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## Human Rights Council

*Human Rights in Times of Terrorism*



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## **Human Rights in Times of Terrorism**

### **1. Introduction**

Since September 11th 2001, fighting terrorism has become an important issue in the political agenda of many countries. During and after the military campaigns in Afghanistan and Iraq, a high number of suspected persons have been imprisoned and detained by the U.S. military and intelligence services. Basic procedural guarantees were not granted to the detainees. These guarantees are enshrined in international human rights documents and in International Humanitarian Law. U.S. authorities justified their action with the following reasoning: According to the U.S. authorities the detainees, who have been arrested in Afghanistan, Iraq and elsewhere, must be qualified as combatants in the sense of International Humanitarian Law. By this qualification they do not fall under the category of civilians in both national and international law. However, due to their “unlawful participation” in armed actions against the U.S., they are –according to the U.S. position – also not eligible for the POW (prisoner of war) status under the Third Geneva Convention of 1949.

The persons arrested during the military campaign in Afghanistan, and during other counter terrorism campaigns in Central Asia, were taken to the US military detention facility in Guantanamo Bay situated in Cuba, where about 500 detainees were held since 2002 (Arnold 2006). At the end of December 2005 nine detainees had been referred for trial to a U.S. military commission and some have already been sent back to their countries of origin.

Those persons who have been captured in Iraq were arrested in the famous Abu Ghraib prison, which was already in use during the rule of Saddam Hussein. In contrast to the notion of International Human Rights Law in the Guantanamo case, the U.S. recognized the applicability of the four Geneva Conventions of 1949 for the detainees in Abu Ghraib (Arnold 2006), therefore Private Lynndie England was brought to court for the breach of the prohibition of torture.

Apart from the U.S. other states qualify rebels, as seen in the case of Chechnya, as terrorists in order to justify their military campaigns against secessionist movements. Also regimes might be tempted to use the denomination “terrorist” to suppress religious activists inside their territory, as seen in the case of Falun Gong in The Peoples’ Republic of China.



Other severe questions arise when it comes to the reduction of data protection. For example, in October 2006 the U.S. and the EU came to an agreement regarding transfer of airline passenger data. Wiretapping by intelligence services like the NSA has become a popular tool again in fighting terrorism, and which has an impact on data protection in times of terrorism, too.

These questions are only a small extract of how the war against terror can restrain human rights. Solutions for a better compatibility should be elaborated during the sessions. On September 8th 2006, the General Assembly adopted the Secretary Generals' Global Counter- Terrorism Strategy, focusing strongly on measures to ensure respect for human rights as the fundamental basis of the fight against terrorism.

The GA-resolution can be accessed via <http://www.un.org/terrorism/strategy/#resolution>

A definition, of what terrorism is and what is not, is hard to determine. One famous phrase is true still today, which reads: "One man's terrorist is another man's freedom fighter".

To have a common basis during the sessions of the Human Rights Council (HRC) in ThessISMUN, it is worth looking at article 2 of the Draft UN Comprehensive Convention on Terrorism, which has been negotiated during the last five years:

## **Article 2**

*1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:*

*(a) Death or serious bodily injury to any person; or*

*(b) Serious damage to public or private property, including a place of public use, a State or government facility, a public transportation system, an infrastructure facility or the environment; or*

*(c) Damage to property, places, facilities, or systems referred to in paragraph 1 (b) of this article, resulting or likely to result in major economic loss,*

*when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or abstain from doing any act.*

Under the Draft Convention when the purpose of an action, by its nature or contacts, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act, it can be called a terrorist act.



The UN General Assembly, however, has not accepted this Convention, since there is still an argument whether military actions, during armed conflict, should be excluded from this definition.

Another definition, which might help, can be found in a clause of International Humanitarian Law. According to art. 33 of the Fourth Geneva Convention, art. 51 (2) Additional Protocol I of 1977 to the Geneva Conventions and art. 3 and 14 of Additional Protocol II of 1977, terrorist acts are acts of violence in breach of the principles of military necessity, proportionality and distinction, which are primarily aimed at spreading fear among the civilian population.

These definitions are not the only ones but can be used as a basis for the discussion.

## **2. Most Important Problems to be Discussed**

### **2.1. Different Legal Regimes for Human Rights Protection**

If we talk only about a fight against terror, then it is still possible to refer detainees to civil courts for trial, since the suspects fall under the ordinary criminal law of the states. But if we talk about war against terror, then the detainees might rather fall under International Humanitarian Law, mainly consisting of the Geneva conventions.

Human Rights Law was designed for times of peace. The most important conventions are the International Covenant of Civilian and Political Rights (ICCPR) and the International Covenant of Economic and Social Rights. International Humanitarian Law, as enshrined in the Geneva Conventions and the Additional Protocols, in contrast was designed for times of interstate war.

But what happens if there are situations in times of peace, escalating to an intensity which can only be compared with an armed conflict, and such an escalation is brought about not by state run armies but by violent civilians?

One can come to the conclusion that a state of emergency has to be declared under which some human rights standards beneath human rights law for peaceful times may be derogated. A government can declare an emergency under the regime of the ICCPR, if two conditions are fulfilled:



First, a situation must threaten the life of the nation and second, the government of the state, which is a party to the ICCPR, must have officially proclaimed a state of emergency [art. 4 (1) ICCPR]. This state of emergency, however, can not lead to a derogation from the right to life, prohibition of torture, the right to recognition as a person before the law, and the right to freedom of thought, conscience, and religion [art. 4 (2) ICCPR].

Over and above that, the U.S. has not notified any official derogation from the ICCPR or from any other international human rights treaty. Therefore detainees, who do not fall under International Humanitarian Law, can be held in custody and can even be deprived of their right of a fair trial, but they may not be tortured or deprived of their right of freedom of religion when they are being held in custody.

Another implication of civilian criminal law would be that detainees have to be released after a short time, if no specific charges can be brought against them.

On the other hand – if the detainees are qualified as combatants, they fall under International Humanitarian Law. Authorities holding the detainees in custody must comply with the following provisions under International Humanitarian Law:

**Art. 13** of Geneva Convention III and the common article 3 provide the right to life to every detainee in war times. It must be made possible to the POW by the detaining power to keep in touch with the outside world. Especially POWs must have the possibility to write to their families (art. 70 and 123 Geneva Convention III). This correspondence has not been granted to the Guantanamo detainees.

**Art. 75** of the Additional Protocol I to Geneva Convention IV stipulates the prohibition of torture, humiliating and degrading treatment, as well as, unjustified delayed release. According to art. 4 (A) (2) of Geneva Convention III, POWs do not have to tell more to the enemy than their personal details, their rank and their serial number. Former Taliban soldiers can enjoy the POW status, since some of them fought as regular Afghan soldiers against the U.S. invasion during the years 2001 to 2002

It becomes clear by these reflections that disregardless if terrorists are qualified as civilian criminals or war criminals they have certain rights under each legal regime. That is the reason why the U.S. qualified the suspects held in custody, after they have been arrested in Afghanistan, as so-called unlawful combatants. One could assume that this was meant to open up the possibility to abscond them from civilian criminal law, such as the need to release after 48 hours, for example, since they are combatants, and at the same time to abscond them from International



Humanitarian Law, such as their right to correspond with relatives, for example, since their status as combatants is unlawful.

The most important task of the Human Rights Council is to deal with these issues and how to solve them so that human rights and combating terrorism can be brought into concordance.

## **2.2. Torture**

According to the Taguba-Report (accessible via <http://www.msnbc.msn.com/id/4894001/>), between October and December 2003, numerous incidents of torture were inflicted on several detainees in the Abu Ghraib prison in Iraq by U.S. soldiers.

As we have seen before, International Humanitarian Law and Human Rights Law prohibits torture. On the other hand, the question arises whether torture should be allowed in extreme cases, in order to extrapolate important information from terrorist suspects, which may save a vast number of lives.

The international community though has made it clear that torture is prohibited under all circumstances by international law. The latest instrument was the adoption of the UN Convention against Torture in 1985 (Arnold 2006). The prohibition of torture has acquired the status of customary international law and a breach of this customary law provision may even qualify as a war crime or a crime against humanity under the Rome Statute establishing the ICC. However the U.S. has not yet ratified the Convention against Torture or the Rome Statute.

Forms of torture which have been alleged not only against the U.S. guards in Abu Ghraib but also against the guards in Guantanamo by released detainees are beatings, sleep deprivation, exposure to extreme temperatures and prolonged isolation.

Furthermore there discussions in Germany and Israel are taking place regarding if the legal system should allow lighter forms of preventive torture to receive information about a ticking bomb or a hijacked child.

## **2.3. The United States Military Commissions Act of 2006**



In late September 2006 the US Senate passed the US Military Commissions bill. This bill creates an extensive legal framework for Military Commissions to deal with the cases of detainees from Guantanamo and other prisons, instead of the regular courts. Sec. 7 of the Military Commissions Act stipulates that civilian courts do not have jurisdiction over habeas corpus of an alien detainee held in custody in a U.S. military detention camp. Human Rights Watch called this act as an act with a “courtstripping” provision, violating the right of habeas corpus. i.e. the jurisdiction of civil courts over the lawfulness and conditions of detentions.

As the Military Commissions Act was brought to discussion in Congress, the Bush administration argued that trials in front of a Military Commission, rather than in front of a regular court, are necessary since “the terrorists with whom the United States is engaged in armed conflict have demonstrated a commitment (...) to the abuse of American legal process.” (Amnesty International 2006).

The Military Commissions Act in § 948a for the first time, as an Act of Parliament, officially defines the term “unlawful enemy combatant”. Under this act unlawful enemy combatants are persons who “engage in hostilities or purposefully and materially support hostilities” against the United States. The so-called unlawful enemy combatants cannot invoke rights from the Geneva Conventions or the Additional Protocols in front of a military commission [§ 948b lit. (g)].

On the other hand, the Military Commissions Act clarifies in sec. 6 that water boarding, extreme sleep deprivation and induced hypothermia continue to be war crimes. However other humiliating and degrading practices, as banned by the international notion of the common art. 3 of the Geneva Conventions, may be allowed as evidence by the judge of a military commission according to § 948r.

The motivation for the Military Commissions Act lies in the Hamdan v. Rumsfeld ruling by the U.S. Supreme Court on June 29th 2006, which called into question the Bush administration’s practice in detaining people arrested in Afghanistan. President Bush stated in his speech on September 6th 2006 that, as soon as Congress would pass the bill, “top terrorist” Abu Zubaydah and the 13 other men newly transferred to Guantánamo from years in secret CIA custody could “face justice”, including the possibility of execution (Amnesty International 2006).

The overall problem of military commissions is that their independence and impartiality is questionable, since their existence and rules of procedure directly depend on the U.S. secretary of defense and the judges according to § 948i and 948j Military Commissions Act consist of army staff.



Furthermore the Military Commissions Act permits the use of evidence extracted under degrading treatment. Another critical point of the Military Commissions Act is the limitation of representation by a civilian defense counsel (§ 949c). This might become a considerable disadvantage for the detainees since the military commission according to § 950i Military Commissions Act are entitled to sentence detainees to death. (Amnesty International 2006).

The US Military Commissions Act incl. a short introduction by David J. Scheffer can be found in International Legal Materials 45 (2006), pp. 1241 ff.

## **2.4. Data Protection in Times of Terrorism**

In times of terrorism states try to exchange as many data about potential terrorist acts as possible in order to prevent attacks especially against airplanes. For this reason the U.S. administration has established a Flight Data Transmission with the EU for all passengers who wish to enter the United States territory.

However in early 2006 the European Court of Justice declared the European Act for transmission of flight data as unlawful because of a breach of European institutional law. In early October 2006 the EU and the U.S. reached a compromise leading to a new treaty regarding the transfer of passengers' data for counter-terrorism purposes. The new agreement lets airlines continue to legally submit 34 pieces of data – such as passenger names, addresses, seat number, credit card and travel details as well as their no-show records – for transfer to U.S. authorities within 15 minutes of a flight's departure for the United States.

In the new agreement one can find improved guarantees for data protection though, since the U.S. Department of Homeland Security no longer will have an automatic right to pull data from European airlines' computer systems, but must ask for such information. Its U.S. Customs and Border Protection agency may disclose passenger data to other American law enforcement agencies only if they have comparable standards of data protection (CNN.com of October 6th 2006).

Other restraints to the right of privacy resulting from counter terrorism instruments are the large-scale wiretapping programs by the NSA in the U.S. or the dragnet investigations in Germany. In Art 17 ICCPR the right of privacy is stated, which is a right for every human being. However states using



widespread measures to collect data regarding potential terrorists might argue that they can restrain this right given a state of emergency according to art. 4(1) ICCPR.

## 2.5. Secret Detentions

On September 6th 2006, President Bush admitted the existence of secret prisons, and justified the past use and continued existence of secret CIA detention and interrogation program, for use against certain "high-value" detainees on the grounds of necessity. He said that it had been "necessary to move these individuals to an environment where they can be held secretly [and] questioned by experts" using unspecified "alternative" techniques to extract information from detainees allegedly resistant to interrogation (Amnesty International 2006).

The Parliamentary Assembly of the European Council put Swiss man Dick Marty in charge with an investigation to clarify whether secret detention camps existed in European countries. He found out that CIA secret detention camps existed in Romania and Poland, both countries that have signed the European Charter of Human Rights.

To familiarize with the problem of secret detention camps and impacts on human rights, please read the report of Dick Marty, presented to the Parliamentary Assembly of the Council of Europe in June 2006:  
[http://assembly.coe.int/CommitteeDocs/2006/20060606\\_Ejdoc162006PartII-FINAL.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf).

## 2.6. Security Council's Listing Procedure according to Resolution 1267

The Security Council pursuant to paragraph 6 of resolution 1267, established a special committee to list terrorists, financiers of terrorist attacks, and other individuals and entities that support, aid, and abet terrorist attacks. Although the committee has already been established before 9/11 its work increased substantially after 2001.

Individuals on this list face travel bans and the freezing of bank accounts. The decision to put a person on this list is made by states, which are member of the 1267 committee, a sub-body of the Security Council, and as such it is a political decision with juridical impacts.



The 1267 committee oversees the implementation by States of the sanctions imposed by the Security Council on individuals and entities belonging or related to the Taliban, Osama Bin Laden and the Al- Qaida organization and maintains a list of individuals and entities for this purpose.

In resolutions 1267 (1999), 1333 (2000), 1390 (2002) and 1455 (2003) the Security Council obliged all States to freeze the assets, prevent the entry into or the transit through their territories, and prevent the direct or indirect supply, sale and transfer of arms and military equipment with regard to the individuals/entities included on the list.

The list can be read via <http://www.un.org/docs/sc/committees/1267/1267ListEng.htm>.

The practice of listing a person is extremely problematic since an effective control of such a listing by a national court is not possible. However, the European Court of First Instance adopted the competence to review an Act by the European Union, which implemented the Security Council decision into European Law (EC CFI Cases T-306/01 - Ahmed Ali Yusuf). Once a person is on the list, he or she is confronted with travel bans and freezing of personal bank accounts from one day to another. The only way to persuade the Security Council members to de-list a person is the exercise of diplomatic protection by the country of origin.

An opinion by the legal advisors of the Council of Europe can be read via [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/public\\_international\\_law/texts\\_&\\_documents/2006/CAHDI%20\\_2006\\_%2022%20E%20Cameron%20report.pdf#search=%221267%20committee%20cfi%20yusuf%22](http://www.coe.int/t/e/legal_affairs/legal_co-operation/public_international_law/texts_&_documents/2006/CAHDI%20_2006_%2022%20E%20Cameron%20report.pdf#search=%221267%20committee%20cfi%20yusuf%22).

### 3. Bloc Positions

#### 3.1. United Kingdom

The United Kingdom, on the one hand, is a member of the EU and the Council of Europe and therefore is committed to the protection of human rights to the same extent as the other European states are. However the UK is the only strong ally of the U.S. having a seat in the Human Rights Council. Therefore the UK has a strong interest in avoiding a clear condemnation of the U.S. policy of counter terrorism.

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#### Human Rights Council- Topic Area A



### **3.2. Russia and China**

Russia and China will try to disguise their fight against secessionist and religious movements by labelling their political enemies as terrorists. They do not have a very strong interest in blaming the U.S. to violate human rights when fighting terrorists.

### **3.3. European States, Canada and Switzerland**

In Europe there exists a tight regime of regional human rights protection. This is mainly based on the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights and the European Court of Justice. The Council of Europe is the executive organ of the European human rights protection regime.

The EU-countries as well as Canada and Switzerland are very concerned about what happens in Guantanamo and about the Military Commissions Act, as well as the secret prisons on European soil. However it is important to notice that countries from Eastern Europe are strongly allied with the U.S. and therefore try to circumvent discussions about secret detention on their soil.

### **3.4. States with Islamic Majority**

The Islamic States, on the one hand, have an interest to condemn all practices of counter terrorism which prohibit the free expression of religion and which put all Muslims in a situation of permanent suspects. They are also tempted to blame Israel of human rights violations, such as the construction of the anti-terror-fence, as well as the “undistinguished” attacks in Lebanon against “civilians” to fight the Hizbullah. On the other hand they are not keen to see themselves severely criticized for human rights violations in their own countries.

### **3.5. Others**

Other states like African and South-American states mostly will try to criticize the U.S. for the counter terrorism practices, but sometimes have strong economic and political relations with the U.S., which might inhibit them to blame the U.S. openly of grave human rights violations.



#### 4. Questions a Resolution should Answer

- Which legal regime should be applied to detainees who are suspected to be terrorists?
- Does the U.S. Military Commissions Act constitute an advance or a step backwards when it comes to the human rights of detainees?
- To which extent – if at all – is torture tolerable to gain important information from detainees to prevent future terrorist attacks?
- Do the secret prisons in Europe constitute a grave breach of international humanitarian law and human rights law? How can secret detention be avoided?
- To which extent are restraints for data protection tolerable in times of terrorism?
- Should the Security Council refrain from continuing its listing-procedure? How can the human rights of a person, once listed, be effectively protected?

#### 5. Suggestions for Further Research

It is expected that participants have read the materials proposed in the main text above.

Please check the homepages of Amnesty International und Human Rights Watch. They both have of vast amount of articles regarding human rights and counter terrorism. Please also visit the official homepage of the HRC.

<http://www.un.org/apps/news/infocusRel.asp?infocusID=114&Body=human%20rights%20council&Body1=>

Participants are also required to familiarize themselves with the most important international treaties on human rights such as the International Convention against Torture, the Geneva Conventions and their two Additional Protocols, the International Covenant on Civil and Political Rights as well as UNCharter provisions regarding human rights.

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#### Human Rights Council- Topic Area A



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For preparation it is extremely helpful to read the chapters dealing with the protection of individuals and human rights of: **Ian Brownlie, Principles of Public International Law, Oxford University Press, Sixth Edition.**

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