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INTERNATIONAL TERRORISM: THE BRITISH RESPONSE

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This article examines the Anti-Terrorism, Crime and Security Act enacted in the United Kingdom in response to the September 11 attacks in the United States last year. The article first identifies the critical framework of the discussion by analysing the reactive quality of the debate on terrorism and questioning the effectiveness of anti-terrorist legislation. The article then considers the concept of terrorism under UK law, before turning to a more specific discussion of the Act, particularly in three areas: tracking terrorist finance, detention and identification of suspected offenders and security measures. Finally, Part IX of the article also provides a European dimension in its discussion on some European Union anti-terrorist initiatives.

I. INTRODUCTION

It is now trite history to observe that the notorious terrorist attacks on the territory of the United States on 11 September 2001 triggered a major new political and legal response to the threat of terrorist activity. The outcome in part has been a global tranche of "tougher" anti-terrorist legislation in a number of States and the response of the British Government and its new legislation is in many respects both typical and predictable. The UK Anti-Terrorism, Crime and Security Act of 2001, which became law on 14 December of that year, is a lengthy and complicated piece of legislation. But for purposes of the present discussion its significant anti-terrorist thrust may be summarised under the three main headings: financial tracking; detention and identification of suspected offenders; and security measures.

II. THE CRITICAL FRAMEWORK

However, it may be useful to preface the discussion of these measures in themselves with some reflection on the circumstances of their enactment. Critically regarded, this is essentially a reactive and opportunistic body of law. Its speedy enactment in the last months of 2001 was due to the exceptional occasion of the attacks on New York and Washington and the shock that they engendered. Any critical evaluation should bear in mind that

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fact and then pose two main questions: those of the necessity for, and secondly, the likely effectiveness of the measures which have been introduced. However, such an argument is more easily stated than carried through to analysis, since both questions are clearly difficult to answer with much confidence. The issue of necessity depends upon an appreciation of the real risks posed by terrorist activity, always difficult to calculate and perhaps exceptionally so in an emotionally highly charged climate immediately following an extensive and dramatic attack. The question of effectiveness is equally problematic. On the one hand, each new attack tends to raise a presumption of ineffectiveness in relation to existing and earlier measures of legal control (how else to explain its occurrence?). Yet that may not be an appropriate approach to evaluation if there is some uncertainty regarding the necessity for and relevance of the measures in the first place.

In short, the whole subject is beset by an obscure and uncertain state of knowledge and understanding and it is disappointing that social scientific and legal evaluation has done little so far to penetrate some of these issues.[1] What is the evidence, for instance, that more extensive and severe criminalisation and further facilitation of international legal co-operation will reduce the risk of future terrorist activity? More measured reflection (such as that which former US Presidents can afford to indulge – see, for example, former President Clinton's Dimbleby Lecture in December 2001[2]) tend to argue that the root causes of and long-term solutions to the terrorist phenomenon lie in a readjustment of foreign policy and a willingness to address structural problems of a political, ideological and economic nature. It is also arguably futile to tackle the issue without regard to changing global political structures. One instance of the latter is the evolution of political organisation in the late twentieth and early twenty-first centuries and what may identified in general terms as a decline in conventional State authority and the emergence of significant non-territorial political actors.[3] "Failed" States and "rogue" governments provide the site and opportunity for politically significant non-State organisations to pursue terrorist policies

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1 Much of the critical literature is either descriptive of terrorist activity or deals with technical difficulties in taking legal action against suspected terrorists. There appears to be little investigation of the link between legal development, *eg* in relation to extended international enforcement co-operation, and any actual improvement or otherwise in the level of legal control.

2 London, 16 December 2001. See www.bbc.co.uk.

3 See generally on this subject: Christopher Harding and C L Lim (eds), *Renegotiating Westphalia: Essays and Commentary on the European and Conceptual Foundations of Modern International Law* (Martinus Nijhoff, 1999); Bas Arts, Math Noortman and Bob Reinalda (eds), *Non-State Actors in International Relations* (Aldershot: Ashgate, 2001).

at a global level.[4] Any legal responses, at either an international or national level, ought to take account of this crucial evolving context which fosters the emergence of terrorist activity. For instance, legal obligations between States to co-operate in criminal law enforcement are only as effective as the degree of participation in such regimes. It only requires a handful of countries not to join for there to be sufficient terrorist "havens" to render such co-operative networks potentially ineffective or irrelevant.

In the context of such argument, the typical legal responses suggest an objective of short-term gain, achieved through the rhetoric and appearance of taking decisive action. This is perhaps not surprising. One of the main perceived roles of modern governments is the maintenance of security and order within their territories and their own viability depends upon a sense that they are effectively carrying out this role. The natural first response to a major outbreak of terrorist activity is therefore to reassure their populations that they are in fact in control of the situation. It is also, of course, in the interest of governments to take advantage of any opportunities for extending the scope of their measures of legal control when political circumstances are conducive to such developments. But whether such action will impress committed terrorists, imbued with a philosophy and attitude which is virtually incapable of appreciating the likely impact of conventional legal sanctions, is another matter.

It may be as well then to start the discussion with this highly cautionary note. It is characteristic of most anti-terrorist legislation and treaty law that they appear in the wake of notable attacks. Indeed, the legal imagination does not usually anticipate the terrorist outrage of the future, since the latter springs from a fundamentally different mindset. So, for example, aerial hijacking as a species of terrorist act was not a legal issue before the 1960s since conventional politicians and lawyers could not unaided imagine the enormity of the event until it took place; in this respect they would be dependent on the ingenuity and bravado of the terrorist outlook. In one sense, this is to state the obvious: by its nature, terrorism is a minority activity, not to be contemplated by the majority.

There are perhaps two main types of question and answer to the problem of outrageous action. One is based on an assumption of a commonly shared outlook, and presupposes a rational response to sanctions once the legality and use of the latter is a real possibility. The other accepts that there are no common outlooks, and therefore reasons for behaviour and reactions to control measures take on an "irrational" character. In so far as the latter kind of analysis may appear as a convincing insight into the reality of the

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[4] This may seem to state the obvious but it is a point that appears rarely to enter discussion of some of the conventional "legal" responses to terrorism. The issue is dramatically illustrated by the action taken in relation to Afghanistan in the wake of the 11 September attacks. There seems to be a tendency to dissociate this kind of strategy as a "political" rather than "legal" response.

terrorist phenomenon, solutions which address the reasons for such different fundamental outlooks are likely to present a higher chance of success.

III. The Concept of Terrorism Under the UK Law

Clearly many of the specific measures provided for in national legislation and designed to control terrorist activity will depend upon a basic definition of the proscribed behaviour which it is sought to control. UK law has a definition of "terrorism" laid down in Section One of the Terrorism Act 2000. This provision defines terrorist activity firstly in relation to a range of acts: entailing serious harm to persons or serious damage to property; endangering life; creating a serious risk to public health or safety; or designed to seriously interfere with or disrupt an electronic system. Secondly, the distinguishing terrorist dimension of these already prohibited forms of behaviour is defined in terms of a motive in carrying out such actions: both a design of influencing the government or intimidating the public, and a purpose of advancing a political, religious or ideological cause. There is an exception in relation to the use of firearms or explosives, in that the latter purpose does not have to be shown to qualify as terrorist activity – the intended effect on government or public is sufficient.[5]

Thus the concept incorporates elements of violence or danger towards others, with a coercive or intimidating purpose, and usually motivated by a broadly ideological argument. Part of the definition is therefore suggestive of the established criminal law concept of blackmail or extortion (under English law, an unwarranted demand with menaces).[6] But there is also of course an important "public" dimension in this definition, contained in the broad target (government or wider public body of citizens) and the context of political motivation. The definition eschews a potentially more problematical sense of "terror", which may arise from a perception of morally outrageous or extreme behaviour. The extremity of the act is contained in the more legally straightforward listing of "serious" basic offences.

IV. Tracking Terrorist Finance

Some terrorist activity may be the outcome of simply personal commitment and determination and may be relatively simple in its planning and

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5 Note the potential width of this definition: it would encompass for instance the acts of "eco-terrorists" campaigning against genetically modified foodstuffs by destroying valuable seedbeds.

6 It is interesting to recall the origin of the term "blackmail": a form of tribute paid by English landowners to Scottish chieftains to gain immunity from raids on their land – thus, terrorism of an earlier period of history. In moral terms, the main objection to all conduct of this kind lies in its method, *ie* the extraction of a certain benefit by threats, intimidation or "terror".

organisation – possession and use of a firearm in a public place, for example, or the willingness to use a motor vehicle as an instrument of mayhem. But the much more sophisticated terrorist action in September 2001 revealed in particular the extent to which terrorist networks have come to employ high levels of financing. Terrorist networks with an international reach and employment of advanced technology necessarily require a high level of funding and it has become clear in recent years that the tracking and control of terrorist finance represented one of the main lacunae in the national and international efforts at legal control. The recent UNGA Convention for the Suppression of the Financing of Terrorism adopted late in 1999[7] seeks to promote a regime of international co-operation in relation to control measures over terrorist funding. In addition to the usual requirement for State parties to criminalise the prohibited conduct (funding or providing financial support for terrorist activities), the Convention also requires action at the national level to track and capture flows of terrorist funding – measures such as the freezing of assets and the forfeiture and seizure of monies (Article 8), and to ensure that financial institutions are alert to suspicious transactions (Article 18). In effect, such international treaties provide a kind of template for national legislation.

In a number of respects the new legislation in the UK builds upon that basis. Part One of the Act is aimed at more effective legal control of terrorist funding, by making it difficult for terrorists to gain access to their money. The principal measures introduced by the Act are account monitoring orders, the power to seize cash and freezing orders. Account monitoring orders enable the police to require financial institutions to supply information about accounts for a period of up to ninety days. Moreover, the obligation on the part of financial institutions to report knowledge or suspicion of terrorist financing has been strengthened by shifting the burden, in that it will now be an offence not to make such a report when there are reasonable grounds for suspicion. The power for seizure and forfeiture of terrorist cash[8] can be exercised whether or not there are any criminal proceedings under way in connection with the money in question. Freezing orders in relation to the assets of overseas persons or governments may now be made not only when such persons are threatening the economic interests of the UK (as under the existing earlier legislation) but also if the threat relates to the life or property of UK nationals or residents. There must be a reasonable belief in the existence or likelihood of such a threat. The effect of such an order is to prohibit anybody in the UK, or any UK national or incorporated person elsewhere, from making funds available to or for the benefit of named persons. Freezing orders are to be made by statutory instrument and will lapse after a period of two years.

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7 9 December 1999 (hereinafter the "Convention'). For the text, see 39 (2000) ILM 270.

8 "Terrorist cash": cash intended to be used for the purposes of terrorism, or comprising the resources of a proscribed organisation, or representing property obtained through terrorism.

Additionally, there are provisions regarding disclosure of information, in particular by the revenue departments, in effect overriding any obligations of confidentiality save those required under data protection legislation (Section 19). This had provoked some vigorous debate in Parliament, as a restriction of individual rights of privacy.[9]

V. Detention of Suspected Terrorists

Some of the most legally controversial insertions in the new legislation relate to powers of detention and their consequent impact on immigration procedures, asylum rights and other human rights protection. Part 4 of the legislation contains two measures which raise such issues: an extended power of detention and an exclusion of asylum claims.

The powers of detention in Sections 21 to 23 extend the existing powers laid down in the Immigration Act of 1971. This is detention with a view to removing the person in question from the territory of the UK and there are existing limitations on the use of such detention. Firstly, the European Court of Human Rights had confirmed that Article 5(1)(f) of the European Convention on Human Rights (ECHR) permitted such detention only when it was being done with a view to deportation.[10] Secondly, the British courts had ruled that such detention was only lawful so long as removal could be effected within a reasonable time. The new law is intended to allow such detention even though either practical considerations or international legal obligations would prevent or delay removal from the UK. This is effected in two legal stages.

A. *Terrorist Status*

Firstly, Section 21 provides for the power of certification of a person as a suspected international terrorist. Such a suspected terrorist is defined as a person whose presence in the UK the Secretary of State reasonably believes to be a risk to national security and reasonably suspects to be a terrorist (in the sense of the definition of terrorism laid down in the Act). Any decision of certification, or following on from such certification may be challenged within three months before the Special Immigration Appeals Commission (SIAC), an independent judicial body set up in 1997 to hear appeals involving a "public interest provision".[11] The SIAC is able to consider whether or not there are reasonable grounds for the belief or suspicion

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9 See *eg Hansard*, House of Lords, Vol 629, comments by Lord Thomas of Gresford at col 219.

10 *Amuur v France* 22 (1996) EHRR 533; *Chahal v UK* 23 (1996) EHRR 413.

11 A provision by which a person's presence in the UK is not considered to be conducive to the public good for reasons of national security, or the relations between the UK and any other country, or for other reasons of a political nature (Special Immigration Appeals Commission Act 1997).

under Section 21, and has the power to cancel the certificate, rendering it an absolute nullity, if it finds that there are no such grounds. There is also provision (under Section 26) for review of the certification, if it is followed by detention, after a period of six months from the original certification or the result of any appeal, and thereafter for every subsequent period of three months. Again, the review is carried out by the SIAC on the same grounds.

B. *Detention*[12]

Following such certification certain types of detention are possible which previously would not have been lawful options. Such detention, taken in prospect of removal from the UK, might have previously been problematical for a number of reasons. Firstly, removal from the UK might have been in breach of the ECHR if this would entail a real risk of torture or inhuman or degrading treatment or punishment, contrary to Article 3 of the Convention.[13] Secondly, removal might have been prevented by "practical considerations", such as a lack of available routes to the country of intended removal, or of appropriate travel documentation. Thirdly, detention might have been unlawful if it was detention pending removal and the removal could not be effected within a reasonable period[14] (for instance, because of one of the above legal difficulties). Under the new law, certification removes these previous legal barriers. It does not permit actual removal if that would be contrary to any international obligations. It simply allows action to be taken *with a view to future removal*, which, but for the person being certified as a suspected international terrorist, the courts might have been able to set aside. Since the detention or other immigration control has been tied to eventual removal, it was considered necessary to remove the obstacles which applied backwards from the prospective removal.

What is now possible, therefore, is detention of suspected terrorists under the existing provisions of the Immigration Act 1971, notwithstanding the fact that their removal from the UK is temporarily or indefinitely prevented by a point of law relating to an international agreement or a practical consideration. Such detention is either that of persons liable to examination or removal[15] or that pending deportation.[16] But critics have

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12 Generally, on the UK law relating to detention, see David Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd ed (Oxford: Oxford University Press, 2002), 357-84.

13 *Chahal v UK*, *supra* note 10.

14 See *eg R v Governor of Durham Prison, ex parte Hardial Singh* (1984) 1 All ER 983; *Re Wasfi Mahmood* (1995) Imm AR 198 (QBD).

15 Immigration Act 1971, Schedule 2, paragraph 16.

16 Immigration Act 1971, Schedule 3, paragraph 2.

argued that in effect this amounts to "indefinite" detention, not easily distinguishable from internment.[17]

A legally significant aspect of this provision is the UK's derogation from Article 5 of the ECHR, so as to ensure that the provisions contained in Sections 21 to 23 of the new legislation do not violate obligations under Article 5 of the Convention. Article 15 of the Convention permits derogation by a signatory State in a time of public emergency to the extent strictly required by that emergency.[18] It was therefore necessary for the British Government to decide that, in the light of the attacks of 11 September, there was an increased threat of international terrorist activity which constituted a state of public emergency in the UK. Furthermore, it argued that the proportionality requirement for derogation was satisfied in that the proposed measures of detention were necessary to safeguard public security in the UK from that threat.[19] However, whether there was a sufficient justification in terms of Article 15 for invoking the derogation may be open to argument, especially in view of the Government's concession in October that there was no immediate danger.[20] At any rate, the British Government notified the Secretary General of the Council of Europe of its derogation on 18 December 2001. This had been anticipated within the UK by the Human Rights Act (Designated Derogation) Order 2001, made on 11 November. From the point of view of constitutional and human rights law, the derogation is arguably as, if not more significant than the extended powers of detention. However, it should also be noted that the provisions contained in Sections 21 to 23 of the Act are due to expire fifteen months after enactment, unless renewed (which can only be for subsequent periods of one year: Section 29). Moreover, the Government is required to commission a review of the operation of these provisions within fourteen months of enactment (Section 28). Such a review (which is to be laid before Parliament) may provide some internal, as distinct from Convention-based, opportunity for reflection on the necessity for and effectiveness of these powers.

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17 See *eg* the debates in the House of Commons: *Hansard*, House of Commons, vol 357, col 50 (19 November 2001). *Cf* also the view of Judge Pettiti in *Chahal*, *supra* note 10: the applicant had been detained for six years and had been treated even more severely than a convicted criminal since his detention amounted to an indefinite confinement.

18 On the exercise of derogation under the ECHR, see: Mark Janis, Richard Hay and Anthony Bradley, *European Human Rights Law* 2nd ed (Oxford: Oxford University Press, 2002), at 387 *et seq*.

19 For an exchange of views as to whether there was indeed such a state of emergency, see *Hansard*, House of Commons, vol 375, cols 21 *et seq* (19 November 2001).

20 *Ibid.*

VI. Implications For Asylum

The other form of terrorist status under the new legislation relates to refugee and asylum procedures.[21] Section 33 enables the Secretary of State to certify that particular individuals are excluded from refugee status or not entitled to the *non-refoulement* protection under Article 33(1) of the 1951 Refugee Convention. The legal significance of this certification lies in any subsequent appeal procedure. The SIAC, in hearing any asylum appeal, may consider only statements made in the certificate, and cannot consider the issue of whether there is a well-founded fear of persecution if returned to the other country.[22] The matter is to be judged, therefore, solely on criteria relating to removal from the UK being conducive to the public good.

In effect, the Government is invoking under Section 33 the exceptions to *non-refoulement* allowed under Article 33 of the Refugee Convention and implementing those exceptions in the new appeal procedure. There are two exceptions under the Convention. The first, under Article 33(2), withdraws *non-refoulement* protection when there are reasonable grounds for regarding the refugee as a danger to national security. The second, under Article 1(F), withdraws the protection of the Convention from persons in respect of whom there are serious grounds for believing that they have committed any listed offences, including terrorist acts (as being "contrary to the purposes and principles of the UN"). Certification under Section 33 thus incorporates a presumption that one or other of these exceptions is applicable, so removing the need to consider the well-founded fear of persecution. In other words, it enables asylum claims to be rejected simply on grounds of what is conducive to the public good.

Unlike the provisions relating to detention, the relevant international treaty obligations on asylum allowed the more restrictive provisions to be implemented within the terms of their own exceptions. Some of the ECHR provisions on the other hand were absolute, so requiring the UK to claim its right of derogation. The overall outcome of Sections 21 to 23, and 33 is that a suspected terrorist status now enables decisions regarding detention and asylum to be taken simply on grounds of the risks to public security arising from the alleged terrorist activity.

VII. Identification Measures

There are a number of provisions in the new legislation extending powers in relation to the identification of suspected offenders. Firstly, regarding fingerprinting, the existing law (the Immigration and Asylum Act 1999) authorised fingerprints to be taken for certain purposes relating to

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[21] For an overview of this area of UK law, see Feldman, *supra* note 12 at 483 *et seq*.

[22] The issue in *Chahal*, *supra* note 10, in which the European Court of Human Rights rejected the assessment of the British courts.

immigration and asylum, but required their destruction after a certain time. Section 36 of the new Act allows such fingerprints (both those already held and those taken in the future) to be retained for ten years. In addition, Section 89 extends the grounds on which fingerprints may be taken. Previously, fingerprints could be taken from suspected terrorists only to establish whether the person concerned had been involved in certain offences listed in the Terrorism Act 2000 or concerned in the commission, preparation or instigation of acts of terrorism.[23] It is now possible also to take fingerprints of suspected terrorist in order to establish identity.

The other relevant provision in relation to establishing identity is Section 92. Again, police powers for this purpose have been extended. Previously, there was no clear power for the police to require the removal of face masks, face coverings or face paint from persons held in custody, so that they could be reliably photographed. Section 92 now allows the police both to require the removal of masks, covering and paint in order to identify and photograph suspects, and also to use reasonable force, if necessary to do this.

VIII. SECURITY MEASURES

The legislation of 2001 contains a clutch of measures intended to provide increased security in relation to a number of dangerous activities or in the context of activities vulnerable to devastating attack. For instance, some new offences have been created: the transfer of biological agents or toxins outside the UK (Section 43); knowingly to cause a nuclear weapon explosion, or to develop, produce, transfer, possess or engage in military preparations to use or threaten to use a nuclear weapon (Section 47); assistance by UK nationals of persons outside the UK to commit weapons-related offences (Section 50). Part Seven of the Act provides for the closer regulation and security of a number of listed pathogens and toxins (such as a duty to notify their keeping or use, and to provide information to the police regarding their security) (Sections 58 through to 75). Part Eight contains a number of provisions relating to the regulation of security in the civil nuclear industry.

Part Nine of the Act is concerned with aviation security, clearly still one of the main areas of vulnerability in respect of terrorist activity. Most of the provisions laid down here again extend control measures in relation to a number of aspects of aviation security. Section 82 extends the power of arrest of suspects without warrant to offences involving unauthorised presence in restricted zones of airports or aircraft and trespassing on licensed aerodromes. Previously there had been no power to remove intruders from restricted zones; this is now provided for under Section 84. Section 85 extends the list of approved security service providers. This

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[23] Schedule 8, Terrorism Act 2000.

originally covered air cargo agents and is now extended to other commercial providers of security services to civil aviation, such as companies contracted to provide passenger and baggage screening services. Finally, a new power has been introduced to detain aircraft, filling another previous gap in legal control. Such powers were limited to purposes of inspection; once the inspection had been completed there had been no legal power to prevent departure of an aircraft, even if there were concerns about the standard of security which had been applied. Section 86 of the 2001 Act amends the relevant part of the 1982 Aviation Security Act by allowing for a power to require detention of an aircraft if there is reason to believe that its security has been compromised –for instance, if a threat has been made against it or an act of violence is likely to be committed against it. This power of detention can be applied to a single aircraft, or to all flights going to a specific destination. The authority to effect detention of the aircraft includes subsidiary powers to enter the aircraft, remove articles and use reasonable force to prevent its departure. Criminal offences have been created relating either to failure to comply with the direction for detention, or obstructing its enforcement.

IX. The European Dimension

Commentary on one further part of the new legislation leads into a discussion of the European context of crime control and counter-terrorist measures, which is growing in significance. At a European level, action may be taken under the third pillar of the EU, which is concerned with police and judicial co-operation in criminal matters. Just as the 11 September attack triggered legal reaction at the national level, so also there has been an EU response. In particular, the EU Council drew up a "road-map" of measures listed for urgent agreement and implementation in the aftermath of the 11 September attacks. These measures comprise the 1995 and 1996 European Conventions on Extradition; three framework decisions (on combating terrorism, joint investigation teams, and the freezing of property and evidence); and the 2000 Convention on Mutual Assistance in Criminal Matters, along with its Protocol. The British legislation links into this initiative by providing, in Section 111, for easier and speedier implementation of third pillar anti-terrorist measures (including those listed in the "road-map"), by allowing them to be implemented at the UK level by secondary legislation.

It is worthwhile noting the parallel process of discussion and activity that has occurred at the EU level in the months following the September terrorist attacks. Once again, the reactive quality of the debates and the exploitation of a new-found political will to take legal action is very much in evidence. Much attention has focused on the proposals for the European Arrest Warrant and a common definition of terrorism, incorporated into drafts for third pillar framework decisions. Both these existing proposals were given considerable political momentum after 11 September and a strict timetable

was set by the Council for their adoption by December 2001. In the event, however, agreement was not reached at the Justice and Home Affairs Council of 6-7 December and the "proclamation" of the two measures at the Laeken Council on 14-15 December was strictly speaking a "provisional agreement". Lack of agreement was due in part to a requirement to re-consult the European Parliament and a number of parliamentary scrutiny reserves made by some of the Member State Parliaments.[24] It is not expected that the European arrest warrant would be operational before 2004, although six of the Member States (Belgium, France, Luxembourg, Portugal, Spain and the UK) have agreed to make the procedure operational between themselves early in 2003.

Parliamentary discussion of the proposal for the European warrant provide a good indication of the nature and points of legal objection to some features of this kind of control measure. Essentially, the framework decision provides for a procedure replacing extradition between the member States. Warrants for arrest in one State would be recognised and executed by a judicial authority in any of the other States. This applies to a wide range of "serious" criminal offences and is not limited to "terrorist" offences. The proposal contains a severe limitation on a number of the traditional restrictions on the exercise of cross-jurisdictional powers, such as the principles of double criminality, speciality and non-extradition of a State's own nationals.

A reading of the UK House of Lords Select Committee on the European Union's report on the proposal provides an idea of the tussle taking place between parliamentary representatives and governments regarding the extent of the new powers and the consequent limitations on individual freedom. In a letter of 17 January of this year to the British Government, the House of Lords Committee expressed its concern about "the apparent speed and suddenness with which rights accorded to individuals Europe-wide were lost".[25] There had been particular disagreement between the Committee and the Government on the need (in the Committee's view) for explicit reference to Articles 5 and 6 of the ECHR in the framework decision.[26]

X. OVERVIEW

It is still an early point at which to attempt some assessment of the legal and political impact of the British anti-terrorist legislation enacted late in 2001. It remains to be seen what kind of use, in both a quantitative and qualitative sense, will be made of the more extensive powers which have been outlined

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[24] See the UK House of Lords, Select Committee on the European Union, 16th Report, 26 February 2002.

[25] *Ibid*, at paragraph 11.

[26] *Ibid*, at paragraphs 8 – 9.

in the above discussion. The passage of this legislation prompted a vigorous discussion as to the necessity for and the constitutional risks inherent in many of its provisions, as evidenced in the debates of both Houses of the UK Parliament and their relevant Committees.[27] In general terms, concern centres around some familiar themes, in particular the introduction of powers to deal with a special problem and their potential use in other situations, and the erosion of constitutional safeguards as contained in the ECHR and the Human Rights Act. However, it is the nature (and doubtless also the design) of terrorist attacks that they produce a climate of public opinion which favours legal control at the expense of constitutional freedoms. In that sense, the Anti-Terrorism, Crime and Security Act was an expected outcome.

In more practical terms, much may be judged by reference to future experience with the relevant procedures of legal review and scrutiny: to what extent it proves possible to regulate in a robust fashion the exercise of a wide discretionary power to apply broadly drafted concepts such as a "reasonable suspicion" of involvement in terrorist activity or measures "conducive to the public good". For instance, examination of the role of the Special Immigration Appeals Commission will supply a test for this purpose. As Feldman has argued:

> It remains to be seen whether the Special Immigration Appeals Commission can successfully provide an independent judicial scrutiny of decisions of what is conducive to the public good, as required by the European Court of Human Rights, or whether its work turns out to be hamstrung by the Court of Appeal's more conservative approach (particularly on national security matters) so that it becomes an institution which merely gives an appearance of legitimacy to uncontrolled administrative discretion.[28]

It is also clear that in this context legal scrutiny originating outside the national framework remains crucial. The shadow of the ECHR is especially significant, as the earlier example of *Chahal v UK*[29] demonstrated. There, in relation to the question whether the applicant faced a well-founded fear of persecution if returned to his own country, the British courts ruled that the Home Secretary was entitled to accept a statement on the matter from the Indian High Commission. The European Court of Human Rights came to a different view, making its own assessment of the risk by taking evidence from the UN Special Rapporteur on Torture and the Indian Human Rights Commission. Such cases reveal very clearly the contestable nature of

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[27] See *Hansard*, House of Commons, vol 374, col 571; vol 375, cols 21-123, 325-432, 673-790, 790-804; House of Lords, vol 629, cols 130, 140-162, 183-290, 949-1019, 1036-62, 1141-1208, 1238-56, 1271-91, 1420-85, 1531-39.

[28] *Supra* note 12 at 507.

[29] *Supra* note 10.

discretionary decisions and judgments, made in such a highly politicized climate, especially when the grounds for exercising such judgments have been legally restricted. And while some provisions of the ECHR may be diluted in their application by the exercise of derogation, there are other external yardsticks which may retain some vitality, if only for purposes of moral and political argument – for instance, the 1993 guidelines of the UN Working Group on Arbitrary Detention.[30]

On the other hand, in so far as it is accepted that there is a terrorist problem which must be controlled, evaluations of such legislation must address not only the negative issues of cost (such as the compromise of wider individual liberty) but also the positive issue of effectiveness. There are important questions still to be answered regarding the success of financial tracking, wider powers of detention and more extensive obligations of international co-operation. It is all too easy to claim the rhetorical gain of new law, as prescriptive action on paper. However, its robust and effective enforcement, by all the relevant parties (both governments and non-State actors) remains a crucial point of uncertainty.

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[30] Report of the Working Group on Arbitrary Detention, UN Doc E/CN 4/1993/24, 12 January 1993. See the discussion by Sam Blay and Ryszard Piotrowicz, "The Awfulness of Lawfulness: Some Reflections on the Tension between International and Domestic Law" 21 (2002) Australian Yearbook of International Law 1 at 17.