Counter-Terrorism Measures And Human Rights of United States, United Kingdom, and European Union: A Comparative Study

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要　旨

本稿の目的は、テロ対策における人権侵害の問題に関して各国においてどのような問題が生じており、それが国際法（特に国際人権法・国際人道法）の観点からどのように評価しうるかを検討することで、テロ対策における安全保障と人権保障の均衡点を探ろうとするものである。具体的には、テロ対策立法での進展が見られる米国・EU（欧州連合）・英国におけるテロ対策立法の概観、その実施における人権侵害に関する事例を検討する。

米国でのテロ対策立法は、テロ行為の被疑者とされる者が公正な裁判を受ける権利や人身保護令状（*habeas corpus*）を要求する権利などを侵害するとの批判がある。また、これに関連してキューバにあるアメリカ軍グアンタナモ基地でのテロ被疑者の拘禁の問題が存在する。EU では、制裁措置（リスト化）による人権侵害の可能性が指摘される。これは、国連安全保障理事会決議の司法審査可能性と相俟って大きな議論となっている。英国ではテロリストに対する訴追前勾留期間の延長や、テロ容疑者の自由を一部制限できる制度が人権保障の観点から議論される。これらの実行を関連する事例を検討しながら、テロ対策における安全保障と人権保障の均衡点を探る。

Keywords: Counter-terrorism measures, International Human Rights, International Humanitarian Law, United States, United Kingdom, European Union, Right to *Habeas Corpus*, Right to Privacy, Right to Freedom Movement, Right to Property, and Right to Liberty and Security of Person, Right to Fair Hearing, Jurisprudence.

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I. Introduction

The issue of protecting human rights while fighting terrorism has always been debated especially after the terrorist attacks on 9 September 2001 (hereinafter 9/11). Soon after 9/11, many countries enacted anti-terrorism laws under the name of "fight against terrorism". In implementing such measures, however, many people became aware of the possibility of human rights abuse. But, on the other hand, Human Rights' observance in counter-terrorism measures, in some cases, would jeopardize the effectiveness of counter-terrorism measures.

The present article will examine human rights problems which appear in the context of counter-terrorism measures in United States (US), United Kingdom (UK), and European Union (EU). In examining the human rights problems in counter-terrorism measures, it is necessary and important to examine the practice of these two countries and one international organization. This is because of the different approaches of the problems. The present article will put emphasis on legal basis and practice of counter-terrorism measures from the perspective of international and regional human rights regimes.

Based on the viewpoint above, US counter-terrorism measures will be examined in Chapter II. It aims at examining US legal basis of fight against terrorism. Further, it will examine human rights and international humanitarian problems of the US counter-terrorism measures, especially from the perspectives

of International Covenant of Civil and Political Rights (ICCPR) and the four Geneva Conventions of 1949. Chapter III and IV deal with the UK and EU counter-terrorism measures and its impacts on human rights. Attention will be paid to the role of judiciary, as well as the regional practices (European Court of Human Rights (ECHR) and European Court of Justice (ECJ)), including the individual communication under the UN Human Rights Committee. Some cases will be discussed along with the human rights problems of each circumstance.

II. US Counter-Terrorism Measures and Human Rights

2.1. Introduction

Soon after 9/11, the US government enacted a series of counter-terrorism acts: the Military Force Authorization (MFA), USA Patriot Act 2001, Military Order, the Detainee Treatment Act 2005, and the Military Commission Act 2006. However, the implementation of these legislations raised variety of legal issues. They were criticized and subject to litigation before the US Supreme Court. We will examine human rights problems of these acts in question. Through the examination of US counter-terrorism measures, a comprehensive view will be obtained in understanding the role of human rights while fighting terrorism. In the next section, an overall examination of US legal basis of counter-terrorist measures is conducted. Through the examination, some human rights problems such as right to *habeas corpus* and right to petition are discussed alongside.

2.2. Legal Framework of US Counter-Terrorism

2.2.1. The Military Force Authorization (MFA) & USA Patriot Act 2001

The 9/11 attack drove US to claim its right to pre-emptive self-defense[1] to find, stop, and defeat every terrorist group worldwide.[2] The legal step of the US counter-terrorism measures can be seen in the enactment of the Military Force Authorization (MFA)[3] on 18 September 2001. The MFA authorizes the President to use all necessary force against any organization or States which found involved in planning or committing a terrorist attack towards US. The MFA is applicable to all persons, regardless of US or non-US citizens.[4]

Subsequently, US government enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act 2001: USA Patriot Act 2001 on October 20.[5] The Act is divided into 10 titles, aiming at strengthening the government ability in combating terrorism.

However, the USA Patriot Act 2001 received criticisms on the following points:

i) Seizure the property and funds of foreign national suspected terrorists or targeted listing system (Section 106).[6]

ii) Shared information of person among government agencies (Section 201).

iii) Interceptions of wire, oral and electronic communication relating to terrorism (Section 203).[7]

iv) Accessed to individual records on whether the person in question is engaged in any criminal or intelligence activities (Section 505).[8]

The above-mentioned actions can be executed without any court order, notification to the person in question, or sunset clause.[9] These acts may have some implications to the enjoyment of the right to privacy of the US citizen which is secured in the Fourth Amendment of the US Constitution.[10] Section 505 of the US Patriot Act was challenged in the case of *Doe v. Holder*.[11] Under this Section, the Federal Bureau Investigation (FBI) is allowed to use the National Security Letter (NSL) to demand personal customer records from Internet service provider without any prior court approval. In the present case, the plaintiff, John Doe (an Internet service provider), American Civil Liberties Union, And American Civil Liberties Union Foundation filed a lawsuit before the US District Court of the Southern District of New York in April 2004. They challenged the FBI's authority to demand records through NSL. John Doe had been served with an NSL and prohibited from disclosing to anyone, that FBI had demanded records. In September 2004 District Court ruled that the NSL is unconstitutional under the First and Fourth Amendment of US Constitution. As a result of a settlement of the case, the FBI's lift the gag order on John Doe and first recipient to challenge the records demand in August 2010.[12]

The UN Human Rights Committee expressed the concern of the Act in its Concluding Observations of the US Report in 2006.[13] The Committee recommended that US should review Section 213, 215, and 505 of the USA Patriot Act 2001 to ensure full compatibility with Article 17 of ICCPR.[14] The Committee recalled that US government should ensure that any infringement on individual's rights to privacy is duly authorized by law.[15]

As a consequence of the MFA and the USA Patriot Act 2001, these domestic laws can be applied to the suspected terrorist regardless of their nationality. It consequently brought the infringement of right to privacy. The US government was criticism from both national and international human rights standards. A similar argument between human rights and national security can also be seen in the discussion of Military Order, the Detainee Act 2005, and the Military Commission Act 2006.

2.2.2. Military Order, the Detainee Treatment Act 2005 and the Military Commission Act 2006

The next executive legislation was the Military Order on 14 September 2001.[16] The Military Order authorized the establishment of military commissions. Persons subject to the Commission have no right to the court system, including a writ of *habeas corpus*.[17] Some legal commentators point out this legislation does not take the US Constitution on *habeas corpus* into account.[18]

In addition, the Military Commission has the authority to prosecute non-U.S. citizen:[19]

i) Present or former member of the terrorist organization Al-Qaeda.

ii) Those who engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation thereof that have as their aim injure or adverse effect on the US citizens, national security, foreign policy, or economy.

iii) Those who knowingly harbored one or more individuals in the first category.

The US Supreme Court declared the invalidity of such restriction to *habeas corpus* in the case of *Rasul v. Bush*.[20] In this case, the plaintiffs (two Australian citizens and 12 Kuwaitis) were captured abroad during the war. They filed suits under the federal law, challenging legality of their detention.

The District Court construed the petitions as *habeas corpus*, dismissing the application. The Court indicated that any aliens detained outside the sovereign territory of the US could not invoke a *habeas corpus* petition.[21] The Court of Appeals for District Colombia Circuit affirmed that the privilege of litigation before US courts did not extent to aliens in military custody.[22] In contrast, the US Supreme Court reversed the Court of Appeal decision. The Court held that no distinction between the US citizens and aliens is held in federal custody. The application of the Constitution to persons detained at the base was consistent with the historical reach of the writ of *habeas corpus*.[23]

In response to *Rasul v. Bush*, the Congress enacted the Detainee Treatment Act (DTA 2005) in December 2005. The DTA 2005 prevented Guantanamo Bay detainees from bringing any future *habeas corpus*. However, in *Hamdan v. Rumsfeld*,[24] the Supreme Court once again declared the invalidity of the Act. In this case, the applicant Hamdan was charged in July 2004 with conspiracy to attack civilians and commit acts of terrorism. He was held at Guantanamo Bay from 2002 to late 2008. In his petitions before the Military Commission, he asserted that the Commission lack authority to try him, under the following reasons:

i) Neither congressional Act nor the law of war supports trial by this Commission for conspiracy,

which is not a war crime.

ii) The procedures adopted to try him violate basic rules of military and international law, including the principle of equality of arms.

The Court concluded;

i) The procedures adopted for Military Commission violated the basic tenets of Uniform Code of Military Justice (UCMJ) and Common Article 3 of the Third Geneva Convention.

ii) Hamdan is entitled to the full protections of the Third Geneva Convention until adjudged, in compliance with the Treaty, not to be a prisoner of war.

In order to keep the restriction on the right to *habeas corpus*, the US government enacted the Military Commission Act (MCA) 2006.[25] It confirmed the DTA 2005 with regard to the refusal of the right of *habeas corpus*. The MCA 2006 is applicable to non-citizens in US custody anywhere in the world.[26] Moreover, under the Act, the Military Commission can prosecute individuals that have been generally handled by ordinary courts.[27]

The controversial on the right to *habeas corpus* ended in the Supreme Court's decision in the case of *Boumediene v. Bush*.[28] The case was filed on behalf of Lakhdar Boumediene, a naturalized citizen of Bosnia and Herzegovina and detained in Guantanamo Bay. The case was combined with *habeas* petition of *Al Odah v. United States*.[29] They challenged the legality of the detention and the constitutionality of the Military Commission Act 2006. In the judgment, the Supreme Court maintained that the prisoners had a right of *habeas corpus* under the US Constitution and the Military Commission Act was unconstitutional in that it restricted the right.[30] The Court indicated that, US had a complete jurisdiction and control over Guantanamo, while Cuba retained ultimate sovereignty over this territory. The Court further held that the foreign detainees in Guantanamo were entitled to the right of *habeas corpus*.[31]

As a consequence of a series of decisions on the legality of detention and the right to *habeas corpus*, the US government replaced the Military Commission Act 2006 in a new Military Commission Act 2009 in October 2009.[32] The new Act guaranteed defendants' rights before military commissions.[33] The recent Act was revised the MCA 2006, but the Act still considers military commissions to be "regularly constituted courts" for the purposes of Common Article 3 of the Geneva Conventions.[34] In November 2009, the Department of Justice and State announced that they would bring to justice some terrorist cases to both federal courts and reformed military commission, making case by case decisions for each detainee.[35] This decision still leaves big question for public. As to date, there is no case law that challenges the new Act to the

Supreme Court on the right to *habeas corpus*.

In addition, another controversy on the US counter-terrorism measures can also be seen in the case of *Hamdi v. Rumsfeld*.[36] The case demonstrated the fact that US counter-terrorism Acts can be extended to their citizens. In this case, the applicant was an American citizen. He was arrested in Afghanistan by NATO and turned over to the US military base. The government contended that Hamdi was an enemy combatant. The Government could therefore detain him indefinitely, without access to counsel, and without any formal charge or proceedings.[37] In contrast, the Supreme Court held that a US citizen being detained in the United States as an enemy combatant had the right of *habeas corpus*.[38] The Court ruled that, the US government could not hold indefinitely nor deny legal access to detainees of U.S citizens.[39]

In discussing the legal framework of US counter-terrorism, it is clearly that the US counter-terrorism Acts places much more emphasis on national security considerations than human rights. As noted above, despite the Supreme Court decisions in correcting the executive power, the question of violation of individual rights still remains unresolved. The right to privacy and the right to *habeas corpus* were main points in relation to human rights protection within US counter-terrorism measures. In order to understand more in depth, it is necessary to examine the legal problems arising out of circumstances of Guantanamo and detainees therein.

2.3. US Counter-Terrorism

2.3.1. Status of Guantanamo

The legal status Guantanamo is one of the most crucial issues within the US counter-terrorism practice. This is because of the unique legal status of the territory: US government has detained the foreign capturer at the base since 9/11.[40] The critical legal question remains unresolved especially the problem of jurisdiction and that of attribution of responsibility for their human rights violations within the territory.[41] For that purpose, we shall firstly see the historical contexts of the territory. Based on the 1903 Cuban-American Treaty,[42] Cuba agreed to rent the territory which had controlled Cuba since the Spanish-American War as a condition for securing independence from the US. The Treaty declared that Cuba retained "ultimate sovereignty" over Guantanamo.[43] However, the treaty also stipulated the US exercised "complete jurisdiction and control."[44] The term "complete" was argued by legal scholars with several views.[45] The meaning of the term was not clear whether "complete" is equal to US jurisdiction and its sovereignty.[46]

According to the recent view, the word "complete" suggests "a special sort of control and

jurisdiction, a view consistent with the interpretation that US is temporary sovereign for duration of the lease."[47] On the other hand, after the Cuban Revolution in 1959, Cuba wanted the US to leave Guantanamo Bay and began to insist that the lease be illegal and unfair. Nonetheless, Cuba has consistently behaved passively toward the territory as evidence by its policy of not prioritizing Guantanamo's recovery through legal means. Cuba has never brought the dispute before any international tribunals or arbitrations.[48] The Inter-American Commission indicated in its precautionary measures on the basis that the detainees at Guantanamo "remain wholly within the authority and control of US Government".[49]

The legal status of Guantanamo became important in term of US counter-terrorism measures, who especially in relation to the protection of detainees (suspected terrorists). The problems of applicability of US law and the possibility of legal challenge for the detainees were answered in the judgment of US Supreme Court in the case of *Rasul*[50] and *Boumediene.*[51] In those cases, the Court decided that the US Courts had jurisdiction to hear the claims for *habeas corpus* filed by detainees in Guantanamo, by virtue of the fact that they are being held by the State.

From the above, we can say the following things. The US does not have complete sovereignty over the Guantanamo, but it has a *de facto* sovereignty since US is exercising effective control over the territory. Even though Cuba has the ultimate sovereignty, the US government has the responsibility for what happened in Guantanamo, based on *de facto* territorial jurisdiction *(ratione loci).* Inter-American Commission on Human Rights (Precautionary Measures in Guantanamo Bay, Cuba, Inter-American Commission on Human Rights, March 13, 2002), and US Supreme Court (Case of *Rasul and Boumediene*) are concordance on this point in that US has a jurisdiction over the area. Next legal question would be what kind of protection the detainees in Guantanamo are given, based on what rules, together with the appropriateness of US policy for detainees.

2.3.2. Status of detainees in Guantanamo

According to the US counter-terrorism terms, the status of the detainees is divided into two categories: Taliban and Al-Qaeda detainees. However, both of them are labeled as "unlawful enemy combatant" and they are not protected under International Humanitarian Law. This unprotected situation of the detainees raise much debate on the legitimacy of US counter-terrorism measures. The US government defines the term as follows:

i) A person who has engaged in hostilities or who has purposefully and materially supported

hostilities against the Unites States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, Al-Qaida or associated forces); or,

ii) A person who, before, on, or after the date of the enactment of the Military Commission Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under authority of the President or the Secretary of Defense.

The term does not appear in the four Geneva Conventions. But the term has been used for the past century in legal literature, military manual, and case law.[52] The US government states that the conflict between US and Al-Qaida/Taliban does not fall within the category provided in the Geneva Conventions, denying the protection provided under the Third Geneva Convention.[53] The US legal rationale for denying the detainees of war status under the Third Geneva Convention is not clear and its explanation changed over time.[54]

Article 4A (1) of the Third Geneva Convention provides the legal status of Prisoner of Wars (POWs). According to it, POWs are the captured members of the armed forces of a party to the conflict, as well as members of militias or volunteer corps past of such armed forces. In addition, Article 4A (2) stipulates that member of other militia and members of other volunteer corps who have fallen into the hands of the enemy are POWs if the following conditions are met:

i) They are commanded by a person responsible for his subordinate.

ii) They have a fixed distinctive sign.

iii) They carry arms openly.

iv) They conduct their operations in accordance with the laws of war.

According to the Article 4A (1) of the Third Geneva Convention, the Taliban was entitled for protection under the Conventions. However, the US government contended that Taliban did not fulfill the criteria as provided in Article 4A (2) of the Third Geneva Convention.[55] Therefore, the US government says that Taliban detainees are not protected by the Third Geneva Conventions.[56] Later, the US government announced that the Third Geneva Convention was applicable to members of Taliban since there was an armed conflict between two parties to the Convention, the US and Afghanistan.[57] This shift position brought legal consequence to the Taliban. Under the Convention, the US government shall protect and treat them as POWs.

The US distinction between unlawful enemy combatant status and the POWs is in question from the perspectives of International Humanitarian Law. Such distinction was rejected in the case of *Hamdan v.*

Rumsfeld.[58] The Supreme Court held that the US government's effort to separate the Taliban from Al Qaida was not supported by the Geneva Conventions.[59] The Court further maintained that the POWs status of the detainees could be denied only through a competent tribunal decision. The presidential determination and the Combatant Status Review Tribunal (CSRT)[60] were not sufficient for the purposes.[61]

In conclusion, the US Supreme Court corrected the executive rule on the status of detainees in Guantanamo. The new administration policy confirmed that some suspected terrorists have been trying under domestic court, and some are not decided yet.[62] It indicated that struggling between human rights and national security considerations will keep on US counter-terrorism measures.[63] The next section will look into human rights problems in US counter-terrorism measures.

2.3.3. Human Rights Problems

As noted above, the US legal framework and practice in counter-terrorism measures does not respect International Human Rights Law and International Humanitarian Law. The detention of suspected terrorist in Guantanamo would be a typical example. In order to challenge the legitimacy of the detention before the US Court, their human rights are debated in that connection, especially in relation with *habeas corpus.* They are right to fair trial, and the right to liberty and security of person. By examining human rights problems through the international human rights norms, a brief evaluation of US counter-terrorism is conducted here.

As a normative content of international human rights law, the right to fair trial is stated in Article 14 of ICCPR. The right to a fair trial and public hearing before a tribunal in all suits at law and criminal matters pursuant to Article 14 (1) is the core of due process of law.[64] All of the remaining provisions in Article 14 (2) to (7) and Article 15 are specific formulations of the fair trial in criminal cases. Article 14 (1) contains an institutional guarantee that requires the State parties to take extensive and positive measures.[65] The tribunal must be set up by law, and must be independence and impartial. The State parties provide them with the competence to heard and decide on criminal charges and on rights and obligations in suits at law. Such hearing must be fair and public. All decisions in criminal and civil matters must be pronounced publicly.[66]

The right to liberty and security of person is protected under Article 9 of the ICCPR. Under the article, procedural guarantees on legality, prohibition of arbitrariness, right to information, *habeas corpus,* and compensation was applicable.[67] Article 9 (1) guarantees liberty of person together with the right to security

of person. No one shall be subjected to arbitrary arrest or detention, unless provided by law. In case of deprivation of liberty is permissible, States obligate to define precisely the case through independence judiciary. In its General Comments 8 (1982), the Committee states that the right to liberty and security of person has a relatively broad scope of applicability.[68] It has not recognized any form of permissible deprivations of liberty beyond the cases of arrest and detention.[69] Whether deprivation of personal liberty is permissible in the case must be evaluated against the principle of legality and the prohibition of arbitrariness.[70]

Although the right to liberty and security of person may be restricted in the case of a public emergency within the meaning of Article 4 of the ICCPR, UN Human Rights Committee took a view that the requirement of court review over lawfulness of detention (right to *habeas corpus*) forms a part of non-derogable element under Article 9 (1) of the Covenant.[71] In addition, the UN Working Group on Arbitrary Detention found that the preventive detention of suspected terrorists for prolonged period of time without any criminal charge and judicial review of their detention confers an arbitrary character on the detention.[72] Furthermore, The Group asserted that under Article 9 (4) of the ICCPR, the US government had to provide lawfulness of detention reviewed by an independence court.[73]

Seen from international norms, the US government practice to try suspected terrorist detained in Guantanamo violates the minimum standards of equal access to justice and fair trial. As a fact, the US is a party to the ICCPR and the Geneva Conventions of 1949. As a consequence, the US counter-terrorism measures shall comply with the international provisions.

Based on the examination above, we can say that there are human rights violations in the US government counter-terrorism measures. In examining the right to fair trial and the right to liberty and security of persons, the government action would be considered to be unconstitutional and it would be not compatible with human rights standards. Even though the Supreme Court judgments corrected the acts, the substantial points still leave behind.

2.4. Conclusion

The discussion above shows that there are human rights problems in the legal practices of US counter-terrorism measures. In the analysis of the US counter-terrorism measures, the US Supreme Court decisions made clear that a right to *habeas corpus* was fundamental rights, even though the person in question is a suspected terrorist. This has been illustrated in several cases in particularly in the case of *Rasul* and

Hamdan.[74] Nevertheless, the discussions in the US Supreme Court also demonstrated that the role of the Supreme Court is limited only in the procedural aspects rather than substantive matters.[75]

Furthermore, the US policy on the treatment of detainees in Guantanamo has so much legal problems. Firstly, the term "unlawful enemy combatant" raises many problems of International Humanitarian Law and may not meet the requirements in the Third Geneva Conventions. Secondly, from the international human rights perspectives, US counter-terrorism practices might be considered as not respecting the basic human right of detainees: the right to security and liberty of person and right to fair trial. Thus, the Obama's administration enacted the New Military Commissions Act 2009, aiming as reformed military commissions and civilian courts.[76] However, this policy still focuses primarily on procedural rather than on substantive change in counter-terrorism measures and practices.[77]

III. United Kingdom Counter-Terrorism Measures and Human Rights

3.1. Introduction

United Kingdom is recognized as an experienced country among EU members in fighting against terrorism far before 9/11. There are three phases of the UK's legislative action in responding to terrorism.[78] The first one is based on the experiences in colonial conflict. The second one corresponds with unification of Ireland. The third phase emerged in response against international terrorism. In 2003 and most recently updated in 2009, UK adopted a Comprehensive Strategy to Counter the Threat or "CONTEST."[79] The terrorist attack in July 2005 in London, together with the impact of the 9/11, immediately placed the UK government's commitment to tighten national security. Since this attack, the UK counter-terrorism responses have tended to be more proactive.[80]

3.2. Legal Framework of United Kingdom Counter-Terrorism

The UK legislative responses to the threat of terrorism have been by way of temporary and fragmented measures.[81] The UK tends to treat terrorism as temporary responses to particular situations. The UK counter-terrorism scheme under the Prevention of Terrorism (Temporary Provisions) Act 1974 introduced special powers of arrest of 48 hours detention, dealing with terrorism problems in the Northern Ireland.[82] In 2000, the UK Government adopted a broad definition on terrorism with the introduction of the Terrorism Act 2000 (TA). The TA relied on ordinary criminal approach and aimed to modernize anti-terrorism legislation and applies it to the whole of UK, rather than just Northern Ireland.[83] The TA introduced the arrest and

pre-charge detention. 7 days of detention without judicial approval is allowed for the police. Following the 9/11, UK enacted several laws on counter-terrorism actions. They are the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), the Prevention on Terrorism Act 2005 (PTA), the Terrorism Act 2006 (TA), and the Counter-Terrorism Act 2008 (CTA).

ATCSA 2001 takes as preventive measures of suspected international terrorists. Under the Act, the indefinite detention regime was introduced. The UK government aimed to enable to detain non-nationals who where suspected of being terrorist or who were deemed to pose a threat to the UK as potential terrorists.[84] However, the House of Lords declared that that regime was incompatible with the right to liberty and security of person and non-discrimination in 2004.[85] As a consequence, the regime was abolished by the PTA 2005. As an alternative, the PTA 2005 introduced the system of control orders. The PTA 2005 was replaced by the enactment of the Terrorist Act in 2006 (TA). The TA introduced two new and very broad definitions offences of preparation of terrorist act [86] and the incitement offences. It also extended the period of detention from 14 days to 28 days. The incitement offence is aimed at incitement of specific and serious acts of violence. In *R v. El-Faisal*[87] the Court of Appeal upheld the convictions of the applicant for soliciting murder, for having made audio tapes urging Muslims to fight and kill among others unbelievers.[88] The CTA 2008 deepens and widens existing legal measures on counter-terrorism, *inter alia*, post-charge questioning, longer terrorism sentences, interception, asset seizing, evidence gathering, DNA, and finger prints.[89]

The UK legal framework on counter-terrorism enacted a series of Acts. The Acts ruled certain and temporary measures in particular situation. Indeed, the substantial of the Acts still stick on the newer Acts. Further explanation will be concluded along with the topic.

3.3. United Kingdom Human Rights Problems within Counter-Terrorism Measures

3.3.1. Arrest and Pre-Charge Detention

Arrest and Pre-charge detention refers to period of time that a terrorist can be held and questioned by police, prior to be charge with an offence.[90] The UK counter-terrorism shows that arrest and the pre-charge detention of person are most well developed in UK.[91] From 2000 to 2008, the duration time of arrest and pre-charge detention increased significantly from 48 hours to be 7 days by TA 2000, from 7 days to be 14 days by the Criminal Justice Act 2003, and from 14 days to be 28 days by the TA 2006.

However, the measures were challenged by several legal actions before the UK House of Lords. One of the latest case is *A & Others v. Secretary of State for the Home Department.*[92] In this case, the

applicants were eleven foreign nationals and they challenged the legality of their detention. They claimed that the detentions were contrary to the European Convention on Human Rights (Article 3,[93] Article 13[94] Article 5 paragraph 1,[95] Article 14,[96] and Article 5 paragraph 5.[97] They also claimed that the UK's derogation from the Convention was invalid. In December 2004, the House of Lords declared that Section 23 of the ATCS Act was incompatible with Article 5 paragraph 1 and Article 14 of the European Convention on Human Rights.[98] To response the House of Lord decision, the detention provisions in the ATCS Act were repealed under Section 16 (2) (a) of the PTA 2005. However, the substantial provision of the arrest and pre-charge detention can be seen on Control Orders under the PTA 2005, which was enacted later. Based on the case, the UK executive power always wants to search a new method to restrict the suspected terrorist movement within newer enacted Act.

3.3.2. Control Order

The system of Control Order was introduced under PTA 2005. The orders can be imposed on both UK and foreign citizens whom the authorities are unwilling to prosecute, or whom the authorities say they can not prosecute. In case of foreign nationals, they can not be deported.[99] The measure places one or more obligations upon an individual in order to prevent, restrict or disrupt involvement in terrorism related activity, including a 18 hours curfew, restriction on the use of communication equipment, restriction on the people that individual can associated with, travel restrictions, electric tagging, the suspect house can be subject to search at any time.[100]

One of the latest important decisions on the control orders is *AE and AF v. Secretary of State for Home Department.*[101] In this case, the control order was disputed by the affected appellants: two suspected terrorists AE and AF. They challenged their wrongfully imposed orders against UK government. The House of Lords held that using secret evidence to impose control order violated the right to fair hearing under Article 6 of the European Convention on Human Rights.[102]

Based on *AE and AF v. Secretary of State for Home Department* case, the UK government will seek to impose a newer version of control orders regime in a newer Act in different terms.[103] According to the latest UK's legal news, control orders will replaced by the Terrorism Prevention and Investigation Measures Bill.[104] The expected Bill is scheduled on the Public Bill Committee Stage Report on 5 September 2011.[105] It strongly indicated that the substantive of control orders will remain in the successor Act.

3.4. Conclusion

Through the examination of the UK counter-terrorism framework and practice, it can be conclude that there is problem in the UK counter-terrorism measures. The problem lies within the domestic legal framework and practices, particularly on the arrest and pre-charge detention and the control orders from human rights view. The House of Lords disclosed that measures were contrary to the right to liberty and security of person and the right to fair trial of Article 5 and Article 6 of the European Convention on Human Rights. Overall, the UK legal frameworks in combating terrorism demonstrated its temporary and have fragmented measures.[106] The arrest and pre-charge detention and control orders provisions prevail from earlier Act to the newest Act. The first provision introduced since 1974 in Prevention of Terrorism (Temporary Provision) Act and the second one in 2005 of the PTA, but it is still maintained in the Act enacted later.

IV. European Union Counter-Terrorism Measures and Human Rights

4.1. Introduction

In this section, we will discuss the institutional development of the EU counter-terrorism measures especially after 9/11. A critical review of EU Regulation on listing procedure with human rights concerns will follow in the next section. The most notable questions on EC Regulation were dealt within human rights sphere, as well as within UN Security Council. In examining human rights problems of EC Regulation on listing system, we should first confirm the UN Charter. Article 25 of the Charter provides that the UN member States have an obligation to accept and carry out the decisions of the Security Council. In addition, Article 103 of the UN Charter provides the superiority of the obligations under the Charter to other duties. In that perceptive, Security Council Resolutions should be implemented by the UN member States, including EU member States as members States of the UN. In order to implement the UN Security Council Resolution on listing procedure, the EU member States apply the Resolutions under the EC Regulation. However, in case the implementations of listing procedure above, there might be the possibility of human rights violation. If the Security Council decisions are not compatible with human rights, do the member States still have the obligation to carry out it? This is a very important question and shall be discussed under the topic of "clash of duties". In this respect, a possibility of judicial review of Security Council Resolutions would be in debate. We will examine those points in the next sections through the examination of cases.

In response to 9/11, the EU adopted a range of measures against terrorism. On 20 September 2001, the EU Council adopted a first comprehensive EU Action Plan to Fight Terrorism.[107] The Action Plan stipulated; *inter alia*, judicial cooperation between police and intelligence services, combating financial terrorism, and measures at borders. On 13 June 2002 it was followed by the adoption of Council Framework Decisions on Combating Terrorism to improve legal harmonization.[108] It defined the term of terrorist offences in EU law, and facilitated police and judicial co-operation through the European Arrest Warrant.[109]

In the face of the terrorist attack in Madrid in March 2004, EU Council adopted a Declaration on Combating Terrorism on March 25, 2004.[110] The EU Council endorsed the revised EU Action Plan on Combating Terrorism on June 18, 2004.[111] In the aftermath of the London bombing in July 2005, EU Council adopted a series of measures as an urgent matter at Extraordinary Council Meeting, Justice and Home Affairs of the Minister of Interior of Member States.[112] Nevertheless, such EU response in fighting international terrorism was criticized as a paper tiger.[113] Comparatively, little attention has been paid to the implementation and governance process in this policy.[114] Some scholars have opinions that this condition is caused by the difficulties of coordinating the wide range of actors and institutions that form the EU's counter-terrorism network.[115]

In order to combat the international terrorism after 9/11, EU counter-terrorism showed some development in institutional and cooperation among EU members States. A consequence of the cooperation, EU faces problem on reviewing EC Regulation on listing procedure from human rights perspective.

4.2. Case Analysis of European Union Counter-Terrorism Measures and Human Rights

To implement the UN Security Council Resolutions on international cooperation against terrorism[116] in regional level, EU Council enacted EC Regulation[117] on the listing system.[118] The system enables freezing of assets and blockade of financial transactions of individuals or entities whose names were put on the consolidated list. The impacts of the listing system on human rights are always discussed. These impacts will be examined in the following landmark cases: *Sayadi v. Belgium* (UN Human Rights Committee),[119] *Kadi & Al Barakaat Foundation v. Council of the European Union and Commission of the European Communities* (European Court of Justice),[120] and *Bosphorus v. Ireland.*(European Court of Human Rights).[121]

4.2.1. Sayadi v. Belgium

The case of *Sayadi v. Belgium*[122] was examined before the Human Rights Committee under the Optional Protocol of the ICCPR and it concerned the allegation of violation human rights in the Listing Procedure in Belgium.

The origin of the communication lies in an investigation against the authors based on the Public Prosecutor Office initiative.[123] Afterwards, Belgian government provided their information to the UN Sanction Committee.[124] As a result, the names of the authors were placed on the list appended to the Security Council Resolution on 23 January 2003, as well as the EU Council Regulation and the Belgian Minister Order. Following the decision, all of their financial assets were frozen and they were subject to travel ban. In response, the authors submitted several requests to remove their names from the list in Belgium.[125] Later, they obtained an order to have their removed from the Sanction Committee's list from the Brussels Court of First Instance.[126] At the time of the communication, no decision on the matter had been taken by the Sanctions Committee.

4.2.1.1. The Authors' Claims before the UN HR Committee: Violation of Human Rights

The authors argued that they had no effective remedy in the criminal court. They also maintained that the Belgian government contravened the order to initiate the delisting procedure delivered by the Belgian Courts on 11 February 2005.[127] According to them, the situation a clear violation of the right to effective remedy under Article 2, paragraph 3 of the ICCPR. Furthermore, the authors claimed that they could not travel freely to outside Belgium. As a consequence, they could not take up an offer of employment with the Red Crescent in Qatar. Therefore, according to them, this is the direct violation of Article 12 of the Covenant, which dealt with the right to free movement.[128] They further asserted the violation of Article 14, paragraph 1, since the determination of listing was made in absence of any decisions before the courts.[129] In respect to the presumption of innocence, they claimed the violation thereof because their names were placed on the Sanction Committee list without any notifications.[130] In their view, this is an infringement of the principle of presumption of innocence enumerated in Article 14, paragraph 2 of the Covenant.[131]

In this case, the authors claimed that the Belgian government violated several their fundamental rights: the rights to effective remedy, the right to free movement, the right due process in judicial, and the right to presumption of innocent of the ICCPR.

4.2.1.2. Response of the Belgian Government

In reply to the claims of the authors, the Belgian government justified its action, provoking the UN Security Council Resolution. According to Belgium, the communication is inadmissible within the meaning of Article 5, paragraph 2 of the Optional Protocol.[132] The Belgian government added that the authors were not subject to its jurisdiction within the meaning of Article 1 of the Optional Protocol.[133] The rules on communications preclude the authors from disputing United Nations rules concerning the fight against terrorism before the Committee.[134] The same rules prevent the authors from challenging measures taken by the State party to implement its obligations under the Charter of the United Nations.[135] As for the alleged violations of the Covenant, the Belgian government claimed that its role was limited to relaying information about the authors to the Sanctions Committee.[136] The State party has taken all appropriate measures within its power to have their names de-listed, consistent with respect for their fundamental rights as well as United Nations rules.[137]

The Belgian government invoked the UN Security Council Resolution for justifying its action. It also maintained that the communication outside of the meaning of Article 1, Article 5, paragraph 2 of the Optional Protocol of the ICCPR. Further, the Belgian government asserted that its role only to inform the author's name to the Sanction Committee, as well as, it has tried its best to de-list the authors' names.

4.2.1.3. Committee's Observation on the Admissibility

The Committee considered that the admissibility of the Communication based on Article 1 of the Optional Protocol.[138] The provision recognizes the competence of the Committee to receive and examine communication from individuals who claim to be victims of the a violation of any rights set forth in the Covenant, and who are subject to the jurisdiction of the state party regardless of the source of the obligations. The Committee did not address the question whether it could consider alleged violations of the Charter of the United Nations (Article 103), or United Nations rules concerning the fight against terrorism.[139]

The Committee further recalled that it could not consider a communication if the same matter was not being examined under another procedure of international investigation or settlement.

Consequently, it was not prohibited from examining the communication in accordance with the provisions of Article 5, paragraph 2 (a).[140] As to the authors claims under Article 2, paragraph 3, Article 12, Article 14, paragraph 1, 2, and 3, Article 15 and 17 of the Covenant, the Committee found that the facts

submitted by the authors were closely bound up with the substance of the case and should be considered on the merits.[141] As to the claims under Articles 18, 22, 26 and 27 of the Covenant, the Committee found that the authors had not sufficiently substantiated their complaints for the purposes of admissibility.[142] The Committee therefore concluded that the communication was admissible under Article 2, paragraph 3, Article 12, Article 14, paragraph 1, 2, and 3, and Articles 15 and 17 of the Covenant.[143]

4.1.2.4. The Committee's Consideration on the Merits

The Human Rights Committee considered the communication in the light of all the information supplied to it by the parties under Article 5, paragraph 1 of the Optional Protocol.[144] According to the Belgian government, it acted on the basis of UN Security Council Resolution. However, the Committee did not share the view and maintained that it could receive the communication dealing with human rights claims.[145] The Committee maintained that the provision of Article 1 of the Optional Protocol did not preclude the consideration of the communication.[146]

With regard to the violation of Article 12 of the Covenant, the Committee considered the authors claims that the right to free movement was important for them, as they could not travel outside Belgium and accept an offer of employment in another country. [147] The Committee found that the arguments of the Belgian government were not determinative, particularly in view of the facts that other States have not transmitted the names of other employees of the same charitable organization to the Sanctions Committee.[148] It also noted that the authors' names were transmitted to the Sanctions Committee even before the authors could be heard.[149] The Committee considered that the facts, taken together did not disclose that restrictions of the authors' rights to leave the country were necessary to protect national security or public order. The Committee concludes that the circumstance constitutes a violation of Article 12 of the Covenant.[150]

The *Sayadi* Case showed that the Committee was competence to receive and examine the case, even though it is involving the UN Charter. This argument, however, was subject to some dissenting opinion from the members of the Committee.[151] The Committee emphasized its considerations on human rights violations, regardless the source of the obligation in questions.

4.2.2. Kadi and Al Barakaat v. Council of European Union and the Commission of European Communities.

Kadi and Al Barakaat v. Council of European Union and the Commission of European

Communities[152] was a case before Court First Instance (CFI) of the European Union [153] and the European Court of Justice (ECJ). The UN Sanctions Committee designated both Mr. Kadi, a national of Saudi Arabia national and Al Barakaat Foundation, established in Sweden, as being associated with Al-Qaeda in 2001 and put their names on the UN Security Council Sanction Committee List.[154] In the implementation of the Security Council Resolution, based on the EC Regulation No. 2199/2001 and 2062/2001, their names were added to Annex I of the EC list.[155] In December 2001, Mr. Kadi and Al Barakaat Foundation filed proceedings before CFI against the measures. They requested: [156]

i) Annulment of EC Regulation No. 467/2001 on prohibiting the export of certain goods and service to Afghanistan, strengthening the flight ban, and extending the freeze of funds and other financial resources in respect of the Taliban and Afghanistan and repealing EC Regulation No. 337/2000.

ii) Annulment of the EC Regulation No. 2061//2001.

iii) Annulment of EC Regulation No. 2199/2001.

In support of his claims, Mr. Kadi put forward three grounds of annulment alleging, breaches of his fundamental rights: the right to be heard, the right to respect for property, and the right to effective judicial review.[157] Subsequently, Al Baraakat Foundation based its claims on three grounds:[158]

i) Incompetent of the Council to adopt the contested regulation.

ii) Infringement of the Article 249 of the EC Treaty.

iii) Breach of its fundamental rights.

The claims were rejected by CFI. The Court confirmed the validity of the regulations. According to the Court, it had no jurisdiction to review the validity of the contested regulation or the validity of the relevant UN Security Council Resolution, except in respect of *jus cogens* norms.[159] In the view the Court, the Resolutions were binding upon the EC. The Community must take all measures necessary to ensure that those resolutions are put into effect and this prevail over their obligations under the EC Treaty. [160] The CFI concluded the restrictive measures provided in the contested regulation did not infringe the appellant's fundamental rights as protected by *jus cogens.*[161]

Mr. Kadi and Al-Barakaat Foundation appealed the CFI's judgment to the European Court of Justice (ECJ) on November 17, 2005. Mr. Kadi mentioned two grounds of challenge of the decision:

i) Lack of any legal basis for the EC Regulation.

ii) Breach of several rules of international law.[162]

In addition, Al-Barakaat Foundation claimed an infringement of Article 249 of EC Treaty.[163] In the judgment, ECJ dismissed the CFI's decision, confirming its jurisdiction to review the EC Regulations even if they are designed merely to give effect to the UN Security Council Resolutions.[164] It confirmed the reviewing purposed for protection of fundamental rights.[165] The Court further asserted that the judicial review applied only to the Community Act, emphasizing the independence of EU law.[166]

The ECJ further maintained that the claims on the right to be heard were patently not respected.[167] The ECJ held that the regulation provided no procedure for communicating the evidence in justifying the inclusion of appellant on the list.[168] In addition, the Council of the EU never informed the applicants of the evidence against them that justified being included on the list. Thus, the appellant were not able to defend their rights before the EC Court.[169] In response to the claims on the right to effective judicial remedy, the Court held the contested regulation, in so far as concerns the applicants, was adopted without any guarantee being given as to a communication of the evidence against them or as their being heard in that connection.[170]

Furthermore, with regard to the right to property, the Court maintained that the contested regulation was adopted without furnishing any guarantee enabling him to put his case to the competent authorities, in a situation in which the restriction of his property rights must be regarded as significant, having regard to the general application and actual continuation of freezing measures affecting him.[171] In the judgment, the ECJ took the view, *inter alia*:

i) Set aside the judgments of the CFI.

ii) Annuls EC Regulation No. 881/2002 of 27 May 2002 and No. 467/2001.

iii) Orders the Council of the European Union and the Commission of the European Communities to pay to their cost and half of those incurred by Mr. Kadi and Al Barakaat Foundation both at first instance and in appeals.[172]

The ECJ decision above demonstrated that the Court respect to human right. Citation The case of *Kadi* answered crucial question on regional human rights institution, whether EU had jurisdiction to review the UN Security Council Resolutions. This corresponds to some scholar view on that matter.[173] The *Kadi* decision was the first one for the ECJ to confirm its jurisprudence to review the lawfulness of measures under giving effect to the UN Security Council Resolutions.[174] The ECJ judgment in *Kadi* represents a strong commitment of the Court to protect fundamental rights, rule of law.[175] It also expresses separate and autonomous nature of the EC legal order.[176] However, the effectiveness of the EU Court judgment in human rights sphere was questioned by the applicants, since their names remain listed and assets remain frozen in the

EU level.[177]

4.2.3. Bosphorus v. Ireland

The case of *Bosphorus v. Ireland* [178] was a case concerning the EU implementation of the UN Security Council Resolution before the European Court of Human Rights. The applicant was a Turkish Airline Charter Company, Bosphorus Hava Yollari Turizm. On April 1992, the applicant rent and registered two aircraft belonging to a company residing in the Former Republic of Yugoslavia (FRY).[179] The company brought the aircraft to Dublin in order to have maintenance work performed on it by an Irish Company on May 17, 1993.[180] On June 8, 1993, the Irish authorities impounded the aircraft under the authorization of the Irish Minister for Transport.[181] The legal basis of the impoundment was based on the European Community (EC) Regulation 990/93/EC of 26 April 1993[182] and it formed part of the United Nations Security Council Sanction Regime against the Former Republic of Yugoslavia (FRY).

The applicant appealed the case before the Irish High Court on November 1993, with the following claims: [183]

i) The impoundment was not proportionate to the general interest because of the applicants' significant economic loss and its status as an innocent party.

ii) The EC Regulation would infringe the right to peaceful enjoyment of its possessions and its freedom to pursue a commercial activity.

In response, the Irish government claimed several arguments:

i) European Union (EU) membership obliged the country to apply the EC Regulation.

ii) Any interpretation of the Convention must allow State parties to comply with international obligations, extending and strengthening international co-operation.

iii) The public interest in ending war in Bosnia justified a deprivation of the applicant.

The applicants' objection was affirmed by the High Court decision on June, 21, 1994. The Court held that the EC Regulation did not even apply to the present case because the applicant's Turkish Company was neither held nor controlled by a person or undertaking from the FRY.[184]

The Irish High Court decision was appealed by the Irish Minister of Transport before the Irish Supreme Court. There, one of the central issues was the interpretation of EC Regulation. The Irish Supreme Court subsequently asked for Preliminary Ruling.[185] The ECJ ruled that the EC Regulation No. 990/93 applied to the aircraft in question.[186]

Consequently, the applicant, Bosphorus brought the case before the European Court of Human Rights. The applicant claimed the violation of Article 1 of Protocol I.[187] However, the Court held that the impugned interference was not the result of an exercise of discretion by the Irish authorities, either under EC or Irish law, but rather amounted to compliance by the Irish State with its legal obligations flowing from EC law and, in particular, Article 8 of EC Regulation 990/93.[188] This Court has accordingly accepted that compliance with Community law by a Contracting Party constituted a legitimate general interest within the meaning of Article 1 of Protocol 1.[189] The Court stressed that the protection of fundamental rights within the EU legal order was equivalent to that offered by European Court Human Rights (Equivalent Protection Doctrine).[190] Consequently, the presumption arises that Ireland did not depart from the requirements of the Convention when it implemented the legal obligation flowing from its membership of the European Community.[191]

Bosphorus Case above demonstrated that both EU Court decisions on the aircraft impoundment stressed on autonomous of the EU law, even though it was delegated from UN Security Council Resolutions.

4.3. Analysis of Cases

In the examination of the cases above, there are two crucial issues of international law which need to be discussed further. Firstly, debate on clash of duties on State obligations whether under the UN Charter or regional organization (such as EU), in case of the duties might bring human rights violations. This dilemma can be seen in the case of *Sayadi* and *Bosphorus*, where States invoked the EU law and UN Security Council Resolutions as legal justification of their acts. Secondly, debate on judicial review of the UN Security Council Resolutions whether the regional organization (EU) has an ability to review the UN Security Council Resolutions from the point of view of human rights. This problem can be seen in *Kadi* Case, where the ECJ decided that it can review the UN Security Council Resolution, if the Resolution had been enacted into EU law. This position in debate since the UN Security Council Resolutions has to carry out by the UN member States, but not EU. In same point was also discussed in *Sayadi*, before the Human Rights Committee of the ICCPR.

4.3.1. Clash of Duties

The clash of duties was on issue in *Sayadi* Communication. The Belgian government addressed it on their arguments, invoking the UN SC Resolutions. However, the Communication held that the Belgian

government should be held responsible for the presence of the authors name on the EU Regulation's listing procedure, not the UN Security Council itself.[192] It shows that the Committee did not address the clash of duties issue, but the Committee took into account the issue human rights violations as main considerations.

In *Bosphorus* case, the European Court of Human Rights did not mention the clash of duties issue implicitly. But, the Court pointed out the importance of human rights protections in the EU Law. It indicated that the Court stressed on the human rights considerations.[193] Furthermore, the government action flowed from EU Regulation as a part of the UN Security Council Resolutions.[194] In those perspectives, the UN SC Resolutions are not implemented individually by each member States but, rather, are promulgated at the EU level.[195] Therefore, the responsibility of the action in question was attributable to EU. But, the EU is not a party to the European Convention on Human Rights and its action could not be directly brought before the Court.[196]

The clash of duties issue arises when EU member States have to implement its obligation under UN Security Council Resolutions or EU law. This issue became crucial when the obligation might bring human rights violations. Even though Article 103 of the UN Charter provides a formula to avoid such conflict arise, the issue still remains.[197] The EU Court did not answer the issue straightforwardly as shown on the cases law above.

4.3.2. Possibility of Judicial Review of Security Council Resolutions

Under the UN Charter (Chapter VII), the Security Council has a power in order to restore and maintain international peace and security. However, the implementation of the Security Council Resolutions brought legal consequence, particularly when the action might have the possibility of human rights abuse. Accordingly, the legitimacy of the collective authority of the Security Council increasingly criticized and accused of exceeding its power under the UN Charter.[198]

The possibility of judicial review of UN Security Council Resolutions was considered from the viewpoint of the EU. In *Kadi* Case, the question on the possibility have been answered this point partially. The ECJ decided that Regulations were subject to judicial review, even if they are designed merely to give effect to the UN SC Resolutions.[199] The Court further asserted that the judicial review applied only to the Community Act.[200] It neither entailed a review of the Security Council Resolution nor challenged the primacy of the UNSC Resolutions under international law.[201] However, the Court's approach in *Kadi* may lead to a fragmentation of international law, and even ultimately to the filling of the ECJ from any

international human rights law standards.[202] The judgment of the Court shows less respect for international law, rejecting the notion that the regional EU is in a subordinate relation to the UN.[203]

In contrast to *Kadi*, this point was not discussed in *Sayadi* nor *Bosphorus*. In *Sayadi*, the Committee had simply noted that it could not consider alleged violation of other instruments such as the Charter of the UN or allegation that challenge the UN rules.[204] Additionally, the Committee recalled the relevance of Article 46 of the Charter, which states that nothing in the Covenant shall be interpreted as impairing the provisions of the Charter of the UN.[205] The Committee's position demonstrated that it did not touch the issue of the possibility of judicial review of the UN Security Council Resolutions, but stressing on the issue of the compatibility with the ICCPR.[206] However, it is worthy to note that the critical decisions such as in *Sayadi* and *Kadi* have exerted significant pressure on the Security Council, its subsidiary bodies, and its member States to improve their listing practice, and to show more respect for basic norm of due process.[207]

As proven in *Sayadi*, it was again repeated in *Bosphorus* case. The Court recognized the EC Regulation but the Resolution did not form part of the Irish domestic law.[208] Therefore, it could not have constituted a legal basis for the impoundment.[209] The ECHR decided that the impoundment of the *Bosphorus* aircraft was proportionate, only if equivalent with human rights protection.[210] The Court decisions can be concluded that no human rights violation can be founded, ignoring the judicial review of the UN Security Council Resolutions.

4.4. Conclusion

The above discussion shows the EU Court reluctance to exercise the judicial review of UN Security Council Resolutions.[211] The Court demonstrated that they might be well aware of the existing hierarchy and the special position of the UN Security Council Resolutions. However, in *Kadi* case, the EU Court has begun reviewing implementation of the UN Security Council Resolutions on terrorist list, even though; it was only applied to the Community Act.

V. Conclusion

It could be seen that the three jurisdictions, counter terrorism measures addressed in this article vary in its compliance of human rights law and humanitarian law standards. The problem lies within the local legal framework and practices as a background. The role of the Supreme Court in US, the House of Lord in UK, and The European Court of Human Rights in EU played a substantial role in protecting human rights.

The attempts might be considered as the last resort for individuals to defend their fundamental rights. Nevertheless, the cases on the US Supreme Court demonstrated that the Court roles are limited only on procedural aspects than substantive matters of human rights.[212]

The UK legal frameworks in combating terrorism demonstrated its temporary and fragmented measures.[213] The UK government has enacted various legislations on counter-terrorism. Each Act was named differently, but the substantial provisions are still inherent. For instance, the provisions on arrest and pre-charge detention and control orders measures have changed, in term of its durations. But, substantial element is still untouchable. It shows that the UK government trends to stay in domestic security control concerns, regardless human rights.

In EU practices, the EC Regulations on listing system did not move forward significantly. Although the ECJ has decided that, there was a violation of human rights on the procedural but the violation is still not corrected. In a wider scope, the UN General Assembly Resolution No. 1904 of 2009 on Ombudsperson conferred nothing to improve the system from human rights law perspectives.[214] The function of the Ombudsperson is to improve the system with the accessibility element, where the target individuals or entities can directly engage in dialogue with the body. However, the Ombudsperson is only empowered to give as observer, not decision maker. After all, the examination of the three jurisdictions on counter-terrorism measures showed the national security is still main considerations rather than human rights and rule of law.

End Notes

1 President Bush spoke of "preemption" in a speech on combating terrorism at West Point in May 2002. Mike Allen and Karen DeYoung, "Bush: U.S will Strike First at Enemies; in West Point Speech, President Lays Out Broader U.S Policy, " *Washington Post*, June 2, 2002. For more discussion on Pre-Emptive Self-Defense *see*; Michael Reisman & Andrea Amstrong. "The Past and Future of the Claim of Pre-emptive Self-Defense," *American Journal of International Law*, Vol..100, No. 3 (July 2006), pp. 525-550.
2 President Bush addressed it in Joint Session of Congress and American People, 20 September 2001.
3 Pub. L. No. 107-40.
4 *Ibid.*
5 Pub. L. No. 107-56.
6 *Ibid.*, Title I.
7 *supra* note 5, Title II.
8 *Ibid*, Title V.
9 Sunset date clause means a provision which determined the end date of the certain provisions mentioned on the Act. This clause usually attaches on the US Acts, especially for controversial Acts, *see* in; Robert P. Abele., *A User's Guide to the USA PATRIOT Act and Beyond*, (University Press of America, 2005), p. 45.
10 The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizure, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized (US Constitution Amendment IV) . Charles Doyle, *The USA Patriot Act: A Legal Analysis*, April 2002, at http://www.fas.org/irp/crs/RL31377.pdf.
11 *Doe v. Holder*: 703 F. Supp. 2d 313; 2010 U. S. Dist.
12 *Ibid.*

13 U.N. Doc., CCPR/C/USA/CO/3Rev.1, 18 December 2006. para. 21: Consideration of Report Submitted by States Parties Under Article 40 of the Covenant.
14 *Ibid.*
15 *Ibid.*
16 Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism (Military Order), Art. 3 (a), 4 (b) 66 Fed. Reg. 57, 833 (Nov. 13. 2001).
17 215 F. Supp. 2d 55: *See* also: Henry Campbell Black M. A., *Black's Law Dictionary*, Abridged Sixth Edition, (West Group, 1991), p. 491.
_____*Habeas Corpus*, from Latin, the name given to a variety of writs (of which these were anciently the emphatic words), having for their object to bring a party before a court of judge. The primary function of the writ is to release from unlawful imprisonment. The office of the writ is not to determine prisoner's guilt or innocence, and only issue which it present is whether prisoner is restrained his liberty by due process.
18 US Constitution, Article 1, Section 9, Clause 2.
19 Joan Fitzpatrick., "Jurisdiction of Military Commissions and the Ambiguous War on Terrorism," *American Journal of International Law*, Vol. 96, No. 2 (April 2002), p. 345-354. *See* also, Daryl A. Mundis., "The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Act," *American Journal of International Law*, Vol. 96, No. 2 (April 2002), p.320-328.
20 *Rasul v. Bush*; 542 US 466, 159 L Ed 2d 548, 124 S.CT.2686 (2004).
21 *Ibid.*
22 *Ibid.*
23 *Ibid.*
24 *Hamdan v. Rumsfeld*; 548 U. S 577, 126 S. Ct. 2749.
25 Pub. L. No. 109-366, 120 Stat 2600 (2006).
26 *Ibid.*
27 *Ibid.*
28 *Boumediene v. Bush, 533*. US 723, 128 S. Ct. 2229 (2008).
29 *Al Odah v. United States*, 321 F 3d 1134 (D.C. Cir. 2003).
30 *Ibid.*
31 *Ibid.*
32 561 F. 3d 509 (D.C. Cir. 2009); *see* John R. Cook., "Contemporary Practice of the United States," Vol. 104, *American Journal of International Law,* (2010), p. 117.
33 *Ibid.*
34 *Ibid.*
35 US Dept of Justice New Release, Attorney General Announces Forum Decisions for Guantanamo Detainees (Nov, 13 2009), at http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html., accessed on August 2011.
36 *Hamdi v. Rumsfeld*; 542 US 507, 159 L Ed 2d 578, 124 S. Ct. 2633 (2004)
37 *Ibid.*
38 *Ibid.*
39 *Ibid.*
40 Kal Raustiala, "The Geography of Justice," *Fordham Law Review*, Vol. 73, (2005), pp. 2501-2560.
41 Marko Milanovic, From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties, *Human Rights Law Review*, Vol. 8, No. 3, (2008), pp. 411-448.
42 Agreement for the lease to the United States of lands in Cuba for coaling and naval stations at http://www.yale.edu/lawweb/avalon/diplomacy/cuba/cuba002.htm/, accessed on August 2011.
43 *Ibid.*
44 *Ibid.*
45 Joseph Lazar., "International Legal Status of Guantanamo Bay," *AM J. International Law Review,* Vol. 62, (1968), pp. 730, 739.
46 *Ibid.*
47 *supra* note 45.
48 *Ibid.*
49 Inter-American Commission on Human Rights, Precautionary Measures in Guantanamo Bay, 12 May 2002, in *International Legal Materials*, Vol. 41 (2002).
50 *supra* note 20.
51 *supra* note 28.
52 ICRC: Knut Dormann, "The Legal Situation of unlawful/unprivileged combatants," at http://www.icrc.org/, accessed on August 2011.
53 Sean D. Murphy (ed.), "Decision Not to Regard Persons Detained in Afghanistan as POWs," *American Journal of International Law*, Vol. 96, No. 2 (April 2002), pp. 477-478.
54 *Ibid.*, Initially, the US Government took the view that the Third Geneva Convention did not apply to Al-Qaeda and Taliban: i) The Third Geneva Convention could not apply to members of a non-state organization, such as Al Qaeda, ii)

the conflict was not non-international conflict or international conflict: Al-Qaeda memberships covered internationally or the conflict was not between states, where Al-Qaeda as non-state actor iii) Al Qaeda members failed to meet the requirements set fort in Article 4 (A) (2) of The Third Geneva Convention. Further since Afghanistan was not functioning state during the conflict and the Taliban was not recognized as a legitimate government, Afghanistan did not continue as a party to the Third Geneva Convention, which therefore could not apply to members of the Taliban.

55 *supra* note 53, p. 475

56 *Ibid.*

57 Katherine Q. Seelye, In Shift, Bush Says Geneva Rules Fit Taliban Captives, *New York Times*, Feb. 8 2002 at A15; John Mint & Mike Allen, Bush Shifts Position on Detainees, *Washington Post*, Feb, 8 2002, at A1

58 *supra* note 24.

59 *Ibid.*, para. 15.

60 CSRT was tribunal established by the US Department of Defense in order to response to *Rasul v. Bush* judgment. Under the CSRT process, each detainee at Guantanamo is given notice of the factual basis for his detention and an opportunity to challenge his designation as an enemy combatant.

61 *supra* note 24., para. 18.

62 *supra* note 32.

63 Thomas Michael Mcdonnell, *The United States, International Law, and the Struggle against Terrorism* (Routledge, 2010), p. 40.

64 Manfred Nowak., *UN Covenant on Civil and Political Rights, CCPR Commentary,* 2nd Revised Edition, (N. P. Engel Publisher, 2005), p. 314.

65 *Ibid.*

66 *Ibid.*, The UN Human Rights Committee in General Comment No. 29 (2001) suggested that the Military Tribunals established by the Bush Administration to try suspected terrorists of Al Qaeda members detained in Guantanamo must comply with the international humanitarian law and may not deny the right fair trial. See on Joan Fitzpatrick, "Jurisdiction of Military Commissions and the Ambiguous War on Terrorism," *American Journal of International Law*, Vol. 96, No. 2 (April 1002), pp. 345-354.

67 *supra* note 63, p. 212.

68 UN HRC, CCPR General Comment No. 8, Article 9 (Right to Liberty and Security of Person), 30 June 1982, No. 8

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