COMBATING INTERNATIONAL TERRORISM: A STUDY OF WHETHER THE RESPONSES BY THE UK AND US TO THE EVENTS OF 9/11 ARE COMPATIBLE WITH RESPECT FOR FUNDAMENTAL HUMAN RIGHTS.

by

PAUL M.A. WALEWSKI

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ABSTRACT

On Tuesday 11 September 2001, four commercial planes were hijacked by terrorists. One hijacked passenger jet leaving Boston, Massachusetts crashed into the north tower of the World Trade Centre at 8.45 a.m. setting the tower on fire. Eighteen minutes later, a second hijacked airliner, United Airlines Flight 175 from Boston, crashed into the south tower of the World Trade Centre and exploded. Later that morning both the north and south towers collapsed, plummeting into the streets below. At 9.43 a.m., a third hijacked airliner (American Airlines Flight 77) crashed into the Pentagon sending up a huge plummet of smoke. A portion of the building later collapsed. At 10.10 a.m. a fourth hijacked airliner (United Airlines Flight 93) crashed into Somerset County, Pennsylvania, south-east of Pittsburgh. The crashing of these hijacked airliners into buildings and on land were the worst terrorist attacks in the history of the United States. They led to the loss of thousands of innocent lives and damaged property running into billions of dollars. The attacks were heralded as not only terrorist attacks on the US, but also an attack on the entire global community.

The atrocities led to the most dramatic amendment to anti-terrorism legislation ever known, both within the United States and the United Kingdom. The new anti-terrorism legislation in both nations however, has been widely criticised as not being compatible with respect for fundamental human rights, due to its hasty enactment.

This thesis analyses the responses and new anti-terrorism legislation in both countries examining the question: do they deprive international human rights?

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CHAPTER I

1.1 THE FACTS BEHIND, AND IMMEDIATE RESPONSES BY INTERNATIONAL ORGANISATIONS TO THE EVENTS OF 9/11

The complicated issue of how to respond to terrorism has not solely arisen due to the attacks on September 11, 2001. For more than 35 years, policy makers, lawyers and academics have attempted to develop an effective counter-terrorism model. In developing these principles, experts unanimously agreed that any campaign aimed at combating global terrorism had to adhere to strict liberal democratic principles and the rule of law. As British academic, Paul Wilkinson asserts: *"the primary objective of any counter-terrorist strategy must be the protection and maintenance of liberal democracy...it cannot be sufficiently stressed that this aim overrides in importance even the objective of eliminating terrorism and political violence as such."* [1] In addition, the preservation of democracy requires, most of all, unfailing respect of three of liberal society's fundamental values: civil liberties, human rights and the rule of law. With reference to the importance of human rights in the context of this thesis, it is essential to comply with the legal principles established in important international treaties, such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR). This requirement was stressed by the United Nations General Assembly in *Resolution 54/164*, stating, *"all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards."* [2] As a result, liberal democratic nations, such as the United Kingdom, who have significantly developed human rights standards, are responsible of upholding these rights, even during the gravest of emergencies.

On September 11, 2001, four aircraft on internal flights within the United States were seized, causing undoubtedly the most devastating single acts of terrorism ever to take place, resulting in the loss of some 3000 lives. In addition, the economic repercussions were scarcely calculable. Responsibility of the attacks were attributed to the *al-Qaeda* movement, a group regarded by the United States as being accountable for previous attacks against US targets, including the bombing of American embassies in East Africa in 1998 and on the USS Cole in Yemen in 2000. Although it was believed that *al-Qaeda* had members in numerous states worldwide, the principle base for its operations was Afghanistan. Within days of the attacks, extensive condemnation ensued worldwide.

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[1] Paul Wilkinson, *"Terrorism Versus Democracy: The Liberal State Response"*, Oxford University Press (2001).
[2] UN Doc A/Res/54/164 (1999).

Within the United Nations (UN), the General Assembly expressed both empathy and resentment at the attacks, evident in the immediate drafting of *Resolution A/56/1*.[3] On September 12 2001, the Security Council additionally drafted *Resolution 1368* [4] (the Resolution), which branded the attacks as *"threats to international peace and security"* ordering states to join forces to bring the individuals responsible to justice. The Resolution expressed the Security Council's willingness to *"take all necessary steps"* to respond to the attacks in accordance with its Charter.

By the end of September 2001, the Security Council elaborated on the wide-ranging steps and strategies needed to be implemented to combat international terrorism. This resulted in the drafting of *Resolution 1373*, which imposed duties upon states to suppress the financing of terrorism and to improve international co-operation in relation to counter-terrorism measures. *Resolution 1373* restated the need to combat terrorism *"by all means"*. Provision was additionally made for the institution of a Counter-Terrorism Committee, whose duties included the monitoring of compliance with the Resolution's provisions and to which states were to report, within 90 days, of the actions they had taken to curtail potential acts of terrorism.

In addition to the response by the UN, the North Atlantic Treaty Organisation (NATO) equally expressed their condemnation at the attacks. In a statement made on September 12 2001, the NATO Council indicated that if the attacks had come from outside of the United States, they should be considered as an armed attack under *Article 5 of the Washington Treaty*, warranting recourse to collective action in self-defence.[5] In support of this point, following the publication of evidence holding *al-Qaeda* responsible for the attacks,[6] NATO's Secretary General, Lord Robertson, concluded that the attacks were initiated from within Afghanistan, and therefore Article 5 was applicable. Furthermore, he stated that the United States could rely upon *"the full support of its 18 NATO allies in the campaign against terrorism"*.[7] In addition to this, both the UK and United States initiated a

[3] See press release GA/9903, including the adoption of Resolution A/56/1 on the Condemnation of the Terrorist Attacks in the USA.
[4] Available at http://www.un.org.
[5] Statement by the North Atlantic Council in response to the Terrorist Attacks (12 September 2001) available at http://www.nato.int/docu/pr/2001/p01.124e.htm.
[6] The UK Government's statement on the evidence of responsibility for the terrorist attacks in the United States available at http://www.pm.gov.uk/news.asp?Newsid=2686.
[7] Statement by NATO Secretary General (2 October 2001) available at http://www.nato.int/docu/speec.

comprehensive campaign aimed at promoting and sustaining support for a coalition to act against these terrorist actions.[8]

Further to the publication of evidence by NATO, concluding that *al-Qaeda* was responsible for the attacks on September 11 2001, it is evident that the British government followed suit in producing such verification.[9] Compiled amongst the literature was evidence that the *al-Qaeda* network, headed by *Osama Bin Laden*, was being protected by the *Taliban* regime within Afghanistan. Consequently, calls were made for the *Taliban* to surrender *bin Laden*, together with other members of the *al-Qaeda* hierarchy. This, however, proved to be to no avail, breaching *Security Council Resolution 1267*. As a result, on 7 October 2001, the US ambassador to the United Nations, *John Negroponte*, initiated proceedings under *Article 51 of the United Nations Charter* on the Right to Self Defence,[10] resulting in US-led military action, entitled *Operation Enduring Freedom*, which shall be discussed in Chapter Four of this thesis. Concerns on civilian casualty immediately ensued; however, the UK government addressed this fear, by stating, *"the Coalition has made every effort to avoid them"*.[11]

As the Operation progressed, we began to witness the gradual downfall of the *Taliban* regime. In light of this, the UN passed *Resolution 1378*, on November 14 2001. This Resolution provided assurance that the UN would assist Afghan nationals in establishing a multi-ethnic, transitional administration, with the intention of forming a new government and resulted in the signing of the Bonn Agreement[12], endorsed by the UN Security Council. In addition to the signing of this Agreement, the Security Council established an International Security and Assistance Force (ISAF), mandated to maintain security within Kabul, Afghanistan, and its surrounding areas. The Assistance Force was to be led by the UK; however, the US-led *Operation Enduring Freedom* was to have overriding authority over the ISAF in order to avert a conflict of activities between the two operations. Furthermore, a *Military-Technical Agreement*, signed on January 4 2002,[13] was realised in order to regulate the affiliation between the ISAF and the Interim Administration, and provided explanation

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[8] Description of the activities of the Coalition identified within *"Campaign Against Terrorism: A Coalition Update"*, Coalition Information Centre, available at http://www.fco.gov.uk/Files/Kfile/cicupdate,0.pdf.
[9] Publication of evidence available at http://www.pm.gov.uk/files/pdf/culpability_documents.pdf.
[10] Letter from John Negroponte to the United Nations Security Council President on 7 October 2001 available at http://www3.itu.int/MISSIONS/US/Dai.
[11] Paragraph J: *"Response of Secretary of State for Foreign and Commonwealth Affairs to the Foreign Affairs Committee Report on the Foreign Policy Aspects on the War on Terrorism"*, August 2002 available at: www.lib.gla.ac.uk/Depts/MOPS/Offpub/newaware0203.shtml.
[12] S/2001/1154.
[13] Available at http://www.operations.mod.uk/isafmta.doc.

of the status of ISAF personnel and their respective immunities, most notably protection from arrest or detention.

We can argue that complications arise in portraying a vivid account of what has evolved post-September 11 2001, and what techniques may be characterised as constituting a correct and morally acceptable response. Among the ideologies that exist, is that the military and criminal aspects of the response are variable, with possible gaps and overlaps existing between the two. This is particularly apparent in considering the legal status of individuals detained at Guantanamo Bay, which shall be discussed in Chapter Five of this thesis, who may be both criminal suspects and prisoners of war.

The British government has published a report on its action in the year after September 11 2001.[14] This document deals with what it perceives as the "campaign" against terrorism and identifies the UK activity in its entirety, together with that taken within the international arena. It clarifies that much of the response to September 11 2001, not only needs new legislation, in the form of the *Anti-Terrorism, Crime and Security Act 2001* (ATCS), to be analysed within Chapter Two of this thesis, but also the requirement of policy development together with administrative action. Similarly, a considerable part of the future programme involves detailed international co-operation, a significant element of which is the continued support for the new regime within Afghanistan. This position brings forth the final question surrounding the legitimacy and legality of the use of military force in Afghanistan, in the aftermath of September 11 2001, to be addressed in Chapter Four.

This thesis not only has the objective of identifying the responses by the UK and US to September 11 2001, in the form of new legislation, the military deployment in "Operation Enduring Freedom" and the use of the Naval Base at Guantanamo Bay, Cuba to detain suspected international terrorists, but aims to clarify the criticism that exists, in that the responses deprive and disrespect fundamental human rights.

We do, however, before beginning this study paper, need to ask the question: should certain civil liberties be sacrificed in order to maintain national security? Moreover: what should take precedence? Preserving individuals' fundamental human rights, or fortifying national security?

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[14] *'The International Fight Against Terrorism"*, available at http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/XceleratPage&cid=1007029394239&a=Karticle&aid=1013618391514.

1.2 Fortifying National Security or Preserving Fundamental Human Rights?

After the passing of the *ATCS* by the UK parliament in the wake of September 11, 2001, Lord Roker, UK Home Office Minister, stated:

"...it [the Bill] strikes a balance between respecting our fundamental liberties and ensuring that they are not exploited. The problem is that in a tolerant liberal society, if we are not guarded we will find that those who do not seek to be a part of our society will use our tolerance and liberalism to destroy that society. That is reality."[15]

The argument that subsequently develops is whether the search for national security in the war against terrorism, carries a legitimate repercussion under the rule of law that is the deprivation of certain fundamental human rights. This view is supported by British Home Secretary, David Blunkett, who, in a speech to Harvard Law School on March 8, 2004, entitled *"Defending the Democratic State and Maintaining Liberty: Two Sides of the Same Coin?"*, submitted that:

"...[T]he Universal Declaration of Human Rights...recognises that the most fundamental human rights are those of life, liberty and security of person. This implies for me that people who are killed or maimed, bereaved or put in fear by terrorists are stripped, cruelly and arbitrarily, of their rights and that security and safety is the underpinning raison d'etre of government."

"...[T]he dichotomy which some individuals seek to establish between the rights of people to be protected against terrorists and their right to enjoy traditional liberties is I believe a false one. It is not a question, therefore, of choosing between rights, but achieving a balance which maintains those rights."

On balancing the rights and needs of UK and US citizens, Mr. Blunkett adds:

"...[A]nd in the same as domestically, we are now talking much more about rights alongside responsibilities, so we must do the same in the international context. We must not make the mistake of thinking too much about purely international rights and too little of duty and responsibility.... Of course, at national level, we have institutions to help us achieve this balance between individuals' communities and the State. And in your own country (US) that also means between the different elements of the State....I

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[15] Hansard Reports, House of Lords, November 27 2001 available at www.parliament.the-stationery-office.co.uk/pa/cm200102/ cmhansrd/vo011106/debtext/11106-05.htm.

have in mind the image of the mechanisms of a clock – the elements are fixed, the cogs provide movement and the weights ensure balance."[16]

To expand upon these views, it can be argued that common public interests override those of the individual, and subsequently, institutions and codes that support and endorse human rights are under the obligation to make necessary sacrifices. The consequences of introducing draconian legislation, therefore, in the form of the *ATCS* and the Patriot Act, are that social harmony, through the objective of combating terrorism, result in the deprivation or loss of certain established fundamental human rights norms, suppressing of the dissident voice.[17] Consequently, the fundamental right of freedom of speech is disregarded and criticism about the executive may be perceived as being unpatriotic. This, therefore, leads to human rights institutions either being in favour or in opposition to the executive, resulting in a disregard for the rule of law, by way of prioritising issues of terrorism to a lesser extent.

It can be argued that this shift may consequently cause considerable changes to the criminal process dealing with national security crimes, creating an adverse dual, parallel structure. Furthermore, it may also have a detrimental impact in the way everyday, ordinary crimes are dealt with by changing established, dominant structures. For example, a closed military tribunal may replace the right to a public judicial trial, imposing assigned legal advice rather than counsel of choice and changing rules of criminal evidence and procedure, all increasing the likelihood of conviction.[18] This can be argued, is what exists with several of the detainees being held in Guantanamo Bay, which shall be addressed in Chapter Five. The judiciary itself is conscious of the rules they must interpret, however, certain cases suggest that the courts have acted insufficiently in testing the State[19], or have been drawn into an unjust position by the applicable laws.[20] Furthermore, in situations involving national security, and in times of public emergency, it can be argued there is insufficient examination of the executive by the judiciary through, for example, the testing

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[16] *"Defending the Democratic State and Maintaining Liberty – Two Sides of the Same Coin?"*, March 8, 2004 available at: http://www.homeoffice.gov.uk/docs3/hs_speech_harvard04.html.

[17] Richard Posner, *"Security Versus Civil Liberties"*, Atlantic Press (December 2001).

[18] The success of the prosecution under such adverse conditions is not always guaranteed, however. See *Falklands War R. v Ponting, Crim L.R. 318 (1985)* involving issues of national security and official secrets arising form the Falklands War.

[19] David Leigh, *"Betrayed: The Real Story Behind the Matrix Churchill Case"*, April, 2003, 26 Fordham Int'l L.J. 1193.

[20] Official Secrets Act 1911 (UK), Section 2, which offers no public interest defence available at: www.hmso.gov.uk/acts/acts1911/Ukpga_19890006_en_4.htm.

of public immunity certificates.[21] All of these examples create a concluding theory that legal formalism remains, however, the sacrifice is the spirit of the law.[22]

We can also argue that in situations involving terrorism and threats to national security, the media assumes an intransigent position providing the executive with unequivocal support.[23] For example, the editor of the New Republic, writing on the events of September 11, 2001, said: *"this Nation is now at war. In such an environment, domestic political dissent is immoral with a prior statement of national solidarity, a choosing of sides.'*[24] Moreover, evidence of such executive action in democratic states, can be argued expands the authority of tyrannical regimes, such as the *Taliban*, and *al-Qaeda*, that use acts of barbaric terrorism, such as those of September 11, 2001, to their advantage of commanding and suppressing minority voices and those who condemn the values and actions of the state.

In discussing the claim of the executive that an essential balance exists between maintaining the safety of the nation and respecting fundamental human rights norms, it is important to acknowledge the views of *Dworkin*, who argues that this represents a somewhat false dichotomy.[25] The political norm usually advocates that such is the terrorist threat to the nation, fundamental human rights values must be reduced in order to preserve the safety of the nation. Hence, safety overrides freedom in exigent situations. Theoretically, this should assume that once the situation subsists, the freedom that previously existed should be returned to. However, fortifying national security exposes suspected terrorists of more likely being unjustly convicted due to the fact that the traditional procedural safeguards associated to the rule of law, identified earlier, are subject to temporary suspension. *Dworkin* argues this by suggesting that the majority of the nation would be willing to accept certain restrictions to civil liberties in order of preserving and guaranteeing the security of the nation:

"...[S]ome of the powers which these Acts give to the police undoubtedly encroach more upon the individual's civil liberties than people would be prepared to tolerate in normal circumstances. Successive

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[21] See Lord Simon in the judgement in D v NSPCC, 1 All ER 607 (1977) stating that, *"...if society is disrupted or overturned by internal or external enemies, the administration of justice will itself by one of the casualties...as regards national security in its strictest sense, a ministerial certificate will almost be regarded as conclusive."*

[22] Franz Neumann, *"The Rule of Law"*, (1935), William E. Scheuerman ed. (1996).

[23] Edward W. Said, *"Covering Islam: How the Media and the Experts Determine How We See the Rest of the World"*, Columbia University Press (1997).

[24] Lewis Lapham, *"American Jihad"*, Harper's (January 2002).

[25] Ronald Dworkin, *"The Threat to Patriotism"*, NY Review of Books (February 28, 2002).

governments and the general public have accepted this in the past as the necessary price of measures calculated to protect the public from terrorist attack.'[26]

The UK and US will continue to operate in ways undamaged and unaware by the new legislation and politics on terrorism, implemented by their respective executive actions. It can also be argued, that the everyday working-class individuals of the UK and US will remain uninvolved and ignorant of the scope of the *ATCS* and the Patriot Act in its relevance and enforcement. Those, however, most likely to be affected by the new, poorer standards of justice will likely be ethnic minorities, such as Muslims and followers of Islam, similar to when the Irish living in Britain were victimised during the peak of the terrorist campaigns instigated by the IRA. Nonetheless, it is these minorities and aliens residing in the UK and US that will have to deal with the injustices that the *ATCS* and Patriot Act impose. Thus, denial of fundamental rights to these minority individuals, which are available to the popular nation, implies a slippery slope that the UK and US may be faced with. The respective nations should instead concentrate, for the purposes of fortifying national security, on reducing the civil and constitutional rights only of individuals suspected of involvement in acts of terrorism.

Finally, it is once again important to refer to the views of British Home Secretary, David Blunkett, who stated, in a discussion document exploring how best to protect society from terrorism, while retaining personal freedoms and rights, dated February 25, 2004:

"...[A]s Home Secretary, I am the custodian of civil liberties, but I do not own them. How we balance them with security is a matter for the country, not just for Government.... However, it is the Governments ultimate responsibility to find a fair and effective balance between security and liberty. The rights we must balance belong to everyone. Ensuring a successful fight against international terrorism demands we all play our part in getting the balance right.... But we also need to consider whether adequate powers are available to deal with all terror suspects, irrespective of their nationality."

"...[I] am in no doubt that the terrorism threat remains and the need to have the right legislation in place is greater than ever. The recent attacks in Riyadh, Jakarta and Istanbul and continuing threats, (this speech was made prior to the terrorist attacks in Madrid on March, 11, 2004) *illustrate*

[26] Supra note 25.

the need to address these difficult issues now and debate how best to protect our country from these genuine dangers."[27]

1.3 An Introduction to Terrorism and the Problems Surrounding a Consistent Definition

The term "terrorism" is surrounded by ambiguity, as there is no established definition of its precise meaning and scope.[28] This is due to the fact that there are varying global views regarding the classification of terrorist acts and the purpose and motivation surrounding them. While it can be established that there is anti-terrorist legislation[29], which mainly deals with the granting of powers of search, evidence gathering, arrest and detention, there are no consistent definitions of who a terrorist actually is, and thus can be considered elusive to precise legal definition.[30] Hence, the question lies as to whether it is possible to distinguish between a terrorist and a freedom fighter, as the famous cliché indicates *"one mans terrorist is another man's freedom fighter"*, which also suggests a subjective perspective to understanding the term "terrorism".[31] We can argue, therefore, that it is this difficulty that has perhaps most complicated and hindered the fight against terrorism in international law today.[32] In domestic law, however, terrorism resists legal definition with no greater difficulty than other problematic concepts.[33] The nature of terrorism itself justifies a distinct offence, as it is a particular kind of violence with repercussions for stable,

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[27] *"Anti-Terrorist Legislation Must Balance Public Protection With Individual Rights"*, February 25, 2004 available at http://www.homeoffice.gov.uk/pageprint.asp?item_id=829.

[28] M.C.Bassiouni, *"A Policy-Orientated Inquiry Into the Different Forms and Manifestations of International Terrorism."*, PCIJ Series A/B N° 65 (1988); *"there is...no internationally agreed upon methodology for the identification and appraisal of what is commonly referred to as "terrorism". Including causes strategies, goals and outcomes of the conduct in question and those who perpetuate it. There is also no international consensus as to the appropriate reactive strategies of States and the International Community, their values, goals and outcomes. All of this makes it difficult to identify what is sought to be prevented and controlled, why and how. As a result the pervasive and indiscriminate use of the often politically convenient label of "terrorism" continues to mislead this field of inquiry."*

[29] For example the United Kingdom has the *Anti-terrorism, Crime and Security Act 2001* and the USA has recently enacted the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act 2001.*

[30] Wesley K. Wark, *"Intelligence Requirements and Anti-Terrorism Legislation"*, in *"The Security of Freedom"*, University of Toronto Press (2001).

[31] It is interesting to note that Irwin Cotler suggests this phrase "has not only undermined intellectual inquiry, but its moral relativism...has blunted the justificatory basis for a clear and principled counter terrorism law." *"Thinking Outside the Box: Foundational Principles for a Counter-Terrorism Law and Policy"*, 6 UCLA J. Int'l L. & Foreign Aff. 89 at 91.

[32] See Jacqueline Ann Carberry, *"Terrorism: A Global Phenomenon Mandating a Unified International Response"*, 6 Ind. J. Global Legal Stud. 685 at 695 (1999).

[33] Peter Chalk, *"West European Terrorism and Counter-Terrorism: The Evolving Dynamic"*, London: MacMillan Press (1996).

democratic government.[34] Furthermore, the terrorist engages in more than anti-social behaviour; he or she is acting in a manner calculated to promote social and political change through violent, undemocratic means.[35] As *Michael Reisman* acknowledges:

"One should resist jumping to conclusions of the irrationality of terrorists, especially in the cross-cultural environments in which terrorism takes place. The means-end rationality and means-end morality of the terrorists may be quite different from that of the target, but be cogent nonetheless."[36]

In today's society views on acts of violence conducted by groups such as the Palestinians, Northern Irish Catholics and members of *Al-Qaeda* are variable. Furthermore due to the legal vagueness of the term "terrorism", the traditional means of determining guilt, by way of guilty acts and thoughts, are useless because the guilty act is so ill defined. In addition, the rule of law requires a clear and precise definition of terrorism that narrowly delineates when extraordinary legal measures are needed to be taken and which acts need to be outlawed.[37] Due to the fact that terrorism involves violence and the spreading of fear, we can argue that the term covers existing criminal offences such as murder or assault.[38] However, to create a specific act of terrorism incorporating an ideological element recognises it as a unique criminal phenomenon having international and politically systematic implications beyond the actual harmful act in question.[39]

It is interesting to note that between 1936 and 1981 there have been no fewer than 109 legal definitions of terrorism.[40] One of the earliest and most prominent definitions was identified in *Article 1(2)* of the *Convention for the Prevention and Punishment of Terrorism 1937.* Under this Article terrorism was defined as:

"...criminal acts directed against a State intended or calculated to create a state of terror in the mind of particular persons, or a group of persons or the general public."

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[34] Jutta Brunnee, *"Terrorism and Legal Change: An International Law Lesson"*, Macklem & Roach eds. (2000).
[35] Paul R. Pillar, *"Terrorism and US Foreign Policy"*, Washington DC: Brookings Institution Press at 56-61. (2001).
[36] W. Michael Reisman, *"International Legal Responses to Terrorism"*, 22 Hous. J. Int'l L. 3 at 5 (1999).
[37] Kent Roach, *"The New Terrorism Offences and the Criminal Law"*, University of Toronto Press (2001).
[38] The New Oxford English Dictionary on Historical Principles, 4th ed., vol. 2 defines terrorism as *"the systematic employment of violence and intimidation to coerce a government or community into acceding to specific political demands".*
[39] Mark S. Zaid, *"Combatting International Terrorism into the 21st Century"*, 2 ILSA J. International & Comparative Law 661 (1996).
[40] W.Laqueur, *"Reflections on Terrorism"*, 64 Foreign Affairs 86, 88 (1986).

More recently the United Nations General Assembly established an Ad Hoc *Committee on International Terrorism* in order to attempt to create a collective definition on international terrorism.[41] Furthermore it can be argued that contrasting views regarding the definition of terrorism have hampered new efforts in drafting a single treaty dealing with international terrorism. Consequently, the most effective way for the international community to move forward in defining terrorism is by considering specific individual aspects within the subject. Hence binding conventions have been adopted in areas of aircraft hijacking,[42] unlawful acts against the safety of civil aviation,[43] marine terrorism,[44] hostage-taking[45] and theft of nuclear materials.[46] However one is still no closer in understanding a single consistent definition. One must nevertheless acknowledge the fact that in the existing global community it may never be possible to come up with a single conclusive definition. Academics have argued though, that most reasonable and sensible individuals have a basic understanding of what the term involves, and that it has a core meaning that virtually all definitions recognise. *Owen Schachter* asserts that terrorism is:

"...the threat or use of violence in order to create extreme fear and anxiety in a target group so as to coerce it to meet political (or quasi-political) objectives of the perpetrators. Such terrorist acts have an international character when they are carried out across national lines or directed against nationals of a foreign State or instrumentalities of that State. They also include the conduct defined in the international conventions against hijacking, ariel sabotage, sabotage at sea, hostage taking, and attacks on diplomats and other internationally protected persons. Terrorist acts are generally carried out against civilians but they also include attacks on governmental buildings, vessels, planes, and other instrumentalities. The objectives of the

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[41] UN General Assembly Committee on International Terrorism advised on the following definition on International Terrorism (available at http://www.un.org):

(1) Acts of Violence and other repressive acts by colonial, racist and alien regimes against peoples struggling for their liberation...
(2) Tolerating or assisting by a State the organisation of the remnants of fascist or mercenary groups whose terrorist activity is directed against other sovereign countries;
(3) Acts of violence committed by individuals or groups of individuals which endanger or take innocent human lives or jeopardise fundamental freedoms. This should not affect the inalienable right to self-determination and independence of all peoples under colonial and racist regimes and other forms of alien domination and the legitimacy of their struggle...;
(4) Acts of violence committed by individuals or groups of individuals for private gain, the effects of which are not confined to one State.

[42] Convention on Offences and Certain Other Acts Committed on Board Aircraft (1963).
[43] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (1971).
[44] Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988); Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf (1988).
[45] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (1973); International Convention against the Taking of Hostages (1979).
[46] Convention on the Physical Protection of Nuclear Materials (1980).

terrorist are usually political but terrorism for religious motives or ethnic domination would also be included. However violence or threats of violence for purely private motives should not be included."[47]

If this is done, it can be said that, in spite of varying political and ideological views, a general and consistent definition of terrorism should not be impossible to draft.

As this thesis is dealing with the issue; are the responses by the United States and the United Kingdom to combat the escalating threat of global terrorism compatible with respect for fundamental human rights? Accordingly, it is important to determine the definition of terrorism from both nations perspectives.

First, I am going to look at the United Kingdom. There is no definition of terrorism in the European Convention on Human Rights and the European Court of Human Rights has also not developed one single definition of the term in its jurisprudence. The most recent piece of legislation by the United Kingdom defining terrorism can be found in the *Prevention of Terrorism Act 1999*. Section one of the Act defines terrorism as:

"...the use or threat, for the purpose of advancing a political, religious or ideological cause, of action which involves serious violence against any person or property, endangers the life of any person or creates a serious risk to the health or safety of the public or any section of the public."

A widely accepted definition of terrorism in international law has also proved elusive, however a number of anti-terrorism "suppression conventions" have been agreed and are gradually expanding the list of objective acts which States are prepared to make criminal in their national laws. It has also proved impossible to reach agreement on a treaty covering a general offence on terrorism, in which the prohibited violence can in all circumstances be condemned. The most recent treaty of its kind, the *International Convention on the Suppression of Terrorist Financing 1999*, switches attention from the criminalisation of "terrorist acts" to activities in support of terrorist campaigns. This is a similar stance as was adopted by the United States, with their enactment of the *USA Patriot Act 2001*, which shall be discussed in greater depth later in this thesis. Furthermore, it can be said, that a descriptive approach to understanding terrorism has certain limitations. Descriptions of terrorism may range from isolated acts by single persons, through single-issue groups, to

[47] O.Schachter, *"The Lawful use of Force by a State against Terrorists in Another Country"*, 19 Israel Yearbook on Human Rights 209, 216 (1989).

wholesale operations of groups, which reach the level of international armed conflicts. There is also a possibility for making distinctions depending on whether the violence is used by a State, is supported by a State, or is purely the work of non-State individuals.

A further question that can be posed in relation to defining the concept of "international terrorism" lies in distinguishing the difference between soldiers who attack military adversaries, and war criminals who deliberately attack civilians, such as the attacks on the US on September 11, 2001. Therefore a comprehensible definition of terrorism can be based upon accepted international laws and principles regarding what behaviour is permitted in conventional wars between nations. These laws are set out in the *Geneva* and *Hague* Conventions. These Conventions are based upon the basic principle that the deliberate harming of soldiers during wartime is a necessary evil, and therefore permissible, whereas the deliberate targeting of civilians or non-combatants is absolutely forbidden. The normal principle relating to a state of war between two countries can however be extended to a conflict between a non-governmental organisation and a State. This would therefore differentiate between guerrilla warfare and terrorism. Exactly in parallel with the distinction between military and civilian targets in war, the extended version would assign guerrilla warfare to the deliberate use of violence against military and security personnel in order to attain political, ideological and religious goals. Terrorism, on the other hand, would be defined as "the deliberate use of violence against civilians in order to attain political, ideological and religious aims." This would therefore associate the attacks on the US on September 11, as acts of terrorism, by the non-governmental organisation of *Al-Qaeda,* due to the fact that it was a deliberate use of violence against civilians in order to attain political, ideological and religious aims. It is important to note that the aims of terrorism and guerrilla warfare may well be identical, but they are distinguished from each other by the means used, or more precisely by the targets of their operations. The guerrilla fighter's targets are military ones, while the terrorist deliberately targets civilians. By this definition a terrorist organisation can no longer claim to be "freedom fighters" because they are fighting for national liberation or some other worthy goal. There is no merit or amnesty in fighting for the freedom of one population if in doing so you destroy the rights of another population. This is why one is able to yet again label the attacks on the US as acts of terrorism. Only by a broadly subscribed to international agreement on the definition of terrorism will it be possible to demand that all nations withhold all support from terrorist organisations.

CHAPTER II

2.1 LEGISLATION INTRODUCED BY THE UNITED KINGDOM SINCE 9/11 TO COMBAT TERRORISM

On 14 December 2001, a new counter-terrorism bill was introduced into UK Law in the form of the *Anti-Terrorism, Crime & Security Act 2001* (ATCS). The new legislation was heralded as necessary in order to fortify the gaps and weaknesses in the UK's counter-terrorism laws exposed by the attacks in America on 9/11. The *ATCS* is a vast document, containing 129 sections and 8 Schedules. Its provisions range from asylum and immigration law, bribery and international finance, police and security service powers and weapons of mass destruction and aviation security. It is important to note that some of the sections within the *ATCS* are time limited, and therefore after two years the Privy Council must review the entire Act. Any section it specifies will cease to have effect six months later unless Parliament chooses to re-enact it.[48] It is also important to note that the *ATCS* has been certified by the Secretary of State as complying with the Human Rights Act 1998 and the United Kingdom's obligations under the European Convention on Human Rights. However, as shall be discussed later in the chapter, it became evident that some sections of the *ATCS* directly violated certain Articles of the European Convention on Human Rights.

The introduction of the *ATCS* provided strong declaration of the United Kingdom's stance on terrorism and its support for the United States after the attacks.[49] It is important to note that the *ATCS* was also passed in response to the United Nations Security Council's call:

"...on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council Resolutions."

On 28 September, 2001, the UN Security Council issued *Resolution 1373* affirming the principle that:

"...[E]very State has the duty to refrain from organising, instigating, assisting or participating in terrorist acts in another State or acquiescing in organised activities within its territory directed towards the

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[48] ATCS 2001, ss122-124.

[49] Full text of Prime Minister Tony Blair's speech declaring that the United Kingdom will stand by the United States and will support the US in its efforts to eliminate terrorism, is available at http://www.guardian.co.uk/wtccrash/story/0,1300,550655,00.html.

commission of such acts.'[50]

This Resolution directed all States to introduce criminal offences to prevent and suppress terrorist financing and adopt powers to freeze or seize terrorist property. The Resolution also decided that all States shall introduce measures to prevent attacks by terrorists, block any form of support for terrorist groups, ensure international co-operation and bring those who commit, help or finance terrorist attacks to justice.

The new UK legislation has been criticised however, as it is believed that it curtails certain civil liberties for individuals, for example those foreign non-nationals suspected of being terrorists.[51] The United Kingdom is a member of the Council of Europe and one of the original contracting parties to the *Convention for the Protection of Human Rights and Fundamental Freedoms* first ratifying the Convention on March 8, 1951. Consequently, the UK made a commitment to the protection of basic human rights and democratic principles by signing to the Convention. However, after the UK introduced the new terrorism legislation within the UK in the form of the *ATCS* it was realised that certain areas of the Act directly violated *Article 5(1)* of the European Convention, most notably the section dealing with detention, which shall be discussed at greater depth later in this chapter. As a result, the UK decided to temporarily opt out of its obligation under that part of the Convention. Furthermore it became evident that the UK was the only Member State forced to derogate from the European Convention on Human Rights because of the implementation of new national anti-terrorism law.

It is apparent that within days of becoming law, the Government had already used its powers under the Anti-Terrorism Act 2001 to detain suspected international terrorists.[52] However after the arrests of the suspected individuals, civil libertarian groups announced that they planned to challenge the law both within the British Courts and the European Court of Human Rights, claiming that the British Government lacked a valid justification for the state of emergency it declared to suspend its obligations under the European

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[50] United Nations Security Council Resolution 1373, 28 September 2001, para 1.

[51] See e.g. Brian Groom; *"In Liberty's Name – The Sweeping Powers that Britain and the US want to assume to counteract terrorism are raising fears that fundamental freedoms will be lost"*; Financial Times, November 21 2001. Here it was argued that although the UK's Bill was not as detrimental to civil liberties as the proposed US measures, controversy and debate surrounded the Anti-Terrorism Act for its impact on fundamental rights.

[52] Phillip Johnston, *"Terror Suspects Rounded Up"*; Daily Telegraph (December 2001); Paul Waugh, *"Campaign Against Terrorism: Terror Suspects to be Rounded Up Under New Law"*; The Independent (December 15, 2001).

Convention.[53] It must be argued however that *Article 15(1)* of the *European Convention on Human Rights* states that a Member State may temporarily opt out of the Convention under certain circumstances, most notably situations involving public emergency. Further to this the United Kingdom Government correctly concluded that it was faced with such a public emergency within the scope of *Article 15* and took the necessary steps required to protect the nation.

2.2 The UK's Position on Terrorism Prior to 9/11; How 9/11 Has Changed Attitudes Towards Terrorism in Britain From a Predominantly Irish Emphasis to a Wider Appreciation of the International Scope of Terrorism in the Twenty-First Century

It is evident that over the last two centuries we have seen severe acts of terrorism take place in relation to Ireland. The "Thirty Years War" in 1968 to the "Good Friday Agreement" of 1998 has kept Britain aware of the many important aspects of terrorist activity and their impact on law, political concerns, international relations and the mood of the nation. However, with the severe escalation of international terrorism in recent years, most notably the events of September 11 2001, complexities in dealing with the problem have arisen. These most notably include an apparently never-ending string of terrorist outrages throughout various corners of the globe, perpetrated by a variety of terrorist groups and organisations and inspiring a diversity of responses in individual countries whether or not they are directly affected by the actions.

From the UK's perspective, we can argue that the nation is sufficiently experienced in dealing with the virtues of domestic terrorism, particularly from an Irish emphasis. However, the challenges of dealing with national security in a democratic society post 9/11 are both changeable and indecisive. It is evident that the British Government has responded to these demands in recent years by adopting custom-made legislative powers, seeking international cooperation and reassessing and adapting national laws on asylum, immigration and deportation, as shall be discussed later in the chapter.

From 1968 onwards, terrorism associated between Northern Ireland and the UK has resulted in the evolvement of several new-style sophisticated methods: advanced

[53] *John Wadham*, director of civil liberties group "Liberty" indicated that the arrests destroy the basic principles of Human Rights of British Law and the European Convention on Human Rights. The Telegraph (UK) (April 12, 2001).

technology, simplified communication devices and a wider international impact (for example drawing on sympathisers in the United States). In addition to this, some groups initiated threatening fundraising campaigns, so much so that the Northern Ireland Affairs Committee of the House of Commons addressed their concerns in mid 2002:

"...[I]n addition to traditional fundraising activities such as extortion and armed robbery, paramilitaries from both traditions are increasingly turning their attention to more complex and sophisticated forms of organised criminal activity such as fuel smuggling and counterfeiting. These probably net the terrorist groups millions of pounds of income each year. Some of the revenue goes to fund individual criminal lifestyles. The remainder buys propaganda and weapons which help terrorists maintain their dominance – often violent – of local communities."[54]

It must be noted that the distinct kind of domestic terrorism associated with Ireland over the past three decades has produced new legislation, litigation, constitutional proposals and much political controversy. The official reports on their own provide extensive descriptions and analysis of terrorism directed towards Northern Ireland.[55] The legislation over the past thirty years includes laws purposely directed towards Northern Ireland [56] together with laws directed towards the UK as a whole.[57] Further to this, following an extensive consultation service[58], an effort to draw the legislation together resulted in the drafting of the *Terrorism Act 2000*.[59] It is important to note that prior to the *Terrorism Act 2000* the *"tension between terrorist legislation and human rights"* had *"generated a remarkable amount of litigation before the Strasbourg court"* which is likely to continue.[60]

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[54] Northern Ireland Affairs Committee, Fourth Report, 2001-2002 session. *"The Financing of Terrorism in Northern Ireland"*, H.C. 978-I, at 5 (July 2, 2002), available at: http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmniaf/978/97802.htm.

[55] See e.g. Tribunal of Inquiry, Violence and Civil Disturbances in Northern Ireland in 1969, 1972, Cmnd. 566 (reporting violence and civil disturbances in Northern Ireland in 1969), available at http://cain.ulst.ac.uk/hmso/scarman.htm;
Committee of Privy Counsellors, Report of the Committee of Privy Counsellors Appointed to Consider Authorised Procedures for the Interrogation of Persons Suspected of Terrorism, 1972, Cmnd. 4901, available at http://cain.ulst.ac.uk/hmso/parker.htm.

[56] See e.g. Civil Authorities (Special Powers) Act 1922, available at http://cain.ulst.ac.uk/hmso/spa1922 leading to the now repealed Northern Ireland (Emergency Provisions) Act 1996 (amended 1998) available at http://www.hmso.gov.uk/acts/acts1996/1996022.htm.

[57] See e.g. Prevention of Terrorism (Temporary Provisions) Act 1974, available at http://www.hmso.gov.uk/acts/acts1989/Ukpga19890004en1.htm repealed Prevention of Terrorism (Temporary Provisions) Act 1989, available at http://www.hmso.gov.uk/acts/acts1989/Ukpga19890004en1.htm.

[58] See Legislation Against Terrorism, 1998, Cmnd. 4178 (a consultation paper presented by the Secretary of State for the Home Department and the Secretary of State for Northern Ireland), available at http://www.archive.official-documents.co.uk/document/cm41/4178/4178.htm.

[59] Terrorism Act 2000 available at http://www.hmso.gov.uk/acts/acts2000/20000011.htm.

[60] See A.W. Bradley & K.D. Ewing, *"Constitutional and Administrative Law"* (13th ed. 2003). Chapter 26 providing an account of emergency powers and terrorism.

Furthermore, within the UK, and in particular Northern Ireland, events since 1968 have substantially influenced approaches to national security (including the involvement of secret intelligence service MI5), police powers, maintenance of public order, ombudsmen procedures, status of the police, prosecution and trial procedures, and cooperation with other countries in law enforcement including the Republic of Ireland and the United States.

After a direct rule from parliament in London was re-established for Northern Ireland in 1972, efforts to create a new constitutional settlement resulted in the *Good Friday Agreement* 1998, which restated *"total and absolute commitment to exclusively democratic and peaceful means of resolving differences on political issues"* and *"opposition to any use or threat of force...for any political purpose".*[61] We can argue that the initiation of the *Good Friday Agreement* has undoubtedly improved the situation in Northern Ireland and provided the framework for the drafting of the *Terrorism Act 2000.*

With further reference to the consultation paper presented by the British Government, identified earlier, and to the escalation of terrorist acts taking place in the UK, it is of importance within the context of the chapter, to recognise their position, *"that the threat from international terrorist groups (and to a lesser extent other groups within this country) means that permanent UK-wide counter-terrorist legislation will be necessary even when there is a lasting peace in Northern Ireland."*[62] It was realised that between 1969 and 30 November 1998, 3289 people were killed in Northern Ireland as a result of Irish terrorism and that between 1972 and 30 November 1998, 121 people died in mainland Britain in incidents involving Irish terrorism. In addition, between 1976 and November 1998, 94 incidents of international terrorism took place in the UK, including the bombing of Pan Am Flight 103, where 270 people were killed over Lockerbie, Scotland in December 1988. As a result, it was not surprising that new anti-terrorist legislation was drafted, in the form of the *Terrorism Act 2000*, to replace the *Prevention of Terrorism (Temporary Provisions) Act 1989* and the *Northern Ireland (Emergency Provision) Act 1996.*

In referring back to Chapter One of this thesis, and the ambiguity surrounding a consistent definition of terrorism, it is evident that the *Terrorism Act 2000* continues to follow this trend. Incorporated within the Act is a wide-ranging definition, in addition to

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[61] The Belfast Agreement: An Agreement Reached at Multi-Party Talks on Northern Ireland, 1998, Cmnd. 3883, available at http://cain.ulst.ac.uk/events/peace/docs/agreement.htm.
[62] *Ibid*, "Legislation Against Terrorism".

powers to ban specified organisations linked to terrorism in Britain or internationally. Furthermore, there are also detailed provisions on terrorist property and finance, extensions to police powers, and Northern Ireland still being provided for separately.[63] We can note that the Act has been utilised on several occasions already. More recently, in 2002, two Indian businessmen were convicted and imprisoned for being members of the banned organisation *"International Sikh Youth Federation"*, which was listed in addition to a number of other foreign groups, under subordinate legislation of the *Terrorism Act 2000.*[64] In addition, charges under the Act were also brought after the discovery of *Ricin* in a London apartment in January 2003.[65]

The events of September 11 2001 forced a new dimension to international terrorism, changing perceptions in the UK from a largely Irish emphasis to a wider appreciation of the escalating threat of international terrorism. There has always been the existence of terrorism from a European viewpoint. Moreover, considerable increases in terrorism have taken place since September 11 2001, with a rise in the number of arrests for terrorist offences in Italy, Spain and France.[66] We can acknowledge the views of the Select Committee of the House of Commons in relation to the recent escalation of international terrorism, stating:

"Some of the physical vulnerabilities of western society, but they also highlighted less tangible vulnerabilities in the way in which the shock at the attacks was transmitted rapidly throughout a globalised, interconnected system, costing billions of dollars in economic damage through direct losses, lost growth, instability to certain industries (airline insurance). The attack(s) also had major knock-on effects in political and social terms, as well as psychological."[67]

More recently the international threat of terrorism has become as concerning as ever post September 11 2001, with a variety of severe terrorist attacks in late 2002 up to the present day. Amongst the acts includes an attack in October 2002 on a French registered ship, *"the Limburg"*, off the coast of Yemen; an attack destroying the *Sari Club* at Kuta Beach, Bali; an attack by Chechen rebels on a Moscow theatre, killing 119 hostages;

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[63] See Clive Walker, *"Blackstone's Guide to the Anti-Terrorism Legislation"*, Blackstone (2002).
[64] Subordinate legislation being the Terrorism Act 2000 (Proscribed Organisations) (Amendment) Order 2001, entered into force on March 29, 2001, listing organisations such as al-Qaeda, Hizbollah, ETA (Spain).
[65] Steve Bird, *"Four Appear in Court on Chemical Weapons Charge"*, The Times (UK) (January 14, 2003).
[66] Bruce Johnston, *"Italy: Little Evidence Britain was to be Targeted"*, Daily Telegraph, (January 25, 2003).
[67] Defence Committee, Sixth Report, 2001-02 Sess., *"Defence and Security in the UK"*, H.C. 518-I (2002) available at http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmdfence/518/51808.htm.

the bombing of the Israeli-owned *Paradise Hotel* in Mombassa, Kenya; and most recently, on March 11 2004, the bombings in Madrid, Spain killing more than 200. Recognition of these recent attacks has unquestionably influenced UK courts. For example we can relate to a case involving the deportation of a Pakistani citizen in the interests of national security[68] and another one involving the extradition of two individuals suspected of terrorist links in the United States.[69] Contained within the judgements of these cases were several references to the *"modern world of international terrorism and crime"*[70] together with *"today's global village where national borders are no impediment to international terrorists and other criminals."*[71]

As shall be discussed later in the chapter, the courts within the UK need to come to terms with the escalating threat of global terrorism, whatever path they take; be it under national, international or European law. As Allen Dulles, director for eight years of the Central Intelligence Agency, stated in 1963:

"...[I]t is impossible to predict where the next danger spot may develop. It is the duty of intelligence to forewarn of such dangers, so that the government can take action. No longer can the search for information be limited to a few countries. The whole world is the arena of our conflict."[72]

The difficulties arise, however, in striking an even balance in response. With this lies a danger of complacency, together with the possibility of overreaction, as argued by *Alan Dershowitz*.[73]

2.3 ANTI-TERRORISM, CRIME & SECURITY ACT 2001

Described by one political commentator as, *"the most draconian legislation Parliament has passed in peacetime in over a century"* [74], the new legislation increases the British Government's power to prevent international terrorists and suspected international

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[68] Secretary of State v Rehman 1 All ER 122 (H.L. 2002).
[69] Re Al-Fawwaz 1 All ER 545 (H.L. 2002).
[70] *Ibid* note 32 para 63.
[71] *Ibid* note 31 para 102(4).
[72] Allen Dulles, *"The Craft of Intelligence 55"*, University of Massachusetts Press (1963).
[73] Alan M. Dershowitz, *"Why Terrorism Works"*, ch.5, Yale University Press (2002).
[74] Adam Tomkins, *"Legislating Against Terror; The Anti-Terrorism, Crime and Security Act 2001"*, Public Law 205 (2002).

terrorists from abusing the asylum and immigration laws of the United Kingdom,[75] together with containing provisions on terrorist property and finance, weapons of mass destruction, security of pathogens and toxins, security of the nuclear industry, aviation security and police powers. In addition, the wide definition of terrorism, originally drafted within the *Terrorism Act 2000*, has been carried over. It is important to note that, prior to the introduction of the *ATCS*, and with reference to national security, there were no definitions of terms such as "security", "espionage", "subversion", and "sabotage". Furthermore with reference to the term "terrorism", this is a relatively new introduction to the field of overlapping threats to national security.

We can note that sections 21 through to 23 of the *ATCS* allow the Government to take action against foreign non-nationals whom the Secretary of State for the Home Department suspects of terrorist activity. According to *section 21(1)* of the *ATCS*, the Secretary of State may issue a certificate in respect of a an individual if he or she reasonably believes that the person's presence in the UK is a risk to national security and that the person is a terrorist. With reference to this, we must note that a terrorist is defined as:

A person who (a) is or has been concerned in the commission, preparation, or instigation of acts of international terrorism, (b) is a member of or belongs to an international terrorist group, or (c) has links with an international terrorist group (s.21(2)).[76]

Furthermore, under *section 23* of the *ATCS*, a suspected international terrorist may be detained despite the fact that his removal or departure from the United Kingdom is prevented by international law. It is important to note that prior to the enactment of this section, the UK only had three options for dealing with suspected international terrorists. Firstly to deport them to a safe country, secondly to prosecute them under existing UK law and thirdly to let them go free. With the new legislation, *section 23* provides the Government with a fourth option of detention, to prevent the suspected terrorist from taking part in any future activities that may be harmful to the UK. Furthermore, it is important to note that the detention of a non-national without the intention or authority to deport him would violate *Article 5(1)(f)* of the European Convention, due to the fact that the Convention only permits detention of non-nationals if deportation proceedings are in

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[75] *Rt.Hon David Blunkett* indicating that the Anti-Terrorist Bill has *"Proportionate, Targeted Measures"*, declaring that the purpose of the Bill is *to "prevent terrorists abusing immigration and asylum laws."* Taken from The Times (UK) (November 13, 2001).

[76] See http://www.homeoffice.gov.uk/oicd/antiterrorism/at.

progress.[77] With regard to this we can note the case *Chahal v United Kingdom*[78] where it was recognised that the requirements of *Article 5(1)(f)* are met when *"action is being taken with a view to deportation."* Furthermore the case identified that if deportation proceedings are not in progress or are not prosecuted with due diligence, the detention of a non-national will violate *Article 5(1)(f)*.

In reviewing the complexities surrounding the *ATCS*, we can refer to the problems associated with terrorist property and finance in addition to the statutory power to detain without trial. With specific relation to Northern Ireland, the Northern Ireland Affairs Committee commented in June 2002 that, *"[t]errorism is about gaining power through violence, and money is a means to that end."*[79] In addition, in July 2002, a Working Group of the Society for Advanced Legal Studies examined in some detail the enormous difficulties faced in tapping into the funds available to terrorists.[80] And finally, the Foreign Affairs Committee stated in December 2002, that an *"important aspect of multilateral co-operation against terrorism has focused on the elimination of sources of terrorist financing"*, adding that *"international progress to eliminate sources of funding to al-Qaeda and associated terrorist groups has been frustratingly slow."*[81] These issues undoubtedly underline the enormous commitment of resources required within this area alone.

2.4 Is the New Anti-Terrorism Legislation Within the UK Compatible With Respect for Fundamental Human Rights?

Another issue of great importance to identify lies in the European Convention on Human Rights. It is evident that this Convention obligates the member countries to *"secure the rights and freedoms"* of the Convention to everyone within their jurisdictions. In addition the Convention expresses the idea that promoting individual rights and freedoms above those of the state will best protect democracy. This view was expressed by *Brian Simpson*, in

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[77] Article 5(1)(f) reads: "No-one shall be deprived of his liberty save in...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."

[78] Chahal v United Kingdom, app.No.22414/93, 23 Eur.H.R.Rep.413, 465 (1997).

[79] *"The Financing of Terrorism in Northern Ireland"*, supra note 17.

[80] Society for Advanced Legal Studies, London, *"The Funding of Terror: The Legal Implications of the Financial War on Terror."* (July 2002) available at http://ials.sas.ac.uk/SALS/Wordfiles/ 2003%20Annual%20Report.doc.

[81] Foreign Affairs Committee, Second Report, 2002-03 Sess. *"Foreign Policy Aspects of the War Against Terrorism"*, H.C. 196 (December 19, 2002), available at http://www.publications.parlaiment.uk/pa/cm200203/cmselect/cmfaff/196/19602.htm.

'Human Rights and the End of the Empire.'[82] One can further elaborate on the importance of the European Convention on Human Rights by acknowledging *Elizabeth A. Faulkner* in *'The Right to Habeas Corpus'*[83]. Here she identified the Convention as *"the most advanced international system for protecting human rights in existence today."*

As discussed earlier, the most relevant article within the European Convention on Human Rights in dealing with the prevention of terrorism and potential terrorists is *Article 5(1)*, dealing with the Right to Liberty and Security. This provision protects against unwarranted state intrusions upon the liberty and security of individuals by prohibiting unjustified detentions. It states that, *"everyone has the right to liberty and security of person."*

The issue of detention without trial raises severe doubts, not least for those aware of detention without trial in both World Wars of the last century. For example, during the Second World War *"a very considerable number of people were detained by the British government without charge, or trial, or term set, on the broad ground that this was necessary for national security. Most were not British citizens, but technically enemy aliens...."*[84] Furthermore, according to *Brian Simpson*, the story of wartime detention *"illustrates a problem which faces liberal democracies in times of grave crisis, is it essential to their survival that they should temporarily cease to be liberal democracies until the threat is over?"*[85] We can argue a similar situation applies today within the scope of international terrorism, both within the UK and United States. In the UK, the issue relates to select individuals: non-British nationals who cannot, by virtue of Article 3 of the European Convention on Human Rights, be deported to places where they may face torture or inhumane or degrading treatment or punishment and yet are certified as suspected international terrorists.

This, however, raised concerns surrounding discrimination. Subsequently, nine people detained under the *ATCS* and the *Human Rights Act 1998 (Designated Derogation) Order 2001* successfully appealed to the Special Immigration Appeals Commission (SIAC) on grounds of discrimination, namely that the Act *"allows only suspected terrorists who are non-nationals to be detained when there are equally dangerous British nationals who are in exactly the same*

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[82] A.W.Brian Simpson; *"Human Rights and the End of the Empire: Britain and the Genesis of the European Convention"*, Oxford University Press (2001). Here it was concluded that of the two theories discussed in Europe during and following World War II to preserve peace and democracy, the Convention favoured the theory of individual rights over the alternative theory of economic and social justice.

[83] Elizabeth A.Faulkner; *"The Right to Habeas Corpus: Only in the Other Americas"*, 9 Am.U.J.Int'l L.& Pol'y 653, 675 (1994), discussing the well established judicial system to protect the rights guaranteed in the Human Rights Convention.

[84] Preface to A.W. Brian Simpson, supra note 82.

[85] *Ibid.*

position who cannot be detained."[86] Lord Woolf, the Lord Chief Justice, identified in a further appeal to the Court of Appeal from the SIAC, that the right not to be discriminated against *"is now enshrined in Article 14 of the European Convention, but long before the Human Rights Act came into force the common law recognised the importance of not discriminating."*[87] He added that the danger of unlawful discrimination *"is acute at times when national security is threatened."*[88] However, in a dissenting judgement on the SIAC ruling, Lord Goldsmith, the Attorney-General, indicated that the attacks on September 11, 2001, *"had changed forever the landscape of terrorism"* and he argued that the detention provisions in the 2001 ATCS represented *"a balance between the interests of the suspected individuals and the interests of the community as a whole to be protected from terrorism."*[89] As a result, in its judgement on 25 October 2002, the Court of Appeal largely agreed with Lord Goldsmith's views. Furthermore, Lord Woolf, on recognising the necessity of a collective approach to terrorism, spoke of an appropriate degree of deference to the actions of the Executive, which he regarded was proportionate to what is necessary. In addition, one of Lord Woolf's colleagues, Lord Justice Brooke, further acknowledged that, *"it has been a longstanding feature of international law that a state is entitled to treat non-nationals differently from nationals in time of war or other public emergency threatening its life as a nation."*[90]

From a European perspective, we must acknowledge that the European Court understands that certain problems, such as organised crime and terrorism, present particularly *"delicate issues"* for member states, requiring them to balance the interests of the public with the protection of individual rights. One can also add that certain member countries believe so strongly in the idea that individuals should be free from unwarranted state intrusions that a person has the right to compensation if a member state deprives him of his liberty and security in violation of *Article 5(5).*[91] From this, the right to compensation under *Article 5(5)* can be identified as a domestic remedy, and therefore domestic courts of the offending country must provide compensation for a violation of this provision. It must also be noted that *Article 5(5)* requires countries to make this compensation to victims, even if the Convention has not been incorporated into the domestic law of the country in question.

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[86] Andrew Norfolk et al., *"Suspects Win Hits Terror Crackdown"*, The Times (July 31 2002).
[87] A, X and Y v Secretary of State [2002] C.A. Civ 1502, para. 7. Within that paragraph, Lord Woolf cited Jackson J. in *Ry Express Agency v New York, 336 U.S. 106, 112-113 (1949).*
[88] *Ibid*, Para 9.
[89] *Ibid*, Para. 83 (Lord Goldsmith).
[90] *Ibid*, Para. 115 (Lord Brooke).
[91] Aticle 5(5) states: *"Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation."*

As discussed earlier in this chapter, the UK was subject to derogation from the *ECHR*. Although member countries consider the rights and freedoms detailed in the Convention to be fundamental to democracy, the Convention itself contains the public emergency exception, discussed earlier, stating that:

"...[I]n 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."[92]

It must, however, be noted, that while member states may not derogate from the entire Convention, *Article 15* allows member countries to derogate from the provisions of only *Article 5,* and the Right to Liberty and Security.[93] *Article 15* goes on to indicate that member countries must notify the Secretary General of the Council of Europe of its derogation from the Convention and it's reasoning[94]. Furthermore, under the Convention, and in particular *Article 34*, there is no restriction on whether an individual or a member state may challenge the derogation of a member state at the European Court of Human Rights.[95] Prior to this, individuals could not petition directly to the Court, but instead were only permitted to apply to the European Commission on Human Rights. Once the Commission had received the application, they would then decide whether to forward the petition to the Court itself. This process was widely criticised, creating a backlog of cases. As a result *Protocol 11* was incorporated into the Convention in 1998, replacing the Commission and the Court with a single Court. It is important to note that when petitioning, an applicant must first exhaust all reasonable domestic remedies before the Court will declare a matter admissible.[96] In other words, application to the European Court is the last resort. One also has to note the significance of *Article 32(1)* in this instance, which provides the Court with

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[92] Article 15(1) articulate the requirements that must be met for a member country to properly derogate from its responsibilities and obligations under the Convention.

[93] Article 15(2) identifies the specific articles of the Convention from which no derogation may be made. The case Ireland v United Kingdom, 2 Eur.H.R.Rep.25, 91 (1978) also establishes that because Article 5 is not expressly mentioned in Article 15(2), it is consequently subject "to the right of derogation reserved by the contracting states."

[94] Note Article 15(3) which states, *"Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."*

[95] Article 34 states: *"The Court may receive applications from any person...or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."*

[96] Article 35(1) states: *"the Court may only deal with a matter once all domestic remedies have been exhausted and that the petitioner must bring the matter to the Court's attention within six months of the final domestic decision."*

jurisdiction to decide if the challenged country made a proper derogation under *Article 15*.[97] This point was raised in the case *Lawless v Ireland*[98], where it was held that the Court makes the determination as to whether the condition for derogation under *Article 15* has been met. This definition was further developed and clarified in *the Greek Case*.[99] Reaffirming the basic elements of the Court's approach in *Lawless*, the Commission emphasised that the emergency must be actual or at least "imminent", a notion that is present in the *Mertis* judgement in French, but not in the English version.[100]

As stated by the European Commission in the *Greek case*, and by the Human Rights Committee in its *General Comment 29*, the state parties bear the burden of proof in establishing the existence of a "public emergency".[101] However, in assessing whether a "public emergency" exists, and what procedures are required to address it, states are granted a "margin of appreciation". This doctrine demonstrates the general approach of international organs to the complex task of balancing the sovereignty of Contacting Parties with their obligations under the Convention.[102] Furthermore, in the context of derogation in times of "public emergency threatening the life of the nation", the margin of appreciation represents the discretion left to a state in ascertaining the necessity and scope of measures of derogation from protected rights in the circumstances prevailing within its jurisdiction.

The European Court of Human Rights decided that it plays a limited role in the review of a member country's declaration of a public emergency under *Article 15*. This was raised in the case *Ireland v UK*[103] where it was held that the Courts power of review is limited when a member country makes a derogation under *Article 15* because of public emergency. Consequently the Court grants Member States a Margin of Appreciation due to the fact that it recognises that each State is primarily responsible for its own survival and stability. This issue was raised when the European Court held that:

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[97] Article 32(1) states: *"The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto."*
[98] Lawless v Ireland, 1 Eur.H.R.Rep.15 (1961).
[99] Greek Case (1969) 12 Yearbook ECHR 1.
[100] *Ibid*, para 153 reads, *"une situation de crise ou de danger public exceptionnelle et imminente…"*.
[101] HRC, General Comment 29 (2001) paras 4 and 5.
[102] See Ronald St. J. MacDonald, *"The Margin of Appreciation"*, Matscher & Petzold (1993), where MacDonald observes that it is the doctrine of margin of appreciation which allows the Court to escape the dilemma of "how to remain true to its responsibility to develop a reasonably comprehensive set of review principles appropriate for application across the entire Convention, while at the same time recognising the diversity of political, economic, cultural and social situations in the societies of the Contracting Parties".
[103] Ireland v United Kingdom, 2 Eur.H.R.Rep.91 (1990).

"...[I]t falls in the first place to each Contracting State, with its responsibility for the "life of [its] nation", to determine whether that life is threatened by a "public emergency" and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the movement, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this manner Article 15(1) leaves the authorities a wide margin of appreciation."[104]

However, the Court also stressed that states do not enjoy an unlimited margin of appreciation. As a result, the discretion of the State is "accompanied by a European supervision".[105] The European Court usually seems prepared to grant a much wider margin of appreciation than the monitoring organ of the ICCPR, the Human Rights Committee. With this in mind, the Committee found in *Landinelli Silva v Uruguay* that *"the State Party is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes Article 4(1)"* and that it is the Committee's duty *"to see to it that States Parties live up to their commitments under the Covenant."*[106]

It must also be noted that a Member State must determine the severity of a threat to the nation and its people and the scope of the measures necessary to control the situation. The Court in *UK v Ireland* came to the conclusion that because the individual Governmental authorities have continuous and direct contact with the daily conditions of the state, those authorities are in the best position to make such a determination. One can note that member nations do not however enjoy absolute deference from the Court regarding the scope of derogation from their obligations under the Convention. The Court's job is to rule on the lawfulness, not the wisdom, of the derogation and the measures taken to combat the emergency. Therefore it may be said that the Court maintains the limited role of ensuring that Member States do not abuse the right to derogate by acting in a manner that the situation does not strictly require. This point was yet again clarified in the case *UK v Ireland*, where it was held that the Court has a supervisory role in derogation decisions made by member countries. We can refer to a contrasting view on this issue by acknowledging *Oren Gross* in *"Once More Unto the Breach: The Systematic Failure of Applying the European Convention on Human Rights to Entrenched*

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[104] Supra note 103, Series A No 35 at 78-79.
[105] *Ibid.*
[106] Landinelli Silva v Uruguay (1981) HRC Comm No 34/1978 para 8.3.

Emergencies."[107] Here *Gross* argues that the Court of Human Rights gives almost complete deference to member countries, rarely disagreeing with a country's decision to declare a public emergency or with measures taken in response to the emergency.

To expand on the issue of derogation under *Article 15* in response to today's current threat of terrorism, one has to acknowledge the significance and importance of the case, *Lawless v Ireland.* Here the Court heard the first challenge by an individual to a country's derogation under *Article 15* of the Convention. The background of the case focused on acts of violence committed by the Irish Republican Army (IRA) beginning in 1921 where the Republic of Ireland's legislature conferred special powers on the Irish Government with the *Offences Against the State Act 1939* (hereinafter "Offences Act"). The Offences Act allowed the Irish Minister of State to detain individuals without a trial if the Irish Government declared such powers necessary to secure public peace and order. Due to the fact that a trial did not accompany this detention, Ireland derogated from the Human Rights Convention in 1957 when it invoked the special powers under the Offences Act. Consequently the Irish Minister of Justice detained *Lawless* under the Offences Act. After an unsuccessful challenge through the Irish Court system, *Lawless* challenged both Ireland's detention law and its derogation before the European Court of Human Rights. However the Court declared that it had the authority to *"determine whether the conditions laid down in Article 15(1) for the exercise of the exceptional right of derogation had been fulfilled in the present case".* Due to the fact that *Article 15(1)* has two parts, the Court first considered *"the existence of a public emergency threatening the life of the nation"* and then examined the *"measures taken [by Ireland] in derogation from obligations under the Convention."* The Court in *Lawless* relied on several key facts in reaching its conclusion that Ireland faced a public emergency,[108] thus satisfying the first element of *Article 15.*

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[107] Oren Gross, *"Once More Unto the Breach: The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies"*; 23 Yale J.Int'l Law 437, 460 (2002).

[108] Amongst those reasons the Court held: 1) The secret nature of the IRA's unconstitutional behaviour and violence. 2) The operations of the IRA outside of Ireland potentially jeopardising relations with other countries. 3) The steady increase in the levels of violence used by the IRA. 4) The failed attempts used to control the situation using ordinary legislation and criminal procedure.

2.5 THE SIGNIFICANCE OF "LAWLESS" TO THE CURRENT THREAT OF TERRORISM IN THE U.K.

In applying *Lawless* to the current situation regarding terrorism within the United Kingdom, the Court of Human Rights should find that the United Kingdom has a reasonably justifiable belief that it faces *"a public emergency threatening the life of the nation"*, consequently satisfying the first element of *Article 15(1)*. The British Government enacted extraordinary means to deal with the threat of terrorism due to an increased sense that the United Kingdom is a terrorist target, in part due to its close relationship with the United States.[109] It may be noted however, that although the focus of the campaign against terrorism since 9/11 has been in Afghanistan, intelligence sources suggest that terrorist cells are operating and co-ordinating activities throughout Europe, including the United Kingdom.[110] Therefore it may be argued, that the British Government correctly believes that a public emergency exists, requiring the use of extraordinary measures to detain suspected international terrorists, in order to protect the nation from terrorism and repeats of the atrocities of 9/11 in the United States.

We can, however, argue as to whether the British measures of derogating are *"strictly required by the exigencies of the situation"*, and whether the powers contained within sections 21-23 of the *ATCS* are necessary. In the case *Aksoy v Turkey*[111], the European Court of Human Rights held that that not even the undoubted *"public emergency"* in southeast Turkey justified the detention. Here, the claimant was detained for 14 days, without adequate judicial control, on suspicion of an involvement in acts of terrorism. In relating the *Aksoy* decision to the UK's position, it is difficult to establish how *indefinite* detention of suspected international terrorists can be *"strictly required"*, even in situations that amount to an Article 15 emergency. Furthermore, we can note that the UK government has not, as yet, established why actions taken under the existing *ATCS*, in

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[109] *Groom* commenting that *"the broad anti-terrorism proposals in the UK and US following the attacks on 9/11, result from their perceived vulnerability to further attacks."* Yale J International Law, 234, 265 (2002);
Prime Minister *Tony Blair's* speech post 9/11 stating, *"the attack on America was an attack on the world and that the United Kingdom would work with the US to defeat international terrorism."* The Telegraph, 21 September, 2001
Thomas K.Grose & Kenneth T.Walsh, *"A Statesman, Steadfast and Strong"*, US News & World Rep. (Oct 12 2001), discussing President Bush's views on Tony Blair being *"all you want from an ally."*
Jeffrey Ian Ross, *"The Nature of Contemporary International Terrorism, In Democratic Responses to International Terrorism"*, American Journal of International Law, December (2001), discussing that the citizens of the United Kingdom along with France, Israel, Turkey and the US account for approximately half of the targets of terrorists.

[110] Rod Nordland, *"al-Qaeda Runs for the Hills"*; Newsweek (December 17, 2001). Here it was discussed that most of the planning for recent major terrorist attacks, such as the bombings on 9/11, has largely taken place outside of Afghanistan.

[111] Aksoy v Turkey 22 EHRR 553 (1996).

conformity with international human rights obligations, are not sufficient to meet the terrorist threat. For example *section 41(1)* of the *Terrorism Act 2000* states *"a constable may arrest without warrant a person whom he reasonably suspects to be a terrorist."*

It is interesting to note that the United Kingdom believes that it is not only a possible target of international terrorism, but also an organisational base for terrorist activity. One can acknowledge the report by the *International Institute for Strategic Studies*, which recognises three possible reasons for the United Kingdom's popularity with terrorist suspects. First, it is evident that a large immigrant community exists in the UK, allowing non-nationals to blend into the community relatively easily. This theory is supported by *John Cloud* in *'The Plot Comes Into Focus'*[112], who believes instructions from a terrorism operations manual produced by *Osama bin Laden's* organization, recommend integrating into society by adopting the style of dress and manner of the host country. The second reason that the UK attracts terrorist suspects lies in the population's concern for the protection of civil liberties, which makes it difficult for law enforcement agencies to investigate and identify suspected activities quickly. It can be said that a debate exists both in the public forum and in Parliament surrounding the passage of the Anti-Terrorism Act providing ample proof of the overwhelming resistance to any change in, or limitations on, civil liberties in the UK.[113] The third and final reason surrounding the UK's popularity with terrorist suspects concerns the recruiting activities of several mosques. Evidence of those recruiting activities comes from admissions by suspected terrorists that experiences at certain London mosques radicalised them. The figurehead of the Finsbury Park mosque in London, *"Iman"*, to which several suspects have connections, openly supports Islamic extremism. Investigation by the authorities have discovered that some mosques, including

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[112] John Cloud, *"The Plot Comes Into Focus; A Low-Profile, Even Meagre Lifestyle Allowed 19 Hijackers to Blend Into the American Tapestry"*; Time Magazine (October 1, 2001).

[113] Peter F.Carter-Ruck, *"Anti-Terrorism Bill will erode Civil Liberties"*; Daily Telegraph (November 21, 2001); stating concerns over the injustices that may arise from the detention powers of the Anti-Terrorism Act, leading toward the erosion of a trial by jury.

Greg Hurst, *"Blunkett Limits Detention Power"*; The Times (November 22, 2001); discussing concessions required during the committee stage debate on the Anti-Terrorism Act due to the cross-party criticism of the detention powers.

R.J.Overy, *"Deep Concern Over Anti-Terrorism Bill"*; The Times (November 28, 2001); indicating the alarm felt because of the detention provisions in the Anti-Terrorism Act and the eroding impact it will have on civil liberties.

T.R.Reid, *"Britain Proposes Anti-Terrorism Measures"*; Washington Post (November 14, 2001); where he noted the strong criticism of the civil libertarians to the proposed Anti-Terrorism measures.

John Wadham, Director of "Liberty", *"Innocents Are Going to be Locked Up: The Terror Bill is not Needed and will Lead to Human Rights Abuses"*; The Guardian (November 21, 2001); where it was perceived that asserting the Anti-Terrorism Act will follow in the footsteps of other anti-terrorism laws and lead to human rights abuses, contribute to miscarriages of justice, and cause the detention of innocent people.

the Finsbury Park mosque, are distributing recruitment videos produced by *Bin Laden* backed organisations.[114]

It can be said that terrorism has become increasingly global and sophisticated, post 9/11. As a result Governments, such as the UK, are required to recognise that a public emergency exists, subject to *Article 15(1)* of the European Convention on Human Rights.[115] The ease with which people can communicate makes the globalisation of international terrorism a significant threat to the security of a nation, enabling terrorists to plan operations in one location to be carried out in another, potentially straining international relations. This information, combined with suspected international terrorists attraction to the UK, the confirmation of terrorism recruitment activities in the UK, and Britain's aversion to deporting foreigners who could face execution or torture in their home countries, gives the UK ample justification to conclude that it has become a popular location for terrorists to locate their operations. This therefore creates a "public emergency" that *"affects the whole population and constitutes a threat to the organised life of the community of which the state is composed,"* subject to the judgment of *Lawless.*[116]

The opposing view would argue that under the European Convention on Human Rights and the *Lawless* judgement, the current situation in the UK fails to qualify as a public emergency because of the differences in circumstances.[117] In *Lawless*, the terrorism actually occurred in the country declaring the public emergency. Parliament enacted the *ATCS*, however, in response to an attack that occurred in the United States, not in the UK. The UK, however, believes the attack on the United States was essentially an attack on the UK, because of its connections to the United States, which makes it a potential target for future international terrorists. To support this, it is important to recall that terrorism not only damages the location where the attack occurs, but also the areas in which the terrorists

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[114] J. Burke; *'Bin Laden and Terrorism'*; The Telegraph (April 2002); explaining that recruitment videos, labelled by security sources as "pornographic catalogues of violence" are sold to raise funds for the "Islamic Cause" and recruit new volunteers.

[115] Emanuel Gross, *'Legal aspects of Tackling Terrorism: The Balance Between the Right of Democracy to Defend Itself and the Protection of Human Rights'*; 6 UCLA Journal of International Law and Foreign Affairs (November, 2001) 89, 97, where it was discussed that terrorism is now global, operating within a network that exchanges intelligence, tactics, weapons, and training information and assists with funding.

[116] Lawless, 1 Eur.H.R.Rep, where public emergency was defined under Article 15(1) of the European Convention on Human Rights.

[117] S. Gibb, *'Lawless and Derogation under Article 15 of the European Convention on Human Rights'*, HRLR (April 2002); criticising claims of civil liberties groups that a public emergency does not exist in the United Kingdom, therefore the derogation is invalid and the detention of suspected international terrorists violates the Human Rights Convention. Furthermore the differences between the previous uses of anti-terrorism legislation to address terrorism directly attacking the United Kingdom and the current legislation that addresses the threat of global terrorism.

plan and organize the attacks.[118] The UK continues to find evidence that terrorist planning and recruiting are taking place inside its borders. As the judgement in *Lawless* stated, terrorist activities within a country's borders that jeopardise relations with other countries, helps support the finding that a public emergency exists. The UK also has reason to suspect that terrorist organisational activities taking place within its borders will strain and harm relations with neighbouring countries and other allies, based on the criticism that Britain has become a terrorist haven. Even though the attacks on September 11, 2001, occurred in the United States, the realities of international terrorism have created a public emergency in the UK that probably meet the standards established in *Lawless*, and within *Article 15(1)* of the European Convention on Human Rights.

A major part of the debate in Parliament concerning the *ATCS* was that the detention of suspected international terrorists must remain a temporary measure. The debate resulted in a *"sunset"* clause in *section 29*, causing the detention powers to expire on November 10, 2006.[119] While the expiration date sets an important limitation on the extraordinary powers to detain suspected international terrorists, Parliament can renew the detention powers through further legislation. It is important to note that allowing the detention powers to expire when the emergency situation ends is necessary not only for the protection of the right of due process, but also for maintaining the validity of the derogation under *Article 15* of the Convention.[120] In addition to a long history of using temporary emergency powers, the UK has also continually renewed the temporary Acts, ignoring the limitations on derogations under *Article 15(1)*.[121]

Pressure from several sources will help to ensure that the UK's derogation from the Convention and the extraordinary powers of detention remain temporary. Although the majority of the public support the *ATCS* and condone the acts of terrorism committed on 9/11, the public has voiced its concern for the protection of basic civil liberties. Members of Parliament also expressed their concerns regarding the indefinite detention of

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[118] Judgement in *Lawless* identified: "the finding of a public emergency resulted from the secret nature of the terrorist organization, the international operations of the groups, and the inability to control the groups using traditional law enforcement." Supra note 116 at 110.

[119] Anti-Terrorism, Crime & Security Act 2001, stating that sections 21 through to 23 will expire on the date specified in section 29.

[120] Supra note 115, asserts two reasons why the UK should use criminal law. Firstly, the resulting appearance of normalcy demonstrates symbolically that the Government can overcome the problem using the ordinary legal system. Secondly, the ordinary criminal procedure carries a greater legitimacy than does the use of extraordinary powers.

[121] *Ibid* identifies that the emergency powers enacted to resolve Northern Ireland's terrorism problems were not temporary because they were continually renewed.

suspected international terrorists through the establishment of the expiration date in *section 29* of the *ATCS*, discussed earlier. Additional pressure from the international community, particularly the Council of Europe, may help decrease the UK's temptation to extend the temporary powers of the *ATCS* beyond its expiration date.

2.6 The Requirement of Maintaining Consistency and Non-Discrimination

It is important to note that in derogating, states must realise the obligations of consistency and non-discrimination. As discussed previously, the United Kingdom has derogated from *Article 5(1)* of the *ECHR* and also *Article 9(1)* of the *ICCPR*. However, as the UK's derogation measures additionally breach *Article 5(4)* of the *ECHR*, it can be argued that they lack the required consistency with other obligations under international law. In addition, it can be submitted that derogation measures do not fulfil the requirement of non-discrimination. With this in mind, sections 21-23 of the *ATCS* apply only to individuals subject to immigration control under the UK's *Immigration Act 1971*. They do not apply to British citizens, which can be argued is incompatible with the requirement of non-discrimination underlined within *Article 14* of the *ECHR* and *Article 4(1)* of the *ICCPR*. Furthermore, even though it is not overtly established within Article 4(1) of the ICCPR or Article 15(1) of the ECHR, it has long been the norm within international human rights law, that in the absence of war, disparate treatment on the grounds of national origin may be inconsistent with international non-discrimination provisions.[122]

However, it must be noted that not all disparities of mistreatment are considered discriminatory. In the case *Belgian Linguistics*, the European Court of Human Rights held that only those differences in treatment for which the state could not give a *"reasonable and objective"* justification are discriminatory.[123] Nevertheless, the burden of justification is considerably high if certain grounds of discrimination are relied upon. This ideology was subscribed to in *Gaygusuz v Austria*, where the court held that differences in treatment on grounds of nationality require substantial justification.[124] In associating these prerequisites to the current situation within the UK, it can be argued that the government needs to establish that treating British nationals differently from aliens is impartially and reasonably

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[122] Colin Warbrick, *"The Principles of the European Convention on Human Rights and the Response of States to Terrorism"*, 3 European Human Rights Law Review 287 at 313-314 (2002), where Warbrick observes that the list of prohibited grounds of discrimination is both a long one and an open one.
[123] Belgian Linguistics Case (No 2) (1968) 1 EHRR 252.
[124] Gaygusuz v Austria (1997) 23 EHRR 364 at 381.

justifiable. A distinction would be justified, therefore, if the terrorist threat to the UK exclusively originates from the alien population of the UK. However, at present, the threat is not so confined, as hundreds of British nationals have attended *al-Qaeda* training camps in Afghanistan,[125] including would-be shoe bomber, Richard Reid, who holds British citizenship.[126] As a result, in these situations, it can be argued as to how the United Kingdom's derogation is other than discriminatory on the grounds of national origin.

In sum, it can be argued, that the United Kingdom's derogation measures lack any justifiable proportionality, subsequently not fulfilling the prerequisites of consistency and non-discrimination.

2.7 Relevance of Article 1 of the European Convention on Human Rights (The Right to Property) in Relation to the Current Threat of Terrorism

One of the most prominent demands made of States by the Security Council in its reaction to 9/11, was to require that they take effective action against terrorist sources of finance. In particular the freezing and confiscation of the assets of terrorists and their supporters. As a result the Security Council introduced *Resolution 1383* in 2001 in order to identify this problem. It can be argued however that subject to the judgement in *AGOSI v United Kingdom* [127] there is a wide margin of appreciation to States in regulating the enjoyment of possessions in their national law, including the power to confiscate property. In each case where a State does act to confiscate property, it can be argued that this limits the civil rights of the property owner. The determination of these rights will therefore be subject to a fair hearing under *Article 6(1)* of the European Convention on Human Rights. There are, however, two principal issues, which arise. First, what is the condition for the freezing or confiscation of the property, and secondly, how is the existence of that condition to be demonstrated? These issues were identified in the recent case *Phillips v United Kingdom* [128], where it was held that a criminal conviction is a necessary condition for proceeding to confiscate property.

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[125] Peter Beaumont, *"Briton Held in US Camp as al-Qaeda Prisoner"*, The Observer (UK) (13 January 2002).
[126] Gary Younge & Duncan Campbell, *"Shoe-bomber Sentenced to Life in Prison"*, The Guardian (UK) (31 January 2003).
[127] AGOSI v United Kingdom (A/108) (1986) para.54.
[128] Phillips v United Kingdom (5/7/2001) paras 35, 53.

2.8 Overview of the United Kingdom's Position on the Global Threat of Terrorism

In response to the atrocities of 9/11, the UK enacted extraordinary legislation aimed at preventing such action from occurring again. Although the *ATCS* deprives suspected international terrorists of civil liberties, the UK has concluded that suspected international terrorists are such a threat to the nation that extraordinary legislation is required. Responding to the report of the review of the *ATCS*, the British Home Secretary, David Blunkett, on 18 December 2003 explained that:

"The outrages committed on September 11 2001 meant that we faced a new and unprecedentable threat. The threat has been further underlined by terrorist attacks since then, notably in Bali, Singapore, Kenya, Saudi Arabia and, most recently, Istanbul." (This comment was made prior to the terrorist attacks in Madrid, Spain on March 11, 2004).

"It was against this background that the Anti-Terrorism, Crime and Security Act 2001 was brought into force in December 2001. At its heart, the Act ensures that there are effective powers in place to protect the public from international terrorism."

"My first duty as Home Secretary is to protect the citizens of the United Kingdom. I continue to believe that the Act is a key element in securing that."[129]

The European Convention on Human Rights allows member states to use extraordinary measures that would otherwise violate the Convention, during times of public emergency so member states can properly protect their citizens. Furthermore, the UK firmly believes that it faces a public emergency that threatens the life of the nation. While the European Court of Human Rights will likely side with the UK, declaring Britain's derogation valid, the UK must ensure that it does not permanently suspend civil liberties. The British public and the European Court of Human Rights may approve of the restriction of civil liberties as a short-term emergency response, but neither group wishes to allow terrorism to result in the permanent destruction of human rights. On the whole however, the *ATCS* seems to prioritise short-term counter-terrorism. Subsequently there is little attempt in the Act to balance competing needs of counter-terrorism and human rights, which is why the Act has been widely criticised, and why we can answer this thesis

[129] Home Office Press Release, *"Response to the Report of the Anti-Terrorism, Crime and Security Act 2001 Review"*, available at http://www.homeoffice.gov.uk/pageprint.asp?item_id=743.

title by concluding that the new ant-terrorism legislation of the UK is not compatible with respect for fundamental human rights.

CHAPTER III

3.1 LEGISLATION INTRODUCED BY THE UNITED STATES SINCE 9/11 TO COMBAT TERRORISM

After the atrocities of 9/11, a number of questions were asked within the United States: why the nation was unprepared and surprised by the attack? And, how a large number of people who participated in the suicide operation managed to move freely around the country and spend years planning and training for the operation without the intelligence services finding out? These issues raised the presumption that the immigration, intelligence and security authorities were insufficiently equipped to deal with a terrorist threat because of constitutional restrictions. Therefore it was believed that constitutional solutions had to be found in order to create a new balance between preserving the nations civil liberties and fortifying its (the US') security needs.

This view led to the enactment of the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act 2001*[130], (Patriot Act), which was designed to provide security and law enforcement agencies with tools to fight terrorism.

Prior to September 11 2001, the three principal pieces of anti-terrorism legislation in the United States were themselves responses to tragic terrorist attacks. The first two statutes followed the 1985 hijacking of the Mediterranean cruise ship, the *Achille Lauro*, by terrorists affiliated with the Palestine Liberation Organisation (PLO), resulting in the killing of Leon Klinghoffer, a disabled Jewish-American citizen.[131] Thereafter, Congress passed the *Omnibus Diplomatic Security and Anti-Terrorism Act 1986*[132], extending federal court jurisdiction over those individuals committing terrorist acts against American citizens anywhere in the world. The second Act, the *Anti-Terrorism Act 1987*[133], took harsher measures, however specifically targeted the PLO. It is important to note, an significant development in American anti-terrorism law occurred through an inconspicuous provision

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[130] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001.

[131] Summary of the *Achille Lauro* affair can be found at Philip B. Heymann, *"Terrorism and America: A Commonsense Strategy for a Democratic Society"*, Cambridge, Mass.: MIT Press (1998) at 20-23.

[132] Pub. L. No. 99-399, 100 Stat. 853.

[133] Pub. L. No. 100-204, 101 Stat. 1406. This statue barred fundraising for the PLO organisation in the United States, aimed to shut down their offices, and criminalised activities taken in support of the organisation. Pursuant to this Act, the US government attempted to close the PLO permanent observer mission at the United Nations, New York, but a federal district court kept it open by finding no clear congressional intent to contravene the United Nations Headquarters Agreement. These issues were held within the case United States v Palestine Liberation Organisation, 695 F.Supp. 1456 (S.D.N.Y. 1988).

of the *Federal Courts Administration Act 1992*[134], defining international terrorism as *"acts intended to intimidate a civilian population or coerce a government"*.[135] Furthermore, the bombings of the World Trade Center in 1993, by Islamic militants, together with the Oklahoma City Federal Building in 1995, by domestic right-wing extremists, led to the enactment of the *Anti-Terrorism and Effective Death Penalty Act 1996*[136](AEPDA). Similar to previous legislation, the Act made incremental changes as oppose to affecting a comprehensive re-synthesis of anti-terrorism law.

Although the two Acts, The Patriot Act and the *AEPDA*, are similar, the Patriot Act is more far reaching in terms of powers granted to the enforcement, security and intelligence agencies, and the extent to which the instruments violate human rights. The Patriot Act also empowered and equipped authorities with the legal means to better observe the conduct of individuals through sophisticated surveillance devices. This included monitoring, tracking, searching a suspect's computer databases and eavesdropping on communications with other computer users. The Patriot Act also equipped authorities with special powers to search and investigate aliens seeking to enter the United States, together with special powers to arrest individuals suspected of being terrorists. It is fair to say that the Patriot Act does limit the principle of judicial supervision almost to the point of elimination, so that security agencies and law enforcement can perform expanded functions. These expanded functions are intended to be pursued as quickly as possible, without being delayed by court proceedings. This is why, immediately upon the enactment of the legislation, the American Civil Liberties Union (ACLU) felt it was necessary to explain to the nation the exact effect of the Patriot Act:

"At first glance...the Act signed into Law by President Bush appears to only mean to give law enforcement officials the necessary tools to find terrorists and prevent future attacks. But in reality, the USA Patriot Act continues an alarming trend known as court-stripping – removing authority from the judiciary, in times of crisis...As it has done in times of past tragedy, the Government responded by passing legislation that reduces or eliminates the process of judicial review and erodes our civil liberties."[137]

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[134] Pub. L. No. 102-572, 106 Stat. 4506 at 4521.
[135] s. 1003(a)(3), codified at 18 U.S.C. 2331(1)(A), as amended by the USA Patriot Act, Pub L. No. 107-56, 115 Stat. 272 (2001).
[136] Pub. L. No. 104-132, 110 Stat. 1214 (1997).
[137] American Civil Liberties Union (ACLU) press release at: http:/www.aclu.org/features/f110101b.html (November 11, 2001).

Critics understand that creating a balance between national security, democracy and human rights is a difficult task. It can be argued that the US Congress took action without coordinating a suitable debate of identifying the Patriot Act's compatibility with human rights, and without providing the American public with an opportunity of voicing its concerns, despite the impact of the Patriot Act on the everyday lives of its citizens. This was a somewhat similar stance to that adopted by the UK Government on the passing of the *ATCS*, discussed in Chapter Two. Here, no opportunity was given to the general public of the UK to voice their opinions on the proposed introduction of the new legislation. The Patriot Act has also further been criticised amongst US citizens, as it is believed that overwhelming weight has been given to security needs, subsequently ignoring important human rights issues.[138] The US Government responded by stating that the goals of the Patriot Act had two dimensions. First, the Act increased internal oversight procedures by creating a new balance between human rights and security needs. And secondly, the Act seeks to combat terrorism abroad by armed means and other methods.

In order to further understand how the Patriot Act is to be used to combat terrorism, it is important to identify the most relevant sections which have been amended in order to confront the threat. One can therefore begin by looking at *Section 411*. This section defines terrorist activity *"to encompass any crime that involves the use of a weapon or dangerous device other than for mere personal monetary gain"*. The section also provides the Government with the necessary tools to bar entry into the US by non-citizens whom the Secretary of State believes makes *"public endorsement of acts of terrorist activity"* and *"who use their position of prominence within any country to endorse or espouse terrorist activity"*. It is also apparent that the section vastly expands the class of immigrants that can be removed on terrorism grounds, just as communist immigrants were removed from the US in the 1950's.[139] Also amended by *section 411* of the Act is the term *"engage in terrorist activity."* Now an individual may be labelled a terrorist even if he/she *"provides material"* or *"supports"* a terrorist organisation. It is also important to note that *section 412* of the Act gives the Attorney General the authority to detain indefinitely an alien who has been charged with a criminal or immigration violation, when he determines that the individual is engaged in activities that threaten national security. An analysis of both *sections 411 and 412*, leads to the

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[138] Daily Record, (November 19, 2001) states: *"Our nation is rightfully in both shock and mourning from the events of September 11, 2001. But the principles of rigorous debate and thoughtful legislative process should not be forsaken in this time of crisis. When fundamental individual liberties are at stake, our process of public discourse is all the more important. After all this is what democracy is all about."*

[139] Leading case on immigrants being removed from the USA: Harisiades v Shaughnessy, 342 U.S. 580 (1952).

conclusion that strong evidence exists in supporting the US stance on eliminating terrorism.

The next section of the Act, that is important to acknowledge, is *section 218*. This section permits the use of wiretaps. The original legislation covering the use of wiretaps was found within the *Foreign Intelligence Surveillance Act 1978* (FISA), but *section 218* of the Patriot Act enables wire-traps to be used even if the primary purpose of the surveillance is criminal investigation. One can argue that this could lead to law enforcement domestic spying on Government enemies under the guise of combating terrorism. However even prior to the Act, there is evidence that police forces were using anti-terrorism to justify spying on purely lawful domestic legal and political groups.[140] It can be argued though, that what *section 218* and other provisions of the Act do is, *"encourage a closer working relationship between criminal and intelligence investigators than has previously been the case."* [141] In doing so, the Act muddles the line between foreign intelligence gathering and domestic law enforcement that led so pervasively to abuses during the Cold War. Not only does *section 218* of the Act permit warrantless wiretaps where foreign intelligence gathering is not the primary objective of surveillance, but it also allows for increased sharing of information between criminal and intelligence operations. In response to criticisms on the Government's new direction on surveillance, it is important to acknowledge the views of Assistant Attorney General Daniel J. Bryant who stated:

"As Commander-in-Chief, the President must be able to use whatever means necessary to prevent attacks upon the United States; This power, by implication, includes the authority to collects information necessary to its effective exercise...The Government's interest has changed from merely conducting foreign intelligence surveillance to counter intelligence operations by other nations, to one of preventing terrorist attacks against American citizens and property within the continental United States itself. The courts have observed that even the use of deadly force is reasonable under the Fourth Amendment if used in self defence or to protect others...Here, for Forth Amendment purposes, the right to self defence is not that of an individual, but that of the nation and its citizens...If the Government's heightened interest in self defence justifies the use of deadly force, then it certainly would also justify warrantless searches."[142]

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[140] *"Denver Police Files Raise Rights Concerns"*; New York Times (March 14, 2002).
[141] James Dempsey & David Cole, *"Terrorism & The Constitution; Sacrificing Civil Liberties in the Name of National Security"*, American Journal of International Law (2002).
[142] Full speech available together with President George W. Bush's Address to a Joint Session of Congress to the American people available at: http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html.

Therefore, as long as the war on terrorism continues, the Assistant Attorney General's argument would justify warrantless searches.

Finally, the Act creates a number of new, often vaguely defined crimes. One of the most dangerous to domestic dissidents is the new crime of "domestic terrorism". *Section 802* defines domestic terrorism as *"acts dangerous to human life that are a violation of criminal laws"*, if they *"appear to be intended...to influence the policy of a Government by intimidation or coercion"* and if they *"occur primarily within the territorial jurisdiction of the United States."* Theoretically, under this definition, it can be argued that any life-threatening demonstration against terrorism could be subject to prosecution. This is due to the vagueness of the definition itself and consistent with the arguments raised in Chapter One of this thesis regarding the ambiguity surrounding the characterization of terrorism.

Another provision of the Act makes it a crime for a person to fail to notify the FBI if he or she has *"reasonable grounds to believe"* [143] that someone is about to commit a terrorist offence. This has also been widely criticised, as the definition of terrorism is so vague that it could result in the prosecution of innocent Americans if they have a connection to a person who later turns out to be a terrorist.

It is also important to note that Congress incorporated a "sunset clause" within the Patriot Act, resulting in the expiration of certain provisions on December 31, 2005. As was established in Chapter Two of this thesis, this is a similar policy to that adopted by the United Kingdom, when the *ATCS* was passed with the inclusion of a "sunset clause". It must be noted, however, that most of the Patriot Act, including the provisions involving immigrants, new crimes and certain areas of surveillance powers, are not included in the clause. It is also unclear as to how Congress will review several of these key provisions, as some of them are implemented by a secret court. Here there are no reporting requirements to Congress, and also in certain cases, no reporting requirements to a judge. Further to the point, if by December 2005 the US is still engaged in a war on terrorism, the pressure on Congress will be immense to continue these provisions to the future. One can relate to the metaphor used by Justice Jackson, where he said:

"...the question will be whether the sunset will devolve into a hazy twilight zone, where executive emergency powers are believed needed to protect against the harkening forces of darkness."

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[143] USA Patriot Act, s412 (3)(b).

3.2 UNDERSTANDING THE HUMAN RIGHTS SYSTEM IN THE UNITED STATES

As discussed in Chapter Two, the European Convention on Human Rights binds the United Kingdom. At this stage therefore, it is important to understand the instruments by which the United States is bound when dealing with human rights issues. The Inter-American system is considerably different from other regional systems, as its origins lie in two distinct but unrelated instruments. First, there is the Organisation of American States (hereinafter "O.A.S.") Charter system of human rights, which relies upon the O.A.S. Charter and the *American Declaration of the Rights and Duties of Man.* Secondly, human rights protection is provided by the *American Convention on Human Rights* to those members of the O.A.S., which have become parties to the Convention. The two systems operate through a unified body, known as the Inter-American Commission on Human Rights. This Commission is vested with authority to receive complaints from individuals and groups alleging violations of human rights contained within the American Declaration or the American Convention on Human Rights.

With respect to this thesis, it is also important to identify the most fundamentally central Covenant governing Human Rights in the US, that being the *Universal Declaration on Human Rights 1948* (UDHR). While not a treaty, the UDHR provided the basis for the two primary international human rights treaties adopted by the US: the *International Covenant on Civil and Political Rights 1966* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights 1966* (ICESCR). As treaties, these two documents bind party States.[144] The documents are based on the principle that Governments must answer at the international level for the way they treat people, and that all governments must be held to the same international standards. Both instruments recognise the indivisibility of human rights and are identical in composition. Their Preambles state that the ideal of free human beings enjoying civil and political freedom, as well as freedom from fear and want, can only be achieved if conditions are created so that everyone may enjoy civil, political, economic, social and cultural rights.

Although the United States played an active role in the drafting of these two treaties, it was not until 1992 that it joined the other 127 nations in ratifying and becoming party to the *ICCPR.* Although President Carter signed the treaty and sent it to the Senate for its advice and consent to ratification in 1977, the United States has yet to endorse the

[144] Vienna Convention on the Law of Treaties opened for signature May 23, 1969, art. 46, 1155 U.N.T.S. 331: *"Every international agreement in force is binding upon the parties to it and must be performed by them in good faith."*

ICESCR. It is also important to note, with relevance to fundamental human rights aspect of this thesis, that the *ICCPR* recognises the right of every human being to life, liberty and security of person; to privacy; to freedom from torture and cruel, inhuman or degrading treatment or punishment; to immunity from arbitrary arrest; to freedom from slavery; to a fair trial; to recognition as a person before the law; to immunity from retroactive sentences; to freedom of thought, conscience and religion; to freedom of expression and opinion; to liberty of movement and peaceful assembly; and to freedom of association.

It can be argued that the *ICCPR* is the most ambitious human rights treaty to emerge from the mid-century human rights revolution. It was designed to give legal force to the brief human rights commitments of the *United Nations Charter 1945* and to the more elaborate but technically non-binding *UN General Assembly Declaration on Human Rights* adopted and proclaimed by *General Assembly Resolution 217 A (III)* of 10 December 1948.[145] The large majority of the *ICCPR's* rights are similar to those guaranteed by US domestic constitutional and statutory law, but there are certain rights that clearly go further than US Law. For example, the *ICCPR's* prohibitions on *"any propaganda for war"* and on *"any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence"*, in *Article 20*, are arguably inconsistent with First Amendment free speech rights. It is also important to note, that in addition to guaranteeing these substantive rights, the *ICCPR* sets up a Human Rights Committee. Parties to the *ICCPR* are required to submit reports to the HRC on measures taken to implement the *ICCPR* and on progress made in the enjoyment of those rights. The HRC also provides a forum for international scrutiny of nations' human rights practices. It is important to note however, the HRC does not have official judicial or enforcement authority in connection with State Party reports.

Furthermore in 1994, the United States completed the ratification process for two other United Nations Human Rights Treaties, these being the *International Convention on the Elimination of All Forms of Racial Discrimination 1966*, and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987*.

[145] Available at http://www.hrweb.org/legal/udhr.html.

3.3 Is the USA Patriot Act Compatible With Respect for Fundamental Human Rights?

In discussing whether US legislation on terrorism is compatible with respect for human rights, it is important to establish that human rights are not absolute, and it is possible to infringe them in order to preserve national security and the safety of the public. Furthermore, the security of the State, the nation and its citizens is an important public interest, which stands at the heart of basic values of a democratic state. Without guaranteeing the personal safety of each citizen in relation to ensuring national security, it is difficult to uphold fundamental human rights, which was initially discussed in Chapter One. There are circumstances however, in which a balance must be drawn between human rights and the public interest. In this balance the superior value of national security may surpass inferior values such as the liberty of the individual, his right to privacy or the right to a fair trial.

The phenomenon of terrorism is not new to the United States. However, its appearance on September 11, 2001 exposed the extent of the dangers inherent in it requiring a response from the United States in a variety of ways. As a result the US turned to legislation, which on one hand, distorted the previous balance between human rights and national security, and on the other hand, failed to establish any new balancing test between these conflicting interests. The question arises, therefore, as to whether this response is proper, in respect of human rights? One can argue that it is not, due to the fact that the US Constitution does not establish any guidelines for an examination of the violations of human rights. As discussed earlier, the US Congress responded to the terror attacks by enacting legislation in the form of the Patriot Act, which, as has been studied, infringed certain fundamental human rights. The contravention is apparent due to the fact that the Patriot Act denies almost all judicial review, neutralises the courts' function of enforcing the US Constitution and prevents citizens from properly defending their rights. This important point is asserted by the American Civil Liberties Union, stating:

'The Anti-Terrorism legislation recently signed into law by President Bush appears to only be a means to give law enforcement officials the necessary tools to find terrorists and prevent future attacks. But in reality, the USA Patriot Act continues an alarming trend known as court-stripping, removing authority from the judiciary at times of crisis...As it has done in times of past tragedy, the Government responded by passing legislation that reduces or eliminates the process of judicial review and erodes our civil liberties and human rights. In treating the judiciary as an inconvenient obstacle to executive action rather than an

essential instrument of accountability, the recently passed USA Patriot Act builds on the dubious precedent Congress set five years ago when it enacted a trilogy of laws that, in various ways, deprive federal courts of their traditional authority to enforce the Constitution of the United States."[146]

Therefore the answer to the question as to whether laws introduced by the US since 9/11 to combat terrorism are compatible with respect for human rights would be negative.

The requirement that the US Government take action against terrorism is a legitimate and proper demand. It is the duty of the Government to defend the citizens of the State, but this must be done in accordance with democratic values and not in opposition to them. There are some who believe that if action by the Government will infringe democratic values, it would be better to refrain from acting altogether. This view is taken by *Steven Kimelmen*, who stated in the *US National Law Journal* that, *"there is a real legitimate need* [sic] *for protection (of freedoms). ...Anti-terrorist actions could do more harm to our society than not taking action."* [147] Further to this point, it can be argued that actions should be taken by the Government, which minimise the violation of human rights, yet achieve the purpose of the legislation. There are individuals who argue that the anti-terrorist legislation, in the form of the Patriot Act, seeks to protect national security and the lives of American citizens whatever the price to democracy. Therefore the criticism continues that the Patriot Act is not compatible with respect for fundamental human rights.

When dealing with the dangers of terrorism, it is not known when the danger will pass. It cannot enable the US to imprison thousands of individuals, without there being a more than low-level certainty that these people threaten the security of the State. Nevertheless, how can the danger posed by terrorism influence the balance between national security and human rights from a constitutional point of view? With regard to this point, it is possible to adopt the constitutional test applied by the state of Israel, known as the limitation clause. The central element of this test is the principle of proportionality,[148] which US courts have used to defend constitutional rights. Further to the "limitation clause" test, it can be said that every measure supplied by US law to security authorities

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[146] American Civil Liberties Union: *"Terrorism and Civil Liberties: New Anti-Terrorism Law Continues Dangerous Trend of Stripping Federal Judiciary of Authority"*. (November 1, 2001); available at: http://www.aclu.org/news/2001/n110101a.html.

[147] Steven Kimelmen, *"Protecting Privilege"*; National Law Journal (US) (December 3, 2001).

[148] It can be noted that the principle of proportionality is the central principle in the balancing tests the US courts created in order to defend constitutional rights. For example in the case Matthews v Eldridge 424 U.S.319 (1976) the court created a balancing test which is relevant to the right to due process. In Israel however, the balancing test is relevant to all constitutional rights, but is created by the legislature. Moreover, the principle of proportionality is not exclusive. An important principle is whether a proper purpose exists.

that violate human rights must meet two conditions. First, the test must be in accordance with the democratic values of the United States. And secondly, it must be for a proper purpose. Satisfying these two categories will prevent an unnecessary violation of human rights.

At this stage it is important to look more closely at particular parts of the legislation that may conflict with international human rights. First it is important to discuss arbitrary detention and whether the legislation governing it is consistent with international human rights norms. The detention provisions of the Patriot Act authorize deprivations of personal liberty without sufficient procedural guarantees. Under *Article 9(1)* of the *ICCPR* no one shall be *"subjected to arbitrary arrest or detention"* or *"deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."* Therefore the "principle of legality" recognised in this provision claims to regulate both the substantive grounds upon which the detention or arrest is based and the procedure used to confirm the arrest or detention. Although the *ICCPR* does not establish a list of the grounds upon which detentions may be ordered, the exclusion of uncertainty does ensure that the law itself is not arbitrary. This issue was raised in the case *Womah Mukong v Cameroon*, where it was held that *"deprivation of liberty should not be manifestly unproportional, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case."*[149]

It must also be noted, as has been discussed earlier, that definitions of terrorism for which non-nationals can be detained or deported under the Patriot Act are broad and inconclusive. In particular those relating to "membership" or "material support" for any organisation designated as "terrorist organisations" by the Secretary of State. In these situations, the burden is placed on the detainee to prove that his or her assistance was not intended to further terrorism. One can argue that this is contrary to *Article 9(2)* of the *ICCPR*, stating *"anyone who is arrested shall be informed, at the time of arrest of the reasons for his arrest and shall be promptly informed of any charges against him."* These provisions indicate that anyone who is arrested must be informed of the general reasons for the arrest *"at the time of the arrest"*, while formal legal charges must be furnished *"promptly"*. There must also be sufficient information in the disclosures to permit the detainees to challenge the legality of his or her detention. This point was observed by the Human Rights Committee in the case

[149] Womah Mukong v Cameroon, Comm. No. 458/1991, UN Human Rts. Comm., 51st Sess., UN Doc CCPR/C/51/D/458/1991 (1994), para. 14.

of *Caldas v Uruguay.*[150] It is evident from discussing the issues surrounding detention under *Article 9(2)* of the *ICCPR* that there seems to be evidence of inconsistency between the Patriot Act and a real respect for fundamental human rights

The next provision of the *ICCPR* to look at in relation to the Patriot Act's inconsistency with it, is under *Article 9(3).* This Article states that all persons arrested or detained on a criminal charge *"shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."* [151] Although no test for "promptness" has emerged, the Human Rights Commission held that an individual must be brought before a judge or officer within "a few days". The *ICCPR* also permits the use the *Habeas Corpus* doctrine under *Article 9(4).* Under this provision, anyone deprived of liberty by arrest or detention has the right to *"take proceedings before a court in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."* Moreover, it can be noted that this provision implies that the detainee has the right to continuing review of the lawfulness of his or her detention. Clearly the seven-day detention period authorised by the Patriot Act departs from existing international standards, and therefore provides us with more evidence of the Patriot Act being inconsistent with respect for human rights.

Further to discussing the United States anti-terrorism legislation in relation to international human rights, it can be said that there are certain international treaties that allow for the suspension of some rights in public emergencies. *Article 4* of the *ICCPR* is similar in composition to that of *Article 15* of the European Convention on Human Rights, in relation to derogation in times of public emergency, which was discussed in Chapter Two of this thesis. *Article 4* of the *ICCPR* provides that, in situations threatening the life of the nation, a Government may issue a formal declaration suspending certain human rights guarantees.[152] The suspension of these rights are held on five conditions: First, a state of emergency that threatens the life of the nation must exist. Second, the exigencies of the situation "strictly require" such a suspension. Third, the suspension does not conflict with

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[150] Caldas v Uruguay, Comm No. 43/1979 U.N. Human Rts. Comm., 192 (1983).

[151] It must be noted that Article 9(3) of the ICCPR applies only to individuals arrested or detained on a criminal charge, while the other rights recognised in the Article apply to all persons deprived of their liberty. People awaiting trial on criminal charges should not, as a general rule, be held in custody. In accordance with the right to liberty and the presumption of innocence, persons charged with a criminal offence, in general, should not be detained before trial, which is indicated within Article 14(3).

[152] Article 4(1) of the ICCPR states that: *"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant 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 nations other international obligations. Fourth, the emergency measures are applied in a non-discriminatory fashion. And finally, the Government must notify the United Nations Secretary General immediately.[153] The only rights that are not subject to suspension in this situation are those specified within *Article 4* as protected from derogation.[154] It is fair to say that these exceptions significantly differ from those exceptions to derogation stated within *Article 15(2)* of the European Convention on Human Rights.[155] Although the rights to fair trial and personal liberty are derogable provisions under the *ICCPR*, the Human Rights Committee has suggested that restrictions of these rights are inappropriate even in times of emergency.[156] Furthermore the Committee, following the lead of the Inter-American Court of Human Rights, strongly suggested that the right to *habeas corpus* is non-derogable.[157]

It can be said that international human rights treaties authorise states to restrict or suspend some rights for an unidentified set of important public policy objectives. Therefore it can be argued that these "states of exception" strike a balance between universal human rights norms and national interests by specifying the circumstances in which derogations may be enacted lawfully. The question therefore arises as to how much should the concern for individual human rights about the Patriot Act affect the participation of the United States in international human rights regimes? Under international human rights law, the US may suspend various rights provided that such derogations are strictly required to meet the challenges posed by an emergency threatening the nation. International Human Rights Treaties must therefore effectively limit the ambitions of national Governments. At the same time, fundamental threats to democracy,

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[153] The Human Rights Committee has emphasised the importance of notification of derogations in states of emergency. This was acknowledged in the Annual Report of the Committee to the General Assembly, UN GAOR, 36th Session, Supp. No. 40, Annex VII, UN Doc A/36/40 (1981).

[154] The exceptions are as follows: Prohibiting derogation from: Article 6 (Right to Life), Article 7 (Prohibition on Torture), Article 8 (Prohibition on Slavery and Servitude), Article 11 (Imprisonment for Failure to Fulfil Contractual Obligation), Article 15 (Prohibition on Retrospective Criminal Offence), Article 16 (Protection and Guarantee of Legal Personality), and Article 18 (Freedom of Thought, Conscience and Religion).

[155] Exceptions to derogation within the ECHR are: Article 2 (Right to Life), Article 3 (Freedom from Torture), Article 4 (Freedom from Slavery) and Article 7 (Retrospective Effect of Penal Legislation).

[156] Human Rights Committee Annual Report to the UN General Assembly; UN Doc A/49/40 (1994):

"The Committee notes that the purpose of the possible draft optional protocol is to add Article 9, paragraphs 3 and 4, and Article 14 to the list of non-derogable provisions in Article 4, paragraph 2, of the Covenant. Based on its experience derived from the consideration of States Parties' reports submitted under Article 40 of the Covenant, the Committee wishes to point out that, with respect to Article 9, paragraphs 3 and 4, the issue of remedies available to individuals during states of emergency has often been discussed. The committee is satisfied that States Parties generally understand that the right to habeas corpus and amparo should not be limited in situations of emergency. Furthermore, the Committee is of the view that the remedies provided under Article 9, paragraphs 3 and 4, read in conjunction with Article 2 are inherent to the Covenant as a whole. Having this in mind, the Committee believes that there is a considerable risk that the proposed draft third optional protocol might implicitly invite States Parties to feel free to derogate from the provisions of Article 9 of the Covenant during states of emergency if they do not ratify the proposed optional protocol. Thus, the protocol might have the undesirable effect of diminishing the protection of detained persons during states of emergency."

[157] *Ibid.*

such as terrorism, might require a temporary suspension of certain rights to protect liberty in the long run.

In 1987, Justice William Brennan of the US Supreme Court gave a lecture in Jerusalem on human rights in times of security crises in the United States.[158] In his view, the history of the United States has shown that fundamental human rights have been repeatedly infringed upon in times of emergency, not by reason of calculated actions, but as a result of panic. Each time, after the crisis had passed, it became clear that there had been no justification for violating human rights. In his view, the history of the United States in this connection *"teaches that the predicted threat to national security, which leads to victimisation of human rights in times of crises, is exaggerated."* With the examples raised in this chapter, there is substantial evidence to argue that the Patriot Act will lead to further infringements of human rights as a result of a paranoid fear of terrorism. In contrast, it has been demonstrated that Israel, which is subject to persistent terrorist threats to its security, has not let paranoia result in security interests being given preference over human rights. It could have been argued in the past that a comparison between the United States and the United Kingdom on one hand and Israel on the other was unfair, *"because the security threat to Israel is a permanent threat, meaning that Israel must be cautious in relation to human rights more than other nations."*[159]

Today, however, international terrorism has placed the world under a permanent threat. The powers within the Patriot Act are not limited to times of emergency. The Act is active and developing, in the sense that it has immediate and future effect in the light of the reaction to terrorism as a permanent threat. This is in contrast to terrorism being thought of as a temporary or passing threat, which requires the use of powers that are limited in time and confined to emergencies.

It can be argued, in conclusion, that the terrorist attacks on the US on September 11 could have been avoided had law enforcement, security and investigative agencies possessed the necessary tools to fight terrorist attacks. However, the outcome of the legislation gives the impression that at the time of enacting the Patriot Act, the US Government did not ask itself the following questions: Firstly, How did the preparation for

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[158] William Brennan, *"The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises"*, National Security and Free Speech, Kluwer Press (1989).
[159] I.Zamir, *"Human Rights and National Security"*, 19 The United Synagogue of Conservative Judaism, Parashat 70 17, 23 (1989).

the attacks on September 11 evade our intelligence services? Secondly, what powers do law enforcement agencies now have? And thirdly, how can these existing powers be used more effectively to combat terrorism? Had Congress asked itself these questions, it can be argued that it would have reached a different conclusion to that attained in the Patriot Act.

CHAPTER IV

4.1 "OPERATION ENDURING FREEDOM": THE LEGALITY OF THE UK AND US MILITARY RESPONSE AGAINST AL-QAEDA IN AFGHANISTAN UNDER INTERNATIONAL LAW

On October 7, 2001, the UK and US initiated "Operation Enduring Freedom", an immense military operation on Afghanistan in response to the attacks on September 11 2001. Both the UK and US governments defended the military action as an exercise of lawful self-defence. The military operation was instigated as a result of the *Taliban's* refusal to surrender *Osama bin Laden*, in addition to other senior members of *al-Qaeda*. President George W. Bush explained the reasoning behind the military operation in an address on October 7.

"This military action is a part of our campaign against terrorism, another front in a war that has already been joined through diplomacy, intelligence, legislation, freezing...assets, and the arrest and detention of suspected terrorists by law enforcement...in 38 countries.... We are supported by the collective will of the world...[but] given the nature and reach of our enemies, we will win this conflict by the patient accumulation of success...[rather than by quick military victory]."[160]

When not responding to existing terrorism, however, but with the purpose of averting future acts, the fundamental concern as to whether international law permits the use of force has raised enormous criticism in the aftermath of September 11, 2001. We can refer to an earlier statement, in September, 2002, when President George W. Bush issued the *National Security Strategy* document, stating:

"The United States has long maintained the options of pre-emptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act pre-emptively...."

"...The United States will not use force in all cases to pre-empt emerging threats, nor should nations use pre-emption as a pretext for aggression. Yet in an age where the enemies of civilization openly

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[160] *"Address to the Nation Announcing Strikes Against al-Qaeda Training Camps and Taliban Military Installations in Afghanistan"*, 37 Weekly Comp. Pres. Doc. 1432 (October 7, 2001).

and actively seek the world's most destructive technologies, the United States cannot remain idle while dangers gather..."

"...The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reason for our actions will be clear, the force measured and the cause just."[161]

Critics have argued such statements are indicative of an alarming eagerness by governments, in light of the September 11, 2001 attacks, to disrespect and ignore fundamental international law norms.[162] Meanwhile, other schools of thought perceive them as signals for a fundamental reform of the law, including a possible amendment of the UN Charter.[163] Before attempting to side with either ideology, we must identify the appropriate areas of international law that permit the use of force to prevent an attack yet to materialise. We can associate this to the established protocol that the use of force in international relations is only lawful if it satisfies both the recourse to force, together with the lawfulness, under the UN Charter, of this force, known as the *jus ad bellum*. Moreover, the conduct of hostilities must also meet the requirements of international humanitarian law, or *jus in bello*.

4.2 Self-Defence Under Customary International Law

When faced with an armed attack, customary international law provides States with an inherent right to defend themselves. *Francis Boyle* identifies, that under *Article 51* of the UN Charter, *"self-defence could only be exercised in the event of an actual or imminent armed attack against the state itself."*[164] It is interesting to note, to a somewhat differing perspective, *Professor Coll's* perception of self-defence constituting, *"measures necessary to protect the state and its people from outside armed attacks in all their conventional and unconventional forms – including terrorism."*[165] In acknowledging these views, it becomes evident that the events of September 11, 2001 permitted the International Coalition Against Terrorism (ICAT) to respond, in self-defence, under any interpretation of a high, moderate or low self-defence threshold. This is

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[161] President George W. Bush, *"The National Security Strategy of the United States of America"*, 15-16 (September 17, 2002) available at http://www.whitehouse.gov/nsc/nss.pdf.
[162] D.W. Bowett, *"Self-Defence in International Law"*, Manchester University Press (1958).
[163] Oscar Schachter, *"International Law in Theory and Practice"*, Kluwer Law International (1991); Yoram Dinstein, *"War, Aggression and Self-Defence"*, Cambridge University Press (2001).
[164] Annual Meeting of the American Society of International Law (ASIL) (1987).
[165] A.R. Coll, cited in Y. Dinstein, *"War, Aggression and Self-Defence"*, 2nd Edition, Cambridge University Press (1994).

further confirmed by *Boyle* and *Coll*, who identify, *"close in time"* or immediate responses to acts of terrorism in self-defence, as being permissible under international law.[166]

It is also important to acknowledge the Preamble to the UN Charter, which asserts that, the *"Peoples of the United Nations"* are *"determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind"*. In addition, *Article 1(1)* of the UN Charter provides that the primary objective of the United Nations is to,

"...[m]aintain international peace and security, and to that end: to take effective collection measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

These provisions highlight the importance of maintaining international peace, together with the willingness, by states, to use force for combating aggression, and to prevent threats to peace from materialising into acts of aggression. *Article 2(4)* of the UN Charter, which arguably, is the most far-reaching restriction yet implemented by the UN on the use of force by states on one another, states that:

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[167]

This provision has provided a paradigm principle that has evolved into customary international law, binding all states under the doctrine of *jus cogens*.[168] It has, however, been argued that *Article 2(4)* implies only partial prohibition, and that certain examples of recourse to force between states fall outside of its scope.[169] This view, however, is regularly dismissed, as academics argue *Article 2(4)* proscribes all use of force by States against another, unless justified within certain exceptions under international law.[170] Moreover, whilst *Article 2(4)* does not overtly relate to actions of non-state actors, such as

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[166] Supra notes 162, 163.
[167] UN Charter Article 2, para. 4 available at http://www.un.org.
[168] *"Military and Parliamentary Activities"* in Nicaragua v United States of America ICJ 14, 99-100 (1986).
[169] Anthony D'Amato, *"Israel's Air Strike Upon the Iraqi Nuclear Reactor"*, 77 Am. J. Int'l Law 584 (1983).
[170] Ian Brownlie, *"International Law and the Use of Force by States"*, Oxford University Press (1963); Christine Gray, *"International Law and the Use of Force"*, Oxford University Press (2001).

international terrorist groups, it is evident that under the general rules of international law, acts of terrorism are illegal, and therefore fall within the scope of international criminal law. It must be noted that *Article 2(4)* also includes prohibition of state sponsorship of terrorism[171], which can be argued may result in serious repercussions for states who are suspected of assisting the *al-Qaeda* network's attacks of September 11, 2001.[172]

For the purposes of this chapter, we must identify the principal provision under international law, governing the use of military force in self-defence, that of *Article 51* of the UN Charter. It must be established that the fundamental prerequisites of any self-defence response are necessity and proportionality. In other words, armed force used in self-defence must be necessary for the objective of the defence, and must be proportional to the injury threatened.[173] These principles form the core customary law codes of international humanitarian law.[174] Necessity can be described as, *"involving only that degree and kind of force, not otherwise prohibited by the law of armed conflict (LOAC), required for the partial or complete submission of the enemy with a minimum expenditure of time, life and physical resources may be applied."*[175]Furthermore, the proportionality principle prohibits *"employment of any kind or degree of force not required for...the partial or complete submission of the enemy within a minimum of time, life, and physical resources."*[176] A subsequent third condition arises, in anticipatory self-defence, when a situation immediately arises, and allows no other alternative. This provision shall be discussed later in the chapter, arguing as to whether *"Operation Enduring Freedom"* is, in fact, deemed to be such a response.

We also have to ask the question: did the attacks on September 11 2001, prompt an unexpected change in the perception of the acceptability of the use of force in response to

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[171] See for example the Libyan sponsorship of the bombing over Lockerbie, Scotland of Pan Am Flight 103, where it is evident that it is the only time when the UN Security Council have addressed the issue of Article 2(4)'s applicability to state involvement.

[172] R. Beeston, *"Iraqi Met Hijacker Before Attacks on US"*, The Times (UK) (October 8, 2001), where it is noted that Khahil Ibrahim Samiral-Ani, an Iraqi intelligence officer, was seen meeting Mohammed Atta, one of the al-Qaeda suicide pilots of September 11, 2001, in Prague, prior to the atrocities.

[173] Judith Gardam, *"Proportionality and Force in International Law"*, 87 Am. J. Int'l Law 391 (1993) stating that in the law of armed conflict, the notion of proportionality is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy.

[174] Christopher Greenwood, *"Historical Development and Legal Bases, in the Handbook of Humanitarian Law in Armed Conflicts"*, D. Fleck ed,. (1995).

[175] International Institute of Humanitarian Law, *"San Remo Manual on International Law Applicable to Armed Conflicts at Sea"* (hereinafter San Remo Manual) Louise Doswald-Beck ed. (1995) para. 4.

[176] Supra note 171, para. 5.

an act of terrorism by a private actor? Further: is international law faced with a "new constitutional moment"[177], or a process of creating instant customary law?

4.3 Applying Article 51 of the UN Charter to "Operation Enduring Freedom"

The inherent right of self-defence presupposes the absence of any other means of defence for the fundamental rights of the states that are threatened, who must be in serious and imminent danger. The UN Charter does not, however, create the right of self-defence. It is a customary law right of considerable antiquity said to be innate within the concept of Statehood. *Article 51* of the *UN Charter* provides that:

"Nothing in the ...Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to...Council and shall not in any way affect the authority and responsibility of the ...Council under the...Charter to take any time such action as it deems necessary...to maintain international peace and security."[178]

This definition has led to several differing interpretations of its meaning and scope. For example, *Goodhart* proposes that when members of the UN exercise the right of self-defence, they do so not by grant, but by an already existing right.[179] Moreover, he considers that the Charter limits the sovereign rights of the states, and is not a source of those rights. *Kelsen* adds to this by arguing that *Article 51* is only applicable in the event of an actual armed attack.[180] This can be supported by the International Court of Justice's (ICJ) decision in the case *Nicaragua v United States*[181] (Nicaragua), which shall be discussed in greater depth later in the chapter, where it was held that self-defence was a pre-existing right of customary nature, which they desired to preserve.

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[177] William Burke-White, *"An International Constitutional Moment"*, Harvard International Law Journal 43 (2002).
[178] Article 51, United Nations Charter available at http://www.un.org.
[179] A. Goodhart, *"The North Atlantic Treaty of 1949"*, R.C. (1951) (II).
[180] H. Kelsen, *"Collective Security and Self-Defence Under the Charter"*, Law of the United Nations, Vol. 42 (1948) 792.
[181] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits), ICJ Rep. (1986) 14, 94.

It can be noted, *Article 51* was inserted into the Charter by UN members, not for the purpose of defining the individual right of self-defence, but with the objective of clarifying the position in regard to collective understandings for mutual self-defence.[182] There was fear amongst the delegates to the San Francisco Conference that the UN Charter may affect the Pan-American Treaty, known as the *Act of Chapultepec*, which was signed by the majority of the American republics on March 8, 1945, one month prior to the San Francisco Conference, declaring that aggression against one American State would be considered an act of aggression against all. It is important to note that *Article 51* was originally drafted to be included in Chapter VIII of the UN Charter, which would have limited the right of collective self-defence to regional organisations, requiring prior endorsement by the UN Security Council to exercise the right of self-defence.[183] In the resulting debate, the delegates intended the customary right of self-defence to remain unchanged and sought to prevent a single member of the UN Security Council from being able to prevent a regional organisation from taking action by using its veto power.[184] Consequently, the delegates collectively agreed to place *Article 51* within Chapter VII.

Further history that encompasses the drafting of *Article 51* suggests that UN legislators left the idea of "armed attack" deliberately open for interpretation amongst its Member States.[185] Importantly, however, the wording of *Article 51* is sufficiently broad to permit the use of self-defence against terrorist acts originating from non-state actors. The broadness of the text, however, seems to imply an element of caution. It appears as though the evidence of the facts, rather than an uncompromising rejection of the applicability of the right to self-defence, largely relate to criticisms of the self-defence doctrine against acts of terrorism.[186] For example, the 1986 US bombings on Libya in response to the *La Belle* nightclub attack, concentrated on two issues: First, whether the murder of a US serviceman overseas gave rise to an armed attack under *Article 51*; and, second, the issue of the necessity and proportionality of the attacks.[187]

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[182] See *"Verbatim Minutes of the Fourth Plenary Session"*, April 28, UN Doc. 24 (1945) at 313, acknowledging the need for organised coercive action.

[183] Richard J. Erikson, *"Legitimate Use of Military Force Against State-Sponsored International Terrorism"*, Government Printing Office (1989) discussing the origins and significance of Article 51.

[184] D.W. Bowett, *"Self-Defence Under International Law"*, Manchester University Press (1958), arguing that the fear that single Member's veto could prevent action by the regional organisation.

[185] Stanimir A. Alexandrov, *"Self-Defence Against the Use of Force in International Law"*, Kluwer International (1996).

[186] Thomas M. Franck, *"Recourse to Force: State Action Against Threats and Armed Attacks"*, Cambridge University Press (2002).

[187] William O'Brien, *"Reprisals, Deterrence and Self-Defence in Counter-Terror Operations"*, Virginia Journal of International Law 30 (1990).

The shift in the stance to the aforementioned in response to the September 11 2001 attacks, can be argued is a result of a change in fact, rather than a change in law. The implementation of the self-defence right in response to these atrocities is far less controversial, however, as the claim to self-defence within the context of the raid in Libya. This is due to the fact that the September 11 attacks resulted from a terrorist attack aimed at targets in the US, rather than overseas. Furthermore, the severity of the September 11 attacks were significantly greater in magnitude, leading to the declaration by NATO of *"clear and compelling"* justification for the use of self-defence.[188] This all supports the argument that it is the circumstances rather than the law that has changed.

The UK[189] and US[190] have, in addition, consistently upheld the stance that the right of self-defence also applies when an armed attack is imminent, but yet to take place. This dates back to the *Caroline* incident of 1837, which involved UK forces in Canada taking action against a merchant vessel (the Caroline) that was being used by Canadian rebels and their American supporters in attacks against Canada. British forces attacked the vessel while she was on US territory of the Great Lakes, destroying her and killing members of the crew. As a result, US forces arrested Lieutenant McLeod, a British officer involved in the incident, on charges of murder. Following his arrest, the UK government argued that its forces had exercised the right of self-defence, subsequently requesting the release of McLeod. The resulting statement by US Secretary of State, Daniel Webster, to the British government is regarded as being of fundamental importance within the right of self-defence under international law today.[191] Here, Webster identified that the right of self-defence did not depend upon the UK having already been subject of an attack, but acknowledged that there was a right of anticipatory self-defence provided that there was *"necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation."*[192] Further, it is important to establish that the *Caroline* precedent has since been

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[188] Supra note 7.

[189] Statements by the UK government regarding the 1986 attack by the US on Libya, 57 Brit. Y.B. Int'l Law 494, 639-641 (1986).

[190] Statements by the US government at the time of its attack on Libya, *"Legal Regulation of Use of Force"*, 1980-1988 Digest 1 at 3405-06.

[191] Michael Lacey, *"Self-Defence or Self-Denial: The Proliferation of Weapons of Mass Destruction"*, 10 Ind. Int'l & Comp Law Review 293, 294 (2000) discussing how the Caroline standard still applies to issues of self-defence in recent US military action against Libya, Afghanistan and Sudan.

[192] Letter from Daniel Webster to Henry S. Fox (April 24, 1842) available at 29 Brit. and Foreign State Papers 1129, 1138 (1857). The British government accepted the definition of Mr. Webster in a letter sent by Lord Ashburton to Mr. Webster on July 28, 1842, but disagreed on the facts:

"[A]greeing therefore, on the general principle and on the possible exceptions to which it is liable, the only question between us, is whether this occurrence came within the limits fairly to be assigned to such exceptions: whether, to use your words,

applied by numerous International Tribunals, including Nuremberg[193] and Tokyo[194], suggesting that the right of anticipatory self-defence against imminent threats of armed attack is part of the customary law right preserved by *Article 51*. According to the *Caroline* principle, therefore, the preconditions for acting in self-defence are: "necessity", "proportionality", and "immediacy".[195]

We can also identify an apparent contradiction that appears to exist within *Article 51*. First, the Article indicates that, *"[N]othing in the present Charter shall impair the inherent right of individual or collective self-defence,"* however, this *"inherent right"* is immediately incorporated in the same sentence by the words, *"if an armed attack occurs...."*[196] This appears to suggest that the UN Contracting Parties agreed to surrender whatever inherent right of self-defence existed under customary international law. Several political analysts have, however, argued that the right of self-defence under customary international law contains no "armed attack" provision.[197] This contradiction advocates that UN Member States may have less of a right over non-members to defend themselves, and also proposes that customary international law, within the scope of self-defence, continues to exist alongside treaty law.[198] However, it must be pointed out that *Article 51* does not replace or undermine the doctrine of self-defence identified within customary international law. *D.W. Bowett* confirms this, stating:

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there was "that necessity of self-defence, instant, overwhelming, leaving no choice of means which preceded the destruction of the Caroline", which moored to the shore of the United States?"

Letter of Mr. Webster to Lord Ashburton, August 8, 1842, in 30 Brit and Foreign State Papers 1841-1842 at 196 (1857), arguing that the act of destruction of the Caroline was wrong:

"I would appeal to you, Sir, to say whether the facts which you say would only justify the act, viz,, "a necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation", were not applicable to this case in as high a degree as they ever were to any case of a similar description in the history of nations".

Mr. Webster repeated his definition in his letter of August 6, 1842 to Lord Ashburton:

"[U]ndoubtedly it is just, that while it is admitted that exceptions growing out of the great law of self-defence do exist, those exceptions should be confined to cases in which "the necessity of that self-defence is instant, overwhelming, and leaving no choice of means and no moment for deliberation."

[193] 13 Ann. Dig. & Rep. Pub. Int'l Law cases 203, 210; International Military Tribunal (Nuremberg), 41 American Journal Int'l Law 172, 205 (1947).
[194] International Military Tribunal at Tokyo (1948).
[195] Robert Ago, *"Addendum to the 8th Report on State Responsibility"*, (1980) 2 Y.B. Int'l Law Comm'n 52, para. 83, UN Doc. A/CN.4/318/ADD.52.
[196] Supra note 176.
[197] Abraham D. Sofaer, *"US Acted Legally in Foreign Raids"*, Newsday (New York) (October 19, 1998). Sofaer, who is a former State Department Legal Advisor, argues that, *"Self-defence allows a proportionate response to every use of force, not just armed attacks."*
[198] Myers S. McDougal, *"The Soviet-Cuban Quarantine and Self-Defence"*, 57 Am. J. Int'l Law 597, 599-600 (1996).

"[I]t is...fallacious to assume that members have only those rights which the Charter accords to them; on the contrary they have those rights which general international law accords to them except in so far as they have surrendered them under the Charter.... As we have seen, the view of Committee I at San Francisco was that this prohibition left the right of self-defence unimpaired; in the words of the rapporteur "the use of arms in legitimate self-defence remains admitted and unimpaired."...The history of Article 51 suggests nothing of an additional obligation; the travaux preparatories, to which we may legitimately resort in the case of ambiguity, suggest only that the Articles should safeguard the right of self-defence, not restrict it."[199]

As a result, we can conclude that *Article 51* is only significant on the basis that there is a "customary" or "inherent" right to self-defence.[200] It also identifies certain prerequisites to the rules contained within customary international law of responding independently with lawful force to unlawful force.

As was established in Chapter One, both the UK and US have consistently justified the use of military action against *al-Qaeda* in Afghanistan on the right of self-defence under *Article 51*, and not on any UN Security Council mandate. This reliance is evident in documents sent by the UK and US to the Security Council, identifying the action they were going to take against Afghanistan.[201] In addition, the UK *Charge d'Affairs* stipulated that:

"...forces have now been employed, and exercised the inherent right of individual and collective self-defence, recognised in Article 51, following the terrorist outrage of 11 September, to avert the continuing threat of attacks from the same source. My government presented information to the United Kingdom parliament on 4 October which showed that Osama bin Laden and his al-Qaeda terrorist organisation have the capability to execute major terrorist attacks, claimed credit for past attacks on United States targets, and have been engaged in a concerted campaign against the United States and its allies. One of the stated aims is the murder of United States citizens and attacks on the allies of the United States."[202]

We have to ask the question, however: did the right of self-defence form an acceptable legal basis for *"Operation Enduring Freedom"*? First, we have to argue as to whether the UK and US should have first obtained Security Council authorisation before

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[199] D.W. Bowett, *"Self-Defence Under International Law"*, Manchester University Press (1958).
[200] Michael F. Lohr, *"Legal Analysis of US Military Responses to State-Sponsored International Terrorism"*, 34 Naval Law Review, 1, 16 (1985).
[201] Supra note 10.
[202] UN Security Council letter dated 7 October 2001 from the Charge d'Affairs a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations Addressed to the President of the Security Council, UN Doc. S/2001/947 (2001).

resorting to force? In answering this, it has to be established that there is no legal prerequisite requiring them to do so. The self-defence right under *Article 51* is vested in states, and exercising it does not require prior consent from the Security Council. The only instance when this is not applicable is when the Security Council *"has taken measures necessary to maintain international peace and security"*. This condition has, however, been the focus of restrictive interpretation.[203]

Second, was the action by the US and UK a response to an armed attack within the scope of *Article 51*? As has been discussed earlier in the Chapter, the theory of an armed attack is not restricted to state intervention. Nonetheless, the attacks on September 11, 2001, took place several weeks prior to the initiation of *"Operation Enduring Freedom"*. Furthermore, we have to cautiously distinguish between the doctrine of self-defence, which is lawful at international law, and reprisals, which, if involve the use of armed force, become unlawful under the UN Charter. The requirement of necessity in self-defence confirms that it is not sufficient that force is used after an armed attack, but it must be necessary to deter that attack. As a result, it can be argued that the use of force in response to an armed attack that has already taken place does not satisfy this requirement, and can subsequently be labelled a reprisal. Some have argued *"Operation Enduring Freedom"* constituted more of an act of reprisal, rather than an act in self-defence. This ideology is, however, unpersuasive, as the events of September 11, 2001, cannot be considered on there own merit. The attacks on the US embassies in Tanzania and Kenya in 1998, and the USS Cole, signalled that *al-Qaeda* was targeting the US and that future attacks were inevitable. Furthermore, the US and several European states also apprehended a number of individuals who indicated that more attacks were planned,[204] and found documentary evidence in Afghanistan confirming supporting this.[205] Under these conditions, there seems little difficulty in categorising the threat of future attacks from *al-Qaeda* as imminent. Providing that military action in Afghanistan is perceived as being preventative, rather than an act of retaliation, it seems impossible to identify the operation as being anything other than in self-defence.

Another issue that needs to be addressed is whether the UK and US' refusal to recognise the *Taliban* regime as forming part of the Afghanistan government affects the

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[203] Christopher Greenwood, *"New World Order or Old?: The Invasion of Kuwait and the Rule of Law"*, 55 Modern Law Review 153, 164-165 (1992).
[204] Peter Finn, *"Germans Identify More Terror Suspects; Police Watch Five People Who May Have Provided Support to September 11 Hijackers"*, Washington Post (November 17, 2001)
[205] *"Recovered al-Qaeda Documents Reveal Plans for Other Terror Acts: Official"* Agence Fr.-Presse (February 1, 2002).

legality of *"Operation Enduring Freedom"*? On closer inspection this becomes void, due to the fact that, although the *Taliban* were the *de facto* ruling government, they were in breach of international law by permitting *al-Qaeda* to operate from within its territory, and developing close links with a known international terrorist organisation. The UK government confirmed *al-Qaeda's* association with the *Taliban* by stating:

"...[I]n 1996 Osama bin Laden moved back to Afghanistan. He established a close relationship with Mullah Omar, and threw his support behind the Taliban. Osama bin Laden and the Taliban regime have a close alliance on which both depend for their continued existence. They also share the same religious values and vision."

"...[O]sama bin Laden has provided the Taliban regime with troops, arms and money to fight the Northern Alliance. He is closely involved with Taliban military training, planning and operations. He has representatives in the Taliban military command structure. He has also given infrastructure assistance and humanitarian aid. Forces under the control of Osama bin Laden have fought alongside the Taliban in the civil war in Afghanistan."

"...[O]mar has provided bin Laden with a safe haven in which to operate, and has allowed him to establish terrorist training camps in Afghanistan. They jointly exploit the Afghan drugs trade. In return for active al-Qaeda support, the Taliban allow al-Qaeda to operate freely, including planning, training and preparing for terrorist activity. In addition the Taliban provide security for the stockpiles of drugs."[206]

Under international law, a state must not permit its territory from being used as a base for attacks on other states, whether by regular armed forces or terrorists.[207] Additionally, Afghanistan violated several specific obligations imposed by the Security Council flowing the 1998 embassy bombings.[208] The *Caroline* principles on self-defence, discussed earlier, clearly permitted such action, and the undoubted changes in international law since then have not abolished this aspect of the right of self-defence. However, because the *Taliban* clearly indicated that it would strongly oppose any foreign forces entering its territory to remove *al-Qaeda*, it can be argued it exposed its own forces to a lawful attack in exercise of the right of self-defence.[209]

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[206] *"British Release Evidence Against bin Laden"*, available at http://www.salon.com/news/2001/10/04/british_evidence.htm.
[207] UN General Assembly definition on Aggression under Resolution 3314, available at http://www.un.org
[208] UN Security Council Resolution 1333, UN SCOR 55th Sess., 4251st mtg., UN Doc. S/RES/1333 (2000).
[209] Christine E. Philipp, *"The Status of the Taliban: Their Obligations and Rights Under International Law"*, 6 Max Planck Y.B. of UN L. 559 (2002).

It is also important to note that the action taken in self-defence, in the form of *"Operation Enduring Freedom"*, needed to be necessary and proportionate. It can be submitted that, as the US and UK were faced with the possibility of further attacks of similar magnitude and repercussion to those of September 11, 2001, both criteria were satisfied. Furthermore, although the effect of the US and UK involvement in Afghanistan altered the balance of the civil war there, it is difficult to see how the intervention could have succeeded in removing the *Taliban* regime and *al-Qaeda* bases without going that far.

It is important to also identify that the issue of the gravity of the terrorist act has to be considered, when applying *Article 51* to acts of terrorism. The ICJ in the Nicaragua case originally implemented the gravity condition, within the definition of armed attack, with the *scale and effect* test. The Court held that:

"...[T]he prohibition of armed attacks may apply to the sending by a state of armed bands to the territory of another state, if such operation, because of its scale and effects, would have been classified as an armed attack rather than a mere frontier accident had it been carried out by regular armed forces."[210]

Although the Court did not identify which threshold must be satisfied in order for the use of force to qualify as an armed attack, it nonetheless stated that this would only be the case if the acts of armed bands *"occur on a significant scale."*[211] This has been criticised by some analysts, describing it as a motivation for low-intensity acts of violence.[212] Furthermore, it has also been criticised that the quantitative distinction between armed attacks and frontier confrontations is defective due to the fact that the prerequisites of necessity and proportionality would provide sufficient safety against the excessive use of force.[213]

In adopting the ICJ's formula in Nicaragua to "Operation Enduring Freedom", we have to argue as to whether the ruling is superfluous and inconsistent with the situation in Afghanistan? In response, according to *Philipp*, the military action by the US and UK implies that the ruling in Nicaragua is not redundant. On the contrary, *"Nicaragua is dead, long live Nicaragua."*[214] Moreover, the application of Article 51 does not solely rely upon the question of whether acts of terrorism can be associated with state-related acts of violence,

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[210] Nicaragua v US, 1986 ICJ at 195.
[211] *Ibid* at 198.
[212] Michael Reisman, *"Allocating Competences to Use Coercion in the Post Cold-War World: Practices, Coalitions and Prospects"*, in Damrosch and Scheffer, *"Law and Force in the New International Order"* (1991).
[213] *Ibid.*
[214] Supra note 207.

but the foremost issue is that gravity does, and should, still be relevant in the context of terrorist acts.

4.4 Applying the *"Nicaragua"* Judgement to "Operation Enduring Freedom" and the Right of Self-Defence

One certainty that has evolved post-September 11, 2001, is that the *"effective control test"*, identified by the International Court of Justice (ICJ) in the Nicaragua case, has been overturned. In response, a practical alternative has since evolved, known as the *"overall control test"*, implemented by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in the case *Prosecutor v Tadic.*[215] This test relieves the defending state from the idealistic obligation that it is required to provide evidence of specific instructions of the host state relating to the terrorist act, prompting the right to self-defence. In applying this test to the military campaign led by US and UK forces in Afghanistan, it can be submitted that this would suffice in justifying the action against the *Taliban* and *al-Qaeda.* Referring back to the *Nicaragua* "effective control test", the issue here was whether the US could be held accountable for breaches of international humanitarian law committed by military and paramilitary groups of Nicaraguan rebels. The ICJ held that the acts committed by the Nicaraguans could not be ascribed to the US due to the fact that they had not *"directed or enforced"* the perpetrator of the acts:[216] In linking this judgement to the use of force against *al-Qaeda* and *the Taliban*, we can argue against the earlier views expressed by *Phillip*, by submitting that the action cannot be justified merely on the *Nicaragua* requirements. This is because no state has been in a position to prove the *Taliban's* association to *al-Qaeda* and their knowledge, and involvement in, the September 11, 2001 attacks.[217] Furthermore, even if the Afghanistan government had directly provided the September 11 terrorists with the aeroplane, tickets, and other requirements necessary to carry out the hijacking, such support would still not constitute an armed attack carried out by the US and UK.

An alternative implication on the overturning in *Nicaragua* lies in the growing use of force in response to acts of hostility on *Article 51*. The reduced threshold for linking terrorist acts to non-state actors will force states to rely on *Article 51* to justify military

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[215] Prosecutor v Tadic, ICTY, Appeals Chamber, July 15 1999, para. 137.
[216] Supra note 208, para 115.
[217] Mark A. Drumbl, *"Victimhood, in Our Neighbourhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order"*, North Carolina Law Review 81 (2002).

action, rather than exercise a right to self-defence under customary international law or the state of necessity.

It also has to be noted that *Nicaragua* did not explicitly address the issue of anticipatory self-defence, as the Court stated: *"...[since] the issue of the lawfulness of a response to the imminent threat of armed attack has nor been raised...the Court expresses no view on that issue."* [218] The Court also addressed that in interpreting "armed attack", whether states might establish an exception to the general principle of non-intervention, will depend on whether they *"justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition."* [219] Meanwhile, *"[R]eliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law.'*[220] In contrast to this, we can note the dissenting opinion of Judge Schwebel, who, it can be argued sides with the views of *Phillip*, by subscribing to the view that, under Article 51, self-defence was not limited to a situation *"if, and only if, an armed attack occurs".*[221]

In deciding whether the "effective control test", established in *Nicaragua*, or the "overall control test", adopted by the ICTY in *Tadic*, is more appropriate to "Operation Enduring Freedom", it must be said, the principle still remains the same: the defending state is under a duty to resort initially to diplomatic means in requesting the government in whose territory the terrorist acts have been planned, to take suppressive measures. Furthermore, if it becomes apparent that the host state is unable or unwilling to act, the injured may, as an *ultima ratio* measure, initiate military action in order to prevent the threat. This is based on two foundations: First, a formation of sovereignty as responsibility, requiring protective duties in relation to third states. And, second, the relative quality of territorial integrity, providing states with the obligation to comply in defensive action of other states, if no other alternative is accessible, in order to put an end to an imminent threat.[222] The difficulties in these criteria, however, lie in the permissible scope of self-defence. It can be argued that it may seem rational to permit military action against states in which training centre's or global terrorist camps are located, however, the argument that subsists, is in relation to the states that only train minimal numbers of terrorists, or states that have supported terrorists, or complied in acts of terrorism.

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[218] Nicaragua v US, 1986 ICJ at 103.
[219] *Ibid* at 109.
[220] *Ibid.*
[221] *Ibid* at 358.
[222] Barry A. Finstein, *"Operation Enduring Freedom"*, Journal of Transnational Law & Policy 11, 284 (2002).

The right to self-defence is evidently in a shifting process. As identified, several of the armed attack prerequisites under *Nicaragua* have either been reversed or disputed, namely in the "effective control test". As a result, an altered scope of *Article 51* emerges in the evaluation of necessity and proportionality. Moreover, the threats to a widened scope of self-defence exist, namely in the uncertainty and indeterminacy of self-defence. However, in referring to the aphorism of *'Nicaragua is dead, long live Nicaragua'*[223], it becomes evident that the potential for mistreatment is considerably reduced if states adopt the evidentiary threshold established by the ICJ in Nicaragua, requiring that: (1) states carefully evaluate the evidence as to who is responsible for the attack; (2) that the facts relied upon made public; and (3) the facts are subject to international examination and investigation.[224]

4.5 Alternatives to Self-Defence

When the conditions for self-defence are not satisfied, a state may resort to three alternatives: First, it may seek Security Council authorisation for the use of force. Second, it can employ coercive countermeasures. And, third, it can engage in cooperative policing.[225]

The Security Council may authorise the use of armed force and lesser measures by a state, under *Article 39* of the UN Charter, when they believe that a threat to the peace, breach of the peace or acts of aggression subsist, or are imminent.[226] The use of force authorised must, however, comply with the necessity, proportionality and discriminatory of the circumstances.[227] It must be noted that in two cases that exist, where the Security Council sought the extradition of known, wanted terrorists, economic sanctions were imposed, rather than adopting the use of force or forceful apprehension of persons.[228]

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[223] *Ibid.*

[224] The ICJ held that the claim to use force in self-defence must be supported by credible evidence of an armed attack and of the attacker's identity. *Nicaragua* at 110, para 232-234.

[225] For analysis of international police action see, Jost Delbrck, *"The Fight Against Global Terrorism: Self-Defence or Collective Security as International Police Action?"*, 44 Ger. Yearbook of International Law 9, 19-24 (2001).

[226] Article 39 United Nations Charter available at http://www.un.org.

[227] Mary Ellen O'Connell, *"Debating the Law of Sanctions"*, 13 Eur. J. Int'l Law 63, 71-72 (2002).

[228] The Security Council demanded that the Taliban hand over Osama bin Laden to a country where he was under indictment in Resolution 1267, which was fortified by Resolution 1333. The Security Council also implemented sanctions on Libya until it extradited two individuals suspected of the bombing of the Pan Am flight over Lockerbie, Scotland (1992 S.C. Rules 748 UN SCOR, 3063rd Meeting). See also Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from Aerial Incident at Lockerbie (Libya v US) 1992 ICJ 114 (April 14) (Request for the Indication of Provisional Measures).

When the right of self-defence against a state is not prompted, and when the Security Council does not act, an alternative for the victim of a terrorist act lies in the domestic criminal justice system of the states involved. Terrorists and groups carrying out attacks without the sponsorship and support of the state can, consequently, be labelled as common criminals, and therefore fall under the jurisdiction of the state on whose territory they were captured. Moreover, it is evident that territorial states also have an obligation to extradite, or try individuals' accused of terrorist acts.[229]

It must also be noted that failure to realise certain obligations under international law, including the extradition and trial of accused terrorists, may result in the right to implement countermeasures, which are acts that violate the law, but are in response to prior infringements.[230] These countermeasures must be proportional to the injury sustained, and are only available if the involved parties have no unequivocal obligations to use alternative means of dispute settlement.[231] Countermeasures may also be taken by the injured states, however, in dealing with cases involving universal jurisdiction crimes, it may be lawful for any state to adopt the necessary measures.[232] In referring to the attacks on September 11, 2001, it can be argued that as the atrocities resulted in the international murder of thousands of innocent individuals, the attacks subsequently qualify as acts against humanity, and therefore universal jurisdiction crimes.[233] As a result, it can be argued that any state's national court should be given the power to exercise judicial jurisdiction over individuals accused of universal jurisdiction crimes.[234]

4.6 OVERVIEW

This chapter has assessed the legality of the military deployment in Afghanistan by the International Coalition Against Terrorism (ICAT) in "Operation Enduring Freedom". Throughout, it has been submitted that that the gravity of the offences committed by the *al-Qaeda* terrorists on September, 11, 2001, justifies, in principle, the actions by the UK and

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[229] See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), (September 23, 1971, 24 U.S.T. 565); Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), (December 16, 1970, 22 U.S.T. 1641).

[230] See Case Concerning the Gabcikovo-Nagymaros Project, Hungary v Slovakia, ICJ 1 (1998); Case Concerning the Air Services Agreement, US v France, 18 R.I.A.A. 416 (1978).

[231] See Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, UN GAOR, 56th Sess., UN Doc. A/RES/56/83 (2002).

[232] Id articles 40, 41.

[233] Frederic L. Kirgis, *"Terrorist Attacks on the World Trade Centre and the Pentagon"*, ASIL (2002); also Rome Statute of the International Criminal Court, UN Doc. No. A/Conf. 183/9 (1998).

[234] Kenneth Randall, *"Universal Jurisdiction Under International Law"*, 66 Texas Law Review 785 (1988).

US, under the right of individual and collective self-defence; a right that is contained both at customary international law and within the UN Charter. In spite of the establishment of the right to self-defence, particular areas have been identified as to the manner in which the UK and US conducted the military operation.

The foremost criticism surrounding the legality of "Operation Enduring Freedom" lies in determining whether the Operation remained necessary and proportional to the US' self-defence after the fall of the *Taliban* government. Where states are confronted with attacks that do not permit armed force in self-defence, they must use criminal law enforcement methods, backed by countermeasures. These alternatives to self-defence have much to acclaim them in a world where terrorism appears to be escalating, and where the means of armed force is frequently disproportionate to any injury suffered or threatened.

Amidst the determination of extinguishing the global threat posed by international terrorism, and of eliminating those responsible for the September, 11, 2001 attacks, there have, however, been huge civilian casualties during "Operation Enduring Freedom". This has been, and continues to be, an unfortunate aspect of the UK and US' response. It is significant to conclude by acknowledging the comments of UN Secretary General, Kofi Annan, while addressing the UN General Assembly in November 1999:

"[W]e are all determined to fight terrorism and to do our utmost to banish it from the face of the earth. But the force we use to fight it should always be proportional and focused on the actual terrorists. We cannot, and must not, fight them by using their own methods – by inflicting indiscriminate violence and terror on innocent civilians, including children.'[235]

[235] Kofi Annan, UN Secretary-General addressing the UN General Assembly, 18 November 1999, available at http://www.un.org/NewLinks/index99/oct-nov-dec99.htm.

CHAPTER V

5.1 IS THERE JUSTIFICATION THAT DETAINING "UNLAWFUL COMBATANTS" AND INDIVIDUALS SUSPECTED OF TERRORIST ACTIVITY IN GUANTANAMO BAY IS AN ADEQUATE RESPONSE TO THE GLOBAL THREAT OF TERRORISM AND CONSISTENT WITH RESPECT FOR INTERNATIONAL HUMAN RIGHTS NORMS?

The US response to the events of September 11, 2001, represents the largest deployment of military force by any State since the Persian Gulf War ended a decade earlier. In the course of one year, the United States conducted major air and ground operations against a foreign State, toppled its government, pursued suspected terrorists across at least one international border, detained thousands of Afghan and other nationals, and initiated plans for possible military tribunals for some of those captured. In pursuance of these policies, the US Government has pledged to continue this operation for an indefinite period.

Although most of these actions address the effectiveness, political wisdom, or morality of US measures, a significant number of influential entities have offered their opinions as to the legality of the US policy on combating the increased threat of both global terrorism and hunting down individual suspected terrorists.

The claims of the United States about the lawfulness of its actions and the responses to them have addressed both divisions of international law concerning force – the law on the recourse to force, *jus ad bellum*, and the law on the conduct of hostilities, *jus in bello*. Although these divisions are not entirely distinct, they have different historical backgrounds and modern contours. For example, certain basic norms of *jus in bello*, such as those protecting civilians and prisoners of war, long predate the principles of *jus ad bellum*, in that States' initiation of force against other States are generally limited to self-defence or cases of United Nations authorisation.[236]

We must at this stage acknowledge the criticism that surrounded President Bush's classification of the attacks on September 11, 2001 as "acts of war" and his commitments to wage a war, which can be argued constituted an unequivocal *animus belligerendi*. The ambiguity emerged as to whether there was a basis under international law for any

[236] UN Charter Arts. 2(4), 42, 51; Lawrence Weschler, *"International Humanitarian Law: An Overview in the Crimes of War: What the Public Should Know."*, Gutman & Rieff (1999).

justification and grounds for engaging in such a conflict, that many consider an "aggression" within the meaning of the General Assembly's definition of aggression within UN *Resolution 3314*, identified earlier in Chapter Four. In order to answer this, we need to refer back to Chapter One of this thesis in recognising the uncertainty surrounding what actually constitutes a terrorist under international law. Terrorists may be perceived merely as "domestic criminals", whose capture, trial and punishment are subject to the rules relating to international jurisdiction and treaties governing extradition. On the other hand, a terrorist may also be perceived as "an international criminal", whose status may express broader jurisdictional rights. Hence we may once again refer to the accepted cliché of *"one man's terrorist is another man's freedom fighter."*[237]

In light of the atrocities of September 11, 2001 a variety of proposals emerged for bringing the perpetrators to justice. Among the propositions were included the use of courts-martial, the creation of a special tribunal (whether with the backing of the United Nations or otherwise) and prosecution in US Federal Courts.[238] On November 13, 2001, President Bush issued a military order entitled *"Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism"* (Military Order).[239] In addition to the Military Order, the US also decided to implement military commissions to prosecute terrorists for violations of the laws of war and "other applicable laws".[240]

The most prodigious step implemented by the US however, emerged as captured *Taliban* and *al-Qaeda* detainees, designated as "unlawful combatants" by the Pentagon, were flown to the US Naval Station at Guantanamo Bay, Cuba, on January 10, 2002. Whilst President Bush was quick to label the September 11 attacks as "acts of war", prisoner of war status for those captured has been less accommodating. Consequently, the US Government agreed to treat the captured members of the *Taliban* and *al-Qaeda* within the standards established in the Geneva Conventions, but maintained its position that they be categorised as "detainees" rather than prisoners of war. This categorisation is where vast criticism has emerged, resulting in various non-governmental organisations, such as

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[237] See *"Liberation Movements"*; Encyclopaedia of Public International Law, Rudolph Bernhardt, vols. 1-4, North-Holland Publishing Company.

[238] *"Military Order, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism"* 66 Fed.Reg. 57, 833 (November 16, 2001).

[239] US Dep't of Defence, Military Commissions Order No.1, *"Procedures for Trials by Military Commissions of Certain Non-united States Citizens in the War Against Terrorism"* (March 21, 2002) http:/www.defenselink.mil/news/Mar2002/d20020321ord.

[240] Harold Hongju Koh, *"We Have the Right Courts for Bin Laden"*, New York Times (November 23, 2001).

Amnesty International[241], Human Rights Watch and inter-governmental bodies such as the Organisation of American States[242] expressing concern about the legal status and treatment of the detainees. In a memorandum to the Bush Administration, Amnesty International raised several concerns relating to the conditions under which detainees being held at Camp X-Ray (now Camp Delta) were being subjected to.[243] Amongst their specific concerns included the denial of legal counsel or court access to detainees, holding prisoners under conditions that amount to cruel, inhumane, or degrading treatment, including torture[244] and mental and physical interrogation and the threat of trial by military tribunal and indefinite detention, even after potential acquittal. There is also evidence of the detention of three minors.[245]It is evident that the European Parliament also expressed their concerns towards the treatment of the detainees, subsequently calling for an

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[241] Amnesty International Press Release, *"AI Calls on the USA to end Legal Limbo of Guantanamo Prisoners."* AMR 51/009/2002 (Jan 18, 2002); http:/web.amnesty.org/802568F7005C4453/0/926FDF718913300080256B430056163A?Ope

[242] John Mintz, *"US Told to Rule on Detainees Status"*; Washington Post (March 14, 2002).

[243] Memorandum to the US Government on the Rights of People in US Custody in Afghanistan and Guantanamo Bay, Amnesty International, AMR 51/053/2002 (December 12, 2002); http:/web.amnesty.org/802568F7005C4453/0/807F25047CCE168F0256B97004FD0C0?

[244] BBC *"Inside Guantanamo"*, broadcast on BBC One (UK) on Sunday 5 October 2003, interviews of former Guantanamo detainees who have been released, pp. 1-21, testimonies of, among others, Sayed Abassin, Azmat Begg and Alif Khan:

"They put cuffs and tapes on my hands, taped my eyes and taped my ears. They gagged me. They put chains on my legs and chains around my belly. They injected me. I was unconscious. I do not know how they transported me. When I arrived in Cuba and they took me off the plane, they gave another injection and I came back to conscious...they tied me up.... We go to a big prison and there were cages. They built it like a zoo.... Each container housed 48 cages. Everyone was in a cage individually. Every cage had a tap, a toilet and water for washing. There was room to sit but not enough to pray...the light was very light there as well. They were switched on all the time. Because of that our eyes were damaged and from constantly having to look through the netting. There were other blocks and we were not allowed to speak to the other people in the other blocks. If we talked to them, they would draw the curtains and they would tale our bedding and blankets and they wouldn't give them back for three days.... They weren't letting us sleep, night or day. They were banging the walls with sticks, making lots of noise."

[245] Monica Whitlock, BBC News (UK), *"Legal Limbo of Guantanamo Prisoners"*, in which she reported:

"Two weeks ago, US defence department officials announced that they had three children between the ages of 13 and 15 at Guantanamo...Last month, the US Secretary of State Colin Powell, wrote a strongly worded letter to Donald Rumsfeld, deploring the imprisonment of children and old people, and saying that eight governments friendly to the US had complained about the holding of their citizens."

On 29 April, 2003 Irene Kahn, Secretary-General of Amnesty International, wrote to President Bush to express:

"Deep concern at reports that several children are among the more than 600 detainees being held at the US Naval Base in Guantanamo Bay. We have written to your government on several occasions since the detainee transfers to the Naval Base began more than a year ago, and deeply regret that our concerns have gone unanswered and unremedied. While we continue to seek such remedies, under International Law and standards, for the adult prisoners, we are now urgently requesting your assurances that the USA will abide by its international obligations in relation to these young detainees.... The reports indicate that a "handful" of children, described as being between the ages of 13 and 15 years old, have been discovered by the authorities in Guantanamo. It is reported that the children were transferred, possibly from the air base in Bagram, earlier this year. We further note that a 16-year-old Canadian national, Omar Khadr, was transferred in late 2002 from Afghanistan to Guantanamo Naval Base. We are concerned by reports indicating that it took six months for even the Canadian Government to have access to him. Along with all the other detainees, he remains without access to legal counsel or his family. We are further concerned at reports indicating that the child detainees may be subjected to interrogation without access to any legal representatives. Article 40 on the Convention on the Rights of the Child states that, "every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

independent tribunal.[246] In accordance with these views, the United Kingdom also requested that its citizens detained in Cuba be returned for trial, as shall be discussed later in the chapter.[247]

We must also acknowledge that the conditions, to which the detainees held within Guantanamo are being subjected to, have proven to be the foremost reason behind condemnation of detention in Guantanamo Naval Base. Prisoners are housed in individual cells, measuring 1.8 by 2.4 meters. The cells are constructed of chain-link fence, have metal roofs, concrete floors and are partially exposed to the outdoors. The majority of the detainees, who are Muslim, are allowed to pray, but have been forced to shave their beards. This has consequently drawn harsh criticism from a number of human rights groups, as mentioned earlier, including Amnesty International who stated that the *"cages...fall below minimum standards for humane treatment."*[248] The International Committee of the Red Cross also complained that the release of photographs depicting the detainees shackled and confined was exposing them to public curiosity, which is prohibited under the Third Geneva Convention, together with deploring the prisoners' treatment. This was an unprecedented move, released to the public on 10 October, 2003.[249] Furthermore such adverse treatment suggests deviation from the Geneva Convention's requirement that Prisoners of War be treated similarly to the armed forces of the Detaining Power. However the US Administration was quick to dismiss this criticism, with Vice President Dick Cheney publicly stating that the detainees were, *"probably being treated better than they deserve."*[250] Such statements are consistent with the Administration's overall position that its treatment of the detainees is not only well within the bounds of its legal obligations, but the bounds of propriety as well.

As a result, the objective of this chapter is to discuss the legality of Guantanamo Bay, and ask the following question: does the Naval Base deprive its inmates of

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246 *"Euro MP's Seek Tribunal to Determine Cuban Prisoners' Status"*, Agence Presse-France (February 7, 2002).

247 Sue Leeman, *"Britain Wants Captives Tried at Home"*, The Telegraph (UK) (January 24, 2002).

248 Exert taken from BBC News Online, April 27, 2002 at http:/www.bbc.co.uk/1/hi/world/Americas/1784700.s.

249 ICRC President Jakob Kellenberger voiced objections over the prisoners' uncertain fate during meeting with US National Security Advisor Condoleezza Rice and Secretary of State Colin Powell in May 2003. Since then, prisoner camp commanders have confirmed 32 suicide attempts. Amanda Williamson of the ICRC's office in Washingron said:

"The main concerns today after more than 18 months of captivity is essentially that the internees in Guantanamo have been placed beyond the law...they have no idea about their fate...and they have no recourse....We have witnessed growing anxiety and a rather serious deterioration in the psychological health of the detainees, linked very much, we believe to their ongoing uncertainty."

250 *"No POW Rights for Cuba Prisoners"*, CNN.com (Jan 15, 2002) available at: http:// www.cnn.com/2002WORLD/americas.

fundamental human rights? In relation to this, it is important distinguish between the protection of "combatants"[251] and prisoners of war, analyse the terminology of "combatant" versus "unlawful combatant" and discuss the legal protection of individuals appointed with "combatant" status, all in respect of International Human Rights norms within the Geneva Conventions. We must also analyse the importance of *habeas corpus* and the detainees' right to due process under the US Constitution, and also address the issue as to which state jurisdiction the captives held at Guantanamo Bay fall under. Finally it is important to examine the UK's position regarding Guantanamo, and to conclude by identifying relevant legal challenges to the detention of the individuals at Guantanamo Bay, from both within the United States and the United Kingdom.

5.2 Detainees Rights and Remedies under International Law

5.2.1 Geneva Conventions

Although the Detainees held in Guantanamo have been denied the protection of the United States Constitution, we must note that many of them have substantial rights under International Law. While additional bodies of law may apply to these prisoners, at a minimum the *Geneva Convention Relative to the Treatment of Prisoners of War*[252] of August 12, 1949 (Geneva Convention III) and the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*[253] of August 12, 1949 (Geneva Convention IV) may afford them a generous body of rights particularly relevant to their incarceration and potential trials before military commissions. Among the rights that may be utilised by the detainees, are the right to representation by counsel, to confront witnesses, and to present witnesses and evidence favourable to the individual detainee.

The 1949 Geneva Conventions and the 1977 Additional Protocol I predominantly govern the protection of prisoners of war held during international conflicts. These are four separate Conventions, each governing a distinct aspect of humanitarian law, and two additional Protocols adopted 28 years later after the Conventions. The four segments

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[251] See A. De Zayas; *"Combatants"*, Encyclopaedia of Public International Law, vol. 1, Rudolph Bernhardt.
[252] Geneva Convention Relative to the Protection of Prisoners of War, done August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (hereinafter Geneva Convention III).
[253] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, done August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (hereinafter Geneva Convention IV).

govern the amelioration of the sick and wounded of the armed forces in the field; the amelioration of the wounded, sick and shipwrecked members of the armed forces at sea; the treatment of prisoners of war; and the treatment of civilian persons in time of war. The Third and Fourth Geneva Conventions regarding the treatment of POW's and civilians are the most relevant in the context of this chapter.

For the purposes of examining the Third and Fourth Geneva Conventions with respect to the detainees in Guantanamo, we must establish its historical background within the US legislative framework. The Third and Fourth Geneva Conventions were ratified by the US Senate on July 6, 1955, and by Afghanistan on September 26, 1956.[254] In addition to their application during declared wars, the Third and Fourth Geneva Conventions also apply during any armed conflict between parties to the Treaties (High Contracting Parties). Thus, regardless of whether the US military incursion into Afghanistan amounts to a declared war, the provisions of these Treaties apply.

It must be noted that *Article 2* of the Convention applies in all cases of declared war, in any armed conflict and in cases of partial or total occupation, even if that occupation is unopposed. The use of the word "armed conflict" demonstrates the intent for the Convention to apply broadly and a desire to prevent States from evading their obligations by refusing to designate a conflict as a "war". Furthermore, it states that even if one of the Powers is not a party to the Convention, countries that are parties are *"bound by it in their mutual relations"*.[255]

Not all individuals captured during armed conflict, however, are entitled to prisoner of war status and the legal protections that stem from it. The basic principle identifies that individuals recognised as "combatants" under the 1949 Conventions and the Additional Protocol I are entitled to be treated as prisoners of war upon capture by an adverse party during armed conflict. Furthermore *Article 4* of *Geneva Convention III* defines the categories of individuals that are entitled to prisoner of war status, and describes the treatment that they must accordingly receive. The text indicates that:

"Prisoners of War, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

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[254] International Committee of the Red Cross; *"Geneva Conventions of 12 August 1949 and Additional Protocols of 8 June 1977: Ratifications, accessions and successions"* available at http:/www.icrc.org/eng.
[255] Third Geneva Convention, Art.2, 6 U.S.T. at 3318.

(1) *Members of armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.*

(2) *Members of other militias and members of other volunteer corps, including those of organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions:*

(a) *that of being commanded by a person responsible for his subordinates;*

(b) *that of having a fixed distinctive sign recognisable at a distance;*

(c) *that of carrying arms openly;*

(d) *that of conducting their operation in accordance with the laws and customs of war.*[256]

Additionally, under *Article 5* of *Convention III*, even where an element of doubt exists as to whether the individual has committed an aggressive act, and having fallen into the hands of the enemy come within any of the categories stipulated within *Article 4*, such individuals are treated as prima facie entitled to the status of prisoner of war until such time as the question of status has been determined by a competent tribunal.[257]

We must also acknowledge the importance of the *Additional Protocol I 1977*[258], which broadens the category of "lawful belligerents", or those combatants who are entitled to the protection afforded by the laws of war. In this respect, we must consider Geneva Convention III, which initially established the criteria that combatants must meet in order to be considered "lawful belligerents". However, one can argue that guerrilla movements on their own would fail to satisfy these prerequisites. Accordingly, *Article 44* of *Protocol I*, sought to extend legal recognition to certain types of guerrilla activity by modifying the requirements of distinctive emblems and carrying arms openly. Furthermore, it is also significant that *Article 44(3)* of *Protocol I*, provides that, while combatants should undoubtedly differentiate themselves from civilians, it may be that "the nature of hostilities" will prevent such distinction. As a result, when such circumstances arise, it can be argued that members of a fighting force will retain "combatant" status and be entitled to "prisoner of war" status upon capture, provided that they "carry arms openly" during actual military engagements and are visible to the enemy during deployment in preparation for such engagements. It is also important to note that captured combatants who fail to

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[256] Geneva Convention III, Art.4, 75 U.N.T.S. at 138-139.

[257] Geneva Convention III, Art.5, 75 U.N.T.S. at 140.

[258] Protocol Additional to the Geneva Convention of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature December 12, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

satisfy the minimum criteria outlined in *Protocol I* will not be entitled to Prisoner of War status, however such an individual will benefit from "equivalent" protections, with particular reference to the essential guarantees of treatment and due process in the context of offences committed prior to capture.[259] *Protocol I*, however, has not been ratified by the US.

It is of importance also to recognise that under *Article 44* of *Geneva Convention III*, "combatants" entitled to Prisoner of War status upon capture will, on the whole, fall into three categories: those who are members of regular armed forces and duly authorised supporting personnel; Or combatants who, although otherwise satisfying the qualifying criteria, are not in "uniform", but carry arms openly and distinguish themselves with some distinctive sign that is visible at a distance; Or combatants who otherwise satisfy the qualifying criteria, but who are prohibited from wearing any distinctive sign or clothing, even though they carry arms openly. It can be argued, with support from international publicists, most notably *Hilaire McCoubrey* [260], that this third category has proved to be contentious, associating itself as a "terrorists' charter". However these criticisms may be somewhat overstated, as terrorist organisations would fail to meet even the relaxed qualifications for "combatant" status due to their unwillingness to apply and abide by a "Geneva" regime in their own activities. Moreover, few, if any, organisations, which might be classified as terrorist in nature, would meet the other prerequisites for combatant and prisoner of war status, namely, responsible command and internal discipline incorporating observance of the laws of armed conflict. Finally, Protocol I's relaxation of the general requirement for combatants to wear uniform or some other distinguishing mark applies only where such a distinction is "not possible".

We must at this stage also address the ambiguity surrounding the categorisation of "combatants" versus "unlawful combatants", in order to fully understand its relevance to the detainees being held at Guantanamo Naval Base. It may be said that the term "unlawful combatant" is aimed at drawing a distinction between the civilian population and "combatants" in armed conflict, in order to avoid any uncertainty of differentiation between the two groups. However it is clear that regular troops form the core of "lawful combatants". In order fully to understand the term "unlawful combatant", it can be argued that since the term does not appear in any relevant Convention or Treaty, it should not be

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[259] Geneva Convention III, Arts. 44(4) and 45, 1125 U.N.T.S. at 23-24.
[260] Hilaire McCoubrey, *"International Humanitarian Law"*, Ashgate/Dartmouth (1998).

recognised under International Law.[261] We can note that its original application was adopted by the US Supreme Court in *ex parte Quirin*[262], which upheld military tribunals for a group of German saboteurs, wearing civilian clothes, having entered the US by submarine. In this instance the US Supreme Court distinguished between the *"armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants"*. According to the Supreme Court, *"lawful combatants are subject to capture and detention as prisoners of war"*, whereas unlawful combatants, in addition to being subject to capture and detention, *"are subject to trial and punishment by military tribunals for acts which render belligerency unlawful"*. Consequently, the Court ruled that spies and saboteurs were violators of the laws of war and so were not entitled to prisoner of war status.

In assessing the classification of "combatant" versus "unlawful combatant" to a further level, it is important to refer to the relevant components of the Geneva Conventions. *Article 4(A)* of *Geneva Convention II* [263] refers only to "armed forces". However, as discussed earlier, the Geneva Conventions provide the criteria to distinguish civilians from combatants. Although there is an absence of explicit text requiring members of regular armed forces to wear uniform, this proposition is regularly applied as a procedural rule to determine the status of an individual. As a result, it can be argued, that any regular soldier that commits a belligerent act in civilian clothes is no longer a lawful combatant, consequently losing his privileges. To recapitulate, it can be said "unlawful combatants" may be either members of the regular forces or members of resistance or guerrilla movements who do not fulfil the conditions of lawful combatants. From a differing perspective, it is important to note that *Protocol I of 1977*, does not rely on "understood" criteria for regular armed forces. Armed forces of a Party to a conflict are defined as:

"All organised armed forces, groups and units which are under the command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a Government or an Authority not recognised by an adverse Party. Such armed forces shall be subject to an internal disciplinary system, which, inter alia, shall force compliance with the rules of international law of armed conflict."[264]

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[261] See "Liberation Movements"; Encyclopaedia of Public International Law, Rudolph Bernhardt, vols. 1-4, North-Holland Publishing Company.
[262] Ex parte Quirin, 317 U.S. 1, 21 (1942).
[263] Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217 [hereinafter Geneva Convention II].
[264] Article 43(1), 1125 U.N.T.S. at 23.

Therefore, it can be said that *Protocol I* affords no protection for terrorists, nor does it authorise soldiers to conduct military operations masked as civilians. However, it can be argued that in certain instances it is difficult to identify terrorists and distinguish them from lawful combatants, which may be the case of certain individuals being held at Guantanamo Bay.

Furthermore, we must also pose the question as to whether *al-Qaeda* can be constituted *"A Party to the Conflict"*, under *Article 4(A)(1)* of *Geneva Convention III.* As identified earlier, the Third Geneva Convention is directed towards Governments or similar political entities. Additionally, this provision makes reference to a Party's territory.[265] Since holding territory is essentially a political endeavour, suggesting occupancy, control and sovereignty, this supports the construction that the Third Geneva Convention is concerned with political entities and not private organisations. As a result, although *al-Qaeda* appears to be a private terrorist organisation pursuing political objectives, it can be argued that the fact that *al-Qaeda* claims no territory and does not seek to establish its own sovereignty, strongly suggests that they cannot be considered a Party to a conflict under the Third Geneva Convention. Consequently, its members will not qualify as prisoners of war (POW's) under *Article 4(A)(1)* due to the fact that they are not part of the armed forces of a party to the conflict. Furthermore, in relation to *Article 4(A)(6)*, it can be noted that POW status will also elude most *al-Qaeda* members. This provision awards POW status to inhabitants who spontaneously arm themselves to repel invaders, requiring only that they *"carry arms openly and respect the laws and customs of war."*[266] On this basis, we can confidently conclude that *al-Qaeda* members fail to satisfy this provision.

In summary, it is submitted that *al-Qaeda* members captured as a result of the American military operations in Afghanistan should not be considered POW's under the Third Geneva Convention. The only instance that may grant them POW status is if America recognises *Al-Qaeda* as a *"Party to the Conflict."* In contrast, detainees who are members of Afghanistan's *Taliban* militia, stand in a more favourable position under Geneva Convention III. Since the *Taliban* was the ruling party of a signatory to the Geneva Conventions, it can be argued that they qualify as a "Party to the Conflict"[267] even though the United States tried to deny the legitimacy of the *Taliban* forces by labelling them as "unlawful combatants". Furthermore, regardless of the fact that the *Taliban* may lack the

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[265] Article 4(A)(2), 75 U.N.T.S. at 138.
[266] Article 4(A)(6), 45 U.N.T.S. at 140.
[267] Article 4(A)(2) Geneva Convention III 75 U.N.T.S. at 138.

military formality implied under *Article 4(A)(1)*, it appears to satisfy the threshold criteria of *"other militia...belonging to a Party to the conflict"* within *Article 4(A)(2)*. The primary question, however, lies in whether the *Taliban* followed the laws of war. Instinctively, we would presume that the brutal nature of the *Taliban* rule in Afghanistan would count against them. However, whilst the *Taliban* mistreatment of other Afghan civilians may constitute crimes against humanity under International Law,[268] it may not constitute an offence against the narrower laws of war, which have historically applied to armed conflicts between warring factions.[269] Therefore, unless the United States can point to specific, unlawful *Taliban* policies, or conduct that occurred during the military campaign, the *Taliban* would probably qualify as armed forces or as militia that followed the laws of war. As a result, captured members of the *Taliban* in all probability qualify for POW status under the Third Geneva Convention.

5.2.2 International Covenant on Civil and Political Rights

As discussed earlier within Chapter 3.2 of this thesis, the United States ratified the ICCPR on June 8, 1992. The Covenant sets out certain inalienable rights due to all persons. The US ratified the ICCPR, however, with the specific declaration that the Treaty was not self-executing. In other words, individuals cannot invoke it until it is incorporated into US domestic legislation. Nonetheless, it is possible to use the ICCPR as persuasive authority to assist in the interpretation of domestic law through indirect incorporation.[270]

We can apply the ICCPR to the detainees being held in Guantanamo in a number of ways. First, there is *Article 9*, which deals with an individual's right to liberty and security. The *General Comment* to this Article states that if preventative detention is used to ensure public security, the detentions must meet the provisions set forth by the ICCPR.[271] Specifically the detention *"must not be arbitrary and must be based on grounds and procedures established by law, information of the reasons must be given and court control of the detention must be available...."*[272] Freedom from "arbitrary" detention is a relative right, however. Whether or

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[268] Kriangsak Kittichaisaree, International Criminal Law Review 227 (2002).
[269] William Winthrop; *"Military Law and Precedents"*, Legal Classics Library; 1988 (1886).
[270] Mark A. Sherman; *"Representing Defendants in International Criminal Cases: Asserting Human Rights and Other Defences: Indirect Incorporation of Human Rights treaty Provisions in Criminal Cases in the United States Courts"*, 3 ILSA J. Int'l & Comp. L. 719, 749 (1997).
[271] ICCPR General Comment 8, (4), Right to Liberty and Security of Persons (Article 9); (June 30, 1982).
[272] Article 9, General Comment states:

not detention of an alleged terrorist or direct supporter of terrorism is "arbitrary" has to be considered in context and with reference to various interests at stake, such as the detainees' right to liberty and security, the rights of others to liberty and security, and the interests of the government in maintaining law and democratic order. Under international human rights law, therefore, detention will not be deemed "arbitrary" if it is reasonably necessary under the circumstances.

When an individual is detained by a state, human rights law also requires the availability of judicial review of the detention. As affirmed within *Article 9(4)* of the Covenant, *"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 nay decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."* Access to courts for judicial determination of rights and the right to an effective remedy are also guaranteed more generally under *Article 14(1)* of the Covenant,[273] and supplemented by the General Comments of the Human Rights Committee established under *Article 28* of the Covenant.[274] It must be noted, however, that the right to judicial review of detention is a derogable right, *"in time of public emergency which threatens the life of the nation"*[275], when the existence of such an emergency is officially proclaimed and a denial of judicial review is *"strictly required by the exigencies of the situation."* Such a denial, however, must not be inconsistent with the state's other obligations under international law, for example its obligations under the laws of war and the customary prohibitions against denial of justice to aliens. Therefore derogations are not permissible merely because they would be reasonable, but they must be "strictly required" by the exigencies of the situation.

A strong argument exists, however, that no circumstances should ever *"strictly require"* the denial of judicial review of detention, given that under the applicable standard concerning detention a State has such a low burden to justify detention to a court. Due to

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(1) Everyone has the right to liberty and security of a person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
(2) Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
(3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release....
(4) Anyone who is deprived of his liberty or 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 and order his release if the detention is not lawful.

[273] Article 14(1) states: *"everyone shall be entitled to a fair...hearing by a competent, independent and impartial tribunal."*
[274] General Comment No.29, PP11, 15-16.
[275] Article 4(1)(2), ICCPR.

the fact that a State must merely demonstrate that detention is reasonably needed under the circumstances, the State should have to make his showing to a court. Many authoritative international bodies have expressed this view, for example the European Court of Human Rights. There, it has been recognised that detention by the Executive without judicial review of the proprietary of detention, is violative of fundamental human rights law.[276] Such widespread recognition of the right to freedom from arbitrary detention affirm the non-derogability of judicial review and therefore require that the Executive branch may not exercise its discretion to detain without independent, fair and effective judicial review. Similarly, the Inter-American Court of Human Rights has recognised that judicial guarantees essential for the protection of non-derogable or authoritative human rights are also non-derogable in times of emergency.[277]

5.3 Under Which Jurisdiction do the Guantanamo Detainees Fall?

Whilst the detainees' rights in Guantanamo may be restricted, they are not entirely absent due to the their right to due process under the United States Constitution and the writ of *habeas corpus*, both serving as a key tool to challenge unlawful incarcerations and to enforce prisoners rights.[278] Unfortunately for the detainees however, US courts have appeared reluctant to implement the writ of *habeas corpus* in proceedings involving alien enemies.[279] A reason for this is that the scope of review in military cases is predominantly narrow.[280] In considering a petition for writ of *habeas corpus* arising in a military case, the reviewing court considers only whether the military court has jurisdiction over the individual and whether it has authority to try the offence charged.[281] Nevertheless, even with the precedent existing of extinguishing *habeas* review, opportunities exist for the Federal Courts of the United States to ensure that justice is administered correctly to all individuals, even alien enemies.[282]

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[276] The Court stated in Al-Nashif v Bulgaria, App. No. 50963/94, E.Ct.H.R. (June, 2002): *"everyone who is deprived of his liberty is entitled to a review of the lawfulness of the detention by a court...The requirement is of fundamental importance to provide safeguards against arbitrariness...National authorities cannot do away with effective control of lawfulness of decision by the domestic courts whenever they choose to assert that national security and terrorism are involved...."*

[277] See Advisory Opinion No. OC-9/87, Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 of the American Convention on human Rights, Inter-Am. C.H.R. (Ser. A) No.9 (Oct.6, 1987).

[278] Writ of Habeas Corpus, 28 U.S.C. 2241 (1994).

[279] Examples include: Johnson v Eisentrager, 339 U.S. 763, 780 (1950); Hirota v MacArthur, 338 U.S. 197, 198 (1948); Application of Yamashita, 327 U.S. 1, 26 (1946); Ex parte Quirin, 317 U.S. 1, 48 (1942).

[280] See Burns v Wilson, 346 U.S. 137, 139 (1953).

[281] See Eisentrager; ex parte Quirin and United States v Grimley, 137 U.S. 147, 150 (1890).

[282] From a differing perspective we may look at *Yamashita*, where the court observed, *"the trial and punishment of enemy combatants who have committed violations of the law of war is...a part of the conduct of war."* Since the Constitution declares the President as Commander-in-Chief of the armed forces, waging war is almost

Guantanamo Bay, on lease to the United States by the Cuban Government, is the oldest overseas military base and the only one located within a Communist regime. Negotiated in 1903, long before Cold War tension arose between the US and Cuba, the lease costs the US only $4,085 per annum and can be terminated only by mutual agreement between the two States.[283] It can be argued that due to the strategically advantageous location of the base, this is the main reason as to why the US has never expressed any interest in abandoning it. It must also be noted that the current situation involving the detainees within Guantanamo is not the first instance in which the US has used the Base as a holding tank. In 1994 tens of thousands of Haitian and Cuban refugees were interdicted in the waters off the Florida coast, and subsequently taken to Guantanamo. In that instance, when *Cuban American Bar Association v Christopher (1995)*[284] was challenged in Federal Court, lawyers for the refugees argued that although the base was technically on Cuban territory, it was effectively under US control.

The issue therefore of Guantanamo Bay residing under US control raises a further question as to whether US Constitutional protections extend to the detainees being held there. This issue may only be resolved when it is established whether Guantanamo is deemed to be within the US' sovereign territory.[285] The general rule for determining jurisdiction in *habeas corpus* cases is that jurisdiction lies in the district where the prisoner is in custody.[286] This ruling creates confusion, when the prisoner is not held within any district. Under such circumstances, certain courts have held that when a prisoner is incarcerated outside US territory, jurisdiction for *habeas corpus* lies in the district where a respondent may be found who can compel the prisoner's release.[287] In cases of extra-territorial imprisonment by the US military, some courts have found that jurisdiction lies in

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exclusively an executive function. Also Eisentrager, *"certainly it is not the function of the Judiciary to entertain private litigation...which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad."* Combining the constitutional provision with the Yamashita quote, it can be argued the President holds plenary authority to try enemy aliens accused of war crimes. Therefore, the Federal Courts have no authority to review the actions of military tribunals, not even on petition for writ of habeas corpus. However, even *Eisentrager* and *Yamashita* reject that notion, where the court considered whether any basis existed for the writ. Accordingly, the fact that the court even went through the exercise of considering the writ of habeas corpus demonstrates that habeas requests should not be rejected simply on the mistaken notion that the military holds absolute authority to try accused war criminals.

283 Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantanamo and Bahia Honda (July 2, 1903), available at http:/www.yale.edu/lawweb/Avalon/diplomacy/cuba/cuba003.htm.

284 Cuban American Bar Association v Christopher, 43 F.3d. 1412, 1424-1425 (11th Cir. 1995).

285 To determine this we may look at cases such as *United States v Verdugo-Urquidez, 494 U.S. 259, 260 (1990)* which held that those cases in which aliens have been determined to enjoy certain constitutional rights establish only that aliens receive such protections when they have come within the territory of, and have developed substantial connections with the US.

286 Ahrens v Clark, 335 U.S. 188, 192 (1948).

287 eg. Braden v 30th Judicial Circuit Court of Ky., 410 U.S. 484, 500 (1973).

the District of Columbia, as both the military and civilian heads of the various services are located there. The same can be said for the Guantanamo detainees' petitions for writ of *habeas corpus*. Since they are being held at a US naval base in Cuba, it would seem that proper respondents to be named in the petition would include the Chief of Naval Operations and/or the Secretary of Defence.

Any analysis of this issue involves an examination of the case of *Johnson v Eisentrager*.[288] Here, a group of German soldiers convicted of war crimes by a military tribunal sought *habeas corpus* review in the District of Columbia. The prisoners were incarcerated in Germany, and neither the offences nor the military proceedings occurred within US territory. In its disdainful rejection of their petition, the United States Supreme Court discounted the position of enemy aliens held outside US military sovereignty.[289] With reference to the Guantanamo detainees, initially the circumstances sound remarkably similar. However, on further analysis we notice that the location was the secondary issue. In fact, the primary issue was that the petitioners failed to state a genuine reason as to why their imprisonment was unlawful. Therefore, although the *Eisentrager* judgement seemed to make much of the fact the prisoners were held outside the US, the location proved largely irrelevant as their petition failed to allege any facts that if true, could have affected their release. Subsequently, the Court intimated that, had the prisoners made some supportable claim about the unlawfulness of their detention, it would have been taken into consideration.[290] In spite of this dictum on extraterritoriality, we can also note Justice Douglas' dissenting judgement in the case of *Hirota v MacArthur*[291], describing the correct rule in handling *habeas corpus* proceedings involving extraterritorial detention. In rejecting the argument that incarceration abroad was a basis for withholding habeas jurisdiction from Federal courts, Justice Douglas warned that such a ruling would create an incentive for extraterritorial incarceration where the Executive Branch may circumvent judicial

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[288] Johnson v Eisentrager, 339 U.S. 763, 780 (1950).

[289] The court held: *"...a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offences against the laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States."*

[290] The Court stated: *"...despite this, the doors of our courts have not been summarily closed upon these prisoners. Three courts have considered their application and have provided their counsel opportunity to show some reason...why they should not be subject to the usual disabilities of non-resident enemy aliens.... After hearing all contentions they have seen fit to advance and considering every contention we can base on their application and the holdings below, we arrive at (the conclusion)...that no right to writ of habeas corpus appears."*

Also accord Quirin, 317 U.S. at 25 where the Court stated: *"the fact that the petitioners are enemy aliens does not foreclose consideration by the Courts of petitioners' contentions that the Constitution and the laws of the United States constitutionally enacted forbid their trial by military commission."*

[291] Hirota v MacArthur, 338 U.S. 197 (1949).

review of its actions. Furthermore, it is also evident that Justice Douglas identified the distinctions that lie between judicial review of Executive actions and judicial review of presidential authority. He noted that if the military treats the detainees in accordance with the relevant Geneva Conventions, the courts can order no more. Similarly, if a military court acts within its jurisdiction, no civilian court can overturn the decision. Therefore, in summary, under the Douglas argument, the writ of *habeas corpus* will not free alien terrorists charged with war crimes.

We must also take note of the US Government's stance that no Federal court has authority over the *al-Qaeda* militants held at Guantanamo.[292] This is because under a recent brief filed in the District Court of California, Government lawyers argued that Camp X-Ray is not a sovereign territory due to the fact that Cuba retained sovereignty when it leased the base to the US in 1903. This view is confirmed by the Cuban Government, who stated that *"the American Naval Base at Guantanamo is a facility located within an area of 117.6 square kilometres of the national territory of Cuba...."*[293] Furthermore in the case *Coalition of Clergy v George Walker Bush*,[294] the US District Court for the Central District of California agrees with both Cuba's and the US Government's assertion of Camp X-Ray not being within US sovereign territory. It is evident that the decision in the *Coalition of Clergy* case was based on the language of the lease agreement itself, stating;

"While on the one hand the United States recognises the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of the agreement the United States shall exercise complete jurisdiction and control over and within said areas."[295]

In sum, even though the US retains jurisdiction and control over the area at Camp X-Ray, Cuba retains sovereignty, as established by international treaty, and judicially recognised by US courts. As the detainees are not held on US sovereign territory, they do not subsequently have constitutional protections.

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[292] David Rozenberg; *"Response to Terror: US Asks Judge to Reject Claim Over Detainee Prisoners."* Los Angeles Times (February 1, 2002).

[293] See Decleration del Gobierno de la Republica de Cuba a la Opinion Publica National e Internacional, 11 de enero del 2002 [Statement by the Government of Cuba to the National and International Public Opinion January 11, 2002], available at http:/www.cuba.cu/gobierno/documentos/2002/ing/d110102i.html.

[294] Coalition of Clergy v George Walker Bush, 2002 U.S. Dist. LEXIS 2748 at 41.

[295] Lease to the United States of Lands in Cuba for Coaling and Naval Stations, February 23, 1903, US-Cuba, T.S. No. 418, as modified by Treaty Between the United States of America and Cuba Defining Their Relations, May 29, 1934 art. III, 48 Stat. 1682, 1683.

5.4 Current Legal Challenges to Detention at Guantanamo Bay

We have seen that the United States judiciary has expressed little willingness to intervene in cases involving the Guantanamo detainees and other cases involving assertions by the Government of unlawful combatant status of detainees or accused individuals. The issue becomes complicated, not only due to disputes relating to sovereignty, as discussed earlier, but also because of the general unwillingness of the judicial branch to intervene in what it perceives to be foreign policy issues within the exclusive prerogative of the executive branch. Furthermore, as the Administration has cast all of the cases deriving from Guantanamo as matters arising from combat and war, rather than as violations of criminal law, the courts have adopted a similar stance showing their reluctance to intervene in terms of executive discretion in the exercise of powers and the military.

In addition, it has also become evident that the US Government has taken extensive measures to hide the identities of alien detainees, both in Guantanamo and within the US, and to subsequently obstruct legal access to courts or counsel for all detainees. Owing to the difficulties experienced by such alleged terrorists as *Yaser Hamdi*, *Jose Padilla* and *Zacarias Moussaoui*, to achieve favourable treatment from the courts, the Inter-American Commission appears to be one of the few deliberative bodies willing to expose the weaknesses within the Bush Administration's legal arguments.

The cases involving *Hamdi*, *Padilla* and *Moussaoui* raise complex issues of international law regarding prisoner of war and combatant status together with access to the courts. In the case of Jose Padilla, we can see evidence of a US citizen arrested in Chicago on a material witness warrant. He is now designated as an "enemy combatant" by the President, and is being held at a naval detention centre in South Carolina without formal charges. In December 2002, a Federal District Court judge in New York affirmed the President's authority to designate *Padilla* as an "enemy combatant". However, it was concluded that he was entitled to a defence counsel in the exercise of the court's discretion over *habeas corpus* petitions, rejecting various Government criticisms that intervention by a lawyer on Padilla's behalf was *"inconsistent with legitimate goals of intelligence gathering and prevention of further attacks"*. It is evident that the judge reaffirmed this ruling while expressing his concern with the Government's legal position. He subsequently categorised the arguments of the Department of Justice and Solicitor General as *"permeated with the pinched legalism one usually encounters from non-lawyers"*.

5.4.1 HAMDI V RUMSFELD[296]

Yaser Esam Hamdi, known as the *"Cajun Taliban"* is a United States citizen who was captured by American and Allied Forces in Afghanistan. Initially the US Government detained him at Camp Delta, however once it was discovered that he was an American citizen, the Government transferred him to the Naval Brig at Norfolk, Virginia, where it has labelled him as an "enemy combatant", detained him indefinitely, failed to bring charges against him, and denied him access to counsel and due process.

Subsequently, Hamdi's father filed a petition for writ of *habeas corpus* under the legal relationship of *"next of friend"*.[297] The district court held that Hamdi's father sufficiently fulfilled the next of friend criteria. In addition, the district court appointed Hamdi counsel and ruled that the Government must allow Hamdi unmonitored meetings with his appointed counsel.

In *Hamdi v Rumsfeld* the Court of Appeals reversed the district court's decision and held that proper weight was not given to national security concerns when the court granted Hamdi access to counsel. Furthermore, the court stated, *"the President's wartime detention decisions are to be accorded great deference from the courts."*[298] The Government took an even more radical position by requesting that the court of appeals dismiss the petition for a writ of *habeas corpus* without leave to amend because the government's judgement as to whom is an enemy combatant is not subject to judicial review, since this would result in an invalidation of executive policy. The court, however, refused to summarily dismiss the petition for writ of *habeas corpus*, because it did not want to endorse the proposition that a citizen, alleged to be an enemy combatant, is not entitled to *"meaningful judicial review...on the Government's say-so."* The Court, however, held that *"...if Hamdi is indeed an enemy combatant who was captured during hostilities in Afghanistan, the Government's present detention of him is an lawful one."*[299]

Upon remand, the district court directed the government to answer Hamdi's petition for writ of *habeas corpus*. Along with its responses, the government submitted an

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[296] Hamdi v Rumsfeld, 296 F.3d 278, 280 (4th Cir. 2002).
[297] Next of friend status can be granted to an individual who is (1) acting on behalf of a defendant who is unable to appear on his own behalf and (2) has a significant relationship with the defendant and will ensure that the defendant's best interests are upheld.
[298] Citing ex parte Quirin.
[299] Supra note 189, para. 64.

affidavit from Michael Mobbs (Mobbs Declaration), a special advisor to the Under Secretary of Defence for Policy. This declaration contained information regarding Hamdi's capture that allegedly confirmed and validated his detention as an enemy combatant. In response, the district court held that the *Mobbs Declaration* was insufficient proof and ordered the Government to produce more evidence.

Subsequently, the Government appealed this decision. On January 8, 2003, the Court of Appeal held that the *Mobbs Declaration* was sufficient to justify Hamdi's detention. The court reasoned that to hold otherwise risked creating *"judicial involvement...into an area where the political branches have been assigned by law a pre-eminent role."* Specifically, the Court held that the Government's right to detain Hamdi as an enemy combatant emanates from its war making powers of Article I and II of the US Constitution. As a result, the court dismissed Hamdi's petition for writ of *habeas corpus* because *"it [was] undisputed that he was captured in an [sic] zone of active combat operations abroad"* and the *Mobbs Declaration* was sufficient to *"establish a legally valid basis"* for his detention.

We must also point out, however, that the district court did go on to state that under *"a government of checks and balances"*, a court cannot allow detention with *"few or no standards"* or on the *"sparse facts"* presented to support an executive decision to detain. Therefore, allowing the Executive to make a final determination with respect to the content and application of international law governing the status of persons, individual rights, and the permissibility of detention would necessarily involve a violation of separation of powers, and would not be excusable under international law.[300] However, in contrast to this philosophy, it is important to acknowledge *Justice Diana Gribbon Motz's* dissenting judgement. Here she asserts:

"For more than a year, a US citizen, Hamdi, has been labelled an enemy combatant and held in solitary confinement in a Norfolk, Virginia Naval brig. He has not been charged with a crime, let alone convicted of one."

"To justify forfeiture of a citizen's Constitutional rights, the Executive must establish enemy combatant status, with more than hearsay. In holding to the contrary, he panel allows appropriate deference

[300] In relation to this we can also refer to, United States v Altstoetter (The Justice Case), 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No.10, at 983-984 (1951).

to the Executive's authority in matters of war to eradicate the Judiciary's own Constitutional role: protection of the individual freedoms guaranteed to all citizens."

"With respect, I believe the panel has seriously erred, and I dissent from the court's refusal to rehear this case en banc."

"The panels' decision marks the first time in our history that a Federal Court has approved the elimination of protections afforded a citizen by the Constitution solely on the basis of the Executive's designation of that citizen as an enemy combatant, without testing the accuracy of the designation. Neither the Constitution nor controlling precedent sanctions this holding."

5.4.2 PADILLA EX REL. NEWMAN V BUSH[301]

Like Yaser Esam Hamdi, Jose Padilla, known as Abdulalah al-Muhajir, is a United States citizen. On May 8, 2002, believing him to be a member of *al-Qaeda,* the US Government arrested Padilla as he arrived in Chicago on an international flight from Pakistan. The FBI became interested in Padilla after interrogating a senior *al-Qaeda* leader who revealed that Padilla planned to return to the United States and detonate a dirty bomb.[302]

Originally the government arrested Padilla on a material witness warrant and detained him at the Metropolitan Correctional Centre in New York City. After determining Padilla to be an unlawful enemy combatant, the President transferred him to a high security Navy prison in Charleston, South Carolina. On December 4, 2002, the district court announced its decision that the government has the authority to detain enemy combatants who are United States citizens for an indefinite period of time. The court held:

"...although unlawful combatants, unlike prisoners of war, may be tried and punished by military tribunals, there is no basis to impose a requirement that they be punished. Rather, their detention for the duration of hostilities is supportable – again, logically and legally – on the same ground that the detention of prisoners of war is supportable: to prevent them from rejoining the enemy."

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[301] Padilla ex rel. Newman v Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

[302] A dirty bomb is a "conventional explosive combined with radioactive material." Associated Press, (June 16, 2002), available at http://www.cbsnews.com/stories/2002/06/10/attack/main511671.shtml.

The court held, however, that Padilla was entitled to meet with counsel regarding his petition for writ of *habeas corpus*. The court also announced that:

"...upon further submission from Padilla, should he choose to make one...the court will examine only whether there was some evidence to support the President's finding, and whether that evidence has been mooted by events subsequent to Padilla's detention."

The Padilla court has since lowered its differential standard for evaluating executive determinations. On reconsidering, the Court clarified its *"some evidence"* standard to provide for greater review of executive determinations than what the Fourth Circuit Panel in *Hamdi* required.

5.4.3 Overview Of Hamdi and Padilla Judgements In the Context of the US Constitution and International Law Identified Within this Chapter

As established in Hamdi, Padilla assumed that *"if the petitioner does not dispute that he was captured in a zone of active combat operations abroad and the government adequately alleges that he was an unlawful combatant, the petitioner has no right to present facts"* to dispute the government. Additionally, Padilla assumed that the *"undisputed detention of a citizen during a combat operation undertaken in a foreign country and a determination by the executive that the citizen was allied with enemy forces"* should be determinative. Padilla, unlike Hamdi, *"was detained in this country...by law enforcement officers pursuant to a material witness warrant."* Therefore we can argue that the judicial review, originally identified within Hamdi, and the assumptions of Padilla concerning the place of capture, are inconsistent with international law norms and trends in judicial review policies identified earlier within this chapter. While Hamdi's *habeas corpus* petition moved forward on the legal challenges to his detention, unlike Padilla, Hamdi will not be able to contest the factual allegation on which the Executive based its decision to label him an enemy combatant. This has consequently denied Hamdi access to any meaningful judicial review of his detention. As such, these cases have raised important Constitutional issues of separation of powers as between the Executive and Congress, not previously addressed by the Courts. Specifically, these cases pose the question of whether the Executive's unilateral curtailment of *habeas corpus* review for Guantanamo detainees and obstruction of any factual review in Hamdi's detention amounts to an unconstitutional

suspension of the writ of *habeas corpus* under Article I, Section 9 Clause 2 of the Constitution.[303]

In addition, we can also argue that the US Governments' policy for incommunicado detention, identified in Padilla and Hamdi, raises other inconsistencies with international law norms. Customary and treaty-based human rights law requires that no persons shall be subjected to torture, or to cruel, inhumane, or degrading treatment.[304] The same prohibition exists in custom and treaty-based laws of war. For example ***Article 3*** of the *Geneva Conventions* requires that all persons detained *"shall in all circumstances be treated humanely,"* and that *"to this end...at any time and in any place...cruel treatment and torture"* are proscribed in addition to *"outrages upon personal dignity, in particular, humiliating and degrading treatment."* *Article 5* of the *Geneva Civilian Convention* also reiterates that *"in each case"* persons detained as security threats shall be *"treated with humanity."* Additionally, *Article 31* requires that *"no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them,"* whilst *Article 33* prohibits *"all measures of intimidation."* In respect of these proscriptions, we can argue that the physical interrogation techniques used for months by the US in such cases as Hamdi and Padilla, contravene such international law norms and therefore qualify as explicit breaches of international human rights standards.

Furthermore, as it stands now, the Padilla court has defined an enemy combatant as an *"unlawful combatant, acting as an associate of a terrorist organisation whose operations do not meet the four criteria necessary to confer lawful combatant status on its members and adherents."*[305] In other words, the Padilla court has reduced the term enemy combatant to simply encompass someone who does not qualify as a prisoner of war. This broad characterisation, however, does not explain the discrepant treatment among those individuals who do not qualify as prisoners of war. Therefore we can argue the Government's failure to rationalise these discrepancies is in violation of the ICCPR's requirement that *"preventative detentions must be based on grounds and procedures established by law."*[306] Furthermore, it can be established that the ICCPR may be important in interpreting US domestic law. In deciding whether to grant the writ of *habeas corpus*, the court should approach the issue in such a manner as to preserve compliance with international law, notably *Article 9(4) ICCPR*, which states that

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[303] Which reads: *"The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."*

[304] See ICCPR, art. 7; and Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, December 10, 1984, 1465 U.N.T.S. 85.

[305] *Ibid* at 593.

[306] Article 9, General Comment to ICCPR.

anyone who is detained *"shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."* Therefore, if the United States required judicial review of those detentions, it would ensure compliance with the aforementioned *Article 9 ICCPR*.

Finally, in light of the arguments aforementioned, we can conclude that the cases involving Padilla and Hamdi demonstrate the stark contrast that exists between the strong presidential prerogative to assert classifications based on evidence and location, together with the Federal judicial requirement to test evidence through the *habeas corpus* petition. We can identify three distinct scenarios that have evolved as a consequence the Hamdi and Padilla cases. Firstly, the situation regarding US citizens who have been apprehended on both foreign and domestic battlefields, and who have been classified as "enemy combatants" and denied criminal protections by the Government. Secondly, non-citizens arrested in the United States, accused of being affiliated with Al-Qaeda, and tried in Federal courts and afforded criminal protections contested by the Government. Finally, non-citizens apprehended outside the United States, both on and off the battlefield, who have been brought to US military bases only to be denied any right of *habeas corpus* based on the lack of US sovereignty.

5.5 THE UK'S POSITION ON GUANTANAMO BAY WITH RESPECT TO DETAINEE, FEROZ ABBASI[307]

The United Kingdom's position on the detainees held in Guantanamo Bay is reflected in the statement of the United Kingdom's Foreign Secretary, Jack Straw, who stated that, irrespective of whether the prisoners fall under the protections of the Geneva Conventions or not, they certainly have rights under customary international law, and it is subsequently the responsibility of the respective Government to safeguard these rights.[308] We can also acknowledge Mr. Straw's statement to the UK Human Rights Annual Report of 2002, where he identified:

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[307] Abbasi (R on application of) v Secretary of State for Foreign & Commonwealth Office [2002] EWCA Civ. 1316; Her Majesty The Queen on the application of Abbasi and another v Secretary of State for Foreign & Commonwealth Affairs and Secretary of State for the Home Department [2002] EWCA Civ. 1598 (6 November 2002).

[308] Edited transcript of an interview given by the Foreign Secretary, Jack Straw, on the treatment of prisoners held in Guantanamo to BBC Radio 4 (UK) (15 January, 2002) at http://www.number-10.gov.uk/output/page4235.asp.

"The struggle for human rights has to be a major part of the fight against terrorism. Combating terrorism, however, must not become a pretext for setting aside the human rights norms so painstakingly established over the last 50 years."[309]

With regard to this view, it was noted that the UK had received assurances from the US that the detainees in Guantanamo were being treated humanly and consistent with international law norms, identified earlier in the chapter, most notably within the Geneva Conventions. As for their status, whilst the UK indicated that it was a complex issue, which it would continue to discuss with the US authorities, it has acknowledged the right of the US, as the detaining power, to decide whether they are going to prosecute the detainees.

It must also be noted that the United Kingdom's High Commissioner for Human Rights emphasised that all the detainees were entitled to the protection of international human rights norms, predominantly within the relevant provisions of the *ICCPR*, and the Geneva Conventions. Furthermore, the High Commissioner also identified that any dispute concerning their status should be brought before a competent tribunal, whilst any trial of these individuals should meet the international standards of the relevant components of the *ICCPR* and Third Geneva Convention. These recommendations therefore, can be argued are consistent with the ideologies of the United States, on the detainees legal position.

We can further elaborate on the consistency between the UK and US' policies concerning the Guantanamo detainees, by studying the leading case involving a UK national, Ferroz Abbasi, at Camp Delta, who is detained under the United States Presidential Order of 13 November 2001. In an opinion provided by three leading UK legal experts, it was argued that the British Governement could claim his status as a prisoner of war on his behalf. According to this opinion, the US was obliged to allow Abbasi to bring the question of his status before a competent tribunal. Until such a determination, by a competent tribunal on the basis of *Article 5* of *Geneva Convention III,* Abbasi should be presumed to be, and treated as a prisoner of war. As such, Abbasi would benefit from the protections granted under the Convention according to which he could only be prosecuted for war crimes and crimes against humanity. If, on the other hand, he

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[309] UK Human Rights Annual Report 2002 issued by the United Kingdom Foreign and Commonwealth Office, 12-13, at http://www.fco.gov.uk/Files/kfile/fullreport,3.pdf.

were a civilian detainee, then he would be entitled to the protections of Geneva Convention IV, and to immediate release as soon as the reasons of his detention ceased to exist.

Finally, it must noted that if Abbasi was an unlawful combatant, subject to the criteria identified earlier in the chapter, then he would be entitled to the minimum standard of treatment provided by *Article 75* of *Additional Protocol I*, if it were accepted as customary international law. Furthermore, it can be argued that by excluding non-nationals of the right to have access to counsel, and of the right to petition courts in the US or other countries and international tribunals under the Presidential Order, the US would be violating its international legal duties to maintain the equality of all individuals before the law, without discrimination.[310]

In light of these views, proceedings were introduced before British Courts with the object of compelling the British Government to take action in support of Abassi. Here it was argued that the British Government failed to make adequate representations concerning Abbasi's status to the US authorities. Effectively, the applicant was seeking an order to force the Government to exercise its rights with respect to the US to secure his protection. On the other hand, it was submitted by the Government that the matter fell within the foreign affairs prerogative, and that subsequently no court had jurisdiction to adjudicate on the case. Rather surprisingly, the Court of Appeal gave leave to appeal and decided to hear the application on its merits. It subsequently rejected the Government's claim that matters of diplomatic protection were inevitably non-justiciable, although it conceded that they would be subject to judicial scrutiny only in exceptional circumstances. On the facts of the case, although the Court expressed its concern about the way British nationals were being treated in Camp Delta, it did not find the applicant's circumstances brought him within the "exceptional circumstances", provided to US authorities by the British Government.

On a final note, in relation to the United Kingdom's position on Guantanamo Bay, it is important to acknowledge Lord Steyn's remarks on the current deplorable situation there. In a speech in London on 25 November 2003[311], His Lordship, the third most senior judge in Britain, expressed his concerns at the way detainees were being

[310] This view is supported by the opinion of Professor Vaughan Lowe, within the press release from the Bar Human Rights Committee found at: http://www.barhumanrights.org.uk/pdfs/25_02_02CubaOpionion.pdf.
[311] Full text of speech available at: http://www.channel4.co.uk/news/2003/11/week_4/25_rights.html.

treated and held within the Camp. As identified earlier within the chapter, Lord Steyn confirms that there is evidence of *"sleep deprivation, forcing prisoners to stand for hours on end – not quite torture, but as close as you can get."* He goes on to identify that *"the purpose of holding the prisoners at Guantanamo was and is to put them beyond the rule of law, beyond the protection of any courts, and at the mercy of victors.... The procedural rules do not prohibit the use of force to coerce prisoners to confess."* Furthermore, he confirms what has been identified throughout this chapter, that that no justice exists within Camp Delta, concluding that the US Presidential Order, *"deprives all inmates of any rights whatsoever, and as a lawyer brought up to admire the ideals of American democracy and justice, I would have to say that I regard this as a monstrous failure of justice."* Therefore, the principal arguments that can be derived from Lord Steyn's views, raise the question: does the quality of justice granted to the prisoners at Guantanamo comply with the minimum international standards for the conduct of fair trials and the treatment of detainees? Lord Steyn's answer would be a resounding *'No"!* Concluding, we can argue Lord Steyn's views epitomise the general concerns on how deplorable the conditions at Guantanamo are, and the lack of fundamental human rights that exist there. The judge confirms that both the United States' and British Governments' stance of continually indicating that they are working hard behind the scenes *"just won't wash anymore"*, and that *"it may be appropriate to pose a question: Ought our Governments make plain publicly and unambiguously our condemnation of the utter lawlessness of Guantanamo Bay?"*

5.6 Overview of Guantanamo Bay within the Context of this Thesis

The Guantanamo detainees hold few, if any, rights under the US Constitution. At most, they enjoy the Fifth Amendment's promise of due process. However, that right simply entails the process due to an alien enemy charged with war crimes in a military trial. Furthermore, most non-Afghan *al-Qaeda* members hold nothing more than basic humanitarian rights under the Geneva Conventions, discussed throughout this chapter. On the other hand, *Taliban* militia members may qualify for substantial procedural rights under the Third Geneva Convention. Similarly, both *Taliban* and *al-Qaeda* members may obtain procedural rights under Geneva Convention IV. Furthermore, in order to effectively enforce those rights, the detainees must be entitled to seek writs of *habeas corpus* in the US Federal Courts. While the executive branch may hold near plenary power to wage war on foreign soil, the judiciary must retain oversight of post-war criminal proceedings. It must also be made clear that Cuba remains the *de jure* sovereign of Guantanamo Bay, whilst the United States retains *de facto* and *de jure* occupancy.

It can also be argued that the worldwide condemnation of the American *Sonderwag* in Guantanamo should make certain politicians in Washington, together with the Bush Administration, reflect about the long-term consequences to the American foreign policy. As stated in a Richard Goldstone BBC interview on 5 October 2003, *"A future American President will have to apologise for Guantanamo."*[312]

Finally, we can end this chapter by acknowledging a quote from former US President Jimmy Carter, condemning the deplorable situation at Camp Delta, stating:

"[The Guantanamo detainees] have been held in prison without access to their families, or a lawyer, or without knowing the charges against them. We've got hundreds of people, some of them as young as twelve, captured in Afghanistan, brought to Guantanamo Bay and kept in cages for what is going on two years. It's difficult for international aid workers to spread the message of human rights to places like Cuba, Africa and the Middle East when the US Government doesn't practice fairness and equality.... I have never been as concerned for our nation as I am now about the threat to our civil liberties."[313]

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[312] *"Inside Guantanamo"*, BBC One (UK) (5 October, 2003).

[313] Full text of President Carter's Speech available at: http://www.meaus.com/jimmy-carter-article.htm.

CHAPTER VI

6.1 THESIS CONCLUSION

In 1759, one of America's founding fathers, Benjamin Franklin, advised: *"they can give up essential liberty to obtain a little temporary safety neither deserve liberty nor safety."*[314] Today, ironically, the United Kingdom and the United States are on the verge of eliminating fundamental human rights without even being able to obtain security for their respective nations. No part of this thesis has argued that governments should be denied powers they genuinely require to defend the democratic way of life against the continuing threat of global terrorism. However, as has been discussed throughout this paper, these powers need to strike a correct and consistent balance between the vital needs of the state and the liberty of its citizens, between national security necessities, and international human rights obligations.

In democratic nations, the law is the paramount tool in combating global terrorism. These laws restrain the state from overreaching, while at the same time allow a strong response that protect and reaffirm the normative values of liberal democracy. The rule of law demands vigilance against, as well as a decisive balance between, state oppression and state weakness. One of terrorism's dangers lies in provoking these extremes, which pose existential threats to constitutional order. Fortunately, terrorism's ultimate goal of subversion is one that is within control. The possible solutions to terrorism naturally pose difficult and challenging questions about the complex interconnection between rights and security concerns. However, reasonable and effective anti-terrorism measures in the law are not only achievable, but are also necessary to abolish terrorism and maintain democratic values.

The United States and the United Kingdom have a long history of balancing the importance of protecting national security against maintaining the freedoms enjoyed by its citizens. Sometimes certain human rights and civil liberties must be temporarily sacrificed in order to protect the nation from a threat of terrorist activity. However when those rights are permanently sacrificed, it is only then that the United States and the United Kingdom cease to be countries of freedom and protected civil liberties.

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[314] Benjamin Franklin, *"Historical Review of Pennsylvania"* (1759), quoted in Emily Morison Beck, *"Bartlett's Familiar Quotations: A Collection of Passages, Phrases and Proverbs Traced to their Sources in Ancient and Modern Literature"* (1980).

In enacting new anti-terrorism legislation in the form of the *Patriot Act* and the *ATCS* the respected Governments overreached their powers and provided the necessary tools to take away important human rights. However, there are fundamental differences that must be acknowledged between the framework and structure of the European human rights system and to that of its American counterpart. The American human rights framework is more widely open for interpretation than that of the European system. A striking difference between the *ECHR* and the *ICCPR* is that the European Court of Human Rights performs binding adjudication of the rights of the individuals and States under the European Convention. In contrast the *ICCPR* Committee can only request information and make non-binding comments. A party's attempt to limit its consent through a reservation is quite significant to that State's national sovereignty if there is a binding adjudication system in place. In distinction, to the non-binding reporting system established by the *ICCPR* within the US, there are no concrete repercussions for State parties who violate treaty provisions. In this respect, the attack into a State's ability to define the scope of its obligations represented by a severance of a State's reservation under the European Convention is a far more significant invasion of national sovereignty than that under the *ICCPR*. Consequently this provides evidence for arguing that the European human rights system is a more effective system to that within the United States and therefore able to deal with non-compliance of human rights with greater success.

In summarising the *ATCS* , it can be said that this was the UK Government's response to what it perceived will be the nature of terrorist threats in the world after September 11. Counter-terrorism legislation is required to strike a balance between protecting human rights and ensuring that the State has effective counter-terrorism measures. The *ATCS* frequently fails to strike any sort of balance between these competing needs and it repeatedly sacrifices a respect for human rights, due to the examples and reasoning discussed within this study. On the whole, despite some important safeguards, the *ATCS* seems to prioritise short-term counter terrorism tactical gains. This therefore allows the scales to fall significantly against the protection of human rights, which frequently produces a legacy of counter-terrorism ineffectiveness as hostility, violence and terrorism grow within the world.

It can also be submitted that a consistent definition of terrorism together with an International Bill of Rights is essential in providing a universal dimension to the value of human dignity in domestic law and domestic adjudication. Unlike other branches of

International Law, International Human Rights Law is not concerned with State interests, but is concerned with the basic rights of individuals. Individual rights must often be vindicated against the State of which the individual is a national or on whose territory a particular breach of human rights has occurred. Domestic courts therefore, have special responsibilities and opportunities to engage actively in the discovery and enforcement of international norms that can compete, clarify and reinforce the protection of rights in the forum. Even countries with long and effective traditions of human rights may benefit from the incorporation into their legal system of ideas and principles that reflect the universal concern of the international community with the protection of basic rights. Even with the absence of the incorporation of international human rights norms into domestic legislation, domestic courts remain bound to cooperate with the international community in order to ensure movement toward the goal of ensuring the respect for human rights. Courts must help to ensure movement towards this goal through their wide margin of appreciation of domestic law in conjunction with international law. It must be said however, that an international Bill of Rights, no matter how well established in the legal consciousness of the international community, cannot perform the miracle of transforming every State into a democratic and rights abiding society. International human rights norms will need to be known and implemented by independent courts, within systems where the rule of law applies, and where judges share with the legislative and the executive the sense of *"owing a decent respect to the opinion of mankind"*.[315]

The United Kingdom and the United States, along with several other nations, have implemented special laws to combat terrorism. While cooperation throughout the international community is required, these two nations have a common legal heritage that establishes a broader systematic context within which to consider anti-terrorism legislation, both in its impact upon individuals' fundamental human rights and its effective implementation. Their particular anti-terrorism laws additionally share substantive and procedural principles in defining, investigating and preventing terrorism. For these reasons, it is appropriate for each of them to scrupulously consider the others' anti-terrorism legislation and improve its own to become as effective and respectful of rights as possible, while contributing to a more harmonised and cooperative effort. Such comparison does not mean that the United Kingdom and the United States must unthinkably imitate their partner's approach or sacrifice its own constitutional values. Rather, through serious

[315] Justice Harry Blackmun, Am. Soc'y Int'l L. Newsl. (Mar.-May 1994).

consideration of each other's anti-terrorism measures, each nation draws upon wider experiences and ideologies based upon similar underlying concepts that exist within a broader, shared normative context. This approach to combating global terrorism not only permits, but relies upon, the cross-fertilisation of British and American strategies and their flexible adaptation to particular domestic circumstances. As a result, these two common law countries in question, can improve a structure for an international, cooperative framework of anti-terrorism law, which implements best practices tailored to national needs.

As to the significance of international human rights in today's society, it is important to note that the progressive development of international human rights law, and in particular the emergence of increasingly legalised international organisations, has reinforced the political and economic interdependence of many nations. With this interdependence comes the inevitable tension between the need to remain in international obligations and the wish to retain state sovereignty. States will however continue to struggle to retain sovereign authority to make important policy decisions consistent with national values and needs. Nevertheless, all states must accept constraints on their freedom of action in order to obtain the benefits of collective regulation and to promote more humane systems of governance.

BIBLIOGRAPHY

AGO, R; *"Addendum to the 8th Report on State Responsibility"*, 2 Y.B. Int'l Law Comm'n 52, para. 83, UN Doc. A/CN.4/318/ADD.52 (1980).

ALEXANDROV, S. A; *"Self-Defence Against the Use of Force in International Law"*, Kluwer International (1996).

BASSIOUNI, M. C; *"A Policy-Orientated Inquiry Into the Different Forms and Manifestations of International Terrorism."*, PCIJ Series A/B N° 65 (1988).

BEAUMONT, P; *"Briton Held in US Camp as al-Qaeda Prisoner"*, The Observer (UK) (13 January, 2002).

BEESTON, R; *"Iraqi Met Hijacker Before Attacks on US"*, The Times (UK) (October 8, 2001).

BERNHARDT, R; *"Liberation Movements"*, Encyclopaedia of Public International Law, vols. 1-4, North-Holland Publishing Company (1996).

BIRD, S; *"Four Appear in Court on Chemical Weapons Charge"*, The Times (UK) (January 14, 2003).

BOWETT, D. W; *"Self-Defence in International Law"*, Manchester University Press (1958).

BRADLEY, A. W; *"Constitutional and Administrative Law"*, 13th ed. Oxford University Press (2003).

BRENNAN, W; *"The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises"*, Kluwer International (1989).

BROWNLIE, I; *"International Law and the Use of Force by States"*, Oxford University Press (1963).

BRUNNEE, J; *"Terrorism and Legal Change: An International Law Lesson"*, Macklem & Roach eds. (2000).

BURKE, J; *"Bin Laden and Terrorism"*, The Telegraph (UK) (April 2002).

BURKE-WHITE, W; *"An International Constitutional Moment"*, Harvard International Law Journal 43 (2002).

CARBERRY, J. A; *"Terrorism: A Global Phenomenon Mandating a Unified International Response"*, 6 Ind. J. Global Legal Stud. (1999).

CARTER-RUCK, P. F; *"Anti-Terrorism Bill will erode Civil Liberties"*, Daily Telegraph (UK) (November 21, 2001).

CHALK, P; *"West European Terrorism and Counter-Terrorism: The Evolving Dynamic"*, London: MacMillan Press (1996).

CLOUD, J; *"The Plot Comes Into Focus; A Low-Profile, Even Meagre Lifestyle Allowed 19 Hijackers to Blend Into the American Tapestry"*, Time Magazine (October 1, 2001).

D'AMATO, A; *"Israel's Air Strike Upon the Iraqi Nuclear Reactor"*, 77 American Journal of International Law (1983).

DE ZAYAS, A; *"Combatants"*, Encyclopaedia of Public International Law, vol. 1 North-Holland Publishing Company (1996).

DEMPSEY, J; *"Terrorism & The Constitution; Sacrificing Civil Liberties in the Name of National Security"*, American Journal of International Law (2002).

DERSHOWITZ, A.M; *"Why Terrorism Works"*, Yale University Press (2002).

DINSTEIN, Y; *"War, Aggression and Self-Defence"*, 2nd Edition, Cambridge University Press (1994).

DRUMBL, M. A; *"Victimhood, in Our Neighbourhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order"*, North Carolina Law Review 81 (2002).

DULLES, A; *"The Craft of Intelligence 55"*, University of Massachusetts Press (1963).

DWORKIN, R; *"The Threat to Patriotism"*, NY Review of Books, (February 2002).

ERIKSON, R. J; *"Legitimate Use of Military Force Against State-Sponsored International Terrorism"*, Government Printing Office (1989).

FAULKNER, E. A; *"The Right to Habeas Corpus: Only in the Other Americas"*, 9 Am.U.J.Int'l L.& Pol'y (1994).

FINN, P; *"Germans Identify More Terror Suspects; Police Watch Five People Who May Have Provided Support to September 11 Hijackers"*, Washington Post (November 17, 2001).

FINSTEIN, B. A; *"Operation Enduring Freedom"*, Journal of Transnational Law & Policy 11 (2002).

FRANCK, T. M; *"Recourse to Force: State Action Against Threats and Armed Attacks"*, Cambridge University Press (2002).

FRANKLIN, B; *"Historical Review of Pennsylvania"*, (1759).

GARDAM, J; *"Proportionality and Force in International Law"*, 87 American Journal of International Law (1993).

GIBB, S; *"Lawless and Derogation under Article 15 of the European Convention on Human Rights"*, HRLR (April 2002).

GOODHART, A; *"The North Atlantic Treaty of 1949"*, R.C. (II) (1951).

GRAY, C; *"International Law and the Use of Force"*, Oxford University Press (2001).

GREENWOOD, C; *"Historical Development and Legal Bases, in the Handbook of Humanitarian Law in Armed Conflicts"*, D. Fleck ed. (1995).

GREENWOOD, C; *"New World Order or Old?: The Invasion of Kuwait and the Rule of Law"*, 55 Modern Law Review (1992).

GROOM, B; *"In Liberty's Name – The Sweeping Powers that Britain and the US want to assume to counteract terrorism are raising fears that fundamental freedoms will be lost"*, Financial Times (November 21 2001).

GROSS, E; *"Once More Unto the Breach: The Systematic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies"*, 23 Yale J.Int'l Law (2002).

GROSS, E; *"Legal Aspects of Tackling Terrorism: The Balance Between the Right of Democracy to Defend Itself and the Protection of Human Rights"*, 6 UCLA Journal of International Law and Foreign Affairs (November, 2001).

HEYMANN, P. B; *"Terrorism and America: A Commonsense Strategy for a Democratic Society"*, Cambridge, Mass. MIT Press (1998).

HONGJU KOH, H; *"We Have the Right Courts for Bin Laden"*, NY Times (November 23, 2001).

HURST, G; *"Blunkett Limits Detention Power"*, The Times (UK) (November 22, 2001).

JOHNSTON, B; *"Italy: Little Evidence Britain was to be Targeted"*, Daily Telegraph (UK) (January 25, 2003).

JOHNSTON, B; *"Terror Suspects Rounded Up"*, Daily Telegraph (UK) (December 2001).

KELSEN, H; *"Collective Security and Self-Defence Under the Charter"*, Law of the United Nations, Vol. 42, 792, United Nations Publishing (1948).

KIMELMAN, S; *"Protecting Privilege"*, National Law Journal (December 3, 2001).

KIRGIS, F. L; *"Terrorist Attacks on the World Trade Centre and the Pentagon"*, American Society of International Law (2002).

KITTICHAISAREE, K; *"International Law of Armed Conflict"*, International Criminal Law Review 227 (2002).

LACEY, M; *"Self-Defence or Self-Denial: The Proliferation of Weapons of Mass Destruction"*, 10 Ind. Int'l & Comp Law Review (2000).

LAPHAM, L; *"American Jihad"*, Harper's (January 2002).

LAQUEUR, W; *"Reflections on Terrorism"*, US Foreign Affairs Journal (1986).

LEEMAN, S; *"Britain Wants Captives Tried at Home"*, The Telegraph (UK) (January 24, 2002).

LEIGH, D; *"Betrayed: The Real Story Behind the Matrix Churchill Case"*, Fordham Int'l L.J (1993).

LOHR, M. F; *"Legal Analysis of US Military Responses to State-Sponsored International Terrorism"*, 34 Naval Law Review (1985).

MacDONALD, R. St. J; *"The Margin of Appreciation"* Matscher & Petzold (1993).

McCOUBREY, H; *"International Humanitarian Law"*, Ashgate/Dartmouth (1998).

McDOUGAL, M. S; *"The Soviet-Cuban Quarantine and Self-Defence"*, American Journal of International Law (1989).

MINTZ, J; *"US Told to Rule on Detainees Status"*, Washington Post (March 14, 2002).

MORISON BECK, E; *"Bartlett's Familiar Quotations: A Collection of Passages, Phrases and Proverbs Traced to their Sources in Ancient and Modern Literature"* Oxford University Press (1980).

NEUMANN, F; *"The Rule of Law"*, (1935) William E. Scheuerman ed. (1996).

NORFOLK, A; *"Suspects Win Hits Terror Crackdown"*, The Times (UK) (July 31, 2002).

NORLAND, R; *"al-Qaeda Runs for the Hills"*, Newsweek (December 17, 2001).

O'BRIEN, W; *"Reprisals, Deterrence and Self-Defence in Counter-Terror Operations"*, Virginia Journal of International Law (1990).

O'CONNELL, M. E; *"Debating the Law of Sanctions"*, Eur. J. Int'l Law (2002).

OVERY, R. J; *"Deep Concern Over Anti-Terrorism Bill"*, The Times (November 28, 2001).

PHILIPP, C. E; *"The Status of the Taliban: Their Obligations and Rights Under International Law"*, 6 Max Planck Y.B. of UN L. (2002).

PILLAR, P. R; *"Terrorism and US Foreign Policy"*, Washington DC: Brookings Institution Press (2001).

POSNER, R; *"Security Versus Civil Liberties"*, Atlantic Press (December, 2001).

RANDALL, K; *"Universal Jurisdiction Under International Law"*, Texas Law Review (1988).

REID, T. R; *"Britain Proposes Anti-Terrorism Measures"*, Washington Post (November 14, 2001).

REISMAN, M. W; *"Allocating Competences to Use Coercion in the Post Cold-War World: Practices, Coalitions and Prospects"*, in Damrosch and Scheffer, *"Law and Force in the New International Order"* (1991).

REISMAN, M. W; *"International Legal Responses to Terrorism"*, Hous. J. Int'l L. (1999).

ROACH, K; *"The New Terrorism Offences and the Criminal Law"*, University of Toronto Press (2001).

ROSS, J. I; *"The Nature of Contemporary International Terrorism, In Democratic Responses to International Terrorism"* American Journal of International Law (2002).

ROZENBERG, D; *"Response to Terror: US Asks Judge to Reject Claim Over Detainee Prisoners"*, LA Times (February 1, 2002).

SAID, E. W; *"Covering Islam: How the Media and the Experts Determine How We See the Rest of the World"*, Columbia University Press (1997).

SCHACHTER, O; *"The Lawful use of Force by a State against Terrorists in Another Country"*, Israel Yearbook on Human Rights (1989).

SCHACHTER, O; *"International Law in Theory and Practice"*, Kluwer International Law (1991).

SHERMAN, M. A; *"Representing Defendants in International Criminal Cases: Asserting Human Rights and Other Defences: Indirect Incorporation of Human Rights treaty Provisions in Criminal Cases in the United States Courts"*, ILSA J. Int'l & Comp. L. (1997).

SIMPSON, A. W. B; *"Human Rights and the End of the Empire: Britain and the Genesis of the European Convention"*, Oxford University Press (2001).

SOFAER, A. D; *"US Acted Legally in Foreign Raids"*, Newsday (New York) (October 19, 1998).

TOMKINS, A; *"Legislating Against Terror; The Anti-Terrorism, Crime and Security Act 2001"*, Public Law Journal (2002).

WALKER, C; *"Blackstone's Guide to the Anti-Terrorism Legislation"*, Blackstone's Press (2002).

WALSH, K. T; *"A Statesman, Steadfast and Strong"*, US News & World Rep. (October 12, 2001).

WARBRICK, C; *"The Principles of the European Convention on Human Rights and the Response of States to Terrorism"*, European Human Rights Law Review (2002).

WARK, W. K; *"Intelligence Requirements and Anti-Terrorism Legislation"*, *in "The Security of Freedom"*, University of Toronto Press (2001).

WAUGH, P; *"Campaign Against Terrorism: Terror Suspects to be Rounded Up Under New Law"*, The Independent (UK) (December 15, 2001).

WESCHLER, L; *"International Humanitarian Law: An Overview in the Crimes of War: What the Public Should Know"*, Gutman & Rieff (1999).

WILKINSON, P; *"Terrorism Versus Democracy: The Liberal State Response"*, Oxford University Press (2001).

WINTHROP, W; *"Military Law and Precedents"*, Legal Classics Library (1886).

YOUNGS, G; *"Shoe-bomber Sentenced to Life in Prison"*, The Guardian (UK) (31 January, 2003).

ZAID, M. S; *"Combating International Terrorism into the 21st Century"*, ILSA J. International & Comparative Law (1996).

ZAMIR, I; *"Human Rights and National Security"*, Mishpatim (1989).