary detention, torture and disappearance and to advance protection from starvation and the social destruction of poverty.

The cultural politics in which human rights activists are engaged to realise human rights in practice from within states is 'cosmopolitanism-from-below'. While 'cosmopolitanism-from-above' concerns above all the design and construction of institutions of global governance by elites, the cultural politics of the human rights activists I have analysed in these pages is oriented towards imagining a political community of global citizens from within the state, historically constituted in popular terms as national. 'Cosmopolitanism-from-below' intersects with 'cosmopolitanism-from-above' insofar as activists draw on international human rights norms developed initially in the UN and the Council of Europe to bring cases in domestic courts. However, using intermestic human rights in the national context, they aim to persuade state officials of the government and judiciary, but also, through the mediated public, the ordinary people, the voters and taxpayers in whose name state officials act, to think and act as global citizens with rights and responsibilities towards individual human beings regardless of nationality. In this way, human rights activists use intermestic human rights to reform the state, to transform it from a national state, which is legitimate insofar as it serves its citizens, into a cosmopolitan state, which is only legitimate insofar as it *also* serves human beings, regardless of their citizenship status.

The concept of 'human rights field' has proved invaluable to the study of 'cosmopolitanism-from-below' in relation to competing strategies and definitions of human rights, to explore how different actors involved in human rights are organised around privileged sites of contestation, especially courts and the mediated public, and the kinds of justifications they use in competition over the effective authority to define human rights. It has enabled detailed investigation of the cultural politics of human rights across the distinction between state and civil society – in relation to governmental and legal procedures and also in relation to wider questions of how political community and solidarity beyond the nation must be imagined in these procedures and in the mediated public if human rights are to be realised in practice. Can a general conclusion now be reached on the basis of these analyses?

It is always difficult to interpret a direction of general change out of a small number of detailed case studies. It is all the more difficult where change in one area is implicated in so many others. We appear to be in a transitional period in which social forms are being completely re-shaped in a range of interrelated changes as a result of globalisation. There is no area of social life of which this is truer than the state which, albeit partially and in complex ways, is becoming increasingly extended in networks of global governance that link state functions across borders (Sassen 2006: 403; Slaughter 2007). As their realisation depends on state transformation, this re-shaping is vital to human rights practices. By the same time token, however, especially in the current conditions of expanding neo-liberalism and heightened state security as a result of the global war on terror, the form states take, whether they simply become more oppressive and less responsive to the needs of human beings, or whether there is any hope that they may be restructured around norms of global justice, depends on the cultural politics of human rights.

I have argued throughout this study that the cultural politics of the intermestic human rights field concerns the state, the domains of law and government, *and* the mobilisation of human rights activists

and the representation of human rights in the mediated public in civil society. However, in order now to weigh up whether it is possible to identify any progressive trend towards the realisation of the cosmopolitan state in the cultural politics of intermestic human rights, it is useful to separate out assessment of achievements in their institutional–legal realisation from achievements in creating an ethical framework for the understanding of human rights. While the institutional–legal dimension of human rights concerns only the legal and governmental procedures of the state, the ethical framework of human rights concerns an orientation towards globalising human rights in both state procedures and civil society. Ultimately, it is only if we can identify a cosmopolitan ethical framework in the making that we can be optimistic about the long-term prospects of realising cosmopolitan states.

Clearly, as I noted in Chapter 1, and as we have now analysed in some detail, the conditions of cultural politics in terms of the institutional–legal dimensions of human rights are quite different in the US and UK. It is difficult, though as we have seen not impossible, for human rights activists and juridical innovators to bring pressure to bear on state officials using intermestic human rights in the US. In contrast, because of the way in which the UK is embedded in the European human rights system, state officials in the UK are relatively responsive to legal strategies that use intermestic human rights. What is all the more striking, therefore, in the face of differences in the institutional–legal dimension of human rights in these two states, is the similarity between the US and the UK in terms of the success, or rather lack of success, of activists in the human rights field in creating an ethical framework for reform of the state in a cosmopolitan direction.

THE INSTITUTIONAL—LEGAL REALISATION OF HUMAN RIGHTS

Human rights in court

Human rights activists see legalising human rights through courts as vital to their concrete realisation: bringing international human

rights norms, which are otherwise unenforceable, into national courts is a way of making law which is routine, technical, and objectively administered. In principle, as international norms of human rights are tested in national courts, judges should confirm the status of international law, making it increasingly precise and increasingly detailed concerning which activities states are legally required to undertake or to give up. Legalising human rights through judges' decisions in national courts is the most significant way in which human rights activists attempt to bring about the cosmopolitan state through cultural politics in the national context. It is, however, a risky strategy.

Human rights activists bring test cases using human rights into courts because it appears to offer the best possible means to realise human rights in practice. However, in a context in which human rights are so contentious, in so doing they contribute directly to the politicisation of law. In one sense law is always political as it is, like any other social institution, the outcome of cultural politics. The codification of law *as* law never simply involves the neutral regulation of social relations objectively administered; as the outcome of cultural political conflict, law is the naturalisation of power relations that made that particular outcome possible. In order to function as such, however, law must be *de-politicised*. To function effectively, law must appear to be nothing but neutral regulation, impartially administered through the proper procedures by designated officials who act independently of any particular interests, beliefs or values outside their professional investments in legal reasoning. Of course, the technical details of the law itself are often in dispute where it is called on to adjudicate conflicts between members of society. Where law is successfully de-politicised, however, no questions are raised concerning whether legal procedures are the appropriate means by which particular conflicts should be regulated. If the law appears to be political, on the other hand, to be inappropriately intervening in areas that are seen as more properly within the domain of other branches of the state, then the status of the law itself may be called into question.

When test cases are brought in national courts to confirm or extend the law in relation to international state obligations, the law is invariably politicised. Conor Gearty argues that this is actually recognised in the legal procedures that are used to adjudicate controversial human rights cases. That the highest courts of appeal in both the US (the Supreme Court) and UK (the Law Lords) are made up of a *number* of judges indicates that what is involved in adjudicating these cases is more than a technical interpretation of the law. Such cases are clearly seen as requiring, as Gearty puts it, 'the wisdom of the crowd' rather than the logic of legal argument. Whilst this is a feature of long-standing in the US Supreme Court, it is relatively recent in the UK. Similarly, in allowing 'friend of the court' briefs, including those submitted by representatives of other branches of the state, courts also indicate that there is more at stake in such cases than technicalities. Gearty argues that judges allow 'friends of the court' briefs from those who are seen to have an interest in the wider repercussions of the case – again a relatively recent innovation in the Law Lords, but long familiar in the US Supreme Court – because they know very well that in such cases they are involved in *law-making* rather than in *truth-finding* (Gearty 2006: 86–91).

The legitimacy of law depends on its appearance as solely reliant on principles of legal reasoning rationally administered according to the fundamental principles of the legal system in question. It is the prestige of law, its legitimacy, as well as the capacity to enforce agreement through the courts, on which activists depend when they bring controversial test cases in order to extend human rights norms as cosmopolitan law. To the extent, however, that law comes to be *seen* as political, rather than as neutrally administered regulation, legitimacy is not gained for human rights and it may, in the long-term, be lost for law itself. If some judges appear to be using law to arbitrate disputes where, as in intermestic human rights cases that draw upon international law, the status of the law *as* law is itself in dispute, especially where there are marked disagreements between senior judges themselves, the result is not

necessarily a confirmation of the prestige and authority of human rights. On the contrary, it may result in other political actors, especially governmental officials, treating both the law and international human rights norms with contempt (Gearty 2006: 91).

As we have seen, activists have enjoyed some success in winning intermestic human rights cases in the domestic courts of the US and UK. What is most striking about the cases in which they have been successful, however, is that these cases have involved the affirmation of the relative importance of national over international law. Where human rights are *not* encoded in national law, they prove to be of very little use as a resource for activists in furthering the globalisation of human rights from within domestic courts in the US and the UK. It is as national law that human rights may gain legitimacy in national courts. In the US, in campaigns against the violations of the human rights of prisoners in Guantanamo Bay, activists were not able to make use of well-established international human rights law concerning fundamental civil rights of due process in domestic courts because of the long-standing resistance of US political elites to incorporating it into national law. Instead, activists relied on obscure national law to bring the government to court. In contrast, ATCA cases, although they appear to have had very little support from those in the government, judiciary and the mediated public who did not actively oppose the use of customary international law in US courts, were not so easily dismissed. ATCA is national law; indeed, passed as part of the Judiciary Act of 1789 through which the US federal judiciary was created in the very first US Congress, it is part of the very foundations of the US law as such.

In the UK, although the Executive is constrained by cultural politics that makes use of the European system of human rights, the preference for national law over international law also remains strong. In the Belmarsh case, passionate support for British civil liberties was far more in evidence than for European human rights, and human rights activists and innovators in the judiciary tried to build on that support in court as well as in the mediated public. Even

in the Pinochet case, often seen as a turning point for cosmopolitan law because of the way customary international law was drawn upon in the UK's highest court in Pinochet 1 to confirm that torture and murder are crimes that must be tried when, where and by whomever they are committed, the final judicial decision in Pinochet 3 was made using law which had been passed by parliament, the Criminal Justice Act 1988, under which Pinochet's crimes were specified, and the Extradition Act 1870, which limited those crimes for which he might be extradited to torture and conspiracy to torture which were committed after the Criminal Justice Act was passed (Woodhouse 2003: 100). Withdrawal from the resounding commitment to cosmopolitan law in the Pinochet case was undoubtedly the result of reluctance on the part of the judges to make an unequivocal ruling on the issue of universal jurisdiction (Davis 2003: 11). Pinochet 3 was, in other words, a withdrawal from the commitment to restructuring the state along cosmopolitan lines that was endorsed by Pinochet 1.

In terms of the institutional–legal dimension of realising human rights in practice, then, their codification in national law is clearly hugely important. There is no necessary contradiction between national and cosmopolitan law. Legislatures can, and do, pass cosmopolitan law that in significant respects abolishes the distinction between citizens and non-citizens on which national states have historically been founded. As it has been interpreted in courts since 1980 to allow for US judges to decide tort claims in human rights cases when neither party has any connection to the United States, ATCA is cosmopolitan law. Similarly, it was on the basis of the UK's commitments under the ECHR, incorporated into national law in the UK parliament as the Human Rights Act, that the Law Lords found that the detention of non-citizens as terrorist suspects involved illegal discrimination.

As we have seen in all the case studies analysed here, however, judges are almost invariably reluctant to definitively pronounce for cosmopolitan law. In all cases, intermestic human rights cases are hard-fought in the courts at every turn by powerful state actors, and

judges are cautious in upholding international human rights norms in the face of strong and vocal domestic political opposition. This means that intermestic human rights cases are highly contested within the judicial system itself, and the law does not appear to be the rational, technical, and therefore predictable process it is supposed to be. In all the legal cases covered here legal judgements were reversed more than once, legal commentators were astonished at decisions – where human rights advocates were successful just as much as when they failed – and, in each case, it appeared that the law in these areas was undeveloped, contentious, possibly even quixotic. We saw, for example, how surprised lawyers were when judges delivered their judgement in Pinochet 1, and how those same judges altered the substance of that decision – whilst leaving it formally intact – in Pinochet 3. We saw too, in *Sosa* v. *Alvarez-Machain*, how the judge, whilst delivering a judgement that confirmed ATCA as a tool for bringing cases against the gross violation of human rights, commented that 'the door was ajar . . . subject to vigilant doorkeeping', which suggests that the legal struggle *against* such cases is justified and may succeed in the future. The law is hardly de-politicised where there is effectively judicial encouragement to contest it.

Democratic human rights

The relative success of cosmopolitan law passed by Legislatures in the intermestic human rights cases studied here compared to the failure of human rights activists to make international norms effective through the courts where such law was absent, suggests that legislation by elected representatives rather than law-making by judges may ultimately be the only means by which human rights can be secured. It may, therefore, also be the only route by which the national state might practically be transformed into a cosmopolitan state. Most human rights organisations do try to influence government officials as well as judges, by creating reports, lobbying politicians, attempting to represent human rights favourably in the mediated public and so on. Despite these efforts, however, democracy

and human rights are still commonly understood as opposed in principle and in practice.

As we have seen in the contestation of intermestic human rights in national courts, one of the principal arguments used against international human rights is that they are undemocratic. Human rights are criticised by the Executive as undemocratic where they appear to require that states simply comply with universal norms that do not take into account current circumstances, or that are not flexible enough to adapt to the demands of 'the people' who have elected government officials to represent their interests and values. Human rights are criticised as undemocratic where international norms appear to give undue power to unelected judges to make important decisions about the parameters of political life, even when it is democratically elected leaders who have signed and ratified international human rights agreements.

Whilst such arguments are clearly politically motivated in intermestic human rights cases in national courts, the suspicion that human right are undemocratic is much more widespread. Democracy and human rights appear, on the face of it, to be concerned with very different aspects of political life. Democracy appears above all to involve institutional arrangements for popular control over decision-making, while human rights concern the protection of scope for individuals to pursue their own goals (Beetham 2000). Moreover, as fundamental moral principles, human rights actually appear to be beyond democratic consent. As Ulrich Beck puts it, the human rights regime is self-legitimating: based not on popular consent but on the exercise of reason, it seems to open up the possibility of a cosmopolitan regime without democracy (Beck 2006: 297; see also Jacobson and Ruffer 2003; Jacobson 2004).

This understanding of human rights as undemocratic is mistaken. Human rights are actually designed *for* democracy: they are generally formulated in quite abstract and general terms, precisely in order to facilitate their adoption through democratic processes. There

are very few international human rights that are absolute. Those that are absolute, that are not designed to be adapted to particular circumstances but rather to be respected without question, are supposed to provide the conditions for democracy itself; they are fundamental to any form of democracy as popular rule. In the UDHR, the basis of all international human rights law, there are very few Articles which take the absolute form 'No one shall . . .'. What is absolutely prohibited is enslavement; torture; cruel, inhuman or degrading treatment or punishment; arbitrary arrest, detention or exile; arbitrary interference with privacy. Such rights are the foundation of democratic participation as such; they are fundamental to individuals' capacities to express opinions and organise against the re-election of a government they oppose. In fact, even in the case of these absolute rights there is scope for interpretation: what counts as torture, as arbitrary arrest, as cruel, inhuman or degrading punishment? Although there are strong precedents to establish the limits of interpretation of these norms in international law, their meaning can not ultimately be fixed in abstraction; it must, of necessity, be defined in concrete regulations and practices. All other Articles take the form 'Everyone has the right to . . .', for example, 'life, liberty and security of person' (UDHR, Article 3), 'recognition everywhere as a person before the law' (Article 4), and so on. Human rights specified in this form, which is not that of absolute prohibition, have been developed precisely to enable the tailoring of standards to particular social and political circumstances whilst retaining their core conception of the value of the human person as an individual (Merry 2006: 8).

International human rights are designed to be interpreted and defined in democratic processes precisely in order to safeguard democracy. Indeed, it seems that it is only if human rights are institutionalised through democratic processes that they may become effective. Human rights may become democratically legitimate in the institutional–legal dimension of the state where it is the

Legislature that takes the lead rather than the judiciary in authoritatively defining human rights.

This is not to say that judicial activism with regard to human rights should be seen as undemocratic. On the contrary, judicial review of legislation will surely always be necessary precisely because human rights are so open-ended in permitting broad interpretations of fundamental principles and because Legislatures may be tempted into law-making that is oppressive, whether of minorities or of the majority. In most such cases the judiciary should only have to review legislation, returning it to the Legislature to make new law if it is so deeply flawed as to be clearly unacceptable in a democratic society. In extreme cases, however, the judiciary might even make law to safeguard democracy. Where the Executive is determined to override fundamental individual rights to participate in political life, it may be that judges are the only state officials who may call those violations into question in cosmopolitan law (using customary international law, for example), even where they have been agreed upon by elected representatives.

Safeguarding fundamental civil rights is just as important where it is the rights of non-citizens to participate in democratic politics that is at stake. The question of who can or should have voting rights in a state which is properly democratic and in which both citizens and non-citizens are resident is beyond the scope of this study (see Benhabib 2004; Kostakopoulou 2006). It is clear, however, that at any particular time there will be people, possibly relatively new arrivals, who are resident within the jurisdiction of a particular state in which they have no right to vote. In such cases it is vital that newly arrived non-citizens are able to engage in political activities in order to influence those members of the state who do have more direct influence over the actions of elected representatives and therefore over the conditions of their residence in that state. In addition, as we saw in Chapter 5 especially, there may be those who are affected by public policy instituted by a state who are not, and can not be, resident within its jurisdiction. For a cosmopolitan state to be

genuinely capable of making law and public policy in the interests of 'all affected' by particular regulations, it is necessary that citizens and non-citizens alike are able to exercise influence on decisions that directly affect their lives without fear of state repression.

Of course, such a possibility requires a very complex set of conditions which goes far beyond formal civil rights guaranteed in law.[1] We can not address the general conditions that are required for democracy in the cosmopolitan state here. It would surely have to include, for example, at least some kind of representation of the perspectives of non-citizens in the mediated public concerning issues which affect them, both those resident within and outside the territory of the state. The media itself would need to be reformed to make it more ethically responsive to meta-questions of global justice. The media would have to adopt a different orientation from that formed in its historic role as 'the Fourth Estate', watching over and addressing the state on behalf of the people. Such an orientation, while it need not be, and indeed it is not in more liberal sectors of the media, unsympathetic to claims of universal human rights, does tend to privilege the status of citizens. A genuinely popular transnational media would be necessary, in which commonalities and differences were debated from divergent perspectives of citizens and non-citizens alike. The restructuring of media along these lines in terms of both

[1] Indeed, as Conor Gearty argues, given that law itself may be oppressive, at odds with the political freedoms necessary to democracy, it is vital to keep open the possibility of civil disobedience in order to change it (Gearty 2007). Gearty is especially sensitive to interpretations of human rights law in the UK which have been and continue to be at odds with civil liberties (for example, the Law Lords' endorsement of the control orders we considered in Chapter 3 as not breaching European human rights, though they may be applied to terrorist suspects without charging and trying them). For this reason he separates human rights as law conceptually from civil liberties which are political. In my view, however, there is nothing in the theory of civil liberties that Gearty proposes which is not also covered by principles of human rights; it is not because human rights law has been interpreted in ways that are oppressive that human rights activists will give up trying to challenge those interpretations. Indeed, it seems odd to give up on the language of human rights to contest oppression when it is precisely for this purposes that it was designed.

production and consumption both seem unlikely, however, without a huge transformation in citizens' conception of themselves as the 'people' in relation to 'the state'. And where is such a transformation to take place except in the popular media?

In order for human rights to be institutionalised in a cosmopolitan state, then, it seems that they must be interpreted and defined for the most part by the Legislature rather than the judiciary. At the moment, however, it is rare that Legislatures make human rights law. As we saw in the cases examined here, even when the judiciary required the Legislature to create law, to balance respect for human rights with concerns for national security in the Guantanamo and Belmarsh cases, although civil rights as the foundation of democratic political life were actually debated both in the UK parliament and the US Congress, the law that emerged did *not* respect fundamental human rights to due process of law. Both the judiciary *and* the Legislature have been reluctant to endorse fundamental rights for all human beings, regardless of nationality, even after they have been violated by the Executive in the 'war on terror', and even after the judiciary has drawn attention to lack of respect for fundamental rights as a problem. The Legislature will inevitably be too timid to pass legislation to ensure that the human rights of non-citizens are respected where politicians fear that supporting human rights will make them unpopular, or at the very least, where they fear it will not win them any votes.

Intermestic human rights in the global war on terror

It is especially likely that both Legislature and the judiciary will be reluctant to endorse the principles of cosmopolitan law in practice in the current climate of fear generated by the 'global war on terror'. Although the very few fundamental human rights that are absolute are designed precisely to constrain the Executive and its military command structure in times of crisis, where the Executive has successfully argued that national security is concerned there is no doubt

that its power relative to the other branches of the state has increased.[2]

The contestation of Executive power in the US and UK was directly implicated in a number of the cases we have examined here in which human rights activists and juridical innovators brought intermestic human rights cases in domestic courts. It was directly contested in challenging the arbitrary detentions of Guantanamo and Belmarsh which were authorised by a sovereign decision that increased Executive power relative to the Legislature and the judiciary. It was indirectly contested in the ATCA cases, in which the US Executive intervened effectively to defend human rights violations of non-citizens, their torture, murder and enslavement, on the grounds that foreign policy, especially at times of heightened risk in the global war against terror, required that such practices should be prudently ignored for the sake of diplomatic relations with other states. Although, as we have noted, 'the global war on terror' has no legal status, it has clearly made a difference, both in the US and the UK, to the cultural political context in which legal judgements are made.

In the US, legal judgements concerning the Executive violation of human rights in the case of Guantanamo, and the indirect support of the Bush Administration for human rights violations in *Sosa* v. *Alvarez-Machain*, were ambiguous at best. Although the over-reach of Executive power demanded by the Bush Administration was not condoned by Supreme Court judges in *Sosa* v. *Alvarez-Machain*, their

[2] In her study of state transformation through globalisation, Sassen argues that there is a general trend towards the concentration of power in the Executive as a result of the de-regulation and privatisation of the economy. Globalisation is leading to increased constraints on representative democracy, not because there is a lack of control over forces that impinge upon the state, but because states are both enabling and adapting to globalisation by hollowing out the oversight and law-making functions of the Legislature (Sassen 2006). It is not just in the context of the global war on terror that the Executive gains authority; it is also through neo-liberal economic practices.

decision was not as unequivocal as might have been expected concerning the absolute duty of US courts to uphold core principles of universal human rights. The Supreme Court was clearly reluctant to enact principles of universal jurisdiction, even though the judges had a clear mandate to do so in the venerable domestic law of the Alien Tort Claims Act. The decisions in the numerous cases brought on behalf of the Guantanamo detainees over the six years they have been imprisoned which have reached the Supreme Court have also been equivocal. Although in *Rasul* v. *Bush* there was a clear decision, against the Executive, that the detention centre in Guantanamo Bay was effectively under their jurisdiction and that the prisoners did, therefore, have *habeus corpus* rights in US courts, the judges declined to assert unequivocally that they should, therefore, have full access to US courts. Similarly, in *Hamdan* v. *Rumsfeld*, whilst Supreme Court judges ruled against the Executive that the military tribunals they had set up to try the prisoners satisfied neither US nor international military standards of due process, they did not rule either that the detainees must be granted prisoner of war status, or that they should be brought before US courts.

In neither case did the Supreme Court clearly state what the law required in terms of the treatment of the detainees in Guantanamo Bay. Despite the absolutely fundamental prohibition against arbitrary detention on which the rule of law is premised, whether national or international, the judges effectively passed the decision on to Congress to make legislation that would cover the situation in which these prisoners find themselves. Congress similarly ducked making a clear challenge to the Executive's sovereign decision that the global war on terror required the indefinite detention without charge or trial of terrorist suspects deemed 'unlawful combatants'. The fundamental nature of absolute rights in a democratic polity was debated in Congress, but in making legislation in response to the Court's ruling, the Legislature deferred to the Executive decision by passing the Military Commissions Act 2006

which definitively barred Guantanamo detainees from challenging their detention in US courts.

In the UK the Law Lords have been bolder in challenging the Executive than has the Supreme Court in the US. This is undoubtedly due to the way in which the UK is embedded in the European system of human rights rather than to the wider context of cultural politics concerning the global war on terror. The wider cultural political context is somewhat different in the US and UK: the UK is only an ally of the US in the global war on terror rather than its chief prosecutor; there is a great deal of opposition to it in the mediated public in the UK, and as a consequence politicians very rarely use the term 'global war on terror' as such. However, there are also similarities: there are similar concerns about the security of citizens faced with terrorism in the UK and the US, and very little sympathy in the mediated public for those non-citizens suspected of terrorism who are detained without charge. Nevertheless, in *A and others* v. *Home Secretary*, 2004, the Law Lords found that it was illegal to treat non-citizens differently from citizens by arbitrarily detaining those suspected of terrorism, even when 'normal' law had been suspended by the Executive declaration of a state of national emergency.

The UK parliament was, however, just as deferential to the Executive's sovereign decision to suspend normal law as a response to terrorist threats as was the US Congress. Again, although there was much political rhetoric concerning fundamental rights in a democratic polity when legislation required as a result of the Law Lords' decision was debated, the Prevention of Terrorist Act 2005 adheres to the letter rather than the spirit of the human rights law, and actually allows the extension of Executive power rather than its limitation. In addition, parliamentary debates over this legislation and representations of the issues at stake in the mediated public undoubtedly contributed to growing calls for the reform, even the abolition, of the UK Human Rights Act itself, the very basis of the Law Lords' ruling against the sovereign decision.

HUMAN RIGHTS AS A COSMOPOLITAN ETHICAL FRAMEWORK

In liberal-democratic states human rights will only become important to democratically elected politicians in the Executive and Legislature once they are important to citizen-voters. It is only when people with political rights within the state elect and support government officials who understand states to be accountable to humanity rather than exclusively to citizens that states may gradually be reformed along cosmopolitan lines. In effect, citizens must dissolve the conditions of their own privileged position in relation to national states if cosmopolitan states are to become a reality.

This is not quite as impossible as it sounds if we consider that, in supporting the human rights of non-citizens, a minority of citizens already do encourage the extension of cosmopolitan law. However, as we have seen in the case studies, cosmopolitan understandings of human rights are highly contested in the national contexts of the US and UK. For citizens to dissolve their own privileged status *as* citizens, human rights will have to be contested within a much narrower range of possibilities than at present.

There will be no end to competition over authoritative definitions of human rights as long as they are of any value. We have already noted that in legal terms, the meaning of most human rights is quite open-ended, designed for democratic debate. Even where human rights are absolute, designed to safeguard the conditions of that debate, because they are, like all symbolic communication, the product of ongoing practices of cultural politics, their definition can not finally be fixed. The meaning of human rights is essentially contestable. In addition, the meaning of human rights is also highly contested for empirical reasons: designed to be adaptable to different circumstances, human rights are also supposed to guide actors who occupy objectively powerful positions of authority and who are likely to resist being constrained in unfamiliar ways, especially where they have interests in preferring a course of action that does not respect human rights. Whilst the meaning of human rights can not be finally

fixed, however, it is, in principle, possible to establish an ethical framework of relatively stable limits on the *range* within which human rights are contested in cultural politics.

A cosmopolitan ethical framework would limit the contestation of human rights to those meanings which abolish the significance of the moral and legal distinction between citizens and non-citizens, eliminating discrimination in fundamental entitlements that currently exist on the grounds of nationality and residency. It would support only practices of human rights that systematically abolish the discrimination between citizens and non-citizens. As we noted in Chapter 1, the contestation of human rights can be understood as raising meta-questions about the frame of global justice in terms of 'what', 'how' and 'who' (pp. 15–19). While human rights issues invariably concern first-order conflicts over substance, what is ultimately at stake in the cultural politics of human rights is the framing of justice as predominantly of concern to the national political community or as cosmopolitan; a matter for global citizens with rights and responsibilities across borders. In a cosmopolitan ethical framework, debates over justice would be situated within shared understandings that justice must encompass 'all affected' by a particular issue: it can not be arbitrarily applied only to citizens but must include all those for whom the issue is relevant, citizens and non-citizens alike.

What are human rights?

In a cosmopolitan ethical framework human rights would be continually re-confirmed as legitimately and properly concerning *global* justice. Within such a framework, first-order questions of substance would concern only which of the comprehensive schedule of international human rights norms were to be applied in a particular case. As we have noted, there is a wide-ranging list of human rights in international human rights law, including extensive measures to address social and economic misery as well as the details of civil and political rights with which we are more familiar in Europe and North

America. In a cosmopolitan ethical framework of human rights, the 'what' question of global justice would concern only 'which human rights are relevant to this issue?'.

In the current cultural politics of intermestic human rights the 'what' of human rights is much more likely to concern the question 'what is more relevant here, human rights or other considerations?' than the question 'what kinds of human rights are relevant here (civil, political, social, economic or cultural)?'. The meta-question of justice that is most commonly addressed is not 'what kinds of human rights?' but rather *whether* human rights are important at all. This is especially evident, of course, in the cases of national security we have examined. In these cases, human rights activists are engaged in contesting the view that it is citizens' security that matter, while the rights of non-citizens suspected of terrorism to due process of the law are irrelevant. How 'what' becomes 'whether' is also evident in relation to the social and economic rights we examined in Chapter 5; in these cases the question of 'what' human rights mean was settled in advance of the campaign against global poverty with the prior decision that representing claims on global structures that create severe economic inequality as a matter of human rights was unlikely to gain popular support in the US and UK.

Who is the subject of human rights?

I have stressed throughout this study that what intermestic human rights introduce that is radically new into national political life is the principle that it is not exclusively citizens who are the bearers of entitlements but individual human beings, regardless of their citizenship status or where they live in relation to jurisdictional boundaries. In a cosmopolitan ethical framework of human rights, 'who' is reasonably contested where it is a matter of who, as a bearer of universal entitlements, is being treated unjustly in this particular case, and who, as a bearer of human rights obligations, is responsible for that treatment. In the current cultural politics of human rights,

however, the question 'who is the subject of human rights?' is contested in ways that go beyond what would be acceptable within the limits of a cosmopolitan ethical framework of human rights. The idea that citizens and non-citizens should have equal rights appears to be difficult to countenance except by human rights activists and their supporters. Certainly, when it comes to making law in accordance with international human rights norms which abolish this distinction in significant ways, state officials clearly find it a very difficult ideal to live up to in practice.

How are human rights to be decided?

As I have been arguing in this conclusion on the basis of the analysis of the human rights field in previous chapters, intermestic human rights cases raise issues of concern to all branches of government: 'how' decisions concerning human rights are to be settled is appropriately disputed between the judiciary, the Legislature and the Executive. Above all I have argued that what is most necessary, and most difficult, is the making of human rights law by the Legislature. Courts are currently the principal site at which human rights activists have been able to achieve a hearing for human rights cases. However, there is a problem of circularity in arguing that the Legislature must take more responsibility for human rights that makes it virtually impossible for human rights to be secured: it is only if the Legislature makes human rights law that universal human rights will become democratically legitimate; it is only if the electorate values universal human rights that the Legislature will make law that respects human rights for all individuals, regardless of nationality or residence. It is difficult for the Legislature to engage in a cultural politics of human rights to ensure the institutionalisation of equal rights for citizens and non-citizens when politicians are answerable to an electorate which undoubtedly privileges their own individual and collective rights over those of non-citizens.

TOWARDS A COSMOPOLITAN STATE?

The national frame of justice is being called into question in cosmopolitanism-from-below using intermestic human rights. The state is currently in transformation as a result of multiple processes of globalisation, political, economic and legal, as it is extended in networks of global governance. The project of cosmopolitanism-from-below in which human rights activists are engaged is in part a response to that transformation, which seems to offer opportunities to extend norms of justice beyond the national state that were previously difficult to conceive of putting into practice. Cosmopolitanism-from-below using intermestic human rights is also, however, essential if norms of global justice are to have any effect on the state formation that is currently taking place.

Human rights activists construct cosmopolitanism-from-below as a project that simply aims to bring state actors to account in the name of a political community of global citizens which already exists as a consequence of rights and obligations that are clearly laid out in international law. Human rights activists speak, write and act as if the global political community of international law is an 'always already' existing fact as well as being of indisputable normative value. As we have seen, however, activist interpretations of international law are actually highly contested; international law as a global constitution is, at best, in development as a result of the cultural politics in which human rights activists are engaged. The political and legal apparatuses of states, even those that ostensibly have long-standing commitments to the international rule of law like the US and UK, are far from neutral carriers for global values of cosmopolitan law. They are, on the contrary, the sites of vigorous contestation over the meaning and applicability of human rights in particular national contexts.

Contrary to the assertions of those human rights activists engaged in trying to bring about cosmopolitanism-from-below, nationalism seems to remain dominant in all domains of the human rights field outside that of committed human rights activists

themselves. In fact, it would not be too strong to say that nationalism may even be given new life through the cultural politics of intermestic human rights.

Nationalism, and the importance of the national state to its citizens, is re-stated in the perspective of (inter)nationalism. (Inter)nationalism encodes quite a traditional perspective on political life, though it is carried by liberal and conservative governmental officials, lawyers, judges and journalists in somewhat different ways. In both versions, (inter)nationalism emphasises the contested nature of international law, the way in which it results in the politicisation of law in domestic courts. In its conservative version it may, as we have seen, accommodate itself ethically to a ruthlessness towards non-citizens in the name of safeguarding the security and economic well-being of citizens who belong within the boundaries of the only legitimate political community, that of the nation. In its liberal version, (inter)nationalism is more likely to emphasise a politics of international law that should support decisions by state officials that foster democracy and the rule of law within national states. International law is resolutely seen, however, as a tool of political strategy rather than, as it is by human rights activists engaged in imagining a political community beyond the nation, as cosmopolitan law for global citizens. (Inter)nationalism may update nationalism for our globalising times, emphasising co-operation between states in response to the factual and normative challenges to the national community of justice represented in intermestic human rights cases. Above all, however, it re-iterates the ideal of the national state as sovereign, self-determining and democratically responsive to the interests and values of national citizens.

Nationalism is modified, extended and given new meaning as cosmopolitan nationalism. Cosmopolitan nationalism takes concerns about the violation of human rights at home and abroad seriously, and supports legal and political action to deal with them. However, effectively treating international law as politics by any other means, cosmopolitan nationalism is imperialist: cosmopolitan

nationalists take the moral high ground with regard to the rights of non-citizens, but, counselling prudence, unlike advocates of global citizenship, they do not categorically demand that these rights are to be universally respected as a matter of international law in every case.

There is no doubt that international human rights are potentially imperialist where they allow for interference in the affairs of small and weak states which would not be, and are not, tolerated by more powerful states. Whereas human rights activists try to counteract these imperialist tendencies by insisting that human rights must be applied rigorously and universally to protect the fundamental freedoms and well-being of each and every individual human being, regardless of the consequences in terms of international politics, cosmopolitan nationalism takes up the imperialist logic that they should be protected only when it is prudent for national interests to do so. Cosmopolitan nationalism frames human rights in terms of what is possible in a given situation during what is understood to be a transitional period toward the full realisation of human rights. Cosmopolitan nationalism, like (inter)nationalism, constructs international law as a political tool rather than as routinely administered, technical, cosmopolitan law for global citizens.

Cosmopolitan nationalism is symptomatic of one of the most difficult dilemmas faced by human rights activists: it is necessary to translate human rights into the vernacular in order to gain public support for their institutionalisation; to create, in the terms I have used here, a cosmopolitan ethical framework of human rights. But this is inherently risky. As nationalism remains dominant, activists campaign to mobilise national pride, and not just shame, for human rights causes. The risk then, however, is that human rights will be co-opted by nationalism. Cosmopolitan nationalism is pro-human rights, but without respect for international law it may actually be positively dangerous for the bearers of human rights. The view that international human rights agreements can be treated as nothing more than political tools in the short-term means that the aim of

achieving the routine predictability to which law aspires actually becomes impossible to realise in the long-term, if it is possible to maintain it as an ideal at all. The dangers of treating international human rights instrumentally are clear, for example, in the case of the Belmarsh detainees examined in Chapter 3: they were detained without charge (in clear violation of their fundamental human rights) because they could not be returned to the states of which they were nationals where they had well-founded fear of persecution (out of respect for their human rights) (Nash forthcoming).

States are undergoing transformation in networks of global governance. As we have seen in these case studies of intermestic human rights, cosmopolitan law does exist and it is being enforced through national courts, albeit to a far lesser extent than human rights activists imagining a political community of global citizens would have us understand. However, in the US and UK at any rate, and there is no reason to think they are exceptional in this respect, the legitimacy of state institutions and procedures continues to be coded as national. Actually existing states *may* be in transition towards the ideal-type of the cosmopolitan state. However, it is clear from the dilemmas and challenges that are thrown up by the cultural politics of human rights in the globally dominant liberal-democracies studied here that the progressive potential of human rights to become a framework for global justice will be extremely difficult to realise in practice.

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