CURRENT DEVELOPMENTS

PUBLIC INTERNATIONAL LAW

Edited by Colin Warbrick and Dominic McGoldrick

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SEPTEMBER 11 AND THE UK RESPONSE

I. THE FACTS OF THE INCIDENTS OF 'SEPTEMBER 11' AND THE RESPONSES OF STATES AND INTERNATIONAL ORGANISATIONS

On 11 September 2001, four aircraft on internal flights within the United States were seized by passengers who crashed two of them into the World Trade Centre in New York and another into the Pentagon, Washington DC, the other falling into open land in Pennsylvania. The men who seized the planes were all non-US nationals. The total loss of life was over 3,000, including a number of UK citizens. The economic consequences were hardly calculable. Responsibility for the attacks was attributed to the Al Qaeda movement, a group regarded by the United States as being responsible for previous attacks against US targets, including the bombing of American embassies in East Africa in 1998 and on the USS Cole in Yemen in 2000. Although Al Qaeda was thought to have members in many states, the principal base for its operations was in Afghanistan.[1]

In the days after 11 September there was widespread condemnation of the terrorist attacks on the US. Within the United Nations, the General Assembly expressed both its sympathy and anger at the attacks and adopted a resolution on the condemnation of the terrorist attacks[2].On 12 September the Security Council unanimously adopted Resolution 1368 which regarded the acts as 'threats to international peace and security' and required states to work together to bring those responsible to justice. The Resolution also expressed the Council's readiness to take 'all necessary steps' to respond to the attacks in accordance with its Charter responsibilities.

By the end of September, the Security Council further clarified the wide-ranging 'steps' and strategies that were to be taken to combat international terrorism, with the unanimous adoption of Resolution 1373. These 'steps' included duties upon states to suppress the financing of terrorism and to improve international cooperation in relation to counter-terrorism measures. In addition, the Resolution reiterated the need to combat terrorism 'by all means'. Provision was made for the establishment of a Counter-Terrorism Committee, whose duties include the monitoring of compliance with the

[1] This note provides a guide to the sources of the reactions of the United Kingdom to the events of 11 September.

[2] See press release GA/9903, including the adoption of Resolution A/56/1 on the Condemnation of Terrorist Attacks in the USA.

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resolution's provisions and to which states were to report, within 90 days, the actions that they had taken to combat international terrorism.[3] The sense of urgency with which states were to take action and also the commitment to cooperation was reinforced by the Security Council's adoption of Resolution 1377, which referred specifically to the situation in Afghanistan.

The response of the North Atlantic Treaty Organisation was similarly condemnatory. In a statement the day after the attacks, the North Atlantic Council stated that it had agreed that if the attacks had come from outside the US, then they should be regarded as an armed attack under Article 5 of the Washington Treaty and thus there could be recourse to collective action in self-defence.[4] Following the publication of evidence[5] which led to the conclusion that Osama Bin Laden and the Al Qaeda network were responsible for the attacks on the US, the Secretary General of NATO concluded that the attacks were directed from abroad and that Article 5 was applicable. Thus he stated that the US could rely upon the 'full support of its 18 NATO allies in the campaign against terrorism'.[6] Additionally, both the US and the UK mounted an intensive campaign to promote and sustain support for a coalition to act against these acts of international terrorism.[7] The decision so to characterise the attacks added a military element to what might have been seen as a criminal matter.

The British government published evidence which it said established the responsibility of Al Qaeda for the attacks in the US.[8] Evidence was produced that Bin Laden and the Al Qaeda network were being sheltered by the Taliban regime within Afghanistan, and calls were made for the Taliban to surrender Bin Laden and other Al Qaeda leaders, they were to no avail. The Taliban was already in breach of its obligation to surrender Bin Laden contained in Security Council resolution 1267. Thus on 7 October 2001, the US ambassador to the UN, John Negroponte, announced that the US, collectively with other states, had invoked their right of self-defence under Article 51 of the Charter, and had begun action against Al Qaeda installations and the Taliban regime in Afghanistan.[9] The military action, named Operation Enduring Freedom, was US-led, with participation by the United Kingdom and other states.[10] There were concerns about the level of civilian casualties, but the UK government said that although 'some civilian losses have occurred, the Coalition has made every effort to

[3] See the latter half of this note for the actions taken by the UK in response to this resolution.

[4] Statement by the North Atlantic Council in Response to the Terrorist Attacks (12 September 2001)—can be found at: <http://www.nato.int/docu/pr/2001/p01.124e.htm>. See also Bennett, 'Aiding America', *NATO Review*, Winter 2001/2, 6–7.

[5] The UK government's statement on the evidence of responsibility for the terrorist atrocities in the United States can be found at: <http://www.pm.gov.uk/news.asp?Newsid=2686>.

[6] See Statement by NATO Secretary General, Lord Robertson (2 Oct 2001)—which can be found at: <http://www.nato.int/docu/speech/2001/s011002a.htm>.

[7] For a description of the activities of the Coalition, see 'Campaign against Terrorism: A Coalition Update', Coalition Information Centre, available at <http://www.fco.gov.uk/Files/Kfile/cicupdate,0.pdf>.

[8] To be found at: <http://www.pm.gov.uk/files/pdf/culpability_documents.pdf>.

[9] See the letter from John Negroponte to the UNSC President on 7 Oct 2001, to be found at <http://www3.itu.int/MISSIONS/US/DailyBulletin/Tuesday.html>.

[10] Including the participation of the Northern Alliance who had been fighting with the Taliban regime during the 1990s.

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avoid them'.[11] Following 43 days of both air and ground attacks the Taliban withdrew from Kabul and the Coalition forces began to secure the area. In addition to the attacks on the Taliban regime within Afghanistan, operations were also mounted to prevent terrorists from relocating their operations outside of Afghanistan, and these included the interception of fleeing Taliban and Al Qaeda personnel, especially those seeking to escape to the tribal areas of Pakistan.

In the light of the gradual downfall of the Taliban regime, the Security Council passed resolution 1378 on 14 November 2001, which pledged UN support to the efforts of the Afghan people to establish a multi-ethnic, transitional administration, which eventually would lead to the formation of a new government. The interim administration was finally agreed upon with the signing of the Bonn Agreement,[12] which was endorsed by Security Council resolution 1383. This interim authority was supported by the establishment, by the Security Council,[13] of an International Security and Assistance Force (ISAF) mandated to maintain security around Kabul and its surrounding areas. Security beyond Kabul was left to local groups to organise. The Foreign Affairs Committee, in its Report on the Foreign Policy Aspects of the War Against Terrorism, noted that this reliance on 'local warlords' may weaken the authority of the Interim Administration and thus reiterated the call made by the UN High Commissioner for Human Rights, Mary Robinson, for the ISAF mandate to be extended beyond Kabul.[14] However, the Foreign Secretary's response was that 'ISAF expansion outside Kabul is not feasible at the moment.'[15]

The ISAF forces were to be led by the UK, but the US Central Command of Operation Enduring Freedom was to have authority over ISAF to prevent a conflict of activities between the two operations. A Military-Technical Agreement[16] regulating the relationship between ISAF and the Interim Administration was concluded, providing clarification of the status of ISAF personnel and their respective immunities. Most notably, ISAF personnel are immune from personal arrest or detention, and if detained are to be immediately handed over to ISAF authorities. ISAF personnel are not to be surrendered to any international tribunal or state, without the express consent of the sending state. What was at stake here was the insistence of the US that its forces not be exposed to the risk of the exercise of jurisdiction of the International Criminal Court, the coming into force of the Statute for which was clearly foreseeable.[17]

II. THE UK RESPONSE

There are two difficulties in the way of giving a clear account of what has happened since '11 September' and which can be characterised as being in response to it. One is

[11] Paragraph j, Response of Secretary of State for Foreign and Commonwealth Affairs to the Foreign Affairs Committee Report on the Foreign Policy Aspects of the War on Terrorism, Aug 2002.

[12] S/2001/1154.

[13] See Security Council Resolution 1386(2001)

[14] See *Washington Post*, 12 Mar 2002. Also, see paras 115–16 of the Foreign Affairs Committee Seventh Report on the Foreign Policy Aspects of the War on Terrorism, June 2002.

[15] Paragraph o, Response of Secretary of State for Foreign and Commonwealth Affairs to the Foreign Affairs Committee Report on the Foreign Policy Aspects of the War on Terrorism, Aug 2002, n 11 above.

[16] Signed 4 Jan 2002, to be found at <http://www.operations.mod.uk/isafmta.doc>.

[17] The Statute of the International Criminal Court came into force on 1 July 2002.

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that part of the reaction has been to 'international terrorism' rather than simply to the attacks in the US. The other is that the predominance of the military and criminal aspects of the reply varies from context to context, with the possibilities of both overlaps between the two and gaps between them. This is particularly apparent when considering the status of persons captured in the military operation in Afghanistan, who may be both prisoners of war and criminal suspects.

The British government has published a report on its action in the year after 11 September.[18] The paper deals with what it calls the 'campaign' against terrorism and details wholly UK activity as well as that taken in the international arena. It looks forward as well as reporting on what has gone on. It makes it clear that much of the reaction has not needed new law but has occasioned policy development or administrative action. Equally, a substantial part of the future programme involves detailed international cooperation, a significant element of which is the continued support for the new regime in Afghanistan.

This note is designed to draw attention to further sources of information about UK practice since 11 September, covering some matters not included in the Government's report, and referring to some criticisms of some of the action.

A. Justification for Use of Force

The Report is brief in its treatment of the justification for the use of force in Afghanistan. It is described as 'action in self-defence in accordance with Article 51 of the UN Charter . . . not only justified but essential'. Military action against the Taliban became legitimate because of its failure to respond to a US ultimatum to hand over Bin Laden. It was apparent from the outset that the UK felt a duty to act in response to the 11 September attacks. The UK Prime Minister, Tony Blair, made a statement on 11 September in which he stated that:

> This is not a battle between the United States of America and Terrorism, but between the free and democratic world and terrorism. We, therefore, here in Britain stand shoulder to shoulder with our American friends in this hour of tragedy, and we like them, will not rest until this evil is driven from our world.[19]

Parliament was recalled from its recess and the Prime Minister said that Britain had 'an obligation to bring those responsible to account'.[20] There was to be a war on terrorism in all its forms. He outlined the three main objectives of the UK's response to the attacks: first, to bring those responsible to justice, including those harbouring the terrorists; secondly, to form a common alliance against terrorism and in support of any action; and thirdly, to rethink the scale and effort of action taken by the world to combat terrorism. He stressed the need to look at both international and domestic legislation in relation to extradition, the mechanisms for international justice, and the financing of terrorist groups, including money laundering.

[18] The International Fight against Terrorism, available at: <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394239&a=Karticle&aid=1013618391514>.

[19] Statement made by the Prime Minister, Tony Blair, in response to the terrorist attacks in the United States—11 Sept 2001, to be found at <http://www.number-10.gov.uk/output/page3423.asp>.

[20] Hansard, House of Commons, 14 Sept 2001, cols 604–7.

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The publication of 'War on Terrorism—Defeating International Terrorism: Campaign Objectives'[21] provided further clarification of these objectives. This document outlined both the narrow objective of bringing Bin Laden and Al Qaeda to justice, and the broader objective of doing 'everything possible to eliminate the threat posed by international terrorism'. Notably, this included the commitment to take action against any state that was unwilling to take action against terrorists resident in their territory, as well as 'renewed efforts to bear down on Weapons of Mass Destruction Proliferation'.

With the commencement of military action against the Taliban and Al Qaeda in Afghanistan, the Prime Minister made a statement outlining the rationale for UK involvement. He stated that:

> The murder of British citizens, whether it happens overseas or not, is an attack upon Britain. But even if no British citizen had died it would be right to act . . . We have a direct interest in acting in our own self defence to protect British lives.[22]

As for the legal justification for action, the Foreign Secretary told the House of Commons on 4 October 2001:

> I cannot emphasise enough that the actions that the United States, we and other partners in the international coalition have in contemplation are entirely within the framework of international law. The founding text of the United Nations, its Charter, provides at Article 51 for the right of UN members to individual or collective self-defence when they come under armed attack. The UN Security Council has passed two resolutions in response to the crisis. The first, resolution 1368, states that those directly responsible for the attacks should be held to account, together with those who harbour them. The second, resolution 1373, focuses on two key areas: suppressing the financing of terrorists and denying them a safe haven from which to operate.[23]

In a letter to the Security Council of 7 October 2001, the UK representative said:

> These [Coalition] forces have been employed in the exercise of the inherent right of individual and collective self-defence, recognised in Article 51, following the terrorist outrage of 11 September, *to avert the continuing threat of attacks from the same source* [emphasis added]. My Government presented information to the United Kingdom Parliament on 4 October with showed that Osama bin Laden and his Al-Qa'ida terrorist organisation have the capability to execute major terrorist attacks, claimed credit for past attacks on United States targets, and have been engaged in a concerted campaign against the United States and its allies. . . . The military action has been carefully planned and is directed against Osama bin Laden's Al-Qa'ida terrorist organisation and the Taliban regime that is supporting it.[24]

It would be a fair conclusion that the use of force was regarded as legitimate only in relation to activity designed to thwart future attacks planned by Al Qaeda against the US or the UK, which might include action against other states which refused to co-operate in less violent operations on their territory to prevent further items in the terrorist campaign.

B. The Status of the Afghanistan Captives

The Government has consistently maintained that the military operations were being conducted in compliance with international humanitarian law, in particular that any

[21] To be found at <http://www.pm.gov.uk/output/page456.asp>.

[22] Prime Minister's statement on military action in Afghanistan. 7 Oct 2001, to be found at <http://www.pm.gov.uk/output/page3577.asp>.

[23] HC Hansard, vol 372, col 690, 4 Oct 2001.

[24] UN Doc.S/2001/947. See also Seventh Report of the Foreign Affairs Committee—Foreign Policy Aspects of the War Against Terrorism, para 63, n 11 above.

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non-combatant casualties were only the result of proper action against legitimate targets. The characterisation of the 11 September attacks as 'armed attacks' justifying response by way of self-defence and the action against the Taliban (at least the *de facto* government of Afghanistan) meant that the operations of the Coalition were part of an international armed conflict so that the law of armed conflict applied. A possibly unanticipated consequence of this was the status of persons captured by Coalition forces in the conflict. The matter was of concern to the British government, both as a member of the Coalition and because it transpired that some of the captives were UK nationals.

On 11 January 2002 the US Government announced the transfer of the first twenty Al-Qaeda and Taliban prisoners captured during the military operations conducted by the Coalition (mainly American) forces in Afghanistan to Camp X-Ray, a detention facility at its naval base at Guantanamo Bay in Cuba. Many more men have been transferred since. Initially, it was the US position that the prisoners were unlawful combatants and, as such, not entitled to the protections of the Geneva Conventions. However, in the weeks that followed and in an attempt to accommodate to the Third Geneva Convention on the Treatment of Prisoners of War, President Bush said that the Convention did not apply in relation to Al-Qaeda members. As it was explained, the war declared by Osama bin Laden and his Al-Qaeda network had no legitimacy under international law as the right to conduct war is only awarded to states and recognized armed forces or groups which are under responsible command, and not to terrorist organizations such as Al-Qaeda. Moreover, Al-Qaeda members did not meet the criteria of lawful combatants in accordance with the laws of war and thus they were not entitled to the benefits and privileges granted by the Third Geneva Convention above.[25] However, the Geneva Conventions did apply to members of the Taliban forces, although they also did not qualify for prisoner of war status as they were not under responsible command, they did not conduct their operations in accordance with the laws and customs of war, nor did they have fixed distinctive signs from a distance.[26] Acting on the basis that the detainees are not protected persons, the US has proposed to try those accused of criminal conduct before military commissions and to detain others during the pendency of the war on terrorism.[27]

The UK's position on the detainees held in Guantanamo Bay in Cuba is reflected in the statement of the Foreign Secretary who stressed that, irrespective of whether these prisoners fall under the protections of the Geneva Conventions or not, they certainly have rights under customary international law (and, it might be added, under the International Covenant on Civil and Political Rights) and it is up to the Government of their national state to safeguard these rights.[28] The statement is given piquancy by the revelation that a number of the persons detained in Cuba are UK nationals. In April 2002 the Foreign Secretary also stated in Geneva:

[25] The Convention can be found at <http://www.unhchr.ch/html/menu3/b/91.htm

[26] More information on President Bush's statement on the legal status of the detainees at the Guantanamo Bay, 7 Feb 2002 to be found at: <http://www.defenselink.mil/news/Feb2002/n02072002_200202074.html>. Also see the remarks of Ambassador Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues to be found at <http://www.state.gov/s/wci/rls/rm/2002/8491.htm>.

[27] The proposals are legally controversial—see 'Agora: Military Commissions' (2002) 96 *AJIL* 320–8.

[28] Edited transcript of an interview given by the Foreign Secretary Jack Straw on the treatment of prisoners held in Cuba to BBC Radio 4, London, 15 Jan 2002 to be found at: <http://www.number-10.gov.uk/output/page4235.asp>.

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> the struggle for human rights has to be a major part of the fight against terrorism(.Combating terrorism, however, must not become a pretext for setting aside the human rights norms so painstakingly established over the last 50 years.[29]

In this regard it was noted that the UK had received assurances from the US that the detainees in Guantanamo Bay were being treated humanely and consistently with the principles of the Geneva Convention. As for their status, whilst the UK stressed that it was a complex issue which it would continue to discuss with the US authorities, it has acknowledged the right of the US, as the detaining power, to decide whether they are going to prosecute the detainees.

The High Commissioner for Human Rights also emphasised that all the detainees were entitled to the protection of international human rights and international humanitarian law, and in particular of the relevant provisions of the International Covenant on Civil and Political Rights and the Geneva Conventions. Furthermore, the High Commissioner pointed out that any dispute concerning their status should be brought before a competent tribunal, whilst any trial of these persons should meet the international standards of fairness as provided under the ICCPR and the Third Geneva Convention.[30] It is the position of Amnesty International that these detainees are being held in US custody in a legal limbo and in a manner inconsistent with the rules of international law because they are being detained without charge, trial or judicial review for an unspecified and potentially unlimited period of time. According to a report released on 5 September 2002 by Amnesty, the detainees are entitled to a broad range of fundamental rights recognized by international humanitarian and human rights law to all persons under any form of detention, including prisoners of war and other persons detained in connection with an armed conflict, such as the right to humane treatment, to be informed of their rights, to have the lawfulness of their detention determined by a court, and to prompt and confidential access to a counsel of their choice. Finally, these detainees are also entitled to the presumption of a prisoner of war status unless a competent tribunal determines otherwise.[31]

In an opinion given by three UK leading legal experts in relation to the detention of a British national, Mr Feroz Abbasi who is detained at Guantanamo Bay under the United States Presidential Order of 13 November 2001, it was argued that his status as a prisoner of war could be claimed on his behalf, certainly by the British government, possibly by his legal representatives. According to this opinion, the US was obliged to allow Abbasi to bring the question of his status before a competent tribunal. Until there was a determination by such a tribunal on the basis of Article 5 of Geneva Convention III (and Article 45 of the 1977 Additional Protocol I to the Geneva Conventions, which

[29] Human Rights Annual Report 2002 issued by the United Kingdom Foreign and Commonwealth Office, 12–13, to be found at <http://www.fco.gov.uk/Files/kfile/fullreport,3.pdf>.

[30] Statement of High Commissioner for Human Rights on the detention of Taliban and Al-Qaeda prisoners at US Base in Guantanamo Bay, Cuba, 16 Jan 2002, to be found at: <http://www.unhchr.ch/huricane/huricane.nsf/newsroom>.

[31] See 'Amnesty International's Memorandum to the US government on the rights of individuals in US custody in Afghanistan and Guantanamo Bay of 15/4/2002 at: <http://web.amnesty.org/ai.nsf/recent/AMR510532002>. Also see Amnesty's Report on the UK's response to 11 September released on 5 Sept 2002 at <http://web.amnesty.org/ai.nsf/index/EUR450162002?OpenDocument&of=COUNTRIES/UK>. Also, Human Rights Watch's 'Background paper on Geneva Conventions and Persons held by US forces' of 29 January 2002 to be found at: <http://hrw.org/backgrounder/usa/pow-bck.htm#P30_3598>.

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according to these experts reflects customary international law),[32] Abbasi should be presumed to be and treated as a prisoner of war. As such, Abbasi would benefit from the protections granted under the Convention according to which he could only be prosecuted for war crimes and crimes against humanity. If, on the other hand, he were a civilian detainee then he would be entitled to the protections of Geneva Convention IV and to immediate release as soon as the reasons of his detention ceased to exist. Finally, if Abbasi were an unlawful combatant, as the US claimed that he was, then he would be entitled to the minimum standard of treatment provided by Article 75 of Additional Protocol I, if it were accepted as customary international law. Furthermore, it was argued in the opinion that if Abbasi were or might be facing prosecution, then he was entitled to have access to a lawyer, a right well established under applicable human rights law and international humanitarian law. Finally, it is also submitted that by excluding non-US nationals of the right to have access to a lawyer and of the right to petition courts in the US or other countries and international tribunals under the Presidential Order, the US is violating its international legal duties to maintain the equality of all persons before the law, without discrimination.[33]

In the light of this opinion, proceedings were introduced before British courts with the object of compelling the British Government to take action in support of Abbasi. In *Abbasi*,[34] it was argued that the British government had failed to make adequate representations concerning Abbasi's status to the US authorities. Effectively, the applicant was seeking an order that the Government exercise its rights with respect to the US to secure his protection. On the other hand, it was submitted by the Government that the matter fell within the foreign affairs prerogative and that no court had jurisdiction to adjudicate on the case, still less to order the Government to act as the applicant wished. Rather surprisingly, the Court of Appeal gave leave to appeal and decided to hear the application on its merits. Argument was heard on 11 and 12 September 2002 and the judgment of the Court of Appeal is awaited.

C. International Human Rights Aspects of the UK Response

Security Council Resolution 1373 required states to take action to obstruct the financing of terrorist groups and to report to the Counter-Terrorism Committee on the action that they had taken to do this (or to point to the way in which their existing laws achieved the same end). Resolution 1373 required also that states deny safe haven to those engaged in terrorism and prevent the use of their territory for such purpose. Although Parliament had enacted wide-ranging legislation for this end only the year before—Terrorism Act 2000—the Government considered that further powers were required.

With the establishment of the Counter-Terrorism Committee decided by the Security Council Resolution.1373 all states were required to report to it on the measures that they adopted for compliance with the efforts to combat international terrorism.[35] For

[32] Neither the US nor Afghanistan is a party to Additional Protocol I.

[33] Opinion of Stephen Solley, Professor. Vaughan Lowe and Professor Guy Goodwin-Gill, Press release from Bar Human Rights Committee to be found at <http://www.barhumanrights.org.uk/pdfs/25_02_02CubaOpinion.pdf>.

[34] *Abbasi (R on application of) v Secretary of State for Foreign & Commonwealth Office* [2002] EWCA Civ 1316.

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this purpose, the United Kingdom submitted two reports on the measures that it took in accordance with its legal obligations under that resolution, the most significant being the adoption of the Anti-terrorism, Crime and Security Act 2001.[36] The Act provided for the implementation of the Terrorism Financing Convention and for action, including freezing orders, against terrorist property; for extension of some police powers; for regulation and criminalisation of certain matters to do with 'weapons of mass destruction'; for the security of pathogens and toxins and for the implementation of criminal co-operation measures under the Third Pillar of the EU.

The most controversial part of the Act is Part 4 under which the Home Secretary is given the authority to issue against any non-UK national a certificate of his (the Home Secretary's) reasonable belief that the individual's presence in the UK is a threat to national security and that this person is a suspected terrorist. On the basis of the certification, the person may be detained. This possibility presents a difficulty in the sense that neither the European Convention on Human Rights nor the International Covenant on Civil and Political Rights allow for preventative detention of this kind. Ordinarily, non-nationals could be deported to their state of nationality but some suspects face the real prospect of serious ill-treatment if they are returned. The ECHR prohibited return in these circumstances under the '*Soering*' principle.[37] Leaving such persons at liberty in the UK was not acceptable to the government and so it was necessary to make derogations under Article 15 of the ECHR and Article 4 of the ICCPR. During the passage of the legislation, evidence was presented to the Parliamentary Joint Committee on Human Rights suggesting that the derogations were unlawful. Provision to raise this point is specifically provided in the Act.[38] The matter may be raised before the Special Immigration Appeals Commission. Nine persons have been detained, though two have exercised their option to leave the UK and face the risk of ill-treatment in their national state. An action was brought on their behalf to the SIAC. The Tribunal accepted that there was an emergency of sufficient gravity to meet the 'public emergency' test under the ECHR. However, the Tribunal was not persuaded that to confine the power of preventive detention to non-nationals was compatible with Article 14 of the Convention (or put another way, that such a distinction was proportionate to meeting the emergency).[39] The Government has taken the case to the Court of Appeal and it will be heard on 7 October 2002. The applicants seek to challenge the SIAC's finding on the existence of the emergency.

Although the Act was described by the UK government as a necessary and proportionate response to the continuing threat of terrorism,[40] there were strong concerns in relation to the discriminatory character of the detention of non-UK nationals for an unspecified period of time without charge or trial before a tribunal that meets all the international standards of fairness contrary to Articles 5(1) of the ECHR and Article 9

[35] Security Council Res. 1373 (2001) of 28 Sept 2001 to be found at: <http://daccess-ods.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

[36] First report submitted by the United Kingdom of Great Britain and Northern Ireland on 19 Dec 2001 pursuant to para 6 of resolution 1373 (2001) to be found at: <http://www.un.org/Docs/sc/committees/1373/>. Also see Second report submitted by the United Kingdom of Great Britain and Northern Ireland on 25 June 2002 pursuant to paragraph 6 of resolution 1373 (2001) at: <http://daccess-ods.un.org/doc/UNDOC/GEN/N02/492/32/PDF/N0249232.pdf?OpenElement>.

[37] *Soering v United Kingdom* ECtHRs A/161 (1989).

[38] Section 30.

[39] *A & Others v Home Secretary*, Appeal number SC/1–7/2002.

[40] Note 18 above, para 28.

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of the ICCPR. More particularly, it has been argued that such an arbitrary detention violated the right to have a court determine the lawfulness of the detention (art. 5(4) ECHR), whilst indefinite detention could be tantamount to charging with and convicting an individual for a criminal offence without trial in violation of the right to be brought promptly before a judge, the right to trial within reasonable time, and the presumption of innocence (Article 5(3) and 6 ECHR and Article 14 of the ICCPR). Furthermore, evidence may be presented to the Tribunal in the absence of the applicant's lawyer (though in the presence of a special advocate appointed by the Tribunal). It has been suggested that this arrangement is incompatible with the applicant's rights.[41]

D. The Implementation of the EU Response

The European Union responded to 11 September by proposing the introduction of a 'European Arrest Warrant', which would significantly simplify the process of transferring a criminal suspect from one EU state to another. It effectively reduces the existing extradition regime to one of administrative transfer. Initially, the British Government proposed a power to implement the EAW by order under the ATCSA but it was persuaded to withdraw this suggestion. Instead, a new Extradition Bill will include measures to implement the provisions of the EAW. The Bill has been out for consultation and will presumably have been introduced in the Queen's Speech in November 2002.

The European Union, through its collective organs, and highlighting that terrorism constitutes a serious threat to fundamental rights, democracy and the rule of law responded immediately to the terrorist attacks of 11 September with the adoption of a series of measures for the criminalisation of the commission and funding of terrorist activities and the imposition of restrictions against individuals or groups involved in such activities.[42] More interesting, the EU adopted two Council Framework Decisions on combating terrorism and on a European Arrest Warrant (EAW) with which it aimed to harmonize the laws of the Member States in the field of terrorism on the basis of a common definition of offences and penalties on the one hand, and to substitute the existing extradition mechanisms between Member States with a simplified system of surrender of suspected or sentenced persons on the other.[43] More specifically, the EAW is a judicial decision based on the principle of mutual recognition and its ultimate purpose will be to create, as from 1 January 2004 that it will come into force, a more efficient system of coordination between the judicial and other law enforcement mechanisms of the Member States.[44]

Nevertheless, Justice, in a briefing it prepared in January 2002 observed that the

[41] Amnesty International's report on the UK's response to 11 September released on 5 Sept 2002 to be found at: <http://web.amnesty.org/ai.nsf/Index/EUR450162002?OpenDocument&of=COUNTRIES\UK>.

[42] For a general overview of the EU's broad response to terrorism see <http://europa.eu.int/comm/external_relations/110901/>.

[43] See European Commission's proposals of 19 Sept and 25 Sept 2001 for a Council Framework Decision on combating terrorism and on the European arrest warrant respectively at: <http://europa.eu.int/comm/justice_home/unit/terrorism/terrorism_sg_en.pdf>; <http://europa.eu.int/eur-lex/en/com/pdf/2001/en_501PC0522.pdf>.

[44] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, to be found at: <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXmumdoc&1g=en&numdoc=32002F0584&model=guichett>.

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proposal on the EAW lacked and/or lacked satisfactory provisions regarding certain procedural and other guarantees of the rights of the individual and more specifically, provisions concerning the right to fair trial; the double criminality rule in relation to offences not listed in the warrant; the rule of speciality according to which extradition is allowed only for the offence for which the person is requested and with which the rights of the individual from any abuse are safeguarded; and judgments issued in absentia. At the same time it is noted that the EAW should have clear definitions of the offences, of the legal status of the person against whom a warrant of arrest has been issued (whether a provisional arrest as provided by the European Convention on Extradition or detention in accordance with extradition proceedings as this matter is of great importance concerning the rights of the individual under Article 5 of the ECHR), and of the procedures and the rights of the defence. Concerns were also expressed with regard to the expansion under the EAW of the powers for which a person may now be extradited. Accordingly, extradition is permitted not merely for an offence for which the requested person is accused of, but also for interrogation purposes.[45]

ELENA KATSELLI AND SANGEETA SHAH

POSTSCRIPT

On 25 October 2002, the Court of Appeal quashed the decision of the SIAC in *A, X, Y and others v Secretary of State for the Home Department*. The Court found that the notice of derogation under the European Convention was justified in terms of Article 15 and was not to be impugned on grounds of its discriminatory characteristic in applying the power to detain only to non-UK nationals. The Court said that non-nationals were not in an analogous position with nationals and so that Article 14 was not violated.[46]

In *Abbasi*, the Court of Appeal rejected the government's claim that matters of diplomatic protection were inevitably non-justiciable, although it conceded that they would be subject to judicial scrutiny only in exceptional circumstances. On the facts of this case, although the Court expressed its concern about the way British nationals were being treated at Guantanamo Bay, it did not find that the applicant's position brought him within 'exceptional circumstances', given the representations the British government had made to the US authorities.[47]

WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT:

[45] Memo on the European arrest warrant as part of a move towards an area of freedom, security, and justice in the EU, a JUSTICE briefing, Jan 2002 at: <http:///www.justice.org.uk/ourwork/eu/index.html>.

[46] [2002] EWCA Civ 1502 (25 Oct 2002).

[47] *The Queen on the application of Abbasi and another v Secretary of State for Foreign & Commonwealth Affairs and Secretary of State for the Home Department* [2002] EWCA Civ 1598 (6 Nov 2002).

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