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HUMAN RIGHTS IN COUNTER-
TERRORISM LEGISLATION
- A Study of Measures of
Derogation from Human Rights
Provisions with Particular Regard
to the UK and the Anti-terrorism,
Crime and Security Act 2001.

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Summary

The United Kingdom has post September 11th, and the horrifying attacks in the United States, argued that its national security is threatened by international terrorism, in particular by foreign nationals suspected of terrorism present in the country. As a consequence to this, the Government has increased its counter terrorism legislation including the implementation of the Anti-terrorism, Crime and Security Act 2001, in order to protect the security of the State. The new legislation has been subject to criticism due to its infringements on a number of civil liberties, as well as because of the derogations made by the UK, relieving the Government from Article 5 of the ECHR and Article 9 of the ICCPR. These derogations allow for the UK to detain suspected terrorists whom they are not able to deport to their country of origin, for an indefinite period of time. Under normal circumstances, this treatment would be violating international human rights law, however due to derogations from Article 5(1) of the ECHR and Article 9 of the ICCPR, the United Kingdom is under a current suspension from these obligations. Derogations are compatible with international human rights law if they have been made as a consequence to the exigencies of the situation and if a public emergency exists within the Nation.

However, it has not been established according to the author, that in fact there is a public emergency prevailing throughout the United Kingdom, threatening the existence of the Nation. Furthermore, it has not been established that the situation is of such exceptional nature that the crisis or danger cannot be dealt with by normal measures otherwise permitted. Moreover, the provisions subject to derogation are limited to non-nationals and thus incompatible with the non-discrimination provisions. Consequently, the measures of derogation are not in accordance with the obligations under Article 15 of ECHR and Article 4 of the ICCPR and Section 23, of Part 4 of the Anti-terrorism, Crime and Security Act 2001 is not in compliance with international human rights law.

Abbreviations

CAT	Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment
CTC	Counter Terrorism Committee
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EU	European Union
GA	General Assembly
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
IRA	Irish Republican Army
ODIHR	Office for Democratic Institutions and Human Rights
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PKK	Worker's Party of Kurdistan
SC	Security Council
SIAC	Special Immigration Appeals Commission
UK	United Kingdom
UN	United Nations
US	United States

1 Introduction

"I lie awake at night searching...searching for the answer to the constant question- why me?" (Belmarsh Detainee - held without charge under the Anti-Terrorism, Crime and Security Act since December 2001.)

1.1 Objective of the Thesis

In the aftermath of the terrorist attacks in the United States 11 September 2001, the fear of international terrorism has led to a change in attitudes, and many States have, individually and collectively, turned their attention to a re-evaluation of the security. Some measures might be necessary and appropriate, however, many of the measures adopted appear disproportionate to the threat posed by international terrorism and the goal to improve national security. Hence, many of the measures taken has left a lasting implication in human rights protection, and one of the most serious casualties of post September 11th is the erosion of civil and political rights taken by States trying to protect their security.

The United Kingdom took two steps due to concerns from the Government in regard to national security in the aftermath of September 11th. First, it introduced the Anti-terrorism, Crime and Security Act 2001, the latest counter-terrorism legislation implemented in the Country. Secondly, it implemented the Human Rights Act 1998 (Designated Derogation) Order 2001, recognizing that Part 4, Section 23 of the Anti-terrorism, Crime and Security Act 2001, allowing for indefinite detention, would possibly constitute violations to human rights law. The United Kingdom claimed a public emergency within the country in order to propose derogations from Article 5(1) of the European Convention on Human Rights, and Article 9 of the International Covenant on Civil and Political Rights. International human rights treaties contains international norms, laying down the *minimum* international and regional standards, and a derogation from a particular provision cannot automatically be assumed to be a violation but must be examined in the light of the situation.

The United Kingdom implemented a new counter-terrorism law, which includes provisions of detention of foreign nationals that under normal circumstances most likely would be considered infringements on international human rights. Consequently the UK decided to take measures of derogation. Counter-terrorism, although significant in order to stop international terrorism, should however always be in accordance with international human rights. If the United Kingdom had not made the measures of derogation, one may argue that the provisions under Section 23 of Part 4 in the Anti-terrorism, Crime and Security Act 2001 would constitute a violation of human rights law. It is thus relevant to scrutinize if there indeed is a real state of emergency existing in the UK, approving of these measures of derogation allowing for the detentions.

1.2 Approach to the Problem

The following questions will be addressed in the thesis:

1. Is it justified that a measure of derogation allow provisions in counter-terrorism legislation that under normal circumstances would be a violation of human rights?
2. Has it been established that there is a public emergency existing within the United Kingdom requiring the derogations, or are indeed the provisions in Part 4, Section 23 of the Anti-terrorist, Crime and Security Act 2001 excessive and thus a violation of international human rights law?

1.3 Limitations

Counter-terrorism legislation has been implemented in many States around the world; however the thesis will be limited to the Anti-terrorism, Crime and Security Act 2001 in the United Kingdom, with particular regard to Part 4 Section 23, being the part subject to measures of derogation.

It is not the purpose of the thesis to scrutinize the general framework of counter-terrorism; however a brief overlook of the international as well as the European standards will be conducted. This will be limited to the most recent documents and resolutions passed by e.g. the Security Council and the General Assembly, and the documents argued to be of most importance for the issue of counter-terrorism and human rights.

In regard to the section dealing with derogations from provisions in international human rights law, the thesis will only touch upon the International Covenant on Civil and Political Rights and the European Convention on Human Rights as these are of relevance for the United Kingdom. The United Kingdom has ratified the International Covenant on Civil and Political Rights and should ensure the Covenant rights to all individuals within its territory and subject to its jurisdiction. It has moreover ratified the European Convention in Human Rights and has through the Human Rights Act 1998 made the rights in the Convention part of national legislation and enforceable in national courts.

1.4 Method and Material

The author has applied international legislation regarding measures of derogation to the Anti-terrorism, Crime and Security Act 2001 in order to find the legal aspects of the derogations made by the United Kingdom. The approach to the issue has furthermore been through the jurisprudence of the European Court on Human Rights where the issue of the compatibility of derogation in time of state emergency caused by terrorism has been on the table on a number of occasions. The author has also chosen to use various

documents issued by the United Nations as well as by independent experts. The issue of counter-terrorism legislation and human rights has, due to a change in attitude post the terrorist attacks in the United States September 11th, been of great interest and a rather large selection of literature is available.

1.5 Disposition

The thesis will start with a brief background of the case of the United Kingdom and their latest counter-terrorism legislation, to be analyzed in-depth later in the thesis.

The issue of combining counter-terrorism measures with the respect for human rights will be analyzed in Chapter 3. This is of relevance for the thesis due to the fact that the counter-terrorism legislation implemented through the Anti-terrorism, Crime and Security Act 2001, may be argued to violate human rights if the derogations had not been made. The Chapter will start with the most relevant UN resolutions; applicable to international terrorism in general as it is important to point out that the international community indeed has proposed strong measures to combat this phenomenon. The Chapter will later combine this issue with international human rights law, and how States must not forget the continuous respect for human rights despite measures of counter-terrorism.

Chapter 4 will examine derogations according to Article 15 in the European Convention on Human Rights, and Article 4 of the International Covenant on Civil and Political Rights. The reason the author seeks to draw the attention to this topic is that measures of derogation are used to infringe on human rights obligations in certain situations, and it is thus relevant to apply the issue to national legislation. In the present case, the United Kingdom has derogated from provisions in the European Convention on Human Rights and the International Covenant on Civil and Political Rights due to their involvement after September 11th. In order to fully understand if the UK counter-terrorism measures are lawful or not, it is necessary that the reader fully understand the meaning of derogation, and most importantly what a state of emergency in fact is.

Chapter 5 is dealing with the Anti-terrorism, Crime and Security Act 2001, and the measures of derogation made by the UK in particular. An in-depth analyze of the legislation is important for the outcome of the thesis and in order to understand the effect the provisions will have on suspected terrorists. The Chapter also includes the reasoning by the UK on the necessity of derogations providing for indefinite detention, as well as the jurisprudence of the European Court on Human Rights in earlier cases regarding measures of derogation. The outcome and conclusions of the author is discussed in Chapter 6.

2 Background

"We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that in the long-term we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism... while we certainly need vigilance to prevent acts of terrorism, and the firmness in condemning and punishing them, it will be self-defeating if we sacrifice other key priorities - such as human rights - in the process". (Kofi Annan, 18 January 2002.)

States are obligated to make sure that the human rights of each and every individual within its jurisdiction are protected at all times according to international law and human rights provision. Although terrorism has yet to be defined, human rights law has acknowledged that States must address serious and genuine security concerns such as terrorism, as these acts aim to destruct human rights, democracy and the rule of law by destabilizing Governments. A State party to human rights conventions such as e.g. the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) must take all measures to protect nationals and others living within its jurisdiction. To combat terrorism in order to serve a better protection may thus be argued to be an obligation under the human rights treaties.

Counter-terrorism measures are necessary, however, the need to protect human rights in the struggle is great and no measures should have a too far-reaching effect on the overall respect for international human rights. Due to the flexible framework within human rights law this is also possible. The intention of human rights law is to protect States and individuals within their jurisdiction and with regard to terrorism and threats of terrorism; the framework has sought to strike a fair balance between legitimate national security concerns and the protection of fundamental freedoms.¹ States subject to terrorism and terrorist attacks may under specific circumstances legitimately declare to be in a state of emergency - to be analyzed in Chapter 4.3.1. According to certain provisions in e.g. the European Convention on Human Rights², and the International Covenant of Civil and Political Rights³, State parties are allowed to make limitations to the obligations contained in the Treaties, or in extraordinary circumstances, such as war or public emergency, even measures of derogation.⁴ Derogations will lead to a temporary suspension of specific provisions of a treaty and could in certain cases lawfully lead to a breach of certain human rights obligations. As will

¹ *Anti-Terrorism Measures, Security and Human Rights. Developments in Europe, Central Asia and North America in the Aftermath of September 11, Report by the International Helsinki Federation for Human Rights*, of April 2003, p.13.

² Article 15 of the European Convention on Human Rights.

³ Article 4 of the International Covenant on Civil and Political Rights.

⁴ Derogating measures are recognized in Article 27 of the American Convention on Human Rights as well, however, the purpose of this thesis is to deal with only the Conventions ratified by the United Kingdom.

be considered in Chapter 5, all limitations and derogations must, however, be of exceptional character, strictly limited in time and the principle of necessity and non-discrimination must always be respected in order not to be excessive or to violate human rights law.⁵

Terrorism legislation in the United Kingdom is nothing new due to the many outbreaks of political violence, terrorist acts, shootings and bombings in the Northern Ireland Conflict. There has been a Prevention of Terrorism (Temporary Provisions) Act in continuous use in the UK since November 1974⁶, and since then, many anti-terrorism provisions have been put in force.⁷ In 1996 the British Government reviewed all of the counter-terrorism legislation to consider what laws and powers were required in the fight against terrorism in the 21st century.⁸ In February 2000 the Terrorism Act 2000⁹, containing the majority of those recommendations, replaced the Terrorism (Temporary Provisions) Acts and placed a *permanent* anti-terrorism legislation on the statute of books for the first time. It contains a comprehensive range of powers working on the basis of a very broad definition of terrorism but was nevertheless, according to the Government, not comprehensive enough as a protection against terrorism. As a consequence of the attacks in the United States on 11 September, the Anti-terrorism, Crime and Security Act 2001¹⁰ (2001 Act) was passed to fill and embrace the gaps and weaknesses of the Terrorism Act 2000, due to the threat posed to the UK by international terrorism. The 2001 Act was however not directed at the threats in Northern Ireland, but referred to the attacks on September 11th, and the resolutions of the United Nations Security Council, recognizing the attacks as a threat to international peace and security, requiring "... all States to take measures to prevent the commission of terrorist attack, including by denying safe haven to those who finance, lend, support, or commit terrorist attacks."¹¹

The Anti-terrorism, Crime and Security Bill 2001 was passed through the House of Commons after only three days of debate¹² and entered into force on 14 December 2001 as the Anti-terrorism, Crime and Security Act 2001. The purpose of the 2001 Act is to enhance the anti-terrorism and security, including measures to cut off terrorist's access to funding, ensure better information sharing between agencies, prevent terrorists from abusing relevant asylum and refugee laws, improving the security at airports and

⁵ Human Rights Committee, *General Comment 29: States of emergency (article 4)* of 31 August 2001.

⁶ *The first Prevention of Terrorism (Temporary Provisions) Act 1974*, of 29 November 1974.

⁷ Walker, Clive, *Blackstone's Guide to Anti-Terrorism Legislation*, (Oxford University Press 2002), p. 1.

⁸ Talbot, Rhiannon, "The balancing act: counter-terrorism and civil-liberties in British anti-terrorism law", in: *Law After Ground Zero*, Ed. by John Strawson, (The Glass House Press 2002, Newport Australia), p. 124.

⁹ Terrorism Act 2000, of 19 February 2000.

¹⁰ Anti-terrorism, Crime and Security Act 2001, of 14 December 2001.

¹¹ Security Council Resolution 1373 (2001), of 28 September 2001, preamble.

¹² Selected Committee on Home Affairs: *First Report on the Anti-Terrorism, Crime and Security Bill 2001*, para. 11.

nuclear site, extending police powers etc.¹³ It is structured into 14 parts, however, the most worrying provisions might be those contained in Part 4 of the Act.

Part 4 deals with immigration and asylum and has been subject to the derogations made by the UK due to the provisions in Section 23. Section 23 authorizes the Secretary of State to indefinitely detain those whom he, due to reasonable suspicion, has certified¹⁴ as international terrorists. The provisions are only applicable on foreign nationals subject to immigration control, whom the UK intends to remove or deport from the Country but this, for the time being, is not possible. As will be analyzed in-depth in Chapter 5, the former Secretary of State, Mr. David Blunkett, when introducing the 2001 Act, told of a compelling need for more effective powers to exclude and remove suspected terrorists from the country. In order to allow for the detention of foreign nationals, suspected of terrorism and considered a threat to national security, additional detention powers was necessary. These measures would involve derogations from the right to liberty and security as outlined in Article 5(1)¹⁵ of the European Convention on Human Rights (ECHR) and Article 9(1)¹⁶ of the International Convention on Civil and Political Rights (ICCPR).

¹³ *Supra* note 10, Explanatory notes.

¹⁴ See Part 4, Section 23 of the Anti-terrorism, Crime and Security Act 2001, included in Supplement A.

¹⁵ Article 5 of the European Convention on Human Rights provides:

1. Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. 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

¹⁶ Article 9 of the International Covenant on Civil and Political Rights provides:

A proposed derogation from Article 5(1) was notified to the Secretary General of the Council of Europe on 18 December 2001, providing:

“The Government has considered whether the exercise of the extended power to detain contained in the Anti-terrorism, Crime and Security Act 2001 may be inconsistent with the obligations under Article 5(1) of the Convention. As indicated above, there may be cases where, notwithstanding a continuing intention to remove or deport a person who is being detained, it is not possible to say that "action is being taken with a view to deportation" within the meaning of Article 5(1)(f) as interpreted by the Court in the *Chahal* case. To the extent, therefore, that the exercise of the extended power may be inconsistent with the United Kingdom's obligations under Article 5(1), the Government has decided to avail itself of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice.”¹⁷

On the same day the UK also notified the Secretary-General, of the United Nations about the state of emergency within the meaning of Article 4(1) of the ICCPR, and that it would derogate from Article 9 of the Convention:

“The Government has considered whether the exercise of the extended power to detain contained in the Anti-terrorism, Crime and Security Act 2001 may be inconsistent with the obligations under Article 9 of the Covenant. To the extent that the exercise of the extended power may be inconsistent with the United Kingdom's obligations under Article 9, the Government has decided to avail itself of the right of derogation conferred by Article 4(1) of the Covenant and will continue to do so until further notice.”¹⁸

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1. Everyone has the right to liberty and security of 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 authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

¹⁷ *Note Verbale from the Permanent Representation of the United Kingdom*, dated 18 December 2001", registered by the Secretary General on 18 December 2001. The full text of the Note Verbale is to be found in Supplement C.

¹⁸ Notification of the UK's derogation from article 9 of the ICCPR. The full text of the Note Verbale is to be found in Supplement D.

3 Legal Responses to International Terrorism and the Respect for Human Rights

"Some have suggested that it is not possible to effectively eliminate terrorism while respecting human rights. This suggestion is fundamentally flawed. The only long-term guarantee of security is through ensuring respect for human rights and humanitarian law." (Mary Robinson 20 March 2002.)

3.1 Introduction

Ever since September 11th a number of States around the world has taken similar measures as the UK in order to combat terrorism and to protect those living within their jurisdictions. In many of these countries however, already strict counter-terrorism legislation did exist, similar to the case of the UK, an issue that has created worries among human rights lawyers and activists and organizations. While it is in accordance with international standards for a State to take certain counter-terrorism measures, and to implement anti-terrorism legislation as a protection for the national security, it is however of great importance that human rights are never sacrificed in the process. As Secretary General Kofi Annan has pointed out, the respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism, and should be rigorously respected by all, including in states of emergency.¹⁹

3.2 The Problem of Definition - One Man's Terrorist is Another Man's Freedom Fighter

History shows that it is difficult to find an adequate answer to terrorism and the legal responses taken have not come easily. The issue of defining terrorism has for example been complex, and as a result of this there are no multilateral conventions defining terrorism to be found. It is obvious that international law is in need of a clear definition of terrorism in order to fight it properly, which also was pointed out as early as 1972.²⁰

¹⁹ Secretary General Kofi Annan at a special meeting of the Security Council's Counter-Terrorism Committee with International, Regional, and Sub-Regional Organizations, on 7 March 2003.

²⁰ Report from the Secretary General, *Human Rights and Terrorism*, A/50/685, of 26 October 1995.

The UN Special Rapporteur on Terrorism, Kalliopi K. Koufa, has noted:

“[i]t may be that the definitional problem is the major factor in the controversy regarding terrorism. This is all the more true when considering the high political stakes attendant upon the task of definition. For terrorism is emotive and highly loaded politically. It is habitually accompanied by an implicit negative judgement and is used selectively. In this connection, some writers have aptly underlined a tendency amongst commentators in the field to mix definitions with value judgements and either qualifies as terrorism violent activity, or behaviour which they oppose to or, conversely, reject the use of the term when it relates to activities and situations which they approve of. [...]”²¹

One may argue that the reason there is, and has been, a definitional problem is because of the variable nature of the phenomenon - what is one man's terrorist might be another man's freedom fighter. Furthermore, the description of terrorism could range from isolated acts of a single person to organized operations of groups and thus reach the level of non-international conflict.²² In order to establish counter-measures against terrorism according to the rule of law, the international community must establish a less elusive definition. According to the Organization for Security and Co-operation in Europe (OSCE), some of its member States have already established anti-terrorism laws where the definition of terrorism itself is vaguely and imprecise in a way that may violate the rule of law.²³ Hence, if the definition is too wide there is a risk that these rules may be interpreted in a way that they legitimate diverged opinions, as well as violate fundamental rights protected under international human rights law.

Definitions of terrorism often include the description of who may be the perpetrator, who may be the target of the attacks as well as the character of the act. However, often the definition strives to set out what the motivations of the perpetrators may be when carrying out terrorist crimes and thus what makes them different from ordinary criminals. Recalling the statement of “what is one man's terrorist might be another man's freedom fighter”; it becomes evident that a problem involving a value judgment about ideological or political goals of the perpetrators might appear.

²¹ Koufa Kalliopi K, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Terrorism and Human Rights, Progress report*, E/CN.4/Sub.2/2001/31, of 27 June 2001, p.8.

²² Ganor Boaz, *Defining Terrorism: Is one man's terrorist another man's freedom fighter*, 24 September 1998.

²³ OSSE Human Dimension Implementation Meeting, Warsaw, 9-19 September 2002, Statements by the International Helsinki Federation for Human Rights (IHF), *Rule of Law, Counter-Terrorism Measures*, 10 September 2002.

3.3 Measures Taken on an International Level to Combat International Terrorism

The problem of terrorism is all but a new phenomenon and the League of Nation held the first conference dealing with the issue as early as 1937 when the attempt to establish the International Convention for the Prevention and Punishment of Terrorism turned out to be abolished.²⁴ The draft included the description of terrorism and the possibility to set up an international criminal court with jurisdiction over these crimes, but turned out to be too innovative and radical to ever be out into practice.²⁵ Due to the increase in political terrorism in the early 1970's however, legal responses at both national and international levels has been evoked. In an attempt to find a solution to the problem the United Nations has been active in the fight against international terrorism, including the elaboration of multilateral conventions dealing with different crimes associated with the issue. Each of the Conventions defines a particular type of act considered an offence under the Convention, such as hijacking or attacks on diplomats. Accompanied by an obligation to criminalize, and establish jurisdiction over such offences the conventions are aimed at preventing and suppressing the commitments of acts of a grave nature.

3.3.1 The Security Council

The Security Council has established a number of declarations and resolutions concerning terrorism over the years. Most of the resolutions passed by the Council have been in the context of condemning specific terrorist acts that have been committed.²⁶ The first Security Council resolution ever to address the matter of terrorism in general was resolution 1269 (1999) where the Security Council stated its position on terrorism, and that it:

"[u]nequivocally condemns all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security."²⁷

In the resolution the Security Council further emphasizes the necessity to intensify the fight against terrorism at the national level and to strengthen effective international cooperation on the basis of the principles of the

²⁴ Homepage of the United Nations Office on Drugs and Crime.

²⁵ Wilkinson Paul, "Pathways out of terrorism for democratic societies", in: *Contemporary Research on Terrorism*, Ed. by Paul Wilkinson and Alasdair M Stewart, (Aberdeen University Press, 1987, Aberdeen) pp. 453-465.

²⁶ E.g. Security Council Resolution 1368 (2001) of 12 September 2001, Security Council Resolution 1438 (2002) of 14 October 2002, Security Council Resolution 1440 (2002) of 24 October 2002, Security Council Resolution 1450 (2002) of 13 December 2002.

²⁷ Security Council Resolution 1269 (1999) of 19 October 1999, para. 1.

United Nations, including respect for international humanitarian law and human rights. Appropriate steps should be taken by States in order to deny those who plan finance or commit terrorist acts safe havens.²⁸

The Security Council has condemned acts of international terrorism as criminal and unjustifiable, as these acts constitute a threat to international peace and security, and it has affirmed the right of each State to protect their nationals. From an early stage the Council called upon States to cooperate with one another to prevent and suppress terrorist activities. Furthermore it pointed out that the prevention of terrorism must, despite the importance to fight it, at all times be in accordance with Article 2(4)²⁹ of the Charter of the United Nations.³⁰ The Security Council also called upon States to ensure that before granting refugee status, appropriate measures must be taken to ensure that the asylum-seeker has not participated in terrorist acts. Nevertheless, all these measures must be appropriate, and in confirmatory with the relevant provisions of national and international law, including international standards of human rights.³¹

In the aftermath of September 11th, the Security Council activity in regard to international terrorism reached a new level, trying to strengthen the framework for national and international action. On September 12, 2001, the Security Council adopted resolution 1368, noting that it was “determined to combat by all means threats to international peace and security caused by terrorist acts”³², condemning the terrorist attacks that took place in the United States on September 11, 2001. A few weeks later resolution 1373 (2001) was adopted under Chapter VII of the UN Charter, reaffirming this position. The latter resolution made a series of binding decisions, demanding States to implement more effective counter-terrorism measures at the national level and to increase international cooperation in the struggle against terrorism in various ways. According to the resolution all States should act against the financing of terrorist acts and not support terrorism in any way, as soon as possible ratify the international conventions relating to terrorism, as well as prevent the abuse of asylum and refugee status by possible terrorists. Further, the Council declared that any acts and methods of terrorism, including financing planning or inciting terrorist acts are contrary to the purposes and principles of the UN Charter.³³

On 20 January 2003, the Security Council followed up resolution 1373 and other resolutions relating to the topic of countering terrorism, with a declaration drawing the attention to the human rights dimension. The

²⁸ *Ibid.* para. 4.

²⁹ Article 2(4) of the UN Charter provides:

“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.”

³⁰ Security Council Resolution 748 (1992) of 31 March 1992, preamble.

³¹ *Supra* note 27, para. 4.

³² Security Council Resolution 1368 (2001), of 12 September 2001, preamble.

³³ *Supra* note 11, para. 5.

declaration was adopted as an attachment to the Security Council resolution 1456 (2003) and included that:

“[s]tates must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights law, refugee, and humanitarian law”³⁴.

In the same resolution, the Counter-Terrorism Committee (CTC) was established, tasked with monitoring the implementation of the resolution, as well as the receiving of reports on measures taken to counter terrorism, made by States.³⁵ The Committee has been complimented in that the mandate and work of it opens up new possibilities for Inter-State cooperation. However, it has been criticized that it has failed to even mention States human rights obligations while implementing the measures pursuant to the resolution. Former High Commissioner for Human Rights (OHCHR) Mary Robinson and the late High Commissioner Sergio Vieira de Mello have, among others, addressed the issue of respecting human rights while countering terrorism, and how important it is that the CTC takes this into account in its review of counter-terrorism measures around the world.³⁶

3.3.2 The General Assembly

While the tone in the condemnation of terrorism among the international community has been harsher since September 11th, there has also been an awareness present that while countering this phenomenon, the respect for human rights must still be a key priority and never to neglected. Many resolutions passed by the General Assembly before September 11th, dealt with the issue of human rights and terrorism and called upon States to respect international standards of human rights while countering terrorism.³⁷ Nevertheless, the first resolution specially focusing on the need to *protect* human rights and fundamental freedoms while countering terrorism was adopted in 2003.³⁸ The resolution affirmed the fundamental importance that States ensure that all measures taken to combat terrorism must comply with their obligations under international law, international human rights, refugee and humanitarian law in particular. Furthermore, the resolution encourages States to take into account relevant United Nations resolutions and decisions on human rights, as well as to consider the recommendations of the special procedures and mechanisms of the Commission on Human Rights and the relevant comments and views of United Nations treaty bodies.³⁹

³⁴ Security Council Resolution 1456 (2003), of 20 January 2003, para. 6.

³⁵ *Ibid*, para. 4.

³⁶ Office of the High Commissioner for Human Rights, *Paper on 'Terrorism and Human Rights*.

³⁷ E.g. General Assembly Resolution 49/185 of 23 December 1994, and General Assembly Resolution 50/186 of 22 December 1995.

³⁸ General Assembly Resolution 57/219 of 27 February 2003, para. 1.

³⁹ *Ibid*, para. 2.

3.4 Measures Taken in Europe to Combat Terrorism

The European Union has reacted to September 11th by fairly quickly adopting an impressive number of measures, especially with the cooperation in criminal matters. Most of the other regional conventions relevant to terrorism include an established definition of terrorism, or at least a list of offences to be regarded to fall within the category of terrorism, but not the 1977 European Convention on the Suppression of Terrorism.⁴⁰ In order to improve the harmonization and cooperation in the fight against terrorism among the European States post September 11th, the European Countries have adopted the Council Framework Decision⁴¹ including the adoption of a common definition of terrorism, a European Arrest Warrant and a common list of terrorist organizations. The Framework seeks to ensure a similar definition of terrorist crimes across the Union and sets common maximum and minimum penalties for terrorist crimes. It includes a list of offences, treated as acts of terrorism if they are committed intentionally by individuals or groups, against one or more countries or their institutions or population, in order to threaten them and seriously undermine or even destroy their political, economic or social structures.⁴² This includes all terrorist offences, prepared or committed within the European Union, whatever their target, including terrorist attacks against interests of non EU Member States located in the EU.

The Council of Ministers of the Council of Europe has also adopted a set of guidelines on counter-terrorism⁴³ to stress the importance of efforts to safeguard human rights in the struggle against terrorism. The guidelines were the first international text on human rights and the fight against terrorism, stretching that no States, while using their rights to prevent terrorist activities, should undermine the fundamental values they seek to protect. Hence, the Council of Europe calls on its member states to show respect for human rights while countering terrorism.⁴⁴ The Parliamentary Assembly of the Council of Europe has furthermore called on its members not to make any derogation in their fight against terrorism⁴⁵, especially in cases where the derogation will allow limits of the rights guaranteed under Article 5 of the ECHR.⁴⁶

⁴⁰ Laferrière Dominic, *Fighting Terrorism and Respecting Human Rights. A Case Study of International Human Rights Jurisprudence*, (Lund 2002), p.11.

⁴¹ Commission of the European Communities, *Council Framework Decision on Combating Terrorism*, COM (2001) 521 final, and the *Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States*, COM (2001) 522 final/2.

⁴² Commission of the European Communities, *Council Framework Decision on combating terrorism*, COM(2001) 521 final, para. 1.

⁴³ *Guidelines on Human Rights and the Fight against Terrorism*, adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Minister's Deputies.

⁴⁴ *Ibid*, preamble.

⁴⁵ Security Council Resolution 1271 (2002), of 24 January 2002, para. 9.

⁴⁶ *Ibid*, para. 12.

3.5 States Responses to Terrorism and the Importance Not to Violate International Human Rights Law.

The fight against terrorism is often conducted in terms of a choice between security and public safety on the one hand, and human rights on the other. However, security is itself a fundamental right and States are under a positive obligation under international human rights law to protect it. In cases where current laws are inadequate to provide the protection against the threat of terrorism existing, States are required by international human rights law to establish additional laws as a protection against the current threat. Hence, a State is under an obligation to take the measures necessary to protect everyone under its jurisdiction against terrorist acts or threats of such acts, which is the reason counter-terrorism has been an important issue within the international community. The struggle against terrorism is an integral part of the fight to achieve the goal of liberty and security that acts of terrorism so clearly are threatening. While protecting those living within the territory, States must consequently make sure that all counter-measures taken are in accordance with international human rights law. Any counter-measures against terrorism that does not maintain this is incompatible with a State's effort to achieve security within the State.⁴⁷

The prevention of terrorism may be divided into either peaceful or coercive responses, and when implementing counter-terrorism measures States should always keep the fundamental principle of the United Nation in mind and thus give peaceful responses first priority when fighting terrorism. From a States perspective a number of methods can be used to respond to terrorism e.g. anti-terrorist legislation, covert intelligence gathering, international cooperation, elimination of root causes etc. However, as it is not the purpose of this thesis to focus on anti-terrorist legislation in general, all possible methods to prevent terrorism will not be scrutinized.

International human rights law is rather flexible and human rights instruments do provide for provisions of limitations, as well as derogation, from certain rights in times of emergency. It recognizes that some situations comprise such serious nature that States may be in need of access to additional tools to counter them. However, although not all human rights are absolute a State may not take just any measures in countering terrorism, as it should continue to respect human rights even in times of emergency. The human rights framework imposes certain basic requirements that all counter-terrorism measure must satisfy. For example, they must not be arbitrary, they must not involve torture, they must respect peremptory norms such as the prohibition of discrimination on racial grounds, they must respect the basic principles of a fair trial and they must be subject to a proper judicial supervision.⁴⁸ As former High Commissioner Mary

⁴⁷ *Supra* note 1, p. 13.

⁴⁸ Joint Committee on Human Rights: *Eighteenth Report 2003/04*, para. 9.

Robinson put it: "... the long term guarantor of security is through ensuring respect for human rights and humanitarian law".⁴⁹

In a joint statement together with the former Secretary General of the Council of Europe, and the former Director of the OSCE Office for Democratic Institutions and Human Rights, the former High Commissioner of OHCHR, while condemning terrorism, further called on all States to "strictly adhere to their international obligations and commitments to uphold human rights and fundamental freedoms".⁵⁰ The statement also called on all Governments to "refrain from any excessive step, which would violate fundamental freedoms and undermine legitimate dissent"⁵¹. Further it was recalled that certain rights might not be derogated from under any circumstances, and the statement concluded that: "... the purpose of anti-terrorism measures is to protect human rights and democracy, not to undermine these fundamental values of our society".⁵²

Observers of human rights law have, however, despite the frequent repeats to combine counter-terrorism with the respect of the fundamental rights and freedoms, noted that civil liberties and human rights in fact are particularly threatened during times of crisis.⁵³ It has also been suggested that some States consider the protection of human rights and civil liberties to their fullest extent as a luxury in a state of emergency, and States thus argue that it might be necessary to sacrifice some of these rights in order to overcome the crisis.⁵⁴ When States feel threatened by e.g. terrorism they often declare a state of emergency, and use their emergency powers to suspend the basic human rights and the procedures of their enforcement.⁵⁵ Hence, there lies a great risk in the post September 11th counter-terrorism campaign that certain human rights and fundamental freedoms are threatened by the attempts from States to prevent future terrorist attacks. Many States have taken steps to protect its population by enforcing new security legislation and new law enforcement measures specifically aiming on terrorism.⁵⁶ Thus, instead of addressing the crime of terrorism through a State's regular criminal justice system and establish security concerns, many States have set up specific anti-terrorism legislation. Anti-terrorism laws often include elements, which has raised concerns with regard to human rights protection. Examples of areas are: overly broad definitions, immigrations laws leading to deportation

⁴⁹ Mary Robinson, *Statement at 59th session of UN Human Rights Commission*, 20 March 2002.

⁵⁰ *Joint Statement by Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudman, Director of the OSCE Office for Democratic Institutions and Human Rights*, 29 November 2001.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Supra* note 1, p. 15.

⁵⁴ Gross Oren and Ni Aoláin Fioinnuala, "From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights", *Human Rights Quarterly*, vol. 23, No. 3 (2001), p. 638.

⁵⁵ See Chapter 4 below for a closer examination of measures of derogation.

⁵⁶ Amnesty International, *Rights at Risk Report*, AI Index ACT 30/001/2002.

of persons, introduction of preventive arrests and detention, increased surveillance powers and the impact on the right to privacy and insufficient parliamentary oversight.⁵⁷

3.5.1 United Kingdom's Response to Terrorism

Taking the above mentioned in consideration when scrutinizing the case of the United Kingdom and its counter-terrorism measures post September 11th, one may argue that the measures indeed are according to the international framework of combating terrorism.⁵⁸ When implementing the Anti-terrorism, Crime and Security Act 2001 the UK referred to the Security Council resolution 1373⁵⁹ in which the Council recognized the attacks as a threat to international peace and security, and that the measures taken were thus required due to the UK's obligations under international law.⁶⁰ As mentioned above, acting under Chapter VII of the United Nations Charter, the Security Council required all States to take measures to prevent the committing of terrorist attacks, including by denying safe havens to those who finance, plan, support or commit terrorist attacks.⁶¹ In its report to the Counter-Terrorism Committee, established under the Security Council resolution 1456 (2003), the Government of the UK stated that

“... Following September 11 it was decided to enhance the UK's existing Anti-Terrorist legislation which resulted in the Anti-Terrorism, Crime and Security Act 2001....”⁶²

In regard to the detention provisions under Part 4 of the 2001 Act⁶³, the UK Government claimed these to be in compliance with the resolution referring to the requirements that States must deny safe havens to terrorists and prevent people from conspiring to commit terrorist attacks overseas.⁶⁴ The UK Government has thus been using the requirements of resolution 1373 as a justification for the introduction of the 2001 Act, including the indefinite detentions without trial. The United Nation Human Rights Committee, when considering the United Kingdom's fifth periodic report under the International Covenant on Civil and Political Rights, commented this by pointing out that:

⁵⁷ *Preventing and Combating Terrorism: The new Security Environment*, Food for Thought Paper Prepared for the 2nd OSCE Annual Security Review Conference, Vienna 23-24 June 2004, OCSE, ODIHR. page 6.

⁵⁸ This issue will be analyzed in more dept, see Chapter 5 below.

⁵⁹ *Supra note 11*, para. 5.

⁶⁰ United Kingdom, Statutory Instrument 2001 No. 3644, The Human Rights Act 1998 (Designated Derogation) Order 2001.

⁶¹ *Supra note 11*, para.1.

⁶² The United Kingdom of Great Britain and Northern Ireland, Report to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001, (S/2001/1232) p. 3.

⁶³ See Section 23 of the Anti-terrorism, Crime and Security Act 2001.

⁶⁴ *Supra note 62*, p. 9.

“[t]he Committee notes with concern that the State party, in seeking *inter alia* to give effect to its obligations to combat terrorist activities pursuant to Resolution 1373 of the Security Council, is considering the adoption of legislative measures which may have potentially far reaching effects on rights guaranteed in the Covenant, and which, in the State Party's view, may require derogations from human rights obligations.”⁶⁵

The indefinite detention without trial is a power only granted against non-nationals who are claiming asylum and can not be used towards citizens of the United Kingdom. As have been pointed out in Chapter 3.3.1, resolution 1373 explicitly states that States must ensure that measures are in conformity with relevant provisions of national and international law. As a consequence, all provision in the 2001 Act must be in accordance with international human rights law, including the derogations made under Article 15 of the ECHR and Article 4 of the ICCPR⁶⁶.

⁶⁵ The Concluding Observation of the Human Rights Committee: *United Kingdom of Great Britain and Northern Ireland*. 05/11/2001, CCPR/CO/73/UK, para. 6.

⁶⁶ See Chapter 4 below.

4 Derogation of Human Rights Provisions in Time of Public Emergency

“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare of a democratic society...” (Article 29 (2) of the UDHR)

4.1 Introduction

In the light of terrorism, it has been suggested that international human rights law have a twofold meaning. In the first place, the regulations oblige States to prevent and combat terrorism and to protect everyone within its jurisdiction. Secondly, while doing so, States have to fully observe and respect human rights and fundamental freedoms.⁶⁷ To respect human rights does however not mean that measure against terrorism should be excluded, but that the anti-terrorism measures taken must not be violating international human rights law. Most human rights protections are not absolute, and the flexibility in the international human rights instruments do allow for limitations or even derogations, meaning a temporary suspension from the application of a States obligations under international human rights law from parts of the obligations in the treaties. Generally it is recognized that a *national security* and *states of emergency* justifies derogation from certain human rights provisions.⁶⁸

4.2 Derogation- why and when?

A derogation is an extreme sort of limitation from a human rights provision, and implies that a State temporary suspends, restrict or even commit a breach of certain human rights as a response to a public emergency.⁶⁹ According to Article 4(1)⁷⁰ of the ICCPR, and Article 15(1)⁷¹ of the ECHR,

⁶⁷ “Some limitations of human rights may be necessary to protect other human rights”, See speech by Mr. Herman Van Roijen, To be found in *Human Rights and Terrorism, Hall of Knights-18.09.2003, the Hague, OSCE Seminar in the Hall of Knights*, Ed. Tammo Tekst & Tips, (Utrecht, The Netherlands 2003).

⁶⁸ de Waal, Johan, *The Bill of Rights Handbook 2001*, Fourth Edition, (Juta & Co, Ltd, 2001), p. 144.

⁶⁹ Dimitrijevic, Vojin and Opsahl Torkel, “Article 29 and 30” in : *The Universal Declaration of Human Rights- A common Standard of Achievement*, ed. by Gudmundur Alfredsson and Asbjorn Eide, (Kluwer Law International, the Hague, 1999) p. 645.

⁷⁰ Article 4 of the International Covenant on Civil and Political Rights provides:

1. 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

States may derogate from some of the provisions under the treaties in times of a public emergency and “if strictly required by the exigencies of the situation”.⁷² It is during times of public emergency that many States find derogations from certain obligations necessary as the suspension from a certain human rights provision might be the only way to protect the national security, and prevent the State from falling into chaos.⁷³ Whilst it is arguable that some civil liberties must be curtailed during states of emergency in order to protect the public safety, it is nevertheless important to find a balance so that derogations are not being used unlimited to justify abuses. A derogation can be said to be a compromise between the protection of individual rights and the protection of national need, where a suspension seems to be the only way for a State to solve a serious crisis due to a threat to the safety of a nation.⁷⁴ However, derogations are exceptional in nature and such measures should never be imposed without careful consideration, and must further be appropriate to the rights guaranteed in each treaty. It is important that the proclamation of a declaration of state of emergency is never being used as an escape to comply with the rights enunciated in international treaties, which is why it is significant that derogations are made in extraordinary and extreme situations, and that they are proportionate to the danger.⁷⁵ States should always look for all possible

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 and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

⁷¹ Article 15 of the European Convention on Human Rights provides:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. 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.

⁷² See Article 4(1) of the International Covenant on Civil and Political Rights, and Article 15(1) of the European Convention on Human Rights.

⁷³ International Commission of Jurists, *States of Emergency and Their Impact on Human Rights*, (Geneva 1983).

⁷⁴ Hartman, John F. “Derogation from Human Rights Treaties in Public Emergencies”, *Harvard International Law*, Volume 22, Number 1, Winter 1981, p.2.

⁷⁵ Sinha Manojk , *Implementation of Basic Human Rights*, Manak Publications (P) LTD. 1999, pp 16-18.

alternative options before taking moves to invoke a derogation and if there are other possible alternatives to achieve the equivalent results, the derogation is not strictly required. As the Human Rights Committee has stressed in General Comment No. 29, it is not enough just to show that measures are justified by the exigencies of the situation, a State must also show *how* these measures are strictly required.⁷⁶

Nevertheless, one may argue that derogations are implications that the measures taken, such as counter-terrorism legislation, would be considered excessive under regular circumstances and thus it is of importance that the provisions of necessity are fulfilled. As will be discussed in-depth below in Chapter 5, the United Kingdom's legislative response to September 11th provides for example the Government with the power to certify foreign persons as terrorists⁷⁷ whose removal from the country would be prohibited by the principle of *non-refoulement* and detain them.⁷⁸ Due to the fact that the detention is for an unlimited period of time, until it is safe for the detainees to return to their countries of origin, this provision is incompatible with Article 5 of the ECHR and Article 9 of the ICCPR. The United Kingdom has however acknowledged this, and thus made a declaration of derogation, asserting that there is an emergency arising within the Nation and that the measures outlined are required to meet it.⁷⁹

In cases where it has been a necessity for a State to derogate, it should terminate the derogations as soon as the danger ceases to be one which threatens the life of the Nation.⁸⁰ Under such circumstances the State is bound to respect human rights in full, and may only apply the limitations of certain freedoms provided for within each treaty provisions relating to each right.⁸¹ The State must further officially declare the state of emergency, or it may not adopt measures that would derogate from its treaty obligations. Measures of derogation are justified as long as the emergency lasts, and thus only temporary tools that foresee a return to normalcy at the earliest possible opportunity.

4.3 Terrorism as a Threat to the Life of a Nation

As have been mentioned above, according to international and regional human rights instruments, a State is permitted to derogate from its obligations under international human rights law only if the preconditions of a public emergency, threatening the life of the nation, are fulfilled.⁸² A

⁷⁶ *Supra* note 5, para. 4.

⁷⁷ See Section 21 of the Anti-terrorism, Crime and Security Act 2001.

⁷⁸ See Section 23 of the Anti-terrorism, Crime and Security Act 2001.

⁷⁹ United Kingdom, Statutory Instrument 2001 No. 4032, the Human Rights Act 1998 (Amendment No. 2) Order 2001.

⁸⁰ *Supra* note 74, p.17.

⁸¹ *Supra* note 1, p. 32.

⁸² The wording of Article 4 (1) of the ICCPR and Article 15 (1) of the ECHR are not exactly the same, however both Covenants require this criteria to be fulfilled.

public emergency could for example include a war, or a severe natural disaster, but in order to fulfill the criteria, the threat must be directed at the State as a *whole* and not just part of it. Hence, a State may not derogate from a specific provision unless it has been established that there is in fact a state of emergency, prevailing throughout the country threatening the existence of the whole nation.⁸³ The European Court of Human Rights (ECtHR) has pointed out this issue and commented in the case of *Lawless v. Ireland*⁸⁴ that:

"an exceptional situation of crisis or emergency which effects the whole population and constitutes a threat to the organized life of the community of which the State is composed."⁸⁵

Lawless v. Ireland was also the first case in the European Court of Human Rights to address whether or not *terrorism* could constitute a public emergency threatening the life of a nation. G.R Lawless was arrested under suspicion of belonging to an unlawful organization, the Irish Republican Army (IRA) and detained without trial for almost five months in 1957. The Court acknowledged that terrorism could give rise to a state of emergency in the Republic of Ireland, even though the IRA's activities were largely aimed at the UK rather than Ireland, justifying measures of derogation under Article 15 of the ECHR. The Court was influenced by a number of factors, including the presence of the IRA on Irish territory. Furthermore, the terrorist character of a group, and the fear it creates among the population, creates a situation where the ordinary law is not sufficient in stopping the danger, which would thus justify the need to derogate from certain provisions in order to implement a new, temporary legislation.⁸⁶

The threshold for the condition of a public emergency is fairly high although the ECtHR has often granted that the State's discretion in assessing the situation is rather wide. Due to the emergency situation in Northern Ireland in the early 1970's and the enormous amount of terrorist activity taking place, a number of anti-terrorism legislation were implemented in the UK during these years.⁸⁷ In the case of *Brannigan and McBride v The United Kingdom*⁸⁸, two individuals were arrested and detained pursuant to the Prevention of Terrorism (Temporary Provisions) Act 1984, respectively for six and four days. The detention occurred shortly after the introduction of derogations from Article 5(3)(5), due to the threat of the public emergency by terrorist groups; hence no violation of the UK's obligation

⁸³Carlson, S. and Gisvold, G. *Practical Guide to the International Covenant in Civil and Political Rights*, (Transnational Publishers, Ardsley, NY, USA), p. 33.

⁸⁴*Lawless v Ireland*, 1 July 1961, European Court of Human Rights, no. 250/57, *Judgment (Merits)*.

⁸⁵*Ibid*, para. 28.

⁸⁶*Ibid*, para. 36.

⁸⁷ These counter-terrorism measures were called the Prevention of Terrorism (Temporary Provisions) Act.

⁸⁸*Brannigan and McBride v. The United Kingdom*, 22 April 1993. European Court of Human Rights, no. 350/423-424, *Judgments (Merits)*.

under Article 5 the ECHR was established. When asked whether or not the derogation measures were lawful, the Court noted:

“[i]t falls 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”⁸⁹

According to the Court the margin of appreciation had not been exceeded in this case and a threat to the safety of the nation did indeed exist due to the existence of public disturbance in Northern Ireland, constituting a threat of terrorism. Furthermore, the measures of derogation were taken during a limited scope of time. The requirements of Article 15 of the ECHR were fulfilled and the derogation was thus lawful.⁹⁰

Despite the fact that the jurisprudence of the ECtHR suggests that State's are given quite a wide margin of appreciation, when determining if the situation constitutes a state of emergency, it should be pointed out that all measures proposed by the State must fulfill the criterion of “strictly required by the exigencies of the situation”.⁹¹ Consequently, a State must demonstrate why ordinary criminal law measures and existing counter-terrorism legislation are insufficient. In the *Aksoy v Turkey Case*⁹² a man was detained for 14 days, under which he was subject to torture, following his arrest in Turkey on suspicion of terrorism. The Court accepted Turkey's derogation under Article 15 of the ECHR considering that the terrorist activity of the *particular* organization, Workers' Party of Kurdistan (PKK), in Southeast Turkey had created a “public emergency threatening the life of the nation”.⁹³ Nevertheless, despite the fact that the Court accepted that investigation of terrorist offences creates special problems, it did not find it necessary to detain a suspected terrorist for fourteen days without judicial review.⁹⁴ Further, the Government did not give any explanations on why the proficient safeguards, e.g. the prohibition against torture in the Turkish Criminal Code or a speedy preparation of *habeas corpus*, could not be applicable on the detainee suspected of terrorism. The Court consequently concluded that the State's margin of appreciation had been exceeded.⁹⁵

A State is obliged to protect human rights at all cost even in a state of emergency and all measures taken must be according to the principle of proportionality. Hence, not even the struggle against terrorism should undermine human rights even if terrorism, under specific conditions, may lead to a state of emergency.

⁸⁹ *Ibid*, para. 43.

⁹⁰ *Ibid*, para. 66.

⁹¹ Mentioned in Article 4(1) of the International Covenant on Civil and Political Rights as well as Article 15(1) of the European Convention on Civil and Political Rights.

⁹² *Aksoy v Turkey*, 26 November 1996, European Court of Human Rights, no. 606/694 *Judgment (Merits and just satisfaction)*.

⁹³ *Ibid*, para. 70.

⁹⁴ *Ibid*, para. 78.

⁹⁵ *Ibid*, para. 82.

4.3.1 The Principle of Proportionality

The principle of proportionality is not a principle that applies solely on the derogation clause or the human rights law alone, but a general principle of international law. In the area of human rights law however the principle of proportionality has found a major application as human rights and proportionality has often been linked together.⁹⁶

When determining the legality of a State's interference in individual rights and freedoms by measures of derogation one may argue that the principle of proportionality acquires great importance. One of the main criterion being used when determining the legality of a derogation made by a State in a time of emergency is whether or not these measures are proportionate or not.⁹⁷ As have been pointed out above, these measures are only allowed to the extent strictly required by the exigency of the situation and must always be proportionate to the danger. The principle of proportionality may thus be used when determining whether the emergency is so grave as to amount to what the treaties have defined as a public emergency threatening the life of the nation, as well as when defining if the derogations are proportionate to the threat.

The ECtHR has pointed out in several cases⁹⁸ that it in the first place falls on each contracting State to determine how far it is necessary to go when attempting to overcome the emergency that has set out the necessity of derogation. The reason for this is that the Government of a State normally is in a better position than the Court to decide on the nature and scope of the derogation. Nevertheless, States do not enjoy unlimited power to decide if the requirements of proportionality have been met. It is the Court that is empowered to rule whether or not a State has gone beyond what is strictly required by the exigencies of the situation.⁹⁹ If the Court finds that alternative measures could have been used and that these measures would have been less prejudicial to individual rights it would thus find a violation of the principle of proportionality. The margin of appreciation is thus not unlimited and, as have been pointed out by the Court, the margin is "... accompanied by a European supervision."¹⁰⁰

4.3.2 The Principle of Non-Discrimination

All measures of derogation must be consistent with the States parties other obligations under international law, as stated in the ECHR and ICCPR.

⁹⁶ Oraá, Jaimee, *Human Rights in States of Emergency in International Law*, (Oxford University Press 1992) p. 140.

⁹⁷ *Ibid.*

⁹⁸ E.g. *Lawless v Ireland*, 1 July 1961, European Court of Human Rights, no. 250/57, *Judgment (Merits)* and *Brannigan and McBride v. The United Kingdom*, 22 April 1993, European Court of Human Rights, no. 350/423-424, *Judgments (Merits)*.

⁹⁹ *Ireland v. United Kingdom*, 18 January 1978, European Court of Human Rights, no. 5310/71, *Judgment (Merits and just satisfaction)*, para. 207.

¹⁰⁰ *Ibid.*, para 25.

What those obligations are depends on the context of the situation and the provisions from which the State seeks to derogate. In regard to non-discrimination however, the ICCPR, unlike the ECHR, contains an additional provision that no measures of derogation that are made solely on the ground of race, color, sex, language, religion or social origin may be made. Nevertheless, despite the absence of the provisions regarding non-discrimination in the ECHR, discriminatory application of a derogation is prohibited under the general non-discriminatory provision of Article 14. According to the jurisprudence of the ECtHR, discrimination is established where the facts of the case shows a different treatment, the distinction has no reasonable justification, or, there is no proportionality between the measures taken and the aim to be achieved.

The principle of equality before the law and non-discrimination is a cornerstone of international law and, according to the UN Human Rights Committee non-discrimination “... constitutes a basic and general principle relating to the protection of human rights.”¹⁰¹ According to the general non-discrimination clauses in the ECHR¹⁰² and the ICCPR¹⁰³, discriminatory grounds are race, color, sex, language, religion, political or other opinion, national or social origin, property, and birth or other status. The list in regard to the prohibition of non-discrimination in emergencies thus provides a shorter list since legitimate restrictions of these grounds could be imposed by a state of emergency.¹⁰⁴ Furthermore, if a derogation is discriminatory within the meaning of Article 4(1) of the ICCPR, however not solely based on a discriminatory motive, the discriminatory measure may still be allowed.¹⁰⁵ A State's derogation, that in fact makes a distinction between different groups of people, even on racial grounds, could in certain situations be considered legitimate if they have not been taken exclusively on these grounds, but rather because the measures were necessary, and proportionate to the emergency. Nevertheless, one may argue that it is a greater risk for discriminatory decisions based on hate or racial prejudice in situations of emergency.¹⁰⁶

Hence, it is important that measures of derogation against certain racial, ethnic or religious groups should be carefully scrutinized to assure that these

¹⁰¹ Human Rights Committee, *General Comment No. 18: Non-discrimination*, of 9 November 1989.

¹⁰² Article 14 of the European Convention on Human Rights provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

¹⁰³ Article 26 of the International Covenant on Civil and Political Rights provides:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

¹⁰⁴ *Supra* note 96, p. 174.

¹⁰⁵ *Ibid.*, pp. 175-176.

¹⁰⁶ *Ibid.*, p. 189.

measures have an objective justification and not based on discrimination against these minorities.

4.4 Non-Derogable Rights

One of the most important principles in the regulation of human rights in states of emergency contained in the derogation clauses is the principle of non-derogation.¹⁰⁷ Non-derogable rights are absolute rights; generally adequate to deal with the most severe threats to human rights posed by emergency situations, and measures taken which violates them can under no circumstances be justified.¹⁰⁸

It has been suggested that when adopting the list of non-derogable rights, there were two different criteria implicitly used to identify the most important rights in time of emergency.¹⁰⁹ Firstly, the rights included were the absolute fundamental rights, required for the protection of the human being. Secondly, the rights included were the rights considered to have no direct bearing on the state of emergency, and thus derogation would not be justified.¹¹⁰ In this context it should be mentioned that there are other rights, not listed as non-derogable, which one might argue are no less fundamental and which probably should have been included, such as guarantees of due process of law. It is true that the fact that some rights are not listed as absolute rights does not mean that they can automatically be derogate from due to the principle of proportionality. Nevertheless, it is not uncommon with gross violations in times of emergencies, of some of the fundamental rights not on the list, and as a consequence an enlargement of the list of non-derogable rights has been proposed.¹¹¹

The lists of non-derogable rights in the ECHR and ICCPR contain four rights, which are considered non-derogable, common to the treaties. These rights are: the right to life¹¹², the right not to be subject to torture¹¹³, the right not to be held in slavery or servitude,¹¹⁴ and the right not to be held guilty in retroactive application of criminal law¹¹⁵.

The rights listed above constitutes what has been called the irreducible core of human rights and are so fundamental that they are considered to be not

¹⁰⁷ *Ibid*, p. 87.

¹⁰⁸ Hartman, Joan F, "Working Paper for the Committee of Experts on the Article 4 Derogation Provision", *Human Rights Quarterly*, Volume 7, No. 1, (1985), p. 112.

¹⁰⁹ *Supra* note 96, p. 94.

¹¹⁰ *Ibid*, pp. 113-114.

¹¹¹ *Ibid*, p. 95.

¹¹² Article 2 of the European Convention on Human Rights, and Article 6 of the International Covenant on Civil and Political Rights.

¹¹³ Article 3 of the European Convention on Human Rights, and Article 7 of the International Covenant on Civil and Political Rights.

¹¹⁴ Article 4(1) of the European Convention on Human Rights, and Article 8(1)(2) of the International Covenant on Civil and Political Rights.

¹¹⁵ Article 7(1) of the European Convention on Human Rights, and Article 15 of the International Covenant on Civil and Political Rights.

only customary law, but also norms of *jus cogens*.¹¹⁶ No derogation is allowed in times of emergencies from any of these rights, although it is not uncommon that gross violations of them do occur. Among the most common violations of these rights are executions carried out without due process guarantees, deaths resulting from torture or ill treatment in prison and enforced disappearances.¹¹⁷

In addition to the four common non-derogable rights contained in the two treaties, the ICCPR contains three more rights that are non-derogable. These rights include the right not to be imprisoned for inability to fulfill a contractual obligation¹¹⁸, the right to recognition as a person before the law¹¹⁹ and the right to freedom of thought¹²⁰ as stated in Article 4 ICCPR. These rights have no direct meaning for the security of the State and have not been included because they are the most fundamental rights, but because a measure of derogation is not considered necessary in order to overcome the emergency. According to the Human Rights Committee there are a number of additional rights not listed in Article 4 of the ICCPR that should properly be added to the lists of non-derogable rights as well, due to their character of peremptory norms of international law.¹²¹ Among the rights that may not be subject to lawful measures of derogation is the right of “[a]ll persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person”- Article 10 of the ICCPR.¹²²

¹¹⁶ *Supra* note 96, p. 96.

¹¹⁷ *Ibid*, p. 97.

¹¹⁸ Article 11 of the International Covenant on Civil and Political Rights.

¹¹⁹ *Ibid*, Article 16.

¹²⁰ *Ibid*, Article 18.

¹²¹ *Supra* note, 5, para. 13a.

¹²² *Ibid*, para. 11.

5 Anti-terrorism, Crime and Security Act 2001 and the Provision to Detain Foreign Nationals Without Trial

"That an alien is lesser human because he is not a citizen is an affront to human rights and puts a hierarchy on the value of life."¹²³ (Helena Kennedy, Institute of Advanced Legal Studies, University of London.)

5.1 Introduction

As have been pointed out above¹²⁴, the Anti-terrorism, Crime and Security Act 2001 is Britain's response to the United Nations Security Council's call in resolution 1368 on the international community to "prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorism conventions and Security Councils resolutions."¹²⁵ However, due to the already extensive anti-terrorism legislation the UK was possessing before the implementation of the 2001 Act, it is questionable whether or not the implementation of further counter-terrorism legislation was necessary. The UK has more anti-terrorism legislation in its national legislation than almost any other democracy, especially within Europe.¹²⁶

The Anti-terrorism, Crime and Security Act 2001 have been criticized for its infringements on a number of civil liberties. The most criticized provisions are the violation of the right to liberty and the changes to asylum and immigration law contained in Part 4 of the 2001 Act.

5.2 The Anti-Terrorism, Crime and Security Act and The Detention of Foreign Nationals

In the aftermath of September 11th, speaking in the House of Commons, the former Secretary of State for the Home Department Mr. David Blunkett made a statement of the necessity to counter threats from international terrorism through legislative measures. The former Secretary of State

¹²⁴ See Chapter 3.5.1, above.

¹²⁵ *Supra* note 32, para. 4.

¹²⁶ Mc Arthur, Elisabeth, "Liberty and Security: The State's Dilemma. September 11th and the UK Response to Terrorism", in: *European Master's Degree in Human Rights and Democratization*, (Mestre-Venice, Marsilio Editori S.p.A Venice, 2003).

announced plans to indefinitely detain foreign nationals who were no longer recognized as refugees, but due to circumstances in their countries of origin could not be returned there.¹²⁷ Due to Britain's obligation under international human rights law, the deportation of a person that fears to be subject of torture or inhuman or degrading treatment would not be possible.¹²⁸ However, since the individuals are suspects of international terrorism and therefore a possible threat to the national security in the UK, the indefinite detention will be the consequence. In order for the additional detention powers to be lawful however, derogations from Article 5(1) of the European Convention on Human Rights, and Article 9 of the International Covenant on Civil and Political Rights were necessary.¹²⁹

During the same time even more extreme suggestions were enjoying a degree of political currency. Senior political figures in the Conservative Party began to suggest that Parliament should repeal parts of the Human Rights Act to allow the deportation of suspected and convicted terrorists even if they genuinely fear that they would be tortured or executed. On 7 October, the Leader of the Opposition, Ian Duncan Smith, was quoted saying that the extradition ban on sending suspected terrorists to America because they might be executed was “ridiculous and mad”.¹³⁰ One may argue that this is an outrageous statement, although reflecting the environment in the UK, which would lead to a grave violation of human rights. As became clear in Chapter 4.4, the right to life and the right not to be subject to torture are rights that under no circumstances may be infringed or derogated from. It is also clear that there is an absolute prohibition of extradition of a person whom fears execution or torture upon hers or his return to a country.

5.2.1 The Detention of Suspected International Terrorists

In order to detain someone, based on the 2001 Act, the Secretary of State must have reasonable grounds to believe that the person's presence in the country is a risk to national security.¹³¹ If the person in question is “concerned in the commission, preparation or instigation of act of international terrorism, is a member of or belongs to an international terrorist group, or has links with an international terrorist group”¹³², the person is considered to be a suspected terrorist and will be certified by the Secretary of State as such.¹³³ Accordingly, all that is needed to be eligible

¹²⁷ Statement by the Secretary of State for the Home Department in the House of Commons, 15th October 2001.

¹²⁸ According to the absolute prohibition of *non-refoulement* no one may be returned to a country where they might be at risk of being subject to torture or inhuman or degrading treatment.

¹²⁹ *Supra* note 127.

¹³⁰ Kelly, Mark, *The Human Rights Impact of 11 September 2001 in the United Kingdom, UK Case Study*, 8 January 2002, Conference Papers for Dublin Platform 2002.

¹³¹ Section 21(1) of the Anti-terrorism, Crime and Security Act 2001.

¹³² *Ibid*, Section 21(2).

¹³³ *Ibid*, Section 21.

for a certification of terrorism activities is a mere *suspicion*, which is a criterion that has been widely criticized. The Secretary of State's suspicion will be enough to label the person as a terrorist and a threat to national security and to detain the person, however what the exact standard of proof required in order for reasonable belief and suspicion really is, is not clear. It is thus up to the Secretary of State alone to decide what is reasonable or not.¹³⁴

One of the fundamental issues in regard to the detention of suspected terrorists, is the matter of the reasonableness of suspicion on which the arrest must be based under Article 5(1)(c) of the ECHR. In the case of *Fox, Campell and Hartley v the United Kingdom*¹³⁵ the applicants argued that they had not been arrested and detained on a reasonable suspicion of having committed an offence, but that the detention was aimed at information gathering rather than for the purpose of being charged. This, they argued, would be a breach of Article 5(1) of the ECHR as it was violating the obligation of reasonableness of suspicion contained in Article 5(1)(c). When addressing the question of the reasonableness of a suspicion the Court observed that "... a terrorist crime falls into a special category"¹³⁶. This is based on the fact that since there is the risk of loss of life and human suffering, the police are obligated to follow up all information, including information from secret sources. Further, the police might have to arrest a suspected terrorist on the basis of information, which is reliable, but cannot be revealed to the suspect. Despite this, there is no justification to stretch the reasonableness in such a way as to impair the safeguard of Article 5(1) of the ECHR. Article 5(1) of the ECHR should however not be interpreted in a way that makes it impossible for Governments to counter terrorism. States are not obliged to prove the reasonable suspicion by "disclosing the confidential sources of supporting information or even facts that would be susceptible of indicating such sources or their identity".¹³⁷ Nevertheless, it must be proved by the State by at least some facts or information, that the arrest, or detention, was done under a reasonable suspicion. In the *Fox Case* the European Court of Human Rights concluded that *reasons* for detention must not be given to the detainee in the very moment of arrest but "promptly thereafter".¹³⁸

As have been pointed out in Chapter 3.2, to determine a general definition of terrorism in international law has been proven impossible due to both political and ideological reasons. The definition in the 2001 Act refers to the Terrorism Act 2000, and is very broad, thus a vast range of people and activities could be caught within the provisions.¹³⁹ A suspected terrorist is a person that has:

¹³⁴ *Ibid.*

¹³⁵ *Fox, Campell and Hartley v the United Kingdom*, 26 June 1990, European Court of Human Rights, no. 178/234-236 *Judgment (Merits)*.

¹³⁶ *Ibid.*, para. 32.

¹³⁷ *Ibid.*, para. 34.

¹³⁸ *Ibid.*, para. 42.

¹³⁹ Section 21(5) of the Anti-Terrorism, Crime and Security Act 2001 provides:

“...been concerned in the commission, preparation or instigation of acts of international terrorism, is a member of an international terrorist group or has links with one by supporting or assisting the group”.¹⁴⁰

Due to the wide definition of international terrorism as well as who is considered to be a terrorist, it is thus of little surprise that the definition in the 2001 Act has been criticized. In particular the legislation determining that a person is suspected of international terrorism if she or he has “links with an international terrorist group”¹⁴¹ has been criticized, as it appears to come close to violate the right of association. Hence the broad term of links could result in guilt by association for persons who might share the same political ideology, ethnicity, nationality or even family with persons who commit acts of terrorism.

If a person is being subject to a certification according to Part 4, Section 21 of the 2001 Act, the appeal can be directed to the Special Immigration Appeals Commission¹⁴² (SIAC). The SIAC was established in response to the *Chahal* judgement as a body to where appeals against immigration and deportation decisions taken on national security grounds can be referred.¹⁴³ In the *Chahal case* the European Court of Human Rights held that the United Kingdom failed to provide an effective remedy to the applicant, as required by Article 13 of the ECHR.¹⁴⁴

The SIAC is mandated to allow an appeal when it is questionable if the decisions by the Secretary of State are considered to be in accordance to law or within immigration rules, or where the discretion should have been exercised differently. The SIAC has, however, been criticized for being a statutory body and that it for example considers evidence that is not available to the certified person or her/his lawyer, and the appeal hearing may be held in camera.¹⁴⁵ It is questionable if the procedure is providing the necessary guarantees of due process provided for in Article 6 of the European Convention on Human Rights and Article 14 of the International Covenant of Civil and Political Rights.

5.2.2 Extended Detention of Suspected International Terrorists

Personal liberty and security are fundamental human rights and includes that a person is not arrested or detained by a State without due cause, and that

“In this Part- «terrorism» has the meaning given by Section 1 of the Terrorism Act 2000 (c.11), and «suspected international terrorism» means a person certified under subsection (1).” See Supplement B for Section 1 of the Terrorism Act 2000.

¹⁴⁰ *Supra* note 132.

¹⁴¹ Section 21(2)(c) of the Anti-terrorism, Crime and Security Act 2001.

¹⁴² *Ibid*, Section 21(8).

¹⁴³ *Supra* note 126, p. 411.

¹⁴⁴ *Chahal v the United Kingdom*, 15 November 1996, European Court of Human Rights, no. 576/662, Judgment (*Merits and just satisfaction*) paras. 413,155.

¹⁴⁵ *Supra* note 8, p. 128.

anyone who is detained has the right to challenge the grounds on detention in a Court. There are a number of human rights standards and sources of international law, preventing arbitrary detention, including the right of a detainee to be brought promptly before a judge and challenge the lawfulness in his detention - *habeas corpus*.¹⁴⁶ In the case law regarding terrorism the European Court of Human Rights have emphasized the importance of Article 5 in the ECHR:

“The Court notes at the outset the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It is precisely for that reason that the Court has repeatedly stressed in its case law, that; any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law, but must equally be in keeping with the very purpose of Article 5, namely to protect individuals from arbitrariness [...] This insistence on the protection of the individual against any abuse of power is illustrated by the fact that Article 5 § 1 circumscribes the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom”¹⁴⁷

Other rights include the right to be promptly brought to trial or otherwise released and the right to be informed of the reason for the detention.¹⁴⁸

Despite the above, many countries have sought to derogate from these fundamental norms in recent years, as a protection for the national security, the United Kingdom being one of them.¹⁴⁹ International law recognizes a limited right to arbitrary detention, and in times of public emergency a State may very well derogate from this obligation.¹⁵⁰ Hence, it is not unusual that a derogation from provisions prohibiting arbitrary detention leads to cases where individuals are detained without charge for a long period of time, and often these victims are foreign nationals.

According to the 2001 Act, a person who has been certified by the Secretary of State as a suspected international terrorist will be detained without charge if there is no possibility to deport or extradite the person to a safe country of origin. The detention of someone who is suspected to be a threat to the security of the State, but when there is no intention to prosecute this person with criminal charges, is often called administrative or preventive detentions. These kinds of detentions often take place during periods of

¹⁴⁶ See Article 5(1) of the European Convention on Human Rights, and Article 9(3) of the International Covenant on Civil and Political Rights.

¹⁴⁷ *Kurt v Turkey*, 25 May 1998, European Court of Human Rights, no. 24276/94, *Judgment (Merits and just satisfaction)*, para. 122.

¹⁴⁸ See Article 5(2) of the European Convention on Human Rights, and Article 9(3) of the International Convention of Civil and Political Rights.

¹⁴⁹ *Assessing the New Normal, Liberty and Security for the Post-September 11 United States*, Lawyers Committee for Human Rights, (New York 2003), pp 74-77.

¹⁵⁰ See Article 15 of the European Convention on Human Rights and Article 4 of the International Covenant of Civil and Political Rights.

national emergency, and are often applied to citizens of ethnic, national or religious backgrounds related to the conflict.¹⁵¹

According to Part 4, Section 23 of the 2001 Act:

“[a] suspected international terrorist may be detained under a provision specified in subsection (2)¹⁵² despite the fact that his removal or departure from the United Kingdom is prevented [...] by (a) a point of law which wholly or partly relates to an international agreement, or (b) a practical consideration.”

According to Section 23, a person is detained as someone that will be deported eventually, even in cases where it is actually not possible due to the principle of *non-refoulement*. The former Secretary of State Mr. David Blunkett has argued that “...apart from anything else, these detainees would be free to leave the country.”¹⁵³ According to Mr. Blunkett it would thus not be a question of indefinite detention but rather a free choice of the persons accused of terrorism, and terrorism activities, to continue their stay the United Kingdom. In his argument it appears to the author as if the former Secretary of State has not taken into account the fact that many of the detainees simply are prevented to return to a third country due to the threat of torture and inhumane treatment, or even death.

In 2002, two out of eleven men detained did indeed decide to exercise their right under the Immigration Act to return to their home countries. The other nine men refused to return claiming their life was threatened by the regimes they came to Britain to seek asylum from.¹⁵⁴ The prohibition of sending persons to States where there is a risk of inhuman or degrading treatment is set out as an absolute and non-derogable provision of Article 3 of the European Convention on Human Right and as a fundamental obligation under international law. The European Court of Human Rights has established guidelines in this matter in a number of cases. In the *Soering case*¹⁵⁵ the applicant, who was to be extradite to the United States to face charges of murder, complained that the extradition would violate his rights under Article 3 of the ECHR. Soering was unable to rely on the right to life provision in Article 2 of the ECHR as it contemplates the lawful use of the death penalty. Further he argued that in case he would be sentenced to death penalty in the US, and detained in *death row*, this would violate Article 3, which stipulates that no one shall be subject to torture or to inhuman or degrading treatment or punishment. The Court agreed with his argument, unanimously saying that there was a real risk of treatment incompatible with Article 3 of the ECHR if he was extradited.

¹⁵¹ *Supra* note 56, pp. 17-23.

¹⁵² Subsection 2 provides:

“The provisions mentioned in subsection (1) are- (a) paragraph 16 of schedule 2 to Immigration Act 1971 (c. 77) (detentions of persons liable to examination or removal) or (b) paragraph 2 of Schedule 3 to that Act (detention pending deportation)”.

¹⁵³ Blunkett, David, *This is not Internment*, the Guardian, 20 November 2001.

¹⁵⁴ Gillian, A, *Muslims Seek Talks over Terror Detainees*, the Guardian, 15 April 2002.

¹⁵⁵ *Soering v the United Kingdom*, 27 July 1989, European Court of Human Rights, no. 161/217, *Judgment (Merits and just satisfaction)*.

The Soering principle has been extended in a number of other cases, and in the context of States responses to international terrorism the *Chahal v United Kingdom case*¹⁵⁶ is of particular significance. Mr. Chahal was an Indian citizen whom entered the United Kingdom illegally in 1971, but was regularized to stay in 1974 under a general amnesty for illegal immigrants. Mr. Chahal, whom had been politically active in the Sikh community in the UK, was arrested in connection with a conspiracy to kill the then Indian Prime Minister Rajiv Gandhi, but was released because of a lack of evidence. On the basis of Mr. Chahal's political activities, as well as the criminal investigations taken against him, a deportation order was served in 1990 and he was detained. Faced with deportation to India, where he would risk being subject to treatment violating Article 3 of the ECHR, Mr. Chahal made the Soering claim when appealing against the decision in the European Court of Human Rights. After a lengthy analysis, the Court found that the risk of such treatment had been confirmed by Mr. Chahal and concluded that his deportation indeed would put him at a real risk of torture, or inhuman or degrading treatment. The Court further emphasized that national security reasons had no application in cases where the person expelled would face a real risk of being subject to treatment that would violate Article 3 in the receiving country.¹⁵⁷

If a person is detained under Part 4 of the 2001 Act, she or he is supposed to be deported within a foreseeable future. However, if the deportation cannot take place due the fact that the return to a third country would violate Article 3 of the ECHR, it then seems inevitable to call the detention anything but an indefinite detention. The detainees are thus treated in the same manner as convicted prisoners with the only difference they are neither being charged with a criminal offence, nor are their detentions of a limited duration. One may argue that the purpose for detaining a suspected terrorist under the 2001 Act, is not to punish an offence already committed, but to prevent a conduct the person in question is suspected to probably commit in the future.

In 2003, the Privy Counsellor Review Committee (the Newton Committee)¹⁵⁸ was appointed by the former Secretary of State to review the 2001 Act. In its review, the Newton Committee called for an urgent repeal of Part 4 of the 2001 Act. Rather than implementing specific terrorism legislation, the ordinary criminal justice system and established security methods should remain the preferred approach to tackle the crime of terrorism. The reason for this is simply that terrorists are criminals, and the best way to tackle the problems would be through the regular criminal system, which consequently would mean no one would have to be indefinitely detained.¹⁵⁹

¹⁵⁶ *Supra* note 144.

¹⁵⁷ *Ibid.*

¹⁵⁸ The Privy Counselor Review Committee appointed for the: *Anti-Terrorism Crime and Security Act 2001 Review: Report*, 18 December 2003.

¹⁵⁹ *Ibid.*, pp. 37-38.

We should nevertheless do well to recall that Article 5(1)(f) of the European Convention on Human Rights do permit detention of a person without charge. However, this is only permitted if the person is someone “against whom action is being taken with a view to deportation or extradition”¹⁶⁰. In the *Chahal v the United Kingdom* case the European Court of Human Rights also established that deprivation of liberty under Article 5(1)(f) of the ECHR only is justified for as long as the deportation proceedings are prosecuted with “due diligence”¹⁶¹. Hence, the detention should not be indefinite or of an excessive length of time, and if the person cannot be released in the foreseeable future, the detention is contrary to the Article. According to the General Comment No 8, adopted by the Human Rights Committee in 1982, preventive detentions, used for e.g. public security, must be controlled by the same provisions and thus “...not be arbitrary, and must be based on grounds and procedures established by law (para 1), information of the reasons must be given (para 2) and court control of the detention must be available (para 4)...”¹⁶² It has further more been acknowledged in the Siracuse Principles¹⁶³, that Article 9 of the ICCPR might be limited if strictly required by the exigency of an emergency situation. Nevertheless, there are certain rights that are “fundamental to human dignity”¹⁶⁴ and the denial of them may thus never be considered a strictly necessary measure in any possible emergency. The detention for an indefinite period of time,”... whether pending judicial investigation or trial or detained without charge” is such a right.¹⁶⁵

Accordingly, the former Secretary of State did indeed declare that the exercise of the extended power to detain contained in the 2001 Act might be inconsistent with the obligations under Article 5(1) of the ECHR. Due to this finding, the UK Government decided to avail itself of the right of derogation from Article 5(1)(f), conferred by Article 15(1) of the ECHR¹⁶⁶, to be discussed in more detail in Chapter 5.3. The Joint Committee on Human Rights¹⁶⁷ further proposed that an equivalent notice should be given under the ICCPR¹⁶⁸ and the UK decided to avail itself the same right, permitted under Article 4 of the ICCPR, and derogated from Article 9 of the Convention.¹⁶⁹

¹⁶⁰ See Article 5(1)(f) of the European Convention on Human Rights.

¹⁶¹ *Supra* note 144, para. 113.

¹⁶² Human Rights Committee, *General Comment No. 8: Right to liberty and security of persons* (Art. 9), of 30 June 1982.

¹⁶³ *Siracuse Principles on the Limitations and Derogations of Provisions in the International Covenant on Civil and Political Rights*, Annex, E/CN.4/1985/4 (1985).

¹⁶⁴ *Ibid.*, para. 70.

¹⁶⁵ *Ibid.*, para. 70(b).

¹⁶⁶ *Supra* note 60.

¹⁶⁷ The Joint Committee on Human Rights has been appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom.

¹⁶⁸ Joint Committee on Human Rights, *Second Report 2001-2002*.

¹⁶⁹ *Supra* note 18.

5.2.3 Discriminatory Provisions?

Part 4 of the Anti-Terrorism, Crime and Security Act has also been criticized for its discriminatory provisions, and incompatibility with Article 14¹⁷⁰ of the ECHR, Article 4¹⁷¹ and 26¹⁷² of the ICCPR, as well as with the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). According to these provisions discrimination on grounds of race is prohibited, yet the 2001 Act applies on foreign nationals alone. Article 4 of the ICCPR does however not include a prohibition of discrimination based on national origin like the other provisions so one may argue that the provisions in that Article is not violated by the derogations. However Article 2 of the ICCPR should be mentioned in this context. According to this Article the States parties undertake to ensure to all individuals within its jurisdiction the rights in the Covenant “without any distinction to any kind such as race..., national or social origin....”¹⁷³

The UN Human Rights Committee has emphasized in relation to the ICCPR that:

“... each State party must ensure the rights in the Covenant to all individuals within its territory and subject to its jurisdiction. In general the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness”¹⁷⁴

The Committee further stretches that non-citizens “...have the full right to liberty and security of the person.”¹⁷⁵ Although international human rights law contemplates some distinctions between national and non-nationals, a general discrimination in the guarantee of rights on the basis of nationality is prohibited.

The Joint Committee on Human Rights has highlighted the discriminatory nature of Part 4 of the 2001 Act in its February 2004 Report¹⁷⁶. Instead of making the detention power an aspect of anti-terrorism law the Committee

¹⁷⁰ Article 14 of the European Convention on Human Rights provides:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with national minority, property, birth, or other status”.

¹⁷¹ In regard to non-discrimination, the ICCPR, unlike the ECHR, contains an additional provision that no measures of derogation made *solely* on the ground of race, color, sex, language, religion or social origin may be made. See Chapter 4.3.3, above.

¹⁷² Article 26 of the International Covenant on Civil and Political Rights provides:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law, In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

¹⁷³ See Article 2 of the International Covenant on Civil and Political Rights.

¹⁷⁴ Human Rights Committee, *General Comment No.15: The position of aliens under the Covenant*, of 11 May 1986, para. 1.

¹⁷⁵ *Ibid.*

¹⁷⁶ Joint Committee on Human Rights, *Sixth Report, 2003-04*, para. 35.

is concerned over the fact that provisions has been taken as an aspect of immigration law, and by applying the power only to non-nationals, the efficiency of the 2001 Act as an anti-terrorism tool is reduced. Further on:

"... the Committee remains of the view that there is a significant risk that the powers under Part 4 violate the right to be free of discrimination under ECHR Article 14 because they have a particular impact on only part of the resident community of the United Kingdom."¹⁷⁷

The same concern was expressed by the Special Immigration Appeals Commission (SIAC) in the case *A and others v Secretary of State*.¹⁷⁸ Nine suspected terrorists, all non-nationals, whom have been detained without charge or trial under the provisions of the 2001 Act, appealed the certification by the Secretary of State. In the appeal the SIAC ruled that the derogation from the ECHR was unlawful because it did not comply with the non-discrimination provisions of the European Convention as the provisions only applied to foreign nationals. The SIAC noted that if the indefinite detention section were to be applicable to the alien section only, it would have to be properly confined that the threat stemmed exclusively from that group, which was not true in this case.¹⁷⁹ This ruling was however reversed by the Court of Appeals on October 25, 2002.¹⁸⁰ In the Court's view there are no similarities between British nationals and non-British nationals when the latter does no longer have the right to remain in the country, but currently cannot be deported. According to the Court "... aliens who cannot be deported have, unlike nationals, no more right to remain, only a right not to be removed, which means legally that they come into a different class from those who have a right of abode."¹⁸¹ The Court noted that the United Kingdom had recognized its rights under international law to distinguish between nationals and non-nationals due to the current situations of a national security, and that this was not contrary to the European Court of Human Rights.

5.2.4 Right To a Fair Trial

The right to a fair trial is an essential element to international human rights law and the rule of law. Notwithstanding, terrorism and counter-terrorism measures have led to significant challenges on this important provision as the provision in Article 6 of the ECHR, and Article 14 of the ICCPR are derogable rights, subject to restrictions during times of emergency. E.g. some States have sought to place suspects outside the protection of the legal system, both through legislation and action, so as to enable them to detain

¹⁷⁷ *Ibid.*

¹⁷⁸ SIAC, *A and Others v Secretary of State for the Home Department*.

¹⁷⁹ *Neither Just nor effective, Indefinite detention Without Trial in the United Kingdom Under Part 4 of the Anti-Terrorism, Crime and Security Act 2001*, Human Rights Watch Briefing Paper, 24 June, 2004.

¹⁸⁰ This Case has been appealed to the House of Lords. The judgement is during the course of writing the thesis still pending.

¹⁸¹ *A and others v. Secretary of State for the Home Department*, 25 October 2002, Court of Appeal (Civil Division), no. 2002/1502/C. para.47.

such suspects indefinitely without trial. The main issues of concern have been the violation of the presumption of innocence, special courts, length of proceedings and restrictions on the correspondence between the 'suspected terrorist' and her, or his, legal representative. Persons accused of a crime has the right to a fair trial, including access to a legal adviser and the presumption of innocence, according to Article 6 of the ECHR, and Article 14 of the ICCPR. The right to a fair trial applies not only to procedures for the determination of criminal charges, but also to procedures of the determination of an individual's rights and obligations in a civil proceeding.¹⁸²

It is questionable whether Part 4 of the 2001 Act follow these provisions or if it in fact is violating them. Some have argued that the certification and detention process established in Sections 21-23 does, in substance and effect, amount to the determination of a criminal charge, and that the detainees are not provided with the safeguards according to the provisions of a fair trial. The Court of Appeal concluded in the case of *A and others v Secretary of State*, that the case was dealing with civil proceedings rather than criminal law, and that Article 6(2) and 6(3) of the ECHR therefore should not be applicable.¹⁸³ Nevertheless, this does not mean that there are no obligations on the procedure and trial to be fair, and the Court concluded that the proceedings had been "as fair as could reasonably be achieved"¹⁸⁴. The Court further concluded that despite the fact that the detainees and their lawyers did not have the opportunity to examine the closed material when appealing against their detention, the mere fact that the representation of a legal counselor was allowed, proved that a substantial degree of protection was provided.

In the Court of Appeal the nine men furthermore argued that the evidence against them in order to establish that there were reasonable grounds to detain them, may have be obtained from prisoners at Guantanamo Bay, Cuba under torture. The information acquired as a result of torture should thus not be legitimate to use according to the provisions of a fair trial according to Article 6 of the ECHR and Article 14 of the ICCPR.¹⁸⁵ The prohibition against torture has an absolute character, and at no time can this prohibition be limited, or derogated from.¹⁸⁶ The International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) specially prohibits the use of evidence obtained under

¹⁸² Human Rights Committee, *General Comment 13: Administration of Justice*, of 13 April 1984, para. 2.

¹⁸³ Articles 6(2), 6(3) of the European Covenant on Human Rights, and Articles 14(2), 14(3) of the International Covenant on Civil and Political Rights, are only applicable in criminal proceedings.

¹⁸⁴ *Supra* note 181, para. 337.

¹⁸⁵ *Ibid.*

¹⁸⁶ Article 15(2) of the European Court on Human Rights and Article 4(2) of the International Covenant on Civil and Political Rights expresses a prohibition of derogation from Article 3 of the European Court on Human Rights and Article 7 of the International Convention on Civil and Political Rights.

torture in any proceedings before a court.¹⁸⁷ When considering this, the Court admitted that English Common Law normally would not consider statements made in a third Country as valid evidence due to the rule against hearsay, whether it has been obtained from torture or not. However, the Court argued that in relation to appeals according to Part 4, Section 25 in the 2001 Act, the normal rules relating to admissibility of evidence did not apply.¹⁸⁸ The Court finally approved the use of evidence found as a result of a statement made under torture in a third country, as long as the United Kingdom neither "produced nor connived"¹⁸⁹ the torture. The fact that most of the evidence is still being kept in secret, to both the detainees and their lawyers, due to national security still remain a problem.

Former Home Secretary David Blunkett met the judgment from the Court of Appeals in a welcoming way stating:

"There has been a great deal of speculation about the cases put before SIAC and whether they relied upon torture. Let me make it clear, we unreservedly condemn the use of torture and have worked very hard with our international partners to eradicate this practice. However, it would be irresponsible not to take appropriate account of any information that could help protect national security and public safety."¹⁹⁰

5.3 United Kingdom's Derogation from Article 5 of the ECHR and Article 9 of the ICCPR

The Anti-terrorism, Crime and Security Bill was introduced into the House of Commons in 12 November 2001, together with the Human Rights Act, Designated Derogation, Order 2001¹⁹¹ (Derogation Order 2001). As discussed above, this legislative response to terrorism provides the State with the power to detain 'suspected terrorists', where the removal to their country of origin would be prohibited due to the principle of *non-refoulement*, but whose continued detention would be incompatible with the obligations under Article 5 of the ECHR. The Government asserted, that a public emergency had arisen as result of the existence of a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism, and the measure outlined were strictly required to meet them.

Accordingly, the Government availed itself the right under Article 15 of the ECHR to derogate from Article 5 of the ECHR, in reality Article 5(1)(f), in order to be able to detain persons whom they believe would be a threat to

¹⁸⁷ Article 15 of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

¹⁸⁸ *Supra* note 181, para. 382.

¹⁸⁹ *Ibid.*

¹⁹⁰ Gillan, A. *Judges in row over torture ruling*, the Guardian 12 August 2004.

¹⁹¹ *Supra* note 60.

national security.¹⁹² The extended power of arrest provided in Part 4 of the Anti-terrorism, Crime and Security Act, are measures “strictly required by the exigencies of the situation” according to the Government of the UK,¹⁹³ who announced its derogation to the Council of Europe on 18 December 2001.¹⁹⁴ Hence, the UK has acknowledged that the extended powers providing the indefinite detention of suspected terrorists would indeed be inconsistent with Article 5(1)(f) of the Covenant as well as Article 9 of the ICCPR and a derogation was therefore made. On the same day the UK also notified the Secretary-General, of the United Nations about the state of emergency within the meaning of Article 4(1) of the ICCPR, and that it would derogate from Article 9 of the Convention.¹⁹⁵

Despite the claims of the United Kingdom to be in a public emergency due to the terrorist threat, it is however not clear if the derogations are in fact justified. As has been pointed out in Chapter 4.2 of the thesis, a State may lawfully derogate from certain human rights provisions provided that the measures are strictly required due to an extreme situation. Consequently, the situation in the UK must meet the threshold for a public emergency required under Article 15 of the ECHR and Article 4 of the ICCPR. According to the European Court of Human Rights the wording of Article 15(1) refers to “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed”.¹⁹⁶ Hence, the public emergency must be threatening the life of the nation; the derogations must be strictly required by the exigencies of the situation as well as consistent with other obligations under international law.

The UK Government does not claim to be in a time of war, but claims the necessity for measure of derogation on the basis that there exists an “other public emergency threatening the life of the nation”¹⁹⁷. In a statement to the Parliament on 15 October 2001, the Former Home Secretary Mr. David Blunkett said that the detention of foreign nationals, whom the State intended to remove from the country, was necessary due to the fact that these people were a “threat to national security.”¹⁹⁸ Mr. Blunkett continued: “We rightly pride ourselves on the safe haven that we offer those genuinely fleeing terror. But our moral obligation and love of freedoms does not extend to offering hospitality to terrorists.”¹⁹⁹ However, later in the statement Mr. Blunkett said that “... there is no immediate intelligence pointing to a specific threat to the United Kingdom, but we remain alert, domestically as well as internationally.”²⁰⁰ The Government of the United

¹⁹² United Kingdom, Statutory Instrument 2001 No. 4032, the Human Rights Act 1998 (Amendment No. 2) Order 2001.

¹⁹³ *Ibid.*

¹⁹⁴ *Supra* note 17.

¹⁹⁵ *Supra* note 18.

¹⁹⁶ *Supra* note 84, para. 28.

¹⁹⁷ *Supra* note 127.

¹⁹⁸ *Ibid.*

¹⁹⁹ *Ibid.*

²⁰⁰ *Ibid.*

Kingdom did thus not base its decision to derogate on the existence of a *specific* threat, nor did it prove the existence of such an emergency, but rather based the need for the derogations on a concern for future terrorist threats. Mr. Blunkett even acknowledged the fact that there was no real threat of emergency, stating that the derogation is more of a ‘technicality’ necessary for the implementation of the new Anti-terrorism, Crime and Security Act 2001, without risking breaching the obligations under ECHR.²⁰¹

However, as pointed out in Chapter 4.3.1, there have been cases where the European Court on Human Rights have acknowledged the fact that terrorism in certain situations can amount to a state of public emergency justifying derogation under Article 15 of the ECHR.²⁰² Despite the fact that the Court leaves a rather wide margin of appreciation to national authorities when determining that such emergency exist, it will however not simply except such a declaration without evidence, nor will it except that a State "adopt whatever measures they deem appropriate"²⁰³.

Nevertheless, in the cases that the ECtHR found that terrorism could amount to a public emergency, an *immediate* and *specific* threat, from *specific* terrorist groups were pointed out as reasons for the derogations that was made. Although the request of immediate threat is not expressed in Article 15 of the ECHR or Article 4 of the ICCPR, it has been treated as a necessary condition for making a valid derogation. Referring to the ICCPR the Siracusa Principles²⁰⁴ states:

"[t]he principle of strict necessity shall be applied in an objective manner. Each measure shall be directed to an actual, clear, present or imminent danger and may not be imposed merely because of an apprehension of potential danger."

In Northern Ireland some 3000 deaths related to terrorism, and over 40,000 terrorist incidents occurred between 1972-1992²⁰⁵, which would legitimate the acceptance of the ECtHR of terrorist attacks as emergencies threatening the life of the nation in e.g. *Brannigan and McBride v the United Kingdom*²⁰⁶, and *Lawless v. Ireland*²⁰⁷. In the time of writing there have fortunately been no terrorist incidents in the United Kingdom associated with the events of September 11. The author would thus argue that the circumstances justifying the current emergency threatening the life of the

²⁰¹ Wintour, P. *Blunkett rejects 'airy fairy' fears*, the Guardian, 12 November 2001.

²⁰² E.g. *Lawless v Ireland*, 1 July 1961, European Court of Human Rights, no. 250/57, *Judgment (Merits)*, and *Brannigan and McBride v. The United Kingdom*, 22 April 1993, European Court of Human Rights, no. 350/423-424, *Judgments (Merits)*.

²⁰³ *Klass and others v Germany*, 6 September, 1978, European Court of Human Rights no. 5029/71, *Judgment (Merits)* para. 49.

²⁰⁴ Siracuse Principles on the Limitations and Derogations of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1985/4 (1985).

²⁰⁵ Terrorism: Questions and Answers, Northern Ireland Loyalist Paramilitaries, UK Extremists. Council of Foreign Relation.

²⁰⁶ *Supra* note 88.

²⁰⁷ *Supra* note 84.

nation are *not* the same as in the cases where the ECtHR agreed that a state of emergency indeed did exist. The present derogations are based on a mere *suspicion* that the UK is a possible target. As has been pointed out by the Joint Committee on Human Rights, no other State party to the ECHR has considered the wake of September 11th to consist of such threat that derogations deems necessary,²⁰⁸ although some States have perceived the need for new security measures.²⁰⁹

The United Kingdom has indeed been criticized for not providing evidences sufficient enough when estimating the necessity and proportionality of the emergency measures taken,²¹⁰ as well as the fact that all the evidence used was not available to the public. The Joint Committee on Human Rights expressed that:

"[w]e have consistently made clear that we have never been presented with the evidence which would enable us to be satisfied of the existence of a public emergency threatening the life of the nation. Having considered the Home Secretary's evidence carefully, we recognize the there may be evidence of the existence of a public emergency threatening the life of the nation, although none was shown by him to this Committee."²¹¹

The fact that no other States party to the Treaties has found it necessary to make similar measures of derogations²¹², along with the fact that not all of the evidence is open when justifying the measures, questions, according to the author, the credibility of the United Kingdoms arguments why the derogations are considered strictly required.

In the present case, the UK Government has come to the clear conclusion that Osama Bin Laden and Al Qaeda planned and carried out the atrocities of September 11th, and that the terrorist group still holds the will, as well as the resources to carry out further large-scale atrocities in the future. As a result of its strong support for the United States and Israel, the United Kingdom considers itself, and its nationals, to be potential targets for future terrorist attacks.²¹³ The threat of a very large loss of life in a similar way as in the case of the United States is ever present and it is this threat that might, according to the UK, truly be said to have brought about "an exceptional situation of crisis or emergency".²¹⁴ If Al Qaeda has a base in the United Kingdom, or if there were any proves that they are specifically targeting the UK or its European neighbors, the situation might be considered as an emergency threatening the life of the nation. However, so far, there has

²⁰⁸ *Supra* note 176, para. 18.

²⁰⁹ Countries in Europe that besides the United Kingdom have noted a need for new security measures are for instance Spain, Italy and Denmark.

²¹⁰ *Supra* note 48, para.19.

²¹¹ *Supra* note 168.

²¹² Among those States is Spain, which also has been subject to terrorist attacks.

²¹³ Anderson D and Stratford J, Joint Committee on Human Rights, *Responsibility for the Terrorist Atrocities in the United States, 11.9.01: An Updated Account*, Proposed Derogation from Article 5 ECHR, ATCS Bill Joint Opinion, Brick Court Chambers, 16 November 2001, para. 9.

²¹⁴ *Ibid*, para. 10.

been no concrete evidence suggesting this and thus it is arguable if an attack on a single State, although devastating, can justify the proclamation of states of emergency and special terrorism legislation by its allies, if they are not especially threatened.²¹⁵

A and Others v the Secretary of State, was the first case challenging the lawfulness of the Anti-terrorism, Crime and Security Act 2001, and the Designated Derogation Order 2001.²¹⁶ The Court of Appeal concluded in its judgment that the United Kingdom is indeed being subject to a public emergency threatening the life of the nation. According to the judgment, the measures taken under Article 15 of the ECHR are therefore not in any way inconsistent with the existence of an emergency within the meaning of the Article.²¹⁷ The Court stressed that the fact that no other European States had found it necessary to derogate had no real meaning in the present case as none of those countries are threatened in quite the same way as the United Kingdom, being regarded as a "prime target".²¹⁸ In regard to the evidence the Court of Appeal was satisfied with what was put before them, despite the fact that they had not been able to take part of the closed evidence. It argued that although much is at stake for those who are affected by the decisions of the Secretary of State, one must still recognize that too much is at stake for the United Kingdom.²¹⁹ Consequently the Court accepted the fact that much of the evidence was being kept close due to the legislation of the 2001 Act, and the fact that neither the appellants, nor the Court itself, could take part of it, is a justifiable decision by the Secretary of State. According to the judgment of the Court of Appeals the derogation measures taken are thus in accordance with Article 15 of the ECHR, and compatible with British and international law.

The judgment in the Court of Appeals was appealed and referred to the House of Lords on 4 October 2004 where a nine-judge panel of the House of Lords Judicial Committee are to consider the lawfulness of the indefinite detention foreign suspected terrorism. The panel was also asked to consider whether evidence from third countries, obtained under torture, can be used in the indefinite detention cases. In the time of the writing, however, the judgment from the House of Lords has not yet been published.

²¹⁵ Secretary of State for the Home Department v Shafiq Rehman, 23 May 2001, Court of Appeal (Civil Division) no. 1999/1268/C. para. 34.

²¹⁶ *Supra* note 179, pp. 12-17.

²¹⁷ *Supra* note 181, para. 32.

²¹⁸ *Ibid*, para. 33.

²¹⁹ *Ibid*, para. 35.

6 Conclusion and Final Remarks

In 2001 the United Kingdom adopted the Anti-terrorism, Crime and Security Act 2001, as a way to combat international terrorism due to the threat it causes to the security of the State. When implementing the 2001 Act, it became clear to the Government that measures of derogation had to be made in regard to particular provisions of Part 4 of the 2001 Act, which provides for the right of indefinite detention of foreign nationals. Referring to the September 11th attacks, the United Kingdom argued that there was a public emergency existing within the Nation, allowing for derogations from Article 5(1) of the ECHR as well as Article 9 of the ICCPR. As a consequence of the derogations, Section 23 of Part 4 of the 2001 Act permits the Secretary of State to indefinitely detain foreign nationals while waiting for extradition.

When introducing the derogations the United Kingdom referred to the Security Council resolution 1373.²²⁰ In this resolution, adopted under Chapter VII of the UN Charter, the Security Council is demanding States to implement more effective counter-terrorism legislation at the national level as a part of the struggle against terrorism. However, according to the very same resolution, measures taken at the national level should be "appropriate to measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status..."²²¹ The obligations in Part 4 of the Anti-terrorism, Crime and Security Act 2001 has indeed been included in the Act for the purpose of ensuring that asylum seekers, who are suspected of international terrorism, and a threat to the United Kingdom, are not granted refugee status. It is thus a valuable question if the derogations are in accordance to international human rights law. As pointed out by the United Kingdom itself, the measures may be inconsistent with its obligations under international human rights law²²² and accordingly derogations were made, and provisions of indefinite detention implemented.

As have been established in the thesis, derogations are valid in a situations strictly required by the exigencies of the situation, and if there exists a public emergency threatening the State as a whole. Furthermore, the derogation may only be made if the crisis or danger cannot be dealt with by measures otherwise permitted and during a limited period of time.

However, without the intention to play down the catastrophic nature of what took place on September 11th, or the fact that international terrorism indeed

²²⁰ *Supra* note 11, para. 5.

²²¹ *Ibid*, para. 3(f).

²²² See Chapter 5.3. See also the United Kingdom, Statutory Instrument 2001 No. 4032, The Human Rights Act 1998 (Amendment No. 2) Order 2001 and *Supra* note 16.

constitutes a great threat to the world order, the author would argue that it has not been satisfactorily established that there is a public emergency existing in the UK. As became clear in Chapter 5.4, the Government has not based its decision to derogate on the existence of a *specific* and *immediate* threat, as required under Article 15 ECHR and Article 4 ICCPR, but rather based the needs on the concerns for *possible future* terrorist threats, which might take place. The author would like to recall the statement made by Mr. Blunkett who said that "there is no immediate intelligence pointing to a specific threat to the United Kingdom, but we remain alert, domestically as well as internationally."²²³ The present derogation is based on a mere *suspicion* that the UK is a possible target, rather than on facts and is thus not *immediate* and *actual*, requirements pointed out in Chapter 5.3. In the jurisprudence of the ECtHR, a different situation has been established due to the fact that in many of those cases the threat of terrorism had an upbringing in e.g. the situation of Northern Ireland. As have been pointed out in Chapter 5.3, this has included repeated and continuous terrorist attacks over a long period of time, something that over the years inevitably established an *actual* threat.

The United Kingdom came to the conclusion that Osama Bin Laden and Al Qaeda planned and carried out the atrocities of September 11th.²²⁴ Furthermore, they argued that the terrorist group still holds the will, as well as the resources to carry out further large-scale atrocities in the future attacks, making the UK a potential target for future terrorist attacks, causing a national emergency.²²⁵ The author would argue that as a consequence there is no specific timeframe for the threats. If it is the threat from Al Qaeda that constitutes the state of emergency it will be impossible to know when the group is defeated and the threat will cease to exist. To have a timeframe for the derogation, to make it *temporary*, is also an obligation in order for the derogations to be permitted, and should be carefully applied to make sure States are not abusing their rights to derogate.

Furthermore, had there actually been an immediate threat posed by international terrorism, the author claims that it is most likely that a number of similar derogations around Europe would have been made. However, as have been pointed out, as of today the United Kingdom is the only European State that has felt such a threat from international terrorism and Al Qaeda that it considers it to constitute a national emergency threatening the life of the nation making a measure of derogation necessary.

Part 4, Section 23 of the Anti-Terrorism, Crime and Security Act, provides that the provisions are only aimed at foreign nationals. As have been discussed under Chapter 4.3.3 there will be situations where derogations might be discriminatory, yet justified. In the present case, it is nevertheless no doubt that the question must be addressed since Section 23 of Part 4 in the 2001 Act only applies on *non-nationals* and is aimed at persons whom

²²³ *Supra* note 127.

²²⁴ *Supra* note 214, para. 9.

²²⁵ *Ibid.*

the Government will deport as soon as they are allowed to. The author would argue that the provisions are discriminatory to non-nationals, and thus violating Article 14 of the ECHR and Articles 4 and 26 of the ICCPR as it does not apply equally to everybody within the State. If *everybody* within the jurisdiction of the United Kingdom were to be detained if suspected as terrorists there would be no discrimination, however, the provisions in Section 23 does only apply on non-nationals whom the Government will not grant refugee-status. Section 23 has been included in the 2001 Act for cases where the intention of the Government is to remove the suspects from the country but this is not possible due to the principle of *non-refoulement*. The author would thus argue that, if the Government can prove, not based on a mere *suspicion*, that in fact the non-nationals are suspected of terrorism, but may not be extradited, they should bring them to charge in the UK on a criminal base. The act of terrorism is indeed a criminal act and should be punished as such.

Hence, according to the author, due to the fact that Section 23 of Part 4 in the 2001 Act is directed to foreign nationals only, the provisions are violating the discriminatory provisions under ECHR, ICCPR and ICERD, and thus not according to international law as within the meaning of Article 15 of the ECHR and Article 4 of the ICCPR.

The author cannot stretch the importance of global counter-terrorism measures, as terrorism is indeed a great threat to international peace and security. However, as have been pointed out above, no unfair infringement on civil liberty should take place in the fight or in any of the counter-terrorism legislature around the world. Nor should counter-terrorism be used as an escape to comply with the rights enunciated in international treaties, which also has been established by the world community and a number of sources time and time again.²²⁶ The fact that the United Kingdom, a country that already has very strict counter-terrorism legislation, has used measures of derogation to be able to implement certain parts of the 2001 Act needs to be scrutinized. The author fear that if a country that is supposed to be one of the leading nations for democracy implements legislation where fundamental human rights are being infringed, this might lead to a grater change in attitudes in countries that has been criticized by the world community before September 11th. The climate has however changed due to this horrendous incident, but fundamental human rights must nevertheless continue to be respected in the fight.

One may argue that if counter-terrorism measures are not in conformity with human rights provisions and international law, they are not permitted. However, in situations where a State feels their security to be threatened, measures of derogation may be made and in those situations certain infringements will be justified. The author would finalize the thesis by arguing that this is not the case of the UK and Section 23 in the 2001 Act. The derogations are not within the meaning of Article 4 of the ICCPR nor

²²⁶ See Chapter 3.

Article 15 of the ECHR, due to the fact that, according to the author, the Government has not proved that there actually exists a real state of emergency within the UK, threatening the State as a whole. Furthermore, the provisions discriminate on the ground of nationality, and this has not been proved to be necessary. Consequently, Part 4, Section 23 of the Anti-terrorism, Crime and Security Act 2001 is incompatible with Articles 5 and 14 of the ECHR, allowing for indefinite detention of foreign nationals whom the Government cannot remove from the country.

Supplement A

Anti-terrorism, Crime and Security Act 2001

PART 4

IMMIGRATION AND ASYLUM

21 Suspected international terrorist: certification

(1) The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably-

- (a) believes that the person's presence in the United Kingdom is a risk to national security, and
- (b) suspects that the person is a terrorist.

(2) In subsection (1)(b) "terrorist" means 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.

(3) A group is an international terrorist group for the purposes of subsection (2)(b) and (c) if-

- (a) it is subject to the control or influence of persons outside the United Kingdom, and
- (b) the Secretary of State suspects that it is concerned in the commission, preparation or instigation of acts of international terrorism.

(4) For the purposes of subsection (2)(c) a person has links with an international terrorist group only if he supports or assists it.

(5) In this Part-

"terrorism" has the meaning given by section 1 of the Terrorism Act 2000 (c. 11), and

"suspected international terrorist" means a person certified under subsection (1).

(6) Where the Secretary of State issues a certificate under subsection (1) he shall as soon as is reasonably practicable-

- (a) take reasonable steps to notify the person certified, and
- (b) send a copy of the certificate to the Special Immigration Appeals Commission.

(7) The Secretary of State may revoke a certificate issued under subsection (1).

(8) A decision of the Secretary of State in connection with certification under this section may be questioned in legal proceedings only under section 25 or 26.

(9) An action of the Secretary of State taken wholly or partly in reliance on a certificate under this section may be questioned in legal proceedings only by or in the course of proceedings under-

- (a) section 25 or 26, or
- (b) section 2 of the Special Immigration Appeals Commission Act 1997
- (c. 68) (appeal).

22 Deportation, removal, &c.

(1) An action of a kind specified in subsection (2) may be taken in respect of a suspected international terrorist despite the fact that (whether temporarily or indefinitely) the action cannot result in his removal from the United Kingdom because of-

- (a) a point of law which wholly or partly relates to an international agreement, or
- (b) a practical consideration.

(2) The actions mentioned in subsection (1) are-

- (a) refusing leave to enter or remain in the United Kingdom in accordance with provision made by or by virtue of any of sections 3 to 3B of the Immigration Act 1971 (c. 77) (control of entry to United Kingdom)
- (b) varying a limited leave to enter or remain in the United Kingdom in accordance with provision made by or by virtue of any of those sections,
- (c) recommending deportation in accordance with section 3(6) of the Act (recommendation by court),
- (d) taking a decision to make a deportation order under section 5(1) of that Act (deportation by Secretary of State),
- (e) making a deportation order under section 5(1) of that Act,
- (f) refusing to revoke a deportation order,
- (g) cancelling leave to enter the United Kingdom in accordance with paragraph 2A of Schedule 2 to that Act (person arriving with continuous leave),
- (h) giving directions for a person's removal from the United Kingdom under any of paragraphs 8 to 10 or 12 to 14 of Schedule 2 to that Act (control of entry to United Kingdom),
- (i) giving directions for a person's removal from the United Kingdom under section 10 of the Immigration and Asylum Act 1999 (c. 33) (person unlawfully in United Kingdom), and
- (j) giving notice to a person in accordance with regulations under paragraph 1 of Schedule 4 to that Act of a decision to make a deportation order against him.

(3) Action of a kind specified in subsection (2) which has effect in respect of a suspected international terrorist at the time of his certification under

section 21 shall be treated as taken again (inreliance on subsection (1) above) immediately after certification.

23 Detention

(1) A suspected international terrorist may be detained under a provision specified in subsection (2) despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely) by-

- (a) a point of law which wholly or partly relates to an international agreement, or
- (b) a practical consideration.

(2) The provisions mentioned in subsection (1) are-

- (a) paragraph 16 of Schedule 2 to the Immigration Act 1971 (c. 77) (detention of persons liable to examination or removal), and
- (b) paragraph 2 of Schedule 3 to that Act (detention pending deportation).

24 Bail

(1) A suspected international terrorist who is detained under a provision of the Immigration Act 1971 may be released on bail.

(2) For the purpose of subsection (1) the following provisions of Schedule 2 to the Immigration Act 1971 (control on entry) shall apply with the modifications specified in Schedule 3 to the Special Immigration Appeals Commission Act 1997 (c. 68) (bail to be determined by Special Immigration Appeals Commission) and with any other necessary modifications-

- (a) paragraph 22(1A), (2) and (3) (release),
- (b) paragraph 23 (forfeiture),
- (c) paragraph 24 (arrest), and
- (d) paragraph 30(1) (requirement of Secretary of State's consent).

(3) Rules of procedure under the Special Immigration Appeals Commission Act 1997 (c. 68)-

- (a) may make provision in relation to release on bail by virtue of this section, and
- (b) subject to provision made by virtue of paragraph (a), shall apply in relation to release on bail by virtue of this section as they apply in relation to release on bail by virtue of that Act subject to any modification which the Commission considers necessary.

25 Certification: appeal

(1) A suspected international terrorist may appeal to the Special Immigration Appeals Commission against his certification under section 21.

(2) On an appeal the Commission must cancel the certificate if-

- (a) it considers that there are no reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), or

(b) it considers that for some other reason the certificate should not have been issued.

(3) If the Commission determines not to cancel a certificate it must dismiss the appeal.

(4) Where a certificate is cancelled under subsection (2) it shall be treated as never having been issued.

(5) An appeal against certification may be commenced only-

(a) within the period of three months beginning with the date on which the certificate is issued, or

(b) with the leave of the Commission, after the end of that period but before the commencement of the first review under section 26.

26 Certification: review

(1) The Special Immigration Appeals Commission must hold a first review of each certificate issued under section 21 as soon as is reasonably practicable after the expiry of the period of six months beginning with the date on which the certificate is issued.

(2) But-

(a) in a case where before the first review would fall to be held in accordance with subsection (1) an appeal under section 25 is commenced (whether or not it is finally determined before that time) or leave to appeal is given under section 25(5)(b), the first review shall be held as soon as is reasonably practicable after the expiry of the period of six months beginning with the date on which the appeal is finally determined, and

(b) in a case where an application for leave under section 25(5)(b) has been commenced but not determined at the time when the first review would fall to be held in accordance with subsection (1), if leave is granted the first review shall be held as soon as is reasonably practicable after the expiry of the period of six months beginning with the date on which the appeal is finally determined.

(3) The Commission must review each certificate issued under section 21 as soon as is reasonably practicable after the expiry of the period of three months beginning with the date on which the first review or a review under this subsection is finally determined.

(4) The Commission may review a certificate during a period mentioned in subsection (1), (2) or (3) if-

(a) the person certified applies for a review, and

(b) the Commission considers that a review should be held because of a change in circumstance.

(5) On a review the Commission-

(a) must cancel the certificate if it considers that there are no

reasonable grounds for a belief or suspicion of the kind referred to in section 21(1)(a) or (b), and
(b) otherwise, may not make any order (save as to leave to appeal).

(6) A certificate cancelled by order of the Commission under subsection (5) ceases to have effect at the end of the day on which the order is made.

(7) Where the Commission reviews a certificate under subsection (4), the period for determining the next review of the certificate under subsection (3) shall begin with the date of the final determination of the review under subsection (4).

27 Appeal and review: supplementary

(1) The following provisions of the Special Immigration Appeals Commission Act 1997 (c. 68) shall apply in relation to an appeal or review under section 25 or 26 as they apply in relation to an appeal under section 2 of that Act-

- (a) section 6 (person to represent appellant's interests),
- (b) section 7 (further appeal on point of law), and
- (c) section 7A (pending appeal).

(2) The reference in subsection (1) to an appeal or review does not include a reference to a decision made or action taken on or in connection with-

- (a) an application under section 25(5)(b) or 26(4)(a) of this Act, or
- (b) subsection (8) below.

(3) Subsection (4) applies where-

- (a) a further appeal is brought by virtue of subsection (1)(b) in connection with an appeal or review, and
- (b) the Secretary of State notifies the Commission that in his opinion the further appeal is confined to calling into question one or more derogation matters within the meaning of section 30 of this Act.

(4) For the purpose of the application of section 26(2) and (3) of this Act the determination by the Commission of the appeal or review in connection with which the further appeal is brought shall be treated as a final determination.

(5) Rules under section 5 or 8 of the Special Immigration Appeals Commission Act 1997 (general procedure; and leave to appeal) may make provision about an appeal, review or application under section 25 or 26 of this Act.

(6) Subject to any provision made by virtue of subsection (5), rules under section 5 or 8 of that Act shall apply in relation to an appeal, review or application under section 25 or 26 of this Act with any modification which the Commission considers necessary.

(7) Subsection (8) applies where the Commission considers that an appeal or review under section 25 or 26 which relates to a person's certification under section 21 is likely to raise an issue which is also likely to be raised in other proceedings before the Commission which relate to the same person.

(8) The Commission shall so far as is reasonably practicable-

- (a) deal with the two sets of proceedings together, and
- (b) avoid or minimise delay to either set of proceedings as a result of compliance with paragraph (a).

(9) Cancellation by the Commission of a certificate issued under section 21 shall not prevent the Secretary of State from issuing another certificate, whether on the grounds of a change of circumstance or otherwise.

(10) The reference in section 81 of the Immigration and Asylum Act 1999 (c. 33) (grants to voluntary organisations) to persons who have rights of appeal under that Act shall be treated as including a reference to suspected international terrorists.

28 Review of sections 21 to 23

(1) The Secretary of State shall appoint a person to review the operation of sections 21 to 23.

(2) The person appointed under subsection (1) shall review the operation of those sections not later than-

- (a) the expiry of the period of 14 months beginning with the day on which this Act is passed;
- (b) one month before the expiry of a period specified in accordance with section 29(2)(b) or (c).

(3) Where that person conducts a review under subsection (2) he shall send a report to the Secretary of State as soon as is reasonably practicable.

(4) Where the Secretary of State receives a report under subsection (3) he shall lay a copy of it before Parliament as soon as is reasonably practicable.

(5) The Secretary of State may make payments to a person appointed under subsection (1).

29 Duration of sections 21 to 23

(1) Sections 21 to 23 shall, subject to the following provisions of this section, expire at the end of the period of 15 months beginning with the day on which this Act is passed.

(2) The Secretary of State may by order-

- (a) repeal sections 21 to 23;
- (b) revive those sections for a period not exceeding one year;
- (c) provide that those sections shall not expire in accordance with subsection

(1) or an order under paragraph (b) or this paragraph, but shall continue in force for a period not exceeding one year.

(3) An order under subsection (2)-

(a) must be made by statutory instrument, and

(b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.

(4) An order may be made without compliance with subsection (3)(b) if it contains a declaration by the Secretary of State that by reason of urgency it is necessary to make the order without laying a draft before Parliament; in which case the order-

(a) must be laid before Parliament, and

(b) shall cease to have effect at the end of the period specified in subsection (5) unless the order is approved during that period by resolution of each House of Parliament.

(5) The period referred to in subsection (4)(b) is the period of 40 days-

(a) beginning with the day on which the order is made, and

(b) ignoring any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days.

(6) The fact that an order ceases to have effect by virtue of subsection (4)-

(a) shall not affect the lawfulness of anything done before the order ceases to have effect, and

(b) shall not prevent the making of a new order.

(7) Sections 21 to 23 shall by virtue of this subsection cease to have effect at the end of 10th November 2006.

30 Legal proceedings: derogation

(1) In this section "derogation matter" means-

(a) a derogation by the United Kingdom from Article 5(1) of the Convention on Human Rights which relates to the detention of a person where there is an intention to remove or deport him from the United Kingdom, or

(b) the designation under section 14(1) of the Human Rights Act 1998 (c. 42) of a derogation within paragraph (a) above.

(2) A derogation matter may be questioned in legal proceedings only before the Special Immigration Appeals Commission; and the Commission-

(a) is the appropriate tribunal for the purpose of section 7 of the Human Rights Act 1998 in relation to proceedings all or part of which call a derogation matter into question; and

(b) may hear proceedings which could, but for this subsection, be brought in the High Court or the Court of Session.

(3) In relation to proceedings brought by virtue of subsection (2)-

(a) section 6 of the Special Immigration Appeals Commission Act 1997 (c. 68) (person to represent appellant's interests) shall apply with the reference to the appellant being treated as a reference to any party to the proceedings, (b) rules under section 5 or 8 of that Act (general procedure; and leave to appeal) shall apply with any modification which the Commission considers necessary, and (c) in the case of proceedings brought by virtue of subsection (2)(b), the Commission may do anything which the High Court may do (in the case of proceedings which could have been brought in that court) or which the Court of Session may do (in the case of proceedings which could have been brought in that court).

(4) The Commission's power to award costs (or, in Scotland, expenses) by virtue of subsection (3)(c) may be exercised only in relation to such part of proceedings before it as calls a derogation matter into question.

(5) In relation to proceedings brought by virtue of subsection (2)(a) or (b)- (a) an appeal may be brought to the appropriate appeal court (within the meaning of section 7 of the Special Immigration Appeals Commission Act 1997 (c. 68)) with the leave of the Commission or, if that leave is refused, with the leave of the appropriate appeal court, and (b) the appropriate appeal court may consider and do only those things which it could consider and do in an appeal brought from the High Court or the Court of Session in proceedings for judicial review.

(6) In relation to proceedings which are entertained by the Commission under subsection (2) but are not brought by virtue of subsection (2)(a) or (b), subsection (4) shall apply in so far as the proceedings call a derogation matter into question.

(7) In this section "the Convention on Human Rights" has the meaning given to "the Convention" by section 21(1) of the Human Rights Act 1998 (c. 42).

31 Interpretation

A reference in section 22, 23 or 24 to a provision of the Immigration Act 1971 (c. 77) includes a reference to that provision as applied by-

- (a) another provision of that Act, or
- (b) another Act.

32 Channel Islands and Isle of Man

Her Majesty may by Order in Council direct that sections 21 to 31 shall extend, with such modifications as appear to Her Majesty to be appropriate, to any of the Channel Islands or the Isle of Man.

Refugee Convention

33 Certificate that Convention does not apply

(1) This section applies to an asylum appeal before the Special Immigration Appeals Commission where the Secretary of State issues a certificate that-

- (a) the appellant is not entitled to the protection of Article 33(1) of the Refugee Convention because Article 1(F) or 33(2) applies to him (whether or not he would be entitled to protection if that Article did not apply), and
- (b) the removal of the appellant from the United Kingdom would be conducive to the public good.

(2) In this section-

"asylum appeal" means an appeal under section 2 of the Special Immigration Appeals Commission Act 1997 (c. 68) in which the appellant makes a claim for asylum (within the meaning given by section 167(1) of the Immigration and Asylum Act 1999 (c. 33)), and "the Refugee Convention" has the meaning given by that section.

3) Where this section applies the Commission must begin its substantive deliberations on the asylum appeal by considering the statements in the Secretary of State's certificate.

(4) If the Commission agrees with those statements it must dismiss such part of the asylum appeal as amounts to a claim for asylum (before considering any other aspect of the case).

(5) If the Commission does not agree with those statements it must quash the decision or action against which the asylum appeal is brought.

(6) Where a decision or action is quashed under subsection (5)-

- (a) the quashing shall not prejudice any later decision or action, whether taken on the grounds of a change of circumstance or otherwise, and
- (b) the claim for asylum made in the course of the asylum appeal shall be treated for the purposes of section 15 of the Immigration and Asylum Act 1999 (interim protection from removal) as undecided until it has been determined whether to take a new decision or action of the kind quashed.

(7) The Secretary of State may revoke a certificate issued under subsection (1).

(8) No court may entertain proceedings for questioning-

- (a) a decision or action of the Secretary of State in connection with certification under subsection (1),
- (b) a decision of the Secretary of State in connection with a claim for asylum (within the meaning given by section 167(1) of the Immigration and Asylum Act 1999) in a case in respect of which he issues a certificate under subsection (1) above, or

(c) a decision or action of the Secretary of State taken as a consequence of the dismissal of all or part of an asylum appeal in pursuance of subsection (4).

(9) Subsection (8) shall not prevent an appeal under section 7 of the Special Immigration Appeals Commission Act 1997 (appeal on point of law).

(10) Her Majesty may by Order in Council direct that this section shall extend, with such modifications as appear to Her Majesty to be appropriate, to any of the Channel Islands or the Isle of Man.

34 Construction

(1) Articles 1(F) and 33(2) of the Refugee Convention (exclusions: war criminals, national security, &c.) shall not be taken to require consideration of the gravity of-

(a) events or fear by virtue of which Article 1(A) would or might apply to a person if Article 1(F) did not apply, or

(b) a threat by reason of which Article 33(1) would or might apply to a person if Article 33(2) did not apply.

(2) In this section "the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and the Protocol to the Convention.

Special Immigration Appeals Commission

35 Status of Commission

At the end of section 1 of the Special Immigration Appeals Commission Act 1997 (c. 68) insert-

"(3) The Commission shall be a superior court of record.

(4) A decision of the Commission shall be questioned in legal proceedings only in accordance with-

(a) section 7, or

(b) section 30(5)(a) of the Anti-terrorism, Crime and Security Act 2001 (derogation)."

Supplement B

Terrorism Act 2000

PART I

INTRODUCTORY

Terrorism: interpretation.

1. - (1) In this Act "terrorism" means the use or threat of action where-

- (a) the action falls within subsection (2),
- (b) the use or threat is designed to influence the government or to intimidate the public or a section of the public, and
- (c) the use or threat is made for the purpose of advancing a political, religious or ideological cause.

(2) Action falls within this subsection if it-

- (a) involves serious violence against a person,
- (b) involves serious damage to property,
- (c) endangers a person's life, other than that of the person committing the action,
- (d) creates a serious risk to the health or safety of the public or a section of the public, or
- (e) is designed seriously to interfere with or seriously to disrupt an electronic system.

(3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.

(4) In this section-

- (a) "action" includes action outside the United Kingdom,
- (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
- (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
- (d) "the government" means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.

(5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

Temporary legislation. 2.

(1) The following shall cease to have effect-

- (a) the Prevention of Terrorism (Temporary Provisions) Act 1989, and
- (b) the Northern Ireland (Emergency Provisions) Act 1996.

(2) Schedule 1 (which preserves certain provisions of the 1996 Act, in some cases with amendment, for a transitional period) shall have effect.

Supplement C

Declaration contained in a Note Verbale from the Permanent Representation of the United Kingdom, dated 18 December 2001, registered by the Secretariat General on 18 December 2001.

The United Kingdom Permanent Representative to the Council of Europe presents his compliments to the Secretary General of the Council, and has the honour to convey the following information in order to ensure compliance with the obligations of Her Majesty's Government in the United Kingdom under Article 15(3) of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 5 November 1950.

Public emergency in the United Kingdom

The terrorist attacks in New York, Washington, D.C. and Pennsylvania on 11th September 2001 resulted in several thousand deaths, including many British victims and others from 70 different countries. In its resolutions 1368 (2001) and 1373 (2001), the United Nations Council recognised the attacks as a threat to international peace and security.

The threat from international terrorism is a continuing one. In its resolution 1373 (2001), the Security Council, acting under Chapter VII of the United Nations Charter, required all States to take measures to prevent the commission of terrorist attacks, including by denying safe haven to those who finance, plan, support or commit terrorist attacks.

There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.

As a result, a public emergency, within the meaning of Article 15 (1) of the Convention, exists in the United Kingdom.

The Anti-terrorism, Crime and Security Act 2001

As a result of the public emergency, provision is made in the Anti-terrorism, Crime and Security Act 2001, *inter alia*, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the

detention would be unlawful under existing domestic law powers. The extended power to arrest and detain will apply where the Secretary of State issues a certificate indicating his belief that the person's presence in the United Kingdom is a risk to national security and that he suspects the person of being an international terrorist. That certificate will be subject to an appeal to the Special Immigration Appeals Commission ("SIAC"), established under the Special Immigration Appeals Commission Act 1997, which will have power to cancel it if it considers that the certificate should not have been issued. There will be an appeal on a point of law from a ruling by SIAC. In addition, the certificate will be reviewed by SIAC at regular intervals. SIAC will also be able to grant bail, where appropriate, subject to conditions. It will be open to a detainee to end his detention at any time by agreeing to leave the United Kingdom.

The extended power of arrest and detention in the Anti-terrorism, Crime and Security Act 2001 is a measure which is strictly required by the exigencies of the situation. It is a temporary provision which comes into force for an initial period of 15 months and then expires unless renewed by the Parliament. Thereafter, it is subject to annual renewal by Parliament. If, at any time, in the Governments' assessment, the public emergency no longer exists or the extended power is no longer strictly required by the exigencies of the situation, then the Secretary of State will, by Order, repeal the provision.

Domestic law powers of detention (other than under the Anti-terrorism, Crime and Security Act 2001)

The Government has powers under the Immigration Act 1971 ("the 1971 Act") to remove or deport persons on the ground that their presence in the United Kingdom is not conducive to the public good on national security grounds. Persons can also be arrested and detained under Schedules 2 and 3 to the 1971 Act pending their removal or deportation. The courts in the United Kingdom have ruled that this power of detention can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal and that, if it becomes clear that removal is not going to be possible within a reasonable time, detention will be unlawful (*R. v Governor of Durham Prison, ex parte Singh* [1984] All ER 983).

Article 5(1)(f) of the Convention

It is well established that Article 5(1)(f) permits the detention of a person with a view to deportation only in circumstances where "action is being taken with a view to deportation" (*Chahal v United Kingdom* (1996) 23 EHRR 413 at paragraph 112). In that case the European Court of Human Rights indicated that detention will cease to be permissible under Article 5(1)(f) if deportation proceedings are not prosecuted with due diligence and that it was necessary in such cases to determine whether the duration of the deportation proceedings was excessive (paragraph 113).

In some cases, where the intention remains to remove or deport a person on national security grounds, continued detention may not be consistent with Article 5(1)(f) as interpreted by the Court in the *Chahal* case. This may be the case, for example, if the person has established that removal to their own country might result in treatment contrary to Article 3 of the Convention. In such circumstances, irrespective of the gravity of the threat to national security posed by the person concerned, it is well established that Article 3 prevents removal or deportation to a place where there is a real risk that the person will suffer treatment contrary to that article. If no alternative destination is immediately available then removal or deportation may not, for the time being, be possible even though the ultimate intention remains to remove or deport the person once satisfactory arrangements can be made. In addition, it may not be possible to prosecute the person for a criminal offence given the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required.

Derogation under Article 15 of the Convention

The Government has considered whether the exercise of the extended power to detain contained in the Anti-terrorism, Crime and Security Act 2001 may be inconsistent with the obligations under Article 5(1) of the Convention. As indicated above, there may be cases where, notwithstanding a continuing intention to remove or deport a person who is being detained, it is not possible to say that "action is being taken with a view to deportation" within the meaning of Article 5(1)(f) as interpreted by the Court in the *Chahal* case. To the extent, therefore, that the exercise of the extended power may be inconsistent with the United Kingdom's obligations under Article 5(1), the Government has decided to avail itself of the right of derogation conferred by Article 15(1) of the Convention and will continue to do so until further notice.

Period covered: 18/12/2001 –

Supplement D

Notification of the United Kingdom's derogation from article 9 of the International Covenant on Civil and Political Rights:

“I have the honour to present my compliments, Excellency, and to convey the following information in order to ensure compliance with the obligations of Her Majesty's Government in the United Kingdom under Article 4 (3) of the International Covenant on Civil and Political Rights adopted by the General Assembly on 16 December 1966.

Public emergency in the United Kingdom

The terrorist attacks in New York, Washington, D.C. and Pennsylvania on 11th September 2001 resulted in several thousand deaths, including many British victims and others from 70 different countries. In its resolutions 1368 (2001) and 1373 (2001), the United Nations Security Council recognised the attacks as a threat to international peace and security.

The threat from international terrorism is a continuing one. In its resolution 1373 (2001), the Security Council, acting under Chapter VII of the United Nations Charter, required all States to take measures to prevent the commission of terrorist attacks, including by denying safe haven to those who finance, plan, support or commit terrorist attacks. There exists a terrorist threat to the United Kingdom from persons suspected of involvement in international terrorism. In particular, there are foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are a threat to the national security of the United Kingdom.

As a result, a public emergency, within the meaning of Article 4(1) of the Covenant, exists in the United Kingdom.

The Anti-terrorism, Crime and Security Act 2001

As a result of the public emergency, provision is made in the Anti-terrorism, Crime and Security Act 2001, inter alia, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic law powers. The extended power to arrest and detain will apply where the Secretary of State issues a certificate indicating his belief that the person's presence in the United Kingdom is a risk to national security and that he suspects the person of being an international terrorist. That certificate will be subject to an

appeal to the Special Immigration Appeals Commission ('SIA'), established under the Special Immigration Appeals Commission Act 1997, which will have power to cancel it if it considers that the certificate should not have been issued. There will be an appeal on a point of law from a ruling by SIAC. In addition, the certificate will be reviewed by SIAC at regular intervals. SIAC will also be able to grant bail, where appropriate, subject to conditions. It will be open to a detainee to end his detention at any time by agreeing to leave the United Kingdom.

The extended power of arrest and detention in the Anti-terrorism, Crime and Security Act 2001 is a measure which is strictly required by the exigencies of the situation. It is a temporary provision which comes into force for an initial period of 15 months and then expires unless renewed by Parliament. Thereafter, it is subject to annual renewal by Parliament. If, at any time, in the Government's assessment, the public emergency no longer exists or the extended power is no longer strictly required by the exigencies of the situation, then the Secretary of State will, by Order, repeal the provision.

Domestic law powers of detention (other than under the Anti-terrorism, Crime and Security Act 2001)

The Government has powers under the Immigration Act 1971 ('the 1971 Act') to remove or deport persons on the ground that their presence in the United Kingdom is not conducive to the public good on national security grounds. Persons can also be arrested and detained under Schedules 2 and 3 to the 1971 Act pending their removal or deportation. The courts in the United Kingdom have ruled that this power of detention can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal and that, if it becomes clear that removal is not going to be possible within a reasonable time, detention will be unlawful (*Rv Governor of Durham Prison, ex parte Singh* [1984] All ER 983).

Article 9 of the Covenant

In some cases, where the intention remains to remove or deport a person on national security grounds, continued detention may not be consistent with Article 9 of the Covenant. This may be the case, for example, if the person has established that removal to their own country might result in treatment contrary to Article 7 of the Covenant. In such circumstances, irrespective of the gravity of the threat to national security posed by the person concerned, it is well established that the international obligations of the United Kingdom prevent removal or deportation to a place where there is a real risk that the person will suffer treatment contrary to that article. If no alternative destination is immediately available then removal or deportation may not, for the time being, be possible even though the ultimate intention remains to remove or deport the person once satisfactory arrangements can be made. In addition, it may not be possible to prosecute the person for a criminal offence given the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required.

Derogation under Article 4 of the Covenant

The Government has considered whether the exercise of the extended power to detain contained in the Anti-terrorism, Crime and Security Act 2001 may be inconsistent with the obligations under Article 9 of the Covenant. To the extent that the exercise of the extended power may be inconsistent with the United Kingdom's obligations under Article 9, the Government has decided to avail itself of the right of derogation conferred by Article 4(1) of the Covenant and will continue to do so until further notice.

Please accept, Excellency, the assurances of my highest consideration.”

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