Tackling Terrorism: The European Human Rights Convention and The Enemy Within

Martin Howe

POLITEIA

2001

First published in 2001
by
Politeia
22 Charing Cross Road
London WC2H 0QP
Tel: 0207 240 5070 Fax: 0207 240 5095
e-mail: info@politeia.co.uk
Web Site: www.politeia.co.uk

Policy Series No. 28

Support for this study has been granted by the Foundation for Social and Economic Thinking

ISBN 1 900 525 57 7

Cover design by John Marenbon

Designed and Printed in Great Britain by
Fieldfare Publications
52 Clifton Road
Cambridge CB1 7FW

THE AUTHOR

Martin Howe is a practising Queen's Counsel specialising in European law and intellectual property law. He conducts cases in the English Courts, the European Court of Justice and other European tribunals. Previous publications include *Europe and the Constitution after Maastricht, From Maastricht to Amsterdam* and numerous articles on European legal and constitutional issues. He has stood as a Conservative Party Candidate.

CONTENTS

I
Introduction: Justice and War

When society responds to criminal acts, it is often said that it is better for a hundred guilty men to go free than that one innocent should be punished. That, indeed, is the basic philosophy which our criminal justice system tries to follow. The guilt of a person accused of crime must be proved beyond reasonable doubt. Guilt must be proved by legally admissible evidence which has to come from identified witnesses and is open to challenge by the defence. All relevant material helpful to the defence must be disclosed by the prosecution.

But when it comes to war, we apply quite a different philosophy. Targets do not have to be identified beyond reasonable doubt. Hostile acts, or threats of hostile acts, do not have to be proved by legally admissible evidence. And when it comes to the innocent, it is accepted that in most wars, civilians and other innocent people will be killed or injured along with the military forces of the enemy.

We apply this different philosophy to wars for reasons of dire necessity. It is because the evil of leaving the enemy undefeated is greater than the evil of hurting the innocent, which is inevitable if we are to fight the enemy in an unrestrained way. To leave the enemy undefeated may lead to the death of many more of the innocent.

Which of these philosophies should we apply in the aftermath of the terrible atrocities at the World Trade Center and the Pentagon? The scale and horror of the death and destruction involved, and the likelihood that similar atrocities will be repeated unless action is taken to nullify the terrorist threat, rank these events as acts of war, rather than as ordinary criminal acts.

Important practical, moral and legal consequences follow from ranking these events as acts of war. A State is entitled under the United Nations Charter to take action to defend itself against actual or threatened acts of war. This means that the United States and its allies are entitled, if necessary, to use military force to enter the territory of States which harbour

the terrorist threat in order to suppress it, where the State concerned is unwilling or unable to suppress the threat itself.

That is how we are entitled to act when taking action in *other* countries which harbour terrorists. That is the basis upon which the United States, with British assistance and participation, has taken action against Bin Laden's terrorist network and the Taliban regime in Afghanistan. No court of law need be involved, nor should it be. Military action needs to be swift and to be undertaken without warning. It cannot be held up to await the lengthy procedures of a court of law.[1] Military action needs to be based on intelligence, not on evidence admissible in a court of law. Disclosure of intelligence will compromise its sources and alert the enemy to the information which is known about his plans.

But how should we act when it comes to taking action against terrorists, terrorist networks, supporters and sympathisers within our own country? Can we continue to act on the principle that it is better that a hundred terrorists should go free than that one innocent person should be wrongly harmed? This question only has to be asked for the answer to be obvious. The safeguards which we have in our criminal justice system are a valued part of the free society in which we live. But it is only possible to enjoy those safeguards because when an ordinary criminal goes free, it does not usually threaten the safety or structure of society itself.

That is why it may be necessary in the case of terrorism, to take action on the basis of intelligence rather than legal evidence; and on the basis of decisions taken by our executive authorities rather than judgments in the courts. Intelligence is different from evidence. It is frequently gathered secretly and its disclosure would destroy its usefulness and expose its sources to attack. Much more may be known about shadowy terrorist groups than can ever be proved in evidence in a court of law. We do not expect to have to submit evidence to judges before our executive authorities take military actions abroad. For the same reasons, if we treat terrorism as

1 In an article in *The Times* on 18 September 2001, Geoffrey Robertson QC, a leading human rights law proponent, argued that action against bin Laden's terrorist network should be placed under the jurisdiction of the UN international criminal tribunal at The Hague, with expeditions into Afghanistan to arrest him and his collaborators needing to be sanctioned by the tribunal and the UN Security Council. This suggestion would be comic, if it were not for the desperately serious consequences of failing to take effective action to deal with terrorism.

war, the dire consequences of failing to take effective action to prevent terrorism must justify some actions being taken within this country in the same manner as war decisions.

At the same time, in taking action to protect our society against terrorism, we do not want to threaten the whole basis of our free society which is what the terrorists are trying to destroy. But that is not the same as seeking to preserve every supposed right or privilege which our ever more powerful and vociferous human rights lobby has managed to develop over the past quarter century. In particular, there are aspects of the European Convention on Human Rights - not so much in the Convention itself, but in the way the courts have interpreted and extended it well beyond its originally intended scope - which severely undermine our ability to protect ourselves from terrorism, whilst doing nothing to safeguard the real freedoms of our society.

II
The Problem: A safe refuge for terrorists

There is increasing evidence that at least some of the terrorists involved in the World Trade Center attack had assistance from individuals or groups who stayed or were based in this country. There seems to be direct evidence that the suicide bomb assassination of Ahmed Shah Masood, the leader of the Northern Alliance in Afghanistan, may have been prepared and organised in this country.

It is, of course, impossible to know what advance information or intelligence the security services might have had about the shadowy groups and individuals involved in this kind of activity. However, what is quite clear is that the present state of the law has made it virtually impossible for any effective action to be taken to prevent the United Kingdom being used as a base, training centre and jumping off point for terrorist activity. The reasons for this will be explored below.

The Terrorism Act 2000 made a serious attempt to address the problems of terrorist supporting activities taking place in this country. However, it can of necessity only be of limited effectiveness. The Act made it an offence to plan or incite in this country acts of terrorism anywhere in the world, or to organise or provide funding for terrorist activities. This removed a jurisdictional problem which had existed in the past, namely that planning crimes here which are to take place in foreign countries would not necessarily be an offence under British law. So, if admissible evidence can be obtained that an individual or group have engaged in such conduct within this country, a prosecution can take place under the Terrorism Act.

However, the fundamental problem remains that of obtaining admissible evidence against those planning or engaged in acts of terror. This is difficult enough even after a terrorist plot has culminated in an outrage.[2] It is well nigh impossible when terrorist plots are only in the planning stage and are yet to develop into a concrete event. Short of obtaining legally admissible

2. An important part of the evidence relied on by the United States in its extradition case against Al-Fawwaz (see below) consisted of evidence from anonymous sources who were terrified of being killed if identified. The defence objected on human rights grounds to the fact that the United States sought to rely on such evidence.

evidence of a specific criminal act, which will necessarily be rare in this kind of shadowy activity, the people concerned are able to continue to stay in this country and operate here with impunity. There have been no prosecutions in Great Britain under the Terrorism Act 2000.

The Terrorism Act has also empowered the Home Secretary to produce a list of banned terrorist organisations and made it an offence to belong to, or to take active steps to support, a banned organisation. The effect of these provisions will be more apparent than real. They may succeed to some extent in preventing public shows of support for terrorist organisations. But it is easy enough to circumvent the ban by adopting a new harmless 'front' name for an organisation which claims to pursue humanitarian or peaceful political objectives. The really dangerous people are not those who publicly engage in loudmouthed support for terrorism, offensive as they may be, but those who secretly and silently plan, finance and execute acts of terror.

There is another dimension to the problem posed by the presence in this country of people with terrorist connections or antecedents. Quite apart from the problem posed by whatever activities these people may get up to while here, it is very damaging for this country to be seen to be acting as a safe haven and refuge for those who have engaged in terrorist activities against friendly countries abroad. Middle Eastern countries who have suffered very badly from the activities of Islamic fundamentalist terrorists and have done their best to deal with the threat within their own societies find it galling and offensive that Western countries such as ours offer a safe haven to people who are their enemies and ours. Professor Ahmed Sorour, Speaker of the Egyptian Parliament, attacked the failure of Britain to return terrorists to Egypt who are now living openly here, because of human rights concerns: 'You let our fingers be burned by the fire of terrorism - now when your fingers are burned, you come here with this campaign. Where were you when we were the victims?'[3]

It is easy to see why those who have suffered from and struggled against terrorism in their own countries for many years now see the West's position as one of hypocrisy. What gives us the moral standing to demand imperiously that other countries should take strong action against terrorism when it affects us, if we continue to harbour terrorists ourselves? It is worth

3. BBC Radio 4, Today programme, 27 Sept 2001.

asking the reasons why it has come about that Britain is regarded as providing a safe refuge for terrorists and their support networks.

The heart of the problem: the Soering doctrine

It might be thought that the most obvious and effective measure to deal with these problems would be deportation. Foreign nationals present in this country are guests (whether invited or uninvited) and their continued presence here should be a privilege and not a right. If our government believes that their continued presence here is not conducive to the national interest – still more, if it believes that their presence contributes to exposing our citizens or the citizens of our allies to the danger of terrorist attacks – we should be entitled to demand that they leave.

Because foreign nationals, with certain exceptions,[4] have no legal right to come to this country, still less to live here, it might be thought that it would be a straightforward legal matter to empower the government to withdraw that privilege and require them to leave. Such decisions need not require admissible evidence of the actual commission of terrorist offences. Intelligence rather than evidence would be sufficient. And there are circumstances – such as past conduct or associations – which give cogent grounds for believing that an individual is very dangerous. Those circumstances would justify, on any rational view, the removal of that person from this country, whether or not there was admissible evidence of an actual concrete offence.

However, largely as a result of the way in which the European Convention on Human Rights has been interpreted, the ability of this country to remove dangerous or undesirable foreign nationals has virtually broken down.

The European Convention on Human Rights itself contains no provision restricting in any way the right of States to deport alien nationals from their territory. On the face of it, therefore, the Convention does not inhibit its contracting states from taking such action as they deem necessary to remove undesirable or unwelcome visitors. However, the Convention was

4. The most important exceptions are citizens of other member states of the European Union, who enjoy rights to reside and work here under the Treaties of Rome and Maastricht. Their position requires separate treatment from that of non-EU foreign nationals. However, the terrorist threat does not by and large come from citizens of other EU states.

extended in scope by a remarkable judgment of the European Court of Human Rights at Strasbourg in the Soering case.[5]

The United States sought the extradition from the UK of Soering, a German national, for a murder in Virginia which he had admitted committing. The Strasbourg Court held that the extradition of Soering to the USA would involve a breach *by the United Kingdom* of Article 3 of the European Convention, which prohibits 'torture or inhuman or degrading treatment or punishment'. This startling conclusion was based on two steps: classing as 'torture or inhuman or degrading treatment or punishment' the way in which the death penalty was administered in Virginia;[6] and imputing responsibility under the Convention to the UK authorities for what might befall Soering after his return to the USA, even though the UK authorities could have no direct responsibility for the operation of the American penal system.

In this case, the Strasbourg Court enunciated the doctrine that it is contrary to the Convention for a contracting state to extradite or deport a person to a country 'where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the requesting country'. This doctrine, which has since been further refined and developed in many cases, had the effect of externalising the European Convention: in effect, demanding that foreign countries who are not parties to the European Convention should adhere to the notions and standards of rights as laid down by the Strasbourg Court.

There are two major objections to the Soering doctrine, one of principle and one intensely practical. The objection of principle is that the doctrine amounts to a form of moralistic imperialism: seeking to impose European Convention notions of human rights on other countries with different

5. *Soering v. United Kingdom* A 161 (1989). One group of writers on the Convention has expressed the view that this case 'has a strong claim to be the most influential case that the Court has decided': Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights,* Butterworths Law, 2nd Edition, 2000.

6. It is difficult to resist the conclusion that the Court's reasoning was in fact based on an underlying dislike of the death penalty itself. Because Article 2 of the Convention explicitly permitted the death penalty, the Court could not object to the fact that Virginia had the death penalty *per se*. Rather, they focussed on the way in which the death penalty was imposed in Virginia and the allegedly inhuman conditions of prisoners on death row.

traditions and cultures and their own notions of the correct balance of rights when measured in the context of the needs of their own societies. It is particularly startling that it should have been the United States, a country with its own unparalleled constitutional tradition of the protection of individual rights, that was castigated by the Strasbourg court in the Soering case.[7] Indeed, the Court could only do so by greatly extending the notion of 'inhuman or degrading treatment' in Article 3 of the Convention.

The second objection is practical, and is glaringly apparent following the events of 11th September 2001. The doctrine makes it virtually impossible to deport terrorists or potential terrorists, because they will always allege that their human rights will be at risk if they are deported from this country. They will always claim that they are innocent victims being persecuted for their political or religious beliefs and that they will not get fair treatment or a fair trial if deported to their country of origin. The more dangerous the individual, the bigger the problem, because the more plausible will be the argument that he may be subject to adverse action by the authorities if sent back to his country of origin.

At the time of the decision in the Soering case (1989), the United Kingdom was a party to the Convention, but the Convention was not directly justiciable in British courts. Even so, the fact that individual petitions could be made under the Convention to the Strasbourg Court meant that Britain became increasingly constrained in its policies and practice regarding deportations. However, the incorporation of the Convention into British domestic law under the Human Rights Act 1998 has made the impact of the Soering doctrine even greater and more direct, as it and the other case law of the Strasbourg Court now has to be applied directly by our courts.

There are, of course, a number of British judges who have been overt enthusiasts for the incorporation of the Convention into British domestic law and who have welcomed the expanded role for the judiciary which it casts upon them. However, there has not been unmixed judicial enthusiasm

7. Ironically, the fact that US is so willing to entertain appeals was used by the Strasbourg Court as one of its principal grounds for denying extradition in the Soering case. It was inhuman to allow condemned prisoners to make so many appeals that they could be able to postpone their execution for years.

for all aspects of the Convention and the logical consequences of the Soering doctrine have aroused judicial concern. This concern was expressed by Mr Justice Potts in a decision by the Special Immigration Appeal Commission[8] in July 2000, involving two Sikh extremists whom the Home Secretary wished to deport to India. He said that 'law abiding citizens of the United Kingdom might reasonably feel disquiet about a state of affairs which permits international terrorists proved to be a danger to the national security to remain here'. However, the tribunal considered that they had no alternative but to allow the applicants to stay in this country, because of the risk of possible ill-treatment in India, because of the Soering case and other cases decided by the Strasbourg Court.

The Soering doctrine may lead in some cases to a judicial decision which makes it impossible for the person concerned to be removed from the United Kingdom. But even in cases where the deportee's arguments that his human rights are at risk in the country of destination are ultimately dismissed, the effect of the Soering case and other cases decided by the Strasbourg Court is to introduce extensive delays into the deportation process. This is because in any case where the person to be deported raises a human rights argument, Article 13 of the Convention requires that there shall be 'an effective remedy' against a breach of his Convention rights. The Strasbourg Court has interpreted this as requiring in deportation cases what amount, in effect, to full-blown judicial proceedings. These are, needless to say, normally generously funded by our legal aid system.

The original position was that, because of the need for speed and to protect intelligence sources, persons whom the Home Secretary wished to deport on national security grounds had no right of appeal to a court or tribunal against the decision. This had to be changed because of another decision by the Strasbourg Court. Section 15(3) of the Immigration Act 1971 excluded appeals against deportation in cases where the deportation was ordered on grounds of national security. Although there was no formal appeal, there was a non-statutory advisory procedure involving 'the Three Advisors', before whom the person to be deported could appear. However, the Strasbourg Court ruled that the non-statutory procedure did not satisfy the

8. Appeal by Mukhtiar Singh and Paramjit Singh, decision of 31 July 2000. See below for the status of this Appeal Commission.

requirements of the Convention,[9] even though the Secretary of State's decision could be subject to judicial review.[10]

As a result of this case, the Special Immigration Appeals Commission Act 1997 set up a special tribunal to deal with deportation appeals involving national security questions. Nominally, the Commission is not a court, but it is presided over by a High Court judge. The special feature of this Commission is that it can hear evidence in the absence of the person to be deported, such as confidential material from intelligence sources. A special lawyer is appointed to represent the interests of the appellant at its closed sessions. Apart from this special feature of its proceedings, the Commission follows the full panoply of judicial proceedings and its decisions may be subject to further appeals on points of law to the Court of Appeal and upwards to the House of Lords.

It is clear that the special procedures of the Commission have not satisfactorily overcome the problems caused by the case law of the Strasbourg court. Its proceedings involve delay.[11] These proceedings must involve a significant drain on the resources and manpower of the government department and of the security services. They risk imposing an over-legalistic approach on what should really be an exercise in risk assessment, in which people should not be let into this country unless it is demonstrably safe to do so. Finally, this attempt to improve procedures does not overcome the problem caused by the Soering doctrine when the deportee comes from a country which feels obliged to take stronger measures in dealing with its terrorist threats than the pampered and morally self-indulgent countries of Western Europe.

Whatever might have been the position before 11th September 2001, it is

9. *Chahal v UK* (1997) 23 EHRR 413.
10. The Strasbourg Court decided that judicial review did not provide an 'effective remedy' within the meaning of Article 13, where national security was involved, because of the reluctance of British courts to second guess the decisions of the Secretary of State on national security questions.
11. For example, in one case *(Shafic Ur Rehman)* the decision letter to deport was dated 9 Dec 1998; the decision of the Commission was given on 7 Sept 1999; there was an appeal to the Court of Appeal which gave judgment on 23 May 2000; and that judgment returned the case to the Commission for further proceedings to reconsider its earlier decision. Whilst these timescales are speedier than 'ordinary' court cases, they are still far slower than demanded by the present situation.

now clear beyond any doubt that we can no longer afford to continue this moral self-indulgence. We need to restore the power of our government to deport foreign nationals whose presence in this country represents a terrorist threat or who have terrorist antecedents. There is no effective way to do this unless the Soering doctrine is swept away.

We also need to restore a proper division between the functions of the courts and the functions of the executive. The case law under the European Convention has increasingly dragged the courts into deciding questions which traditionally, and for good reason, were in the province of the executive and outside the province of the courts.

III
Asylum

The problem of dealing with the terrorist threat cannot be divorced from the broader issues of asylum. Of course, the great majority of asylum seekers do not represent a terrorist threat, whatever the arguments may be about the risk of social or economic disruption or the strain on our overloaded social security and welfare services. However, the large numbers[12] of asylum seekers now in this country represent the sea within which dangerous terrorists and terrorist supporters can swim and hide. The legal arguments used by the broader class of asylum seekers are also deployed by those individuals who do represent a threat to our security.

In relation to asylum, another international convention comes into play: the 1951 Geneva Convention Relating to the Status of Refugees. Under the United Kingdom's 'dualist' constitution, traditionally the interpretation of international treaties to which the United Kingdom is a party is a matter for the government rather than the courts. Where treaties require provision to be made in internal law to comply with them, the traditional method has been for the government to invite Parliament to amend the law or to give powers to make provision by statutory instrument. Under this traditional constitutional model, the courts in general have had the task of interpreting and applying Acts of Parliament or statutory instruments which give effect to treaties, rather than interpreting or applying the treaties themselves.

There are, of course, some very important exceptions to this general rule. Most importantly, since 1972 direct effect in internal law has been given to the EC Treaties because of the special requirements of those treaties. More recently, the Human Rights Act 1998 gave direct internal effect to the European Convention on Human Rights.

The 1951 Geneva Convention also belongs to the exceptional category of treaties to which direct effect has been given in UK internal law.[13]

12. For a recently published description of the scale and nature of the problem, see Harriet Sergeant, *Welcome to the Asylum: Immigration and Asylum in the UK*, CPS, September 2001.
13. By section 8(2) of the Asylum and Immigration Appeals Act 1993, an applicant may rely directly upon the UK's obligations under the Convention. This means that the courts have to interpret the Convention to determine the extent of those obligations.

The courts are more used to interpreting Acts of Parliament than international treaties. The 1951 Refugee Convention was drafted with an eye to windy diplomatic generalities rather than with the precision one would expect if it had been legislation intended to be directly applied by the courts. The efforts of our own courts in interpreting this Convention have led to it being interpreted very broadly indeed and in a way which extends well beyond protecting what might be conventionally thought of as refugees suffering persecution by the state from which they are fleeing.

There have been large numbers of decisions of the courts interpreting and applying the Convention. However, the recent decision of the House of Lords in the Adan case[14] can be taken as encapsulating and restating in emphatic terms the general approach which the courts have adopted when faced with this Convention. The case concerned two refugees whose first countries of refuge after leaving their homelands had been, respectively, Germany and France. In 1990, the Dublin Convention between EC member states was intended to put a stop to asylum seekers who went from country to country making repeated applications for asylum in the hope that sooner or later they would find a country willing to take them. It laid down the normal rule that asylum seekers should have their applications dealt with in the first EC member state (all of whom are members of the 1951 Geneva Convention) which they reached; if they went elsewhere, in general they should be returned and dealt with by the first safe country which they reached.

In accordance with the procedures of the Dublin Convention, the British government sought to return the asylum seekers, who had come from Sudan and Algeria, to Germany and France, which had been their respective first safe countries. However, their lawyers argued that they should not be returned there because France and Germany were not 'safe countries'. This was because both countries interpret the Convention more narrowly than this country by refusing to accept that persecution by non-State agents, such as rebel groups or terrorists, counts as persecution entitling persons to asylum under the Convention.

The House of Lords upheld this argument. Although both France and Germany are parties to the Convention and seek to follow it, they are guilty

14. *R v Home Secretary ex parte Adan* [2001] 2 WLR 143.

of failing to apply the 'only true and autonomous meaning' of the Convention, as determined by their Lordships. The House of Lords considered that the Convention does cover acts of persecution by non-State agents. Hence, they reasoned, France and Germany are guilty of acting contrary to the Convention, by interpreting it differently from our own House of Lords and, in consequence, it is unlawful to return asylum seekers to those countries who might be adversely affected by the difference of interpretation.

Furthermore, the ruling of the House of Lords was couched in terms of the need to protect the 'fundamental rights' of the asylum seekers.[15]

As Lord Hobhouse commented, the difference in interpretation has led to the scheme of international protection for asylum seekers becoming 'grossly distorted'; as he put it: 'It is both contrary to the intention of the Convention and productive of the most severe abuses that there should be such a premium on making a claim for asylum on the north side of the English Channel as opposed to the south side. The evidence in the present case discloses that only 5 per cent of the would-be refugees from Algeria are granted asylum if they make their application in France, whereas 80 per cent of such applicants are successful if applying in the United Kingdom.'[16] The more generous interpretation of the Convention adopted by the UK (as extending to persecution by non-State agents) is itself consequent on an earlier decision of the House of Lords.[17]

The consequences of this ruling are obvious and disastrous. Britain is generous in the first place in adopting a broad interpretation of the Refugee Convention, broader than that of its major co-signatories France and Germany. For this reason (and for others as well), Britain has become a magnet for asylum seekers. Now it is told by its own courts that, thanks to its own generosity, in addition to taking in asylum seekers who come here directly, it must also take in and welcome asylum seekers who go first to France or Germany and then Channel-hop here in the hope of more generous treatment. No wonder the Channel Tunnel trains bring stowaways daily.

Legislative changes have been made in an attempt to tighten up this situation. The Immigration and Asylum Act 1999, which came into force on

15.See per Lord Steyn at 154H.
16.At 166E-F.
17. *Adan v. Home Secretary* [1999] 1 AC 293.

2 October 2000, provided that another EU state which is subject to the Dublin Convention should be regarded as being a country which will comply with the Refugee Convention. The problem with this new provision is that it is subject to the Human Rights Act 1998 in the same way as other Acts of Parliament and it remains to be seen whether the courts will uphold it.

This is by no means the only case in which our courts, buoyed up by the notion of protecting the fundamental rights of asylum seekers, have generously broadened the scope of the Refugee Convention. In the Shah case,[18] the Law Lords by majority decided that women in Pakistan could constitute a persecuted 'particular social group' who were entitled to asylum, because they were subject to discrimination and inferior status in Pakistan.

Partly in consequence of that case, the Court of Appeal this year overturned a Parliamentary order made by the Home Secretary which designated Pakistan as a country where, in general, there is no serious risk of persecution.[19] What is quite remarkable about that case was the willingness of the courts to strike down a measure which has been approved by affirmative votes in Parliament, and also the extent to which the Courts were willing to overturn the minister's exercise of his judgment about conditions in a foreign country. The Court of Appeal argued that it was in as good a position as the minister to exercise its judgment on the 'available materials' and to decide that the minister's view was irrational; in the past, the courts would have been very hesitant indeed to have ventured into such a field at all.

It is clear that the position on asylum has been allowed to get completely out of hand. In case after case, the courts have adopted the attitude that the persecuted of the world have a fundamental right to be sheltered in the United Kingdom. If other countries are less generous, that it seems is all the more reason for the United Kingdom to be even more generous in its hospitality and to take in all those whom other countries reject.

The United Kingdom is not morally responsible for the wrongs of the world, nor should it be legally responsible for them. It is impossible for this small, crowded island to accommodate everyone who has suffered ill-treatment

18. *R v. Immigration Appeal Tribunal ex parte Shah* [1999] 2 AC 629.
19. *R (Asif Javed) v. Home Secretary* [2001] 3 WLR 323.

anywhere, from whatever source, even if all who came here were one hundred per cent genuine sufferers. It is even more impossible for us to operate a system which leads to large numbers of non-genuine claims, amongst whom are those who have brought retribution on themselves in their home countries because of involvement in terrorist activities, out of a concern to protect the 'fundamental rights' of all who may have suffered persecution.

We need to disabuse ourselves totally of the concept that asylum seekers have a fundamental right to come to this country. Our generous willingness as a nation to help must be subject to the constraint of what it is practical for us to achieve. It must also be subject to the protection of our own national interest, and to safeguards against the abuse of our generosity. One thing we should demand from those we take in is that they should not represent a terrorist threat to this country. As recipients of our country's generosity, the burden of proof should be on them to show that they are not a threat; not on us to show that they are. We should no longer allow our generosity to be abused by those who are a danger to us and to our allies.

Fundamental reforms to our asylum system are necessary in order to begin to restore a semblance of order to the chaotic and uncontrolled system which exists at present. The practice of allowing our domestic courts to interpret and apply the 1951 Refugees Convention has proved to be a disaster. We should return to the more normal constitutional practice of laying down in domestic law the circumstances in which individuals are entitled to make asylum claims. The courts would then apply the domestic law, not their view of the scope of the Convention itself. The domestic regulations on asylum should accord more closely with the practice of our co-signatories to the Convention by excluding claims to asylum based on alleged persecution by non-State agents and extinguishing eccentric doctrines such as allowing women in Pakistan to make asylum claims on the grounds of sex discrimination.

Secondly, all asylum claims should be subject to being over-ridden on the grounds of the national interest in general and danger to national security, or to the security of our allies, in particular. For reasons of speed and effectiveness, this needs to be achieved by administrative procedures without recourse to lengthy procedures in courts or tribunals. The mechanics of achieving this are considered below.

IV
Extradition

Extradition differs from deportation. Deportation is primarily a means for removing a foreign national from the country, although it may result in practice in him being handed over to a particular country. Extradition is a procedure initiated by another country, the requesting State, which wants a particular individual handed over for trial or (if already convicted and on the run) for punishment.

Extradition applies to British citizens as well as to foreign nationals. Extradition, unlike deportation, can therefore result in the arrest and removal from this country of citizens who have a legal right to live here in freedom. There is therefore a stronger argument than in the case of deportation that there should be strict legal safeguards before a person should be extradited to face criminal charges in another country.

Indeed, the courts frequently refer to extradition as a matter which affects 'the liberty of the subject'. Unfortunately, this has led to an insistence on strict compliance with some highly abstruse and technical legal rules which have little to do with protecting the subject from extradition for a crime he did not commit. On the other hand, in some types of extradition (those under the European Convention on Extradition) there are insufficient safeguards on the substance of the charges concerned. There is a strong argument for sweeping away some of the arbitrary technical and jurisdictional barriers to extradition, while making the substantive safeguards more uniform.

The oldest form of extradition procedure dates back to the Extradition Act 1870 and extraditions to the United States are still governed by this procedure.[20] At present, the United States is seeking the extradition of Khalid Al-Fawwaz on charges of conspiring with Usama bin Laden and others to bomb US embassies and to murder US citizens in the US and abroad. Proceedings have been going on since 1998 and have involved lengthy hearings before the Metropolitan Stipendiary Magistrate and the Queen's Bench Divisional Court.[21] He has been given leave to appeal to the

20.Now governed by Schedule 1 to the Extradition Act 1989.
21. *R (Al-Fawwaz) v. Governor of Brixton Prison* [2001] 1 WLR 1234.

House of Lords and that appeal is pending. Media reports have suggested that the cost to public funds (including legal aid for Al-Fawwaz) will come to around £1m.

Extradition procedure essentially falls into two parts. First, there is the legal phase. During this phase, the courts decide whether or not the person concerned is liable for extradition under the Act. This procedure may last for years if it is complicated and an appeal goes up to the Divisional Court or even the House of Lords. Even when this phase is over, there is then a discretionary decision by the Secretary of State on whether to proceed with the extradition. Because this decision is regarded as quasi-judicial, the decision is subject to judicial review by the courts, which in turn can lead to further lengthy proceedings and even a further round of appeals up to the higher courts.

It is during the second phase – review of the Secretary of State's decision to return – that some human rights arguments come particularly to the fore.[22] Most importantly, the Soering doctrine applies to extradition cases as well as deportations (the Soering case itself involved an extradition) and so the Secretary of State is obliged to assess whether the requested person is at risk of suffering 'inhuman or degrading treatment' (under the extended definition developed by the Strasbourg Court) in the requesting country.

But before reaching that phase, there are some unnecessary – indeed bizarre – obstacles in the legal phase of the extradition process. This can be seen in the Al-Fawwaz case.

The main issue in the case is the question of territoriality. The courts have decided (although this point might be reversed by the House of Lords) that in order for the USA to be entitled to extradite Al-Fawwaz, there must be evidence of commission of the crime physically within the territory of the United States. The English courts themselves will assume jurisdiction over a conspiracy which physically takes place abroad, if the crime which the conspirators plan to commit will take place in England. But it is not enough for extradition purposes that the conspiracy should result in intended

22. The Secretary of State is required by Section 12 of the Extradition Act 1989 to consider, amongst other things, whether it would be 'unjust or oppressive' to return the person to the requesting state. This has the effect, under the Human Rights Act 1998, of requiring him to apply the case law under the convention.

crimes within the USA, nor that the USA should have a right generally recognised in international law to try him for the offence because the embassy officials who were killed are internationally protected persons.

As a result of this jurisdictional ruling, it was necessary for the United States to demonstrate not merely a *prima facie* case that there was a conspiracy and that Al-Fawwaz had taken part in it, but also that at least some of the 'overt acts' involved in the conspiracy had taken place within the USA. The Divisional Court decided that there was enough evidence that some fairly minor acts had been committed in US territory to justify his extradition.

But should it have been necessary for the court to have to look at this question of territoriality at all? Our extradition law has lost sight of the proper division of responsibilities between the courts and the executive in exercising the foreign relations powers of the UK. It is quite right that the courts should be concerned with the question of whether a *prima facie* case has been established against the person to be extradited. That is the courts' proper function and they are used to evaluating evidence.

But what of the jurisdictional question? Of course, there would be objections if a country which had nothing to do with a crime were to turn up and ask for the extradition of a person so that he could be tried there. But in this case the USA had a strong claim, since it and its citizens were victims of the Embassy bombings. Their claim to try Al-Fawwaz for the alleged offences would, in reason and justice, be equally strong whether or not the conspirators had happened to do any preparatory acts physically within the United States.

The evaluation of whether or not the requesting country has a sufficient connection with the crime is essentially a foreign relations value judgement rather than a legal question. It should be removed from the courts and placed squarely where it belongs, in the hands of the government. Fairness to the accused person requires that the court should assess whether the evidence against him is strong enough to amount to a *prima facie* case that he is guilty of a crime. Fairness to the accused does not require the court to decide whether, if he is guilty of a crime, he can escape its consequences because it happened to be committed in one place rather than another.

The old 1870 procedure contains arcane flaws which serve no real purpose in protecting the legitimate interests of the accused person, but simply lead to lengthy and unnecessary court proceedings and technical loopholes, through which the guilty can escape. By contrast, the European Extradition Convention procedure still has procedural flaws and loopholes but has swept away the real legal safeguard involved in the requirement that the requesting country should satisfy a British court that it has a *prima facie* case.

These flaws were brought to light in the Pinochet case, where Spain sought his extradition for offences alleged to have been committed in Chile. The case had a very complicated history and many of the issues involved are outside the scope of this present topic. But one very important point needs to be made about the legal issues which was obscured by the fact that the accused happened to be Chilean and was a political hate figure to the Left. That is that Spain could equally have chosen to make an extradition request for alleged actions taken by a former British minister within the United Kingdom, for example in Northern Ireland.

What is needed is the restoration to the intra-European extradition procedure of the real substantive safeguard that the requesting country should demonstrate a *prima facie* case of guilt. Secondly, except in cases where the crime occurred within its own territory, the requesting country should be required to demonstrate that it has a sufficient connection with the alleged crime to justify it assuming jurisdiction over it. The assessment of that question should, however, be a matter for the government and not for the courts.

Against this background, current proposals for a EU-wide arrest warrant will do little to assist in the fight against terrorism and will serve to undermine the already inadequate substantive safeguards under the European Extradition Convention. Proposals for an arrest warrant exercisable across EU member states first surfaced in the context of *Corpus Juris*, a proposal to create, in effect, a European federal system of criminal law to deal initially with frauds against the Community budget. Serious concerns were expressed in many quarters[23] about the powers to lock up

23. House of Lords Select Committee on European Communities, Ninth Report, HMSO, 8th May 1999, paras. 123-127.

suspects for lengthy periods without trial and other aspects of the proposals. Similar proposals were then advanced based on the need for joint action to combat organised crime. Now, the European Commission has opportunistically taken advantage of the present situation to advance the current proposals under the guise of being anti-terrorist measures, but in fact drafted far more broadly.

There is one further issue that needs to be mentioned in the context of extradition. The United States imposes the death penalty for terrorist murders, as do many Moslem countries who are in the front line of the fight against terrorism. The attitude of European countries to the death penalty has resulted in this becoming a further obstacle to the extradition of terrorists.

Under the Extradition Act 1989,[24] the Secretary of State *may* decide to make no order for extradition if the person concerned could be or has been sentenced to death in the requesting country. This gives a discretion which could be exercised for example in a case where the death penalty would be imposed for an offence which is not serious enough on any view to justify it. However, thanks to developments under the Convention and other political developments in Europe, this has become converted into a hard and fast rule that no extradition will be made in a death penalty case however serious and vile the offence.

First, a Protocol (Protocol No. 6) has been added to the European Human Rights Convention which prohibits the death penalty within the States who have adhered to the Protocol. These now include the United Kingdom[25] and all other EU member states, although not all countries who are parties to the Convention have accepted the Protocol. Secondly, the EU Charter of Fundamental Rights states in Article 19 that 'No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

The EU Charter of Fundamental Rights is a political declaration rather than a binding legal text, but the European Commission has argued that it will

24.Section 12(2)(b).
25.Protocol No 6 was ratified by the present Labour Government on 25 May 1999.

enjoy a legal status through the European Court of Justice interpreting it as expressing general principles of European Community law.[26] The European Court of Justice has given some encouragement to this view in the employment rights field[27] but as yet the field of extradition to non-member states is outside the scope of European Community law. The obstacles to extradition in death penalty cases are therefore political, and as a result of the Human Rights Convention, rather than being a matter of EC law.

It might be thought that the sheer magnitude of the appalling crimes inflicted on the United States might give pause for thought as to whether it is sensible to continue this policy of being 'holier than thou' and trying to export European views on the death penalty to the USA. However, no such concerns appeared to affect the Belgian Justice Minister who took the present opportunity, in his capacity as current holder of the Presidency of the Justice and Home Affairs Council of Ministers, to lecture the United States by stating that EU countries would not hand over terrorists for trial in countries where they would face the death penalty if convicted.[28] Sadly, it appears that Home Secretary David Blunkett is proposing to kowtow to the EU line on this issue and will insist that no extraditions can occur unless the USA undertakes not to impose the death penalty on those involved. Not surprisingly this attitude has met with incomprehension on the part of US authorities, who wonder why it should extend to those who have been involved in the deaths of an estimated 7,000 people.[29] Indeed, the British government's attitude, purportedly based on high principle, is little short of hypocrisy given Foreign Secretary Jack Straw's public statements that the British government would like to see bin Laden 'taken out'. Thus, they are apparently happy to see him killed as a result of military action, or even targeted assassination, without any form of trial or judicial process, but purport to develop pangs of conscience and high principle at the prospect of the death penalty being imposed by the United States under due process of law. Apart from being an arrogant and insensitive attempt to impose insular EU notions of human rights on the USA and countries which are

26. 'Communication From the Commission on the Legal Nature of the Charter of Fundamental Rights of the European Union', Brussels, 11.10.2000, COM(2000) 644 final. The European Court of Justice, which sits at Luxembourg, is an EC institution unlike the Strasbourg Court which belongs to the Council of Europe.
27. Case C-173/99 *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v Secretary of State for Trade and Industry:* the 'fundamental right' to holiday pay.
28. Statement by Marc Verwhilgen, Belgian Justice Minister, 28 Sept 2001.
29. Sunday Telegraph, 7 Oct 2001.

actually in the front line of the fight against terrorism, this rank inconsistency of attitudes to death by military action as opposed to death by judicial process shows a sad failure to appreciate that the sacred cows of European human rights can no longer be allowed to stand in the way if the war against terrorism is to be won.

V
The Government's Proposals and the European Convention on Human Rights

The government is rightly considering a range of measures to enable more effective action to be taken against terrorism. However, the present role of the courts under the Human Rights Act 1998 and the European Convention represents a serious obstacle to the effectiveness of these proposals.

The Home Secretary has pointed out that 'it is elected representatives...who are accountable in a democratic, open and transparent parliament who [are] the prime protectors of our rights, rather than [judges]'.[30] He in effect warned judges that they should use their judgement in interpreting the law, and in particular the Human Rights Act, so as to allow him to crack down on terrorists.

Whilst there is no doubt that Mr Blunkett is genuinely seeking to do his best to combat the terrorist menace in a difficult situation, this is not the right approach. Parliament has, at the instigation of the government of which Mr Blunkett was then and is now a member, conferred on judges a direct responsibility to interpret and apply the European Convention on Human Rights. Having invited the judges to perform that task, the government should not then expect them to bend to the political climate or to the expressed opinions of ministers when they interpret and apply the Convention. Such a notion is highly corrosive and dangerous to the independence of the courts.

As Mr Blunkett rightly argued, it is our elected representatives who are accountable and should be responsible for taking appropriate action to deal with the terrorist threat. But they need to assume that responsibility directly and openly. They cannot expect to keep the present system, under which important questions as to the balance between 'rights' and the safety of society have been abdicated to judges, and then expect to be able lean on the judges to come up with the right answers to suit the politicians when required.

30. 'On the Record' programme, 23 Sept 2001. He expressed similar views in his speech to the Labour Party Conference on 3 October 2001and in an article in *The Times* on 4 October 2001.

On 30th September 2001, the Prime Minister outlined[31] a series of proposed measures intended to combat terrorism. These are to end a situation in which it takes years to extradite people; to end the abuse of our asylum procedures; and to detain suspected terrorists indefinitely until they can be deported.

It is overwhelmingly necessary to take action to deal with the current situation. But how can these measures be squared with the present state of our laws, and in particular the Human Rights Act 1998, the European Convention on Human Rights and the Geneva Refugees Convention?

The answer is that any measures which the government introduces will have only a marginal impact on the present disastrously unsatisfactory situation, unless the government is willing to take the key step of excluding the measures from the scope of the Human Rights Act 1998. That Act explicitly preserves Parliament's power to pass new Acts which are not subject to the Human Rights Act. If the government fails to take that step, then the measures which it does introduce will be undermined and their effectiveness will be blunted.

The reasons are as follows. First, the very fact that new measures are subject to the Human Rights Act will lead to lengthy and complicated legal challenges being mounted. Even if such challenges are ultimately unsuccessful, the delays caused by lengthy litigation and appeal processes until these challenges are resolved will be disastrous in a situation where speed is essential. Secondly, the proposal for indefinite detention would be reasonable if the deportation proceedings were concluded swiftly and the detention were only for a short period; but it would be increasingly difficult to justify continued detention if deportation proceedings and appeals drag on for months or years.[32] And what happens if the courts decide that the person cannot be deported at all because of the Soering doctrine? Must the suspect then be locked up for ever and how can this be justified? Thirdly, it

31. 'Breakfast with Frost', BBC1. He expressed similar views in his speech to the Labour Party Conference on 3 October 2001 and in an article in *The Times* on 4 October 2001.
32. The Home Secretary is currently appealing against a decision of the High Court in *Saadi et al v. Home Secretary* (Collins J, 7 Sept 2001) that the routine detention of asylum seekers at the Oakington detention centre was unlawful: the judge decided that the detention was lawful under the terms of the Immigration Act 1971 but was rendered unlawful by virtue of Article 5 of the Convention and the case law of the Strasbourg Court.

will be very difficult to frame measures which will get round decisions of the Strasbourg Court, the most important of which are the Soering and Chahal cases discussed above.[33] The present position is that Parliament has, by enacting the Human Rights Act, in effect ordered our domestic courts to follow Strasbourg Court decisions. It cannot expect the courts no longer to follow those decisions, unless it explicitly withdraws its instruction to the courts to follow them.

It should do so. The new measures should provide that they are not subject to or to be interpreted in the light of the Human Rights Act 1998 or the Convention. This will be effective under British domestic law to exclude the Convention and the case law of the Strasbourg Court, and allow terrorist suspects to be dealt with rapidly and appropriately in the present situation.

It can be argued that this would be an unsatisfactory situation because it would still leave the possibility of individual petitions to the Strasbourg Court. There are a number of answers to this point. The first is that the only reason for Britain to belong to the European Convention is political. Under Article 58, a contracting state is entitled to withdraw by giving 6 months notice. If it comes to a choice between membership of the Convention and the effective protection of lives against terrorism, there can only be one choice.

However, it need not come to that. We can argue with our co-signatories that the Convention should be revised in order to correct the seriously wrong turning which has been taken by the Strasbourg Court in seeking to externalise the application of the European Convention to non-member countries through the doctrine expressed in the Soering case. It should not be the job of our courts and our lawyers to try to police human rights around the world. The problem with the Strasbourg Court is that it is a human rights court only. The constitutional courts of many countries are charged with upholding charters of human rights or fundamental rights.

33. It is sometimes thought that Article 15 of the Convention, which permits derogation in times of 'war or other public emergency threatening the life of the nation,' could be used to justify these measures within the terms of the Convention. This Article was invoked, for example, to justify internment measures in Northern Ireland. However, the Article cannot be used to justify derogation from Article 3, which prohibits 'torture or inhuman or degrading treatment or punishment'. Since, as discussed above, the Strasbourg Court held that Soering's extradition to the USA would be a breach of Article 3, Article 15 cannot be invoked to by-pass that decision.

But those courts also have responsibility for the other aspects of their national constitutions and are therefore in a position to balance claims to rights against other vital constitutional interests such as the protection of citizens from attack. The Strasbourg Court lacks all responsibility for such constitutional interests and therefore its whole approach lacks balance. The signatory states of the Convention, who individually and collectively do have such responsibilities, are entitled to revise the Convention to correct the errors in approach of the Strasbourg Court.

If a satisfactory revision to the Convention cannot speedily be agreed, in present circumstances the UK would be occupying the political high ground by withdrawing from the European Convention on Human Rights and announcing that it would not re-enter until the Convention had been satisfactorily revised to take account of the need to deal with terrorism in the twenty-first century.

There is a further possible mechanism which could possibly be invoked to achieve a satisfactory result. Article 57 permits States to enter 'reservations' which have the effect of excluding specific laws from the application of the Convention. Many countries have taken advantage of this Article. For example, France entered a number of reservations when it adhered to the Convention, one protecting its system of military discipline from being held in breach of the Convention and another exempting measures taken under Article 16 of the Constitution of the French Republic which authorises emergency measures to be taken.

With this country's ineffable naivety, no reservation was considered to be necessary when we joined the Convention in 1951. Unfortunately, it is not possible to enter a reservation after signing up to the Convention. However, there seems nothing to stop a State from withdrawing from the Convention under Article 58, and then re-adhering to it after a short period attaching reservations under Article 57. This is a possible course of action if all others fail.

VI
Conclusion: What needs to be done

The fundamental problem with the present unsatisfactory state of affairs is that the traditional separation of functions between the courts and the executive has been undermined. Urgent reform is needed which restores the correct balance between the role and function of the courts and the functions of the executive authorities.

Legal cases are rightly conducted on the basis of the strict application of the law to legally admissible evidence. Wars are conducted on the basis of information and intelligence, not evidence. When it comes to war, we have to trust our executive authorities to take the right action without the involvement of the courts or lawyers. The scale of the attacks on the World Trade Centre must make us all realise that we must treat ourselves as under warlike attack from terrorism and that the role of lawyers and courts has to be subject to limitation.

We need to correct the seriously out of balance situation which has developed as a result of the courts being allowed and encouraged to follow an ever more rights-based approach to immigration and asylum questions. There are a number of vital steps which need to be taken:

1. We must ensure that when our government concludes that a non-citizen's[34] presence in this country endangers the national security of ourselves or our allies, in urgent cases, that person should be liable to removal immediately, without the involvement of tribunals, courts or lawyers. This requires that the Human Rights Act 1998 be excluded from applying to such procedures.

2. The government should be given power on grounds of national security to detain non-citizens pending deportation and to deport them to whichever country the government considers it to be in the national

34. As has already been mentioned, special provision has to be made for citizens of other EU states because they enjoy legal rights to reside and work in this country under the EC Treaty. However, those rights can be terminated on grounds of 'public policy or public security' (EC Treaty, Article 39(3)) but EC law requires that a judicial or quasi-judicial procedure be followed: *Van Duyn v. Home Office* Case 41/74 [1975] 1 CMLR 1.

interest that they should be sent. This would enable non-citizens suspected of terrorism to be transferred rapidly to the country best able to deal with them even if no extradition agreement exists, or would by-pass the need for cumbersome procedures. Again, these powers should be excluded from the Human Rights Act 1998.[35]

3. The broader asylum problem needs to be brought under control. This requires a number of steps:

(a) The 1951 Geneva Convention should no longer be directly interpreted and applied by domestic courts. Instead, entitlement to asylum should be judged against criteria enacted in domestic law which reflect the terms of the Convention as interpreted and applied by our major co-signatories.
(b) The government should be given an over-riding power in the national interest to reject asylum claims without investigating the merits of the claim. This would be exercised, for example, where the person concerned is a suspected terrorist, or where the manner of entry into the UK makes it unacceptable that any claim be entertained, such as by aircraft hijacking.
(c) There should be a general power to detain asylum applicants in secure accommodation while their claims are dealt with.

4. Extradition procedures need to be simplified and speeded up, and the arcane technical arguments removed. At the same time, since extradition affects the liberty of citizens, real substantive safeguards need to be retained and in some cases strengthened. There should be a uniform, across the board requirement that the requesting state should demonstrate a *prima facie* case that the defendant has committed a

35. In fact, in an earlier case in 1973 (*Amerkrane v. UK),* there was an attempted coup in Morocco in which an attempt was made to murder King Hassan. One of the participants in the attempted coup fled to Gibraltar and Sir Alec Douglas-Home, then Foreign Secretary, ordered his immediate return to Morocco as an illegal immigrant. He was convicted by a Moroccan military court and executed for his part in the plot. His widow sued the British government in the Strasbourg Court, arguing that he should have been given a chance to find a different country that would give him sanctuary. Although the case did not go to the Court itself, the British government settled it with a payment of £35,000 after adverse comments by the Commission of Human Rights. It seems, therefore, that in the strange world of Strasbourg, the British government is to be expected to assist a participant in an attempt to murder the head of state of a friendly foreign power to find a safe refuge.

crime, as recognised by British law. This should be decided by the courts and be subject to a rapid, but fair, appeal procedure. The present international jurisdictional maze of rules should be swept away and be replaced by a simple uniform decision to be made by the Secretary of State and not the courts, as to whether the requesting state has a sufficient connection with the alleged offences for it to be the appropriate country to exercise jurisdiction over the offences. This decision would be made at the outset of the legal stages of the extradition process rather than at the end, so that there could not be two separate stages of legal challenges and appeals.