

INTERNMENT, MILITARY TRIBUNALS AND PERSECUTION IN THE WEST



Detainees held at Camp X-Ray, Guantanamo Bay, Cuba

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Sultana Tafadar

Introduction

Following the attacks in the United States of America on 11 September 2001, many states have felt the need to introduce new legislation to protect those within their borders from such attacks. Many of the measures currently being introduced are apparently to deal with emergency situations and involve limiting or suspending human rights guarantees. However, it is at times of conflicts and emergencies, when human rights responsibilities are derogated from, that the worst violations occur and when adherences to human rights obligations are most needed.

Undoubtedly the extensive use of emergency laws to combat terrorism will result in gross violations of rights, mostly of innocent people. In many cases the excuse of terrorism is used to combat internal struggles of political opposition. The resulting HR violations that occur range from the violation to the right to life, the right not to be subject to torture, inhuman, degrading treatment or punishment, to indefinite detention without charge or trial, unfair trials and violation of rights to freedom of expression, association and assembly.

Indeed, since September 11 many states have falsely accused the protection of human rights as acting as a barrier to effective action against terrorism and that derogation from human rights is justified in light of the threat. Countries have taken advantage of the tragedy by declaring their internal struggles as battles against terrorism.

President Vladimir Putin of Russia escalated his campaign of arbitrary arrests, torture and summary executions in Chechnya in the excuse of combating terrorism. Israeli Prime Minister Ariel Sharon felt free to conduct violent campaigns in Palestine, frequently referring to Yasir Arafat as "our bin Laden." Uzbekistan's crackdown on dissidents escalated in the name of anti-terrorism after the US government drew links between the Islamic Movement of Uzbekistan and the Al-Qaeda network, and Egyptian Prime Minister boasted of his harsh measures of persecution, calling for western countries 'to think of Egypt's own fight and terror as their new model.

Embracing the rhetoric of anti-terrorism and supporting the global coalition has provided them and many others with the excuse to carry out graver HRV, all parties safe in the knowledge that their role within the global coalition will ensure that their allies turn a blind eye to their human rights transgressions both home and abroad. The willingness of most western governments to tolerate HR abuses by friendly governments is not a post-September 11 attitude, and is apparent in their failure to address the problems of Israeli abuses against Palestinians including the West's role in creating and supporting the problem, and their total disregard for the effects of sanctions against Iraq in causing serious civilian suffering.

Thus, the go ahead for states to act with disregard for human rights implicitly comes from those leading the war on terrorism, the United States and Western European countries, who themselves have adopted draconian measures within their own borders to combat terrorism

in violation of international norms and standards. Their anti-terrorism effort remains focused mainly on those from predominantly Muslim countries namely from the Middle East and North Africa. This selective targeting of particular nationals facilitated the introduction of these oppressive measures. Had it been applicable to the entire population, public pressure may have prevented such measures being adopted.

Since September the 11th, the US government has detained more than 1100 suspects, mainly non-US national. It has powers to detain people for the purposes of interrogation for an extended period before appearing before a court. Reports emerged that many were kept in harsh conditions, sometimes solitary confinement, and were subject to the same rigours as convicted criminals. Many of them have found themselves on the receiving end of physical and verbal abuse from both guards and inmates.

The British government, also upon the introduction of emergency legislation, made arrests and placed the detainees into high security prison, denying them fundamental safeguards to protect their rights to liberty. It further introduced measures that severely curtailed the right to seek asylum.

It appears that Muslims are being persecuted in the name of anti-terrorism in both Muslim and non-Muslim countries. Such selectivity threatens the efforts to combat terrorism and will continue to fuel the fire against what will be seen as out of control aggression by the USA and her allies both home and abroad, directed on the whole upon Muslims.

Human rights standards

The limits on legitimate conduct are set out by the body of international human rights and humanitarian law, affirming the principle that the means do not justify the ends, regardless of how desirable the ends may be.

Human rights standards must govern how states treat all people in all circumstances. There are exceptional circumstances when suspension of some of the human rights obligations is necessary. However they must be consistent with the limits explicitly set down.

Some treaties allow the state to derogate from its human rights responsibilities in times of emergencies that 'threaten the life of the nation'. Measures that restrict human rights guarantees must be applied only while there is a genuine threat "to the life of the nation" rather than a perceived threat, or generalized fear. However In derogating, the state must adhere to the principles of necessity and proportionality that the measures imposed can be done only to the extent strictly required by the exigencies of the situation. The principle of proportionality means that measures must not be excessive in comparison with the threat and must only last for the duration of the officially declared state of emergency. Moreover, states must not derogate from human rights provisions solely on the basis of discriminatory grounds of race, colour, sex, language, religion or social origin. The International Covenant on Civil and Political Rights holds such derogations to be unlawful.

Derogation must be in accordance with the state's other obligations under international law, and should also be in accordance with the principles of international humanitarian law (the rules of war).

Even in times of emergencies, there are a core group of non-derogable rights that must apply fully at all times. For example, the non-derogable rights in the International Covenant on Civil and Political Rights (ICCPR) are: the right to life, the right not to be subjected to torture and other cruel, inhuman and degrading treatment, the right not to be enslaved, the prohibition of retroactive criminal legislation, the right to recognition under the law and the right to freedom of thought, conscience and religion.

Other rights are non-derogable because they are customary rules or peremptory rules of international law. Such non-derogable rights include the obligation to treat detainees with humanity, and certain elements of the right to a fair trial, particularly the prohibition on arbitrary deprivation of liberty and the presumption of innocence.

Therefore, although states are under a legitimate duty to protect those within their jurisdiction, any measures to do so should be implemented within a framework of protection for all human rights. The Universal Declaration of Human Rights was the reaction of the international community to the extensive human rights abuses that had been perpetrated by the governments against their own citizens during the Second World War. The rights enshrined in the human rights treaties represent the bare minimum standards that are necessary to protect individuals from the abuse of power of both state and non-state actors. However, recent actions of many leading western states is not promising and threatens to undermine human rights values and ultimately reinforce the logic that anything is acceptable in the name of a higher cause.

Military commissions

1. Introduction

The most notable example in the west since the attacks in the USA on 11 September is The Executive Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism signed by President George W. Bush on 13 November 2001 that will allow "military commissions" to try non-US citizens suspected of involvement in "international terrorism".

The Order shows blatant US disregard for international law and highlights the behaviour of an executive out of control.

The broad reaches of the Order violates

- fundamental rights to personal liberty and
- to a fair trial, which go far beyond what, is permitted even in times of crisis.
- It further violates the principle of non-discrimination. It only applies to non-US citizens and discriminates in arbitrary and unjustifiable ways against them, denying them basic human rights protection. States are required to ensure the human rights of *anyone* under their jurisdiction or control, regardless of their nationality.

This order removes the distinction between executive and judiciary, by creating a system of military tribunals to try those suspected by the Executive of being terrorists. In essence the Executive has become investigator, prosecutor, judge, jury and executioner in its own court, of those non-citizens (and possibly citizens) it "has reason to believe" are a threat to national security.

President Bush's admission that he is dismissing "the principles of law and the rules of evidence" that underpin the justice system by creating military tribunals is a final blow to the pretence that the USA respects international standards and norms at least in its own territory. With the anti-Muslim backlash in the USA still in full swing, international opinion makers, politicians and civil society need to make a serious stance against this deadly assault on civil liberties.

2. Jurisdiction

The commission's jurisdiction is vast and goes far beyond the traditional use of military tribunals and what international human rights and humanitarian law permit. Instead of limiting its use to trying combatants in armed conflict for violations of the laws of war, it has the power to try non-US citizens accused of membership in al-Qaeda, involvement in the undefined crime of "international terrorism," or harbouring any such person. It has been held by the HR committee that civilians should not generally be tried by military courts, but if necessary, only when due process conditions are provided. In the present context, there is no need for civilians to be subjected to the jurisdiction of military courts whereby their rights to be heard by a competent, independent, impartial tribunal are violated. The US courts are fully equipped to deal with civilians charged with criminal offences.

3. Right to a Fair Trial

The open-ended provisions for the trial of persons under the Executive Order exceed the limits of acceptable derogation of the right to a fair trial under international law. The military commissions lack essential safeguards that are necessary to protect that right.

Although the Executive Order states that at a minimum all trials shall be "full and fair," the reality is far from it. It rejects scrutiny of the military commission proceeding by any domestic or international court, and has ignored the Uniform Code of Military Justice--the procedural code used for regular courts-martial--which would have ensured most basic fair trial rights. It violates the most basic guarantees as provided for by the ICCPR. The Order:

- would authorise secret trials without a jury. There are no guarantees that judgments let alone trials will be made public;
- would limit access of the Defendant to evidence used against him / her on the basis that revealing it would breach national security;
- or even that proof of guilt is established beyond a reasonable doubt. It does away with the requirement for a unanimous verdict. Even if one third of the officers on the tribunal were to find a suspect not guilty, s/he can still be found guilty and executed;
- would impact on the ability of a defendant to choose his / her own legal representatives. And it does not indicate whether a defendant would be able to communicate with their legal representatives; and whether adequate time and facilities will be provided for a defense

The Order further does not:

- necessarily require that there is a presumption of innocence;
- provide protection against forced confessions
- It further denies the right to appeal as provided under international law. It only allows non-judicial review by the President or the Secretary of Defense. This is of particular concern bearing in mind that the military commissions have the power to hand down death sentences. This means that people may be executed after a trial conducted by a court whose decision cannot be appealed but only reviewed by the executive who selected the individuals for prosecution in the first place.

It is alarming that judicial standards of the military commissions would be significantly lower than those at war-crimes courts and tribunals established by the United Nations in prosecuting some of the world's worst war criminals. The U.S. government is backtracking from its long expressed values that even those accused of the most heinous crimes deserve full due process protection.

The Executive Order sends out the message that HR are a mere standard of convenience and that those values can be sacrificed in the light of security threats. It highlights the hypocrisy of the USA in insisting in the past that other countries uphold those values and

jeopardizes future efforts to protect the rights of its own citizens who are brought before such foreign tribunals. It has provided military dictators with a free rein to adopt such measures within its own borders, safe in the knowledge that the US cannot criticize it. It will ultimately undermine the human rights standards that are vital in distinguishing terrorism from lawful conduct.

4. Right to Liberty and Security of Person

The Executive Order further permits the arrest and detention of persons on grounds that the President has "reason to believe" that the individual took part in "acts of international terrorism" against the United States. Again the definition of "international terrorism" is left out, leaving the grounds to be of a vague and broad nature.

The Order does not require:

- that persons detained be told the reason for their arrest;
- that detainees be promptly informed of the charges against them;
- that detainees be afforded the right to bring their detention before a judicial authority to review the legality of that detention;
- that those unlawfully detained have an automatic right of redress or enforceable right to compensation;

The Order allows:

- for the arrest and indefinite detention of suspects without charge and without legal recourse should they be unlawfully held. Such a derogation from article 9 is well beyond what is under article 4 of the ICCPR.

5. Derogation

The USA's derogation from its ICCPR obligations is so wide and ambiguous as to be beyond the extent that the exigencies, or emergency of the situation requires. The Executive Order fails to meet the burden of necessity and proportionality standards from derogating from its HR responsibilities. It violates the right to liberty and security of the person under article 9 and the right to a fair trial under article 14.

This lack of adherence to ICCPR standards and norms is compounded by: procedural irregularity in the USA's declaration of a state of emergency (no formal notice of this state has been given to the UN-Secretary General); no formal declaration of war has been made; the various statements by the Attorney General and senior Presidential figures that terrorists do not deserve the protection of the US Constitution. This type of language and this form of procedural irregularity or contempt indicate that satisfying the criteria that allow an article 4 derogation from some ICCPR obligations was not a serious consideration when this Order was being drafted and executed.

The Executive Order is contrary to fundamental principles of human rights and it unlawful for the U.S. government to transgress these well-established protections of international human rights law.¹

¹ See also IHRC Briefing, 'USA - MILITARY TRIBUNALS VIOLATE BASIC RIGHTS' Arzu Merali, <http://www.ihrc.org.uk/show.php?id=38>

Internment

Governments around the world in times of international and domestic conflict have used internment measures. It is used by state authorities to detain people, who they do not intend to prosecute, on suspicion that they pose a threat to public order or national security

This has been the case in the UK, who followed the US example and introduced the “Anti-Terrorism, Crime and Security Act” on December 14. It arbitrarily allows the government to detain terrorist suspects indefinitely without trial. The introduction of such a measure contravenes fundamental European and international human rights guarantees and raises serious questions about the UK’s commitment to human rights.

1. Who it targets

- It is specifically aimed at foreign nationals who are under suspicion of terrorist activities abroad or may wish to pursue those activities in the UK. The detention of terrorist suspects is aimed at nationals of particular countries such as Iran, Iraq, Libya – predominantly Muslim countries which have been labeled as rogue states that harbour terrorists. It is discriminatory and clearly violates values enshrined in human rights treaties.
- They could be detained when they
 1. cannot be returned to their country of origin where they are likely to be subject to torture or to inhuman or degrading treatment or punishment in violation of Article 3 of the European Convention on Human Rights
 2. or cannot be sent to a ‘safe’ third country because of related practical problems.
- A person can be detained for years without recourse to due process.. Those detained on the basis of national security threats can be held until they no longer pose a threat or until a safe third country agrees to accept them.

2. Who is a suspected international terrorist

- The Act vests power in the Home Secretary to certify a person as a "suspected international terrorist". The certification is based on his belief that the person is an international terrorist and that his presence in the UK is a risk to national security. The certification can take place in the absence of any other illegal acts. The problem here is that it places extensive powers into the hands of one person, and the decision may be influenced by political factors.
- The definition of a “suspected international terrorist” is both wide and unclear. It includes persons who “have links with a person who is a member of or belongs to an international terrorist group.” It is alarming that a person can be branded a suspected international terrorist on the basis of having links, irrespective of whether they have committed any terrorist activities.

3. Procedure

A person can appeal the certification to the Special Immigration Appeals Commission within three months of the certification. It has the power to cancel a certificate or to dismiss an appeal. Detainees would be held for six months after which the Special Immigration Appeals Commission will review their certificate and continue to do so every six months to determine if the person is still a risk to national security. However, such a long period of detention without review will have serious consequences on the rights of the detainees and should be conducted at shorter intervals.

The SIAC's procedures are severely flawed and violate basic due process guarantees. It can base its decisions on secret information that can be withheld from the detainee and his counsel and does not need to provide reasons for its decision. Furthermore, the SIAC would be able to hold proceedings without the applicant or their lawyer being present. In such a case an advocate to represent the interests of the person concerned is chosen, but the advocate may not provide information about the case to the applicant without the Commission's permission.

The use of secret evidence in closed proceedings without the ability of the person subject to certification to confront the evidence against him in person with assistance of counsel of his choice violates fundamental due process standards. Furthermore, detention for an indefinite period without recourse to judicial review by a court exacerbates the situation. This lack of transparency along with the absence of essential procedural guarantees raises concerns about the effectiveness of the Commission in guaranteeing basic rights. These mechanisms are crucial in ensuring that a person is not wrongly detained and their absence will have a serious impact on their basic right to liberty.

4. Derogation

The British government declared a public emergency in the U.K. to derogate from its obligations. However, it is debatable whether a state of emergency does exist which threatens the life of the nation, particularly in light of the fact that none of the other European signatories have felt the need to declare a state of emergency. It is furthermore debatable whether the measures of internment are strictly proportional to the exigencies required by the situation. The government will fail to meet the burden that there was a real need to introduce such measures, particularly in light of the fact that it has not been subject to any terrorist activities linked to September 11.

5. Conclusion

Internment creates a shadow criminal justice system whereby the government can detain people for years without conviction of criminal offences and sentence. The governments justification for the use of internment is that normal safeguards - the strict rules on the admissibility of evidence and the high standard of proof required will prevent successful prosecutions of criminal offences and subsequent imprisonment. What the Home Secretary fails to understand is that the rules and standards in the criminal justice system have been

prescribed in order to minimize the risk of innocent individuals being convicted and punished.

The UK's use of internment will result in the incarceration of innocent people and is in direct violation of its obligations under the Convention. Ultimately such a measure will prove to be ineffective, as it has done so in the past. Further, the targeting of certain nationals and the disproportionate effect of the anti-terrorism measure upon them is likely to create tension amongst the British Muslim communities who may again feel that Muslims are being intentionally subjected to adverse treatment. This measure, therefore, has the potential to strain good community relations in the country.

CONCLUSION

The international crisis following the events of 11 September 2001 undoubtedly has broad implications for human rights work. States must conduct the fight against terrorism, if indeed there is such a threat upon them, without infringing human rights. The most visible and powerful proponents in the West have shown unwillingness to be bound by those principles and have implemented extraordinary constraints on rights by introducing such drastic measures. Indeed, the US has never been willing to subject itself to the international rule of law and have always been a grave violator of human rights. Recent events reinforce that fact. Moreover, the West's persecution of Muslims both home and abroad will have severe repercussions on the war against terrorism. Whatever support and sympathy Muslims have for the coalition will fade replacing it with resentment. Indeed it is this resentment resulting from persecution that began this cycle of violence. Ultimately such persecutory measures will prove counterproductive and their actions will create further polarization between the West and Muslim populations.

Muslims constitute one fifth of the world's population transcending geographical boundaries, and that's a lot of people to alienate.



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