

EURAMERICA Vol. 34, No. 3 (September 2004), 511-553
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Rights to Liberty and Fair Trial —Sacrificed in the Name of Anti-Terrorism

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Abstract

When a state adheres to international human rights treaties, it is obliged to implement them domestically within its jurisdiction, even in a time of anti-terrorism. This paper therefore examines whether the measures taken in the name of anti-terrorism by the US and the UK are in accordance with international human rights standards.

It focuses on three main issues. The first issue relates to the criteria used to define terrorists. Secondly, once identified, how will they be detained, and thirdly how will they be tried? It emphasizes that human rights protections and anti-terrorism measures should not be conflicting aims but parallel goals. It argues that the laws and orders enacted by the US and the UK may not always conform to international human rights standards, and should be rescinded or amended.

Key Words: right to liberty, right to fair trial, anti-terrorism, "USA PATRIOT ACT", "Anti-Terrorism Act 2001"

Received April 25, 2003; accepted March 30, 2004; last revised April 27, 2004
Proofreaders: Audrey Chen, Chieh-Wen Hsu, Yi-wei Yin

I. Introduction

On 11 September 2001 nineteen terrorists hijacked four commercial airliners. Two crashed into the twin towers of the World Trade Center in New York City; one hit the Pentagon in Washington D.C; and a fourth crashed in a field in Pennsylvania. It is believed that more than three thousand innocent individuals from more than 80 nations died or were injured in the attacks and was, without a doubt, a grave violation of human rights: the right to live free from fear and the right to life and liberty.

After such a tragedy it's natural to think of fighting back. The day of the terrorist attacks, US President George W. Bush Jr. addressed the nation and vowed to "find those responsible and bring them to justice."¹ In the view of the President, "America was targeted for attack because we're the brightest beacon for freedom and opportunity in the world." He noted, "Terrorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America. These acts shattered steel, but they cannot dent the steel of American resolve." Therefore, the President urged Americans to "go forward to defend freedom and all that is good and just in our world."²

The United Kingdom is, as usual, an important partner in combating terrorism. In a speech to his Labour Party, British Prime Minister Tony Blair said, "We were with you at the first. We will stay with you to the last... This is a battle with only one outcome: our victory not theirs." Prime Minister Blair also suggested that changes of British laws were "not to deny basic liberties but to prevent their abuse and protect the most basic liberty of all: freedom from terror" (Blair, 2001).

The US and the UK enacted legislation to combat terrorism. Among others, some core acts and orders are the "Military Order:

¹ President Bush's Address to the Nation, September 11, 2001. The White House, Office of the Press Secretary, September 11, 2001.

² *Ibid.*

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”³ (“Military Order”) and “Uniting and Strengthening American by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism of 2001”⁴ (“USA PATRIOT ACT”) in the US, and the “Anti-Terrorism, Crime and Security Act 2001 (The Stationery Office Limited, 2001a: Chapter 24)” (“Anti-Terrorism Act 2001”) in the UK. The dilemma is, however, when enacting new laws, how does one go about combating terrorism without sacrificing liberties and rights? A state must protect its people effectively from acts of terrorism. On the other hand, ensuring that innocent people do not become the victims of counter-terrorism measures should be an important component of the anti-terrorism strategy as well. It is also crucial that the legitimate rights of states to combat terrorism be exercised in full accordance with international human rights law that requires states adhere strictly to their international obligations to uphold human rights and fundamental freedoms (Von Schorlemer, 2003: 281).

Combating terrorism and human rights protection, in my view, consists of three main issues, among others. The first issue relates to the criteria we use to define terrorists. Furthermore, once identified, how will they be detained and tried? Human rights protections and anti-terrorism measures should not be conflicting aims but parallel goals. When a state adheres to international human rights treaties, it is obliged to implement them domestically within its jurisdiction, even in a time of anti-terrorism. This paper therefore, examines whether the measures taken in the name of anti-terrorism by the US and the UK are in accordance with international human rights standards.

II. Terrorist? Terrorism?

From a legal point of view, there exists no internationally-

³ Federal Register: November 16, 2001 (Volume 66, Number 222), Presidential Documents, Page 57831-57836.

⁴ HR 3162 RDS, 107th CONGRESS, 1st Session, H. R. 3162, in the Senate of the United States, October 24, 2001.

accepted definition of terrorism at the present time. States have been unsuccessful at coming up with a definition of terrorism in international law since 1937 (Howen, 2002: 5; International Council on Human Rights Policy, 2002: 11). Several UN conventions exist prohibiting specific acts such as hijacking or bombing, which specify in detail various crimes commonly understood as “terrorist” crimes. The Rome Statute of the International Criminal Court⁵ (“Rome Statute”) does not refer explicitly to the definition of “terrorism.” The drafters decided that the issue of how to define “terrorism” should be a matter for subsequent review (Amnesty International, 2002a: 20). Even the International Convention for the Suppression of the Financing of Terrorism, which was adopted on 10 January 2000, does not offer a clear definition of terrorism. Attempts to finalize a UN Convention on terrorism have not been successful because of disagreements on the definition. The Ad Hoc Committee established by General Assembly resolution 51/210 (Committee on Terrorism) is still finalizing a comprehensive international treaty on terrorism.⁶ It is important to note that draft Article 18 of a “Comprehensive Convention” on terrorism makes clear that, at least nationally, this should not apply to the behaviour of armed forces during an armed conflict or even otherwise in the exercise of official duties (Klabbers, 2003: 306).

Although there is no clear legal definition of terrorism that is universally accepted (Sorel, 2003: 365-367), some international treaties have indicated that the definition of terrorism should be limited to serious offences. For example, Article 1 of the European Convention on the Suppression of Terrorism states that, for the purposes of extradition between Contracting States, some offences

⁵ UN Doc. A/CONF.183/9 of July 17, 1998.

⁶ See Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of December 17, 1996, Seventh Session (March 31-April 2, 2003), General Assembly, Official Records, Fifty-eighth Session, Supplement No. 37 (A/58/37). It has been reported that several delegations reiterated their views that a comprehensive convention should contain a clear definition of terrorism, but no definition has been offered so far.

shall not be regarded as political offences. Such offences include seizure of aircraft; acts against the safety of civil aviation; attacks against internationally-protected persons; offences involving kidnapping; the taking of a hostage or serious unlawful detention; the use of a bomb, grenade, rocket, automatic firearm, or letter or parcel bomb if this use endangers persons. Section 1 of the Regulation on the Prohibition of Terrorism and Related Offences offered by the United Nations Interim Administrative Mission in Kosovo defines terrorism. It includes the commission of one or more of the listed offences that are conducted with the intention of creating a serious threat to public order, to coerce a government or international organization, or to intimidate or endanger a civilian population. Those offences include murder, grave bodily injury, hostage-taking, kidnapping, unlawful detention, poisoning of food or water, causing general danger, destroying or damaging public utilities, making or procuring weapons or instruments, unlawful possession of weapons or exploding substances, endangering internationally-protected persons, hijacking of aircraft, jeopardizing the safety of an aircraft's flight, unauthorized acquisition or use of unclear materials, or jeopardizing safety by nuclear materials. These two treaties support the view that the definition of terrorism should not extend to a broad ambit but be limited to serious offences.

A. USA

State laws on "terrorism" vary considerably in the range of acts proscribed and the clarity with which the acts are defined. One problem is that the lack of precision creates uncertainty about what conduct is prohibited. This section examines whether the ambit of terrorism in the "Military Order" and the "USA PATRIOT ACT" is acceptable in terms of international human rights standards.

(A) The "Military Order"

Using his authority as President and Commander in Chief of the Armed Forces of the United States as granted by the

Constitution and the laws of the United States of America, President Bush issued the “Military Order” on 13 November 2001. That international terrorists had carried out attacks on United States “on a scale that has created a *state of armed conflict*”⁷ prompted the issuance of the new military order. In the President’s view, “international terrorism possesses both the capability and the intention to undertake *further* attacks against the United States.” Therefore, protecting “the United States from such *further* terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them.”⁸

Only individuals who are not US citizens are subject to the “Military Order.” It can be argued that the Order is discriminatory, as foreign nationals may be prosecuted under a lower standard of justice than US nationals. The Order also gives the chief executive the power to decide which individuals military commissions will prosecute, as the President determines, in writing from time to time, who is subject to the Order. The “Military Order” empowers the Secretary of Defense to issue orders and regulations “as may be necessary to carry out any of the provisions of this order.”⁹ Therefore, on 21 March 2002, the Department of Defense issued the “Department of Defense Military Commission Order No. 1,”¹⁰ (“Order No. 1”) which implements “policy, assigns responsibilities, and prescribes procedures” under the “Military Order.” “Order No. 1,” however, extends the jurisdiction of a military commission to not only those subject to the Military Order but also to individuals who have been referred by the Commission by the Secretary of Defense or a designee.¹¹ It has to be emphasized that a principle of international law, which cannot be made subject to derogation, is that there should be no prosecutions for acts which have not been already clearly defined as criminal offences or which

⁷ Section 1(a) of the “Military Order.”

⁸ *Ibid.*

⁹ Section 6 of the “Military Order.”

¹⁰ DoD MCO No. 1, March 21, 2002.

¹¹ Point 3 A of the “Order No. 1.”

were not contrary to international law (McGoldrick, 1991: 306-307).¹² A decision on jurisdiction should not be granted to the administrative branch only.

The “Military Order” identifies two categories of persons. It is no surprise that members of al Qaeda were included after they were suspected of being the responsible party for the events of September 11. Therefore, the first category applies to those who have reason to believe that such an individual “is or was a member of the organization known as al Qaeda”¹³ and also includes those who have “aided or abetted, or conspired to commit, acts of international terrorism”¹⁴ and people who have “knowingly harbored one or more individuals”¹⁵ of al Qaeda or other international terrorists. However, the Order did not offer a clear definition for what is international terrorism or who is a terrorist; it remains a decision that is to be made by the President.

The other category includes persons who act “in preparation there for, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy.”¹⁶ It includes additional persons that the President may decide are suspects in the name of “the interest of the United States.”¹⁷ It seems that the Order is therefore not merely trying to find those who were responsible for the events of September 11, but also for whoever may be viewed as against US citizens, the States, or her policy and economy. It is therefore doubtful that foreigners should be subjected to the Order in the name of the US.

¹² For example Article 15 of the ICCPR says: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” Article 4 (2) of the ICCPR emphasizes: “No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”

¹³ Section 2 (a) (1) (i) of the “Military Order.”

¹⁴ Section 2 (a) (1) (ii) of the “Military Order.”

¹⁵ Section 2 (a) (1) (iii) of the “Military Order.”

¹⁶ *Ibid.*

¹⁷ Section 2 (a) (2) of the “Military Order.”

(B) The “USA PATRIOT ACT”

On 26 October 2001, about six weeks after the September 11 attacks, President Bush signed the “USA PATRIOT ACT” into law, whose purpose is “to deter and punish terrorist acts in the United States and around the world.” Its draft alone spans 342 pages (Chang, 2002: 4) and it has been commented that Congress enacted the “USA PATRIOT ACT” virtually overnight. The bill was never subject to Committee debate or make-up in the Senate. There was a truncated process in the House, which heard no official testimony from opponents of the bill, but at least held a full Committee make-up (Dempsey & Cole, 2002: 51; Chang, 2002: 43).

The “USA PATRIOT ACT” covers both US nationals and foreigners and identified two types of terrorists and terrorism. The first type is named “domestic terrorism,”¹⁸ which indicates activities that occur primarily within the territorial jurisdiction of the US that “involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State.” It also extends to activities that “appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.”

It has been argued that “there are already three definitions of terrorism in usage – international terrorism, terrorism transcending national borders and federal terrorism – which together sufficiently characterize the various manifestations of terrorism” (Asrani, 2002: para. 43). Since there is a federal terrorism whose subject is a US national who violates criminal laws, it appears unnecessary that there is a pressing need to add something called “domestic terrorism” focusing also on US citizens.

The definition of “domestic terrorism” is broad and vague and causes difficulties in interpretation. Any acts dangerous to

¹⁸ Section 802 of the “USA PATRIOT ACT.”

human life, even those that do not result in injury and are entirely non-violent can be regarded as terrorism. Thus, obstructing the passage of an ambulance could be deemed as domestic terrorism, as it could be construed as “dangerous to human life” and “in violation of criminal laws.” Vigorous political activities, by their very nature, could also be construed as acts that “appear to be intended to influence the policy of the government by intimidation or coercion.”¹⁹ Such terms may well be read by federal law enforcement agencies as licensing the investigation and surveillance of political activists and organizations based on their opposition to government policies, and lead to the criminalization of legitimate political dissent.

The second type of law targets foreigners and refers to international terrorism. An alien’s immigration can become inadmissible if he or she is a representative of a foreign terrorist organization. One problem is that again it is the administration that determines what a “terrorist organization” is. The term “terrorist organization” includes any organization designated as such by the Secretary of State. Thus, the definition is very broad. Even “a political, social or other similar group whose public endorsement of acts of terrorist activity the Secretary of State has determined undermines United States efforts to reduce or eliminate terrorist activities” can be regarded as a “terrorist organization.” A group against further “war” on Iraq could fall within such a definition. Human rights organizations that have expressed different views on combating terrorism could also undermine “United States efforts to reduce or eliminate terrorist activities,” and therefore be regarded as “terrorist organizations.” It seems that no group can be against the policy of anti-terrorism; if a group is not a friend, then it must be an enemy. The law could permit guilt to be imposed solely on the basis of political associations protected by the US Constitution.

It should be noted that the term “engage in terrorist activity”

¹⁹ *Ibid.*, paragraph 42.

has been expanded to include soliciting funds for, soliciting membership for, and providing material support to, a “terrorist organization,” even when that organization has legitimate political and humanitarian ends and the non-citizen seeks only to support these lawful ends.²⁰ A “terrorist organization” also includes “a group of two or more individuals, whether organized or not,” which engages in terrorist activities.²¹ The term “engage in terrorist activity” means, to commit or to incite to commit, to prepare or plan, to gather information on potential targets for, to solicit funds or other things of value for, to solicit any individual to engage in a terrorist activity in an individual capacity or as a member of an organization.²² Those who provide material support for a terrorist activity or to a terrorist organization are also regarded as engaging in terrorist activity. It further extends to those regarded as “associated with a terrorist organization,” and aliens who have been and intend to engage solely, principally, or incidentally in activities that could endanger the welfare, safety, or security of the United States. Non-citizens who provide assistance to such groups, such as paying membership fees, will run the risk of detention and deportation. It has been argued that this definition “harkens back to a Cold War-era statute, the McCarran Act of 1952, which permitted the Department of State to exclude foreign speakers based on their political beliefs. It takes us back to the xenophobia of the Cold War” (Chang, 2002: 45-46).

As mentioned earlier, international treaties have limited the definition of terrorism to serious offences such as murder, hostage-taking, kidnapping, causing general danger, destroying or damaging public utilities, making or procuring weapons or instruments, unlawful possession of weapons or exploding substances, hijacking of aircraft, jeopardizing the safety of an aircraft’s flight, unauthorized acquisition or use of unclear materials, or jeopardizing public safety through the use of nuclear

²⁰ See *ibid.*, paragraph 48.

²¹ Section 411 (G) of the “USA PATRIOT ACT.”

²² Section 411 (F) of the “USA PATRIOT ACT.”

materials. It is therefore doubtful whether the US should adopt such a broad ambit as used in the “Military Order” and the “USA PATRIOT ACT.” Defining terrorist and terrorism has become difficult at a time when public opinion is mostly imbued with an unquestioning patriotic spirit. However, what is important is to bring “real terrorists” to justice without creating victims out of those who are in fact innocent. The broad and vague definition used at present could undermine the rights of both immigrants and US citizens.

B. UK

A similarly broad definition has also been adopted in the UK. In the opinion of the Home Office of the UK, “the events of September 11th pose a *direct* challenge to the UK.” Therefore, the UK has “to ensure we are as fully prepared as possible to meet the threat of terrorism.” The purpose of the “Anti-Terrorism Act 2001” is to build on legislation in a number of areas to ensure that the British Government has the necessary powers to counter the threat to the UK in the light of the new situation arising from the September 11 terrorist attacks on New York and Washington (The Stationery Office Limited, 2001b: Chapter 24, point 3).

We may say that following the September 11 events, the UK, as Tony Blair has noted, “was with USA at the first.” Two months after 911, on 12 November 2001, the British government introduced an anti-terrorism Bill to Parliament. It took a little more than one month to pass this legislation.²³ The Queen signified her royal assent to the “Anti-Terrorism Act 2001” on 14 December 2001. In fact, the UK had an anti-terrorism law in 2000, and even the British Government believes that the “Terrorism Act 2000 meant that we already had in place many of the powers

²³ The Bill passed through the Commons with the government allowing it only 16 hours of debate. The Lords were granted somewhat more time, but even in the Upper House, the Bill completed all its stages in nine days. See Tomkins (2002: 205).

needed to protect UK citizens.” However, it is stated by the government that the “Anti-Terrorism Act 2001” “expands on those powers already established to take account of the changed threat and to equip the UK better face the menace of global terrorism.”²⁴

The “Anti-Terrorism Act 2001” focuses mainly on foreigners. The UK feels that there exists a terrorist threat from persons suspected of involvement in international terrorism. The Act targets foreign nationals present in the UK who are suspected of being involved with the commission, preparation or instigation of acts of international terrorism, of being members of organizations or groups which are so concerned or of having links with members of such organizations or groups, and who are a threat to the national security of the UK. Therefore, three types of terrorists have been identified.

First, a terrorist includes an individual who is or has been involved in the commission, preparation, or instigation of acts of international terrorism. The “Anti-Terrorism Act 2001” does not offer a clear definition for “international terrorism.” It indicates terrorism outside the territory of the UK. The “Anti-Terrorism Act 2001” states that terrorism is defined by section 1 of the Terrorism Act 2000, a definition of terrorism even broader than the definition provided in the “USA PATRIOT ACT.” Within Terrorism Act 2000, “terrorism” means “the use or threat of action where it (a) involves serious violence against a person; (b) involves serious damage to property; (c) endangers a person’s life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system.” Furthermore, “terrorism” also includes the use or threat of action where it is “designed to influence the government or to intimidate the public or a section of the public,” or is “made for the purpose of advancing a political, religious or ideological cause.” This is an encompassing and dangerous

²⁴ The Anti-Terrorism, Crime and Security Bill, as introduced in the House of Commons on 12 November 2001.

definition if every criminal act that is dangerous to a person's life, property, or health could be deemed as an act of terrorism. This is surely a serious threat to freedom of expression, as under such a definition no foreigner will be allowed to offer views that are not in accordance with those of the British government. Freedom of religion will not be fully guaranteed either.

The second and third types of terrorists refer to international terrorist groups. A person who is a member of or belongs to an international terrorist group can also be regarded as a terrorist. An international terrorist group is a group suspected by the Secretary of State as being involved in the "commission, preparation or instigation" of acts of international terrorism that is subject to the control or influence of persons outside the UK. Moreover, a person will be deemed a terrorist if he or she has "links with an international terrorist group,"²⁵ or if he or she "supports or assists" such a group. The Bill, however, drafted by the British government did not define what having "links" with a person who is a member of a "terrorist group" was intended to cover. Because some human rights organizations' strongly criticized the Bill, the government agreed to the inclusion of a definition that clarifies and restricts the provision. The definition given, however, is still vague. Anyone who verbally or financially "supports or assists" a group that has a different view from that of the British government could be charged.

A similar question is that, when international treaties have limited terrorism to such offences that include seizure of aircraft, acts against the safety of civil aviation, attacks against internationally protected persons, an offence involving kidnapping, the taking of a hostage or serious unlawful detention, the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons, it is doubtful, while wishing to combat terrorism, whether the UK, who ratified the European Convention on the Suppression of Terrorism in 1978, would need

²⁵ Section 21 (2) of the "Anti-Terrorism Act 2001."

to go beyond the definition offered by the Convention.

III. Right to Liberty

We now turn to the issue of whether the right to liberty is guaranteed under the laws of the USA and UK.

A. USA

This section again examines both the “Military Order” and the “USA PATRIOT ACT.”

(A) The “Military Order”

It is believed that “to protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks,” it is necessary for individuals subject to the “Military Order” to be “detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”²⁶

Any individual subject to the “Military Order” shall be detained at an appropriate location designated by the Secretary of Defense outside or within the United States.²⁷ Such individuals have, in fact, been detained in Guantánamo Bay, Cuba. It has also been enshrined in the “Military Order” that the detainees should be treated humanely without discrimination; afforded adequate food, drinking water, shelter, clothing, and medical treatment and allowed the free exercise of religion consistent with the requirements of such detention.²⁸ Those people may also be detained in accordance with such other conditions as the Secretary of Defense may prescribe.²⁹

The US has been calling the captives held at Guantánamo Bay

²⁶ Section 1 (e) of the “Military Order.”

²⁷ Section 3 (a) of the “Military Order.”

²⁸ Section 3 (b)(c)(d) of the “Military Order.”

²⁹ Section 3 (e) of the “Military Order.”

“detainees” or “unlawful combatants.” However, US Vice-President Dick Cheney declared that those foreign terrorists “don’t deserve the same guarantees and safeguards that would be used for American citizens going through the normal process.” The Bush administration has announced that “Al-Qaeda is not a state party to the Geneva Convention; it is a foreign terrorist group. As such, its members are not entitled to POW status” (Office of the White House Press Secretary, 2002). It has been argued that the US is “treating them just like they were prisoners of war but we are not going to say that they are prisoners of war” (Cohen, 2002). Individuals, who have been called “detainees” or “unlawful combatants,” subject to the “Military Order” were in fact treated by the US neither as prisoners of war nor as normal criminals.

Therefore, one preliminary question concerns the characterization of the events of September 11: whether those arrested are prisoners of war or criminals against humanity. There are two contending approaches. One is that what they constitute crimes against humanity; the other is that they were acts of war.

It is argued that “because without the clear separation of war and terrorism, there will be no meaningful progress towards a definition of terrorism and, more importantly, no chance to implement meaningful measures to combat terrorism.”³⁰ Can there be a war, in the formal legal sense, between a state and a transnational crime group or organization? Those supposedly responsible for the attacks on September 11 were acting not as agents of any recognized state, but, rather, as members of an independent terrorist organization. “According to international law of war, it is a state that can commit a war. A group of individuals, even numbering in the hundreds, cannot commit an act of war” (The Irish Centre for Human Rights, 2001: 3). It is also to be noted that the US Congress never formally declared war with regard to the Bush administration’s military action in Afghanistan.

³⁰ Terrorism and Human Rights, Progress report prepared by Ms. Kalliopi K. Koufa, Special Rapporteur, E/CN.4/Sub.2/2001/31, June 27, 2001, paragraph 71.

It is, therefore, doubtful whether the attacks on September 11 and the military action in Afghanistan can be regarded as acts of war. Those suspects, therefore, may not, consistent with existing international law, be tried before military commissions for violating the laws of war.

According to Article 7 of the "Rome Statute," crime against humanity is defined as several acts committed as part of a widespread or systematic attack directed against any civilian population. Those acts include murder and other inhumane acts of a similar character intentionally causing great suffering or serious injury to the body, mental, or physical health. The large-scale nature of the September 11 attacks and the fact that they were directed against the civilian population would qualify them as crimes against humanity.³¹ Treating those who are responsible for the events of September 11 as criminals against humanity has several benefits. First, those individuals can be personally prosecuted, regardless of whether a state or non-state actor is responsible. Article 25 of the "Rome Statute" grants the International Criminal Court the power of jurisdiction over natural persons. A person who commits a crime against humanity shall be individually responsible and liable for punishment in accordance with the "Rome Statute." Secondly, crimes against humanity are subject to universal jurisdiction. The International Criminal Court has jurisdiction over crimes against humanity. The Court may exercise its functions and powers on the territory of any state party and, by special agreement, on the territory of any other state. Thirdly, unlike domestic crimes, no statute of limitations applies. Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity states that no statutory limitation shall apply to crimes against humanity whether committed in times of war or in times of peace, irrespective of the date of their commission. However, the US did

³¹ See Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights, E/CN.4/2002/18, February 27, 2002, paragraph 4.

not ratify the Convention on the Non-Applicability of Statutory Limitations. Neither the US intends to ratify the “Rome Statute,” but is trying to obtain immunity through the so-called “Article 98 Agreement.”³²

Even supposing the events on September 11 were not crimes against humanity, it is still necessary to distinguish terrorism from acts of war. The European Union, the UN Secretary-General, and the UN High Commissioner for Human Rights have joined together in saying that the detainees in Guantánamo Bay should be regarded as prisoners of war, and should be afforded all the legal protections afforded prisoners of war by the Geneva Convention relative to the Treatment of Prisoners of War (“Third Geneva Convention”).³³ Indeed, an obvious reason to clearly distinguish armed conflict from terrorism is because international humanitarian law automatically comes into effect when there is an armed conflict. Under the law of armed conflict, acts of war are not chargeable as terrorist acts.

The International Committee of the Red Cross (ICRC), the custodian of the Geneva Conventions, has stated that captured “members of armed force and militias associated to them” are protected by the “Third Geneva Convention,” and that there “are divergent views between the United States and the ICRC on how to determine that the persons detained are not entitled to prisoner

³² 75 U.N.T.S. 135.

³³ Article 98 of the “Rome Statute” rules that the International Criminal Court “may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.” The Court may not “proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.”

of war status.”³⁴ According to the ICRC (1958) Commentary, “every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, [or] a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no intermediate status; nobody in enemy hands can fall outside the law.*” Article 5 of the “Third Geneva Convention” also states: “Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy,” belong to any of the categories for prisoner of war, “such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” Thus, this appears to be a presumption that a captured combatant is a prisoner of war unless determined otherwise. Such a determination must be made on an individual basis by a competent tribunal (Human Rights Watch, 2002). The Inter-American Commission on Human Rights has also commented that those persons detained were held at the “wholly unfettered discretion of the U.S. Government” (Amnesty International, 2002c: 10; Center for Constitutional Rights, 2002: 16; The Inter-American Commission on Human Rights, 2002: 532-535).

It is therefore submitted that the US position is inconsistent with the “Third Geneva Convention.” The US should not classify all detainees from the Afghan conflict as a group not entitled to prisoner of war status. In fact, the US ratified the “Third Geneva Convention” in 1955, and therefore has to “undertake to respect and to ensure respect for the present Convention in all circumstances.”³⁵ Neither were the captives treated as interned civilians whose treatment is governed by the “Fourth Geneva Convention.” Not a single captive was an “enemy alien” subject to internment under traditional rules of international law and the

³⁴ See the International Committee of the Red Cross (ICRC), Press release, February 9, 2002.

³⁵ Article 1 of the “Third Geneva Convention.”

“Fourth Geneva Convention” (Fitzpatrick, 2003: 250). The US State Department uses the standards contained in the Universal Declaration of Human Rights and other international human rights treaties in measuring human rights observance in other countries (Dorsen, 1997: 153), however, it is questionable whether the US itself has taken the appropriate steps to ensure its own compliance with the international human rights treaties that it has ratified. Even a war on terrorism does not fit neatly into the current international law of wars, and President Bush does not have the authority to amend international law unilaterally (French, 2002: 1273).

The Pentagon said it planned to release some of the detainees who were apparently no longer of intelligence value or candidates for prosecution under the “war on terror.” But only four inmates have been freed so far, leaving over 620 prisoners in the specially constructed camp (*New York Times*, 2002, March 21). As the late High Commissioner for Human Rights, Mr. Sergio Vieira de Mello, has stated, “the U.S. had had enough time to determine whether charges should be brought against the inmates, some held since January in the camp at Guantánamo base. If that cannot happen after a reasonable period of time, and I think the reasonable period of time has elapsed, then I think they must be freed.”³⁶ It has to be emphasized that Article 102 of the Third Convention states: “Judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible.” More importantly, this Article has emphasized that in no circumstances shall the confinement of prisoners of war exceed three months. It is time for the US to consider freeing those who have been detained.

(B) The “USA PATRIOT ACT”

Regarding the detention of suspected terrorists, the “USA PATRIOT ACT” has focused much more on foreigners. The

³⁶ Reuters, Geneva, November 1, 2002.

Attorney General may certify an alien if he has “reasonable grounds” to believe that the alien is engaged in terrorist activities, or endangers the national security of the US. The Attorney General shall place an alien detained in removal proceedings, or shall charge the alien with a criminal offense, no later than seven days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien. An alien detained who has not been removed, and whose removal is unlikely in the reasonably foreseeable future, may be detained for an additional period of up to six months only if the release of the alien will threaten the national security of the US or the safety of the community or any person. The Attorney General shall take into custody any certified alien until the alien is removed from the US. Such custody shall be maintained irrespective of any relief from removal for which the alien may be eligible, or any relief from removal granted the alien, until the Attorney General determines that the alien is no longer an alien who may be certified. If the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate.³⁷ It is estimated by Amnesty International USA that more than 1,000 people, mostly from Middle Eastern or Muslim countries, were arrested after the September 11 events. Some 300 may remain in detention (Amnesty International, 2002a: 16).

It must be emphasized that human rights standards are not simply legal niceties. States have an affirmative duty to promote and protect the human rights of all persons under their jurisdictions. International human rights treaties also protect foreign detainees. The International Covenant on Civil and Political Rights³⁸ (the ICCPR) affords basic due process protections to everyone irrespective of their citizenship.

Detention under the “USA PATRIOT ACT” raises several concerns (Dempsey & Cole, 2002: 156-157). First, it permits preventive detention of persons who pose no threat to national

³⁷ See Section 412 of the “USA PATRIOT ACT.”

³⁸ 999 U.N.T.S. 171.

security or risk of flight. Article 9 of the ICCPR guarantees the right to liberty and security. Paragraph 1 of that Article states that no one shall be subjected to arbitrary arrest or detention, and no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.³⁹ The Human Rights Committee⁴⁰ points out that paragraph 1 of Article 9 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as immigration control. The Committee has also commented, “if so-called preventive detention is used, for reasons of public security, ... it must not be arbitrary, and must be based on grounds and procedures established by law.”⁴¹ Secondly, the Act allows the Government to detain aliens indefinitely, even where the alien has prevailed in his removal proceedings. It is believed that a state should not detain anyone unless he or she is charged with recognizably criminal offences promptly and tried within a reasonable period, or that action is being taken to extradite or deport him or her within a reasonable period. Prolonged arbitrary detention of non-citizens would be a violation of international human rights standards.⁴² Thirdly, it imposes no affirmative burden of proof on the government, provides for no hearing, and authorizes detention on the Attorney General’s say-so.

The US ratified the ICCPR in 1992. It is the view of the US itself that “States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under

³⁹ Human Rights Committee, General Comment 8, Right to liberty and security of persons (Art. 9), June 30, 1982.

⁴⁰ For the procedures of the Human Rights Committee, please see Young (2002: 29-56).

⁴¹ *Ibid.* See also Joseph, Schultz, & Castan (2000: 207-211).

⁴² For example, Article 9 (3) of the ICCPR says: “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.”

the terms of the Covenant.”⁴³ However, the US declared: “the provisions of articles 1 through 27 of the Covenant are not self-executing.”⁴⁴ It seems that the US is of the view that other states should not offer stricter limitations on the right to liberty, but the US will not carry out those obligations directly in its territory.⁴⁵ It has been argued that the measures taken by the US “could encourage countless authoritarian regimes around the world to do the same” (Méndez, 2002: 384).

B. UK

Crossing the Atlantic Ocean to the UK, foreigners are also under the spotlight. According to the “Anti-Terrorism Act 2001,” the Secretary of State may issue a certificate if the Secretary of State reasonably suspects that the person is a terrorist. However, the object of such a certificate extends further to those who the Secretary of State reasonably believes that the person’s presence in the United Kingdom is a “risk to national security.”⁴⁶ After a certificate is issued, the Secretary of State, “as soon as is reasonably practicable,” has to “take reasonable steps” to notify the person certified. The Secretary of State shall also send a copy of the certificate to the Special Immigration Appeals Commission.⁴⁷

According to the “Anti-Terrorism Act 2001,” a non-UK national, after being certified as a suspected international terrorist, can be detained without charge or trial, for an unspecified and

⁴³ The declaration of the US when it ratified the ICCPR, is available at http://www.unhchr.ch/html/menu3/b/treaty5_asp.htm

⁴⁴ *Ibid.*

⁴⁵ The US ratified the International Convention for the Suppression of Terrorist Bombings on 26 June 2002. On 25 June 2002, one day before the ratification of the International Convention for the Suppression of Terrorist Bombings, the Terrorist Bombings Convention Implementation Act of 2002 was passed. However, although it has been 10 years since the ratification of the ICCPR, the US still holds the view that the rights provisions of the ICCPR are not self-executing.

⁴⁶ Section 21 (1) of the “Anti-Terrorism Act 2001.”

⁴⁷ Section 21 (6) of the “Anti-Terrorism Act 2001.”

potentially unlimited period of time, if the concerned individual's removal or deportation from the UK cannot be effected. Section 23 (1) of the "Anti-Terrorism Act 2001" reads: "A suspected international terrorist may be detained ... despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by (a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration." A suspected international terrorist may be released on bail.⁴⁸ A detainee has the choice to end his detention at any time by agreeing to leave the UK.

As the UK Home Secretary has stated, the authorities cannot secure the imprisonment of "suspected terrorists" by prosecuting them for crimes because of "the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required." Those "suspected terrorists" are therefore put into administrative detention but not subjected to criminal prosecution.

Article 5 of the European Convention on Human Rights⁴⁹ (the ECHR) guarantees the right to liberty and security. Its first paragraph states, "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law. (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition." It is therefore believed that states should not detain anyone unless they are promptly charged with recognizably criminal offences and tried within a reasonable period; or action is being taken to extradite or deport them within a reasonable period.

The ECHR came into force with respect to the UK on 3 September 1953.⁵⁰ However, because it is a monist country, the

⁴⁸ Section 24 (1) of the "Anti-Terrorism Act 2001."

⁴⁹ 213 U.N.T.S. 221; E.T.S. 5; U.K.T.S. 71 (1953).

⁵⁰ The UK signed the ECHR on 4 November 1950 and ratified it on 8 March

ECHR does not have domestic legal status in the UK. The situation lasted until the enactment of the Human Rights Act 1998 (the HRA 1998),⁵¹ which brings the “Convention Rights” home to the land of the UK.

(A) Derogation

On one hand, the British government believes that the provisions of the “Anti-Terrorism Act 2001” do not violate the ECHR. On the other hand, however, the government was wondering whether the exercise of power to detain contained in the “Anti-Terrorism Act 2001” might be inconsistent with the obligations under Article 5(1) of the ECHR. The Government therefore decided to exercise the right of derogation conferred by Article 15(1).⁵² In the view of the British government, there is a public emergency existing in the UK after the September 11 events in USA. It offers mainly two reasons. First, the terrorist acts on 11 September 2001 resulted in several thousand deaths, including many British victims. Second, the UN Security Council’s resolutions 1368 (2001) and 1373 (2001) recognized the attacks as a threat to international peace and security, and the latter resolution required all states to take measures to prevent the commission of terrorist attacks.⁵³

Even before the British government sent its declaration of derogation to the Secretary General of the Council of Europe, it had prepared for “designed derogation,” which is provided by Article 14 of HRA 1998. The Secretary of State therefore issued two orders concerning HRA 1998: the Human Rights Act 1998 (Designated Derogation) Order 2001, which came into force on 13 November

1951.

⁵¹ 1998 Chapter 42.

⁵² Declaration contained in a Note Verbale from the Permanent Representation of the United Kingdom, dated 18 December 2001, registered by the Secretariat General on 18 December 2001, available at <http://conventions.coe.int/Treaty/EN/DeclareList.asp?NT=005>.

⁵³ See the Human Rights Act 1998 (Designated Derogation) Order 2001, Statutory Instruments, 2001 No. 3644 and The Human Rights Act 1998 (Amendment No. 2) Order 2001, Statutory Instruments, 2001 No. 4032.

2001, and the Human Rights Act 1998 (Amendment No. 2) Order 2001, which came into force on 20 December 2001.

Indeed, according to Article 15(2) of the ECHR, Article 5 is not on the “no derogation list,” which includes Article 2, except in respect to deaths resulting from lawful acts of war, Articles 3, 4 (paragraph 1), and 7. Therefore it is lawful to derogate the obligation under Article 5(1) of the ECHR. The issue is however whether derogation is necessary. The UK in fact had derogated Article 5 once in 1988.⁵⁴ Since 1974, the UK has enacted several laws to combat terrorism; one of which was the Prevention of Terrorism (Temporary Provisions) Act 1984 (1984 Terrorism Act).⁵⁵ In *Brogan and Others v. the United Kingdom*,⁵⁶ the European Court of Human Rights found that the 1984 Act was in violation of Article 5, because the four applicants were detained for up to more than four days according to the 1984 Terrorism Act.⁵⁷ The UK therefore decided to derogate obligation under Article 5 of the ECHR. Such derogation was endorsed in *Brannigan and McBride v. the United Kingdom*⁵⁸ by the European Court of Human Rights, who, upon consideration of the nature of the terrorist threat in Northern Ireland, the limited scope of the derogation and the reasons advanced in support of it, as well as the existence of basic safeguards against abuse, took the view that the UK did not exceed their margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation.⁵⁹ However, it has been observed that “at the outset that effective Strasbourg supervision with respect to Article 15 has not yet materialized” (Van Dijk & van Hoof, 1998: 731). The European

⁵⁴ Communication contained in a letter from the Permanent Representative of the United Kingdom, dated 23 December 1988, registered at the Secretariat General on 23 December 1988, available at <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>

⁵⁵ 1984 Chapter 8.

⁵⁶ Eur. Court HR, *Brogan and Others v. the United Kingdom* judgment of November 29, 1988, Series A no. 145-B.

⁵⁷ *Ibid.*, paragraph 71.

⁵⁸ Eur. Court HR, *Brannigan and McBride v. the United Kingdom* judgment of 26 May 1993, Series A no. 258-B.

⁵⁹ *Ibid.*, paragraph 66.

Court of Human Rights will not have any opportunity to measure its legality if no case challenges such derogation.

On the other hand, the Human Rights Committee offered some different views. The Human Rights Committee, when considering the UK's report, has observed that the UK "should ensure that any measures it undertakes in this regard are in full compliance with the provisions of the Covenant, including, when applicable, the provisions on derogation contained in Article 4 of the Covenant."⁶⁰ Article 4 of the ICCPR rules that measures derogating from their obligations can be taken only "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law." The Human Rights Committee has emphasized, "The Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation."⁶¹

Good news came in February 2001 when the UK decided to withdraw such derogation.⁶² It seems that the UK felt that a public emergency no longer existed due to the Northern Ireland peace process. Therefore, the question is whether the UK again is faced with a brand new public emergency after the September 11 events. It has been clearly expressed in Article 15 of the ECHR that "*in time of war or other public emergency threatening the life of the nation* any High Contracting Party may take measures derogating from its obligations under this Convention to the extent *strictly required by the exigencies of the situation*, provided that such measures are *not inconsistent with its*

⁶⁰ Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland, CCPR/CO/73/UK; CCPR/CO/73/UKO, December 6, 2001.

⁶¹ The Human Rights Committee, General Comment No. 29, States of Emergency (Article 4), August 31, 2001, paragraph 3.

⁶² Withdrawal of derogation contained in a Note Verbale from the Permanent Representative of the United Kingdom, dated 19 February 2001, handed to the Secretary General on 19 February 2001, available at <http://conventions.coe.int/Treaty/EN/DeclareList.asp?NT=005>

other obligations under international law” [italics added by the author].⁶³ The European Court of Human Rights, in *Lawless*,⁶⁴ has pointed out that public emergency threatening the life of the nation refers “to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed.”⁶⁵ It is therefore doubtful that there was a public emergency threatening the life of the nation or strictly required by the exigencies of the situation existing in the UK when it declared derogation. In fact, in announcing the proposal for the “Anti-Terrorism Act 2001” in October 2001, the Secretary of State for the Home Department stated: “there is no immediate intelligence pointing to a specific threat to the United Kingdom” (Amnesty International, 2002b).

“While we recognize that the threat of terrorism requires specific measures, we call on all governments to refrain from any excessive steps, which would violate fundamental freedoms and undermine legitimate dissent. In pursuing the objective of eradicating terrorism, it is essential that States strictly adhere to their international obligations to uphold human rights and fundamental freedoms.”⁶⁶ By the end of October 2002, the ECHR had 44 member States. It, however, has to be emphasized that the UK is the only country that has derogated from the ECHR in the aftermath of the events of 11 September 2001 (Amnesty International, 2002). As we know that victims of the September 11 tragedy came from more than 80 nations, including some European countries; therefore, the UK is not the only remaining

⁶³ See also Van Dijk & van Hoof (1998: 730-740); Harris, O’Boyle, & Warbrick (1995: 489-502).

⁶⁴ Eur. Court HR, *Lawless v. Ireland* (No. 3) judgment of July 1, 1961, Series A no. 3.

⁶⁵ *Ibid.*, paragraph 28.

⁶⁶ Mary Robinson, the United Nations High Commissioner for Human Rights, Walter Schwimmer, Secretary-General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the Organization for Security and Cooperation in Europe’s (OSCE) Office for Democratic Institutions and Human Rights, press release, November 29, 2001, available at <http://www.unog.ch/news2/documents/newsen/hr01107e.html>

state other than the USA that has suffered. If the UK's argument for derogation can be sustained, then we may say that all the contracting states of the ECHR can derogate the provisions of rights protection. One simple observation for the answer to the UK is that in terms of derogation, it has no partner at all in Europe. It is really doubtful that, when submitting its derogation, there was "a threat to the life of the nation."

(B) Obligation

The other issue to be discussed to is whether the "Anti-Terrorism Act 2001" conforms to the regulations of the ECHR and the ICCPR. It has to be noted as well that the UK ratified the ICCPR in 1976, and made no reservations to Article 9, which, as mentioned above, guarantees the right to liberty and security. The UK therefore should notice its obligation under Article 9 (3) of the ICCPR: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." It is hard to imagine that a long-term detention will be in conformity with such requirements.

Article 5 (1) of the ECHR requires that any deprivation of the right to liberty should be in accordance with a procedure prescribed by law (Harris et al., 1995: 97-127; Ovey & White, 2002: 107-129; Van Dijk & van Hoof, 1998: 97-127). The European Court of Human Rights has emphasized that "these words do not merely refer back to domestic law; they also relate to the quality of law, requiring it to be compatible with the rule of law, a concept inherent in all Articles of the Convention. Quality in this sense implies that where a national law authorizes deprivation of liberty, it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness."⁶⁷ It can be argued that Section 23 (1) of the "Anti-Terrorism Act 2001" may be inconsistent with the obligations under Article 5(1) of the ECHR.

⁶⁷ Eur. Court HR, *Dougoz v. Greece* judgment of March 6, 2001, *Reports of Judgments and Decisions* 2001-II, paragraph 55.

The European Court of Human Rights has consistently held that “any deprivation of liberty under Article 5 para. 1 (f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1 (f).”⁶⁸ Therefore, where the intention remains to remove or deport a person on national security grounds, continued detention may not be consistent with Article 5(1)(f) of the ECHR.

IV. Right to Fair Trial

A. USA

Now we turn to issues of trial and remedy in the US. According to the “Military Order,” a military commission will try an individual subjected to the Order. President Bush believes that “it is not practicable to apply in military commissions ... the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts,” because of “the danger to the safety of the United States and the nature of international terrorism.”⁶⁹ The “Military Order” sets some standards for trial. First, it requires a full and fair trial, with the military commission sitting as the triers of both fact and law.⁷⁰ According to the “Order No. 1,” the Secretary of Defense or a designee appoints members of a military commission, which range from three to seven with a presiding officer. Members of a military commission should be commissioned officers of the US Armed Forces.⁷¹ Prosecution is empowered to several assistant prosecutors and the chief prosecutor, who shall be a judge advocate of any

⁶⁸ See Eur. Court HR, *Kolompar v. Belgium* judgment of September 24, 1992, *Series A no. 235-C*, paragraph 36. Eur. Court HR, *Quinn v. France* judgment of March 22, 1995, *Series A no. 311*, paragraph 48. Eur. Court HR, *Chahal v. the United Kingdom* judgment of November 15, 1996, *Reports of Judgments and Decisions 1996-V*, paragraph 113.

⁶⁹ See Section 1 (f) of the “Military Order.”

⁷⁰ Section 4 (c) (2) of the “Military Order.”

⁷¹ Point (4) of the “Order No. 1.”

armed force. There is a chief defense counsel, who is also a judge advocate. The accused may select a military officer who is a judge advocate to replace the detailed defense counsel, who is in charge of a specific case. The accused may also appoint a civilian attorney.

Secondly, conviction and sentencing should be held with only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present.⁷² Penalty is up to life imprisonment or death, which requires the unanimous vote of its members. A three-member review panel, appointed by the Secretary of Defense, will review trial findings within 30 days. Findings and sentences are not final until approved by the President or Secretary of Defense, but findings of “not guilty” cannot be changed (Center for National Security Studies, 2002).

“Let there be no doubt, commissions will conduct trials that are fair and impartial,” Defense Secretary Donald Rumsfeld, said, “at the same time, while ensuring just outcomes, the procedures are also designed to respond to the unique circumstances for which they were established” (*New York Times*, 2002, March 21). However, the question is whether these words can be sustained by international human rights standards.

One serious problem is who will decide whether those accused are guilty. If those accused are regarded as criminals they are still entitled to a “fair and public hearing by a competent, independent and impartial tribunal established by law.”⁷³ If those accused are regarded as criminals. The Human Rights Committee has commented that *judges* should have the authority to consider any allegations made about violations of the rights of the accused during any stage of the prosecution.⁷⁴ If believing those detained are prisoners of war, Article 102 of the “Third Geneva

⁷² Section 4 (c) (6) and (7) of the “Military Order.”

⁷³ Article 14 (1) of the ICCPR.

⁷⁴ Human Rights Committee, General Comment 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14), April 13, 1984, paragraph 15.

Convention” guarantees that “a prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power” and, furthermore, the provisions of protection in the Convention have been observed. This provision means that Afghan fighters should be tried in civilian courts or court-martialed, but not in the military commissions the Bush administration has created. The court has decided they must remain independent and impartial, affording all the internationally recognized guarantees of the right to a fair trial. It cannot be an executive or administrative body.

The US in fact has several options. The first option is a special international court; the second choice is a US civilian court; the third choice is a US court-martial (Cassel, 2001; Vagts, 2003: 316-317). Military commission is the last and the worst option. Under the “Military Order” members of a military commission are officers and appointed by the executive. No matter which category the accused belong to, the “Military Order” does not seem to meet the standard of an independent and impartial judiciary.

The second problem is whether there are proper appeal channels. Article 106 of the “Third Geneva Convention” guarantees that every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so. Article 14 (5) also states: “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.” However, under the “Military Order,” there is no possibility of appeal to a court; rather, the executive can review convictions and sentences. The “Military Order” denies the prisoners judicial review or appeals other than to the President or the Secretary of Defense (Paust, 2002: 679-690; Mundis, 2002: 324). The Order

creates the risk that people may be executed after a trial conducted by a court whose decision cannot be appealed but only reviewed by the executive who selected the individuals for prosecution in the first place.

The US has criticized the military courts in some countries, such as Peru, Nigeria, Egypt, and Russia for having tried terrorists without adequate due process. It has been commented by the US that, "military courts do not ensure civilian defendants' due process before an independent tribunal." The US called on Peru to retry a case "in open civilian court with full rights of legal defense, in accordance with international judicial norms" (Human Rights Watch, 2001b). However, when the US itself faces terrorism, it does not insist on these principles. One question has been asked: "Why should other authoritarian regimes listen the next time the United States tries to nudge them in the direction of respect for fundamental guarantees of due process" (Méndez, 2002: 386)? If measures are to be taken for the protection of human rights, there can be no room for double standards.

The Policy Working Group on the United Nations and Terrorism⁷⁵ has recommended, "Key human rights must always be protected and may never be derogated from. The independence of the judiciary and the existence of legal remedies are essential elements for the protection of fundamental human rights in all situations involving counter-terrorism measures."⁷⁶ Article 14 of the ICCPR guarantees: in the determination of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Judicial review in the "USA PATRIOT ACT" is much better than that in the "Military Order." The certification

⁷⁵ The Group was established at the behest of the Secretary-General in October 2001 with the purpose of identifying the longer-term implications and broad policy dimensions of terrorism for the United Nations and to formulate recommendations on the steps that the United Nations system might take.

⁷⁶ Report of the Policy Working Group on the United Nations and Terrorism, Annex to A/57/273, S/2002/875, Recommendation 4.

under the “USA PATRIOT ACT” may be reviewed in two ways. One is that the Attorney General shall review a certification every six months. The Attorney General may then revoke it, while an alien may be released on some conditions that the Attorney General deems appropriate. The alien may, in writing and submitting documents or other evidence in support of that request, also request that every six months the Attorney General reconsider the certification.⁷⁷ Judicial review of the above decisions is available exclusively in habeas corpus proceedings initiated only by an application filed with (i) the Supreme Court; (ii) any justice of the Supreme Court; (iii) any circuit judge of the United States Court of Appeals for the District of Columbia Circuit; or (iv) any district court otherwise having jurisdiction to entertain it.⁷⁸ The final order shall be subject to review, on appeal, by the United States Court of Appeals for the District of Columbia Circuit.

B. UK

The “Anti-Terrorism Act 2001” provides some channels for remedy. After the Secretary of State issues a certificate of international terrorists, there are three ways to change it. First, the Secretary of State may revoke a certificate.⁷⁹ Secondly, a certificate may be reviewed by the SIAC after six months or when the person certificated applies for a review.⁸⁰ The certificate will also be reviewed by the SIAC at regular intervals, if there is no reasonable ground for a belief or suspicion the SIAC should cancel the certificate. Thirdly, a suspected terrorist may appeal to the SIAC⁸¹ within three months, or with the leave of the Commission after the end of that period. The SIAC has power to cancel it if it considers there to be no “reasonable grounds for a belief or suspicion,” or “for some other reason” the certificate should not have been

⁷⁷ Section 412 (a) of the “USA PATRIOT ACT.”

⁷⁸ Section 412 (b) of the “USA PATRIOT ACT.”

⁷⁹ Section 21 (7) of the “Anti-Terrorism Act 2001.”

⁸⁰ Section 21 (1) (4) of the “Anti-Terrorism Act 2001.”

⁸¹ Section 21 (7) and (8) of the “Anti-Terrorism Act 2001.”

issued.⁸² There will be an appeal on a point of law from a ruling by the SIAC to the Court of Appeal. However, the appellant's legal representatives will be chosen for him by the Attorney-General and will not be responsible to the appellant. Further, proceedings before the SIAC may be held in the absence of the appellant or his/her lawyer, and proceedings may take place without the appellant being given full particulars of the reasons for the decisions which have been made in respect of him/her (Tomkins, 2002: 217-218).

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention. One problem of the above-mentioned procedure is that, unlike in the US, the review is not based on the power to challenge by a judicial review of habeas corpus of the detention. Another problem is the member of the SIAC. The Lord Chancellor decides the number of members of the SIAC. It is further ruled that the SIAC shall be deemed to be duly constituted if it consists of three members. But it requires, among them, that only "at least one holds or has held high judicial office."⁸³ It could mean that only one member of the SIAC holds the qualification for high judicial office. Further, if the appellant lacks sufficient defense, he/she may be tried in absence. It has to be noted that Article 14 (1) of the ICCPR guarantees that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" (Amnesty International, 1998: 74-75). Article 6 (1) of the ECHR also provides that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Clayton & Tomlinson, 2001: 107-111). Thus, the SIAC might not be an independent and impartial tribunal for the determination of civil rights and obligations as required by Article 14 of the ICCPR and Article 6 of the ECHR.

⁸² Section 25 (2) of the "Anti-Terrorism Act 2001."

⁸³ Section 5, Schedule 1 of the Special Immigration Appeals Commission Act 1997.

Further, under the “Anti-Terrorism Act 2001,” when asylum is appealed before the SIAC, the Secretary of State may issue a certificate that the appellant is not entitled to the protection of Article 33 (1) of the Convention relating to the Status of Refugees,⁸⁴ (“Refugee Convention”) or that the removal of the appellant from the United Kingdom would be conducive to the public good.⁸⁵ If the SIAC agrees with those statements by the Secretary of State, it must dismiss such part of the asylum appeal as amounts to a claim for asylum.⁸⁶ If the Commission does not agree with those statements it must quash the decision or action against which the asylum appeal is brought.⁸⁷ The Secretary of State may revoke a certificate.⁸⁸ However, no court may entertain proceedings for questioning a decision or action of the Secretary of State in connection with such certifications. Appellants may appeal to the SIAC only on point of law.⁸⁹

The obligation of states, according to Article 33, not to return a refugee, in any manner whatsoever, to a country where his or her life or freedom would be threatened lies at the core of the “Refugee Convention.” Non-refoulement is also a well-established principle of customary international law. The UK ratified the “Refugee Convention” in 1954, and made no reservation to Article 33. It has been argued by the Human Rights Watch that, “It is particularly ironic that in the year the UK marks the 50th anniversary of the Refugee Convention and prepares to meet other State parties in Switzerland to reaffirm its commitment to upholding the convention, it at the same time introduces legislation that seeks to weaken its obligation under this treaty” (Human Rights Watch, 2001a: 11).

According to Article 33 (2) there are two grounds to cancel Article 33 (1) benefit. One is that there are reasonable grounds for

⁸⁴ 189 U.N.T.S. 150.

⁸⁵ Section 33 (1) (a) of the “Anti-Terrorism Act 2001.”

⁸⁶ Section 33 (4) of the “Anti-Terrorism Act 2001.”

⁸⁷ Section 33 (5) of the “Anti-Terrorism Act 2001.”

⁸⁸ Section 33 (7) of the “Anti-Terrorism Act 2001.”

⁸⁹ Section 33 (8) of the “Anti-Terrorism Act 2001.”

regarding a refugee as a danger to the security of the country; the other is that a refugee has been convicted by final judgment of a particularly serious crime and constitutes a danger to the community of that country. However, the Secretary of State seems to have the power to cancel this benefit even without reasonable grounds or before a final judgment. A certificate can be made for reasons of the “public good” without considering a refugee’s status. In fact, the case for refugee status should be decided first, and then whether there are grounds for exclusion (UN High Commissioner for Refugees, 1992: para. 156). It seems that the UK is arguing that its public good should prevail even though an international human rights treaty obligation of protecting refugees is still in effect. As appeals to challenge certificates can only be made on the point of law, it could be a denial of the opportunity to challenge in a fair procedure.

Article 3 of the “Refugee Convention” requires contracting states to apply the provisions of this convention to refugees without discrimination as to race, religion, or country of origin. The preamble of the “Refugee Convention” also refers to the fact that the Universal Declaration of Human Rights has affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. It therefore should be emphasized that refugees from the Muslim world should not be discriminated against.

V. Conclusion

After the tragedy on 11 September 2001 it is quite natural to think of fighting back. However, it is also crucial that the legitimate rights of states to combat terrorism be exercised in full accordance with international human rights laws that require states adhere strictly to their international obligations to uphold human rights and fundamental freedoms.

President Bush (2002) has stated, “In the twenty-first century, only nations that share a commitment to protecting basic human

rights and guaranteeing political and economic freedom will be able to unleash the potential of their people and assure their future prosperity.” The UK and the US have been leaders in human rights protection. The question is: after the September 11 tragedies, will they still be? I hope that the answer will be affirmative, but the reality is that it may be only partly true. In terms of the ambit of terrorism, rights to liberty and fair trial, the laws and orders such as the “Military Order,” the “USA PATRIOT ACT” and the “Anti-Terrorism Act 2001” enacted by the US and the UK may not always conform to international human rights standards. It is argued that the “Military Order” issued by President Bush should be rescinded (Lawyers Committee for Human Rights, 2003: 21); the derogation of Article 5 of the ECHR by the UK should be withdrawn; and the “USA PATRIOT ACT” and the “Anti-Terrorism Act 2001” enacted by the US and the UK respectively should be further amended.

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廖福特

摘 要

當一個國家加入國際人權條約，其有義務在其國內實踐之，即使此國家是處於反恐時期。本文乃檢視美國與英國以反恐之名所採取之法律措施是否符合國際人權標準。本文著重於三項議題。首先，這兩個國家以何種標準定義恐怖份子。其次，所謂恐怖份子所受之待遇為何。第三，他們是如何受審判的。本文強調人權保障與反恐措施不應是衝突的，而應是共存之目標。本文認為美國與英國以反恐之名所制訂之法律及命令，並不盡然都符合國際人權標準，同時亦應廢除或修正。

關鍵詞：人身自由權、公平審判權、反恐、《愛國者法案》、《2001年反恐法》