



## War on Terror in the US and UK: An Evaluation with Regard to Civil Liberties

### **Abstract**

*This article analyses anti-terror legislations which are enacted in the US and UK after September 11, 2001. The article searches the answer to the question whether national security should come at the expense of civil liberties in an era often called as 'the age of terrorism'. Firstly, the notion of terrorism is looked at and then the 'war' on it. The recent anti-terror legislations in the US and UK are elaborated in the third chapter. Last chapter embraces the question whether national security should override civil liberties or vice versa, and questions how contradictory needs of liberal democratic societies are to be reconciled.*

**Keywords:** War on terror, civil liberties, anti-terror legislations, US, UK, 11 September

### **INTRODUCTION**

Every state has established national bodies to protect itself and its national security from whatever that state perceives to be a threat. The notion that every society has the right to protect itself from outside or inside security threats and the measures taken for that purpose, has not been contested much - at least not from mass groups- up until the measures taken in the US and UK in the wake of the September 11, 2001 terrorist attacks.

National security and measures taken to provide it are generally accepted as a state's internal affair and left in a large degree to that state's discretion. Proponents of that argument could support their stance with the Hobbessian theory, in which individuals are seen to have consented to establish their states with the social contract at the expense of the rights they used to enjoy in the 'natural state' for security that states would provide. But various human rights conventions that states are party to, and democratic values developed in the twentieth and twenty-first centuries can be seen as limitative instruments to the discretion of states' authority. Individuals consented to the state executives' large degree of discretion on themselves - according to the social contract theory-, but also -almost all- states have consented to the basic rights of their components by adopting democratic values and signing to human rights conventions. For these reasons, measures taken in democratic states in the war against terrorism have been chosen as a discussion topic in this essay.

In the war against terror after September 11, many states in the world took measures against potential terror attacks on their soil. There were already anti-terror legislations in states like the UK, Germany and Turkey, which had faced internal ter-

ror threats for many years. But what distinguishes the new anti-terror measures in the UK and US from the previous ones are, first of all, that the new measures have been taken primarily against international terrorist groups –especially against Al Qaeda–, and secondly they have been against potential terror attacks, mostly with disputable intelligence, or one can argue against the ever growing shadow of the threat, unlike the internal ongoing actual terror threats in Northern Ireland or in Turkey or in the Middle East. This distinction may be blurred if one observes the states' steps taken against suspected terrorists associated with the IRA, PKK or ETA<sup>1</sup>, but if one takes into account that there is no clear and undoubted intelligence about international terrorist groups and existence of their 'sleeping' cells, actions taken against individuals by asserting they are associated with these organizations seems more difficult to uphold. The reason, one can assert, that state authorities want to shift the burden of proof to the suspects' side, and to detain those, which are merely suspected to be terrorists without having strong evidence, is simply because state authorities themselves believe their arguments before a court of law will not be enough to incarcerate those persons. The motivation behind these incentives of state authorities can be said to derive from states' willingness to adapt the precautionary principle of environmental law<sup>2</sup> to the social life, which in the end arguably will cause more 'evil' than 'good' unlike in the environmental law sphere.

### **THE CONCEPT OF 'WAR ON TERROR'**

After the September 11, the US President Bush declared the 'war on terror'. Whether this concept is justifiable in terms of international law is debateable.<sup>3</sup> However, in the context of this essay, this concept will be taken for granted; as the legitimacy and effectiveness of the measures taken in domestic laws against the threat of domestic/international terrorism will be discussed. But what terrorism is should be precisely defined since the war is on this –still– vague concept. There are many definitions of terrorism, albeit not commonly understood by every nation as the same and

---

<sup>1</sup> There have been some periods that states had taken measures based on exaggerated perception of the terror threat and widened the reasons for suspecting of individuals being terrorists. For further detail see chapter III and IV.

<sup>2</sup> The precautionary principle evolved in international environmental law. The precautionary principle presupposes taking preventive measures in order to avoid probable environmental disasters, even if there is 'a lack of full scientific certainty.' The crucial point is that there must be 'threats of serious or irreversible damage' which are to be prevented. For the precautionary principle see, *The Rio Declaration on Environment and Development* (1992), principle 15. This principle may serve as a useful approach in the environmental sphere. However, it cannot be argued as being an appropriate approach where it may put human beings' liberties (if applied in domestic criminal law) and lives (if applied in *ius ad bellum*) in danger. Its application in criminal law would mean replacing the criminal law's basic principle of presumption of innocence with the presumption of guilt principle, which itself bears serious irreversible dangers.

<sup>3</sup> War is defined "as a legal state of affairs when *states* use force to vindicate rights or settle disputes between themselves" in Oxford Dictionary of Law. The notion that war is fought between two or more states began to change in the post-Cold War era with the rise of intra-state/civil wars. Contemporary international community faces more threat from the non-state actors such as international terrorist organizations or domestic ethnic/religious terrorists groups rather than from other states. But still, the notion of a war against an actor, whose actions are not predictable –with regard to the issues such as when and where the attacks will take place and how it will be– in an indefinite period is technically not compatible with the legal preciseness. See Edward J. Flynn, 'Counter Terrorism and Human Rights: The View From United Nations', EHRLR 1(2005), 29-49.

not legally defined in terms of international law. Before the 9/11 incidents the apprehension of 'one person's terrorist is another person's freedom fighter' was a widespread notion, which began to change with the rise of international terrorism, especially after the terrorist organization Al Qaeda attacked the US Embassies in Nairobi and Dar es Salaam in 1998.<sup>4</sup> But still, despite the fact that many treaties entail the term 'terrorism' and set out measures to suppress and prohibit terrorist acts, there are some difficulties in legal terms deriving from the fact that the term is not precisely defined; problems arise from the principle of legality as Flynn argues.<sup>5</sup> The UN Human Rights Committee, which is the monitoring body of ICCPR and which is now also in charge of monitoring the measures taken by the states while combating terrorism, criticized the current very general and vague definition of terrorism for contradicting the principle of legality, which in the end might risk the liberties or even lives of innocent people.<sup>6</sup> Nevertheless, it should be stated that even if this term is defined precisely, terrorism has a political aspect attached to its nature, which in the end would obstacle efforts to suppress terrorism with the full participation of all states. As a post-modernist would say, the label 'terrorist' is in the eye of the beholder, which in the near past led the Western states to perceive PKK as an organization fighting for the Kurdish people's freedom, while denouncing IRA and ETA as terrorist organizations. These organizations might be recruiting their members due to the oppressive policies of their states, but no reason, no matter how compelling or legitimate it may be, can justify the killing of innocent people. Terrorism cannot be justified with the notion that 'terrorism is the weapon of the weak' either.<sup>7</sup> While the Fourth Geneva Convention, which regulates *jus in bello*, prohibits amidst armed conflicts the targeting of civilians and civilian objectives, the same can be expected from all parts in every kind of conflict. Hence, there would be no logic for not abiding to these basic humanitarian regulations; any attempt to find a justification for terrorism such as by saying that terrorism is the only means the weak have in its possession and every means is legitimate in the war of the weak, is not acceptable. Moreover, as Che Guevara warned, "indiscriminate acts of terrorism should not be employed"<sup>8</sup>, because it would alienate people with its cruelty, and thus have negative impacts on popular support that revolutionists need.<sup>9</sup> On the other hand, states' policies can also alienate people, and domestic/international terror cannot be defeated merely by

---

<sup>4</sup> It is often argued that the terrorism discourse in the US started with the Reagan Administration in 1980s. According to Chomsky, Reagan Administration opened fight against the 'state-directed international terrorism' of Soviet Union by declaring this fight as the core of the American foreign policy. To defy the enemy block's threat, the US itself created "an extraordinary terrorist network, totally unprecedented in scale." See, Noam Chomsky (24.09.2001), "The New War Against Terror", available at <http://www.counterpunch.org/chomskyterror.html> (Last visited, March 2005)

<sup>5</sup> Flynn, op.cit., at 39.

<sup>6</sup> Ibid.

<sup>7</sup> As Chomsky put it, terrorism is the weapon of the strong, because their terror does not attract attention as opposed to the weak's. Moreover, within the anti-terror discourse, the cruel means of the weak justified more harsh and draconian measures against itself. In other words, the weapon of the weak was turned against it and rendered the strong even more powerful. See, Chomsky, *ibid.*

<sup>8</sup> Major Jackie K. Clark (1988), 'Che Guevara: Fundamentals of Guerrilla Warfare' available at <http://www.globalsecurity.org/military/library/report/1988/CJK.htm> (Last visited, 24.06.2006).

<sup>9</sup> Ibid. See also Michael Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh: Edinburgh University Press, 2004), p. 95.

military means, unless one is ready to accept a Pyrrhic victory.<sup>10</sup> As Hoffmann points out, states must always bear international human rights obligations and humanitarian law in mind while fighting against terrorism, where resorted to force and where detainees are involved.<sup>11</sup>

Moreover, one should accept the fact that, either international or domestic, "terrorists have an inherent advantage ... They can attack anywhere, any time. And you cannot protect everything, everywhere, all the time."<sup>12</sup> In case of international terrorism, unlike domestic terrorist activities, the aim can be analogised to the acts of persons who run amok and kill for no aim in the end. In such a case, it is much easier to provide states' cooperation widely against terrorism.<sup>13</sup> But even if the common condemnation of international –or Al Qaeda- terrorism is much easier to reach, or cooperation of states against it, the measures taken domestically has to comply with international law as the UN SC Resolution 1456 dictates. However, as far as the balance between security and human rights is concerned the problematic emerges.<sup>14</sup> In addition, once again, the problem of the lack of a proper definition arises.<sup>15</sup> A broad definition as many states have chosen to employ in their new anti-terror legislations is not recommendable either. Firstly, it might harm democratic values through unnecessary restrictions on opposition groups or organizations due to the greater possibility of abusing the term, and secondly, it cannot be asserted definitely that these restrictions will reach the proposed goals.<sup>16</sup> Expanding the definition of terrorism so that even any harmless protest group could fall under the terrorist label would mean depriving an individual's right of assembly and association, freedom of expression<sup>17</sup> and this might have a discouraging effect on the invoking of the democratic right of opposition and thus might affect set of democratic values in the long term.<sup>18</sup> Moreover, merely restricting individuals' rights of assembly and association

---

<sup>10</sup> Both under terrorism and under harsh counter-terror policies, populations suffer in the end. These issues are going to be discussed in the following chapters.

<sup>11</sup> Paul Hoffmann, 'Human Rights and Terrorism', HRQ 26(2004), 932-955, at 943. The status and conduct of Guantanamo Bay prisoners will not be elaborated in this essay. Although these prisoners are kept incommunicado, and brought/kept there under questionable conditions, the context of this essay is limited with the war on terror and domestic legislations and their effect on certain non-citizens and citizens with regard to civil liberties. For further detail about Guantanamo Bay prisoners see Hoffmann, pp. 941-946 and 948.

<sup>12</sup> Gregory C. Clark, 'History Repeating itself: The (D)evolution of Recent British and American Antiterrorist Legislation', *Fordham Urban Law Journal* 27 (1999), 247-278, at 274.

<sup>13</sup> This can be explained as such: If domestic and especially ethnic terror is the case, generally the cooperation of states depends on their own national interests. However, a global terror with many civilian casualties may find wider co-operation.

<sup>14</sup> The UN SC Resolution no 1373

<sup>15</sup> Mostly, the concept of terrorism is defined by the means that it uses –namely violence which aims to terrorize people- rather than the objective of the act. There is a common consent that terrorist acts are intended to cause serious, deliberate violence, but the goal is not necessarily killing those who have been killed, rather, the aim is causing panic through these killings, and terrorizing peoples' minds to achieve the goal. Nathanson offers a detailed definition for the concept, see Stephen Nathanson, 'Prerequisites for Morally Credible Condemnations of Terrorism', in *The Politics of Terror, The U.S. Response to 9/11*, ed. William Crotty (Boston: Northeastern University Press, 2004), p. 10.

<sup>16</sup> This fact will be elaborated in the following chapters.

<sup>17</sup> Article 21 under ICCPR regulates the right of assembly, and Article 22 regulates the right to freedom of association.

<sup>18</sup> Peirce argues the broad definition of terrorism in the Prevention of Terrorism Act of 2000 in the UK has the effect of 'sanctifying any government' and criminalizing groups opposing/resisting the government.

might not be effective enough in the fight against terrorism, because as Ignatieff enumerates there are six types of terrorism and all of them require "its own political response"<sup>19</sup> and a broad and general definition often fails to address special needs.

In the wake of September 11, many countries tightened the regulations related to the immigration, refugee and interior security issues. Some draconian measures raised questions whether civil liberties should be sacrificed at the expense of more security. Now I shall look at the measures taken for combating terrorism and their effects on individuals' liberties in the US and UK.

## ANTI-TERROR MEASURES TAKEN IN THE US AND UK

### The USA PATRIOT Act<sup>20</sup>

Since 'shock and awe' is the main aim of the most terrorist acts with more or less devastating civilian casualties, tackling terrorism necessitates pursuing the prevention of terrorism in the sense that terrorist acts are averted. This preventive approach is novel in (international) criminal law, which traditionally deals with criminal acts only after their occurrence and sets out rules for punishing crimes. For the purpose of prevention, six weeks after the September 11 incidents, the US enacted the PATRIOT Act in the fight against terrorism.<sup>21</sup> As the US President Bush articulated, the main objective of the new rules set out in the PATRIOT Act are to "help law enforcement to identify, to dismantle, to disrupt and to punish terrorists before they strike."<sup>22</sup> One of the other aims of the PATRIOT Act is to improve domestic security by centralizing the law enforcement authority into the Justice Department.<sup>23</sup> As Cole conveys, with the help of this new regulations about 2000 people were detained "mostly through administrative rather than criminal procedures, and largely because of their ethnic identity"<sup>24</sup> after 9/11. The reason for which the US government invoked the administrative process rather than the criminal process can be explained with its will to evade the guarantees associated with the latter.<sup>25</sup>

---

See, Gareth Peirce, 'Taking Liberties', *The Lawyer*, 1 October 2001, 25-29, at 26. The same feature is also seen in the PATRIOT Act, which establishes a distinction between domestic and international terrorism. By adding this vague phrase "to influence the policy of a government by intimidation or coercion" without defining what coercion and intimidation is, any government would be able to put any opposition or resisting group under terrorist label.

<sup>19</sup> Ignatieff, *op.cit.*, p. 83.

<sup>20</sup> USA PATRIOT Act is an abbreviation for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism. Hereinafter PATRIOT Act.

<sup>21</sup> Cole criticizes the short time taken for enacting such a comprehensive legislation. David Cole, 'Their Liberties, Our Security, Democracy and Double Standards', *International Journal of Legal Information* 31(2003), 290-311, at 297.

<sup>22</sup> [http://www.lifeandliberty.gov/docs/071304\\_report\\_from\\_the\\_field.pdf](http://www.lifeandliberty.gov/docs/071304_report_from_the_field.pdf), p. 3. (Last visited, 18.03.2005).

<sup>23</sup> Shawn Boyne, 'The Future of Liberal Democracies in a Time of Terror: A Comparison of the Impact on Civil Liberties in the Federal Republic of Germany and the United States', *Tulsa Journal of Comparative and International Law* 11(2003), 111-170, at 126.

<sup>24</sup> David Cole, 'The New McCarthyism: Repeating History in the War on Terrorism', *Harvard Civil Rights-Civil Liberties Law Review* 38/1 (2003), 1-30, at 2. Available at [http://www.law.harvard.edu/students/orgs/crcl/vol38\\_1/cole.php#fnB5](http://www.law.harvard.edu/students/orgs/crcl/vol38_1/cole.php#fnB5) (Last visited, 25.03.2005).

<sup>25</sup> Cole, *The New McCarthyism*, *ibid.*, p. 3.

The PATRIOT Act includes provisions regarding criminal law procedure regulations by "amend[ing] or add[ing] language to the existing federal statutes."<sup>26</sup> Mainly, by adding new language to the provisions the aim is to facilitate in 'connecting the dots' by eliminating the barriers which used to hinder cooperation and information sharing, among separate authorities responsible with the national security as Section 203 of the Act now enables.<sup>27</sup> As said in the first chapter, every state has the right to designate the necessary security regulations for its national survival, and there is nothing wrong with tightening security measures and providing cooperation among national law enforcement officers and intelligence agencies when faced with threats. George Washington's maxim, "The price of freedom is eternal vigilance"<sup>28</sup> can be accepted as a reasonable guiding principle. Nevertheless, some provisions and mentality behind them after 9/11 cause controversies. For example, US Attorney-General John Ashcroft's statement, "[L]et the terrorists among us be warned. If you overstay your visas even by one day, we will arrest you. If you violate a local law, we will ... work to make sure that you are put in jail and ... kept in custody as long as possible"<sup>29</sup> is a good example of this paradox. Ashcroft on behalf of the Justice Department, as it can be inferred from his speech, has in his hands nothing better than minor immigration violations to detain alleged terrorists, who cannot be accused of being a terrorist within the existing laws. It is a paradox because from this statement one can infer that these suspected terrorists are captured with other violations rather than terrorist acts, but wanted to be kept in jail –with the accusation of being terrorists– as long as possible, and without trial. The only explanation for avoiding the suspects the right to contest the allegations before courts can be the lack of evidence against them; for that reason this questionable way is chosen.<sup>30</sup>

While one can find many tenable points about the rationality of Section 219, which enables quick search warrants for terror cases<sup>31</sup>, the US Justice Department's new regulations, which follow the principle 'hold until cleared' regarding suspected immigrants, on the other hand, give rise to the just critiques.<sup>32</sup> Especially if taken into account, that many, if not all, of the persons detained after September 11 are non-US citizens and are of Arab origin and Muslims, these rules' seriousness with regard to human rights and the principle of non-discrimination grows.<sup>33</sup> Looking at the provisions of the PATRIOT Act, one can also find some other controversies with re-

---

<sup>26</sup> Jeffrey F. Addicott, 'Legal and Policy Implications for a New Era: The War on Terror', *The Scholar: St.Mary's Law Review on Minority Issues* 209/4(2002), 250-259, at 250.

<sup>27</sup> [http://www.lifeandliberty.gov/patriot\\_overview\\_pversion.pdf](http://www.lifeandliberty.gov/patriot_overview_pversion.pdf) p.2.

<sup>28</sup> Addicot, op.cit., at 259.

<sup>29</sup> For the US Attorney General John Ashcroft's statement, see Anthea Roberts, 'Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 2001', *EJIL* 15/4(2004), 721-749, at 726-727.

<sup>30</sup> One can also criticize this stance, because it merely warns immigrants. It assumes terrorists can only be rooted in the immigrant groups. This approach overlooks that also a native-born citizen could be a terrorist. Therefore, it can be seen as an expression of xenophobia and as a discriminative stance against the other or different.

<sup>31</sup> <http://www.cdt.org/security/usapatriot/011210crs.pdf>, p.18.

<sup>32</sup> The new regulation allows Immigration and Naturalisation Service to hold persons for 48 hours without charge and under "emergency or extraordinary circumstance...an additional reasonable period of time." For detail, see Roberts, op.cit., pp. 723-724.

<sup>33</sup> Marjorie Cohn, 'Human Rights: Casualty of the War on Terror', *Thomas Jefferson Law Review* 25(2002-2003), 317-365, at 347.

gard to civil liberties. Sections 216 and 218 give permission to the government to intervene in individuals' privacy.<sup>34</sup> While Section 219 eliminates unnecessary loss of time, on the other hand, Section 213<sup>35</sup> enables 'sneak and peek' searches, which contradicts individuals' protected civil liberties under ICCPR and various human rights treaties and liberal democratic values.<sup>36</sup> However, one can assert that if the authorities notice the terrorist before they search their place, they probably will not be able to find them anymore in that place or capture any evidence. Nevertheless, mere vigilance towards terrorists at the expense of innocent individuals' rights cannot be pointed out as the accurate solution either. As Turkey's or the UK's experience with the domestic terror indicates, harsh policies are helping terrorist organisations to recruit more supporters.<sup>37</sup> Therefore, states' actions should not merely derive from the incentive of prudence; on the contrary, that not all the time strict measures are leading to achieve the goal should be born in mind. In addition, even a utilitarian point of view would indicate that a permanent authorization, which is granted to the executive authorities for intervening in individuals' privacy in order to capture a few terrorist, would damage democratic values and democracies in a greater extent. After

<sup>34</sup> Section 216 authorizes the government to intercept internet activity, and Section 218 allows the authorities to monitor phone calls without warrant if claimed to be for 'significant purpose'. For further detail see Boyne, op.cit., n 17 at p. 127.

<sup>35</sup> This section allows the so-called sneak and peek search method, by providing the authorities the option of giving a delayed notice to the searched persons, and if found necessary, even without any notification. For further detail see, <http://www.cdt.org/security/usapatriot/011210crs.pdf>, pp.11-12. For the consequences and critics of the Act see, <http://www.amnestyusa.org/waronterror/patriotact/> (Last visited, 18.03.2005).

<sup>36</sup> The right to privacy under Article 17 of ICCPR.

<sup>37</sup> As O'Connor and Ruman quote, such draconian policies are referred as being "the best recruiting tools the I.R.A. ever had." See, Michael P. O'Connor and Celia M. Ruman, 'Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting in Northern Ireland', *Cardozo Law Review* 24(2003), 1657-1751, note 21 at 1662. The same assertion could be made for the Turkish case. As Gürses states, one of the factors behind the PKK's success of recruiting new converts was the central governments hardline stance. See, Emin Gürses, *Ayrılkığı Terörün Anatomisi / IRA-ETA-PKK* (Istanbul: Bağlam Yayınları, 1997), p. 84. In fact, where oppression, or unlawfully employed force is present, terrorist organisations may find more supporters, simply because such policies alienate ordinary people and turn them against the state that restricts their civil liberties and infringes their human rights. Actually, as Şehirli puts it, ordinary citizens in the southeastern Turkey found themselves in a situation, where they had to choose between the terrorist organisation PKK and the state. See, Atilla Şehirli, *Türkiye'de Bölücü Terör Hareketleri ve Devletin Aldığı Tedbirler* (Istanbul: Burak Yayınları, 2000), p. 459. It can be argued, the reason why many had chosen PKK lies behind the fact that in the early stages of the fight against PKK, Turkey perceived even basic rights of their subjects (such as using Kurdish language on the streets and giving Kurdish names to their children) as a threat to its national security. And alienation of citizens as a result of such harsh policies of the central governments helped the terrorist organisation to present itself as an instrument for liberation and to gather more support from them. As Çevik points out, such restrictive policies on ethnic groups would engender and feed grievance, and grievance, one of the main underlying elements of terrorism, would feed terrorism. For further detail on psychological factors' impact on ethnic terrorism see, Abdülkadir Çevik, 'Etnik Terörizmin İkojisi ve Terörle Mücadeledeki Önemi', *Hukuki Perspektifler Dergisi* 5 (2005), 94-102.

Moreover, as Bal states, "...fighting terror is a police matter, but fighting terrorism is a political and ideological matter." Therefore, as Bal in his other article formulates, a soft and all-embracing power should be seen as an answer to terrorism. For the former quotation see, Ihsan Bal (March 2005), 'The Security Policies of the Turkey-EU Axis in Fighting Global Terror: An Alternative?', available at <http://www.turkishweekly.net/articles.php?id=130> (Last visited, 24.06.2006). For further detail on a soft and attractive power alternative as an answer to terrorism see, Ihsan Bal (26 April 2006), 'Terörle Mücadele: Dogmalar Yıkılabilir mi?', available at <http://www.usakgundem.com/yazarlar.php?id=292&type=1> (Last visited, 24.06.2006).

all, not every person in a society turns out to be a terrorist so that wider restrictions of liberties could be justified. Moreover, if such a response would be chosen, in the end there would be no democracy to protect from terrorists, as in the rhetoric since the Reagan era has been often pledged.<sup>38</sup> Acknowledging these dangers, on September 2004 the Federal District Court in Manhattan "uphold a challenge to the surveillance sections of the act"<sup>39</sup> and found "that it violated both free speech guarantees and protection against unreasonable searches."<sup>40</sup> An example for the first part could be the paranoia that might derive from Section 802 of the Act, which expands the notion of domestic terrorism to the extent that it may include acts of activists of NGO's like Greenpeace, and deprive them of freedom of expression and action within legal limits.<sup>41</sup>

Domestic legislation with regard to terrorism in the US is a subject matter of international law disciplines, because many states follow the US by accepting similar tough or sometimes draconian internal security provisions, which strengthen their executive powers.<sup>42</sup> As Human Rights Watch accuses, governments are opportunistic 'in the face of tragedy'<sup>43</sup>, and one can predict that they will be reluctant to give up those powers once gained, even if the US would amend those contradictory provisions following the Manhattan District Court's decision. Additional provisions without a sunset clause have been already suggested under the name of PATRIOT Act II since some of the first Act's provisions will expire; indeed the US administration is seeking ways for keeping the gained powers.<sup>44</sup> Moreover, there are many reasons to be concerned about the increases of human rights violations. No matter how there is the principle of equality of states in the international law, the US has influence and leverage on many global issues. But while the US has been enforcing measures inconsistent with democratic/liberal values -such as detention without trial, non-citizen discrimination, gathering secret evidence and hindering the right to confront allegations and witnesses, phone taping- within its borders, other states would easily evade criticism about their human rights abuses, simply because the critics of a state that itself violates those rights is not in a position to impose the contrary. Next

---

<sup>38</sup> In Cold War era, the US Supreme Court in *US vs. Robel* case decided as such: "...it would be ironic if, in the name of national defense, we would sanction the subversion of ...those liberties which makes the defense of the Nation worthwhile." Quoted in George C. Harris, 'Book Review: Terrorism and Constitution: Sacrificing Civil Liberties in the Name of National Security', *Cornell International Law Journal* 36(2003-2004), 136-150, at 150.

<sup>39</sup> 'Judge Strikes Down Section of Patriot Act Allowing Secret Subpoenas of Internet Data', *New York Times*, September 30, 2004, Late Edition - Final, Section A, Page 26, Column 1. <http://www.nytimes.com/2004/09/30/national/30patriot.html?ex=1097546758&ei=1&en=b93d2b4b76c265d0%20> (Last visited, 04.03.2005)

<sup>40</sup> *Ibid.*

<sup>41</sup> For further detail see, <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=11437&c=111>(Last visited, 18.03.2005).

<sup>42</sup> Cohn, *op.cit.*, p.364.

<sup>43</sup> Human Rights Watch (2002), 'Opportunism in the Face of Tragedy', <http://www.hrw.org/campaigns/september11/opportunismwatch.htm> (Last visited, 07.03.2005)

<sup>44</sup> In February 2003 the Justice Department of the US prepared a draft legislation expanding the executive powers of law enforcement by further jeopardizing civil liberties under the name of PATRIOT Act II, for further detail see <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11835&c=206> (Last visited, 18.03.2005).

chapter will look at another state, which has been for centuries the idol of liberties that has taken controversial security measures against terrorism recently.

### **Anti-Terror Legislation in the UK**

In the UK, in the wake of September 11 incidents, the Anti-Terrorism, Crime and Security Emergency Bill 2001 became an Act in December 2001. As a state struggling with IRA terror for a long time, strict anti-terror legislations in the UK had a long history. On the other hand, Britain has been an icon of civil liberties and rule of law for centuries as well.<sup>45</sup> Lord Atkin's statement during the mass detention of people of German descent in the Second World War amidst Nazi phobia indicates the tradition of the rule of law in the UK. As opposed to the Roman maxim, Lord Atkin stated, "in this country amidst the clash of arms laws are not silent."<sup>46</sup> However one interprets the cause of the state of alert in international arena currently, the fear of terror is leading the UK with the new terror legislations towards a totalitarian regime as Churchill once warned the Home Secretary about detaining individuals without charge.<sup>47</sup>

For the last three decades, the UK has been passing and amending laws against IRA terrorism. There was a two-tier system, one applied in Northern Ireland under the Emergency Provisions Act from 1973 onwards<sup>48</sup> and set out special regime for Northern Ireland and the other under Prevention of Terrorism (Temporary Provisions) Act from 1974 onwards<sup>49</sup> applied in the rest of the UK.<sup>50</sup> Because the European Court of Human Rights had ruled many times against the UK's anti-terror practice, the government set out new legislation in 2000, which abolished 'special regime' for Northern Ireland and some regulations that caused much criticisms in previous legislation –such as the abolishment of the right of remaining silent and evidentiary standards necessary for conviction, and indefinite internment without trial.<sup>51</sup> Nevertheless, the Act of 2000 still included controversial provisions such as the right to search and arrest the suspected terrorists without a warrant. This practice was based on mere suspicion - which can be said this feature has established a precedent for the PATRIOT Act of the US.<sup>52</sup> But the atmosphere that the 9/11 incidents caused, led the British government to enact a new Anti-Terror Act in 2001, which once again embraced the controversial provisions abolished with the Act of 2000.<sup>53</sup> The threat of apocalyptic terror was once again utilized for justifying the sacrifice of the basic civil liberties. Notwithstanding, according to Bindman, the UK's legislation was less

---

<sup>45</sup> Civil liberties stem from Magna Carta in 1215, and the Habeas Corpus Act has been in force since 1679. For Further detail see Geoffrey Bindman, 'A War on Terror or a War on Justice? Terrorism, War and the Rule of Law', p.1. Available at <http://www.statewatch.org/news/2005/feb/bindman-lecture.pdf> (Last visited, 15.03.2005).

<sup>46</sup> Ibid, p.2.

<sup>47</sup> Bindman, op.cit., p.3.

<sup>48</sup> Additional Emergency Provisions were enacted in 1978, 1987, 1991, and 1996. For further detail see O'Connor and Ruman, op.cit., p.1673.

<sup>49</sup> Subsequent Prevention of Terrorism (Temporary Provisions) Acts were enacted in 1976, 1984 and 1989. For further detail see ibid, p. 1674.

<sup>50</sup> Kim Lane Scheppele, 'Other People's Patriot Acts: Europe's Response to September 11', *Loyola Law Review* 50(2004), 89-148, at 125-127.

<sup>51</sup> Ibid., p. 128. O'Connor and Ruman, op.cit., 1664.

<sup>52</sup> Scheppele, ibid., p. 18.

<sup>53</sup> Scheppele, ibid.

infringing compared to the PATRIOT Act.<sup>54</sup> This argument can be supported only if it is assumed that non-citizens, refugees or citizens of Middle Eastern/Muslim descent have no right to enjoy civil liberties. Accordingly, the UK has chosen this time to detain suspected terrorist refugees or asylum seekers indefinitely in order not to breach the principle of *non-refoulement*, but at the expense of fair trial provisions of ECHR and ICCPR.<sup>55</sup> If attention is paid to the fact that these provisions of indefinite detention do not apply to citizens<sup>56</sup>, one can assert that the UK was breaching the well-established non-discrimination principle along with the US.<sup>57</sup> Not to send those suspects to their county of origin in the face of torture has its merits, but not giving those persons due process rights, because they are non-citizens cannot be argued as being a tenable approach since it overlooks the fact that every human being is entitled to basic rights. This fact was acknowledged in the decision of the Appellate Committee of the House of Lords in December 2004, which pointed out that the 4<sup>th</sup> Part of the Act is discriminatory and also disproportionate to the threat posed by terrorism.<sup>58</sup> In order to rule out such criticism, in the Prevention of Terrorism Act 2005, the government repealed the discriminatory parts of the previous Act, and empowered the executive branch to apply harsh policies equally to all UK and non-UK nationals.<sup>59</sup> Actually, the Prevention of Terrorism Act 2005 is far from ruling out criticisms, on the contrary, attracts more due to its -control orders- provisions. Control orders involve controversial measures such as restrictions on work/business, restrictions on communication/association with certain groups or individuals; prohibitions on using certain services like the internet and phones; and requirement of remaining indoors in a place, which is determined by the authorities and may be searched by them anytime, and an imposition of electronic tagging.<sup>60</sup> These control orders were found

---

<sup>54</sup> Bindman, op.cit., p. 4. Even if this comment was to be taken accurate, one cannot continue to assert this argument after the 2005 Act, which will be elaborated below.

<sup>55</sup> Carl Levy, 'The European Union after 9-11: The Demise of a Liberal Democratic Asylum Regime', *Government and Opposition* 40/1, 26-59, at 58-59. Sir David Williams, 'The United Kingdom's Response to International Terrorism', *Indiana International and Comparative Law Review* 13 (2003), 683-697, at 695. See Article 9 of ICCPR.

<sup>56</sup> Williams, *ibid*.

<sup>57</sup> "In 2003, the Special Rapporteur for the Prevention of Discrimination and the Rights of Non-Citizens submitted his final report, in which he concluded that international law generally requires the equal treatment of citizens and non-citizens and that exceptions to this principle can only be made if they serve a legitimate state objective and are proportional to the achievement of that objective." Roberts, op.cit., p. 729-730. Preventing terrorist acts from occurring could not be achieved even if every non-citizen or visitor to the UK or other country will be detained, simply because there is always the possibility that terrorist can be *among* the citizens. Current regulations in the US and UK has a starting point, if not a certain prejudice, that terrorism can be rooted only in certain ethnic/religious groups. It would not be wrong to argue that this over suspicious stance and measures towards non-citizens is not proportional with the threat present.

<sup>58</sup> Brice Dickson, 'Law versus Terrorism: Can Law Win', EHRLR (2005), 11-28, at 19-20. See for the Act <http://www.hmso.gov.uk/acts/acts2001/10024--e.htm#21> (Last visited, 14.03.2005).

<sup>59</sup> Shami Chakrabarti (28.02.2005), available at [http://news.bbc.co.uk/1/hi/uk\\_politics/4291565.stm#Jones](http://news.bbc.co.uk/1/hi/uk_politics/4291565.stm#Jones). (Last visited, 23.03.2005). Under the new legislation, Part 4 powers are replaced by new control orders entitled to the authorities. Authorities have been donated with the power to enact curfew, restriction on movements –which Home Office rejects to call house arrest- or restrictions on certain services such as internet and phone. For further detail see [http://www.homeoffice.gov.uk/docs4/terrorism\\_bill.pdf](http://www.homeoffice.gov.uk/docs4/terrorism_bill.pdf) (Last visited, 23.03.2005) and also <http://www.homeoffice.gov.uk/terrorism/govprotect/legislation/atcsa.html> (Last visited, 23.03.2005).

<sup>60</sup> For the Act of 2005 see, <http://www.opsi.gov.uk/acts/acts2005/20050002.htm> (Last visited, 11.06.2006).

in April 2006 in breach with human rights and 'incompatible' with the UK's obligations under ECHR.<sup>61</sup>

At the centre of the criticisms of the Prevention of Terrorism Act 2005 is the provision concerning detention without charge and trial.<sup>62</sup> Long detention periods without giving the detainees the right to contest the charges that they are accused of is under no circumstances tenable. It is also incompatible with the UK's human rights obligations.<sup>63</sup> On the other hand, the UK's Home Office stated that prosecution is 'preferable', but where it is not possible to follow the rules of evidence and procedures, detention without trial has to be carried on.<sup>64</sup> Once again, this cannot be said to be a reasonable and tenable stance. According to Paye, the Act "establishes the primacy of suspicion over fact."<sup>65</sup> Once primacy is given to mere suspicion –which mostly leads to or stems from racial/ethnic profiling-, the possibility of infringing innocent persons inalienable civil rights would inevitably grow, and hence serious implications on the cohesiveness of the society too. In this context, it is worth to remember the killing of an innocent Brazilian – because he looked like a Pakistani- and the recent anti-terror raids in Forest Gate, East London.<sup>66</sup> Briefly put, given the employed anti-terror measures, it can be said that the UK government has chosen to deviate from a more essential option, namely the right of liberty instead of choosing the 'lesser evil' option.<sup>67</sup> Furthermore, as Burke argues, the perception of Al-Qaeda threat of the government in the UK is not solid enough to justify the controversial anti-terror measures.<sup>68</sup>

---

<sup>61</sup> For further detail see, Vikram Dodd and Carlene Bailey, 'Terror Law an Affront to Justice –Judge', *The Guardian*, 13.04.2006, available at <http://www.guardian.co.uk/terrorism/story/0,,1752773,00.html> (Last visited, 22.06.2006). Moreover, control orders, which were also entailed in the Terrorism Act 2006, were ruled illegal on 28 June 2006. For further detail see, <http://politics.guardian.co.uk/homeaffairs/story/0,1808088,00.html> (Last visited, 28.06.2006).

<sup>62</sup> Pre-charge detention periods of 28 days under the Act of 2005 is kept in the Terrorism Act 2006 as well.

<sup>63</sup> For further detail about the view of human rights organizations see HRW's comment available at <http://hrw.org/english/docs/2005/03/15/uk10321.htm> (Last visited, 22.03.2005). AI's comment 'The Prevention of Terrorism Bill Is a Grave Threat to Human Rights and the Rule of Law' available at <http://www.amnestyusa.org/waronterror/document.do?id=80256DD400782B8480256FB60051E577> (Last visited, 10.03.2005).

<sup>64</sup> Further detail about Home Office's stance is available at [http://www.homeoffice.gov.uk/terrorism/faq/atcsa\\_faq.html#11](http://www.homeoffice.gov.uk/terrorism/faq/atcsa_faq.html#11) (Last visited, 20.03.2005).

<sup>65</sup> See, Jean-Claude Paye, 'The End of Habeas Corpus in Great Britain', *Monthly Review* 57/6 (2005), available at <http://www.monthlyreview.org/1105paye.htm> (Last visited, 22.06.2006).

<sup>66</sup> Amid the raid, one terrorist suspect was injured, which turned out to be innocent of allegations put against him. For further information see, Matt Barnwell and Stephanie Condron, 'Police Set Free 'Terror Raid' Brothers', *The Telegraph*, 10.06.2006.

<sup>67</sup> Any evidence, which is obtained in a way that is not admissible before a court under current laws, could be made admissible by changing relevant laws and procedures. Even if it could be argued that this also would cause some harm to civil liberties, I suppose it would be a better option than depriving eventually innocent persons' liberty without giving them any information (such as with what charge they have been accused) and keeping them in custody especially without giving them the chance to confront those charges. The Home Office claims revealing those evidences would risk the effective continuance of the secret services' work. This argument cannot justify deprivation of individuals' basic rights, which are protected under ICCPR, ECHR and other various human rights conventions/treaties.

<sup>68</sup> Jason Burke, 'Be Afraid, Perhaps. But Very Afraid? No', *The Guardian*, 13 March 2005. Available at <http://politics.guardian.co.uk/attacks/story/0,1320,1436666,00.html> (Last visited, 25.03.2005).

For further detail about the controversial parts of the new legislation see [http://news.bbc.co.uk/1/hi/uk\\_politics/4288407.stm](http://news.bbc.co.uk/1/hi/uk_politics/4288407.stm) (Last visited, 12.03.2005).

**OVERRIDE CIVIL LIBERTIES OR NATIONAL SECURITY?**

First of all, it is essential to test the effectiveness of the policies chosen in order to decide whether it is necessary to sacrifice civil liberties or not. Testing the effectiveness of these anti-terror legislations can be done in the light of the experience that some states gained in the past while tackling the problem of terrorism. For example, in Turkey and in the UK, governments pursued iron hand policies against domestic terror organizations resembling current policies against the allegedly global terrorist organization Al Qaeda. For some experts, there was not even an established organization called Al Qaeda before September 11 and the succeeding counter-terror rhetoric.<sup>69</sup> The fear of further terrorist attacks itself terrorized the communities and pave the way for governments for additional powers, despite strong opposition of human rights advocates/organizations.<sup>70</sup> One can argue that executive powers found the opportunity to extend their power at the expense of civil liberties obtained over centuries because people are terrorized. In the US, the 'Red Scare' between 1917-1920 and in the 40's, and Japanese fear after the Pearl Harbour attack led to irrational policies. Realist perspectives perceive the world to be full of enemies and require realist policies focusing on the concept of vigilance – maybe - more than it is needed. But if one is to take the term realism by its dictionary meaning, the perception of threat has to be realistic and rational as well. Liberal democratic societies cannot live with a constant fear –reaching the level of paranoia- in the indefinite period of 'the war on terror' concept. The prospect of a terrorist attack, especially if one takes into account that no intelligence is totally trustable, should not deprive individuals' rights for good. Moreover, suspicion seeds hatred and alienation, and may cause fragmentation in societies.<sup>71</sup> There is no question about any terrorism's illegitimacy. But while fighting against IRA and PKK terrorism, the UK against the former organization, and Turkey against the latter, took some steps that victimized the terrorist suspects, which in the end caused just the opposite of what was desired. In Turkey, mostly militarist and undemocratic harsh measures have been seen as the appropriate means in the early stages of the fight against PKK terrorism, which could be argued, did not manage to help stopping the circle of violence alone and arguably delayed it.<sup>72</sup> In the UK, the discriminatory and exceptional measures taken in North-

---

<sup>69</sup> In BBC's documentary film 'Power of Nightmares: The Shadow in the Caves' James Burke asserts, that there was not even an organization which called itself Al-Qaeda, it only emerged after the 9/11 incidents with the rhetoric of the US authorities. For detail about that film see <http://news.bbc.co.uk/1/hi/programmes/3970901.stm> (Last visited, 12.04.2005)

<sup>70</sup> Organizations such as Human Rights Watch or Amnesty International.

<sup>71</sup> This would be more the case if the proposed Operation TIPS would come into force. The Terrorism Information and Prevention System hire ordinary citizens for reporting every suspicious act. This is highly debatable, since perception of 'suspicious' for a housewife or for an electrician would differ from those of intelligence agents. Moreover, seeding suspicion to the whole society would only lead to an insecure and unhappy society. For TIPS see [http://www.humanrightsfirst.org/us\\_law/loss/loss\\_report.pdf](http://www.humanrightsfirst.org/us_law/loss/loss_report.pdf) (Last visited 11.03.2005).

<sup>72</sup> Here, it is worth to mention Wilkinson's arguments about the military's role as a response to terrorism in democracies. For Wilkinson, 'criminal justice model' is the appropriate means, and except for the emergency situations military should not have role in combatting terrorism in liberal democratic states. For further detail see, Paul Wilkinson, *Terrorism Versus Democracy: The Liberal State Response* (London: Frank Cass Publishers, 2001), p. 125. Furthermore, as Jenkins points out, 'terrorism may be aimed at deliberately provoking repressions, reprisals and counterterrorism, which may ultimately lead to the collapse of an unpopular government.' See, Brian M. Jenkins, 'International Terrorism', in *The Use of Force: Military Power and International Politics*, eds. Robert J. Art and Kenneth N. Waltz (Oxford:

ern Ireland, between 1970 -1975 according to commentators had the same effect.<sup>73</sup> Violence as the solely answer to terrorism, as seen in the Palestinian-Israeli conflict, cannot be the solution of the terrorism problem for liberal societies.<sup>74</sup> On the other hand, even though pursuing harsh policies instead of military means can be seen in Ignatieff's terminology as the 'lesser evil', this approach contradicts most liberal democratic values. If Al Qaeda terrorism is to be interpreted as being against liberal Western values, these states have to be careful not to diminish these features of their regimes themselves while fighting against the threat. An argument, which supports restrictions on peoples' basic rights amid 'war on terror', which is a war as mentioned earlier could last forever, cannot be rational. This approach can be seen as analogue to the act of a mother killing her own children, to prevent the children's suffering or death at the hands of the enemy.<sup>75</sup> The renouncement of liberal democracies in the face of a possibility of great terrorist threat, even if this possibility is higher than fifty percent, is still not tenable. Like people who happen to live in earthquake zones, the societies of the 21<sup>st</sup> century have to learn to live with the risk of a terrorist attack. In a technologically advanced globalised era, anyone among societies can communicate easily for accessing the means and carry out the planned

---

Rowman & Littlefield Publishers, Inc., sixth edition, 2004), p. 80. And, as a response to the provocative actions of PKK, the counterterrorist measures taken by Turkey many times crossed the lines of the legal use of force and involved in many human rights violations, as was reported by human rights organisations such as Amnesty International and Human Rights Watch. Human Rights Watch's report is available at <http://www.hrw.org/reports/1999/turkey/index.htm#TopOfPage> (Last visited, 22.06.2006). The argument that military tools and excessive/illegal use of force delayed stopping violence can be supported with a concrete evidence; more than 36,000 human being's loss in twenty six years is self explanatory. It can also be explained by Bal's assertion that fighting terror is actually a struggle to win the hearts and minds of the people. See, Bal, 'The Security Policies of the Turkey-EU Axis in Fighting Global Terror: An Alternative?', op.cit. Furthermore, as Laçiner points out, harm done by the state to one person means to turn that person's family and friends against the state. See, Sedat Laçiner(20 April 2006), 'Terörle Mücadelede Sihirli Yasalar', available at <http://www.usakgundem.com/yazarlar.php?id=289&type=3> (Last visited, 26.06.2006). After all, grievance is the main cause of terrorism. Therefore, it would be not wrong to argue that human rights violations, and state coercion are counterproductive and are to be seen as one of the reasons behind the cycle of violence. Moreover, as Guelke argues, state coercion "may be seen as the evidence of effectiveness of the campaign" by the terrorists, which may reinforce the persistence of their activity. See, Adrian Guelke, *The Age of Terrorism and The International Political System* (London: I.B. Tauris Publishers, 1998), p. 180. For Oran, PKK got stronger between 1990-1994 due to vast human rights violations. The reason lies behind the fact that PKK could get more support from population, which found itself alienated from the state. See, Baskın Oran, '1990-2001: Küreselleşme Ekseninde Türkiye', ed. Baskın Oran, *Türk Dış Politikası, Kurtuluş Savaşından Bugüne Olgular, Belgeler, Yorumlar*, Cilt II (İstanbul: İletişim Yayınları, 2002), p.219-221, 233. For further detail see also note 37.

<sup>73</sup> Dickson, op.cit., p. 24.

<sup>74</sup> For Wilkinson, states, which recourse to force without respect of the principles of international law are placing themselves 'on the same level morally as the terrorist states.' Wilkinson, op.cit., pp.104-105. It is not questionable that sovereign states possess the exclusive right of using force for protecting its national security. However, states are bound by international humanitarian law, which prohibits excessive and indiscriminate use of force (principle of proportionality and principle of distinction) and reprisals. In addition, if they claim to be liberal democratic states, they are bound by liberal democratic values, which has been painstakingly evolved over centuries. If states do not abide those fundamental principles of international humanitarian law, as Wilkinson points out, they would risk to come to the same level of terrorist organisations. Apart from the problems with illegality, such unlawful acts are counter-productive too; they would engender grievance, which in the end, can be argued, would feed terrorism.

<sup>75</sup> Ignatieff, op.cit., p.14.

terrorist act. But it is not rational to cease everything in normal life, because of the probable hit of an unpredictable terrorist attack. Washington's maxim has to be taken into account, but as Bindman conveys one should not take security services' threat perceptions as accurate without questioning, since they are 'in the business of constructing threats to security'<sup>76</sup> and they tend to perceive that "the weaker the evidence, the more sinister the threat is."<sup>77</sup> Under these circumstances the answer to the question -either security or civil liberties- should be not one or the other, rather both; the synthesis has to be achieved. Moreover, as Hoffman argues "[B]y challenging the framework of international human rights and humanitarian law, so painstakingly developed over the last several decades, the 'war on terrorism' undermines our security more than any terrorist bombing."<sup>78</sup>

### **Punishment or Prevention?**

As the UK and the US anti-terror measures indicate, the mentality in tackling terrorism is more than ever focused on prevention rather than regular criminal law procedure of punishing after crimes have been committed. There is nothing wrong with seeking to anticipate the cruelties and trying to prevent them from occurring. Criminal law is there for providing justice and where necessary and possible, providing remedies. Nevertheless, one can argue that after a suicide bombing, there is no one to punish -except the terrorists on the decision-making level or planners of the attack- and no remedy would be commensurable with the lives of people. Nevertheless, preventive approach has also weaknesses, and a potential for causing harm. Surveillance agencies, which lack of the knowledge of the suspect's native language, cannot be said to be endowed with the highest capacities to be trusted on for their information, especially if the example Cole in his article conveys born in mind. Secret agents were keen to presume from the music, body language and the tone of the voice of the speakers of a dinner party that they were terrorists, even though they did not understand any word of the native language of the suspects.<sup>79</sup> This approach is carried on with the current Justice Department policy of the US, which is following the steps such as 'first locking up' and then 'questioning' with the presumption of the person being dangerous.<sup>80</sup> Moreover, this over suspicious approach is mostly applied in a discriminative manner. Aliens, especially if they are of Muslim or/and Arab origin<sup>81</sup>, are the ones who come into question first. This, according to Cole, is sacrificing 'selectively' the liberties of non-citizens for the security of citizens. This is, as he continues to explain, simply because non-citizens have no right to vote and do not have channels to make their voice heard. This approach, one can also call pre-

---

<sup>76</sup> Bindman, op.cit., p.3.

<sup>77</sup> Ibid.

<sup>78</sup> Hofmann, op.cit., p.933. Hoffmann also observes that the exaggerated threat perception overshadows the seriousness of the human rights consequences of the measures taken by states.

<sup>79</sup> Cole, 'Their Liberties, Our Security, Democracy and Double Standard', *ibid.*, p.303. Maybe this example is an extreme and old one; but still it is a good example for establishing a clear understanding of security services' way of working. Although secret intelligent agencies in recent years are recruiting more and more native speakers, still, the presumption of guilt by every small fact -due to heightened threat perception- as a sign of being terrorist constitutes the problematic, and does harm civil liberties.

<sup>80</sup> *Ibid.*, p.295.

<sup>81</sup> This stance indicates that authorities target individuals in respect to their ethnicity/religion (ethnic profiling), which is prohibited under Art 1(2) of ICCPR. See Cohn, p.31.

emptive punishment for the sake of prevention of the terrorist acts, is especially harmful, if taken into account that under new regulations, these interned persons have been denied the right of counsel, due process rights, and the public is denied the right of information. This, as Christopher warns, could lead to the situation in Latin America of the 1980's: 'disappeared people incidents'.<sup>82</sup> Moreover, as the term pre-emptive indicates, such a punishment would be employed without having solid evidence – as opposed to the ordinary criminal law procedure- and more dangerously, would be carried out by presuming guilt on the basis of ethnic profiling, association or simply of standing on the contact list of other suspected.<sup>83</sup> Once these steps are accepted as the 'new normalcy'<sup>84</sup> the next stage would be the demand of authorities to extract information from these highly 'dangerous' suspects by torture, even if it is prohibited strictly and is a non-derogable provision of the UN Convention against Torture<sup>85</sup>. Advocates of restrictions on civil liberties would justify their stance with the 'lesser evil' approach, and probably also utilize the Machiavellian phrase that 'the end justifies the means'. And if the objective is saving lives, the suspected individuals' suffering might even not count.<sup>86</sup> In the light of this objective even if the argument for lowering standards for detaining persons in times of emergency seems not harmful, as Gearty argues, giving up some criminal law rules and procedures would pave the way for giving up of the other essential ones.<sup>87</sup> This 'new normalcy' with the selective sacrifice of liberties and punishment without criminal law guarantees is a bit excessive vigilance, which is both useless and has a high possibility of backfiring.<sup>88</sup> Alienating non-citizens or even citizens of a certain origin is risking the cooperation of that certain group, which might be of help in identifying and cracking down the 'sleeper cells'. It is also harming the peace in democratic societies by privileging some citizens over others, which in the end would harm the peace in the world.

---

<sup>82</sup> Cohn, op.cit., p.354.

<sup>83</sup> Setting guilt by association, or even guilt by material support without the intend of furthering terrorist acts is according to Cole a questionable approach, since not every member supports the means that particular organizations uses. Moreover material support is not always given for terrorist ends. According to Cole, even 95 percent of the terrorist organization Hamas' funds is used for social services. See Cole, McCarthyism, pp. 5-15. According to Ignatieff, "persons should be detained only what they have done, not for who they are, what they think, profess or believe." Ignatieff, op.cit., p. 10.

<sup>84</sup> Cohn, op.cit., p. 363.

<sup>85</sup> See Article 1 of UN Convention against Torture and Other Cruel, Inhuman or Degrating Treatment or Punishment of 1984, and Article 7 of ICCPR.

<sup>86</sup> Recently "the Case Daschner" in Germany caused controversies in the public. The question, whether 'torture for extracting information to save human lives' should be accepted, is discussed in Germany did not end with the decision of Frankfurt District Court (Frankfurter Landgericht). Many opposed the decision as it would give the impression that torture is not an absolute taboo anymore, while others justified it with many human life that is at stake. Nevertheless, it should be born in mind, once the way for torture is opened, it would be very difficult to draw the boundaries for the reasons for applying it. Besides, who will decide whether the boundaries are crossed or not? For further detail about the case, see Arthur Kreuzer, 'Zur Not ein bisschen Folter?' at [http://www.zeit.de/2004/21/Essay\\_Verfahren?term=Daschner](http://www.zeit.de/2004/21/Essay_Verfahren?term=Daschner) (Last visited, 01.04.2005) and Can Dündar, 'İşkence', *Milliyet*, 22 March 2005, available at <http://www.milliyet.com.tr/2005/03/22/yazar/dundar.html> (Last visited, 22.03.2005).

<sup>87</sup> "Necessary evils give way to greater ones." See, C.A. Gearty, 'Terrorism and Human Rights', *EHLRLR* 7(2005), 1-8, at 3.

<sup>88</sup> Bindman concludes from the experiences of states dealing with terrorism that "draconian legal measures attempting to deny all legal safeguards to all deemed to pose a threat to security." Bindman, op.cit., p.3. Especially for the consequences of the discriminative and harsh policies see Hoffmann, op.cit., p. 947.

## CONCLUSION

The 9/11 terrorist attacks opened a great debate about civil liberties and national security. The debate heated in the wake of the PATRIOT Act in the US and the UK's anti-terror legislations. Many human rights organizations and advocates discussed questions as such, whether to permit extracting information by torture, whether to allow preventive detention of members of some ethnic/religious groups, or simply, whether to take security measures at the expense of civil liberties -mostly in a discriminative manner. These establish the paradoxical core of the controversies of the subject matter. Above-mentioned dilemmas complicate issues and render finding a clear and optimum solution difficult.

Providing security without giving room for liberties is like putting a human being in a golden cage. No matter how essential security and protection is, restricting liberties to the widest extent would only lead to an unhappy and even more insecure society. Furthermore, 'the right to security is not absolute in theory or in reality.'<sup>89</sup> There will always be a risk of threat to security that no preventive measure could foresee and avert from materialising. Nevertheless, this fact should not be interpreted as negating the need for states and security authorities to take necessary steps and to be vigilant. Even restrictive measures against individuals' civil liberties may be accepted in order to prevent possible apocalyptic threats. But still, this should be the case, only if the threat is imminent, and there is some kind of solid/trustable evidence or intelligence displaying that such a threat exists. Nevertheless, those measures have to be in accordance with the human rights law. It would be not logical to let all civil liberties be deprived at the hands of states -as the example of a mother killing her children herself- in the face of a terrorist threat, which exactly aims to destruct those core values of democratic societies. In sum, the solution for this dilemma could be what Addicot suggests: "all measures employed to combat terrorism must be within the bounds of democratic principles and the rule of law, and, more importantly, so-called extraordinary laws should be *proportionate* to the terrorist threat and *frequently reviewed, revised, and rescinded if no longer required.*"<sup>90</sup> Especially the steps taken in a discriminative manner should be paid attention and should be eliminated immediately, since this, in the end might affect the peace in societies and in the world.<sup>91</sup>

---

<sup>89</sup> Hoffmann, op.cit., p. 950.

<sup>90</sup> Addicot, op.cit., p.5. (Emphasis added).

<sup>91</sup> A survey shows that Muslims with 75 percent fear that they are going to be labelled as terrorist. This fact, as a result of anti terror measures taken in the wake of 9/11 is showing that the social coherence of societies is in danger. Huntington's thesis of 'clash of civilizations' can be said will become more chances to materialize in a world where some groups of people of different religion has alienated. The survey is available at [http://ottawa.cbc.ca/regional/servlet/View?filename=ot\\_muslim20040618](http://ottawa.cbc.ca/regional/servlet/View?filename=ot_muslim20040618) (Last visited, 15 March 2005).