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SELECT COMMITTEE OF PARLIAMENT ON THE 17TH AMENDMENT TO THE CONSTITUTION

THE NATIONAL POLICE COMMISSION OF SRI LANKA

THE IMPACT OF GLOBAL TERRORISM ON HUMAN RIGHTS

LAW & SOCIETY TRUST

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Editor's Note ... ...

This Issue publishes a document that had been requested for by several readers of the Review; namely the Interim Report of the Select Committee of Parliament on the 17th Amendment to the Constitution, datelined August 9th 2007.

Several recommendations of this Select Committee are quite commendatory as for example, its proposal that the ten member Constitutional Council, (the body established by the 17th Amendment to vet nominations to the constitutional commissions and appointment to judicial office as well as to public office), should be legislatively enabled to function with six members rather than with all ten members.

So to is the recommendation that the appointments may not be made altogether at once by the President and that the Sinhala version of the 17th Amendment should be further amended to fall in line with the English text by using the word 'or' in Article 41A(5). The President is further called upon to make the appointments within fourteen days of the receipt of the relevant communication of nomination instead of the current indefinite time frame. The Speaker is vested with the specific duty to ensure that the needed nominations are, in fact, made.

As should be recalled, it was the inability on the part of the political parties 'not belonging to the party of the Prime Minister or the Leader of the Opposition' to agree by majority vote on the remaining nomination to the CC that led to the lapsing of the CC since the terms of office of six appointed members expired in March 2005. While such a deadlock may have been resolved through parliamentary consensus in any decently functioning political system or, at the very least, resolved by sensitive judicial intervention given the paramount importance of the 17th Amendment to the constitutional process of governance, this was not the case in Sri Lanka.

Instead, blatantly problematic appointments were made by Presidential fiat to the several constitutional commissions established by the 17th Amendment such as the Human Rights Commission of Sri Lanka and the National Police Commission even though the CC was not in place and was consequently unable to approve the nominations in question. This status quo has remained for well over two and a half years thus exemplifying the perfidy of politicians in regard to the unconscionable negation of a constitutional amendment in which much public trust was reposed.

Thus, though the laborious process of a parliamentary select committee may have been avoided in order to set the situation to rights, the recommendations in the Select Committee's Interim Report (despite with a limited focus only on the procedural problems affecting the 17th Amendment) is at least a limited improvement

The Committee has suggested that successive acting appointments should also receive the CC approval and has stipulated that the CC makes not one nomination to the post of Chairman of the constitutional commissions but three, out of which the President 'may' appoint anyone of the persons so nominated. Appointments to the Commissions "shall" be made within two weeks of the receipt of the nominations.

Its insistence that decisions of the CC may be subject only to the fundamental rights jurisdiction of the Supreme Court appears however to be superfluous given that Article 41H already specifies this and also given recent judicial precedent on this question.

Further, the Committee's view that the power to make the remaining nomination vested in political parties 'not belonging to the party of the Prime Minister or the Leader of the Opposition' should be decided, not on whether that party was part of the government or opposition at the time of election but rather on the question as to whether they function independently in Parliament, is bound to be contested by some segments of public opinion on the basis that this interpretation lends itself to expedient political maneuvering within Parliament.

Apart from these differences of opinion, what should however not be forgotten is that the 17th Amendment became dysfunctional not as a result of inadequacy of legislative language but rather due to the clear absence of political will both in Parliament and in the office of the Presidency to allow this constitutional amendment to be properly implemented.

The paralyzing effect that the negation of the 17th Amendment has had on the constitutional commissions is discussed in the subsequent paper that the Review publishes regarding the functioning of the National Police Commission. The question arises then as to whether the 17th Amendment was deliberately crippled in order to politicize the constitution of the constitutional commissions, some of which have direct impact on monitoring the human rights situation in the country. These are uncomfortable questions that nevertheless become important due to the reality that confronts us in Sri Lanka today.

If so, then the question arises as to why this bypassing of the constitutional process has not been taken up as a main issue of contention by the Opposition parties? In this respect, the blame lies almost equally on politicians on both sides of the floor in the House. We are also entitled to question as to why the recommendations in the interim report of the Select Committee of Parliament are not placed before the House and implemented forthwith into law? Further delay in this regard should be subjected to stringent public criticism.

The concluding part of the Review examines the balance sought to be struck between rights of individuals and the security of the State in the context of the United Kingdom's 'fight against terror' in a manner that is also pertinent to Sri Lanka.

Thus;

> *It is often argued that human rights cannot be enjoyed in the same way as they have been enjoyed in the past. Nonetheless, the extent to which change must occur to effectively fight terrorism whilst also safeguarding the rights of citizens is also a matter for debate.*

This paper also examines the concept of deterrence in international relations in the wake of the 2003 Iraq war.

Kishali Pinto Jayawardena

THE SIXTH PARLIAMENT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA (Second Session)

- Interim Report - From the Select Committee of Parliament to look into the Operation of the Seventeenth Amendment to the Constitution.

INTERIM REPORT

Your Committee* was appointed on 18th July 2006 with the mandate of assessing the operation of the 17th Amendment to the Constitution, to make recommendations to resolve its procedural shortcomings and further strengthen its objectives. Accordingly you were pleased to appoint the following members to the Committee under the Chairmanship of Hon. DEW Gunasekera, Minister of Constitutional Affairs and National Integration and its first meeting was held on 18th October 2006

Hon. Nimal Siripala de Silva
Hon. A.H. M. Fowzie
Hon (Prof) G.L. Peiris
Hon. Jeyaraj Fernandopulle
Hon. Rauf Hakeem
Hon. Dinesh Gunewardene
Hon. Douglas Devananda
Hon. (Mrs) Ferial Ismail Ashraff
Hon. Karu Jayasuriya
Hon. Mahinda Samarasinghe
Hon. (Prof) W.A. Wiswa Warnapala
Hon. M. Joseph Michael Perera
Hon. K.N. Choksy
Hon. Wijeyadasa Rajapakse
Hon. Bimal Ratnayake
Hon. Piyasiri Wijenayake
Hon. V. Puththirasigamoney
Hon. G. G. Ponnambalam
Hon. (Ven.) Athuraliye Rathana Thero

The immediate problem in respect of the 17th Amendment to the Constitution was the non-appointment of the 10th Member in terms of Section 41A (1) (f) of the 17th Amendment.

The first Constitutional Council was appointed on 22.03.2002 and its term expired on 21.03.2005. Thereafter nominations for the second Constitutional Council to be appointed by President were made by

* Ed Note: Report addressed to the Speaker of Parliament

the Prime Minister and the Leader of the Opposition. However, a problem arose due to the inability to decide on who are the minor parties eligible to nominate the 10th Member under Section 41 A (1) (f). The Council itself does not commence functioning in the absence of the 10th Member due to the fact that the Attorney-General expressed the view that it was essential for all members to be appointed before the Council could start functioning. In the meantime the Janatha Vimukthi Peramuna had informed the Speaker that despite having contested the last General Election in 2004 under the UPFA nomination, they would function as a separate party within the Parliament. The Attorney-General however expressed the opinion that the JVP should not be treated as a separate party. However, sitting as a separate party in Parliament, the JVP which had 38 members claimed its right to select the 10th Member of the Constitutional Council which resulted in a deadlock.

During the course of its deliberations, other issues were highlighted before your Committee i.e.

1. The term of the Constitutional Council should coincide with the lifespan of the Parliament;

2. The Constitutional Council should be able to function with 6 members instead of the total 10;

3. There should be continuity of the Council despite the vacation of office by one member until the next person is appointed particularly in view of Article 31 (6) b. Therefore, a system of filling of vacancies should be formulated;

4. A Member should be eligible for reappointment. The former members of the Constitutional Council expressed the opinion that the present problems could be solved as it is for amending the law and that the 6 persons already nominated could be appointed;

5. It was proposed to prescribe a time frame within which appointments to the Constitutional Council should be made and to require the President to give reasons where he does not make an appointment;

6. The former members of the Council also stated that it was totally unacceptable for one party to withhold the functioning of the Constitutional Council and that the view of the Attorney-General was not acceptable;

7. At present, the Speaker has the sole power to summon the Council. It was proposed that this should be amended to allow ex-officio Members to summon a meeting of the Council;

8. A subsidiary issue was that Members of Commissions nominated by the Constitutional Council have legal immunity to writ applications and it was proposed that the Constitutional Council too should enjoy this immunity;

9. As at present there is no machinery by which violations of rules by the different Commissions could be dealt with. The Commissions do not send progress reports to the Council and sometimes rules are not complied with;

10. It was proposed that a separate Secretariat should be established for the Constitutional Council;

11. A discrepancy between the Sinhala and English version of Article 41 (5) was also pointed out;

12. It was also recommended that a single political party should not be able to have 2 nominees in the Constitutional Council;

13. A suggestion was also made for the Speaker to hold a secret ballot in the event of a deadlock for the appointment of the 10th Member;

14. A proposal was also made that the Constitutional Council should nominate more members for the Commissions so that the President could select the required number from among the nominated members. This proposal was made particularly in the backdrop of the non-appointment of Elections Commission;

Apart from the above major recommendations, additional proposals were made in regard to administrative matters for example, provisions of vehicles, diplomatic passports and pensions to Members of the Constitutional Council.

The Police Commission which appeared before your Committee made certain written recommendations and they suggested that in the event the members of the Commission are not appointed for whatever reasons, the Commission should continue to function until new appointments are made or the current members are reappointed.

The Public Service Commission also made written recommendation and has stated that the jurisdiction of the Commission over the Provincial Public Service Commissions is very much restricted.

Your Committee had 09 meetings and it was decided to accept the following proposals:

1. **Term of office of non- *ex-officio* members – Article 41A (7) and (9)** The Committee decided to recommend that the term of office of members who are not ex-officio members should be five years

2. **Constitutional Council should be able to function with 6 members.** According to the interpretation given by the Hon. Attorney-General, all ten members should be appointed for the Constitutional Council to function. The Committee decided to recommend that there

should be express provision permitting the Council to function when it has six (06) members or more.

3. **Eligibility for re-appointment Article 41 A (10)** This proposal came from the former Constitutional Council members. The Committee was of the view that this may compromise the independence of the appointed members. Some may curry favour with politicians if re-appointment is possible. It is best that members are ineligible for re-appointment. The Committee is of the view that Article 41 A (10) should not be amended.

4. **Time frame for appointments to Constitutional Council – Article 41 A (5)**

As Article 41A (1) (e) and (f) are worded presently, the President has no discretion but to appoint the persons nominated. The present stalemate arose as a result of the nomination under Article 41A (f) not being made and the Hon. Attorney-General had advised that all 6 nominees have to be appointed together due to the Sinhala version of Article 41 A (5) using the word "සහ" (and) while the English version says 'or'.

The Committee is of the view that this anomaly should be rectified by amending the Sinhala version to read as "හෝ" (or)

Article 41A (5) presently uses the word "forthwith." The Committee decided that to the said provision be amended to provide that the President shall make the appointments within fourteen (14) days of the receipt of the relevant communication of nomination.

5. **Article 41A (f) – "party to which the PM and Leader of Opposition belong"**

This has led to the present stalemate. The JVP claims that it is a separate entity that does not sit in Government. The AG is of the opinion that what matters is the party under whose symbol the MP contested. The CWC also prefers the JVP's interpretation.

The Committee decided to recommend that Members of Parliament who belong to political parties or independent groups that function independently in Parliament, irrespective of whether or not they were elected under the parties or groups to which the PM and the Leader of Opposition belong, should be eligible to take part in nominating the person under Article 41A (f)

6. **Speaker to summon meetings of MPs to make nominations under Article 41 A (1) (e) and (f)**

At present, there is no duty on any person to ensure that nomination under Article 41A (e) and (f) are made. The Committee decided to recommend that this responsibility be placed on the Speaker.

7. **Meetings of Constitutional Council – Article 41 E (1)**

The Committee decided to recommend that the Council should meet at least twice a month and that the date of the next meeting should be announced at every meeting. This would not preclude the summoning of the Council at any time if circumstances so require.
The quorum for a meeting of the Council shall be five members (05)

8. **Constitutional Council to be immune from the writ jurisdiction of the Court of Appeal but be subject to the fundamental rights jurisdiction of the Supreme Court.**

The Commissions appointed by the Constitutional Council have immunity from the writ jurisdiction of the Court of Appeal but are subject to the fundamental rights jurisdiction of the Supreme Court. The Committee decided to recommend that a similar provision be included in respect of the Constitutional Council too.

9. **Continuity for Commissions**

The Committee decided to recommend that provision be made to ensure that the members of the Commissions referred to in the Schedule to Article 41 B and the members of the Judicial Service Commission referred to in Part 1 of the Schedule of Article 41C would continue in office after the expiry of their terms until new members are appointed. This would ensure that Commissions function until new members are appointed.

10. **Extensions of appointees under Part 11 of Schedule to Article 41C**

While approval of the Constitutional Council is required for the appointment of the Attorney-General and Inspector General of Police, approval is not required for extensions after they have reached 58 years of age. But the services of the Auditor-General, Ombudsman and Secretary-General of Parliament cannot be extended as their ages of retirement are fixed. This anomaly needs to be rectified. The Committee is of the view that the practice of granting extensions to the Attorney-General and Inspector General of Police without the approval of the Constitutional Council would affect the independence of the said officials.

The Committee decided to recommend that the compulsory age of retirement of the Attorney-General and Inspector General of Police be fixed at 60 years by the Constitution.

11. Acting appointments under Article 41C (2)

While appointments under Article 41C require approval by the Constitutional Council, paragraph (2) permits acting appointments to be made for 14 days without approval. It has been pointed out that this provision could be abused by making successive acting appointments of 14 days each without the approval of the Constitutional Council.

The Committee decided to recommend that provision be made that such successive acting appointments should have the approval of the Constitutional Council.

12. Appointments to Commissions

The Committee decided to recommend that the following provisions be made:

(a) When making nominations to the various Commissions and when the post of Chairman is vacant, the Constitutional Council shall recommend three names for appointment as Chairman. The President may appoint any one of the persons so recommended as Chairman.

(b) The President shall make appointments to Commissions within 14 days of the receipt of recommendations of the Constitutional Council.

(c) Members of the various Commissions appointed by the Constitutional Council should be "physically and mentally sound" and

(d) Members of the Public Service Commission, National Police Commission and Election Commission should be full-time.

13. **Reversion to service in the public sector**

The Commission decided to recommend that members of Commission who are eligible for reversion to their substantive positions in the public sector should retire at the expiry of their terms of office in the Commission with the necessary number of years added and with all benefits as any other retiree.

14. **Reports from the Public Service Commission and National Police Commission**

The Committee is of the view that reports from the above Commissions should be made to Parliament quarterly and that they should be detailed.

15. Power of Constitutional Council to summon members of Commissions.

The Committee decided to recommend that the Constitutional Council be empowered to summon members of Commissions referred to in the Schedule to Article 41B in order to examine the activities of the Commissions and seek clarifications. In regard to the Judicial Service Commission, the Constitutional Council may summon the Secretary of that Commission to examine activities and seek clarification on matter relating to the exercise of powers of the Commission in relation to scheduled public officers.

16. Secretary of the Constitutional Council

The Committee decided to recommend that the Secretary of the Constitutional Council be appointed for a term of five (05) years and be eligible for re-appointment.

17. Appointments at Provincial level

The Committee, while not making any specific recommendations, wishes that the desirability of setting up a mechanism similar to the Constitutional Council at provincial level be considered by Parliament.

18. Implementation of decisions of Commissions.

Members of the Public Service Commission and National Police Commission stated that their decisions/orders are sometimes not implemented. The Committee decided to recommend that provision be made making it obligatory for all relevant officers to implement decisions/orders of the Public Service Commission., National Police Commission, Judicial Service Commission and Election Commission.

19. Appeals to Administrative Tribunals – Articles 58 (1) and 155L

There is no provision to appeal to the Administrative Tribunal in regard to appointments to the public service and police service. The Committee decided to recommend that a right of appeal be given to any person aggrieved by any order of the Public Service Commission or National Police Commission relating to an appointment or non-appointment.

20. Transparency in regard to exercise of powers of the Commissions.

The Committee noted that schemes of recruitment, schemes of promotions, codes of conduct etc are not always available to the public. The Committee recommends that provisions be made requiring the relevant Commissions to publish all schemes of recruitment, codes of conduct, principles to be followed in making promotions and transfers, and the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of

judicial officers, scheduled public officers, public officers, police officers and officers of the Election Commission be published in the Gazette.

21. Existing Commissions

The Committee gave careful consideration to the fact that appointments have been made to the Commissions set out in the Schedule to Article 41B without the recommendation of the Constitutional Council. The Committee decided to recommend that the Chairmen and members of such Commissions who have been appointed without the recommendation of the Constitutional Council should cease to hold office and fresh appointments should be made on the recommendation of the Constitutional Council. Such Chairmen and members shall be considered by the Council in making recommendations.

22. A detailed Report containing the recommendations in respect of the other matters identified in this Report and any other matter referred to it as mentioned in the Terms of Reference of the Committee would be submitted to Parliament in due course.

09 August 2007

An Unfulfilled Promise; Critical Scrutiny of the National Police Commission of Sri Lanka

Kishali Pinto Jayawardena[*]

1. Introduction

The 17th Amendment to Sri Lanka's Constitution, certified by the Speaker of Sri Lanka's Parliament on 3rd October 2001, was properly implemented only for a period of three years; at that time, writers in South Asia cited this constitutional amendment as admirable precedent for their own countries.[1] Indeed, if the 17th Amendment had continued to be implemented according to its constitutional mandate, it may well have proved to be a shining example for the rest of South Asia. Regrettably, the converse has been the case.

The failure of this constitutional amendment had a particularly negative impact on one of the new Commissions that it established, namely the National Police Commission (NPC) as would be examined hereafter.

2. Sri Lanka's Policing System – Its Current Deterioration

A good historical critique of Sri Lanka's policing system emerges from the reports of several government commissions, including the Justice Soertsz Commission of 1946, the Basnayake Commission of 1970 and the Jayalath Committee of 1995. In 1970, the Basnayake Commission recommended an independent Police Service Commission to be in charge of the appointments, transfers, dismissals and the disciplinary control of police officers. This need became even more urgent in later years as the country became inexorably engulfed in a tide of civil and ethnic violence and the police department became converted from a civilian law enforcement agency to a militaristic force.

The extent to which this conversion occurred was well illustrated in the Reports of the three Commissions of Inquiry into the Involuntary Removal and Disappearance of Persons established in 1994 with three specific areas of inquiry; namely Western, Southern and Sabaragamuwa/Northern and Eastern/Central, North Western, North Central and Uva Provinces.[2] These Commissions were established to inquire into

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[*] lawyer/legal consultant, media columnist and author. This paper was delivered at sessions on "Police Accountability in Asia' hosted by the Commonwealth Human Rights Initiative, New Delhi, March 23-24, 2007

[1] For example, in advocating a constitutional amendment similar to Sri Lanka's 17th Amendment in Pakistan, Ahmed Bilal Mehboob, Executive Director of the Islamabad-based Pakistan Institute of Legislative Development And Transparency, writing to the reputed 'Dawn' newspaper on March 14th 2006 remarks that 'Pakistan can take the Sri Lankan Constitutional Amendment as a basis and try to adapt it to suit indigenous conditions.'

[2] Appointed on 30 November 1994 by the President in terms of Commissions of Inquiry Act, No 17 of 1948 to inquire into *interalia*, the involuntary disappearance of persons after January 1, 1988, the persons responsible, the legal proceedings that can be taken, the measures necessary to prevent the re-occurrence of such activities and the relief, if any, that should be afforded to the family members and dependants of the disappeared. The Interim and Final Reports of the three Commissions are as follows; Interim and Final Reports of the Western, Southern and Sabaragamuwa Provinces, respectively Sessional Papers No 11 and No V – 1997; Interim Report/Final Report/the Report containing the Annexures of the Central, North Western, North Central and

those responsible for the extra judicial executions and enforced disappearances of thousands during the late eighties and up to the early nineties. Patterns of police abuse of hapless civilians documented during this period ranged from outright refusal to record complaints of enforced disappearances to specific participation in instances of grave human rights abuses.

For example twenty police superintendents and fifty one police officers in charge (OICs) were identified as being credibly responsible for enforced disappearances during the stipulated period in the Commission Report of the Central, North Western, North Central and Uva Disappearances Commission. Two police officers in charge of police stations (one posted in the Central Province and the other in the North-West Province), were implicated (between them) for fifty four disappearances in this Report.

In the Eastern and Northern Disappearances Commission Report, the Commission came to the conclusion that ninety percent of the removals were at the hands of the security forces; army, navy, air force and the police.[3] Similar patterns of police involvement in enforced disappearances were disclosed in the Report of the All- Island Commission that was established in 1998[4]

While it is clear that abuse by custodial officers is evidenced across ethnic divisions (i.e.; human rights abuses committed during the period of inquiry by the Commissions were as much in regard to civilians of Sinhalese ethnicity as those of Tamil or Muslim ethnicity), police brutality has been documented specifically in the context of the ethnic conflict between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE). For example, the *Thambalagamam* case illustrates one such example; here, several police and home guards were identified in respect of the killings of eight Tamil civilians on February 1998 in what was thought to be a reprisal killing for the LTTE bombing of the Temple of the Tooth a week earlier. The perpetrators were known to have abducted and killed civilians in order to obtain promotions that would be bestowed for the killing of LTTE cadres. For several years, this case has been pending in courts as is the case with many other cases of a similar nature.

Even in times of relative peace, abuse by custodial officers in police uniform has been well manifested. For example, instances of torture being practiced by police officers resulted in a voluminous number of judgements and the awarding of compensation by the Supreme Court during the post ceasefire years. Such cases revealed a wide range of circumstances in which such treatment had been meted out by the police or service personnel – the very people who are expected to protect and safeguard the fundamental rights of members of a society. Torture was therefore clearly not an isolated phenomenon confined to a few rogue policemen and during times of conflict but rather was an 'endemic' problem.[5]

Uva Provinces, respectively Sessional Papers No III and VI – 1997; Interim and Final Reports of the Northern and Eastern Provinces, respectively Sessional Papers No 11 and No V – 1997.

[3] at page 62 of the Report

[4] Appointed on 30 April, 1998 by the President in terms of Act No 17 of 1948 with an all island mandate to inquire into the complaints received but left un-inquired by the earlier Commission. In other respects, the mandate was the same. The Final Report of the All Island Commission is publicly available as Sessional Paper No 1- 2001

[5] Acknowledged as such by the then Chair of the Human Rights Commission of Sri Lanka Radhika Coomaraswamy in an interview with the London based REDRESS, published in REDRESS, Issue 5/May 2005

On 21 November 2004, Gerald Perera, a victim of police brutality who dared to fight it out in the legal sphere, was shot in broad daylight and died thereafter in hospital, days before he was due to give evidence in a High Court trial instituted by the Attorney General's Department under the Convention Against Torture and other Inhuman and Degrading Punishment Act No 22 of 1994 (hereafter the Anti-Torture Act). Perera had earlier, obtained judgement by the Supreme Court declaring that he had been subjected to severe torture.[6] At the time of his death, a major portion of the medical re-imbursements had yet not been paid to him. Subsequent investigations identified the perpetrators of his murder as including some of the very same police officers who were found responsible for the torture. Indictment has been filed at long last though the trial is still pending. Calls made to expedite this process have been to no avail.

In this case as well as in countless others, the Supreme Court called upon the National Police Commission (NPC) and the Police Department to take stringent steps to subject erring individual officers to appropriate disciplinary action. Towards this end, the Registrar of the Supreme Court had been directed to send copies of the judgements to the Inspector General of Police as well as the NPC. Yet, the effect of such directions has been minimal, a fact remarked upon by the judges themselves on occasion.

The following judicial quote is instructive in this regard.

> "The number of credible complaints of torture and cruel, inhuman and degrading treatment whilst in police custody shows no decline. The duty imposed by Article 4(d) [of the Constitution] to respect, secure and advance fundamental rights, including freedom from torture, extends to all organs of government, and the Head of the Police can claim no exemption. At least, he may make arrangements for surprise visits by specially appointed Police officers, and/or officers and representatives of the [National] Human Rights Commission, and/or local community leaders who would be authorized to interview and to report on the treatment and conditions of detention of persons in custody.
>
> A prolonged failure to give effective directions designed to prevent violations of Article 11, and to ensure the proper investigation of those which nevertheless take place followed by disciplinary or criminal proceedings, may well justify the inference of acquiescence and condonation if not also of approval and authorization)." [7]

For many years, even where police officers (junior as well as senior) have been identified as personally responsible for acts of torture in courts of law, no internal departmental action has been taken against them. Directions of the Supreme Court to the police hierarchy to initiate disciplinary action against erring police officers have been blatantly ignored.[8] Official resistance to these pronouncements by the Court has been high and there has not even been minimum acknowledgement that Sri Lanka is facing a serious

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[6] *Sanjeewa* vs *Suraweera*, 2003 [1] SriLR, 317

[7] per observation of Justice Mark Fernando in *Sanjeewa* vs *Suraweera*, 2003 [1] SriLR, 317

[8] See the Law and Society Trust Review, Volume 15 Joint Issue 208 & 209 February-March 2004. Similar directions have been issued by Court to other department heads whose officers have also been found to have violated rights of persons in their custody as for example, directions issued by *the Wewelage Rani Fernando Case* to the Commissioner General of Prisons, (SC(FR) No 700/2002, SCM 26/07/2004), judgment of (Dr) Justice Shirarne Bandaranayake with Justices JAN de Silva and Nihal Jayasinghe agreeing. There appears to be no discernible compliance with these orders as well.

problem in the law enforcement process.. Instead, the police department set up a fund to provide for lawyers to appear for the accused police officers and indeed, in some cases, paid the sums of compensation ordered by Court to be due personally from the implicated officers.

Successful prosecutions have also been minimal. Up to date, there have only been twelve convictions in the prosecutions resulting from the findings of the 1994/1998 Disappearances Commissions,[9] the Reports of which have been referred to previously in this analysis. Many cases are still pending in the High Court even though long years have lapsed since the commencement of the trial. This delay has been due to no fault of the alleged victims or the members of their families, but entirely owing to the inadequacies of the law, the tortuously slow investigative, prosecutorial and legal process.

However, the fact of delay has resulted in some arguing expeditiously albeit disingenuously that the very delay itself is an indication that the accused police officers in these cases are innocent. Recently, the Court of Appeal quashed a circular issued by the DIG, Personal and Training dated 5th January 2001 directing all DIGG Ranges, SSPP Divisions (Territorial and Functional) to reinstate all officers who have been interdicted following the inquiries conducted by Disappearance Investigation Unit (DIU) and charged in courts but subsequently bailed out in connection with the cases of disappearance of persons. The attempted re-instatement (which was frustrated by an effective judicial response) was premised on the argument that these cases had been pending in courts for a long time.[10]

As important as this decision was, it must be noted that it applied only to those limited numbers of police officers who had actually been indicted in reference to grave human rights abuses; hundreds more remained outside even this limited reach of the law due to poor investigations and the lack of political will to bring alleged perpetrators in police uniform to justice.

The convictions rate in respect of policemen indicted for other human rights violations is also extremely poor; only three convictions have evidenced so far as a result of prosecutions in terms of the Anti-Torture Act of 1994. While the clear failure of the legal process in this regard is well illustrated, the above analysis indicates the extent to which the police service had departed from its original objective and purpose of serving the public good. The establishing of the National Police Commission (hereafter NPC) by the provisions of the 17th Amendment to the Constitution was the first serious legislative attempt to reinforce order and discipline to the police service. However, this too has proved to be disappointingly unable to fulfil its constitutional promise as discussed subsequently.

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[9] Comments by the Government of Sri Lanka to the conclusions and recommendations of the Committee against Torture : Sri Lanka. 20/02/2007. CAT/C/LKA/CO/2/Add.1. (Follow-up Response by State Party) Para 3. Response of the Government to Observation No. 249 - 'the Committee is gravely concerned by information on serious violations of the Convention, particularly regarding torture linked with disappearances.'

[10] *Pathirana vs DIG(Personnel & Training) and others*, C.A. Writ Application No 1123/2002, CA Minutes 09.10.2006, per judgment of Justice S Sriskandarajah. The Court ruled that the circular was *ultra vires* the Establishments Code which stipulated that where legal proceedings are taken against a public officer for a criminal offence or bribery or corruption the relevant officer should be forth with interdicted by the appropriate authority

3. The 17th Amendment and the National Police Commission (NPC)

The primary rationale for this constitutional amendment was the public outcry to restore a measure of de-politisisation to the Sri Lankan public service, which had been deprived of credibility due to long and consistent political interference with appointments, transfers, dismissals and disciplinary control of public servants. As a result, the functioning of the public service had deteriorated to an appalling extent. In addition, it was felt that monitors of public institutions should be vested with greater independence and more substantial powers. Importantly there was a public cry that political interference with the police force should be checked and the force itself restored to a credible level of independent functioning.

Its provisions strengthened the process of appointment to existing key institutions such as the Public Service Commission (PSC), the Human Rights Commission of Sri Lanka and the Commission to Investigate Allegations of Bribery and Corruption. Two new rights monitoring bodies were also created, namely the National Police Commission (NPC) and the Elections Commission. Members to these Commissions were appointed by the President on the nomination of a newly created Constitutional Council (CC) which had significant apolitical representation. The Amendment also stipulated that appointments to as the post of the Chief Justice and judges of the appellate courts as well as *interalia* to the offices of the Attorney General and the Inspector General of Police should only be upon the requisite nomination being approved by the CC upon a recommendation made by the President.

The CC comprised a total of ten members, six of whom were nominated through a process of consensual decision making by the constituent political parties in parliament. Out of these six nominations, five individuals of high integrity and standing in public life and with no political affiliations, (out of which, three members represented the minorities), were nominated jointly to the CC by the Prime Minister and the Leader of the Opposition. The remaining one member was nominated by the smaller parties in the House, which did not belong to either the party of the Prime Minister or the Leader of the Opposition. Those nominated in this manner were appointed by the President and held office for three years. They could be removed only on strictly mandated grounds and any individual appointed to vacancies created held office for the un-expired portion of that term. In addition, the President was authorised to appoint a person of his or her own choice. The rest of the CC comprised the Leader of the Opposition, the Prime Minister and the Speaker of the House *ex officio*.

The CC functioned reasonably well during its first term in office. Vested with the power of making nominations to the commissions, its selections attracted little controversy and were generally commended.[11] The first real dispute between its members and then President Chandrika Kumaratunge arose a year or so into the term of the CC when the President refused to appoint the Chairman to the Elections Commission (a retired judge of the Supreme Court) who had been nominated by the CC. Though the nomination was reconsidered by the CC, it found no merit in the objection raised by President Kumaratunge. Consequently, the Elections Commission was never brought into being despite frequent pleas by an ailing Elections Commissioner that he should be allowed to retire. The non-constitution of the

[11] For example, the Chair appointed to the NPC was senior criminal lawyer Ranjith Abeysuriya, P.C. also former Director of Public Prosecutions

Elections Commission was however, only a precursor to a far more serious political attack on the Constitution.

In March 2005, the terms of the six appointed members to this body expired. However, the vacancies were not filled thereafter. Though the above required names of five nominated members were jointly agreed upon by the Prime Minister and the Leader of the Opposition (this too, after a delay of several months) and communicated to the President for appointment as constitutionally required in late 2005, these appointments were not made. The deliberate delay on the part of the smaller political parties in parliament to agree by majority vote on the one remaining nominated member to the CC was cited as the ostensible reason for the CC not being brought into being.

The many representations made to Kumaratunge's successor, President Mahinda Rajapakse by civil society groups that the absence of the one nomination to the CC should not prevent the due appointment of the members nominated already and that the consequent functioning of the body was essential to the good administration of the country, were to no avail. Dire consequences followed. The term of office of the PSC lapsed by late 2005. Five members of the seven member NPC also relinquished their office due to expiry of their terms by this time. However new appointments could not be made as the CC itself had not been constituted. The Cabinet of Ministers then decided that the responsibilities of the NPC and the Public Service Commission (PSC) could be assumed respectively by the Inspector General of Police and by the Secretaries of Ministries/heads of Departments. Public uproar resulted on the basis that this was precisely the mischief that the 17th Amendment had set out to remedy.

Further controversy followed. In early 2006, two senior judges of the Supreme Court (comprising the Judicial Service Commission along with the Chief Justice as the Chairman), resigned their position citing grounds of conscience and inability to work with the Chief Justice. The term of the sitting members of the Human Rights Commission of Sri Lanka also lapsed in March 2006. However new appointments could not be made due to the CC itself still remaining non-functional. With that, the 17th Amendment became a virtual dead letter.

Shortly thereafter, President Mahinda Rajapakse proceeded to make his own appointments to the commissions, including the NPC. The appointees predominated with his supporters and personal friends with only some exceptions to the rule. It is of no small interest that the Chairman of the NPC this time around was the former secretary to the Ministry of Labour when the current President had been the Minister of Labour.[12]

Notwithstanding public protests, the appointments were not revoked and the commissions commenced functioning. Thereafter, promotions to Sri Lanka's appellate courts and new appointments to the Judicial Service Commission also followed, despite the absence of the mandated approval of the CC.

[12] Neville Piyadigama. Some judges and lawyers (including the current President of the Bar Association of Sri Lanka) also accepted appointments to these commissions though two senior legal academics declined appointment to the Human Rights Commission of Sri Lanka with one stating on record that the reason for declining was the fact that the appointments were contrary to the constitutionally mandated procedure, given that the approval of the CC was lacking. A similar refusal was recorded by an activist/lawyer in respect of a putative Presidential appointment again to the Human Rights Commission.

To offset international and domestic displeasure, the government initiated a Parliamentary Select Committee process in mid 2006 to examine the manner in which the 17th Amendment could be improved. This Committee sat for more than a year amidst public fears that this would be a mere delaying exercise on the part of politicians on both parts of the political divide, who had exhibited the utmost contempt for a constitutional amendment which they saw as depriving them of their power in regard to controlling the public service. Up to date, no constructive change in the *status quo* has been evidenced in consequence of the deliberations of this Select Committee.

The impact of the continuing unconstitutional appointments to the NPC will be reverted to at a later point in this analysis.

4. The Functioning of the National Police Commission (NPC)

The NPC comprises seven persons whose security of tenure was explicitly provided for. (Vide 17th Amendment, Article 155A). The NPC is vested with the powers of appointment, promotion, transfer, disciplinary control and dismissal of all officers other than the Inspector General. (Vide 17th Amendment, Article 155G (1)(a). Secondly, the NPC is compulsorily required *("shall)* to establish procedures to entertain and investigate public complaints and complaints from any aggrieved person made against a police officer or the police service...[italics added]"(Vide 17th Amendment, Article 155G(2)). This latter provision is particularly important in the context of the current analysis and will be examined in detail later on.

4.1. Disciplinary Control of Police Officers

Since its official inauguration in November 2002, the NPC in its first term, (referred to for purposes of convenience as the first NPC, the members of which were constitutionally appointed by the CC), concerned itself with matters relating to promotions, particularly the filling of about 4000 vacancies which had remained vacant due to inaction under the earlier system of administration. Resolving this problem of vacancies was deemed as a priority in order to enable the proper functioning of the system. The promotion scheme formulated by the NPC in this regard was however, subjected to much public criticism (and challenged in court).

Where the disciplinary control of police officers was concerned, the NPC decided early on, to delegate the disciplinary control of subordinate police officers vested in it, to the IGP. Such delegation was justified on the basis that it was considered necessary for the IGP to administer his own department. The IGP in turn referred the cases to his subordinate officers, or to a special investigation unit. However, as police officers continued to investigate other police officers, no effective change took place in the rampant indiscipline of the service. This had been the common practice earlier as disclosed for example in the records of the Central, North Western, North Central and Uva Disappearances Commission in relation to at least one instance where a diligent officer in charge of the Disappearances Investigations Unit (DIU), a special body established within the department of the police to investigate disappearances was transferred

out of his station due to his too enthusiastic investigation of senior officers which had invoked the displeasure of the police hierarchy.

In addition, as the higher ranking officers who earlier oversaw the conduct of such inquiries were accustomed to pursuing if not coercing settlements between complainants and alleged perpetrators rather than conducting inquiries in an objective manner, most complainants were rightly distrustful of these inquiries.

Till July 2003 therefore, the functions of the NPC in this regard were appropriately described by its critics as being similar to that of a 'post box", that is, it merely entertained complaints and referred them to the police for investigation.[13] Very few disciplinary inquiries were completed, and the outcome of even those inquiries that were concluded, was not known. Due to strong public criticism, the NPC decided in mid 2004 that it would recall its delegated powers and assume substantive disciplinary control as mandated by the 17th Amendment over the police officers of all ranks, excepting the IGP. However, such perceived aggressive actions by the NPC had an immediate political fall out. Thus adverse statements were made by frontline ministers to the effect that the 'independence of the NPC' was not needed and that the Inspector General of Police (IGP) should be involved in the decision-making processes of the NPC. Inflammatory remarks by other political figures of the ruling coalition also added fuel to the fire. Public hostility was evidenced between the IGP and the NPC where the former considered that the creation of the NPC had imposed an unwarranted fetter on his powers.

Despite this hostility, the continued interventions of the first NPC in preventing politically motivated transfers of police officers prior to elections was creditable during 2004-2005. Its decision to interdict police officers indicted of torture under the Torture Act No 22 of 1994 was also commendable. In regard to this second decision of the NPC, it is pertinent that Section 2 of the Anti-Torture Act makes torture, or the attempt to commit, or the aiding and abetting in committing, or conspiring to commit torture, an offence. A person found guilty after trial by the High Court is punishable with imprisonment for a term of not less than seven years and not exceeding ten years, and a fine of not less than Rs. 10,000 and not exceeding Rs. 50,000.[14] However, due to the lack of immediate disciplinary action against errant police officers and the total absence of a witness protection, victims were threatened, terrorised or even killed as evidenced most particularly by the fate that befell Gerald Perera referred to previously. There is no doubt that when alleged perpetrators of torture and other serious crimes are allowed to continue in their same posts and even considered for promotions[15] the entire system of justice is undermined. The perpetrators are also in a position to destroy vital evidence with the Supreme Court remarking that it is common for the police to fabricate evidence and alter documents.[16] In this context, the decision taken by the first NPC to interdict police officers indicted under the Torture Act was one of the most positive steps taken by this body during 2004.

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[13] See 'An Alternative Report presented to the Committee Against Torture by the Law & Society Trust, Sri Lanka and the Asian Human Rights Commission, Hong Kong', 7 October 2005, at page 35

[14] Some legal professionals argue that the very severity of the said provisions have, at times, deterred judges from handing down convictions

[15] See *The Sunday Times* dated 11/07/2004. Though indictments are issued against particular police officers, there is a lapse in time between issuance and the serving of the indictment resulting in interdicted officers still serving in their posts.

[16] *Kemasiri Kumara Caldera's case*, [S.C. (F.R.) Application No. 343/99), SCM 6/11/2001].

4.2. Public Complaints Procedures

In so far as the second mandate is concerned, Article 155G(2) of the Constitution clearly requires the mandatory establishing of meticulous procedures regarding the manner of lodging public complaints against police officers and the police service. The NPC also has a duty to recommend appropriate action in law against police officers found culpable in the absence of the enactment of a specific law whereby the NPC can itself provide redress. Such Complaints Procedures would include detailing the persons who can complain, the way it is recorded and archived and the way in which it is inquired and investigated.

Quick responses need to be manifested in terms of not only documentation but also the ensuring of medical attention and victim protection. Similar procedures in other countries[17] require the OIC and his superior officers to automatically report categories of grave incidents to the monitoring body, whether a complaint is made or not.

These procedures hold accountable both the police officer concerned as well as officers of the police commission so that both act in strict compliance with their constitutional and statutory duties. This is important in Sri Lanka where officers of monitoring bodies, including the Human Rights Commission, at one time, have been accused of colluding with the very perpetrators of terror. Acts of collusion include settling with victims of the most gruesome torture for small sums of money and in extreme cases, collaborating with the police to cover up the incidents.

Up to 2006, the Public Complaints Procedures had not been established. [18] What the first NPC did at that time was to appoint district co-ordinators (mostly retired policemen themselves), to look into complaints. However, what was required was not *ad hoc* consideration of complaints where the complainant is left to the mercy of an individual NPC officer but the prescribing of uniform procedures in this regard.

Ironically though the NPC in its second term, (referred to as the second NPC), gazetted a Public Complaints Procedure against police officers recently, this has not been met with the unconditional approval that such an action would have in fact attracted, due to the lack of legitimacy attaching to this body in consequence of the unconstitutional appointments process of its members. According to available records, the NPC's Public Complaints/Investigations Division has received a total of 1216 complaints (within the period, January to July 2006). Many of these complaints related to police inaction, misuse of power and partiality. Some 382 of the complaints had reportedly been inquired into but the results of such

[17] For example, the United Kingdom's Independent Police Complaints Commission (IPCC). The IPCC, established by the Police Reform Act of 2002, is a non-departmental public body which is government funded but operates completely independently. Apart from its chair and deputy chair, it has fifteen commissioners all of whom, (except one), work full time in supervising a staff of four hundred 400 investigators, caseworkers and support staff. It has separate and independent investigators, (not police officers 'released' from the police service), and can decide either to supervise police investigations into serious complaints or independently investigate them itself. The independent quality of its investigative staff and the direct disciplinary control that it has exercised over offending police officers are two primary factors that have secured its credibility.

[18] A draft Public Complaints Procedure which used other similar models from around the world, including particularly the UK's IPCC was submitted to the first NPC by civil society in 2004 and several discussions took place between this NPC and activists/lawyers thereafter. However, the draft was not implemented during its term of office.

investigations and the consequences attaching to the police officers found to be guilty of action not befitting their office has not been disclosed to the public.

Meanwhile, this second NPC announced recently that despite thousands of complaints having been received against police personnel, from the rank of Constable to that of a Deputy Inspector General, only 73 indictments had been filed in 2005 for relatively minor offences. However it is clear that the remedy for this grave situation lies in the hands of the NPC itself. Instead of taking umbrage with the Attorney General for the non-filing of indictments against erring police officers, the second NPC should educate the public as to what precise measures it has taken to enforce disciplinary control of errant police officers in accordance with its mandate. Indeed, even in terms of its procedures, it appears that disciplinary control of the officers found responsible in the investigations initiated in terms of the recently publicised Public Complaints Procedures will continue to remain in the hands of the IGP 'in accordance with applicable departmental procedures" rather than be referred for rigorous sanctions in terms of the law. This makes the Procedures themselves, rather ludicrous.

Further, even where prosecution itself may not be possible owing to the requisite standards of proof, appropriate disciplinary sanctions are called for. Examples in other countries may be instructive in this regard. Thus, in many instances where prosecutions have failed, the UK's independent Police Complaints Commission (IPCC) has, in fact, proceeded with suitable disciplinary control against the relevant police officers. In contrast, we are hard pressed to find even one such instance in Sri Lanka despite numerous judgements of the Supreme Court recommending such action, as already pointed out in this paper. There is no doubt that until a sterner commitment is demonstrated, the gazetting of the NPC's Public Complaints Procedures will remain commendatory only in theory.

5. Conclusion - The Challenges Faced by the NPC

Undoubtedly, the most serious challenge currently (insofar as the integrity of the NPC is concerned), is its independence from political control, in perception as well as regards its substantive functioning, as referred to at the start of this paper. The current priority is therefore, to immediately implement Article 41A and 41B of the 17th Amendment to the Constitution bringing the CC into being and to re-constitute the 'independent commissions' including the NPC with the new members being nominated by the CC as constitutionally required.

There is also no doubt that a properly functioning NPC should exercise far greater disciplinary control over the police force than it does currently. As examined in this paper, during its first term of existence, the NPC had been cribbed, cabined and confined in respect of many aspects of the fulfilment of its constitutional duty. In retrospect, even the minute attempts by this body to discipline the police force, (at a time when it was constitutionally functioning), were met with stiff resistance by the political establishment as well as by the police department. Thereafter, the NPC was systematically stripped of even a modicum of its public integrity by the unconstitutional appointment of its current members. We have therefore a situation where the NPC has been generally unable to fulfil its constitutional mandate to

initiate a dramatic—albeit avowedly difficult—process towards change within the Sri Lankan police force.

Currently, Sri Lanka has returned to active conflict between the LTTE and the Government of Sri Lanka. As is well known, the situation has been further complicated by militant groups such as the Karuna group, a breakaway faction of the LTTE which is now in conflict with the LTTE itself. During the past year, disappearances, abductions and killings in all parts of the country have been rampant, including within the capital city of Colombo where militant groups have allegedly been acting in concert with members of Sri Lanka's police and the army to abduct and to disappear Tamils as well as Sinhalese, both for ransom as well as due to their perceived political opposition. The situation has become extremely critical as far as the rights of life and liberties of ordinary persons are concerned. The need for an independent, credible and effective NPC has never been greater.

Yet, in the classically poignant words of Robert Frost, we need indeed, 'to go a long way' before the contemplated and ambitious aims and objectives with which the NPC was constitutionally created, are realised.

The Impact of Global Terrorism on Human Rights; Examining Issues Pertaining to Detention and the Change in Usage of Force in International Relations

Ashan Wickramasinghe[*]

1. Introduction

Acknowledging the value of the individual human being and the diversity between such human beings is central to discussions in regard to the impact of terrorism on the protection of human rights. People generally enjoy a right to live, free of interference. This leads to the demand that any interference with any aspect of an individual's life requires the strongest justification.[1]The term 'human rights' is used in a technical sense to refer to rights which people possess, merely by reason of being a human being. Human rights are those basic standards without which people cannot live in dignity.[2] To violate a person's human rights is to treat that person as though he or she were not a human being.[3] The interference with the liberty of a person - the right to live freely - could take place by private citizens and state agencies, yet agents of the state have more power than private individuals to interfere lawfully with the liberties of persons.

There is no doubt that the events that took place in the United States of America on the 11 September 2001 changed the world we live in today. The effects of global terrorism from then till present have resulted in governments bringing in new rules, regulations and laws to protect the citizens of those nations. However, in an attempt to provide security the governments may have indirectly hindered the same rights they were supposed to safe guard.[4] It is often argued that human rights cannot be enjoyed in the same way as they have been enjoyed in the past. Nonetheless, the extent to which change must occur to effectively fight terrorism whilst also safeguarding the rights of citizens is also a matter for debate.

First, this paper will analyze the impact that efforts directed towards prevention of terrorism have had on human rights in the specific context of the United Kingdom in the hope that such discussions may be instructive in respect of similar debates in Sri Lanka; review the role of the United Kingdom government in bringing about a balance between security and human rights, and examine possible measures that could be taken to ensure the protection of human rights in the fight against terrorism.

Secondly, the paper will discuss the change of the use of force in international relations as signified by the 2003 Iraq war. It must be emphasized in this context that the concept of deterrence has been the

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[1] Chakrabarti, S. and Sawyer, J., 'Terror detainees win Lords appeal, but what now?', Legal Action 2005

[2] Richard, S., 'Textbook on Civil Liberties and Human Rights', (2002), 4[ed] Ed, Oxford University Press

[3] *Ibid*

[4] *Ibid.*

cornerstone of national security strategy of all the major powers for the past sixty years. The concept is based on the idea that states will not undertake ill-conceived action if the costs of that action are greater than the gains it produces. At the heart of deterrence is an assumption of rationality on the part of all concerned. The threat of inflicting punishing retaliation against aggression, not the ability to prevent some hostile act from occurring, lies at the core of the deterrence theory.[5] If the deterrence theory is ineffective against most likely threats such as terrorist organizations and rogue states, which harbor terrorists or aspire to acquire weapons of mass destruction (WMD) with the potential to use those weapons, then it is often argued that 'preventive' and 'pre-emptive' war are the only alternatives which are available to deal with such threats.

The 2003 U.S.-led invasion of Iraq had three stated justifications:[6] a legalistic argument that the war was necessary to enforce United Nations resolutions in the face of Iraqi defiance; a humanitarian argument that the war would remove a brutal dictator and create a vibrant, successful democracy in Iraq spurring reform of the despotic and demagogic regimes that now dominate the Middle East; and a preventive/pre-emptive[7] war argument which must, 'stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends,' which requires acting 'against such emerging threats before they are fully formed'.[8] While the legalistic and humanitarian arguments are by no means unimportant, the preventive war argument is the central focus of this segment of the paper in examining the change that it has brought about in the manner in which force is used in international relations.

The analysis will examine the influence that preventive war has had on the usage of military force with an illustration of contentions between 'pre-emptive' and 'preventive war'. It will then go on to analyze the instances in which such military action would be warranted with reference to the legality of those eventualities, underlying the significance preventive war has brought about in military interventionism for humanitarian, legalistic and possibly deterrent reasons in the practice of future International Relations.

2. The 'War Against Terror' vis a vis Freedoms of Life & Liberty

2.1. The Nature of the 'Terrorist Threat' faced by the United Kingdom

It is a commonly known fact that the most significant terrorist threat to the United Kingdom (UK) and its interests comes from al-Qaeda and associated networks. There have been a number of attacks specifically

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[5] James J. Wirtz and James A. Russell, 'U.S. policy on Preventive War and Preemption', *The Nonproliferation Review*, Vol. 10, No. 1, (2003), p. 114

[6] David Luban, 'Preventive War', *Philosophy and Public Affairs*, Vol. 32, No. 1, (2004), p. 207

[7] For the purposes of this essay, the term "preventive" will be used to refer to all situations when a state uses armed force in advance of the use of force by its enemy; unless specifically mentioned for purpose of clarity on the body of the essay.

[8] The White House, 'The National Security Strategy of the United States of America' (Washington D.C., September 20, 2002), p. 14

targeting the UK such as the al-Qaeda car bomb attack on the British Consulate and the offices of the HSBC in Istanbul in November 2003.[9]

The UK is at particular risk because it is the closest ally of the United States, has deployed armed forces in the military campaigns to topple the Taliban regime in Afghanistan, the conflict in Iraq, and has taken a leading role in international intelligence, police and judicial cooperation against al-Qaeda, and terrorism in general, in an effort to suppress terrorist activities. Al-Qaeda's taped propaganda messages have repeatedly threatened attacks on the United Kingdom. The attacks on the transport system in London on July 7, 2005 represented precisely the nature of the threat from international terrorism that the UK authorities have been concerned with since 9/11.[10] Furthermore, it is common knowledge that the al-Qaeda network has been actively seeking materials and expertise to acquire chemical, biological, radiological, and nuclear weapons.[11] Foreign Secretary Jack Straw outlined the UK's objectives in the War against Terrorism as follows: 'To prevent bin Laden and the al-Qaeda network from posing a continuing terrorist threat; and to ensure that Afghanistan ceased to give safe-haven support and protection to terrorists'.[12]

However, as in the case of President George W. Bush's enunciation of US aims in the War on Terror, the UK's stated aims extended well beyond the campaign against al-Qaeda, promising a crackdown on all forms of state-sponsored terrorism and fresh efforts to suppress the proliferation of weapons of mass destruction.[13]

2.2. New Measures to Fight Terrorism in the UK

In the year 2000, Parliament enacted a new, permanent and very comprehensive Terrorism Act (TA) that applied throughout the United Kingdom. The TA drew heavily on a report of then-Security Commissioner Lord Lloyd who had concluded that as there would be a continuing need for counter terrorism legislation for the foreseeable future, it should be placed on a permanent footing. The UK legal regime for dealing with terrorism formed by the interaction of the TA with prohibitions of the standing criminal law - such as murder and offences under the Explosive Substances Act 1883 or the Aviation and Maritime Security Act 1990 - was, in the words of the European Commissioner for Human Rights Professor Alvaro Gil-Robles, 'amongst the toughest and most comprehensive' in Europe.[14] After 9/11, the TA was augmented by Parliament in the form of the Anti-Terrorism, Crime and Security Act 2001 (the ATCSA).[15] The ATCSA made further provision for dealing with terrorism by dealing more thoroughly with a range of

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[9] An article titled "Security Council United Kingdom of Great Britain and Northern Ireland" by Geneva International Model United Nations.

[10] Events that took place in United States of America on September 11th 2001

[11] Known as C.B.R.N. weaponry for short

[12] Statement of the British government's aims in the 'War on Terrorism', speech by the Foreign Secretary, the Rt. Hon Jack Straw, to the House of Commons, Hansard, 16 October 2001. See also Home Office briefing papers produced in support of changes to terrorism legislation in February 2005

[13] *Ibid.*

[14] Edwards, R., 'New Rules of the Game: The UK Terrorism Bill', Jurist Legal News and Research, School of Law, University of Pittsburg, U.S.A.

[15] Anti-Terrorism, Crime and Security Act 2001

issues such as terrorist owned property, disclosure of information, weapons of mass destruction, and enhanced police powers.

It was held by the House of Lords that s.23 of Part IV of the ATCSA 2001 was incompatible with Articles 5 and 14 of the European Convention of Human Rights. The House issued a Declaration of Incompatibility under s.4 of Human Rights Act 1998 and quashed the (Designated Derogation) Order 2001[16] that prospectively derogated from Art 5(1)(f) ECHR for the purposes of enacting ATCSA. The detainees in *'A v Secretary of the State for the Home Department'*[17] were non-British nationals who had been certified as suspected terrorists under s.21 of ATCSA[18] and were detained under s.23 of ATCSA.

Thereafter, 'Control Orders' were introduced under the Prevention of Terrorism Act 2005 (PTA) in a particular context that will be examined in detail in the following sections of this paper. Under this legislation the Home Secretary can, subject to judicial oversight, make orders which place a wide range of restrictions on the rights and freedoms of individuals suspected of being involved in terrorist related activities. Any individual within the UK - including British citizens - can be subject to a Control Order. Control Orders can prohibit an individual, using specified articles or substances, place restrictions on work and activities, the ability to communicate with others, and freedom of movement. A Control Order can also require that a person reside at specified localities, thus, signifying house arrest.

The Prevention of Terrorism Bill (hereafter Terrorism Bill) was presented to Parliament in October 2005. The Bill contained much that was unobjectionable and eminently sensible. For example, Clause 5 criminalized preparatory terrorist acts and Clause 9 criminalized the possession or manufacture of a radioactive device. Given the chilling prospect that either a 'dirty bomb' or worse, a small tactical nuclear device might be used by utterly ruthless terrorists, these proposals were commended. But while much in the Bill were greeted with approval, there were exceedingly harsh provisions that were met with understandable hostility.

Probably the most contentious part of the Bill was the proposed power to detain those suspected of terrorist offences for up to three months before specifically charging with a crime. As a concession to due process, the Bill envisaged periodic reviews by a judge on the continuing necessity of the detention. The proposed Clauses 23 and 24 came about as a direct result of a request from the police. The police claimed that the investigation of terrorist crime is complex and time consuming. The fourteen day period which was allowed at that time[19] was said to be 'often insufficient'.

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[16] Human Rights Act 1998 (Designated Derogation) Order 2001 SI 2001/3644

[17] [2004] UKHL 56; [2005] 2 AC 68

[18] s.21(1) ATCSA 2001 - "The Secretary of State may issue a certificate under this section in respect of a person if the Secretary of State reasonably (a) believes that the person's presence in the United Kingdom is a risk to national security, and (b) suspects that the person is a terrorist."

[19] The 2000 Terrorism Act initially allowed suspects to be detained for up to seven days. In 2003 this was extended to fourteen days after similar arguments from the police, and despite misgivings

The Prime Minister suggested a further justification for new powers, based on special difficulties facing the police and security services in investigating modern terrorism.[20]

The Terrorism Bill 2005[21] was introduced in the House of Commons partly in response to the London 7/7 bombings.[22] Part I created new offences, including those relating to the encouragement of terrorism, committing acts preparatory to terrorism, and training for terrorism. In Part II, Clauses 23 and 24, as later amended, extended the period for which a terrorist suspect could be detained for questioning before charge from 14 days to a maximum of 90 days. The Bill passed all the House of Commons stages,[23] but the 90-day detention period was rejected in favour of 28 days.

2.3. Impact of the Human Rights Act (1998) and the European Convention on Human Rights on the UK's Legal Regime

In 2002 the Council of Europe issued specific guidelines to its member states on how terrorism should be tackled. Principle Two states that 'all measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.' The impact of these guidelines on the new measures taken by the UK to fight terrorism, led to intense debate as to whether the new laws were proportionate in balancing the right to individual liberties with the state's right to protect itself. The specific impact of the UK's Human Rights Act (1998) in this context will be examined below.

The Human Rights Act (HRA) became part of English law on October 2, 2000 and took effect in Scotland, Wales and Northern Ireland before this date. The HRA makes certain rights and freedoms guaranteed by the European Convention on Human Rights (ECHR) enforceable in United Kingdom courts. According to the HRA[24] legislation, '[s]o far as it is possible to do so; must be 'read and given effect in a way which is compatible with the Convention rights'.

The ECHR has previously been used as a guideline to UK courts, with cases brought under it heading to the European Court on Human Rights. Since the enactment of the HRA, this is no longer applicable. UK courts are now competent to make these decisions and have a statutory duty under the HRA to ensure that all laws, including primary and subordinate legislation, are interpreted 'as far as possible' in a way which is compatible with those convention rights incorporated by the HRA.

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[20] He said: "The investigation is far more complex, they often have to arrest people at an earlier stage, it often is networks abroad, or computer checks that need to be made, or different parts of the conspiracy that have to be chased down ..." As a result, "you can't do it by the rules of the game we have at the moment, you just can't ... [I]t is too complicated, too laborious, the police end up being completely hide-bound by a whole series of restrictions and difficulties, it doesn't work." – Mr. Tony Blair's monthly press conference held on October 11, 2005 (www.number-10.gov.uk)

[21] Full text of Terrorism Bill 2005: http://www.publications.parliament.uk/pa/cm200506/cmbills/077/06077.i-iii.html

[22] The bombing which took place at London on the 7th of July 2005

[23] Bill's 2nd reading http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm051026/debtext/51026 & 3rd reading http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm051110/debtext/51110

[24] Human Rights Act 1998 at Section 3

Not all the rights set out in the Convention and its Protocols are incorporated into British law by the HRA 1998. The HRA only incorporates the rights in Articles 2 to 12 and Article 14 of the Convention, plus those in the First and Sixth Protocols.[25] The incorporated rights are set out in the First Schedule to the HRA and are referred to as 'Convention rights'.

The reason as to why the HRA did not incorporate Article 13 of the Convention – which provides those people whose rights under the Convention have been breached should have the right to effective redress – was that the government took the view that the HRA would meet the requirements of Article 13 by giving people the right to take proceedings to a British court if they considered their Convention rights to have been breached.

Article 5 of the ECHR protects the liberty and security of the person. The underlying aim of Article 5 is to ensure that no one is deprived of their liberty arbitrarily. There are three aspects to the rights under Article 5. First, there is an exhaustive list of circumstances in which a person can be lawfully deprived of his liberty,[26] second, there is a list of procedural safeguards to be met accompanying those permissible grounds on which a person can be deprived of his liberty, and thirdly, a person who is unlawfully deprived of his liberty has an enforceable right to compensation for that deprivation. [27]

It must be noted that detention without trial will apply in cases where a non-British national is suspected of involvement in terrorism and the Government would otherwise wish to deport due to that individual's presence in the United Kingdom 'not being conducive to the public good'.[28] The Government, in its commitment to uphold the principles enshrined in the ECHR, has not openly run the risk of deporting suspects to a country where they could face torture or inhumane or degrading treatment.[29] It has tried (on the face of it) to balance the civil liberties of the individual on one hand against the need to protect society against terrorism on the other. However, the issue of detaining without trial,[30] those who are deemed a threat to national security but who cannot be immediately removed, has emerged as a major violation of the Convention.

The relevant provision of the ECHR relating to derogation is Article 15. It provides that, 'In time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'.

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[25] http://www.yourrights.org.uk/your-rights/the-human-rights-act/convention-rights/index.shtml
[26] Paragraph 1(a) – 1(f)
[27] A country could not violate Article 2 or Article 3 rights, namely, right to life and right not to be subjected to torture, inhuman or degrading treatment or punishment respectively.
[28] Immigration Act 1971 at Section 3(5)
[29] Tierney, S., 'Determining the state of exception: what role for Parliament and the courts?', [M.L.R.] 2005, 68(4), 668 – 672. This is not to negate the obnoxious practices of 'rendition' relating to the covert deportation of terrorist suspects to countries where torture is commonly practiced.
[30] Walker, C., 'Prisoners of "war all the time"', [E.H.R.L.R.] 2005, 1, 50 – 74

However, the courts, while granting the government a wide margin of appreciation,[31] retained a supervisory role for itself as it held: 'It is for the Court to rule on whether, *inter alia*, the States have gone beyond the 'extent strictly required by the exigencies' of the crisis'.[32]

The UK government's approach to crime and terrorist threats needs to be examined in the context of its five-year plan on the criminal justice system,[33] in which a particular strategy had been detailed.[34] Public scrutiny of police methods and acknowledgment of the twin risks of abuse of power and miscarriage of justice had informed the formulation of many proposals to improve safeguards for those in police custody, many of which however foundered on powerful opposition.[35] Recommendations of a Royal Commission[36] led to several attempts at legislative reform that attempted to strike a balance between police powers and the rights of suspects.[37]

2.4 The Role of the UK Judiciary in Determining the Balance

One person's right to life may conflict with another person's right to liberty, in the sense that it may be necessary to interfere with liberty to protect life. However, it does not follow that a threat to one right justifies the wholesale deprivation of another.[38] There is an urgent need, when determining the scope of anti-terrorism measures, their justification or the method of their implementation, to bear in mind the need to uphold four essential principles, if democratic values are to survive. First, there must be a clear necessity for any restrictive measures. Secondly, the restrictions must go no further than is required. Thirdly, the measures must be controlled by law. And lastly, the law must be cast in such a way as to make sure that any interference with liberty is clearly and rationally related to the aim of protecting security.[39]

The Home Secretary may issue a certificate of 'preventive detention' if there is reason to believe that a specified person's presence in the U.K. is a risk to national security and suspects that that person is a

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[31] *Brannigan and McBride v U.K.* [1994] 17 EHRR 539, held that "national authorities are, in principle, in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it"

[32] *Ibid.*

[33] Prime Minister, Mr. Tony Blair making a statement on a strategy for the criminal justice system. On July 19, 2004 (www.number-10.gov.uk)

[34] First, the idea of a liberal, social consensus; secondly, the claim that the nature of the problem has changed; and, thirdly, the idea that there must therefore be a shift of priorities away from freedom and towards responsibilities, and particularly away from protecting the rights of suspects and avoiding miscarriages of justice towards convicting the guilty.

[35] Reiner R., The Politics of the Police, (2000) 3rd edition, Oxford University Press, Ch.2

[36] Royal Commission on Criminal Procedure (Chairman: Sir Cyril Phillips), Report, Cmnd 8092-I (HMSO, London, 1981)

[37] Police and Criminal Evidence Act 1984 was a result of the work carried out by the Royal Commission

[38] Bailey, S. H., Harris, D. J., Jones, B. L., 'Civil Liberties: Cases and Materials', (2000), 5th Ed, Vol. 1, Butterworths

[39] Feldman D, Human Rights, Terrorism and Risk: The Roles of Politicians and Judges, (2006), Sweet & Maxwell Limited and Contributors.

terrorist.[40] Where, however, a person faces the prospect of torture or inhuman treatment in the country to which he would otherwise be deported, then, under Convention jurisprudence, he cannot be deported.[41] To meet that situation, s.23 of ATCSA 2001 provided that a person may be detained even if he cannot be removed from the UK. The manner in which the judiciary responded to this question will be examined in the context of *'A v Secretary of State for the Home Department'*[42] *(hereafter the "A" Case)*

The threshold question in the 'A' Case was whether a state of emergency had arisen entitling the United Kingdom to derogate from Art.5. The question as to whether the circumstances amounted to a public emergency threatening the life of the nation was at the political, rather than the legal end of the spectrum and, therefore, was argued to be a matter in which the views of the other organs of government were entitled to great weight.

The second issue in the A[43] Case was whether the provisions of ATCSA 2001 relating to detention violated the detainees' rights under Art.5 to an extent greater than that strictly required by the exigencies of the situation, and so exceeded the limits within which derogation was permitted under Art.15. On proportionality, the argument focussed on the fact that the powers of detention related only to foreign nationals who could not be deported. It could not be said that foreign nationals were the only threat; if they were a threat, they could under the 2001 Act[44] carry on their activities from abroad. The House of Lords accepted these arguments on the basis that s.23 was irrational.

The House of Lords also held that the powers of preventive detention under the 2001 Act violated Art.14 of the Convention by discriminating unjustifiably between non-U.K. nationals and U.K. nationals, who could not be detained on suspicion. The appropriate comparators were U.K. nationals who were suspected terrorists, and not, as the Government contended, non-U.K. nationals who were suspected terrorists but who could be deported to third countries.[45] Lord Hoffmann did not wish to give the impression that all that was necessary was for the Government to extend the powers to foreigners; any preventive detention was unconstitutional.[46]

In the wake of the ruling of the Law Lords in the A Case that detention under Part 4 of ATCSA was discriminatory and incompatible with the right to liberty and despite the fact that the government had had months to consider alternatives to continue detention of non-deportable foreign nationals without charge under ATCSA, it convinced Parliament that it needed to enact another piece of anti-terrorism legislation; the Prevention of Terrorism Act 2005, as discussed previously. This law was rapidly adopted and entered

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[40] Khan, A., 'International and human rights aspects of the treatment of detainees', [J. Crim. L.] 2005, 69(2), 168 – 187

[41] *Chahal* v *United Kingdom* (1996) 23 E.H.R.R. 413

[42] [2004] UKHL 56; [2005] 2 AC 68

[43] [2004] UKHL 56; [2005] 2 AC 68

[44] *supra* n.15

[45] Arden M., Human Rights in the Age of Terrorism, L.Q.R. 2005, 121(Oct), 604-627

[46] "The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve" as per Lord Hoffman in *A* v *Home Secretary* at 97

into force. The PTA 2005[47] gave the Home Secretary powers to issue 'control orders' to restrict the liberty, movement and activities of people purportedly suspected of terrorism-related activity, whether they are UK nationals or not.[48]

There are two forms of control orders, derogating and non-derogating. The restrictions that can be imposed under them range from 'house arrest', to tagging, curfews, controlling access to telephones and the internet, and restricting whom someone can meet or communicate with. The duration of Control Orders are limited to one year. However, they can be renewed at the end of each twelve-month period so that, effectively, they can be imposed indefinitely. Any breach of the restrictions imposed under a control order without reasonable excuse is a criminal offence, punishable by up to five years in prison.[49]

Concluding this segment of the paper, it may be stated some special laws aimed at terrorists could be justifiable, particularly those dealing with proscription, but others, in particular those which provide for indefinite detention without trial or the use of evidence likely to have been obtained through the use of torture, are not. What is above all crucial, however, is that anti-terrorism measures adopted do not create such a breach in the rule of law that the very goal of terrorists[50] is not 'accidentally' realised.

Insofar as the United Kingdom is concerned a 2003 review of the 2001 Act[51] considered a number of alternatives to detention. Amongst the likely contending proposals for adoption by the Government, especially now that the detention power has been declared incompatible with the European Convention, is the creation of the offence of 'acts preparatory to terrorism', alterations to the rules of evidence to allow the admission of information obtained through covert surveillance and the offering of incentives to informers.

It is to be fervently hoped, moreover, that legislative steps will be taken to ensure that no evidence obtained through a breach of ECHR Art.3 standards can be admitted as evidence against any individual in a court of law. The Court of Appeal held that it could admit evidence which may have been extracted from other detainees at Guantanamo Bay[52] through the application of torture or inhuman or degrading treatment.[53] However, this has now changed with the House Lords finding that where a confession was not proved to be voluntary it has to be inadmissible.[54]

Different state institutions have different approaches to anti-terrorism powers. The definition of terrorism under the UK's Terrorism Act 2000 is extraordinarily wide, and there are extraordinarily extensive powers under the Prevention of Terrorism Act 2005 to make control orders in respect of people suspected of having links to terrorism. Though the comparable situation in Sri Lanka is not examined in detail in

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[47] Prevention of Terrorism Act 2005
[48] Sections 1 and 2 Prevention of Terrorism Act 2005
[49] Article by Amnesty International, United Kingdom – Human Right: A Broken Promise, 23rd February 2006
[50] The destabilisation of society through the spreading of fear and alarm
[51] Under s.122 of the Act the Committee, chaired by Lord Newton of Braintree, issued its report on December 18, 2003: Anti-terrorism, Crime and Security Act 2001 Review, HC 100
[52] Foster, S., 'Detention without trial and the admissibility of torture evidence', [J.P.] 2006, 170(5), 64 - 67
[53] *A* v *Secretary of State for the Home Department* (No. 2) [2005] UKHL 71; [2005] 3 W.L.R. 1249
[54] *Ibid* [2005] 3 W.L.R. 1249

this paper, there is no doubt that there is constant pressure on Parliament to create new offences and grant more powers to the police and the security services. When manoeuvring for position and control against each other, the institutions advance different, and often incompatible, visions of the Constitution and their places within it as a way of legitimating their ambitions and giving credibility to their claims to have greater importance and legitimacy than other institutions.

Tension between state institutions is natural, as is the tendency for them to take different views of the constitutional rules governing their activities and inter-relationships.[55] Tension between institutions is also desirable. A functioning Constitution requires that the various institutions of the state should provide checks and balances, and checks and balances depend on maintaining a state of tension between institutions and their constitutional positions.[56]

In the UK, the style of legislative drafting in Bills designed to confer powers on officials, including the police, does not make it easy to ensure that either the government or the two Houses of Parliament make a proper assessment of the proportionality of, or need for, the powers in question. Modern legislation typically confers very broadly worded powers with few safeguards. Both the government and, when they accept the government's argument, both Houses of Parliament make no assessment of the justification for the powers.[57] In relation to such legislation, there is no reason for courts to give great weight to the assessment of government or Parliament, because both government and Parliament have systematically refused to make such an assessment.

This is a further reason for the judiciary to re-conceptualise its constitutional position vis a vis rights which in fact, is happening in the cases cited in this paper. These developments are encouraging indications that the various institutions of the state are taking their constitutional roles seriously, even to the extent of recreating them in the course of continuing confrontation, or at least tension, between them.

3. Examining the Change in Usage of Force in International Relations as Signified by the 2003 Iraq War.

3.1. Pre-emptive War as Opposed to Preventive War

It is important to distinguish a pre-emptive war from a preventive one. The Iraq war was deemed as a pre-emptive war by the U.S. government but this terminology was politically expedient.[58] In reality, the war with Iraq was a war of prevention. According to the United States Department of Defense Dictionary of Military Terms, pre-emptive action is 'initiated on the basis of incontrovertible evidence than an enemy attack is **imminent**' while a preventive war is 'initiated in the belief that military conflict, while not imminent, is **inevitable**, and that to delay would involve greater risk'.

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[55] D. Feldman, None, one or several? Perspectives on the UK's constitution(s), [2005] C.L.J. 329-351

[56] Allen, M. J., Thompson, B., 'Cases and Materials on Constitutional and Administrative Law', (2005), 8th Ed., Oxford University Press

[57] Joint Committee on Human Rights Session (2001 - 2002)

[58] Hanni M. Cordes, 'Does an ounce of Prevention really bring a pound of cure? The debate over preventive doctrine' p.1. http://www.comw.org/qdr/fulltext/03cordes.pdf (10.12.2006).

An illustration of the differences between military actions grounded in pre-emptive versus preventive motivations can be established in comparison to two historical cases. The Six Day War between Israel and an alliance of Egypt, Syria, Jordan, and Iraq was a classic case of pre-emption,[59] where Israel launched a surprise attack on the Egyptians, following growing tension between the Arabs and Israelis, assuming an invasion was forthcoming and survival doubtful if Egypt attacked first.

The Third Punic War between Rome and Carthage (149–146 BCE.) illustrates preventive warfare,[60] where economically resurgent Carthage was viewed as a future threat which caused considerable worry to Roman leaders, ending in a brutal, unprovoked military campaign, annihilating Carthage. In contrast to the Israelis who saw an immediate Egyptian threat in 1967, the Romans attacked on the perception that someday Carthage might become a threat. Israeli pre-emption involved striking a clear and present danger when the cost of inaction would have been devastating. Roman prevention entailed fighting a winnable war straightaway in order to avoid the risk of later clashing under less favorable circumstances.[61]

While pre-emptive action is warranted sometimes, the academic consensus suggests that attempts to justify preventive wars as a 'bottomless legal pit'.[62] Hugo Grotius for example, argued that pre-emption was lawful when a danger became 'immediate and, as it were, at the point of happening'; in contrast to taking up arms against or to weaken a rising power which might someday use violence was 'repugnant to every principle of justice'.[63] The legality and implications of pre-emptive/preventive war will be discussed in greater detail later on in the essay.

The Use of Force

The concept of preventive war is the result of the globalization of security and the revolution in military affairs it has created along with the unfortunate gulf that has developed between strategy and law. While the world of contemporary strategy has been forced to adapt to the harsh realities of global change, international law has failed to adjust to new conditions. The dramatic changes in the international security environment as manifested on 11 September 2001, demonstrated the reality that it is now possible to organize violence outside a state structure on a scale that is potentially devastating to an entire society. The rise of mass-casualty terrorism has challenged the 20th-century paradigm of modern war in which armed conflict was the monopoly of states and governments. The norms of diplomacy, war and

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[59] Dan Reiter, 'Exploding the Power Keg Myth: Preemptive Wars Almost Never Happen', International Security, Vol. 20, No. 2, (1995), p 16 – 19. – pp 5 - 34

[60] Charles W. Kegley Jr. and Gregory A. Raymond, 'How Nations Make Peace', (New York, 1999), p. 84 – 89.

[61] Jack S. Levy and Joseph R. Gochal, 'Democracy and Preventive War: Israel and the 1956 Sinai War', Security Studies, Vol. 11, No. 2, (2001), p. 7. – pp 1 – 49 and Michael Walzer, 'Just and Unjust Wars', (New York, 1977), p. 85.

[62] Morton A. Kaplan and Nicholas deb. Katzenbach, 'The Political Foundations of International Law', (New York, 1961), p. 213.

[63] Hugo Grotius, 'The Law of War and Peace', translated by De Jure Belli ac Paris, (Ontario, 2001), p. 73, 77.

international relations has been predicated on armed conflict on the basis that it occurs among sovereign states which dates back to the Peace of Westphalia.[64]

This Westphalia model of nation-states has been challenged by the new realities of a global security age, linking military power to sovereignty and national borders. The recognition of universal human rights, being a first of these new realities, now requires adherence by all countries, irrespective of a particular state's internal laws and physical sovereignty. In the 1990s, the Balkan massacres at Srebrenica, for example, saw the birth of a new doctrine of humanitarian military intervention based on the conviction that, state sponsored genocide is a forfeiture of sovereignty.[65] Second, the reality of a proliferation of global and trans-national threats such as fundamentalist terrorism, weapons of mass destruction and ballistic missiles, bypass the barriers of national geography and state borders, and undermine the nation-state's monopoly over violence. Thirdly, the reality of a global economic system that ignores national frontiers, where the global economy brings with it the trappings of Western modernity, yet creates widespread social dislocation that fuels armed conflict. Lastly, there is a reality of a global communications network providing mode interconnectedness enabling destruction through non-territorial space.[66]

The new globalized security constraints, described above, have been recognized by policy makers and analysts alike. However, with the increasing inability of the United Nations to provide legal, rational and realistic frameworks, states have developed their own policies to deal with such threats. Even prior to the Iraq war, it is clear that the U.S. was moving away from Cold War strategies of – deterrence, containment, and retaliation and mass military forces – due to its increasing irrelevancy in the new millennium.[67] Britain, France and Russia are discussing the rise of multi-variant warfare in the form of unrestrained conflict where symmetric and asymmetric wars merge, where Microsoft coexists with machetes and stealth technology is met by suicide bombers.[68] Chinese strategists, meanwhile, have developed the theory of unrestricted warfare in which they state, 'there is no territory that cannot be surpassed; there is no means which cannot be used in war; and there is no territory or method which cannot be used in combination'.[69]

It is, then, the globalization of security that provides the essential background to the elevation of preventive war to the centre of military strategic thought. Faced by a spectrum of global threats that know no geographical boundaries, states move towards a new strategic paradigm where deterrence and containment are not abandoned but supplemented by adding new policies of military prevention and pre-emption. As former U.S. Secretary of State, Colin Powell stated, quote, 'A doctrine of pre-emption in our

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[64] Michael Evans, 'Of Smoking Guns and Mushroom Clouds: Explaining the Bush Doctrine and the Rise of Military Preemption', *Australian Army Journal*, Vol. 1, No. 2, (2003), p. 16
[65] Catherine Guicherd, 'International Law and the War in Kosovo', *Survival*, Vol. 41, No. 2, (1999), p. 23
[66] Evans, 'Of Smoking Guns', p. 17
[67] Gary Hart and Warren B. Rudman, 'New World Coming: American Security in the 21st Century', Bipartisan U.S. Commission Report, (September 15, 1999), http://www.fas.org/man/docs/nwc/nwc.htm (12.12.2006)
[68] Michael Evans, 'From Kadesh to Kandahar: Military Theory and the Future of War', U.S. Naval War College Review, (2003), Vol. 61, No. 3, p. 137
[69] Qiao Liang and Wang Xiangsui, 'Unrestricted Warfare', (Beijing, 1999), p. 199, http://www.terrorism.com/documents/TRC-Analysis/unrestricted.pdf (15.12.2006)

strategy is appropriate... but don't see it as a new doctrine that excludes or eliminates all the other tools of national security'.[70]

In the light of this perceived ending of the dominant traditional notion of deterrence, the rise of a new age of preventive action is dramatically changing the world. Preventive war, violent intervention in the affairs of sovereign states, and forced regime change are not new. These acts are considered as largely unsavory and sometimes even illegal tools of statecraft; nonetheless, nations have resorted to their use when it is believed they are dictated, such as Imperial Japan's preventive attack on the U.S. fleet at Pearl Harbor in 1941.

Despite often hyperbolic criticism of the usage of such tactics, and specifically of the invasion of Iraq, evidence suggests that a significant number of states are beginning to embrace the underlying logic of preventive war.[71] The collapse of previous norms has been accelerated to a large part with the transition to this new method since 9/11. It is believed that if a series of WMD terrorist attacks were to strike a number of cities in the developed Western world, the 'conventional rules of sovereignty would be abandoned overnight', resulting in preventive wars without even the remotest UN approval.[72]

The looming genocide in Kosovo resulted in NATO intervention (to some degree chastened by their failure to stop the carnage in Rwanda) without UN Security Council approval. The principle that states could at times interfere in internal affairs of other states to protect civilians from 'wholesale slaughter'[73] is an evolution of military intervention that could be accepted. The emergence of this new norm of intervention leads to further conclusions that if sovereignty can be violated to stop the murder of thousands, it can also be violated to prevent such disasters including terror attacks.

The growing threat of global nuclear war, through the spread of nuclear weapons to states like Iraq, Iran and North Korea, may trigger the 'next Hiroshima', creating a public opinion consensus in favor of preventive war to keep such weapons away from the arsenals of 'rogue' states[74] and their terrorist allies. For the U.S., the death of over three thousand people in one single attack may have already brought about the 'next Hiroshima'. Stopping the spread of WMD may require destroying those WMD by force, requiring preventive action.[75]

The emergence of large-scale suicide terrorism is a challenge to entrenched beliefs about deterrence and rationality in international conflict. The uncertainty on what to do about rogue WMD forces and to wage preventive war against regimes that harbor terrorists has become a deliberation on whether it is acceptable

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[70] Robert S. Litwak, 'The New Calculus of Preemption', Survival, (2002), Vol. 44, No. 4, p. 59

[71] Peter Dombrowski and Rodger A. Payne, 'Preemptive War: Crafting a New Norm', paper presented at the International Studies Association Annual Meeting, Hawaii, (March 1, 2005), p. 14, http://convention2.allacademic.com/getfile.php?file=isa05_proceeding/2005-09-30/70957/isa05_proceeding_70957.PDF&PHPSESSID=a2c1a3fb2568295d2bce09d1992a5c12 (17.12.2006)

[72] Stephen Krasner, 'The Day After', Foreign Policy, (2005), No. 146, p. 68

[73] Thomas M. Nichols, 'Anarchy and Order in the New Age of Prevention', World Policy Journal, Vol. 22, No. 3, (2005), p. 4

[74] Michael Mandelbaum, 'Lessons of the Next Nuclear War', Foreign Affairs, Vol. 74, No. 2, (1995), p. 37

[75] Ibid. at p. 24

to neutralize such threats preventively.[76] The concern over the qualitatively new kind of danger in the willingness to kill indiscriminately means that the only prudent course of action is to regard WMD as 'possession equals use', thereby warranting action as soon as possible.[77] The unreliability and unpredictability of terrorists provides a strong incentive to strike preventively rather than to trust in deterrence, or in unverifiable agreements, or in negotiation and diplomacy and especially in the unproven deterrability of terrorists who believe that engaging in mass murder and instigating a global religious war will secure them an eternity in paradise.[78]

Despite the row between the United States and some of its allies over Iraq, many European states, as well as others around the world, are showing signs that prevention can, and has already begun to be incorporated into their countries' national defense strategies.[79]

3.2. The Legitimacy of Preventive/Pre-emptive War

The differentiating characteristics and the methods of usage of preventive war were illustrated in the above sections. It is imperative to understand the legitimacy, or lack of it, of using such warfare against another state. The debate among international lawyers, politicians and academics, whether the U.N. Charter permits preventive force in international relations has become even more heated and significant with the highlighting need to ensure security of countries and citizens against the backdrop of unexpected, unannounced attacks, often committed by terror organizations equipped with the means and capabilities and the determination of causing harm.[80]

The U.N. Charter prohibits the usage of force in a general sense.[81] It is stated that, 'All members shall refrain in the international relations from the threat of use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations'.[82] Aside from the arguably 'legal' use of force for humanitarian intervention, where the use of force is to disarm an established aggressor, without altering the territory or depriving its sovereign status,[83] the use of armed force is prohibited under the UN with only two exceptions: force authorized by the UN Security Council and Self-defence. Since the emphasis of this part of the paper is on the use of preventive force, the exception for U.N. authorized force will not be addressed.

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[76] Litwak, 'The New Calculus', p. 56

[77] M. Elaine Bunn, 'Preemptive Action: When, How and to What Effect?', Strategic Forum, (2003), http://www.ndu.edu/inss/strforum/SF200/sf200.htm (10.12.2006).

[78] Nichols, 'Anarchy and Order', p. 8

[79] Francois Heisbourg, 'A Work in Progress: The Bush Doctrine and Its Consequences," *Washington Quarterly*, Vol. 26, No. 2, (2003), p. 81

[80] Vytautas Kačerauskis, 'Can a Member of the United Nations Unilaterally Decide to use Preemptive Force against another State without Violating the U.N. Charter?', International Journal of Baltic Law, Vol. 2, No. 1, (2005), p.80

[81] Peter Malanczuk, 'A Modern Introduction to International Law', (London and New York, 1997), p. 309

[82] Article 2(4), Charter of the United Nations, (1945)

[83] Abraham D. Sofaer, 'On the Necessity of Pre-emption', (2003) 14 European Journal of International Law 223

The Right of Self-defence

Self-defence is the only justification for the use of force by a state without violating the UN Charter on the absence of Security Council authorization. Therefore, the only way to justify preventive action is to prove it fits into the concept of self-defence. This raises the challenge of how a nation can begin to show cause for self-defence without being attacked.

The inherent right of self-defence, as argued by the United States and United Kingdom, is a right exercisable against Iraq given potential threats Iraq posed to them and other nations owing to its purported or intended possession of WMD and its refusal to decommission such weapons, and its links to international terrorists such as al-Qaeda who attacked the United States and continue to undertake and threaten further attacks. In fact, the new official U.S. national security policy (the Pre-emption Doctrine) views self-defence as legitimizing attacks on hostile states connected to terrorists who represent potential threats to the United States, even if uncertainty persists as to the time and place of the potential attack that is to be repulsed.[84]

Article 51 sets out the one clear exception to the general prohibition in the form of states using force in self-defence against an armed attack. This is consistent with the authoritative interpretation of Article 51 by the International Court of Justice (ICJ). There are still questions concerning when an armed attack 'begins' for purposes of the right of self-defence, but the Security Council and governments have clarified some issues since 9/11. An attack must be underway or must have already occurred in order to trigger the right of unilateral self-defence.[85] Any earlier response requires the approval of the Security Council. There is no self-appointed right to attack another state because of fear that the state is making plans or developing weapons usable in a hypothetical campaign.[86]

International law requires that any use of armed force in self-defence, preventive or otherwise, comply with three basic criteria: necessity, proportionality, and imminency.[87] The Nuremberg Tribunal spoke approvingly of it,[88] as has the International Court of Justice in both its judgments[89] and the Use of Nuclear Weapons advisory opinion.[90]

The principle of necessity requires that all reasonable alternatives to the use of force be exhausted. However, certainty regarding a timely preventive operation tends to be much bleaker than other

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[84] The White House, 'The National Security Strategy', p. 15

[85] Mary Ellen O'Connell, 'The Myth of Preemptive Self-defence', American Society of International Law, (2002), p. 5, http://www.asil.org/taskforce/oconnell.pdf (10.12.2006)

[86] *Ibid.*

[87] Michael N. Schmitt, 'Preemptive Strategies in International Law', p. 529, http://www.marshallcenter.org/site-graphic/lang-en/page-coll-index-2/static/xdocs/coll/static/articles/schmitt-article-05232003-en.pdf (10.12.2006)

[88] International Military Tribunal (Nuremberg), Judgment and Sentences (Oct. 1, 1946), (1947) 41 American Journal of International Law 172, 205

[89] Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v. U.S. (1986) 14 International Court of Justice 176

[90] Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), (1996) 41 International Court of Justice 225

situations. For instance, there is considerable doubt regarding whether the 'threat' will ever turn into an attack. Given that the use of force is the most severe form of action available in interstate relations, the likelihood of the threat being carried out must be exceptionally high before preventive action is appropriate. It is suggested that a 'beyond reasonable doubt' standard should apply for the use of defensive force and it should follow once all non-forceful options have been exhausted.[91] Thus, if diplomatic, economic, informational, judicial, or other courses of action might deter the threatened action, defensive use of force would violate Article 2(4). It is in this context that Chapter VII (Article 51) action relates to the law of self-defence.

The principle of proportionality limits any defensive action to that which is necessary to defeat an ongoing attack or to deter or prevent a future attack. A distinct contrast is brought out by the dilemma of what constitutes as being excessive and reasonable amounts of firepower in response to a threat. The concept that the size and scope of the defensive action may not exceed that of the attack is, in fact, a misconception. Such a standard of action could deprive a state of an ability to effectively defend itself, for it may be necessary to employ much more force than that which is threatened. In practice, weighing expected military advantage against possible collateral damage could be an extremely complex calculation to make, especially in the heat of an armed conflict.[92] One important principle established by international law in seeking to make this difficult balance, is that the proportionality of a response to an attack is to be measured not in regard to the specific attack suffered by a state but in regard to what is necessary to remove the overall threat.[93] Accordingly, the right of self-defence includes not only acts taken to prevent the immediate threat, but also to prevent subsequent attacks. Similarly, if the country posed a threat severe enough to legally justify taking military action in self-defence, it is arguably necessary to remove that threat to ensure the threat's complete eradication. This was the case where, even after the defeat of Iraqi forces at the conclusion of the 1991 Gulf War, Saddam Hussein's Iraq continued to surreptitiously develop weapons of mass destruction and obstruct the weapons inspectors from carrying out their assignments.

In the modern era, the means of warfare are such that defeat, or at least a devastating blow, can occur almost instantaneously. Moreover, with the advent of transnational terrorism, the enemy, including his intentions, locations, tactics, and targets, is proving highly elusive. In such an environment, restrictive approaches to imminency, the third criterion, run counter to the purposes animating the right of self-defence. 'Self-defence' recognizes that the international community may not respond in a timely fashion, if at all, to an armed attack against a state. The balance between the state's right to exist unharmed and the international community's need to minimize potentially destabilizing uses of force underlies the right of self-defence.

The maturation of the right to self-defence is, however, relative. For instance, as defensive options diminish or become less likely to succeed with the passage of time, the acceptability of preventive action

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[91] Yoram Dinstein, 'War, Aggression and Self-defence', (Cambridge, 2001), p. 79

[92] Israel Ministry of Foreign Affairs, '*Responding to Hezbollah attacks from Lebanon: Issues of proportionality', (Jerusalem, July 25, 2006),* http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/ Responding +to+ Hizbullah+attacks+from+Lebanon-+Issues+of+proportionality+July+2006.htm (05.02.2007).

[93] Rosalyn Higgins, 'Problems and Process', (Clarendon 1994), p. 232

grows. This is decisive in the case of weaker states for they may have to act, lawfully, sooner than stronger states upon facing identical threats because the risk factor keeps on increasing as the time passes. In the same context, it may be necessary to conduct 'defensive-offensive' operations against groups such as terrorists, long before a planned attack, because of the increasing improbability of having another opportunity to target them prior to an actual strike or while an operation is underway. In other words, each situation presents a case-specific window of opportunity within which a state can foil an impending attack.[94]

4. Conclusion

The challenge of defeating an invisible enemy whilst not undermining the UK's tradition of human rights is more daunting than ever. Post 9/11, the battle against terrorism must be won because the consequences of defeat are unthinkable. But a question exists whether terrorism can be fought without weakening human rights.[95] The answer, at the moment, is that to secure freedom for the many the liberty must be restricted for a few, using means that are reasonable and proportionate. New threats require new responses: in times of great struggle, steps must be taken which are normally regarded as undesirable. In a democracy, whenever governments threaten to challenge human rights, the Rule of Law demands that the Executive's motives be scrutinized with unrelenting rigor.[96] Whilst few would dispute the need to reassess laws in the wake of recent terrorist attacks, many debate the strict measures introduced in the recent 'fight against terrorism'. This is the case in the UK as well as in Sri Lanka.

From a somewhat different though related perspective, it is apparent that the dilemma of preventive war is a present day fact. There are many countries that challenge the civilized world, where human rights are not respected, where dictators who answer to no one rule with the whip of violence and intimidation, where fanatics engineer plots against the international peace and seek the weapons that could bring total chaos. Many states are little better than criminal enterprises, ethnic killing zones, and havens for terrorists and other barbarisms. They are threats both to their own people and to international order.

Current international norms and legal frameworks are, to a large extent, outdated, with international institutions consequently incapacitated in the face of these new dangers. The world's leading countries will continue to justifiably resort to pre-emptive and preventive military actions if, and when, a deadly threat against them can be identified. For the United Nations to complain that such a course of action violates the traditional values of the U.N. Charter is superfluous and doing so will only result in the U.N. being further marginalized.

New form of security threats requires radically new legal rules. Both the UN Charter and international law needs to be updated and modernized in order to reflect the underlying geopolitical realities of the current age. The law needs to revisit the justification of preventive action and incorporate its role in the

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[94] Michael N. Schmitt, 'Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework', (1999) 37 Columbia Journal of Transnational Law 885, 930

[95] Khan, A., 'International and human rights aspects of the treatment of detainees', [J. Crim. L.] 2005, 69(2), 168 – 187

[96] Allen, M. J., Thompson, B., 'Cases and Materials on Constitutional and Administrative Law', (Oxford, 2005)

protection of a state's citizens. Unless UN member nations meet the grave intellectual and ethical challenges posed by the lethal trinity of weapons proliferation, messianic terrorism and rogue states, they will allow immorality, brutality and fanaticism to flourish. In the words of John F. Kennedy, 'The only thing necessary for the triumph of evil is that good men do nothing', and as such, inaction against these threats is to condemn security, justice and human rights to failure, while risking the lives of the innocent and compromising the moral values of a democratic society.

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