THE STATUE OF LIBERTY IS UNDER ATTACK:
DEROGATION OF HUMAN RIGHTS AND CIVIL LIBERTIES IN THE AGE OF
TERRORISM

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Monika Juhasz-Nagy

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The Statue of Liberty is Under Attack:
Derogation of Human Rights in the Age of Terrorism

Approved by:

Dr. Sylvia Maier, Advisor

Dr. Kalpa Weber

Dr. Kirk Bowman

04/12/04
Date Approved
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SUMMARY

Since the adoption and ratification of the Universal Declaration of Human Rights, the value of human rights and civil liberties has been advocated and honored by the majority of democratic governments during peacetime. Traditionally, however, when a crisis has taken place and a threat been posed to a nation, the protection of human rights and liberties has lost importance, diminished, and become inferior to national security.

In my thesis I analyze the current and future position of human rights in the age of terrorism. I state that regardless of the last five decades' thriving human rights movements, in a crisis of national security support for human rights will decline. Supporting my hypothesis I selected two strong democratic nations, the United States and the United Kingdom, and analyzed their past reactions to a crisis situation, their post September 11 provisions and laws and their compliance with international laws. I also assessed some of the activities of the most successful non-governmental organizations, predicting their future role in safeguarding human rights and civil liberties.
CHAPTER 1
INTRODUCTION

The respect of human rights and civil liberties, so essential for the maintenance of a democratic society, has generally been upheld and honored by the majority of democratic governments during peacetime. Historically, however, when a crisis has arisen and a threat been posed to a nation, the protection of human rights and liberties has lost significance, declined, and become subordinate to the national security. As David Cole shows, these concepts are easily disregarded in a crisis:

"Emergency periods and new vulnerabilities may well warrant sacrifices of rights and liberties. Few rights are absolute; most require balancing, meaning that demands for increased security may properly lead to decreased liberty, as long as the loss in liberty is made up for by sufficient gains in security. But in striking that balance, we should all share the costs of the trade-offs." ¹

Since the end of World War II great strides have been made in the support and enactment of human rights and civil liberties in both democratic and democratically evolving nations. It is my assertion in this thesis that despite the advances of the last six decades human rights and civil liberties continue, unchanged, to be abrogated, and subordinated to the concept of "national security" during periods of a national crisis.

I analyze the current and future position of human rights and civil liberties in the age of terrorism. I examine this issue through the analysis of the United Kingdom and the United States' anti-terrorism laws and policies, particularly, the new US Homeland Security measures, the USA Patriot Act, the new UK Anti-Terrorism, Crime and Security

Act, and their compliance with international laws such as the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and the European Convention on Human Rights, ratified by both nations in the last five decades. I analyze and compare the new sets of immigration laws and policies, and their impact on the legal, political and social status of immigrants; predominantly immigrants from the Middle East and Southwest Asia. I also demonstrate that in reaction to September 11, 2001 the United States has been focusing more on implementing restrictive immigration laws and regulations, while Britain has emphasized the establishment and enforcement of asylum laws. I will also explain in detail to what extent these new policies violate human rights in the name of national security. Aside from examining the impact of the new, rather strict government policies and laws, I also assess some of the activities of the most recognized, and successful human rights non-governmental organizations, foreseeing their future role in the protection of human rights and civil liberties.

Understanding how different nations with similar backgrounds cope with the issue of terrorism allows us to see if there is a possibility of maintaining and respecting human rights and civil liberties in democratic societies in the future. In my comparative analysis, I investigate the future role of human rights and civil liberties within a specific time frame, from the terrorist attacks of September 11, 2001 to the present time. There are four reasons why I chose the United States and the United Kingdom to illustrate the derogation of human rights and civil liberties in the name of increased national security. The simple fact that the terrorist attacks on the World Trade Center and the Pentagon took place on U.S. soil made people believe that the United States has become a main
target for terrorists. It is very rational for people to believe that of all western countries, this nation would alter its policies most dramatically. Since the United Kingdom is the closest ally of the United States, it is reasonable to suspect that this country is also in a vulnerable position to terrorist attacks.

Furthermore, each country has a long history of welcoming and accepting immigrants from all over the world. The United States along with the United Kingdom holds high percentage of immigrants, including Muslims and Arabs, and most of them highly assimilated to American or British culture. They both play an instrumental role in the war on terrorism, and propose sets of policies and laws for other nations to follow. Each nation has a long history of advocating human rights and democratic values. However, both have demonstrated erosion of basic human rights and civil liberties in crises or emergency situations in the past. It would be interesting to know whether these two nations have learnt from their past mistakes or will repeat the old pattern. Since September 11th, U.S. and U.K. non-governmental organizations have been very active, and committed to playing an influential role in the administrations’ policymaking process on human rights and civil liberties.

My thesis has a strong normative content/emphasis. While I argue that human rights historically have been subordinated to national security especially in times of crisis, such as war, terrorist attacks, or threat of invasion I also hope to show that this subordination is ethically unacceptable as human rights are universal, meaning that every human being is entitled to enjoy them.
I argue that there are multiple reasons why the government’s ill-conceived measures during wartime, such as unfairly targeting certain persons because of race, national origin, or religious beliefs, do not make us safer. They weaken our fundamental democratic values, for instance, the rights of freedom of speech, religion, association, due process and equal protection. They also alienate people who had previously looked upon the United States as well as our allies who can help us to fight against terrorism.

The equal value and treatment of each human being is an important element in the war on terrorism. Mistreatments of certain groups of immigrants and foreign nationals who share the same racial or ethnic backgrounds with the enemy can backfire on the government’s effort in finding and punishing the ones who are responsible for the criminal acts. Unfortunately, after the terrorist attacks of September 11, 2001, Muslims and Arabs had to face not only harsher policies and laws, but also numerous attacks by civilians. Daily violent acts, scrutiny, and harassments of foreigners has increased dramatically not only in the United States but in most parts of the European Union. Arabs have been interrogated, attacked and murdered because of their distinct Middle Eastern appearance and heritage. Incidents in the U.S. include shots fired at a mosque in Texas, two Muslim-owned buildings lit on fire in Maryland, and other accounts of property vandalism. At the University of Texas in Austin, Muslim students have had their baggage searched and meetings in their student union broken up.  

One of the most disturbing examples related to a police officer who sent an e-mail days after the September 11 attacks advocating the killing of millions of Arabs, and suggesting the

United States “eliminate the entire Arab world” if terrorism continues. “I think 1,000 Arabs must die for each American killed,” the police officer wrote. “If they continue their attacks we will simply eliminate the entire Arab world. It doesn’t bother me a bit.” The Islamic Institute of New York received a telephone call threatening the school’s four hundred and fifty students. The male caller said he was “going to paint the streets with the children’s blood”. The school is closed, but continues to receive several threats a day.

Likewise, in the United Kingdom discrimination against Muslims and Arabs is more significant now than it was before 9/11. “Discrimination affects people who look as if they are of Muslim origin and people are faced with hate because of the sole fact that they wear a turban”. Reports show that Muslims feel unsafe at night both in their homes and walking alone in their neighbourhood. They have been exposed to “hate speeches” both in private and public speeches, violent attacks on their religious institutions, and discrimination in employment and other areas of life.

As a result of the terrorist attacks, carried out by nineteen Muslim terrorists, the entire Muslim population appears to have become associated with terrorism. Although the Bush administration has continually said that it would not engage in racial and ethnic profiling, its human rights violations, such as curtailment of freedom of expression and


opinion, lack of due process in courts, intimidation of the free press as well as political opponents has become more severe and widespread, and is particularly directed toward Muslims and Arabs. In response to the catastrophic events of 9/11, the United States created the US Patriot Act and, developed and began to enforce very strict and discriminatory immigration policies and laws. The Immigration and Naturalization Service profiled and held hundreds of predominantly Muslim, Arab, and South Asian foreign nationals for months without affording them hearings and without charging any violation of criminal or administrative law. Under the Special Call-In Registration Program, adult male nationals from twenty-five, mostly Arab and Muslim countries have been required to submit to being photographed, fingerprinted, and interviewed under oath. Along with foreign nationals several US citizens were also held indefinitely without offering them any trial.

"And 9/11 has already produced several comparable missteps. The administration’s efforts to stymie habeas corpus rival the civil liberties low points of prior wars, as does its determination (wholly without precedent) to hold American citizens indefinitely on disputed charges without affording them a trial in any forum whatsoever."  

The UK government stated that in the aftermath of the September 11, 2001, terrorist attacks in the United States, and the threat posed to the UK by the al-Qa‘ida network made it necessary for the authorities to enact new “anti-terrorist” measures. As a result of this “public emergency” the British administration developed the UK Anti-Terrorism, Crime and Security Act, enacted on December 14, 2001. Its provisions breach human rights and civil liberties, such as the right to liberty and security, equal treatment, due

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process, and the right to privacy. It permits arbitrary detention of non-UK nationals suspected of terrorist activity, denial of the right to seek asylum, and the exclusion and indefinite detention without charge or trial of exclusively non-British citizens without sufficient legal safeguards. Under the ACTSA the police and security services are now authorized to go through personal information held by public authorities, such as medical records, bank statements, school records, tax returns or inland revenue, even though no crime has been committed or suspected.

The fear that human rights will be unjustifiably and unnecessarily violated is strengthened by the fact that legislation such as the Patriot Act/UK Anti-Terrorism, Crime and Security Act is not directed solely at terrorist acts, but rather can be interpreted to apply to all acts of political violence.

The United States and the United Kingdom have again proved, as they did in the past, that in times of emergency situations and crisis, democracy does not succeed in preserving its values and human rights are violated in the name of safeguarding national security. 7

I embarked on a comparative study of the implementation of new immigration laws, anti-terrorism measures, and the disregard of human rights and civil liberties, rather than a single comprehensive case study, as I was curious to find out how two stable democratic countries with significant Muslim populations deal with the treatment of immigrants and

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foreign nationals, execution of effective anti-terrorism measures, and compliance with international laws.

As George Washington University law Professor, Stephen Saltzburg asserts "We tend to overreact in times of war and then we apologize for it afterward." 8

Shanaz Mohammed who was held in Brooklyn for eight months on an immigration violation before being deported to Trinidad said, "it feels good to have someone saying that we shouldn't have had to go through all that we did". 9

After September 11, the promised land turned into a dangerous place for many Arabs and Muslims. Mufeed Khan, a Pakistani small businessman said: "For me America was a dreamland. I used to think I was lucky to live in a liberal and democratic country. But the dreamland became hell I was treated badly because I was a Muslim. Carrying a Muslim name should not be a crime." 10

Not surprisingly, in the aftermath of September 11, 2001, academic scholars, authors, and human rights advocates published widely on this subject. Two points of convergence emerge from their views and studies. First, they agree that without the respect of foreign nationals' fundamental human rights and civil liberties, a successful outcome in the war on terrorism should not be expected. Their opinions also coincide on the importance of


educating the general public on how, behind closed doors, the current administration is able to subvert immigrants' basic rights in the name of protecting national security, and the impact these new policies will have on US born citizens, and on the nation as a whole. Secondly, their essays are addressed to the government. Each author firmly believes that the Bush and Blair administrations need to be reminded about their nations' important role in the world, which is to preserve and promote human rights, and democratic values. As Azizah Al-Hibri, a professor of law at the University of Richmond asserts,

"I think we need to figure out, how can America grab again the mission it was given by people like Jefferson and Wilson and other, so that it is the leader in democracy and hope around the world. That's what we need to be thinking about instead of thinking ethnicity, instead of thinking religion, instead of thinking retribution, instead of thinking fear. We should look at this as a wake-up call for America to grab back its historical role in the world." 11

My thesis contains three chapters. In Chapter 2, I will introduce a theoretical human rights analysis within the international human rights framework, showing some of the works of the scholars whose materials I relied upon in the process of formulating my own argument, and I will demonstrate how human rights and civil liberties became subservient to national security during the two World Wars, and throughout the Cold War. In Chapter 3, I will explore the legal dimension of my topic, specifically the USA Patriot Act, the Military Order, the National Security Entry-Exit Registration System, the UK Anti-Terrorism, Crime, and Security Act, and the Nationality, Immigration and Asylum Act. In Chapter 4, I will present some of the international non-governmental

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human rights organizations, their platforms, and their influence on the future of human rights.
CHAPTER 2
BACKGROUND

2.1 History of Derogation of Human Rights during the Great Wars

The history of civil liberties in times of emergency situations suggests that governments seldom react to a crisis carefully or wisely. They agree with the most alarmist proponents of repression and pursue preexisting agendas in the name of national security, targeting unpopular or vulnerable groups whose voices do not count in a political sphere.

“In practice, however, the government has most often at least initially sacrificed noncitizens’ liberties while retaining basic protections for citizens. This is a politically tempting way to mediate the tension between liberty and security. Citizens need not forgo their rights, and the targeted noncitizens have no direct voice in the democratic process by which to register their objections. No one has ever been voted out of office for targeting foreign nationals in times of crisis; to the contrary, crises often inspire the demonization of ‘aliens’ as the nation seeks unity by emphasizing differences between ‘us’ and ‘them.’”

In the United States’ history, government officials have rounded up large numbers of people without having to prove these individuals engaged in any particular dangerous conduct. In World War I, over two thousand people were prosecuted and sentenced to a fifteen-year prison term mainly for speaking out against the war and draft. J. Edgar Hoover, then masterminded the first nationwide roundup of radicals, the Palmer Raids, which employed extensive powers to target, regulate and imprison “dangerous” foreign nationals without criminal charges. These foreign nationals were detained in overcrowded cells and beaten into signing a confession. Several of those who were

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12 Cole, “Enemy Aliens” p. 4-5

13 Cannon, “Taking Liberties.”
arrested were U.S. citizens. In 1919, 6,000 suspected immigrants in 33 cities across the nation were rounded up as the federal government’s response to a politically motivated bombing of Attorney General Mitchell Palmer’s home. 556 immigrants were deported not for their participation on the bombing, but solely for their political affiliations.14

In the period prior to World War II, both the federal and state governments implemented a wide range of anti-Japanese measures, denying people of Japanese ancestry the right of U.S. citizenship, to own property, and to work in several industries. Though, there was never any evidence to support the concern that the Japanese living in the United States posed a threat to national security, 120,000 persons of Japanese ancestry were interned without having been charged with, or convicted of, espionage, sabotage, or treason.15

One of the most well known cases of the U.S. government’s discriminatory treatments against people with Japanese origin was the conviction of Gordon Hirabayashi. In 1943 Hirabayashi was convicted and sentenced to 90 days in prison for violating the military curfew. “Adopting the military’s equation of ancestry with suspicion, the Court wrote that “[t]he fact alone that attack on our shores was threatened by Japan rather than another enemy power set these citizens apart from others who have no particular association with Japan.”16

The Korematsu v. United States case a year later also used military emergency rationale to uphold the exclusion of all citizens of Japanese ancestry from the West Coast. In a


15 Cole, “Enemy Aliens” p. 96-97

16 Ibid; p.98
widely divided Supreme Court the majority supported the exclusion relying on the military’s judgment that threats of invasion, espionage, and sabotage existed and constituted “military necessity” for exclusion, while ignoring the fact that Japan was not likely to be able to attack the West Coast after the defeat of Japan’s navy at the Battle of the Midway in June 1942. 17

The Japanese American W.W.II experience is well known. However, less widely known is the W.W. II experience of the European Americans, particularly those of the German Americans. During the Second World War, the U.S. government interned at least 11,000 persons of German ancestry, whose internment was often based upon unconfirmed information and evidence gathered by the FBI and other intelligence agencies.

“The government used many interrelated, constitutionally questionable methods to control those of enemy ancestry, including internment, individual and group exclusion from military zones, internee exchanges for Americans held in Germany, deportation, “alien enemy” registration requirement, travel restrictions and property confiscation. The human cost of these civil liberties violations was high. Families were disrupted, reputations destroyed, homes and belongings lost.” 18

Potential internees were held in custody for weeks in temporary detention centers, such as jails and hospitals, prior to their hearings. Those arrested were subject to scrutiny and hostile questioning by the local prosecuting U.S. Attorney. Their treatment by the US


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government was harsh, and their experience gives sufficient evidence of why our civil liberties are so valuable. 19

During the Cold War, the United States government made it a crime to be member of the Communist Party, and passed the McCarran-Walter Act, authorizing the government to exclude and expel noncitizens who advocated proscribed ideas. 20 As David Cole asserts,

"The Communist Party never actually took any concrete steps to overthrow the United States government by force or violence, but because of its rhetoric was interpreted as so advocating, the government was able to control and ultimately decimate the Party through guilt by association." 21

These individuals were placed under surveillance and suspicion without ever having been engaged in violent actions or advocating the use of violence. The administration's intent of establishing concentration camps "for emergency situations" where suspected political dissenters and subversives would be rounded up and placed was a frightening prospect. President Truman vetoed this bill and sent a message to the legislators.

"The basic error of this bill is that it moves in the direction of suppressing opinions and beliefs. This would be a very dangerous course to take, not because we have sympathy for Communist opinions, because any governmental stifling of the free expression of opinion is a long step toward totalitarianism. ... The course proposed by this bill would delight the Communists, for it would make a mockery of the Bill of Rights and of our claims to stand for freedom in the world."

19Id. at footnote 37

20 Cole, Dempsey, and Goldberg, p. 150

Regardless of the President’s veto, Congress passed the bill with 29% voting in favor of it. Millions of Americans lost their jobs because of rumors that they were a “security risk” due to their political opinions. In 1952, McCarran joined Francis Walter and created the “McCarran-Walter Act”, mainly an immigration bill, assigning severe quotas to immigrants who want to enter the United States from an “undesirable” part of the world. Under the McCarran-Walter Act, the United States denied visas to anyone accused of voicing the wrong political opinions, for example favoring of communism, or if already in the country they faced deportation without hesitation. Scholars and government officials asserted that the government has learned from the past, and now views those severe provisions against German and Japanese immigrants as big mistakes.

In August 2001, U.S. Senator Russ Feingold introduced the Wartime Treatment of European Americans and Refugees Study Act, a bill to establish a commission to review the facts and circumstances surrounding injustices suffered by European Americans, European Latin Americans, and European refugees during World War II. The goal was to “... take this moment at a time of peace, to review the U.S. government’s violation of civil liberties and its failure to protect refugees facing persecution during World War II.”

“Thousands of German Americans, Italian Americans, and other European Americans were unfairly arrested, detained, interned or relocated by the US government, some remaining in custody long after World War II had ended. Many European Americans were stripped of their personal property and travel rights. This bill intends to recognize those who were harmed and discourage future occurrences of similar offenses.”

Though it is true that the current US/UK administrations have not arrested people simply for speaking out against the war, nor interned immigrants for their racial identity, or punished individuals for their political affiliations, they have replaced old forms of political repression for new ones. Basic freedoms have been restricted, such as equal, legal treatment of foreign nationals, immigrants, and US citizens, by limiting political freedoms, such as freedom of speech, right to fair and public trial, right to be presented at the trial, right to an impartial jury, and the right to be heard in one's own defense. This has applied to several hundreds of foreign nationals of Arab origin and/or Muslim faith, and there are reasons to believe that later on it would apply to US citizens as well.\(^\text{24}\)

"We hope that by revisiting the grievous errors committed by our political leaders and Supreme Court justices in the 1940s, and by contrasting those errors with more recent yet reminiscent measures adopted since September 11\(^\text{19}\), that policymakers will work harder to avoid repeating the mistakes of history."\(^\text{25}\)

Although, the post-September 11 reaction does not yet match these historical overreactions, it features some of the same mistakes of principle --- in particular targeting vulnerable groups not for illegal conduct, but for political speech, political activity, or group identity, and relying on broad investigatory sweeps rather than focusing on objective individualized suspicion.\(^\text{26}\)

\text{21} Geller, Ari "Wartime Treatment of European Americans and Refugees Study Act" http://members.cox.net

\text{24} Cole. "The New McCarthyism: Repeating History in the War on Terrorism" www.law.harvard.edu

\text{25} Mark, Brooks Masters, Mehta, "Have We Learned The Lessons of History?"

\text{26} Cole, Dempsey, and Goldberg, "Terrorism and the Constitution: Civil Liberties in the Name of National Security."
The primary reason the government’s current provisions are not as severe as they were during the two World Wars and that is that due to the diligent work of international regimes and human rights advocacy groups, human rights have gradually and increasingly become part of a nation’s domestic and foreign policy discussion.

2.2 Theory of International Human Rights

“Man discovered the idea of humanity.”27 “The challenge we now face is whether we can reclaim that idea in the wake of September 11.”28

The human rights movement of the last fifty years reflects a clear understanding that there are certain fundamental human rights to which all persons are entitled, simply on the basis of their humanity. As Jack Donnelly describes, “Human Rights are a special class of rights, the rights that one has simply because one is a human being. They are thus moral rights of the highest order.”29 The real value of a right is the unique privilege it gives one to press right-claims if enjoyment of the object of the right is in danger or denied. Donnelly states that human rights derive from humanity, human nature, being a person or human being. He further explains that the origin of human rights is “a man’s moral nature, which is only loosely linked to the ‘human nature’ defined by scientifically ascertainable needs.”


28 Cole, 2003 “Enemy Aliens” p. 233

vision of human potentiality, which lays on a particular substantive account of the minimum requirements of life of dignity. 30

If human rights are indeed special rights that everyone is entitled to simply because one is a human being, then they should apply to "all human beings without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." 31 At the center of the Universal Declaration of Human Rights is the principle that human rights are universal and indivisible.

A wide range of internationally recognized human rights protects the principle that human rights are interrelated, interdependent, and mutually reinforcing. They identify that freedom from fear and freedom from want are two inextricably related characteristics of human well-being. The two major international human rights treaties, the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights (both deriving from the UDHR) affirm the indivisibility of human rights, stating, "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights." 32

Since the adoption of the UDHR, governments from all regions of the world have been expressing formal support for universality and indivisibility of human rights, and

30 Donnelly; p. 16-17

31 Article 1, The Universal Declaration of Human Rights.

incorporating these principles into the structure of their constitutions. In 1993, at the UN World Conference on Human Rights in Vienna, 171 governments adopted by consensus a declaration, stating that

"All human rights are universal, indivisible, and interdependent and interrelated... While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect human rights and fundamental freedoms." 33

There are several debates on the source and extent of what exactly human rights are. Ethicist Henry Shue argues, "a right is basic if its enjoyment is essential to the enjoyment of all other rights." In his view there are three such rights, security, subsistence, and liberty which cannot be justifiably excluded as priority items in U.S. international, human rights policy. 34 Donnelly, on the other hand states that all human rights are basic rights. He further explains that human dignity, the understanding of which is the goal of human rights cannot be diminished to dimensions that can be included by a small list of "basic" human rights. 35 According to David Cole, basic rights are owed to people as a matter of human dignity, and should be respected no matter what type of government a certain community chooses to adopt. The rights of freedom of speech, religion, association, due process and equal protection are among the fundamental rights that need to be honored globally. According to the Supreme Court, these rights are "implicit in the concept of ordered liberty." 36

33 Anonymous. www.amnesty.org
34 Donnelly, p. 38
35 Ibid; p.41
Clearly opinions are greatly polarized on this significant matter. To create and defend a list of universally accepted basic human rights would require a comprehensive, normative, and empirical theory of human rights, something that nobody has attempted to the present.\textsuperscript{37}

Human rights have become a global hegemonic discourse, which means that states do agree on the important principles of human rights, but with lack of enforcement policy, they are not held accountable to obey the laws.

As Ignatieff states, "The states that signed the Universal Declaration never actually believed that it would constrain their behavior. After all, it lacked any enforcement mechanism. It was a declaration only, rather than a state treaty or a convention requiring national ratification."\textsuperscript{38}

This problem of the international non-enforcement is presented prominently in the current debate on the acceptable limitation of human rights.

Fifty years ago, human rights were almost universally perceived as the exclusive preserve of the state, with the exception of shortly after the Second World War when emotional and moral demands for international human rights regime were high, and decision-making under the Universal Declaration was national. According to Donnelly, states usually participate in an international regime only to achieve national objectives, and even then, they contribute only when independent national action has failed, and only

\textsuperscript{36} Cole. p. 215

\textsuperscript{37} Donnelly. p.43-44

when participation appears "safe". Donnelly claims that a more powerful international human rights regime does not present a safe outlook for gaining otherwise unattainable national benefits. 39 Human rights are national, not an international issue from the international jurisdiction's perspective, and with respect to successful actions to institute a rights respecting administration of human rights. States are the principal violators of human rights and are the main actors governed by international norms. International actions typically can be at best a force toward and support for national action on behalf of human rights. Since in the area of human rights, states are not willing to sacrifice their national sovereignty in order to realize the benefits of cooperation, there is no strong request for a more powerful regime. Thus only a promotional regime has evolved with widespread, coherent, and broadly accepted norms, but extremely limited international decision-making powers. While a promotional regime requires a relatively low level commitment, an enforcement regime would necessitate a major increase in commitment of states. 40

Amy Gutmann, Laurance S. Rockefeller University Professor of Politics at Princeton University, believes that respect and enforcement of human rights are instrumental measures to protect individuals from abuse, cruelty, oppression, and degradation. 41

The struggle for international human rights is, ultimately, a series of national struggles. International action can support these struggles, or it can aggravate them, and sometimes even prevent them. Though, international action is a significant, but not the most

39 Donnelly, p.211
40 Ibid; p.233
41 Ignatieff, p.x
important factor in the fate of human rights, Donnelly suggests that we should not give up on international action.

Internationally recognized human rights are significant because, as Donnelly asserts, they enforce responsibilities on the state, control relations between citizens and states, and require the state and society for their awareness. Since he is a strong advocate for international human rights, Donnelly created his own model of international human rights, called "Universal Declaration Model". His model was built upon the principles and ideology of Universal Declaration of Human Rights, which was ratified and supported by numerous nations, and enjoyed great popularity among scholars and human rights advocates. There are four elements that deserve importance in his model: its focus on rights; the restriction to individual rights; the balance between civil and political rights and economic, social, and cultural rights; and national responsibility for implementing internationally recognized human rights. National implementation of internationally recognized human rights is a vital aspect of the Universal Declaration model as well. The model allowed states with complete sovereign authority to implement human rights within their territory. While creating norms has been internationalized, the implementation of them remained exclusive to states. In the contemporary world, state is the essential institution for effectively implementing internationally recognized human rights.

The empirical claim of the Universal Declaration model is that human rights have become a hegemonic political discourse, or what Mervyn Frost calls "settled norms" of a
contemporary society, principles that are widely acknowledged as authoritative within the society of the state.

Along with Donnelly, Ignatieff also acknowledges the importance of international involvement in the advocacy of universally accepted human rights. Ignatieff claims the pressure that human rights advocates can bring to bear on state actors has forced most states to accept that their foreign policy must at least pay symbolic attention to principles, as well as interests. Human rights considerations are now increasingly making the claim that in a case where values point one way and interests another, values should trump. The United Nations itself is starting to mirror this new reality.

At the same time there is a consensus among foreign policy makers, human rights activists, and scholars that even in the most democratic societies, wars, and certain emergency situations, such as terrorist threats, human rights be temporarily lizated or curtailed. In fact all human rights documents include derogation clauses that permit governments to limit and suspend freedom of speech, due process, freedom of liberty and security. For example, Article 15 of the European Covenant of Human Rights as well as Article 4 of the International Covenant on Civil and Political Rights permit the suspension of a person's right to liberty and security in the course of public emergencies or national security threats. Naturally, it is precisely the cause of the permissible limitations of human rights.


43 Ignatieff, p. 11
Creating a balance between national security, democracy, and human rights is a difficult task, most especially in a national emergency situation. The terrorist attack against the United States on September 11th threatened the freedoms of the nation in a concrete manner. However, the majority of new, restrictive legal measures have changed the balance between upholding personal freedoms and the government’s need to protect national security can serve to threaten these freedoms even more in the United States and throughout Europe. Overwhelming weight has been given to national security needs, leaving human rights behind.\textsuperscript{44}

2.3 Literature Review

The academic/scholarly response to the anti-terror laws, and policies enacted in the aftermath of September 11, 2001, has focused on precisely this question: How to balance human rights, civil liberties and national security.

One of the most vocal supporters of civil liberties David Cole, illustrates the great danger of the erosion of civil liberties in the war against terrorism. The main focus of his argument is aimed at the administration’s double-standard, which while publicly and vocally supporting the rights of Muslims in America, is at the same time legally targeting them. Cole states that the government’s newly implemented provisions are wrong as a constitutional and normative matter, counterproductive in terms of increasing security, and likely to lead to further attacks on citizens’ rights. He further argues that this

\textsuperscript{44} Gross.
double-standard, which the Bush administration has relied upon undermines the legitimacy of the war on terrorism, and decreases the likelihood of a meaningful cooperation from the targeted communities. Relying on historical evidences, Cole asserts that to deprive immigrants of their fundamental rights is just a precedent that can easily be extended to citizens.

Of all the writers, Cole presents the most profound work on the government’s anti-terrorism provisions. While the majority of the authors “only” describe the new policies and their potential devastating consequences, Cole goes a step further and criticizes the administration’s the differing legal treatment of foreign nationals and US citizens. He emphasizes that while US citizens and foreign nationals need not be treated identically in every respect, even in a war or emergency situation, every human being regardless of his/her citizenship is entitled to enjoy fundamental rights, such as the rights of freedom of speech, religion, association, due process, and equal protection.

He warns that most constitutional rights are not absolutes. They can be overridden or altered by the administration’s need or interests. “While the definition of most constitutional rights contains an implicit consequentialist balance, the balance should be struck equally for all --- even if it might appear convenient or politically tempting to strike it differently for some.”45 Cole claims that the government should not “cheat on the balance by drawing the line differently for non-nationals and citizens.”46 For Cole, the greatest challenge in the war on terrorism, with regard to preserving basic human rights, is to design and implement effective immigration policies which would satisfy the

45 Cole, “Enemy Aliens” p. 222
46 Ibid, p. 222
American public, rather than questioning differing legal protection of human rights for citizens and foreign nationals. "...the true test of justice in a democratic society is not how it treats those who have no voice in the democratic process. How we treat foreign nationals, the paradigmatic other in this time of crisis, ultimately tests our own humanity."

William Schulz, another prominent human rights advocate uses a human rights framework as a means to critique post September 11 U.S. policies. Schulz in his essay demonstrates the significance of respecting human rights in a time of uncertainty. He argues that human rights have become dispensable in the interest of national security, which tainted the integrity and legitimacy of the international human rights regimes. Schulz attacks the U.S. government’s disrespect and disregard for human rights by looking at the secret detention and interrogation that many Muslim and Arab immigrants endured after the catastrophic terrorist attacks. Schulz offers careful analysis based on moral principles, international law, and concrete case studies, and makes a strong argument on the importance of the government’s cautious examination of the right balance between security and human rights. According to Schulz, the only possible approach to win the war on terrorism is “to employ tactics that respect human rights in the war against those who would destroy them.” However, one of the reasons why the U.S. administration is so hesitant to punish the ones who have cracked down on human

47 Ibid; p.227


49 Ibid; p. 83
rights is because U.S. officials know they have compromised human rights here at home, Schulz added.

Jack Donnelly claims that no matter how important human right concerns are, national security will always rank higher. Donnelly, along with several scholars agrees on the importance of finding the right balance between human rights and national security. He states that the nation needs to create rules for trade-offs, and take the effort seriously. With the lack of consistent attempts, human rights will never be integrated into foreign policy, but sacrificed in the name of foreign policy. 50

Timothy Lynch claims that shortly after a terrorist attack, it is typical of government officials to propose and implement rigorous and restricted policies, which curtail the privacy and civil liberties of the people. 51 According to him, many policymakers believe that the only method to deal with terrorism is to pass strict laws, spend more money on security, and sacrifice civil liberties. Lynch asserts that it would be a disservice to the American people to decrease their privacy and liberties for nothing more than an illusion of increased security. In many policymakers’ minds, altering the balance between liberty and security is invariably viewed as the “solution” to the terrorist problem. Lynch disagrees with the expansion of government power and along with Schulz suggests for policymakers carefully examine the extent to which liberty in the United States deteriorated, and whether it is necessary to restrain more privacy and

50 Donnelly, p. 248-49
liberty in the name of security. Lynch also states that, although policymakers cannot control the actions of terrorists, thereby guaranteeing the safety of Americans from terrorist attack, they can keep full control over the extent of government power.

Donnelly, Schulz, and Lynch place great emphasis on the significance of establishing the right balance between security and human rights in times of uncertainty, such as the war on terrorism. Each scholar agrees on the simple fact that creating and implementing restricted laws and policies, which result in the curtailment of fundamental human rights and civil liberties will not be successful at combating terrorism. They all emphasize the "wise balance" between human rights and national security, however, do not offer a specific explanation on how that "wise balance" should be constructed. I suspect the reason these authors were unwilling to offer solutions to the problem is that they did not want to be labeled "unpatriotic" by the current administration. To avoid harassment and scrutiny, they simply stated the facts with some hidden criticism of the new polices and laws, without offering any solution to the problem.

Other writers, lawyers, and civil rights activists, such as Barbara Olshansky, Philip Heymann, Kate Martin, and Christopher Edley have been very outspoken about the government's anti-terrorism measures, policies and laws. While Olshansky's main concern regards the creation of a "system of secret proceeding" authorizing the President to have totalitarian power, Heymann's concerns are the widespread proliferation of those severe counter terrorism measures and the government's refusal to be open and honest with the public. Both Martin and Edley find the administration's "discrete provisions"
In the United Kingdom, most of the literature focusing on the connection between human rights and national security has been analyzing and critiquing the new Anti-Terrorism measures, the new citizenship law and asylum rules, and the harassment of Muslim and Arab civilians.

Similar to the United States, there are a great variety of essays written by scholars in the U.K. Sir David William states the important and impressive role of the British Court which might potentially influence the Foreign Affairs Committee of the House of Commons to recommend that the British Government press for the trial of those detained at Guantanamo Bay, and provide further information about detained British citizens. The British Court is determined to monitor and scrutinize the developments in the American courts on the subject of the illegality of detentions. William claims the biggest dilemma facing liberal democracies in times of crisis is whether it is essential for their survival to temporarily cease being liberal democracies, until the threat has passed. He asserts that “emergencies do come to an end”, but in the meantime, the court has a major responsibility to keep everything in order.52

Virginia Helen Henning analyzes, and illustrates with evidences, why the UK is such a terrorist haven. She also asserts that these evidences gave the government justification to

declare a public emergency, and as a consequence to violate several international human rights statutes.53

"The British government enacted extraordinary means to deal with the threat of terrorism due to an increased sense that the United Kingdom is a terrorist target, in part because of its close relationship with the United States. Although the focus of the campaign against terrorism since September 11 has been in Afghanistan, intelligence sources suggest that terrorist cells are operating and coordinating activities throughout Europe, including the United Kingdom. As a result, the British government believes that a public emergency exists requiring the use of extraordinary measures to detain suspected international terrorists in order to protect the nation from terrorism."54

The United Kingdom believes that it is not only a potential target of international terrorism, but also an organizational base of terrorist activity. A recent study by the International Institute for Strategic Studies indicates three possible reasons why the United Kingdom is labeled as a terrorist haven. Firstly, there is a large immigrant community, which assimilates easily into British society, enabling foreign terrorist suspects to go unnoticed, and permitting them to maintain secrecy of their activities. Secondly, people’s concerns about the protection of civil liberties makes law enforcement agencies’ job more difficult to investigate and identify suspected activities quickly. Thirdly, investigations have disclosed that the U.K. is a recruiting center for radical Muslims, who are distributing videos produced by bin-Laden-backed organizations. 55


54 Ibid

55 Ibid

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While the previous authors simply talk about Britain’s situation, David Jenkins compares three Western democratic states, the US, the UK, and Canada. He analyzes each country’s anti-terrorism laws and policies and points to the importance of shared security concerns, and comparative and harmonized anti-terrorism laws. According to Jenkins it is absolutely essential for these countries to cooperate with one another so that each government can be assured the laws are representative of, and compatible with, free and democratic societies.  

He concludes that "... the consideration of anti-terrorism measures in the law should not be unduly constrained by a domestically oriented mindset, but should instead take place within a broader transnational context."  

U.K. newspaper writers are also disagree with the government’s new Anti-Terrorism provisions, and express their concerns on what these draconian measures might do to the protection of basic human rights and civil liberties. Their main goal is specifically to inform readers about the drastic measures implemented by the administration in the name of a “state of emergency.”

Jamie Barton introduces a new concept, the notion of “limited democracy,” which he believes could characterize the current political system of the U.S. and that of the UK. Under this new term, legal protection for citizens is under threat, likewise fundamental human and civil rights of foreigners and refugees. Unfortunately, “limited democracy” is penetrating to increasing numbers of western countries, such as Spain, Italy, and France.


57 Ibid; p.
Barton further argues that the government’s new extreme measures to combat terrorism, such as imprisonment of foreigners without valid evidence, collection of personal data on citizens and foreign nationals without proof of guilt or crime, contradict the ideas and principles of civil liberty and individual privacy rights that most Western governments advocate. Barton is concerned about Western governments’ increasing law enforcement power, and its negative effects on the future of international human rights. He explains that while abuse of human rights and civil liberties was experienced only in authoritarian regimes, such as China, India and Cuba, now the newly empowered, seemingly democratically elected administrations have been executing repressive measures, similar to the ones that have been used by Communist regimes.58

Ann Treneman, a respected British journalist, also strongly criticizes the human rights violations of child asylum seekers and attacks the “chaotic, and in many ways incompetent” asylum system.59 She also raises her voice about indefinite detention of children of asylum seekers. Alan Travis in one of his articles describes the important function and contribution of the Special Immigration Appeals Commission (SIAC) to the equal protection of basic human rights. Travis also mentions that the administration used “public emergency” as an excuse to derogate article five of the European convention on human rights which bans detention without trial.60

Writers for Muslim newspapers such as “The Muslim News” have a different approach in response to 9/11. While they unreservedly condemn the evil acts of September 11, they feel obligated to express their concerns about the draconian measures against immigrants, especially Muslims, and the government’s double standards towards them. Their aim is to illustrate for the readers how the Muslim community has been coping with the administration’s mistreatment, discrimination, and scrutiny, and what they would like to see take place in the future.  

The issue of discrimination, and the growing prejudice against Muslims and Arabs has even attracted international conferences.

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62 In these conferences, such as the St. Anthony-Princeton Conference, speakers address various important issues. They are deeply concerned about the increasing violence against Muslims since 9/11. Muslims and Arabs’ involuntary social exclusion from political, economic, and cultural institutions, and Islamophobia, and religious discrimination. These conferences and the presence of some Muslim papers are equally important to send the message to the public and the government as well. St. Anthony’s-Princeton Conference, “Muslims in Europe post 9/11”, www.sant.ox.ac.uk
CHAPTER 3
LEGAL DIMENSION

The events of September 11 called for a change in the direction of a more effective means of deterring terrorism. The United States along with the United Kingdom moved rapidly to evaluate their own security measures and to create new laws cracking down on terrorism.

3.1 Counter-terrorism measures in the United States

The Bush Administration has proposed a major restructuring of the federal government that realigns government activities into a single cabinet-level Department of Homeland Security whose primary mission would be to detect and deter terrorism. Under the Administration’s plan, visa processing would be brought within the Border of Transportation Security division so that the “new department would consolidate the legal authority to issue visas to foreign nationals and admit them into the country.”\(^{63}\) The State Department, working through US Embassies and Consulates abroad, would continue to administer the visa application and issuance process. These proposals would "unify the policy authority on who can receive visas in the new Department.”

Kathleen Campbell Walker presented specific immigration proposals on behalf of the American Immigration Lawyers Association (AILA).\(^{64}\) She believed that the United

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States needed to enhance its security without harming the nation’s internationally based economy, the individual rights preserved by the Constitution, or America’s tradition as a nation of immigrants. The AILA strongly supported the passage of Enhanced Border Security and Visa Reform Act and the Border Security Act.

The organization proposed that immigration functions needed to be reorganized outside of the proposed Homeland Security Department in order to best contribute to the United States’ national security. It also believed that immigration functions needed to remain separate from this newly proposed, large federal bureaucracy, and suggested the establishment of an Undersecretary for Immigration Services and Security.  

To diminish the possibility of another terrorist attack directed specifically at the US, the government developed the USA Patriot Act. This Act is more than three hundred pages long, and was signed into law by President Bush on October 26, 2001, intended to provide security and law enforcement agencies with tools to fight terrorism. It made several changes to criminal, immigration, banking, and intelligence law. These changes were made with no public discussion of whether this fundamental shift to an intelligence rather than law enforcement model would be effective in the war on terrorism.

64 AILA is the national association of nearly 8,000 attorneys and law professors, who represent the entire spectrum of individuals subject to the US immigration laws.

65 The primary responsibilities of the Undersecretary for Immigration Services and Security would be to secure the US borders, prevent the entry of terrorists, and administer the Customs laws of the United States; administer the immigration and naturalization laws of the United States, including establishing the rules governing the granting of visas and other forms of permission to enter the US to individuals who are not citizens or lawful permanent residents; enforce our immigration laws within the interior of the United States; ensure oversight of our immigration laws and the protection of civil and due process rights in carrying out these responsibilities; and ensure the speedy, orderly, and efficient flow of lawful traffic and commerce in carrying out these responsibilities.
The USA Patriot Act first expanded the secret surveillance authorities under Foreign Intelligence Surveillance Act, (FISA). It removed the constitutionally mandated requirement that these extraordinary powers be used only for foreign intelligence purposes, not when the government is in search of making criminal cases. The FISA allows wiretaps and secret searches without probable cause to assume that a crime was being committed. The USA Patriot Act expanded the definition of terrorism, instead of carefully defining those criminal acts of international terrorism. The Act greatly enhanced the power of federal agencies, such as the CIA and the FBI. It gave the CIA the benefit of the grand jury’s powers with none of the protection of the criminal justice system, and authorized the FBI to conduct electronic surveillance and secret searches without full probable cause that a crime has been or is about to be committed. The USA Patriot Act treats foreigners and citizens differently. Characteristically most of the new and severe provisions are principally directed at noncitizens. “It makes foreign nationals deportable for wholly innocent associational activity, excludable for pure speech, and subject to incarceration on the attorney general’s say-so, without a finding that they pose a danger or a flight risk.”

The USA Patriot Act also further increases the authority of the Attorney General to detain and deport non-citizens with little or no judicial review. The Attorney General may certify that he has “reasonable grounds to believe” that a non-citizen endangers national security. The Attorney General and Secretary of State are also given the authority to designate domestic groups as terrorist organizations, and deport any non-citizen who belongs to them.

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66 Ibid; p.58
“For U.S. citizens, terrorism has a limited definition that roughly corresponds to a common understanding of the phenomenon, whereas for foreign nationals Congress has labeled as “terrorist” wholly nonviolent activity and ordinary crimes of violence.”

The Act also gave the Secretary of Treasury regulatory powers to combat corruption of US financial institutions for foreign money laundering purposes, strengthened America’s borders through expanded border patrolling, and established a counterterrorism fund.

The administration time after time has validated its anti-terrorism measures as an intelligence operation created to prevent further attacks not to prosecute criminal violations. Government officials have argued that the secret arrest of hundreds of individuals without probable cause and their indefinite detention when charged only with minor immigration violations are an essential piece of a larger intelligence “mosaic.”

John Edwards, Senator of North Carolina, and one of the former democratic candidates for the 2004 Presidential Election has been strongly critical of the implementation of the USA Patriot Act. In a press release, in June 2003, he stated that “We cannot in the name of the war on terrorism let people... take away our rights, our liberties, and our most basic freedoms.” At a speech at the Center for Strategic and International Studies (CSIS) Edwards proposed for a creation of special courts with independent civilian judges, who

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would make decisions based upon hearing evidences from both the detainees' lawyers and governmental officials.

In addition to providing domestic law enforcement to potential terrorists who already are in the country, the Justice Department developed a special registration program called the National Security Entry-Exit Registration System (NSEERS) The Department of Justice designated twenty-five countries, including Saudi Arabia, Iraq, Lebanon etc., whose citizens or residents are regarded "an elevated national security risk" to the United States. 70 Under the, National Security Entry-Exit Registration System all nationals of twenty-five countries are required to undergo fingerprinting, photographing and registration upon arrival and departure at the port of entry. In addition, the system includes exit controls that will enable law enforcement officers to remove foreign visitors who overstay their visas. "This system will expand substantially America's scrutiny of those foreign visitors who may present an elevated national security risk. And it will provide a vital line of defense in the war against terrorism." 71 Statistics released in the Washington Post in March 2003, show that nearly twelve percent of the men who have registered under the government's special program for temporary visa holders from Muslim nations have been charged with visa violations that could result in their deportation. "The registration program for males sixteen years and older has touched off

70 http://www.usdoj.gov, Attorney General Prepared Remarks on the National Security Entry-Exit Registration System. The following countries are also part of the US government's National Security Entry-Exit Registration System: Afghanistan, Algeria, Bahrain, Bangladesh, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Morocco, North Korea, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates, Yemen,


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confusion and fear among visitors. Some have chosen not to sign up, and some have fled the country." 72

In March 2003, the Bush administration announced yet another program targeted at foreign nationals from Arab and Muslim nations. All foreign nationals from thirty-three nations who sought political asylum would be automatically detained once they enter the United States, and would stay in detention until their asylum cases were determined, a process that normally takes a minimum of six months. The administration refused to identify the countries, describing them solely as countries where Al Qaeda or other terrorist groups are known to operate. However, civil rights groups were able to obtain the list from government officials unofficially, and these countries match the list of countries subjected to NSEERS. 73

On November 13, 2001, President George W. Bush, in his capacity as commander in chief, established military tribunals to try noncitizens, whom he deemed to be suspects in the involvement of the brutal attacks on September 11, 2001. White House officials said that military tribunals would let the government try suspected terrorists quickly, efficiently, and without jeopardizing public safety, classified information, or intelligence-gathering methods and operations. The officials also announced that the tribunals would protect American jurors, judges and witnesses from the potential dangers of trying accused terrorists. According to President Bush’s executive order, the military tribunals would apply to any foreign individual who is a member of Al-Qaeda, has engaged in or

72 Lardner, George, “Registration May Face Deportation” Washington Post, 27 March 2003

aided acts of terrorism against the United States, or has "knowingly harbored" such a person. Under the Military Order there is no time limitation required for informing those who are detained, and no judicial review exists for those who are being held. The military order's jurisdiction exceeds beyond Osama bin Laden, and even Al Qaeda.

Even though the Military Order is a violation of the Geneva Convention which states that all combatants are to be treated presumptively as "privileged" and held as "prisoners of war," the Bush Administration claims it is constitutional, politically necessary, and morally appropriate. Vice President, Dick Cheney supported the order and claimed that "somebody who comes to the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans -- men, women, and children -- is not a lawful combatant ...... They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process...."

Dick Cheney reassured American citizens that their rights are not in jeopardy. Five months after the Vice President's speech, however, the military order was extended to US citizens as well. Yaser Hamdi, and Jose Padilla, both American citizens, were held under the same conditions as the foreign nationals held in Guantanamo Bay. They were both held indefinitely, without charges, without trials, without access to a lawyer, and for all practical reasons, incommunicado. 75

"There has been no sweeping claim, in living memory, than the Bush administration's assertion of power to hold any American in detention forever, without a trial, and without access to counsel, simply by declaring him an enemy combatant" 76

Prisoners of war have the rights to be treated humanely, regardless of their race, color, religion or faith, sex, and birth of wealth. The wounded and sick have the rights to ask and receive medical care by an impartial humanitarian body, such as the International Committee of the Red Cross.

74 Prisoners of war have the rights to be treated humanely, regardless of their race, color, religion or faith, sex, and birth of wealth. The wounded and sick have the rights to ask and receive medical care by an impartial humanitarian body, such as the International Committee of the Red Cross.

75 Ibid; p.3

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The Military Order provides the President complete authority to reach whatever final decision he considers proper. Under this new system, individuals can be arrested, detained indefinitely without being charged, tried in secret before a military panel on evidence that may not be examined or tested by a fair jury, convicted by the two-thirds vote, sentenced to death, and executed without Congress, the judiciary, or the American public ever knowing anything about any aspect of the proceedings. This Military Order sacrifices those constitutional protections that are intended to prevent the conviction and punishment of innocent people. “The U.S. has set up a third system, whereby they call everyone an enemy combatant, for which there is no legal designation, and then make up the rules as they go along. It is an utterly lawless situation”, said Michael Ratner, a lead civil liberties lawyer.

The president’s executive order has been heavily criticized as an unconstitutional expansion of executive authority with the potential for significant abuse. The potential defendants --- a person who harbored someone, who aided someone in committing an act in preparation for an act of international terrorism that was designed to have an adverse effect on the US economy --- could be sentenced to death in a trial held entirely in secret. There is no right to appeal, no protection against forced confession, no condition for access to counsel, and no presumption of innocence.


78 Ibid; p. 32-35
3.2 Counter-terrorism Measures in the United Kingdom

In the United Kingdom, Home Secretary David Blunkett attempted to give the government exceptional powers to fight terrorism. However, his law proposals, such as increased police powers have suffered a series of defeats in the House of Lords. 79 Similar to the US, the British administration has developed and implemented several new immigration laws. Although, unlike the Bush administration, which has concentrated more on developing stricter immigration policies, the British administration has focused more on creating new asylum laws. “Sixty new cases a week are coming from asylum seekers denied support under a change in the law that requires them to claim asylum ‘as soon as reasonably practicable’ or forfeit the right to financial support and accommodation” 80. The number of asylum applications have been cut by forty five percent since the Nationality, Immigration and Asylum Act was passed in 2002. 81

Although the terrorist attacks by the Al Qaeda network took place on US soil, the UK government enacted new anti-terrorist legislative measures. In asserting the existence of a public emergency in the UK, the United Kingdom’s Anti-Terrorism, Crime and Security Act was passed on December 14, 2001. The Act permits, among other things, the prolonged indefinite detention of foreigners certified as international terrorists on determination by the Home Secretary; the denial of the right to seek asylum if so certified; and severely limited appeals venues.


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The Anti-Terrorism Act permits the arbitrary detention of persons suspected of terrorist activity as well as the denial of the right to seek asylum, the exclusion, and indefinite detention of certain individuals without adequate safeguards. Sections 21 through 23 of the Act allow the government to take action against foreign non-nationals whom the Secretary of State for the Homeland Department suspects of terrorist activity. Under Section 23, “a suspected international terrorist may be detained despite the fact that his removal or departure from the United Kingdom is prevented” by international law. Under the Act, the definition of “a suspected international terrorist” is vague. It states that a person is a suspected international terrorist if he/she has connections to a person who is a member of or belongs to an international terrorist group. Broad, undefined terms could result in findings of “guilt by association” for persons sharing the same political ideology, nationality, ethnicity, social grouping, or even family with persons who commit acts of terrorism.

This comprehensive anti-terrorism law also empowers the police and the British army to arrest, enters homes, and search and seize evidence without a search warrant. Security services are also authorized to go through personal information held by public authorities, such as medical records, bank statements, school records, tax returns, and inland revenue, even though no crime has been committed or suspected. The Act, which will be extended for up to five years is an extension of the draconian laws that govern British military and paramilitary powers in Northern Ireland, the laws that have triggered protests and petitions in English courts. The United Kingdom’s Anti-terrorism, Crime and Security Act is an example of the British policy makers’ fear of terror and also an indication of increasing disregard of civil liberties and basic human rights.
In 2002, the Home Secretary David Blunkett legislated for the most radical reforms of British laws on nationality, immigration, and asylum. By April 2003, most of the major strands of that reform were implemented. More than two thirds of the ATCS is now in force. Under the new Nationality, Immigration and Asylum Act there are severe measures to crack down on illegal immigrants, to tighten significantly citizenship provisions, and to tackle widespread abuse of the asylum system. 82 Mr. Blunkett said:

"With the major provisions of the Nationality, Immigration and Asylum Act now in force, we expect to see further progress on the encouraging reductions we saw at the end of last year in the number of asylum applications and substantial further improvements since. The measures which come on line today will help to deal with the current, frequently farcical, situation whereby people we have determined not to be in need of protection lodge time wasting or late appeals in order to frustrate the proper removal process."83

Under the new law, asylum seekers considered to have applied for asylum late were not provided with any support, such as food, shelter, clothes, and medication. As a result of this new law, asylum seekers, some physically injured or psychologically disturbed had to line up for hours in a bitter cold, sleep under rough circumstances because no assistance was given. Section 55, which penalizes late claimants, was one of the most severe measures introduced by government amendment as the Bill went through the parliament. Other revisions disentitled refugees from social service assistance and support, re-introduced the notorious "white list" of "safe" countries of origin abolished in 1999, and for the first time removed in-country appeal rights from asylum applicants whose claims the Secretary of State thinks "clearly unfounded". Since the "white list"

82 Henning, p.2
83 Home Office Press Release: "Major building blocks of Immigration Reform now in place" April 14th, 2003

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provision came into force, asylum seekers whose claims were considered "clearly unfounded" had no right to appeal before removal from the UK. The Nationality, Immigration and Asylum Act contains further policing powers for immigration officers, and information gathering by the Home Office. The Act allows the screening of all asylum seekers for "terrorist" connections, which gives security services a central role with respect to visa, asylum and residence applications. It also gives immigration officers all the powers of police officers to arrest those believed to be in violation of the law, to search people's homes and business premises, to use "reasonable force", and to detain on suspicion. To obtain British citizenship, candidates not only have to possess a clean criminal record and good knowledge of the English language, but also need to have an understanding of democratic values assumed to be uniquely British. British citizens can have their citizenship taken away if they do anything the Home Office considers seriously prejudicial to British interests.

After September 11, 2001, both the US and the UK administration believed that severe counter-terrorism measures needed to be implemented and enforced to prevent another terrorist attack. Provisions of the USA Patriot Act, Military Order, and the UK Anti-Terrorism, Crimes and Security Act are representing some of the administrations' most severe policies, such as indefinite detention, secret hearings, and secret trials created in the last five decades, which resulted in worldwide criticism.
3.3 Violations of Human Rights Guarantees

Human rights treaties including those that the United States and the United Kingdom ratified clearly state that all persons are entitled to basic human rights by virtue of their humanity. They also provide that the rights of due process, political freedoms, and equal protections are owed to every individual regardless of nationality. 84

However, the USA Patriot Act, and the Military Order in the United States along with the UK Anti-Terrorism, Crime and Security Act in United Kingdom, in the name of increased national security contravene fundamental international, and in the case of the UK, European human rights guarantees.

The most comprehensive list of human rights guarantees, ratified by over one hundred states is the Universal Declaration of Human Rights. (UDHR) It is the leading articulation of the basic human rights that any human being may claim. 85 Professor Richard L. Lillich describes it as the “Magna Carta of contemporary international human rights law.” It is founded on “the inherent dignity and ... the equal and inalienable rights of all members of the human family.” 86 The Universal Declaration clearly guarantees the rights of due process, political expression and association, and equal protection. Article 7 of the Declaration states that

84 Cole, p.14
85 Schulz, p.5
86 Cole, p. 214
“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

It also guarantees non-nationals, among other rights, the right to life, the right not to be objected to arbitrary arrest or torture, due process, equality before the courts, and the freedoms of thought, opinion, conscience, religion, and expression. Articles 9 and 10 are against arbitrary arrest or torture. Article 9 states that “No one shall be subjected to arbitrary arrest, detention or exile.” Furthermore, Article 10 holds that “Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Articles 18 and 19 clearly express the rights for freedom of thought, expression, and religion. Article 18 holds that

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone, or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

while Article 19 states that

“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

One of the most important human rights documents is the International Covenant on Civil and Political Rights, which the U.S. ratified in 1992. It obligates state parties to the Covenant to protect the due process rights of all persons subject to any criminal proceeding. The Military Order raises significant concerns regarding whether the U.S. will comply with the ICCPR. Like other agreements guaranteeing the protection of
human rights, the ICCPR allows a nation to deviate from some of these obligations in times of public emergencies. However, the Covenant also provides that certain rights and freedoms are fundamental that they may not be suspended even in a time of public emergency. These rights include the right to life (Article 6), "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life," the prohibition against torture and cruel, inhuman and degrading treatment or punishment (Article 7),

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation,"

the prohibition against slavery (Article 8), "No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.", the prohibition against convictions based on retroactive laws (Article 16), "Everyone shall have the right to recognition everywhere as a person before the law," and the right to religious freedom (Article 18),

"Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

Furthermore, the Military Order sharply restricts the right to liberty and security of the person as guaranteed in Article 9 of the Covenant. The Article clearly declares that

"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."

The Military Order also limits the right to a fair trial as guaranteed by Article 14.

As Article 14 states,

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at
law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (order public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

Under Article 14, an individual detained on a crime charge must be brought quickly before a judge or officer and is usually permitted to bail pending trial. The trial must be held in a reasonable time frame, and anyone who is detained has the right to have the lawfulness of the detention decided by the court. However, under the President’s Military Order there is no requirement that individuals detained need to be told the reason for their arrest, or the charges against them, or that they must be brought before a judicial authority to determine the lawfulness of their detention. As a matter of fact, the Order does not allow a detainee to challenge the lawfulness of his detention, makes no provision for bail, and does not require that trials be held within reasonable period of time after the commencement of detention.

Section 3(d) of the Military Order states that detainees will be able to exercise their religion only to the extent “consistent with the requirements of such detention.” This section of the Order violates the nondiscriminatory requirements of Articles 2,

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”
Moreover, the Military Order specifies that the military commission system will be relevant only to non-US citizens. This discrimination on the basis of national origin violates Article 4 in the Covenant, which asserts that

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

In May 1976, The United Kingdom ratified the International Covenant on Civil and Political Rights. However, the government’s new Anti-Terrorism, Crime and Security Act 2001 violates some articles of the Covenant. Under part 4 of the ATCSA, a suspected international terrorist, a non-UK national can be detained without charge or trial, for unspecified and potentially unlimited duration, if the concerned individual’s removal or deportation from the UK cannot be effected. These measures of the ATCSA are inconsistent with the right to liberty and security as guaranteed under Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

“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.”

87 Olshansky, p.52
90 Ibid
Article 9 of the ICCPR provides key practical guarantees to ensure that no person is detained arbitrarily. It is important to note that the prohibition against arbitrary detention has risen to the level of customary law, meaning it is such a fundamental and widely accepted principle that even states that have not ratified regional or international human rights instruments are obliged to observe the prohibition.  

Article 14 of the ICCPR, stating that “All persons shall be equal before the courts and tribunals”, and “everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law” is also being violated by the ATCSA.

For more than fifty years one of the most highly respected covenants has been the Geneva Conventions. The four Conventions along with two Protocols regulate the conduct of war and the treatment of war prisoners. After the Second World War, the Geneva conventions required that all combatants be treated presumptively as “privileged” and held as “prisoners of war”. They are entitled to be held in humane conditions until the war ends in order to prevent them from rejoining aggressive forces.

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92 185 countries are parties to the four conventions, which constitute one of the most widely agreed-upon set of international norms.

93 Those who violate the laws of war can be classified as “unprivileged” combatants. They may be tried and punished by special military tribunals for their war crimes. If an individual’s status is not clear, the Geneva Conventions require the military to provide a hearing before a “competent tribunal” to decide on the person’s status.
Over the course of the Afghan war, hundreds of prisoners were taken into custody and transferred to the US military base at Guantanamo Bay, Cuba, where they have been held virtually incommunicado. Under international law, the state is legally responsible for the human rights of persons in all areas where it exercises "effective control". The Bush administration claimed that all those sent to Guantanamo Bay are terrorists, the "worst of the worst." The US administration has not allowed family members, attorneys, or human rights groups to visit the base, or the detainees. Detainees were labeled as "enemy combatants" with no right to any judicial review of their detention. Since prisoners were taken in during the combat the detainees should have been considered prisoners of war and therefore subject to Article 3 of the Geneva Convention IV, which states,

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."

Under the Convention these captured prisoners could not be prosecuted merely for participating in hostilities, and would need to be released at the end of the war. If they are declared prisoners of war, they are subject to court martial just as American soldiers would be for the same crimes, not for special military tribunals. In case if there is any doubt who or who is not a prisoner of war, the decision has to be referred to a "competent tribunal" such as an international or civilian court on a case-by-case basis. The procedures set up by the Geneva Conventions have been overridden by the decree of the president. At the beginning of the war against the Taliban, President Bush asserted that
none of the detainees needed to be treated as prisoners of war under the terms of the conventions, therefore there was no need to determine their individual status. 94 Besides Article 3, Article 75 of the First Additional Protocol to the Geneva Convention was violated as well. The Article states that "persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the conventions" that is, have not been declared prisoners of war, still have right to such things as a trial, the right to mount a defense to be presumed innocent, to not be compelled to testify against themselves and to examine witnesses. 95

While Great Britain does not have a Constitution it has incorporated The European Convention on Human Rights (ECHR) into its domestic law by statute. The United Kingdom, as a member of the Council of Europe and one of the original contracting parties to the Convention for the Protection of Human Rights and Fundamental Freedoms made a commitment to the protection of basic human rights and democratic principles. However, it is the only member nation forced to derogate from the Human Rights Convention because of the implementation of a new anti-terrorism law. The UK declared a state of emergency, used it as an excuse to temporarily suspend its obligation under that part of the Convention.

To avoid the reoccurrence of the human rights atrocities of the Second World War, the Human Rights Convention obligates the member countries to "secure the rights and freedoms" of the Convention to everyone within their jurisdictions. The Convention

95 Schulz, p. 96
expresses the idea that promoting individual rights and freedoms above those of the state will best protect democracy. Called "the most advanced international system for protecting human rights in existence today," the Human Rights Convention has an important impact on the lives of residents in Europe. 96

Under the ECHR everyone is entitled to fundamental rights protection regardless of his or her nationality. Article 5(1) states that "Everyone has the right to liberty and security of person". "Fundamental rights are owed to persons as a matter of human dignity and should be honored no matter what form of government a particular community chooses to adapt." 97

By implementing the Anti-Terrorism, Crime and Security Act, the British government derogated from the protection against detention without charge or trial, which is provided by Article 5 of the European Convention of Human Rights.

"No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (...) 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." 98

96 Henning, p.2-3
97 Cole, p.215
The detention of a non-national without the intention or authority to deport him also violates Article 5 of the Human Rights Convention, because the Convention only permits detention of non-citizens if deportation proceedings are in progress. 99

Under the Home Secretary, David Blunkett’s new orders suspects in the UK have been arrested indefinitely, including those foreign nationals who have been incarcerated without charge or trial at maximum security prisons for as long as 18 months. 100

Investigators from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment took an emergency visit to some of the prisons where detainees have been held for several months. According to them the condition and the kinds of treatment that interns have been receiving are not acceptable to Western democratic norms, and therefore, raise a number of serious concerns. “All are being held in poor conditions and under harsh regime normally reserved for prisoners in a high-security jail --- despite the fact that they face indefinite detention on the basis of suspicion, rather than charge or conviction.” 101

The types of torture and humiliation that all interns have to face every day violate Article 3 of the European Convention of Human Rights, which asserts, that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

99 Hennings, p.3


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While states may not derogate from the entire Convention, in a public emergency situation, Article 15 permits member states to derogate from the provisions of Article 5. \(^{102}\)

The UK government justified --- and continues to do so --- the need for the ATCSA by claiming that the UK is facing a "public emergency threatening the life of the nation." It derogated from Article 5(1)(3) of the ECHR in order to permit the indefinite detention without charge or trial of foreign nationals who allegedly pose a threat to national security and whom the government is unable to remove or deport, under Article 3 of the ECHR. Under Article 15(1) of the ECHR, derogation from the Convention is legitimate if the nation faces a public emergency. \(^{103}\)

The Secretary of States claims that terrorist threat exists to the United Kingdom from individuals, particularly foreign nationals present in the United Kingdom, who are suspected of having links with members of organizations involved in international terrorism. The statement of Jack Straw indicates a situation of serious concern, but does not provide evidence that suggests serious and immediate threats to "the life of the nation" or to "the organized life of the community." In contrast, prior to the

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\(^{102}\) the Convention contains a public emergency exception. The exception states that "in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligation under this Convention to the extent strictly required by the exigencies of the situation."

\(^{103}\) Article 15(1) of the ECHR states: "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."
implementation of the ATCSA, the Secretary of State announced that "[t]here is no immediate intelligence pointing to a specific threat to the United Kingdom...".\(^{104}\)

In examining the current situation, critics assert that the present condition in the United Kingdom does not qualify as a public emergency requiring derogation from the Human Rights Convention. The main reason is that the terrorist attacks occurred in the United States, not in the United Kingdom. However, others who support the implementation of the Anti-terrorist Act argue that terrorism not only damages the location where the attack occurs but also the areas in which the terrorist plan and organize attacks. The United Kingdom also has reason to suspect that terrorist organizational activities taking place within its border will strain and harm relations with neighboring countries and other allies based on the criticism that Britain has become a terrorist haven.\(^{105}\) This action of the British government sends an extremely worrying signal to other European states. It proves that "rights obligations are easily dispensed with when the specter of security vulnerability is raised."\(^{106}\) The Court of Human Rights warned the member nations not to adopt measures that will demolish democracy in an effort to fight terrorism. However, the United Kingdom is certain that the extraordinary detention power of the Anti-Terrorism Act provides the only means to protect the country from the threat of suspected terrorism.\(^{107}\)

\(^{104}\) http://web.amnesty.org

\(^{105}\) Ibid, p.3


\(^{107}\) Ibid;
In the United States, the erosion of sections of the Bill of Rights quickened when the President signed the USA Patriot Act on October 26, 2001. With Attorney General John Ashcroft insisting on the crucial need for speed, the House passed the 342-page document by a vote of 356 to 56, although few had the chance to read it. Several members later said that parts of the new law seemed unconstitutional, but in view of the coming elections, they did not want to be attacked as “unpatriotic” by their opponents. In the Senate, only one senator, Wisconsin’s Russ Feingold, voted against the USA Patriot Act. The USA Patriot Act violates numerous articles of the US Constitution. The First Amendment to the Constitution of the United States is the best-known provision of the Bill of Rights. It states,

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

It prohibits Congress from making any laws that abridge or restrict freedom of religion, freedom of speech, freedom of the press, or the right to assemble peaceably and to petition the government for redress of grievances. Under section 411 of the USA Patriot Act the Secretary of State can designate any group that has ever engaged in violent activity, whether it is Operation Rescue, Greenpeace, or People for the Ethical Treatment of Animals. The designation would render the group’s non-citizen members inadmissible to the United States and would make payment of membership dues a deportable offense.


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An essential condition of a democratic regime is that it enables legitimate criticism of the administration’s policies. The USA Patriot Act fails to meet this requirement. It allows the F.B.I. to investigate any person who has a connection with a terrorist organization without first proving that that person knowingly supports terrorist activities or that he or she was aware that the group supports terrorism. The prohibition against supporting a group is a violation of the First Amendment of the US Constitution, specifically the violation of freedom of association.  

The plenary immigration power does not validate differential treatment of foreign nationals’ First Amendment speech. Indeed the Supreme Court has Insisted that the First Amendment acknowledges no distinction between citizens and noncitizens. For more than a century the Court has recognized that the Equal Protection Clause is “universal in [its] application to all persons within the territorial jurisdiction, without regard to differences of nationality.” Several provisions of the USA Patriot Act are violating the Fourth Amendment of the U.S. Constitution that states

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Section 218 of the USA Patriot Act allows the FBI to secretly conduct a physical search or wiretap primarily to obtain evidence of a crime without proving probable cause of a crime. Section 215 grants FBI agents enormous authority to obtain an order from the FISA court requiring any person or business to produce any books, records, documents,


110 Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)


59
or items. These agents can also have access to a wide range of personal, educational, medical, and financial records without requiring evidence of a crime and without judicial review based on a very low standard that does not require credible cause of a crime or even relevancy to an ongoing terrorism investigation. In other words, agents may enter a house or an office armed with a search warrant while the occupant is away, complete a search of the property, take photographs, explore the person’s electronic communication equipments, and notify the occupant that the search had taken place at a later time. Searching without notification deeply erodes the provisions of the Constitution indent ed to protect citizens against unreasonable searches. 112 Section 216 gives law enforcement agents who obtain pen register and trap and trace orders access to “dialing, routing and signaling information.”

These sections of the Patriot Act are clear violations of the rights of privacy, presented in the Fourth Amendment. The Fourth Amendment to the Constitution requires that before the government conducts an invasive search to find evidence of a crime, it must prove to a judicial officer that it has probable cause of crime. This requirement helps ensure that wiretaps and search warrants are applied only to those likely to be involved in criminal activity, and not to others. FISA searches are not conditioned upon a showing of a probable cause of crime.

The Patriot Act impairs the right to due process, which is declared in the 5th Amendment. The Fifth Amendment to the U.S. Constitution affirms that

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

112 Gross
the land or naval forces, or in the Militia, when in actual service in time of War
or public danger; nor shall any person be subject for the same offence to be
twice put in jeopardy of life or limb; nor shall be compelled in any criminal case
to be a witness against himself, nor be deprived of life, liberty, or property,
without due process of law; nor shall private property be taken for public use,
without just compensation."  

Section 421 of the Patriot Act permits indefinite detention of immigrants and other non-
citizens. There is no requirement that those who are detained indefinitely be removed
because they are terrorists, and no requirement that indefinite detainees ever be given a
trial or a hearing in which the government would have to prove that they are in fact
terrorists. Other important procedural protection would not apply either, such as the
requirement of proof beyond a reasonable doubt or proof by "convincing and unequivocal
evidence."

The fact the right to appeal a conviction is restricted is a gross encroachment of due
process to which the suspect is entitled prior to being deprived of his liberty. According
to the Attorney General, these provisions "are vital preventing, disrupting, or delaying
new attacks. It is difficult for a person in jail or under detention to murder innocent
people or to aid or to abet in terrorism."  

In criminal cases the Fifth Amendment Due Process Clause further requires the
government to disclose any "exculpatory information" --- evidence supportive of the
defense innocence --- from its otherwise confidential files.

"Even in noncriminal settings, the government may not take a person's property
or liberty without providing notice and a meaningful opportunity to respond, a

113 http://caselaw.lp.findlaw.com
114 Gross, "The Influence of Terrorist Attacks on Human rights in the Unted States: the
       Aftermath of September 11, 2001"
right that would seem minimally to require access to the evidence used against
one. Yet in immigration cases, the government has relied on the citizen-
noncitizen â€œto defend its refusal to give foreign nationals access to the
evidence used against them." 115

The Structure and the staffing of the military commission under the Military Order are
also considered infringement of the 5th Amendment. Military officers, who are acting as
prosecutors and judges fill all of the key roles in the military commission process, and
report through the chain of command to the President. Another disturbing aspect of the
Military Order is that double jeopardy --- the constitutional principle secured in the Fifth
Amendment that the same sovereign can not try an individual twice for the same offense
--- is never mentioned. The basic guarantee against double jeopardy includes numerous
protections: It protects against a second prosecution for the same offense after one is
cleared; it protects against a second prosecution for the same offense after one is
convicted, and it protects against the imposition of multiple punishments for the same
offense. 116

The Military Order disregarded many of the Sixth Amendment guarantees as well.

According to the 6th Amendment of the U.S. Constitution,

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and
public trial, by an impartial jury of the state and district wherein the crime shall
have been committed, which district shall have been previously ascertained by
law, and to be informed of the nature and cause of the accusation; to be
confronted with the witnesses against him; to have compulsory process for
obtaining witnesses in his favor, and to have the assistance of counsel for his
defense." 117

115 Cole, p.170
116 Olschansky, p.24-26
The Sixth Amendment provides for the defendant in a criminal case to have a speedy and public trial; to have the benefit of an impartial jury selected from the area where the crime occurred; to be informed of the accusation against him; to confront the witness against him; to be able to use necessary process to find favorable witnesses; and to have the assistance of counsel in presenting his case. However, under the Military Order there is no right to a jury trial; individuals who are accused under the Order will be tried before three to seven members of the U.S. armed forces. According to the Supreme Court, the right to a jury trial provides the person accused "an inestimable safeguard against the corrupt and overzealous prosecutor and against the compliant, biased or eccentric judge." Despite the Supreme Court's proclamation, the President's military commission system does not provide for the right to a public trial.

As a result of the severe provisions of the USA Patriot Act, and the UK Anti-Terrorism, Crime and Security Act, and their violations with international human rights guarantees several human rights activist groups became more determent and proactive to deliver the information to the public and to put pressure on the government to consider altering its policies.

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118 Olszansky p. 26

119 Duncan v. Louisiana 391 U.S. 145,156, 88 S. Ct.1444 (1968) Holding the Sixth Amendment right to a jury trial applicable to the states
CHAPTER 4
ACTIVIST RESPONSE

It would be impossible to assume that the US/UK administration’s counter-terrorism measures can go unchallenged in democratic societies where internationally accepted human rights are highly valued and respected by the majority of people. More severe and increasing numbers of these provisions and laws have led to increased involvement of some of the main non-governmental human rights organizations’, such as the Amnesty International, The American Civil Liberty Union, Human Rights Watch, the Council on American Islamic Relations etc. more aggressive and proactive role in defending and promoting human rights.

In the current climate, according to Hina Jilani, a UN Special Representative to the Secretary-General on Human Rights Defenders, advocacy functions of human rights defenders are becoming important because practices and laws are receiving the type of acceptance that they should not be receiving. 120 Activist groups are the ones to deliver the global message on the significance of preserving democratic values, civil liberties and human rights. As Michael Ignatieff asserts, these non-governmental human rights organizations keep state participants up to the mark, or at least reveal the gap between promise and practice, rhetoric and reality. They support the universalist language of human rights, but in reality often use it to defend highly particularist causes: the rights of specific national groups or minorities or classes of persons. Without the advocacy

120 "Human Rights Convention" at the Carter Center, televised on CNN International, November 16, 2003 at 8:30AM
revolution of the NGOs it is possible that the passage of so many human rights instruments since 1945 would have remained a revolution only on paper. 121

These NGOs' platforms revolve around four main areas: awareness and raising/education, documentation, legal actions, and lobbying. Their goals are to get the public involved in the protection of human rights and civil liberties, and to make the administration realize the devastating effects of the erosion of freedom and civil liberties on a democratic society.

Although, after September 11th these organizations have systematically documented harassments and discriminatory acts against Muslims and Arabs and illustrated US/UK administrations violations of human rights, condemned secret detentions and hearings, the mistreatment of detainees, and opposed the immigrant registration law, it is apparent that each organization has its own special agenda that it prefers to promote and force.

The American Civil Liberty Union (ACLU) which operates solely within the US border, has been one of the nation’s leading advocates for the rights of immigrants, refugees, and non-citizens, challenging unconstitutional laws and practices, and opposing the myth upon which many of these laws are based. ACLU has been the most progressive, influential, and successful organization in regard to its membership, affiliation with other civil right organizations, and media coverage. Its membership has increased more than 30% to 400,000 since the terrorist attacks, and the organization has held its first national

121 Ignatieff, p.9-10
conference in June 11, 2003. “The more people find out about the policies of John Ashcroft, the more concerned people get”, said Laura Murphy.\footnote{Murphy, Laura. June 10, 2003 director of the organization’s legislative office in Washington. http://gtel.gatech.edu.}

One of the greatest goals of the ACLU is to hold the US government accountable for its human rights violations through effective legal actions. It filed its first legal challenge to the controversial law of the USA Patriot Act which vastly expands the power of FBI agents to secretly obtain records and personal belongings of innocent people in the U.S., including citizens and permanent residents. “Investing the FBI with unchecked authority to monitor the activities of innocent people is an invitation to abuse, a waste of resources, and is certainly not making any of us safer,” said Ann Beeson, Associate Legal Director of the ACLU and the lead attorney in the lawsuit.\footnote{Anonymous. July 30, 2003. “ACLU Files First-Ever Challenge to USA Patriot Act, Citing Radical Expansion of FBI Powers.” www.aclu.org} The ACLU has filed a lawsuit in federal court on behalf of six advocacy and community groups from across the nation whose members and clients have been targets of investigations because of their ethnicity and religion.\footnote{Groups participating in the lawsuit are: Muslim Community Association of Ann Arbor, American-Arab Anti Discrimination Committee, Arab Community Center for Economic and Social Services, Bridge Refugee and Sponsorship Services, Council on American – Islamic Relations, The Islamic Center of Portland} and has filed legal challenges to closed immigration hearings as well. The lawsuits were filed in federal district courts (the first was in Michigan, January 29, 2002; the second one along with the Center for Constitutional Rights was in New Jersey in March 6, 2002) In their complaints, the ACLU and CCR noted the vulnerable position of the hundreds of immigrants being held in detention centers and the need for the press
to observe and report on the government's actions in these matters. The positive outcome in either lawsuit could result in the reopening of the court proceedings in deportation cases in those in Michigan and New Jersey, according to Lee Gelernt, a senior staff attorney with the ACLU’s Immigration Rights Project. 125

The ACLU also puts great emphasis on educating and creating a public awareness of the dangerous effects of the government's human rights violations. The organization has been focusing on proliferating its image nationwide by involving more and more activist groups in the process, as well as investing a great amount of money into media coverage. It has launched an advertisement campaign, aimed at alerting conservatives and liberals alike to the possible changes that might take place in the Patriot Act II. In July 15, 2003 the ACLU started running two 30-second ads on national TV, featuring school children who question the government's restriction on basic freedoms in the name of national security. This ad campaign cost them four million dollars.

As the result of the ACLU's wide exposure, other organizations' 126 -- nonpartisan, conservative and liberal -- have been receiving phone calls and letters about the negative effects of the Patriot Act, wanting more information. About what the government has been doing behind closed doors. "They want to know what on earth is happening." Lucy

125 Anonymous. “ACLU Files Second Challenge to Closed Immigration Hearings” http://www.aclu.org

126 Organizations such as American Library Organization, Reporters Committee for Freedom of Press
Dalglish said. "Basic civil liberties issues are hitting a nerve with the public," she added.127

Several days after September 11, 2001 the ACLU urged tolerance and respect for everyone in the United States, and encouraged police officials across the country to respond quickly to reports of violence and threats against all people, and particularly Muslims and Arabs.128 The ACLU raised serious concerns with the Patriot Act's new measures, as the majority of them are not limited to terrorism related offenses.129 Numerous measures of the Patriot Act erode the basic human rights and civil liberties of foreign nationals as well as citizens, violating several international laws as well.

"Just as in criminal investigations, racial profiling in national security investigations is an ineffective substitute for hard leads and individualized suspicion," said Laura W. Murphy, Director of the ACLU's Washington Legislative Office.130 The American Civil Liberties Union also strongly criticized the government's misconduct in its treatment of detainees held in the months after the attacks. It is particularly unfortunate, the majority opinion continues to state that many of those arrested by the federal

127 Dalglish, Lucy. June 10, 2003 “ACLU Cites Concerns Over Ashcroft” http://gatel.gatech.edu,


130 Ibid
government after September 11th had "links to terrorism," when the Inspector General's report makes clear that many people with no connection whatsoever to terrorism were picked up indiscriminately and randomly in the government's post-9/11 sweep. I A government of the people and for the people must be visible to the people. As a lower court has ruled, civil liberties invariably disappear without standards of public accountability.

While the ACLU is the most known and respected non-governmental human rights organization in the U.S., Human Rights Watch, (HRW) has the same reputation worldwide, and its widespread mission and proactive actions are highly valuable. The HRW's primary work revolves around the conditions of the Muslim and Arab detainees, particularly those in Guantanamo Bay. Although, Human Rights Watch understands the need for enhanced internal security in the aftermath of the September 11th attacks in the U.S., its members were disappointed by U.K. proposals that would permit the arbitrary detention of persons suspected of terrorist activity, deny the right to seek asylum, and permit the indefinite detention of certain individuals without adequate safeguards, in contradiction of the 1951 Refugee Convention. 131

"We are dismayed at the measures in the bill because they breach core human rights guarantees," said Elizabeth Andersen, executive director of Human Rights Watch's


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Europe and Central Asia Division. "There are few rights so fundamental as the right not to be detained without adequate safeguards and the right to seek asylum." 122

According to Human Rights Watch administrative detainees under states of emergency should enjoy at a minimum the following rights and guarantees: the right to be brought before a judicial (or other) authority promptly after arrest; the right to receive an explanation of rights upon arrest in one's own language; specific, detailed and personalized reasons for the deprivation of liberty; the right of immediate access to family, legal counsel and a medical officer; the right to communicate with and be visited by a representative of an international humanitarian agency, such as the International Committee of the Red Cross (ICRC); the right to complain to a judicial authority about mistreatment; the right to challenge in a fair hearing, and periodically if necessary, the lawfulness of the detention and to be released if the detention is arbitrary or unlawful; and the right to seek and obtain compensation if the detention proves to be arbitrary or unlawful. 133

The HRW is troubled by the US government's indefinite detention process, secret hearings and secret arrests, as is the ACLU. "In a nation created and continually recreated by immigrants, it is particularly tragic to see the willingness of the US


133 “Commentary on the Anti-Terrorism, Crime and Security Bill 2001”
government to sacrifice the rights of non-citizens and to find the public largely mute in its response”.  

Lobbying and educating the general public are important strategies for the Human Rights Watch group. The organization believes that if it actively expresses its discontent, and creates opportunities for people to learn about new laws and policies, it might put some pressure on the government to develop policies that do not violate human rights. This advocacy group has not been as influential at challenging government’s policies, as is its American counterpart is the ACLU, regardless of its increased activities since September 11th.

Many more NGOs, civil rights organizations, and advocacy groups exist, and such as The Council on American Islamic Relations (CAIR), the Arab American Institute, Amnesty International, American-Arab Anti-Discriminatory Committee, etc. These groups have also spoken out against the government’s continuous violations of basic civil rights, but though they have made some progress, have not been very dominant players yet.

The Council on American Islamic Relations (CAIR), similar to the HRW has provided several examples of discriminations and harassments of Muslim and Arab civilians and have been bothered by the administration’s double standard, and by the crude and anti-Muslim comments made by some high-profile religious and political leaders. To quote Nihad Awad, “...government policies are part of the problems, the government can also

be part of the solution by refusing to succumb to the siren song of religious and ethnic profiling".135

To increase the CAIR’s efficiency in altering some of the newly implemented policies, the organization has been working closely with FBI and other law enforcement agencies through town hall meetings, sensitivity training sessions, and even joint-news conferences on security related issues.136

Of all activist groups and organizations, the Arab American Institute (AAI) has been the most outspoken about the government’s lip service and double standard. “What is especially troubling here is that after six weeks of telling Americans that they should not treat all Arabs and Muslims as suspects, the practices of profiling and massive detentions are sending the exact opposite message”.137 Anticipating the backlash on Muslims and Arabs immediately after the terrorist attacks, Dr. James Zogby, the president of the AAI, started his own campaign against targeting innocent Arab and Muslim civilians in the name of national security. Similar to the ACLU, Zogby demanded more media coverage, produced two ads with Ad Council, and designed educational material, and sent hundreds of thousands of pieces to school boards and districts. His attempts were very successful at spreading the message of tolerance and urging respect for Arab Americans.

In the last decade non-governmental human rights organizations have been more successful than ever at raising awareness on governments’ human rights violations;

136 Ibid;

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documenting prisoners and detainees’ conditions, such as physical and mental abuse; and educating the public about the importance of fundamental human rights and civil liberties. On one hand, specifically the process of getting the public involved in the protection of human rights and civil liberties, most of these NGOs have achieved their goals. However, they have not made very great progress yet in influencing the government in its decision-making policies.

The most serious obstacle facing these NGOs is the non-enforceable nature of international human rights. Since governments are not being held reliable for their human rights violations, non-governmental human rights organizations do not have any leverage with governments. Regardless of the above-mentioned circumstances, ACLU has filed several lawsuits against the U.S. government, but to date has not won any of them.

As a result of their growing political influence, however, some NGOs have been placed under government control and attack, and have been warned not to speak against Bush administration policies, or in support of international treaties opposed by the White House.

“This attack on the no-profit sector marks the emergence of a new Bush doctrine: NGOs should be nothing more than the charity wing of the military, silently mopping up after wars and famines. Their job is not to ask how these tragedies could have been averted, or to advocate solutions. And it is certainly not to join anti-war and globalization movements pushing for real political change.”

With the exception of the ACLU, the majority of NGOs do not have the financial support to finance the advertising campaigns to help them gain more exposure to the public.

However, regardless of their difficulties and challenges, they have made great progress in advocating human rights and civil liberties. It is probably fair to say that non-governmental organizations will not change government policies in the near future, but through their grass-root works, and their extensive network they might be able to influence them. The more people find out about governmental “secret” activities and policies, and their impact on civil and human rights, the more chance these NGOs will have to put pressure on the government for policy change.
CHAPTER 5
CONCLUSION

International human rights values are built on the Principle of Universality, the fundamental premise that is equally applicable to all states without exception. With the end of the Cold War came renewed hopes for a general respect for "human dignity" as declared in the foundations of the Universal Declaration of Human Rights of 1948. Under normal circumstances the majority of democratic nations do respect and honor human rights and civil liberties. In times of crisis situations, however, even governments that usually protect freedom of speech, association, and due process have shown a deplorable willingness to curtail these rights. Fundamental human rights lose their significance and are subordinated to national security.

History has demonstrated that during the course of a war or public emergency, an entire minority or ethnic group is often connected to the "enemy" and suffers discriminatory treatments, as did the Germans in World Wars I and II by both the U.S. and U.K. governments, and, most notably, the Japanese during World War II by the United States. Both administrations, particularly the US, received world-wide criticisms for their actions. After September 11, 2001, as a result of the nineteen Muslim terrorists responsible for the terrorist attacks, Muslims and Arabs have been labeled as the "enemy", associated with terrorism, and are experiencing discriminatory treatments, particularly through severe government provisions and laws. Selectively targeting foreign nationals and immigrants
was a practical political "tool" in the past, as it is now, and was used by both the U.S. and the U.K. administrations. Although, the current U.S./UK administration's new measures and recently implemented policies and laws do not allow federal officials and agents to arrest people simply for speaking out against the war, intern immigrants for their racial identity, or punish certain individuals for their political affiliation, the counter-terrorism strategies pursued by both nations after September 11th, restrict individual rights including privacy, freedom of thought, presumption of innocence, fair trial, the right to seek asylum, political participation, freedom of expression, and peaceful assembly. The United States and the United Kingdom have demonstrated once again that in times of urgency and national crisis, security issues will take precedence and undermine democratic values and fundamental human rights.

It would seem to be in the best interests of the US/UK government to defend those values and rights both at home and abroad since the curtailment of these values, liberties, and fundamental human rights in the western hemisphere are all on the terrorist's agenda. Yet, since the catastrophic events of September 11, the US/UK administration did quite the opposite.

The Bush administration responded to September 11th with the development of the following: The USA Patriot Act, which violates the rights of privacy, the right to due process and equal treatments; The Military Order, which deprives one of his/her rights to appeal, to have access to counsel, to protection against forced confession, and to the presumption of innocence; The National Security Entry-Exit Registration System, (NSEERS), which violates the rights for equal treatment.
The United Kingdom responded by creating both the *Anti-Terrorism, Crime and Security Act 2001*, which deprives individuals from their rights of liberty, privacy, association, and equal treatments; and the *Nationality, Immigration and Asylum Act 2002*, which also breach the rights of liberty and privacy.

To succeed in the war on terrorism it is imperative to find the right balance between national security and human rights. If the US/UK governments keep diminishing Muslim and Arab immigrants’ fundamental human rights further, they can lose their opportunity to win the war on terrorism. Those discriminatory measures and polices that both administrations implemented and now enforce, can alienate Muslim and Arab individuals who could provide important information and resources to the US government, generate more terrorist activities around the world, eliminate international cooperation, and undermine the international community’s effort to pursue justice under the law. As Mary Robinson asserts,

“Fair balances built into human rights law should be at the center of the overall counter-terrorism efforts. Addressing the challenges to human insecurity requires enhancing international cooperation, taking prevention seriously, reinforcing equality and respect, and fulfilling human rights commitment. It is time for leadership on the basis of values.” 139

The jeopardizing of freedom, civil liberties and human rights in the name of increased security is not only a constitutional tragedy, but is also likely to be ineffectual and counterproductive. Once an administration starts violating international human rights laws, and undermining the international institutions’ significant roles, it loses its

credibility in the international arena. If strong democratic states defy international covenants, declarations, and conventions, then there is little hope that non-democratic nations and states where human rights abuse is acceptable would ever participate in improving their human rights records. Nations with strong democratic values have a global responsibility to demonstrate the important value of international tempting to undercut them. If all the leading nations in the democratic world are persistent in cherishing and safeguarding those rights, they have the leverage to penalize leaders who act against human rights values and consistently abuse and destroy them.

Impunity for substantial international rights violations generally creates an atmosphere of confusion, fear, and in the worst cases, terror. It also produces instability within a society, which could lead to a delegitimated government.

After the end of the Cold War and up until September 11, 2001, the world experienced a positive trend in the revolution of international human rights. New international human rights institutions were developed and came into force, such as International Criminal Court (its statute entered into force on July 1, 2002) and International War Crimes Tribunals to punish leaders who caused great atrocities against humanity. However, the September 11 terrorist attacks, which led to the creation and enforcement of severe counter-terrorism measures forced human rights and civil liberties under attack, and made them become subservient over national security once again.

The global war on terrorism presents great challenges for the future of human rights. Unlike past wartime experiences, in the actors were clearly identified and the length
of the war was predictable, the enemy is this time widely spread out over the world, and the end of the war is highly unpredictable, and has the likelihood of lasting longer than any war in modern history. It is reasonable to assume that if the war on terrorism persists for a long period, the curtailment of internationally recognized human rights and civil liberties will persist as well. Since international human rights still rest greatly on voluntary agreement, as their enforcement is technically impossible, it therefore becomes easy even for the most influential and powerful democratic states to violate them without any future consequences. After September 11, 2001 two of the leading nations (US/UK) proved how simple it is to infringe on human rights and civil liberties in the name of national security.

Despite all these negative elements, and disadvantageous circumstances, the future of human rights and civil liberties do not look as hopeless as some people might think. The moral, political, normative power of the Universal Declaration has enabled the international community to reach for extraordinary measures, especially in cases of mass violations of human rights. Through international conventions, commission, and human rights courts, the international community has established procedures, which make it possible for the individual to come out to the international stage in the field of international law and be protected by international laws. The tendency of internalization of human rights indicated the global community’s willingness to increasingly take into account the sovereignty of the individual, or of minority groups, and not of states. Respect for human rights is no longer within the domain of a state’s internal matter, care
for these rights is increasingly being taken over, at a higher level, by the international community.

Non-governmental human rights organizations also play an important role in determining the fate of the future of human rights. It is apparent that their presence, dedication, and crucial work, especially in the last ten to fifteen years, greatly influenced the development of the current international human rights community.

After September 11, 2001 some of the most prominent non-governmental human rights organizations, such as Amnesty International, The American Civil Liberty Union, Human Rights Watch, and the Council on American Islamic Relations have become more proactive, speaking up against the US/UK government’s newly implemented measures such as racial profiling, indefinite detention, secret evidence, secret arrest, and denial of the right to seek asylum. They have been informing the public about these measures through internet sites, radio, TV appearances, and newspaper and magazine advertising.

Despite their lack of financial resources, the NGOs are all determined to challenge the administration’s counter-terrorism policies, and raise human rights to a much higher standard.

Despite non-enforceable international human rights laws, the undermining of international human rights institutions, and the unforeseeable end of the war on terrorism, universal human rights have still become more powerful due to the efforts of successful non-governmental human rights organizations, and a growing global understanding of the importance of human rights and civil liberties.
However, to avoid future human rights violations, especially during "public emergencies", it is essential to further strengthen the international human rights regimes. Making international human rights enforceable, and punishing nations that do not comply with the law might give states incentives to respect international human rights even when it would be easier to do the opposite.


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