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Opening Plenary Session

The Patriot Act, Post 9-11 Politics and the Protection of Privacy and Civil Rights in the University Community

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ACADEMIC FREEDOM AND COUNTER-TERRORISM

A: Some remarks on academic freedom

1. The concept of academic freedom is well-known in the Western world, and in other countries which have developed their higher education from Anglo-American or Continental European models. Academic freedom originated in the 17th century, notably in the German doctrine of *Lehr- und Lernfreheit*. It is 'freedom for the members of the academic community - that is, teaching personnel, students and scholars - to follow their own scholarly enquiries and are thereby not dependent on political, philosophical or epistemological opinions or beliefs though their own opinions may lead them in this direction.'[1] The right has been infringed by totalitarianism in its various forms and by religious and political intolerance in many parts of the world, both in terms of free access to information and in freedom to express opinion.

2. In 1988 academic freedom along with institutional autonomy was declared to be an essential shared core value of the university community[2] for the 'public good' but both can also be seen as 'baggage' of old-fashioned higher education carried over into a fast-changing new world. Now the general view seems to be that we should try to preserve the older concepts while opening up to new realities.[3] There is a wide variation internationally in the extent to which the concept of academic freedom is incorporated into public law[4] and to what extent it depends on convention, custom or practice. Along with institutional autonomy it is found explicitly (reflecting the content of human rights treaties[5]) in some constitutions and laws of states emergent from the

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[1] International Association of Universities (IAU*) Report on The Feasibility and Desirability of an International Instrument on Academic Freedom and University Autonomy* (1998)

[2] Emphasised in the *Magna Charta Universitatum* (Bologna, 1988).

[3] As seen in the *Glion Declaration* (Glion, Switzerland, 1998) referred to in D Van Damme *Outlooks for the International Higher Education Community in Constructing the Global Knowledge Society* Paper presented to the First Global Forum on International Quality Assurance, Accreditation and the Recognition of Qualifications in Higher Education (UNESCO, Paris, 2002)

[4] There is a significant difference between the common and civil law traditions: the UK has no constitution as such.

[5] Academic freedom is arguably not to be equated directly with freedom of speech which is the origin of these constitutional provisions. 'Academic freedom draws on and distinguishes itself from freedom of speech, widely considered to be a general right. Academic freedom is a stronger right than anything that the general idea of freedom of speech connotes. But in another respect, academic freedom is more limiting than freedom of speech. Freedom of speech is available to everyone. Academic freedom is a privilege of certain academic institutions and no-one is entitled to membership in that institution.' (R Dworkin, *Monday Paper* **21** 2, University of Cape Town, 2002). So there is a balance to be drawn

collapse of the European Communist bloc and which now embrace democratic values. In other countries with a written constitution, commitment to freedom of thought and speech figures frequently, as constitutions, particularly the newer ones, reflect the content of human rights treaties. Academic freedom and/or institutional autonomy may be mentioned specifically, either entrenched or qualified by law.

3. In legal terms the two concepts of academic freedom and institutional autonomy are separate but related:[6] the various Declarations of the late 20th century (e.g. Magna Charta, Siena, Lima, Mexico)[7] [8] were responses to restrictions on academic freedom of individuals and autonomy of physical institutions by governments, described in the preface to the Lima Declaration as 'an alarming tendency to undermine, restrict or suppress academic freedom and autonomy of institutions of higher education.' 'Many governments…blocked the access of vulnerable and disenfranchised segments of their population to education through their acts or omissions.'[9]

4. Institutions have in various ways, principally but not exclusively related to protection of intellectual property, been given legal responsibilities which are difficult to exercise without infringing traditional concepts of academic freedom. If they are not carried out, however, the institution or its staff may face heavy penalties, particularly in countries where a significant sector of business is involved in producing books, periodicals and, perhaps most importantly, software. Much of this activity is now controlled by multi-national corporations with significant global markets. The responsibilities exercisable by institutions include policing access, regulating e-mail[10] and website creation, restricting downloading of music and video material and generally preventing misuse of systems leading to defamation, harassment, hacking or infection by viruses.

5. The student equivalent of academic freedom for staff is free access to information but this is arguably an illusion. Traditionally, institutions and staff selected the information to which students had access: recommending booklists, producing course readers, choosing which materials were placed on

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between the free exercise of academic freedom as a 'public good' and the accountability of the members of institutions to ensure that it is not misused.

[6] See e.g. the development of the concept of academic freedom in the courts of the United States, most recently in *Urofsky v Gilmore*,n.xi *infra*.

[7] Declaration of Rights and Duties inherent in Academic Freedom, Siena, 1982.

[8] Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, World University Service, Lima, 1990; see also mention of academic freedom in the Mexico Declaration on Human Rights Education in Latin America and the Caribbean, Mexico City, 2001.

[9] Human Rights World Watch Report 2002.

[10] In *Pichelmann v. Madsen* (E.D.Wisc. 2001), a court ruled that a student who worked as a clerk for the university could have words on her outgoing email censored. The university considered a quote from Gloria Steinem in the student's email signature line ("The truth will set you free, but first it will piss you off") to be vulgar. The court upheld the demand for the student to remove the sentence.

library shelves, restricting the free use of Inter Library Loan services. With the coming of the Internet, that control of information is severely attenuated[11] although paradoxically the free availability of information may be more restricted: students are directed towards specified on-line learning materials and may be unlikely to range more widely to access on-line materials normally provided free under licence by traditional institutions, but chargeable to individual users.

Legal frameworks

6. The courts in the United States, where allegations of breach of academic freedom have been extensively litigated, have not always found it easy to distinguish clearly between academic freedom and institutional autonomy:

   '…though many decisions describe "academic freedom" as an aspect of the freedom of speech that is protected against governmental abridgment by the First Amendment,…the term is equivocal. It is used to denote both the freedom of the academy to pursue its ends without interference from the government… and the freedom of the individual teacher (or in some versions – indeed in most cases – the student) to pursue his ends without interference from the academy; and these two freedoms are in conflict.[12]'

   'academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students… but also, and somewhat inconsistently, on autonomous decision making by the academy itself. [13]'

7. In the private sector the First Amendment constitutional protection of free speech does not apply.[14] The litigation prevalent in the United States in relation to free speech and academic freedom applies to the public sector of higher education.[15] In private institutions, faculty members possess whatever academic freedom is guaranteed under the faculty contract either expressly or by implication.

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[11] Not entirely, however. In *Urofsky v Gilmore* 216 F.3d 401 (4th Cir. 2000) the idea of individual academic freedom was rejected by the US Court of Appeals. A Virginia law prohibits any use of state-owned computers to look at pornographic websites. Staff must receive permission from their "supervisor" in order to research any potentially sexually explicit topics on their office computer as opposed to reading it in a library (cf. the unsuccessful attempt at censorship of 'Mapplethorpe' in a University library by West Midlands Police in the UK in 1997).

[12] *Piarowski v Illinois Community College* 759 F.2d 625 (7th Cir. 1985).
[13] *Regents of the University of Michigan v Ewing* 474 U.S. 214, 226 n.12 (1985).
[14] *Higher Education Law in America*, Oakstone 2001 p. 148.
[15] As already noted however, in *Urofsky v Gilmore* 216 F.3d 401 (4th Cir. 2000) the US Court of Appeals declared that it was not unconstitutional for a state statute to prohibit state employees from accessing sexually explicit material on computers owned or leased by the state. The court declared that if there is a right to academic freedom, it belongs to the universities and not to individual faculty members. And a public university professor does not have an uncontrolled right to determine what will be taught in the classroom. (*Edwards v California University of Pennsylvania* 156 F 3d. 488 (3d Cir. 1998).)

8. As in the United States the extent of institutional autonomy and - in general terms - individual academic freedom is determined by the education (or in some countries higher education) law. Analysis of these provisions in detail is beyond the scope of this note but as an example, all states, old and new, which have emerged from the collapse of communism in Central and Eastern Europe have incorporated provisions on individual academic freedom and, to some extent, institutional autonomy into their laws, to a degree influenced by advice from the Council of Europe.[16] All states apply some restrictions on institutional autonomy to the public or private institutions of domicile and some (but not in general terms within Europe), may restrict the freedom of speech of local academics.[17] Thereby a state may restrict, or attempt to restrict through sanctions, free access to information which does not support its political aims. It may suppress academic discourse to an extent which even in the post- 9/11 situation and the general campaign against terrorism may be unacceptable to general world opinion.[18] It may not be able to regulate the freedom of access to information presented over the Internet without blocking public access to websites, an expensive process which may in practice easily be circumvented.

9. Institutions may then in the exercise either of legal obligations or their own institutional autonomy restrict academic freedom of individuals, either by suppressing criticism[19] or by contract. Restriction may take several forms including:

- requirement to submit teaching materials for approval (whether expressed as for quality assurance purposes or otherwise);
- restrictions on access to library materials or Internet sites deemed 'unsuitable' by the institution;
- asserting control to an unacceptable degree over intellectual property rights in materials produced by academic staff otherwise than under a specific arrangement (and even here there is room for the 'specific arrangement' to fly in the face of academic freedom).

10. Academic freedom in UK universities is generally understood to be the legally-established right of members of academic and academic related staff to express their opinions without fear of losing their jobs because of other people's hostility to those views. It underpins the right of academic staff to

[16] See Council of Europe *Legislative Reform Programme in Higher Education and Research 1991-2000: Final Report* (Council of Europe CC-HER (2000) 40).

[17] There have been some exceptions, for example related to the expression of certain political views in Turkey (e.g. *Baskaya v Turkey* ECHR 23536/94; *Okcuoglu v Turkey* ECHR 24408/94), the 'Tolstoy' libel trial in England (*Tolstoy-Miloslavsky v UK* ECHR 18139/1) and the 'microwave ovens' case in Switzerland (*H.U.H. v Switzerland* ECHR 25181/94).

[18] See B Rajagopal *Academic Freedom as a Human Right* MIT Faculty Newsletter, February 2002.

[19] In *Felsher v. Univ. of Evansville* 755 N.E.2d 589 (Ind. 2001) and *In re Baxter* (W.D.La. 2001), lower courts have ordered disclosure of names of anonymous staff who created a website criticizing the administration, although it may be argued that such disclosure might have been ordered if the criticism had been expressed by more traditional routes.

exercise their own best judgment in the pursuit of knowledge and the conduct of research. Without the underlying guarantee of academic freedom, it would be considerably more problematic for university staff to engage freely in research of their choosing, to pursue the path of their research where the logic of the results, their intellectual curiosity and professional expertise may lead them, and to publish the results. Professional integrity in research would be endlessly compromised by staff having to weigh the potential consequences of their expressions of opinion for their continuing employment.

11. The legal basis of academic freedom is expressed in Section 202(2) of the Education Reform Act 1988, which requires the University

    "to have regard to the following needs:

    (a) to ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions;

    (b) to enable qualifying institutions to provide education, promote learning and engage in research efficiently and economically; and

    (c) to apply the principles of justice and fairness."

    The employment and privileges of academic researchers must thus not be put in jeopardy by reason of objections, however weighty, raised against the opinions or findings they arrive at in the course of their professional activity in scholarship, research or teaching, or against the opinions they express in a lay capacity. Similarly, academic freedom entails the right to publish the findings of research without threats grounded in disapproval of or concern over those findings being directed to the employment or privileges of the researcher.

12. With this legal protection in mind, academics are aware that academic freedom has a fundamental and far-reaching character. However the right of academic freedom is balanced by the obligation to use that freedom responsibly, in the context of the professional values in which it is grounded. Implicit in the concept of academic freedom is the value to society of the independent, professional opinions of academic staff. In deserving such implicit trust, academic staff need in turn to be thoughtful about the scope of their professional authority, and resist offering interpretations of data which trespass beyond the limits of that expertise without signalling the lay status of such statements. Not to respect such a distinction is to risk laying false claims to expertise, which is an ethical abuse.

B: Some history of recent terrorist activity in the United Kingdom

13. The UK has experienced domestic terrorism on a large scale over the last three decades of the 20th century. Until quite recently the terrorist threat was almost completely based on the conflict in Northern Ireland, constitutionally a province of the UK since the Government of Ireland Act 1920 'temporarily' partitioned Ireland. Irish history from before the Norman Conquest unfortunately is a fairly bloody one. In its most recent incarnation from 1969 the armed conflict, following on a period of civil unrest, was between (i) different factions of the Irish Republican Army, members of the minority 'nationalist' section of the population which advocated the severance of Northern Ireland from the UK and its incorporation into a new all-Ireland Republic (or Free State as had been planned in 1914 before the First World War intervened), and (ii) the civil authorities of Northern Ireland, which enjoyed its own form of Parliamentary government between 1921 and 1972. As the conflict developed, it transformed into one between the Provisional IRA and the civil and military authorities of the United Kingdom, which suspended devolved government in 1972. Extremists belonging to the 'loyalist' majority section of the population, in various forms, also took up arms against the Provisional IRA and its splinter groups and in some instances against members of the public who happened to profess the Catholic faith.

14. During the early period of the conflict, when atrocities committed by extremists of both sides in Northern Ireland were confined to the province, the 1972 emergency legislation, which replaced earlier legislation of the Northern Ireland Parliament (the much derided Special Powers Act), provided for initial internment (badly bungled by the intelligence services in 1972) and ultimately detention without trial of terrorist suspects. While this has a familiar ring about it today, at the time both practices were widely condemned both at home and abroad, as were allegations of brutality by the then Royal Ulster Constabulary and the infamous 'Bloody Sunday' which is the subject of a second judicial enquiry due to report in mid-2005. In fact all IRA and Loyalist detainees had their cases reviewed on a regular basis by civil judges flown in under high security from the mainland: from 1974 onwards there was a progressive phasing out of these procedures, with reliance placed on regular conviction by a special court of judges sitting without juries to avoid jury rigging or intimidation. At no time was there any suggestion of establishing military tribunals, although IRA prisoners frequently claimed 'POW' status. Male prisoners were initially housed in a special prison – 'Long Kesh', a former army camp subsequently converted into a regular prison 'The Maze' – guarded by regular prison officers and police. Female prisoners were housed in the regular women's prison.

15. However in 1974 bombs exploded on the mainland UK causing death and serious injury to innocent civilians. There were also attacks on military targets on the mainland including one on unarmed soldiers carrying out ceremonial duties. The response to the first bomb in Birmingham was to rush through Parliament the Prevention of Terrorism (Temporary Provisions) Act 1974 which, with various amendments thereafter, was the forerunner of today's Terrorism Act 2000 and the Anti-Terrorism, Crime & Security Act 2001. The convictions of those arrested and jailed for life for the two main outrages in

1974 were ultimately quashed many years later when evidence was found to be seriously flawed, although it must be remembered that forensic science was not as well developed then as it is today.[20] All in all many lessons may be learned from that period on how to maintain the balance between security, proper investigation of offences and the human rights of the suspects. Unfortunately it is not clear that the latter is given sufficient importance today.

16. At the time of writing there have been no terrorist attacks carried out in the UK as a consequence of the UK government's support for the US government's military initiatives post 9/11, although it is widely predicted that attacks will occur. All households in the UK have been issued with advice on what to do in an emergency situation.

C: Current antiterrorism laws in the UK

17. Terrorism Act 2000 (TACT)

The Terrorism Act is the primary piece of UK counter-terrorist legislation and according to the government "it has proved a vital tool in the fight against terrorism."[21] Passed by Parliament on 20 July 2000, well before the 9/11 tragedy, it came into force on 19 February 2001 in response to the changing threat from international terrorism, and replaced the previous temporary anti-terrorism legislation that as already explained dealt primarily with Northern Ireland and the consequences of that conflict.

These are some of the specific measures in TACT:

- It outlaws certain terrorist groups and makes it illegal for them to operate in the UK (a process known as proscription), and specifically extends this proscription regime to include international terrorist groups, like Al Qaida. According to the government, "this is a tangible demonstration that we are serious in our fight against international terrorism and an effective deterrent against would-be terrorists."[22]
- It creates new criminal offences, including:
    1. inciting terrorist acts,
    2. seeking or providing training for terrorist purposes at home or overseas,
    3. providing instruction or training in the use of firearms, explosives or chemical, biological or nuclear weapons;

[20] Note however even today there are problems with 'unsafe' convictions: in the Republic of Ireland a retrial has been ordered of the only person convicted of the bombing in Omagh, Northern Ireland, of an Armistice Day parade.
[21] Both TACT and ATCSA are available with explanations and links to other sites on www.homeoffice.gov.uk. The website contains up to date details of the use of the legislation including details of detentions under ATCSA.
[22] Ibid

- It provides additional powers applicable to Northern Ireland only, which must be renewed every year.
- It gives police enhanced powers to investigate terrorism, including wider stop and search powers, and the power to detain suspects after arrest for up to seven days (though any period longer than two days must be approved by a magistrate).

Police records show that from 11 September 2001 until 30 September 2004, 664 people were arrested under TACT. 118 of these were charged under the Act. Of these, 44 were also charged with offences under other legislation. 135 were charged under other legislation. This includes charges for terrorist offences that are already covered in general criminal law such as murder, grievous bodily harm and use of firearms or explosives. However, only 17 individuals have been convicted of offences under TACT (2.5% of those arrested, which to the cynical may be a guide to the quality of intelligence or police competence). 315 were released without charge and most of the rest were transferred to the immigration authorities. It could be argued that TACT has been used to root out illegal immigrants, whether or not involved in any criminal activity.

18. Anti-Terrorism, Crime and Security Act 2001 (ATCSA)

The Anti-Terrorism, Crime and Security Act was passed in the immediate aftermath of the September 11 attacks. It builds and expands on TACT. However, TACT is still the main piece of legislation that the police use operationally, on a day-to-day basis, to arrest and investigate suspected terrorists.

These are some of the specific measures in ATCSA:

- It prevents terrorists from abusing immigration procedures by allowing the Home Secretary to detain foreign nationals who are suspected of involvement in international terrorism but who cannot immediately be removed from the UK, until we can deport them.
- Normal immigration powers allow detention pending deportation only if there is a realistic prospect of removal. This may not be possible for a number of reasons, but in most cases it derives from a fear that deportation might result in those deported being subject, within their countries of origin, to torture or inhuman or degrading treatment or punishment, which is subject to an absolute prohibition under Article 3 of the European Convention on Human Rights (ECHR).
- Anyone detained under the Act is free to leave the UK at any time, and has a full right of appeal to the Special Immigration Appeals Commission (SIAC). After hearing the case, SIAC issues a determination recording their findings. The certificate is reviewed by SIAC six months after the date on which the appeal was finally determined, and every three months thereafter. Up to the time of writing, 17 persons have been detained under the Act, only one of

whom has volunteered to be publicly identified. Of the 17, three have been released and two have left the UK voluntarily. One is detained under other legislation. That leaves 11 persons detained under ATCSA, all of whom are free to leave the UK at any time as they have not been convicted of any offence. They are treated like other detainees awaiting deportation. There is no question of subjecting them to any inhuman or degrading treatment, of holding them in military custody, of trying them before military or other tribunals, of shackling them or in any other way infringing their individual human rights. They are not even interrogated.

- The Act strengthens the protection and security of aviation and civil nuclear sites, and tightens the security of dangerous substances held in laboratories and universities;
- It creates tough penalties for people seeking to exploit the events of September 11 by extending the law on hoaxes and increasing the penalties for crimes aggravated by racial or religious hatred;
- It cuts off terrorists from their funds by allowing assets to be frozen at the start of an investigation.

19. The Article appended describes the case taken before the House of Lords challenging certain aspects of ATCSA. The outcome of course is well known. The specially constituted panel of the House held almost unanimously that detention under ATCSA breached the human rights of the detainees under the European Convention incorporated into the Human Rights Act 1998. The government is considering what to do in the light of this ruling, as the powers in ACTSA need to be approved annually by Parliament (as did the 1974 and successive 'detention' powers). The appended article by Liberty, written prior to the annual review in early 2004, is also worth reading. A year ago Parliament did in fact approve the extension, but against considerable criticism. Now of course it is even more difficult.

20. The UK has also suffered from domestic terrorism of other kinds, mainly due to animal rights extremists, pro-life campaigners and certain nationalist groups. All of these incidents have been dealt with under the existing law.

D: Freedom of expression

21. There is no equivalent in the UK of the US concern about freedom of expression. The UK has no constitution, but freedom of expression is protected under the European Convention on Human Rights and thus under the Human Rights Act 1998 which incorporated the 1949 Convention into domestic law. Academic expression of the kind under challenge in the US on 'patriotic' grounds could not be challenged lawfully in the UK since as already mentioned the Education Reform Act 1988 provides protection for academics who express controversial or unpopular opinions or challenge received wisdom 'within the law'. Of course there might be pressure outside the law, but none has been publicly reported. It is interesting to note that the proponent of the amendment in the House of Lords which secured this protection was the Home Secretary (the late Roy, later Lord, Jenkins) who introduced into the

House of Commons the Prevention of Terrorism (Temporary Provisions) Bill in 1974. The academic freedom clause is thus often referred to as the 'Jenkins amendment.' There is further discussion of this provision later.

22. The Education (No 2) Act 1986 also requires institutions to secure freedom of speech 'within the law' for students, staff and visitors, but it does provide for universities, in pursuance of a mandatory code of practice, to refuse permission to speakers in certain limited circumstances where a disturbance to public order inside, but as the High Court has ruled, not outside, the premises is feared[23]. There is no record of any other problem in the use of this legislation. It was passed at a time when government policy towards higher education was widely criticised – something relatively new - and when government ministers and their supporters found it difficult to get a hearing at all, or if they did, to be subjected to abuse and minor physical attack. Students have become better behaved, if not more tolerant.

23. What is 'within the law' in both the 1986 and the 1988 legislation requires some examination, since all manner of statutes dating from the still-valid Treason Act 1351 to the present day impose some restrictions, for example inciting treason, treason felony, inciting racial hatred, inciting unlawful discrimination, blasphemy, misuse of drugs, paedophilia, mutiny and disaffection, etc and of course the offences created by ACTSA. 'The law' probably includes European law (automatically part of domestic law) and international law (so far as incorporated into domestic law.) It might be interpreted by institutions as allowing them to impose private law restrictions such as those contained in a research contract prohibiting publication of research results without a sponsor's consent, but this is untested. In recent years some academic staff have been dismissed or resigned for expressing views which incite racial hatred, i.e. discussion of racial issues which are biased, unprofessional or not in keeping with the academic standards of the institution.

24. Although no faculty member has been disciplined in recent years for uttering 'treasonable' words, the possibility is still there. In 2003, in an analogous case, the House of Lords was asked to clarify whether the Treason Felony Act 1848 could be used to prosecute the Guardian newspaper and its staff for publishing articles advocating a republican form of government. In one of several lengthy opinions, Lord Scott disposed of the argument: "It is plain as a pike staff to the respondents and everyone else that no one who advocates the peaceful abolition of the monarchy and its replacement by a republican form of government is at any risk of prosecution." So that is clear: no UK citizen can be prosecuted for advocating peaceful constitutional change whether in the classroom or in a newspaper. So it would appear that university students and staff are free to debate these issues and publish their views as indeed they did

[23] *R v University of Liverpool ex.p. Caesar-Gordon* [1991] 1 QB 124

fiercely debate the 1974 anti-terrorism legislation and no doubt do still discuss the impact of TACT and ACTSA on human rights. It might, and probably would be different if they seriously advocated an armed overthrow of our democracy. The only known attempt was that of what are referred to as the 'Colonel Blimps' who allegedly plotted the overthrow by military force of Harold Wilson's Labour government in the 1960's. Something similar to the failed *coup d'état* in Spain in the early days of post-Franco democracy. But both came to nothing of course.

D: Comment on 'patriotism' and conclusion

25. It is fair to say that the impact of anti-terrorism laws on academic freedom in the UK has, as far as is publicly known, been zero. Academics are not singled out for 'unpatriotic' acts since the concept of patriotism as a reaction to a major threat against the security of the state is not widely recognised in the present day. In fact most British people would consider patriotism as an outdated concept relegated to the days of WW I ('Your King and Country needs you') and WWII (when the nation was under direct threat of invasion for the first time for many years). The siege mentality created then is no longer applicable and no school pupil or student would know what to make of patriotism and probably find the idea of volunteering for a non-professional army or the concept of conscription ludicrous. The US idea of using patriotism as a response to a genuine threat of terrorism is regarded, if it is considered at all, either as somewhat quaint or, to use the siege mentality allusion, as an attempt to pull up the drawbridge after the invaders have entered. Of course the UK population is (almost) united in condemning terrorism but that is not the same thing at all.

26. Today in the UK, patriotism is replaced by nationalism, whether it be a pan-UK scepticism about the European Union and its proposed Constitution, or the sharp increase in English nationalism since the constitutional reforms of 1997-8 which gave substantial autonomy to Scotland and Wales.[24] The recent disastrous attempt by the government to stimulate some 'regional patriotism' in England by proposing to create regional assemblies illustrates how disinterested the English are in anything other than being English but this is pragmatism rather than patriotism. Nobody –except perhaps the Scots - voluntarily wants to pay higher taxes to bankroll more politicians.

27. Today's war against terrorism is not the same as the war against the Axis. Support for UK troops carrying out government policy in Iraq at great personal risk, mainly to the lower ranks recruited from lower socio-economic groups, should not be misinterpreted as support for the policy itself. Large sections of the public including many academics strongly oppose the invasion of Iraq as a response to the tragedy of 9/11 and the declared aim to eradicate what are now apparently non-existent weapons of mass destruction. In the UK everyone is free to express these views, as they were free to express opposition

[24] It will not have escaped US visitors to England that The George is now more prominently displayed than the Union Flag while in Scotland and Wales The Saltire and The Welsh Dragon respectively have dominated the flag scene for many years.

to internment and detention of terrorist suspects in the 1970s. No academic is at risk of censure for expressing them.

28. It appears that the same principle applies in all modern European democracies even Spain which has experienced long-standing domestic terrorism and recently international terrorism. The twin pillars of society, democracy and human rights, achieved after periods of totalitarianism are seen as of paramount importance.

29. As a final word, it is a widely-held view in Europe that as soon as a country, especially a 'democracy' ceases to respect international law, human rights and democratic values including academic freedom in pursuit of self-interest or arguably exaggerated self-defence it begins to lose respect itself. That message is clear. Many commentators have interpreted some remarks in the recent inaugural speech of the US President as encouraging that view.

Dennis Farrington
January 2005

Appendix 1

HUMAN RIGHTS WATCH

Britain's Core Values Face Ultimate Trial

By Ben Ward, counsel in the Europe and Central Asia division of Human Rights Watch, published in *The Observer*

October 3, 2004

It will be one of the most important tests of legal principles Britain has ever seen. A special panel of nine Law Lords will meet tomorrow to decide whether indefinite detention is acceptable under British and international law. The judges are being asked to consider whether the government is entitled to rely on evidence obtained by the torture of people abroad. Nothing less than Britain's values are at stake.
The government suspended core human rights in the wake of 9/11, allowing it to detain foreign nationals indefinitely without charge or trial. It says it is entitled to rely on evidence produced by torture elsewhere.

If the panel decides these changes are justified, a profound and dangerous shift will have taken place. The principle of equality under the law—a cornerstone of the legal system in democratic countries around the world—will have been abandoned. Worse still, the absolute ban on torture will have been seriously undermined.

The government has said that the power to detain foreign nationals indefinitely is justified because the UK faces a serious threat from terrorism.

It also insists that the suspects detained, at Belmarsh prison in south-east London and elsewhere, are free to leave the country at any time. It says it abhors torture, but says it would

“be irresponsible” to ignore information on terrorism from elsewhere, even if torture was used.

The threat from terrorism is real. But it does not justify the erosion of core human rights, in legal or in practical terms. The government believes it is entitled to remove basic legal rights from people merely because they hold a foreign passport. Yet most of those arrested on terrorism charges since 9/11 have been British citizens, who rightly continue to enjoy the traditional safeguards of the legal system: they must be charged and put on trial, or released.

The government argues that the detainees cannot be prosecuted under current laws. But those same constraints limit prosecutions against British terror suspects, too. The answer is to reform the law—by allowing judges more discretion in the use of phone tap evidence, say—so those who act against national security can be put on trial, Britons and non-Britons alike.

A ruling in favour of indefinite detention is unlikely to impress British Muslims, many of whom regard the detentions as an injustice targeted against their community. There is growing evidence that the government's policy alienates the very group whose cooperation the police and security services need most to combat terrorism.

The recent release of D, an Algerian detainee, does not mean the necessary safeguards are in place. On the contrary, it underscores the arbitrariness of the government's approach.

D still knows neither the case against him, nor why he has been freed. His reaction, on hearing that his long detention was about to end was: “I don't understand.” Lack of logic is a constant.

At Belmarsh—unlike at Guantánamo—many detainees are not even questioned, despite being held for more than two years. The Home Office believes this is “not extraordinary.”

The government's line on torture is even more pernicious. Torture is a universal taboo. There are no excuses or exceptions, and no government in the world will admit carrying it out.

Britain was key in drawing up international rules outlawing torture and a convention aimed at making them stick. Last August, the government successfully argued in the Court of Appeal that information gained under torture can be used if the UK is not involved directly.

The arguments for torture are superficially seductive. How, it is argued, can it be wrong to torture somebody who may have information that could save lives? Once the door to torture is open, however, experience suggests it is impossible to close. The message that it is sometimes acceptable undermines more than half a century of work to eradicate this moral cancer.

Concern is mounting about Britain's counter-terrorism strategy. The Privy Counsellor Review Committee called for the “urgent repeal” of the indefinite detention regime. The all-party parliamentary Joint Human Rights Committee pointed to the “corrosive effect” of the policy. Lord Justice Neuberger, who dissented from the appeal judgment, argued that by relying on torture evidence, Britain was “losing the moral high ground an open democratic society enjoys.”

The government has an obligation to protect those who reside in the UK. It also has a duty to safeguard the country's fundamental values. We have seen little evidence that the current counter-terrorism strategy has made Britain a safer place.

Yet it has eroded the ban on torture, undermined the principle of equality under the law and weakened the right to a fair trial. The Law Lords have a historic opportunity to restore the balance. All those who care about liberty must hope they seize it.

Appendix 2

Anti-terrorism debates February 2004

Liberty (edited)

" Our position remains that the detainees should either be tried in accordance with international standards or they should be returned…"
Jack Straw, The Foreign Secretary, February 2004 (of the Guantanamo Detainees)

"I lie awake at night searching…searching for the answer to the constant question why me?"
Belmarsh detainee, February 2004 (held without charge under the Anti-Terrorism, Crime and Security Act since December 2001)

A. Introduction

1. This briefing serves two purposes. Section 29 (2) of the Anti-terrorism Crime and Security Act 2001 (ATCSA) requires detention provisions to be approved annually by both houses. The Act also requires (at Section 122) the appointment of a committee to conduct a review of ATCSA. The committee has a power to specify which provisions of the Act shall cease to have effect unless a motion has been laid before Parliament considering the report. This is the report from Privy Councillor Review Committee chaired by Lord Newton (the 'Newton Report'). The Report is broad in its recommendations and covers the whole Act.

2. Liberty believes that the detention provisions in Part 4 of ATCSA are so contrary to the rule of law and the principle of due process that we restrict our comments to them. The UK is the only member of the Council of Europe that felt the need to opt out of its human rights commitments in order to allow detention without charge or trial. Any attempt to continue this derogation should be subject to intense scrutiny by Parliament.

3. The Newton Report is emphatic:
'We strongly recommend that the powers which allow foreign nationals to be detained potentially indefinitely should be replaced as a matter of urgency'. The Report is extremely convincing and there is little we can add to such a comprehensive indictment on continuing detention. The complex issues can be distilled into one principle. Some of the men have been detained for over two years, none of them know what they are accused of. If the Government is satisfied that they are involved in terrorist activity, then they should be put on trial. The Report makes a number of recommendations as to the process and conduct of criminal trials. Again, we do not give detailed consideration to these, other than the proposal to remove the bar to admitting intercept evidence in court. We also draw attention to the wide-ranging provisions contained in the Terrorism Act 2000 (TA 2000). The Government has stated that prosecution is preferable to internment. We are not convinced that the ordinary criminal and counter-terror law has been sufficiently examined and used in preference to the passing of ever-more exceptional measures.

4. We make reference in this briefing to 'internment'. We appreciate that the Government does not refer to detention powers under Part 4 as 'internment', arguing that those held are not prevented from leaving the UK. However, they are likely to be subjected to torture or inhuman or degrading treatment if they return to their home nation (the reason why the UK cannot force them to return). Therefore we find this distinction as incredible as it is distasteful.

B. The Newton Committee and other reports on Part 4

5. Consideration of the Newton Report will dominate parliamentary discussion on Part 4, but there have been other recent observations which are relevant. In December 2003 the International Committee on the Elimination of all forms of Racial Discrimination (ICERD) stated;

"The Committee is deeply concerned about provisions of the Anti-Terrorism Crime and Security Act which provide for the indefinite detention without charge or trial, pending deportation, of non-UK nationals who are suspected of terrorism-related activities. While acknowledging the State Party's national security concerns, the Committee recommends that the State Party seek to balance those concerns with the protection of human rights and its international legal obligations. In this regard, it draws the State Party's attention to the Committee's statement of 8 March 2002 in which it underlines the obligation of States to "ensure that measures taken in the struggle against terrorism do not discriminate in purpose or effect on grounds of race, colour, descent, or national or ethnic origin".

Although there is nothing within ATCSA that specifies race, only foreign nationals can be interned. Liberty does not see how terror legislation that can only be used against foreign nationals, and which in fact has only been used against Muslims, can satisfy the non-discriminatory obligation referred to in the ICERD report.

The discriminatory effect of this and other issues of illegality are the subject of litigation due to be heard by the House of Lords Judicial Committee this spring.

6. Section 28 of ATCSA requires the appointment of a person to annually review the operation of the detention provisions. Lord Carlile of Berriew was appointed for this role and published his second report on 11 February 2004. Lord Carlile found that he was satisfied that individuals have only been certified and detained in appropriate cases. However, it is important that Members of Parliament and Peers be clear as to the extent of Lord Carlile's remit:

"My task is to report, on the premise that those sections (21-23) are in effect, on their operation. I take that task to mean that I should report as to whether the provisions operate effectively and as fairly as is compatible with legislation of its type…The merits, content and method of the derogation from the ECHR are not part of my responsibility as reviewer of the operation of sections 21 to 23, under section 28".

Lord Carlile's role is not to consider the justification, effectiveness or desirability of detention, or the derogation. His positive report on the provisions is not an endorsement but simply confirmation that the provisions are operating satisfactorily within the scope of the legislation. It is possible that Parliamentarians may be persuaded that Lord Carlile is correct and still endorse the view of the Newton Committee that detention provisions should come to an end as soon as possible.

7. Acceptance that the legislation may be functioning effectively while remaining objectionable in principle is particularly relevant when considering that detention is portrayed as part of the immigration, rather than criminal, legal system. We maintain this is a fallacy of convenience, designed to eliminate due process whilst painting on a thin veneer of semblance of law. The fact remains that by definition, these men are detained by reason of suspicion of criminality and not because any immigration action lies within prospect.

8. A further chilling aspect of the policy is shown by the judgment of the Honourable Mr Justice Ouseley in the Special Immigration Appeals Commission (SIAC) hearings to determine whether evidence against those detained justified their continued detention. It

emerged that evidence against them is likely to have been obtained though the use of torture in other jurisdictions. Representatives for the detainees argued that such evidence should be inadmissible for a number of reasons, including Article 15 of the Convention Against Torture which states 'Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings'. In his judgment Mr Justice Ouseley said:

"In the context of these appeals, which do not involve criminal proceedings, an exclusionary principle would be difficult, if not impossible to apply…We cannot be required to exclude from our consideration material which[the Secretary of State] can properly take into account, but we can, if satisfied that the information was obtained by means of torture, give it no or reduced weight…we are, of course not bound by any rules of evidence, but must act fairly in considering the appeal of each appellant"

As the detention provisions are grafted onto the immigration, rather than the criminal system, evidence obtained by torture is admissible. Not only does the lack of due process mean that the internee does not have the chance to hear and test the case against him, but the process itself is free from any statutory or international rights that ensure a fair hearing. A weak and nebulous duty to act 'fairly' cannot mitigate against the implications of this.

9. As the Newton Committee was not constricted in remit or by evidential rules it was able to present an overarching review of Part 4. We cannot improve on the reasoning behind the Committees conclusion that detentions should end as a matter of urgency. For convenience we simply summarise the Committees' main objections and concerns which we believe constitute an overwhelming case against continued internment:

_ The suspects face no specific charge and are not presented with the evidence against them.
_ The SIAC standard of proof is the low balance of probabilities.
_ SIAC rules do not oblige the Home Secretary to reveal material that could help the suspect.
_ The UK is the only country to have felt it necessary to derogate from Article 5 in order to allow detention.
_ Detention is potentially indefinite.
_ The selective nature of detention and small number of detainees might avoid political retribution but this does not justify the principle.
_ Part 4 has efficacy problems in that it can only be used to counter threats from foreigners.
_ If those held are terrorists then seeking to deport them as an alternative will only export the problem and (given the international nature of terrorism) not offer protection to the UK. They should be tried in a British criminal court.
_ There is a serious risk of disenfranchising the British Muslim population.
_ There was a one and a half year gap between detention and the first appeal hearings.
_ Each appeal requires a new security cleared special advocate who has not seen closed material. The supply of such advocates is limited.
_ Despite statements that prosecution should be favoured the authorities have given little thought to methods of alternate resolution.

10. We draw particular attention to the sixth Newton observation. It is easy for Governments to single out members of disenfranchised minorities (such as foreign nationals) for less favourable or fair treatment. However Parliament should operate as the first Court of Human Rights. Political retribution must be employed to protect such minorities and indeed the rule of law so essential to democracy. Some of the objections referred to by the Newton Committee have been referred to by the Home Secretary, not in the context of abolition but of expansion. On his recent trip to India he proposed extension of the SIAC framework so that there would be far greater scope for evidence to be kept secret and possible use of the special advocate process.

He also suggested that the burden of proof in cases involving terrorism could be lowered from beyond doubt to a balance of probability. Liberty has previously expressed concern that once precedents that bypass due process have been set, it takes little time for their use to spread through the legal system, compounding the injustice.
However, we did not anticipate that the immediate response to the Newton Committee's criticisms of the discriminatory nature of the detention procedures would be to bring other parts of the criminal justice system in line with ATCSA.

C. The Impact of Internment on British Muslims

11. An area of concern touched on by the Newton Committee, and one we believe should be a focus of debate, is the impact internment is having on British Muslims.
Internment powers are counterproductive in that they become an icon of injustice for a section of the community whose co-operation is essential if the UK is to be effective in its counter terrorism policy. In order to ascertain the effect that terrorism legislation is having upon the British Muslim community, we sought the views of prominent Muslims and Islamic organisations. It is clear that the Muslim community believes the law is being used disproportionately against them. The majority of arrests under antiterrorism legislation post September 11 2001 have been of Muslims (a great number of whom have been subsequently released without charge) and all of those detained indefinitely are Muslim men.

12. Members of the British Muslim community feel that their rights are seen as less important as those of non-Muslims, that they are being treated as second-class citizens. This has served to create feelings of mistrust and resentment, which in turn can foster extremism. Consequently, the use of anti-terrorism measures such as internment, rather than being an effective tool in the fight against terrorism, are
counter productive.

Dr Ghayasuddin Siddiqui, Leader of The Muslim Parliament of Great Britain:
"Muslims are one of the most marginalized and criminalized communities in Britain. By extending the provision of internment to British nationals on the basis of mere suspicion by intelligence agencies or the police will be seen by the community as a war on Islam, not a war on terror. This will serve no useful purpose except to fuel further extremism, which every sensible person wants to avoid."

Solicitor Muddassar Arani:
"The perception by Muslims who live in the UK is that the 2001 Act has created the first Muslim concentration camp in Belmarsh prison, as it now houses prisoners who are Muslim, have not been convicted of any crime, and who are being held indefinitely. I understand and appreciate that this is a bold statement to make and that this may not please everyone however this is the position as it is perceived by the
Muslim community"

Anas Altikriti, President of the Muslim Association of Britain:
'This legislation will only lead to a society that is divided, shattered, rife with hatred, heaving with racism and with no promise of a prosperous future.'

Ssamar Mashadi, Director of Projects at the Forum Against Islamophobia and Racism (FAIR):
'The arrests under the legislation clearly illustrate that the legislation has been used to target the Muslim community, and that racial and religious profiling seem to be the prime motivators behind the arrests. The legislation fails to combat terrorism but instead controls asylum and immigration and impinges on civil liberties.'

13. Internment undermines the rule of law and can, at best, only have limited impact on the 'war on terrorism'. If wars in Afghanistan and Iraq, coupled with over two years of counter-terrorist activity, have not significantly reduced the risk of terrorist attack in the UK, then neither can holding a small number of people indefinitely have any discernable impact. If the people held are senior figures in sophisticated terrorist networks then no doubt others will have by now replaced them. The crucial point (and leaving aside any comments on legality or morality) is that even if it were established that this detention had some real impact on the capability of Al-Quaida or others it would still be counterproductive. The alienation felt by British Muslims will undermine willingness to co-operate with the authorities. The police made significant attempts to gain the confidence of the British Afro-Caribbean community during Operation Trident and benefited from their efforts. Unfortunately, such trust building exercises are absent here. A more fitting comparison lies in the years of mistrust, alienation and conflict exacerbated by the British Government's use of anti–terror powers against Irish communities in Britain and Northern Ireland.

D. Replacing Detention and use of existing offences

14. The Newton Report makes a number of alternative approaches to detention which it strongly urges the Government to take up. We will not comment on these detailed proposals other than to re-iterate support for a relaxation of the blanket ban on the use of intercepted communications in court. Liberty has never agreed with the ban, which is contained in the Regulation of Investigatory Powers Act 2000 and backed by criminal sanction. The justification for the bar always seems to have been more concerned with protecting intelligence service interests than fair trial rights. Liberty agrees with comments made by the Newton Committee that concerns about protecting sources should be surmountable. We are convinced that removal of the bar will allow cases which the authorities say cannot currently be prosecuted to be brought to trial. If there are privacy issues or concerns over self incrimination then proportionate privacy rights contained in the Human Rights Act 1998 and admissibility provisions in the Police and Criminal Evidence Act 1984 should provide sufficient protection.

15. Liberty believes that the enormous breadth of offences contained in the Terrorism Act 2000, along with the reversal of burdens of proof for many of the offences contained within the Act, undermine the Government's claim that prosecution is not a viable alternative to detention. The TA 2000 is concerned with proscribed, or banned, organisations. The Secretary of State is granted the discretion to proscribe an organisation "by order" if he believes it engages in acts of terrorism. The current list of proscribed organisations includes Hamas and Al-Quaida.

16. Being a member of, or belonging to, a proscribed organisation is a recognised offence under TA 2000, and carries a maximum penalty of ten years imprisonment. A person charged with such an offence bears the onus of proving (a) the group was not proscribed at the time he or she became a member, or (b) he or she was not involved in any activity of the group while it was proscribed. The only 'defence' rests in these two options. A person may also be guilty in relation to proscription without being an actual member of a banned group. It is enough to support or "further the activities of" an organisation by literally any method. The TA 2000 stresses that support is not restricted to money or property terms. It is also an offence to arrange or address a meeting which either aims to support or further the activities of a proscribed organisation, or merely features a speaker who is a member of the proscribed organisation.

17. The TA 2000 also creates a category of offences which are available even when the option of proscribing an organisation cannot be exercised, and, therefore, the proscription-related offences do not apply. It makes an offence of directing the activities of a terrorist organisation "at any level". "At any level" is vague, but would appear to cover acting in any directive

capacity whatsoever within a ‘terrorist organisation’. This offence carries the penalty of life imprisonment.

18. It is an offence, punishable by ten years imprisonment, to possess something “in circumstances which give rise to reasonable suspicion that [the] possession is for a purpose connected with terrorism”. There is a penalty of ten years imprisonment for the offence of collecting “information of a kind likely to be useful to a person committing or preparing an act of terrorism” or to keep any form of documentation or record (including photographic or electronic) which contains such information.

19. The TA 2000 also creates an offence of “inciting terrorist activity overseas”
Further offences include fundraising for terrorist activity and using money for terrorist activity.

20. The crucial point here is that even without the suggested alterations to the criminal process suggested by the Newton Committee, it does not seem credible that none of those detained (if they really are so dangerous) could not be prosecuted under the TA 2000. Obviously, we are not aware of the nature of offence the detainees are supposed to have committed, but it seems safe to presume that most would come within the wide scope of the TA 2000. Many of the offences do not require participation in terrorist activity, so presumably the real issue for the state is not whether a conviction can be secured, but whether bringing a prosecution would undermine the way in which they collect and use information. We accept this is a valid consideration when safeguarding national security (although not one which justifies suspending the rule of law), but we agree with the Newton Committee that insufficient effort has been made to seek alternatives.

E. Conclusion

21. As Gareth Peirce, the solicitor for several of the detainees has highlighted, internment experiences in Northern Ireland are not encouraging. Internment was a disaster. It failed to incarcerate IRA activists. It was based on erroneous intelligence.
It succeeded merely in consolidating support for an armed struggle against the British state that lasted nearly thirty years. The parallels with today are obvious. We have given examples of the fears expressed by many Muslims. The treatment of those detained perpetuates a belief that they are a ‘suspect community’ who will not receive fair regard from the authorities. At best this sense of injustice will make young British Muslims less likely to co-operate with the police or security services. At worst it may leave them more susceptible to approach from those who plan terrorist action.

22. The Government finds itself in a difficult position. It has stated that detention is necessary to safeguard national security. Unless Parliament refuses to endorse a renewal of detention powers, the detainees will be held until it can be established that the risk they present has diminished. As the Government seems to be unwilling to take any action we must presume that internment will continue indefinitely. The Government is aware of the concerns expressed by the Newton Committee, Liberty and others. We are confident that it accepts many of these concerns are, and will remain, justified. However, without an acceptance of diminished risk, the Government cannot allow the detainees to be released. Similarly, it cannot bring to an end the UK’s derogation from its human rights commitments without giving rise to the implication that opting out was not justified in the first place. Only by voting against the Part 4 renewal can parliamentarians bring to an end a discriminatory, ineffective, counterproductive and objectionable abuse of the principle of due process under the law. Rejection of the renewal order would provide the Government with the opportunity to end internment without being forced to explain that it is no longer justified.