

# THE UNITED KINGDOM'S RESPONSE TO INTERNATIONAL TERRORISM

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## I. INTRODUCTION

The United Kingdom is not unfamiliar with terrorism. Over the last two centuries there have been outbursts of terrorism in and related to Ireland, and the "Thirty Years War" from 1660 to the so-called Good Friday Agreement of 1998 has kept the British people aware of the many important facets of terrorist activity and their impact on the law, on political priorities, on international relations, and on the mood of the nation.

With the rapid emergence of what is loosely called international terrorism in recent years, the complexities grow; and there is an apparently never-ending sequence of terrorist outrages in different parts of the world, perpetrated by a variety of terrorist groups and organizations and stimulating a variety of responses in individual countries whether or not they are directly affected by particular actions. Moreover, there is a growing appreciation of the seemingly endless drift of terrorist activity well into the future. The endless drift also applies to anti-terrorist activity. When interviewed by an American journalist in 1915 about the Great War, David Lloyd George – later to be Prime Minister from 1916 to 1922 – said that there was "neither clock nor calendar" to the British war effort.<sup>1</sup> The phrase itself – "neither clock nor calendar" – can be applied today to terrorism and anti-terrorism alike, with virtually all countries compelled to respond as never before in what may be described, at least formally, as times of peace.

For the United Kingdom, well versed in domestic terrorism and acutely aware of the threat of international terrorism, the challenges of national security in a democratic society are both pressing and changeable. The British government has in recent years responded by reaching for custom-made legislative powers, by seeking international cooperation (ranging from bilateral contacts between London and Dublin to cross-border links within

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1. JOHN GRIGG, *LLOYD GEORGE: WAR LEADER 1916-1918* 5 (2002).

Europe or world-wide links through the United Nations), and by reassessing and adapting the laws of asylum, immigration, and deportation.

There has, given the rapidity of the responses, been a sense of bewilderment and tentativeness. Consider, for example, the detention of hundreds of individuals, including several British nationals, in Guantanamo Bay, Cuba. The United States has claimed the right, in the words of Donald Rumsfeld, "to detain certain individuals 'for the duration of the conflict,'" a statement which the Foreign Affairs Committee of the House of Commons saw as "pos[ing] the question of whether the 'war against terrorism', unlike a conventional conflict, can ever have an end."<sup>2</sup> One of the detained British nationals, Feroz Ali Abbasi, and his mother sought judicial review in order to compel the Foreign and Commonwealth Office "to make representations on his behalf to the United States Government or to take other appropriate action or at least to give an explanation as to why this has not been done."<sup>3</sup> The Court of Appeal found itself, in hearings last September and its decision handed down on 6 November 2002, obliged to delve into treaty obligations, public international law, human rights, and searching issues of justiciability.<sup>4</sup>

The appellate judges were patently uneasy, not least over recent rulings by courts in the United States on Guantanamo Bay. Lord Phillips, the Master of the Rolls, speaking for the Court of Appeal, suggested that it was objectionable that "Mr Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal."<sup>5</sup> On the facts before the Court of Appeal, Lord Phillips was satisfied that the Foreign and Commonwealth Office had not been inactive over the position of British citizens in Guantanamo Bay and that appellate decisions in the United States were still to be made.<sup>6</sup> "[T]he issue of justiciability depends [on subject matter and suitability in the particular case,"<sup>7</sup> and in this case it was felt to be inappropriate to order the Secretary of State to make any specific representations to the United States.<sup>8</sup> The Center for Constitutional Rights, New York, concluded that "at present the British

2. FOREIGN AFFAIRS COMMITTEE, SECOND REPORT, 2002-03 Sess., *Foreign Policy Aspects of the War Against Terrorism*, H.C. 196, para. 230 (Dec. 19, 2002), available at <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmcaff/196/19602.htm>. See also *id.* app. at 7, para. 4 (a Memorandum from the Foreign and Commonwealth Office, which states that "[t]he Government is conscious of the importance of safeguarding the welfare of the British detainees in Guantanamo Bay and of the need to resolve their position"); *id.* app. at 12, para. 1 (a detailed Memorandum submitted by the New York-based Center for Constitutional Rights expressing "very grave concerns" over the entire situation at Guantanamo Bay).

3. *Abbasi v. Sec'y of State*, [2002] C.A. Civ. 1598, para. 1. (C.A. 2002) (Lord Phillips, MR; Waller L.J.; Carnwath L.J.).

4. See *id.*

5. *Id.* para. 66.

6. See *id.* para. 107, i., iii.

7. *Id.* para. 85.

8. *Id.* para. 107, i.

courts have considered themselves unable to do more than give their admittedly damning view of the illegality of the detentions, and have not compelled the Foreign Secretary to act in a particular way.”<sup>9</sup> The expression of view by a British Court is not unimpressive or unimportant, however, and it may have encouraged the Foreign Affairs Committee of the House of Commons to recommend that the British Government should “continue to press” for the trial of those detained at Guantanamo Bay and to provide further information about the British citizens detained.<sup>10</sup> Developments in the American courts will be monitored and scrutinized, of course, though a recent decision of the Federal Court of Appeals in Richmond, Virginia, demonstrated great deference to the President in the context of the war against terrorism.<sup>11</sup>

A recent example of the British courts skirting the boundaries of justiciability while at the same time allowing the public airing of the issues at stake is the case where the Campaign for Nuclear Disarmament (CND) sought judicial review against the Prime Minister and others in an effort to secure a declaratory ruling as to the true meaning of United Nations Resolution 1441.<sup>12</sup> The spur behind CND was the apparent imminence of war against Iraq,<sup>13</sup> a subject which also occupied much of the time of the Foreign Affairs Committee in December 2002.<sup>14</sup> It was claimed that the Government should not embark on military action against Iraq in the mistaken belief that it was lawful to do so.<sup>15</sup> They sought, in effect, a ruling on a pure point of law.<sup>16</sup> The Divisional Court, however, rejected any temptation to declare the meaning of an international instrument operating purely on the plane of international law, adding that it did not wish “to embark upon the determination of an issue if to do so would be damaging to the public interest in the field of international relations, national security or defence [sic].”<sup>17</sup> “The issue on which CND [sought] a ruling[,]” said Mr Justice Richards, “is one on which the Government has deliberately refrained from expressing any concluded or definitive view.”<sup>18</sup> Once again the applicants had to be content with a public airing of the issues but without a substantive ruling in their favor. The *Abbasi* case and the *CND* case reflect the difficulty of securing

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9. FOREIGN AFFAIRS COMMITTEE, *supra* note 2, app. 12, para. 31.

10. *Id.* paras. 238-39.

11. *See* United States v. Lindh, 212 F. Supp. 2d 541, 554-58 (E.D. Va. 2002).

12. *See* Campaign for Nuclear Disarmament v. Prime Minister, [2002] H.C. 2777 (Q.B. Div’1 Ct. 2002) (Simon Brown L.J., Maurice Kay J., Richards J.).

13. *See id.* para. 2.

14. *See* FOREIGN AFFAIRS COMMITTEE, *supra* note 2, paras. 77-200 (dealing extensively with the Threat from Iraq, Disarming Iraq, and Military Action Against Iraq, along with Oral Evidence, Memoranda and Appendices). Resolution 1441 was adopted by the Security Council on Nov. 8, 2002. U.N. SCOR, 57th Sess., 4644th mtg. at 1, U.N. Doc. S/RES/1441 (2002), available at <http://www.un.org/Depts/dhl/resguide/scact2002.htm>.

15. *See* Campaign for Nuclear Disarmament, [2002] H.C. 2777.

16. *Id.* para. 59.

17. *Id.* para. 47, ii.

18. *Id.* para. 53.

political accountability on serious issues of international law and policy and, at the same time, underline difficulty of securing an alternative mechanism of accountability through the courts. A similar problem exists in wider areas of national security, especially in the face of new-style terrorism.

## II. NATIONAL SECURITY: THE IRISH QUESTION AT THE CENTRE

Terrorism in and associated with Northern Ireland from 1968 onwards made many facets of new-style methods familiar to the British people: advanced technology, easier communications, a greater international impact (involving, for instance, countries such as Libya as well as drawing on sympathizers in the United States who were active enough even in the nineteenth century), and the deliberate use of the media, especially television, to offer the "oxygen of publicity" to various groups.<sup>19</sup> In addition, some groups indulged more and more in sinister fundraising on a rapidly evolving basis, so much so that the Northern Ireland Affairs Committee of the House of Commons spoke as follows in mid-2002:

In addition to traditional fundraising activities such as extortion and armed robbery, paramilitaries from both traditions are increasingly turning their attention to more complex and sophisticated forms of organised [sic] criminal activity such as fuel smuggling and counterfeiting. These probably net the terrorist groups millions of pounds of income each year. Some of the revenue goes to fund individual criminal lifestyles. The remainder buys propaganda and weapons which help terrorists maintain their dominance – often violent – of local communities.<sup>20</sup>

The Committee went on to examine in devastating detail the corrupt side of terrorism which is so often ignored by romanticists and apologists. Authorities in the United States are fully aware of what terrorism brings in its slipstream, and the Committee referred to the trial and conviction of Provisional IRA members in the United States in 2000 for seeking, well after the Good Friday Agreement of 1998, to acquire weapons there; and mention was also made of arrests of alleged Provisional IRA explosives engineers in Colombia, allegedly linked to FARC (the Revolutionary Armed Forces of Colombia) "which has strong links with the Colombian drugs trade."<sup>21</sup> In the

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19. See *Brind v. Sec'y of State*, 1 All E.R. 720 (H.L. 1991).

20. NORTHERN IRELAND AFFAIRS COMMITTEE, FOURTH REPORT, 2001-02 Sess., *The Financing of Terrorism in Northern Ireland*, H.C. 978-I, at 5 (July 2, 2002), available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmniaf/978/97802.htm> (last visited May 6, 2003).

21. *Id.* para. 5.

United Kingdom the trial began only last month of three men alleged to be part of a Real IRA bomb plot,<sup>22</sup> the Real IRA being dissident Republican terrorists in the undergrowth of activity in Northern Ireland in both the Republican and the Loyalist traditions.

The special brand of domestic terrorism associated with Ireland has, over the last three decades, produced considerable legislation, considerable litigation, a plethora of official and unofficial reports and studies, a series of constitutional proposals and agreements, and a cauldron of political controversy over international and national law. The official reports alone provide an arsenal of description and analysis of terrorism, mainly associated with Northern Ireland.<sup>23</sup> The legislation for the last thirty years includes laws specifically related to Northern Ireland<sup>24</sup> and laws related to the United Kingdom as a whole.<sup>25</sup> A major effort to bring the legislation together, to

22. See Stewart Tendler, *Phone Calls 'Link Three Accused to Real IRA Gang,'* THE TIMES (London), Jan. 23, 2003, at 9. The bombings took place in 2001. See *id.* "As the attacks were being planned, members of the gang were allegedly running a racket called 'diesel washing', whereby cheap diesel meant for farmers is sold as normal diesel at enormous profit." *Id.*

23. See, e.g., TRIBUNAL OF INQUIRY, VIOLENCE AND CIVIL DISTURBANCES IN NORTHERN IRELAND IN 1969, 1972, Cmnd. 566 (reporting violence and civil disturbances in Northern Ireland in 1969), available at <http://cain.ulst.ac.uk/hmso/scarman.htm>; COMMITTEE OF PRIVY COUNSELORS, REPORT OF THE COMMITTEE OF PRIVY COUNSELORS APPOINTED TO CONSIDER AUTHORISED PROCEDURES FOR THE INTERROGATION OF PERSONS SUSPECTED OF TERRORISM, 1972, Cmnd. 4901, available at <http://cain.ulst.ac.uk/hmso/parker.htm> [hereinafter THE PARKER REPORT]; REPORT OF THE ENQUIRY INTO ALLEGATIONS AGAINST THE SECURITY FORCES OF PHYSICAL BRUTALITY IN NORTHERN IRELAND ARISING OUT OF EVENTS ON THE 9TH AUGUST 1971, 1971, Cmnd. 4823, available at <http://cain.ulst.ac.uk/hmso/compton.htm>; REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND, 1972, Cmnd. 5185, available at <http://cain.ulst.ac.uk/hmso/diplock.htm> [hereinafter THE DIPLOCK REPORT]; REPORT OF A COMMITTEE TO CONSIDER, IN THE CONTEXT OF CIVIL LIBERTIES AND HUMAN RIGHTS, MEASURES TO DEAL WITH TERRORISM IN NORTHERN IRELAND, 1977, Cmnd. 5847, available at <http://cain.ulst.ac.uk/hmso/gardiner.htm> [hereinafter THE GARDINER REPORT]; STANDING ADVISORY COMMISSION ON HUMAN RIGHTS, THE PROTECTION OF HUMAN RIGHTS BY LAW IN NORTHERN IRELAND, 1977, Cmnd. 7009, available at <http://cain.ulst.ac.uk/hmso/cmd7009.htm>; REPORT OF THE COMMITTEE OF INQUIRY INTO POLICE INTERROGATION PROCEDURES IN NORTHERN IRELAND, 1979, Cmnd. 7497, available at <http://cain.ulst.ac.uk/hmso/bennett.htm>; REPORT OF AN INQUIRY INTO LEGISLATION AGAINST TERRORISM, 1996, Cmnd. 3420 (see *infra* note 27 for a more current report on legislation against terrorism).

24. See various laws including CIVIL AUTHORITIES (SPECIAL POWERS) ACT (1922), available at <http://cain.ulst.ac.uk/hmso/spa1922.htm>, leading up to the now-repealed NORTHERN IRELAND (EMERGENCY PROVISIONS) ACT (1996) (amended 1998), available at <http://www.hmso.gov.uk/acts/acts1996/1996022.htm>.

25. See PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT (1974), available at [http://www.hmso.gov.uk/acts/acts1989/Ukpga\\_19890004\\_en\\_1.htm](http://www.hmso.gov.uk/acts/acts1989/Ukpga_19890004_en_1.htm), re-enacted finally in the now-repealed PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT (1989), available at [http://www.hmso.gov.uk/acts/acts1989/Ukpga\\_19890004\\_en\\_1.htm](http://www.hmso.gov.uk/acts/acts1989/Ukpga_19890004_en_1.htm). Periodic review of such legislation was undertaken at various times: see Cmnd. 7324 of 1978 (Lord Shackleton); Cmnd. 8803 of 1983 (Lord Jellicoe); and Cmnd. 264 of 1987 (Viscount Colville). The original Act of 1974 was enacted as an immediate response to the Birmingham pub bombings of that year, in which 21 died and over 180 were injured. See CLIVE WALKER, THE PREVENTION OF TERRORISM IN BRITISH LAW 31 (2d ed. 1992).

encompass domestic and international terrorism, was the Terrorism Act 2000,<sup>26</sup> which itself followed on an extensive consultation exercise.<sup>27</sup> Well before the Terrorism Act 2000 the “tension between terrorist legislation and human rights” had “generated a remarkable amount of litigation before the Strasbourg court,” and the tension is likely to continue.<sup>28</sup> In the United Kingdom as a whole but with regard to Northern Ireland in particular, events since 1968 have deeply influenced approaches to national security (including the involvement of the Security Service, MI5), to police powers, to the maintenance of public order, to the exercise of administrative discretion at its widest level, to ombudsman procedures, to the status of the police, to the systems of prosecution and of trial, to the use of informers, to the employment of the military arm in aid of civil power, and to co-operation in law enforcement with other countries including the Republic of Ireland and the United States.

The various events stretched mechanisms of political accountability to their limits, and pressures were brought to bear in Parliament as well as in the courts. After direct rule from London was re-established for the province in 1972, successive efforts to find a new constitutional settlement culminated in the Good Friday Agreement of 1998 which reaffirmed “total and absolute commitment to exclusively democratic and peaceful means of resolving differences on political issues” and “opposition to any use or threat of force . . . for any political purpose.”<sup>29</sup> Despite continuing activity by various paramilitary groups, the slow movement to the decommissioning of illegally-held arms in the possession of paramilitary groups, and the suspension last year of the Northern Ireland Assembly, the Good Friday Agreement has unquestionably improved the situation in Northern Ireland; and furthermore it provided a basis for the adoption of the Terrorism Act 2000.

The Government recognized in 1998 “that the threat from international terrorist groups (and to a lesser extent other groups within this country) means that permanent UK-wide counter-terrorist legislation will be necessary even when there is a lasting peace in Northern Ireland.”<sup>30</sup> It was pointed out at the

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26. See Terrorism Act 2000, available at <http://www.hmso.gov.uk/acts/acts2000/20000011.htm> (last visited May 6, 2003).

27. See LEGISLATION AGAINST TERRORISM, 1998, Cmnd. 4178 (a consultation paper presented by the Secretary of State for the Home Department and the Secretary of State for Northern Ireland), available at <http://www.archive.official-documents.co.uk/document/cm41/4178/4178.htm> (last visited May 6, 2003).

28. See A. W. BRADLEY & K. D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 628 (13th ed. 2003). Chapter 26 of the book provides a valuable account of emergency powers and terrorism. See *id.* at 602-28. The litigation, of course, relates to the European Convention on Human Rights and latterly to the Human Rights Act 1998, which incorporates the Convention into domestic law.

29. THE BELFAST AGREEMENT: AN AGREEMENT REACHED AT MULTI-PARTY TALKS ON NORTHERN IRELAND, 1998, Cmnd. 3883, at 1, para. 4, available at <http://cain.ulst.ac.uk/events/peace/docs/agreement.htm> (last visited May 6, 2003).

30. LEGISLATION AGAINST TERRORISM, *supra* note 27, at vi, para. 6.

time that between 1969 and 30 November 1998, 3289 people died in Northern Ireland as a direct result of Irish terrorism and that between 1972 and 30 November 1998, 121 people were killed in mainland Britain in incidents of Irish terrorism.<sup>31</sup> Between 1976 and November 1998, 94 incidents of international terrorism took place in the United Kingdom and these included the bomb planted on Pan Am Flight 103 which exploded over Lockerbie in December 1988, killing 270 people.<sup>32</sup> Against this background it is not surprising that new comprehensive legislation was brought in to replace the Prevention of Terrorism (Temporary Provisions) Act 1989 and the Northern Ireland (Emergency Provision) Act 1996; and it is not without significance that Parliament in the new legislation abandoned internal exile or banishment orders previously allowed for<sup>33</sup> and also abandoned the discredited powers of detention without trial which had been discontinued for some time despite their re-enactment in 1996.<sup>34</sup>

The Terrorism Act 2000 nevertheless consists of 131 sections and 16 schedules.<sup>35</sup> There is a loose, wide-ranging definition of "terrorism" itself; there is power to proscribe specified organizations linked to terrorism at home or internationally; there is detailed provision on terrorist property and finance; police powers are enhanced; a number of terrorist offences are identified; and Northern Ireland is still provided for explicitly and separately (for example, trial on indictment for scheduled offences continues to be before a court without a jury, an innovation recommended by Lord Diplock in 1972).<sup>36</sup> Already the Act has been invoked in numerous situations. In July 2002, two Indian businessmen were jailed for being members of a proscribed group, namely the International Sikh Youth Federation, which was listed with a number of other foreign groups by virtue of subordinate legislation under the Terrorism Act 2000;<sup>37</sup> a Muslim convert was acquitted after being accused of trying to recruit Islamic terrorists by offering weapons training on his

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31. *Id.* para. 2.2.

32. *Id.* para. 2.3. Twenty-six people were killed in other incidents during that time. See *Id.*

33. *Id.* ch. 5 (Exclusion). On earlier attempts to utilize the law effectively to secure internal banishment, see D.G.T. Williams, *Suspended Sentence at Common Law* [1963] PUBLIC LAW 440, 446-54.

34. See BRADLEY & EWING, *supra* note 28, at 615.

35. See Terrorism Act 2000, *supra* note 26.

36. See *id.* See generally CLIVE WALKER, BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION (2002).

37. See *Sikh Pair are Jailed Under New Terror Act*, THE TIMES (London), July 20, 2002, at 7. The subordinate legislation was the Terrorism Act 2000 (Proscribed Organizations) (Amendment) Order 2001, SI 2001 No. 1261, which came into force on March 29, 2001. This list includes Al-Qa'ida, Hizbollah, External Security Organisation ETA. See WALKER, *supra* note 36, at 43-50.

website;<sup>38</sup> charges under the Act were brought last month after the discovery of the poison, Ricin, in a London flat;<sup>39</sup> during a police raid in Manchester on 14 January 2003, a detective constable, Stephen Oake, was stabbed to death by a suspect;<sup>40</sup> later in January police rapid entry units smashed through the door of the Finsbury Park mosque, which had been the centre of various concerns over several years, and seven men were arrested.<sup>41</sup>

It is not as if pre-2000 laws and pre-2000 events were being forgotten, especially where Ireland is concerned. We have been reminded often of the "two great misfortunes" in Anglo-Irish political relations: "One is that the Irish memory is too long, and the other is that the English memory is too short."<sup>42</sup> Alternatively, we have been assured that the "curse of Ireland has been the length of its memory."<sup>43</sup> Take for instance, the events of Sunday 30 January 1972 when British soldiers opened fire in the streets of Londonderry: thirteen civilians died and "a like number" were injured,<sup>44</sup> and the circumstances of the shooting have remained highly contested and highly charged ever since. An immediate inquiry conducted by the then Lord Chief Justice,<sup>45</sup> who reported in April 1972, satisfied no one, and some of the Lord Chief Justice's findings – that, for instance, "there is no reason to suppose that the soldiers would have opened fire if they had not been fired upon first"<sup>46</sup> – have been strongly challenged. Over a quarter of a century later the Government of the United Kingdom, almost as a prelude to the Good Friday Agreement, set up a new Tribunal of Inquiry headed by Lord Saville of Newdigate, a serving judicial member of the House of Lords, and consisting

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38. Richard Ford, *Muslim Cleared of Attempting to Recruit Terrorists*, THE TIMES (London), Aug. 10, 2002, at 2; Tania Branigan, *Cleared Chef Says He was Terror Case Scapegoat: Jury Dismisses First UK Charges Since Attacks on September 11*, THE GUARDIAN, Aug. 10, 2002, at 2.

39. Steve Bird et al., *Four Appear in Court on Chemical Weapon Charge*, THE TIMES (London), Jan. 14, 2003, at 11.

40. Ian Cobain & Russell Jenkins, *Struggle Ended as Suspect Lashed Out with Knife*, THE TIMES (London), Jan. 16, 2003, at 4. See also *The Algerian Connection*, THE TIMES (London), Jan. 16, 2003, at 23. Powers under the Anti-Terrorism, Crime and Security Act 2001 were also invoked. See 397 PARL. DEB., H.C. 2002-03 Sess. (Jan. 15, 2003) 683 (statement by the Home Secretary), available at [http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmhansrd/cm030115/debtext/30115-04.htm#30115-04\\_head0](http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmhansrd/cm030115/debtext/30115-04.htm#30115-04_head0) (last visited May 6, 2003).

41. John Steele et al., *Police Seize Weapons in Mosque Raid Forged Passports and ID Cards Found*, THE DAILY TELEGRAPH, Jan. 21, 2003, at 1. Seven people were arrested under the Terrorism Act. *Id.*

42. 162 PARL. DEB., H.L. (5th ser.) (1949) 947.

43. 149 PARL. DEB., H.C. (5th ser.) (1921) 358.

44. See REPORT OF THE TRIBUNAL APPOINTED TO INQUIRE INTO THE EVENTS OF SUNDAY, 30 JANUARY 1972, H.L. 101, H.C. 220, (1972), available at <http://cain.ulst.ac.uk/hmsol/widgery.htm> (last visited May 6, 2003) [hereinafter THE WIDGERY REPORT].

45. See *id.* See generally J. BOWYER BELL, THE IRISH TROUBLES: A GENERATION OF VIOLENCE 1967-1992 (1993, paperback ed. 1994), ch. 8 (Bloody Sunday: January 1972); D. WALSH, BLOODY SUNDAY AND THE RULE OF LAW IN NORTHERN IRELAND (2000).

46. THE WIDGERY REPORT, *supra* note 44, at Summary of Conclusions, para. 7.



also of a former New Zealand appellate judge (subsequently replaced by a former Australian appellate judge) and of a former Chief Justice of New Brunswick.<sup>47</sup> That Tribunal, which has been exposed to legal questioning in the ordinary courts (especially over the claimed anonymity of military witnesses),<sup>48</sup> is still sitting and recently, in January 2003, it devoted several sessions to the examination and cross-examination of Sir Edward Heath, who had been the British Prime Minister in 1992.

As if to emphasize that efforts to challenge alleged injustices of the past are not confined to one side of the political or religious divide, the bombing in Omagh on 15 August 1998 “when a large car-bomb exploded in the centre of the town, killing 28 persons and injuring at least 220”<sup>49</sup> has aroused sustained concern. The Real IRA was allegedly responsible, aiming to undermine the peace movement in Northern Ireland, but five individuals allegedly involved have not – for lack of evidence – been prosecuted. However, through the initiative of a firm of lawyers, writs have now been served seeking compensation for families of those killed.<sup>50</sup> It remains to be seen what happens when the case, as expected, reaches the High Court in Belfast later this year.<sup>51</sup>

There is little doubt, however, that the events of 11 September 2001 changed attitudes, perspectives, and responses to the scourge of terrorism, shifting us sharply in the United Kingdom from a predominantly Irish emphasis to a fuller appreciation of the international sweep of terrorism in the twenty-first century. There has long been a European dimension,<sup>52</sup> though the pace of events has changed dramatically since 11 September, with recent

47. The New Zealand judge, who had to retire through ill-health, was Sir Edward Somers; the Australian judge is the Hon. John Toohey, formerly of the High Court of Australia; the former Chief Justice is the Hon. William. L. Hoyt. See *R v. Lord Saville of Newdigate*, 4 All E.R. 860 (C.A. 1999). See generally 642 PARL. DEB., H.L. (2003) 880-82, available at [http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldhansrd/pdvn/lds03/text/30107-03.htm#30107-03\\_star0](http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldhansrd/pdvn/lds03/text/30107-03.htm#30107-03_star0) (last visited May 6, 2003) [hereinafter 642 PARL. DEB.]. The total cost of the inquiry will be £155 million sterling. *Id.* at 880. The cost of the inquiry has led to controversy, especially after criticism by the Chief Constable of Northern Ireland. See David Lister, *Outcry Over Police Chief's Bloody Sunday Comment*, THE TIMES (London), Feb. 19, 2003, at 2.

48. See *R v. Lord Saville of Newdigate, ex parte A and others*, 4 All E.R. 860 (C.A. 1999). For more recent legal action involving the Saville inquiry, see Joshua Rozenberg, *Saville Loses Appeal Over Bloody Sunday Soldier X*, DAILY TELEGRAPH, Feb. 15, 2003, at 16.

49. See WALKER, *supra* note 36, at 209. One of the injured subsequently died. See *id.*

50. See Paul Mungo, *Legal Action Heroes*, THE TIMES MAGAZINE, Jan. 25, 2003, at 34-37.

51. See *id.* See also, 642 PARL. DEB., *supra* note 47, at 882; David Lister, *Families Challenge Adams Over Omagh Bombing Evidence*, THE TIMES (London), Feb. 11, 2003, at 4.

52. See ANTONIO VERCHER, *TERRORISM IN EUROPE: AN INTERNATIONAL COMPARATIVE LEGAL ANALYSIS* (1992).

arrests for alleged terrorism in Italy, Spain, and France.<sup>53</sup> There is now, however, full recognition of the global dimension reflected in a variety of terrorist attacks in later 2002 alone: the attack in October on a French-registered ship, the *Limburg*, off the coast of Yemen; the attack which destroyed the Sari Club at Kuta Beach, Bali; the attack by Chechen rebels on a Moscow Theatre which ended with the deaths of all the terrorists and 119 hostages; the bombing of the Israeli-owned Paradise Hotel in Mombasa, Kenya, and the firing of two missiles at an Israeli airline taking off from Mombasa on the same day.<sup>54</sup>

The attacks of 11 September 2001 truly brought home the global aspects of terrorism. They demonstrated, in the words of a Select Committee of the House of Commons,

some of the physical vulnerabilities of western society, but they also highlighted less tangible vulnerabilities in the way in which the shock at the attacks was transmitted rapidly throughout a globalised [sic], interconnected system, costing billions of dollars in economic damage through direct losses, lost growth, instability to certain industries (airline, insurance). The attack(s) also had major knock-on effects in political and social terms, as well as psychological.<sup>55</sup>

Recognition of the global impact has undoubtedly influenced the courts of law in the United Kingdom, as was vividly shown in a case concerning the deportation of a Pakistani citizen in the interests of national security<sup>56</sup> and in another case involving the extradition of two people suspected of terrorist links to the United States.<sup>57</sup> There were several references in one form or another to "the modern world of international terrorism and crime"<sup>58</sup> or to "today's global village where national borders are no impediment to international terrorists and other criminals."<sup>59</sup> For its part, Parliament in London responded to 11 September by enacting a major statute additional to

53. For a useful itemizing of terrorist arrests in Europe (including the United Kingdom) since September 11, 2001, see Bruce Johnston, *Italy: Little Evidence Britain was to be Targeted*, DAILY TELEGRAPH, Jan. 25, 2003, at 4. On European Union action against terrorism, see FOREIGN AFFAIRS COMMITTEE, *supra* note 2, paras. 23-43.

54. FOREIGN AFFAIRS COMMITTEE, *supra* note 2, paras. 63-69. See a statement and debate on global terrorism and Iraq in 398 PARL. DEB., H.C.(2003) 167, available at [http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmhansrd/cm030121/debtext/30121-04.htm#30121-04\\_head0](http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmhansrd/cm030121/debtext/30121-04.htm#30121-04_head0) (last visited May 6, 2003).

55. DEFENCE COMMITTEE, SIXTH REPORT, 2001-02 SESS., *Defence and Security in the UK*, H.C. 518-I, para. 118 (2002), available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmdfence/518/51808.htm> (last visited May 6, 2003).

56. *Sec'y of State v. Rehman* 1 All E.R. 122 (H.L. 2002).

57. *Re Al-Fawwaz* 1 All E.R. 545 (H.L. 2002).

58. *Id.* para. 63.

59. *Id.* para. 102 (4).

the Terrorism Act 2000 and also by seeking enhanced scrutiny of the actions of the executive, especially through the employment of select committees with self-explanatory titles such as the Home Affairs Committee, the Foreign Affairs Committee, the Intelligence and Security Committee, and the Defence Committee.<sup>60</sup> The executive, entrusted with the initiative and principal responsibility in matters of national security, has obvious global contacts, and on 20 June 2002 the Prime Minister announced a new post of "Security and Intelligence Co-coordinator and Permanent Secretary, Cabinet Office" created to enhance the capacity at the centre of government to co-ordinate security and intelligence and to deal with risks and major emergencies.<sup>61</sup> The political and indeed legal assumptions have changed irreversibly.

### III. NATIONAL SECURITY: GLOBAL DEMANDS

The legislation which reached the statute book some three months after 11 September was the Anti-terrorism, Crime and Security Act 2001.<sup>62</sup> This statute has been received with nothing approaching unanimous approval, and the critics have raised issues of proportionality, relevance, human rights, democracy, police powers, the definition of terrorism, and the "legislative morass" resulting from having to take account of two major anti-terrorism laws enacted in successive years.<sup>63</sup> The Act, which consists of 129 sections and eight schedules,<sup>64</sup> has been described by one commentator as "the most draconian legislation Parliament has passed in peacetime in over a century."<sup>65</sup> Some concessions were made during the legislative proceedings – for instance, the proposed new offence of incitement to religious hatred was dropped (at least for the time being) –<sup>66</sup> but the main body of the Bill remained intact, and the resulting statute is formidable in range and depth.

There are provisions on terrorist property and finance, on immigration and asylum, on weapons of mass destruction, on the security of pathogens and toxins, on the security of the nuclear industry, on aviation security, on police powers, and on many other matters. In addition, a wide definition of terrorism

60. See *Defence and Security in the UK*, *supra* note 55, paras. 33-34.

61. *Id.* para. 183. The first holder of the post is Sir David Omand.

62. See Anti-Terrorism, Crime and Security Act 2001, available at <http://www.legislation.hmso.gov.uk/acts/acts2001/20010024.htm> (last visited May 6, 2003).

63. See WALKER, *supra* note 36, at 7. See generally, Helen Fenwick, *The Anti-Terrorism, Crime and Security Act 2001: A Proportionate Response to 11 September?*, 65 MOD. L. REV. 724, 724-62; Adam Tomkins, *Legislating against terror: the Anti-terrorism, Crime and Security Act 2001* [2002] PUBLIC LAW 205-20.

64. See Anti-terrorism, Crime and Security Act 2001, *supra* note 62.

65. Tomkins, *supra* note 63, at 205.

66. For criticisms, see HOME AFFAIRS COMMITTEE, 2001-02 Sess., *The Anti-Terrorism, Crime and Security Bill 2001*, H.C. 351, paras. 56-61 (2001), available at <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmhaff/351/35102.htm> (last visited May 6, 2003).

is carried over from the Terrorism Act 2000. Previously, in the context of national security, there have been no formal definitions of terms such as 'security', 'espionage', 'subversion' and 'sabotage'; and the term 'terrorism' is a relative newcomer to the field of overlapping threats to national security. The Parker Committee, which reported in 1972 on procedures for the interrogation of persons suspected of terrorism, said that the term "no doubt connotes violence, and violence for political ends"<sup>67</sup> while the Gardiner Commission which reported in 1975 on terrorism and human rights stressed that "[t]he new factor in the long history of dissent is the effectiveness of the weapons its more extreme proponents can command."<sup>68</sup> The Commission anticipated many contemporary assessments of terrorism in speaking of "the relative ease with which arms, money and terrorist skills can cross frontiers, the effect of mass communications in both facilitating and glamorizing [sic] violence, and above all the vulnerability of complex industrial societies."<sup>69</sup> Perhaps it is not surprising that open-ended definitions of terrorism are preferred.

In surveying the complexities of the legislation of 2001, reference could perhaps be made to problems associated with terrorist property and finance and also to the statutory power to detain without trial. In the area of property and finance there is considerable anxiety. Looking specifically at Northern Ireland, the Northern Ireland Affairs Committee commented in June 2002 that "[t]errorism is about gaining power through violence, and money is a means to that end";<sup>70</sup> in July 2002 a Working Group of the Society for Advanced Legal Studies examined in some detail the huge difficulties faced in cutting into the financial streams available to terrorists,<sup>71</sup> and the Foreign Affairs Committee stated in December 2002 that an "important aspect of multilateral co-operation against terrorism has focused on the elimination of sources of terrorist financing," adding that international progress to eliminate sources of funding to al Qaeda and associated terrorist groups has been "frustratingly slow."<sup>72</sup> This state of affairs underlines the enormous commitment of resources required in this area alone.

The issue of detention without trial raises deep misgivings, not least for those aware of detention without trial in both World Wars in the last century. During the Second World War, for instance, "a very considerable number of people were detained by the British government without charge, or trial, or

67. THE PARKER REPORT, *supra* note 23, para. 1. See also, THE DIPLOCK REPORT, *supra* note 23, paras. 3-5.

68. THE GARDINER REPORT, *supra* note 23, para. 7.

69. *Id.*

70. *The Financing of Terrorism in Northern Ireland*, *supra* note 20, para. 1.

71. SOCIETY FOR ADVANCED LEGAL STUDIES, LONDON, *THE FUNDING OF TERROR: THE LEGAL IMPLICATIONS OF THE FINANCIAL WAR ON TERROR, THE INTERDICTION OF TERRORIST PROPERTY WORKING GROUP*, (July 2002). This Report consists of 186 pages.

72. FOREIGN AFFAIRS COMMITTEE, *supra* note 2, paras. 18-19.

term set, on the broad ground that this was necessary for national security. Most were not British citizens, but technically enemy aliens . . . .”<sup>73</sup> One such person detained was Michael Kerr, whose family was forced to flee from Berlin in March 1933: he was later to serve in the Royal Air Force and ended up as a distinguished member of the Court of Appeal.<sup>74</sup> The story of wartime detention, according to Brian Simpson, “illustrates a problem which faces liberal democracies in times of grave crisis – is it essential to their survival that they should temporarily cease to be liberal democracies until the threat is over?”<sup>75</sup> The same dilemma applies today in the face of international terrorism, both in the United States and the United Kingdom. In the United Kingdom the question relates to only a few people: non-British nationals who cannot (by virtue of article 3 of the European Convention on Human Rights) be deported to places where they face torture or inhuman or degrading treatment or punishment and yet are certified as suspected international terrorists. In order to allow for the detention without trial of such persons, the government formally derogated from article 5(1) of the Convention (on fair trial) in accordance with article 15 which permits derogation from most articles “in time of war or other public emergency threatening the life of the nation.” Certification by the Home Secretary is subject to appeal to the Special Immigration Appeals Commission (SIAC) which had originally been set up under a statute of 1997. A further appeal from SIAC to the Court of Appeal is provided for in the statute.<sup>76</sup>

Nine people detained under the Act duly appealed to SIAC and succeeded on the ground of discrimination, namely, that the Act and the Human Rights Act 1998 (Designated Derogation) Order 2001 “allow only suspected terrorists who are non-nationals to be detained when there are equally dangerous British nationals who are in exactly the same position who cannot be detained.”<sup>77</sup> The right not to be discriminated against, explained Lord Woolf (the Lord Chief Justice) in a further appeal to the Court of Appeal from SIAC, “is now enshrined in article 14 of the [European Convention], but long before the HRA came into force the common law recognised [sic] the importance of not discriminating.”<sup>78</sup> Lord Woolf added that the danger of unlawful discrimination “is acute at times when national security is

73. *Preface to A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN* at vii (paperback edn. 1994).

74. See MICHAEL KERR, *AS FAR AS I REMEMBER* chs. 29-33 (2002).

75. SIMPSON, *supra* note 73, at 409.

76. For a clear exposition of the detention provisions, see Fenwick, *supra* note 63, at 730-58; Tomkins, *supra* note 63, at 210-19.

77. Andrew Norfolk et al., *Suspects' Win Hits Terror Crackdown*, THE TIMES (London), July 31, 2002, at 1. Earlier arguments are reported in Andrew Norfolk, *New Anti-terror laws 'Deny Basic Human Rights'*, THE TIMES (London), July 18, 2002, at 8.

78. *A, X and Y v. Sec'y of State*, [2002] C.A. Civ 1502, para. 7 (C.A. Civ. 2002) (Lord Woolf). In that paragraph, Lord Woolf cited *Jackson J. in Ry Express Agency v New York*, 336 U.S. 106, 112-13 (1949). See *id.*

threatened.”<sup>79</sup> In arguing against the SIAC ruling, “Lord Goldsmith [QC, the Attorney-General], said that the attacks on the World Trade Centre and the Pentagon had changed for ever the landscape of terrorism[,]” and he argued that the detention provisions in the 2001 Act represented “a balance between the interests of the suspected individuals and the interests of the community as a whole to be protected from terrorism.”<sup>80</sup> In its judgment on 25 October 2002, the Court of Appeal broadly agreed. Lord Woolf, accepting the need for a collective approach to terrorism, spoke of an appropriate degree of deference to the actions of the executive, which he regarded as proportionate to what is necessary. One of his colleagues, Lord Justice Brooke, also noted that it “has been a longstanding feature of international law that a state is entitled to treat non-nationals differently from nationals in time of war or other public emergency threatening its life as a nation.”<sup>81</sup>

The courts in the United Kingdom are, by whatever route in national or European or international law, having to come to terms with the global pressures of terrorism. The challenge is to maintain a balance. There is a danger of complacency, of course, but equally there is a danger of overreaction in the face of what seems to be the unknown and the unpredictable.<sup>82</sup> The pressure on the intelligence services in all countries is very great. In a different era, Allen Dulles – the younger brother of John Foster Dulles and for eight years director of the Central Intelligence Agency – wrote that

it is impossible to predict where the next danger spot may develop. It is the duty of intelligence to forewarn of such dangers, so that the government can take action. No longer can the search for information be limited to a few countries. The whole world is the arena of our conflict.<sup>83</sup>

Yet it is important to bear in mind that emergencies do come to an end – even the Hundred Years War, or the Thirty Years War, or the Wars of the Roses – and we should not dig trenches for all time. At the end of the nineteenth century many people feared the activities of anarchists – indeed, it was an anarchist who assassinated President McKinley on 6 September 1901 – but the

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79. A, X and Y [2002] C.A. Civ 1502, para. 9 (C.A. Civ. 2002) (Lord Woolf).

80. Andrew Norfolk, *Anti-terror Laws 'Have Boosted Global Support Against Al-Qaeda'*, THE TIMES (London), Oct. 8, 2002, at 2.

81. A, X and Y [2002] C.A. Civ 1502, para. 112 (C.A. 2002) (Lord Brooke).

82. See, e.g., ALAN M. DERSHOWITZ, *WHY TERRORISM WORKS*, ch. 5 (2002) (Striking the Right Balance).

83. ALLEN DULLES, *THE CRAFT OF INTELLIGENCE* 55 (1963).

threat receded,<sup>84</sup> there were subsequent fears about radicals in politics<sup>85</sup> and later post-war fears about Communists during the McCarthy period in American politics,<sup>86</sup> but in these and other cases of fear and even hysteria the mood changed with the passage of time and the turn of events. For reasons indicated earlier, the present emergency over international terrorism is unprecedented, but realistic and well-informed responses are not incompatible with the demands of balance and proportionality in a democratic country.<sup>87</sup> The courts owe a special responsibility to maintain a watching role in volatile times.

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84. *See, e.g.*, JOHN QUAIL, *THE SLOW BURNING FUSE: THE LOST HISTORY OF THE BRITISH ANARCHISTS* (1978).

85. *See, e.g.*, WILLIAM PRESTON, JR., *ALIENS AND DISSENTERS: FEDERAL SUPPRESSION OF RADICALS, 1903-1933* (1963).

86. *See, e.g.*, ERWIN N. GRISWOLD, *OULD FIELDS, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH CENTURY LAWYER 189-94* (1992) (on the McCarthy Period and the Privilege against Self-Incrimination). Griswold writes of "the massive upsurge of concern about communism. It was blown into a sort of firestorm by the activities of Senator Joseph McCarthy of Wisconsin. In retrospect, it is hard to explain why the reaction was so extreme." *Id.* at 189.

87. *See* 1 COMMISSION OF INQUIRY CONCERNING CERTAIN ACTIVITIES OF THE ROYAL CANADIAN MOUNTED POLICE, SECOND REPORT, FREEDOM AND SECURITY UNDER THE LAW, paras. 16-24 (Canadian Government Publishing Centre, 1981) ("Security and the Requirements of Liberal Democracy"). *See also*, LAURENCE LUSTGARTEN & IAN LEIGH, *IN FROM THE COLD: NATIONAL SECURITY AND PARLIAMENTARY DEMOCRACY* (1994).

