Human Rights Violations under the Guise of Counter-Terrorism Measures: A Question of Reconciling Security Concerns and Protecting the Fundamental Right to Life

by

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ABSTRACT

Both security and human rights are important to all within the civilized world. Yet there are some serious tensions between the two political norms. For instance, it may not be easy for a state or the international community to reconcile well intentioned acts to maintain security and to preserve human rights. In the recent past, such a difficulty has been played out not only in the events, but also in the aftermath of the September 11, 2001 terrorist attacks in the United States. The result of the attacks, culminating in the massive loss of lives and property, has been in the adoption of various international treaties and domestic laws that have swiftly been enacted and deployed to counter terrorism, and the development of a concept of a state of "urgency" that appears to shadow the obligation to protect fundamental human rights, particularly the right to life under international law. This thesis thus focuses on the promotion and protection of fundamental human rights, particularly, the right to life with the subsequent declaration of the "war on terror" by the United States. The work targets the debate between security and human rights in the light of terrorism post 9/11, highlights the impact of choosing one ideal over another, and eventually rationing out a balance that would serve as a threshold for upholding standards in both security and human rights in the face of terrorism threats.

Essentially, however, this thesis is hinged on the argument that to allow the ideal of security which apparently appears advantageous to a "continuing state of urgency" to overwhelmingly influence the implementation of counter-terrorism measures while

paying no attention to the fundamental right to life would constitute a paradox in combating terrorism. I posit that the result of the above exercise, if chosen, implies more tragic consequences when implemented than the singular acts of terrorism in themselves.

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LIST OF ABBREVIATIONS

Art - Article

ACHR - American Convention on Human Rights

ACHPR - African Charter on Human and Peoples' Rights

ECHR - European Convention on Human Rights

GA - General Assembly

Gen Cmt - General Comment

HRC - Human Rights Committee

ICCPR - International Covenant on Civil and Political Rights

Mtg - Meeting

OHCHR - Office of the UN High Commissioner for Human Rights

Plen - Plenary

RES - Resolution

S - Section

SC - Security Council

Ser - Series

Sess - Session

Supp - Supplement

UDHR - Universal Declaration on Human Rights

UN - United Nations

UNESCOR - United Nations Economic and Social Council Official Record

UNGAOR - United Nations General Assembly Official Record

UNSCOR - United Nations Security Council Official Record

V - Volume

CHAPTER ONE: TERRORISM: ROOTS, RESPONSES AND RATIONALE FOR COMBAT

1.0 Introduction

The General in Disguise: A Doomsday Prophet

The day had worn on with a variety of speakers weighing in on the essence of the counter-terrorism struggle. The audience, which appeared as a finely constituted league of extraordinary gentleman most of whom had ventured into the growing field of "new threats" after the Cold War, had begun to feel listless and then enlivened by the promise of closure at the introduction of the last speaker for the day. The ceremony, a conference on counter-terrorism, which was organized by the Defense Intelligence Agency (DIA) of the Pentagon and held at George Washington University, was set to end on a successful note.

But before then, the strange figure of a man dressed in shabby pants, a leather vest, and a black hat that covered long black hair strode on to the podium, briefcase in hand. He wore dark sunglasses while the rest of his face was framed in a thick beard. His appearance contrasted sharply with that of the rest of the intelligence bureaucrats. With lightning speed, he opened his mystery briefcase and flung two hand grenades into the crowd while drawing an M16 on the stunned audience. Subsequently, however, there were no explosions and the M16 remained hushed. Calmly, this odd looking gentleman took the floor and addressed the audience, many of whom

immediately recognized the voice - for it belonged to no stranger. It was the director of the DIA himself, disguised as a "terrorist". His aim had been to demonstrate the ease with which a person or persons intent on committing acts that would fit the description of terrorism could easily gain access to the building where the conference was being held, and in one stroke of good fortune, wipe out the cream of the American counter-terrorism crop. Needless to say, his demonstration drove home the message before he made his eerily prophetic statement:

> [O]ne day, terrorists will attack a building like this, in Washington or New York. They will kill hundreds of people and deal us an unprecedented psychological blow. The question is not whether such an act will occur on American soil, but when and where. It is up to you, gentlemen, to be prepared. The security of our territory is in your hands.[1]

It would seem that the predictive words spoken by the director of the Pentagon's DIA would set the stage universally for the conscious development and adoption of more security-oriented approaches to counter-terrorism. However, not even these dark warnings prophetically spoken could have prepared the US and the world at large for an event that would shake and threaten the foundations of national and international peace and security. Three years after the director of the DIA's "warning," the acts of which he foretold took place with the nihilistic destruction of the Twin Towers in New York and the Pentagon in Washington D.C, respectively, on

[1] These words were the opening statement of the Director of the Pentagon Defense Intelligence Agency in 1998 at a colloquium on Counter-terrorism held at the George Washington University. See Gerard Chaliand & Arnaud Blin, eds, *The History of Terrorism: From Antiquity to Al Qaeda* (California, USA: University of California Press, 2007) at 2. [Chaliand & Blin].

September 11, 2001. Undoubtedly, it was the worst yet attack in the history of terrorism.

The attacks constituted a new and more deadly concept of terrorism popularly referred to by political analysts as "hyper-terrorism", not so much in the sense that it featured sophisticated and premeditated plans and weaponry, nor the fact that the perpetrators were decoupled from a particular territory or state so as to impute the idea of a state sponsored attack per se. Rather, the flimsiness of these attacks in relation to a rational constructive plan or intention, which has been a popular feature of conventional terrorism for over centuries, injected a new profundity and a great sense of urgency and caught the immediate attention of the world community.[2]

Considering terrorism's inauspicious beginnings in the early 1970s culminating into a near death of irrelevance in the twentieth century, the events of September 11, 2001 have definitely awakened it from the dust of obliteration onto a grand stage at the epicenter of international relations. Whereas previously the lack of a definition of terrorism was legally inconsequential, the United Nations Security Council has required states to implement measures against "terrorist acts" and "terrorists," according these terms operative legal significance. There has been a prodigious outpouring of literature on the subject that possesses the definite hallmarks of a registered fascination with the novelty of terrorist weapons and methods as well as the use of hyperbolic language embodied in terms such as "hyper-terrorism" and

[2] See Frederic Mergret, "Justice in Times of Violence" (2003) 14:2 EJIL 327 at 329-331; see also Martha Crenshaw, *Explaining Terrorism: Causes, Processes and Consequences* (London, New York: Routledge, 2011) at 51.

"mega-terrorism."[3] In the most prominent instance, it has reoriented American foreign policy and has led to two long wars in Afghanistan and Iraq.

More importantly and rather despairingly, the emphasis on the events of September 11, 2001 as the most harrowing tragedy yet in the history of all terrorist attacks has singled out a "continuing state of urgency" or rather, an insidious atmosphere of crisis that has heightened public panic and apprehension, and has been subsequently exploited for the pursuit of arbitrary and excessive counter-terrorism responses.[4] Some of these responses to terrorism have led to the tenable conclusion that "it is perhaps the ultimate paradox of the 'war on terror' that the horrendous acts of lawlessness witnessed on 11 September 2001 have been relied upon to justify repeated violations and further disregard. . . the international rule of law."[5]

Nonetheless, the promotion and protection of human rights and the rule of law should be the primary focus of all governments who must recognize that "effective counter-terrorism measures and the promotion of human rights are not conflicting goals but complementary and mutually reinforcing."[6] This thesis is a response to this principle.

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[3] The terms "hyper-terrorism," "mega-terrorism" and "super-terrorism" are synonyms that characterize and define terrorism that has global aims in an ideologically apocalyptic and war-like manner, and with which political negotiation is impossible. See Michael Freeman, "Order, Rights and Threats: Terrorism and Global Justice" in Richard Ashby Wilson, ed, *Human Rights in the 'War on Terror'* (Cambridge: Cambridge University Press, 2005) 37 at 38.
[4] See Ben Saul, *Defining Terrorism in International Law* (Oxford, New York: Oxford University Press, 2006) at 5. [Saul, *Defining Terrorism in Int'l Law*]; see generally Hilary Charlesworth, "International Law: A Discipline of Crisis" (2002) 3:65 MLR 377. [Charlesworth].
[5] Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: Cambridge University Press, 2005) at 445 [Duffy].
[6] See *The United Nations Global Counter-Terrorism Strategy*, GA Res 60/288, UNGAOR, 60th Sess, UN Doc A/60/L.62, (2006), para 3 [*UN Global Counter-Terrorism Strategy*].

1.1 About the Thesis

This work examines excessive or arbitrary counter-terrorism responses that have been developed in the apparent "continuing state of urgency" triggered by the 9/11 attacks. In particular, this thesis will engage this question: Whether the "war on terror" constitutes an attack so imminent and so urgent as to warrant the neglect of fundamental human rights, particularly the right to life under the implementation of counter-terrorism measures. In order to resolve the above question, the following objectives are pursued:

- an assessment of the concept of terrorism and the emerging theme of a "continuing state of urgency" and how both play out in issues of national and international security;
- an examination of counter-terrorism strategies adopted post 9/11 and their impact on the enjoyment of fundamental human rights, particularly the right to life;
- identification of relevant human rights principles and standards that must be respected at all times, with particular reference to the context of counter-terrorism measures; and
- the proposition that a balanced approach will guarantee the ideals of the fundamental right to life and state security in combating twenty-first century terrorism.

In essence, this thesis hinges on the argument that, to allow the ideal of security which apparently appears advantageous to a "continuing state of urgency," to overwhelmingly influence the implementation of counter-terrorism measures, while paying no attention to the fundamental right to life, would constitute a paradox in combating the crime of terrorism. I posit that the result of the above exercise, if chosen, must in the longer term generate more tragic consequences than the singular acts of terrorism in themselves.

The thesis begins with a general introduction that summarizes from the state of the law and policies relating to terrorism from a post 9/11 perspective. It will highlight among other things, the increase in literature as well as regional and international instruments on the subject as responses to the "continuing state of urgency" evoked by the 9/11 attacks. This general introduction will also outline the question that the thesis puts forth and its subsequent aims and objectives.

The first chapter of the thesis will open with a discussion about terrorism. It will seek to establish the roots or history of terrorism as well as its place and relevance in recent times with an illustration of both past and recent examples. It will further seek to classify terrorism per the examples that have been identified throughout history and establish a particular class of terrorism that will be the peculiar subject of discussion throughout this thesis. In addition, this chapter will also discuss the measures that have been put in place over time to combat the crime of terrorism, paying particular attention to measures and responses post 9/11. In doing so, this chapter will identify

the purpose of these measures and examine why security is thought to combat terrorism in the "continuing state of urgency."

The second chapter examines fundamental human rights, and in particular, the origins of the right to life in international human rights law. It also explores how the right to life is applied in emergencies and times of war, and considers its application to counter-terrorist measures.

Chapter three then focuses on how post 9/11 counter-terrorism measures potentially violate the right to life using instances from the application of the US counter-terrorism regime as applied in the Guantanamo Bay Naval Base Detention Facility. This chapter further discusses the lack of weight ascribed, and how security interests appear to outweigh the protection of right to life.

Chapter four concludes a proposal that only security-oriented vision of counter-terrorism measures that actively protect the fundamental right to life can be effective in the longer term.

1.2 Terrorism: Roots and Responses

The word "terrorism" is difficult to define, largely because it is so pejorative and fraught with much partisanship.[7] In the words of Ben Saul, "few words are plagued by so much indeterminacy, subjectivity and political disagreement as "'terror',

[7] Jean-Marc Sorel, "Some Questions About the Definition of Terrorism and the Fight against Its Financing" (2003) 14:2 EJIL 362 at 366.

'terrorize', 'terrorism', and 'terrorist'."[8] There certainly could not be a more apt observation about the word terror and its subsequent variations in the English language. "Terror" originates from the Latin word "terrere" meaning "to make tremble" from which terrorism is subsequently derived. The word entered English in the fourteenth century and is currently referred to as an uncountable noun which literally represents "a feeling of extreme fear"[9] evoked by the act or acts of persons capable of inciting such feelings.

This simple definition does not assist in defining terrorism for legal purposes because it is so expansively used to refer to just about anything that features some form of illegitimate destructive violence. Thus, the term is notoriously controversial and elusive in meaning.[10] The inability of the international community to come to a consensus at treaty-levels on a definition of terrorism, for example, has heightened the confusion and has made it more difficult to define it.[11]

The earliest attempts to define terrorism in international law took place in conferences dubbed the "International Conferences for the Unification of Penal Law." Notable among these conferences was the one held in Copenhagen in 1935. Delegates agreed on a model penal provision on terrorism that defined the concept by making reference to a number of acts, including "willful acts directed against life, physical

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[8] See Saul, *Defining Terrorism in Int'l Law*, *supra* note 4 at 1.
[9] See Oxford English Dictionary, "terror", online: Oxford English Dictionary <http://www.oed.com>; Gilbert Guillaume, "Terrorism and International Law" (2004) 53:3 ICLQ 537 at 537.
[10] See generally Thomas M. Franck & Scott C. Seneca, "Porfiry's Proposition: Legitimacy and Terrorism" (1987) 20:2 Vand J Transnat'l L 195 for a more philosophical analysis on the difficulties associated with a legal definition of terrorism. See also Ben Saul, "Attempts to Define 'Terrorism' In International Law" (2005) 52 Nethl Int'l L Rev 57.
[11] Michael V Bhatia, "Fighting words: naming terrorists, bandits, rebels and other violent Actors" (2005) 26 Third World Quarterly 5 at 13.

integrity, health or freedom . . . [that have] endangered the community or created a state of terror calculated to cause a change in or impediment to the operation of the public authorities or to disturb international relations."[12]

Concerted efforts to negotiate a uniform definition of terrorism in penal law continued in 1937 with the adoption of the *Convention for the Prevention and Punishment of Terrorism*[13] by the League of Nations. This draft convention, which contained a definition for "terrorism," was intended by the League of Nations to serve as an ostensible anti-terrorism measure following the assassination of French Foreign Minister Jean Barthou and King Alexander I of Yugoslavia. Regrettably, this convention never did enter into force due to lack of sufficient ratifications from member states, and was then superseded to a large extent by the events that signaled the oncoming World War.[14]

The United Nations Organization, which replaced the League of Nations after the Second World War, once again undertook to define terrorism by establishing a committee on terrorism in 1972.[15] This committee seemed poised for results per its determination to carry out its charges, thus functioning until 1979. Despite its attempts, however, the committee was unsuccessful in its efforts to reach a

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[12] See "Sixth International Conference for the Unification of Penal Law", Copenhagen, August 31 – September 3, 1935, *Actes de la Conferenc*e, *1938*, Paris, in M Cherrif Bassiouni, ed, *International Terrorism and Political Crimes* (Illinois, USA: Charles C Thomas, 1975), at 471.

[13] *Convention for the Prevention and Punishment of Terrorism*, League of Nations Doc. C 546 (1). M.383 (1) 1937 V. [*Convention for the Prevention and Punishment of Terrorism*]; See also Geoffrey Marston, "Early Attempts to Suppress Terrorism: The Terrorism and International Criminal Court Conventions of 1937," (2003) 73 Brit Y B Int'l L 293.

[14] *Convention for the Prevention and Punishment of Terrorism*, *Ibid*; see also Claire de Than & Edwin Shorts, *International Criminal Law and Human Rights* (London: Sweet & Maxwell, 2003).at 233. [de Than & Edwin].

[15]Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, 2d ed (New York, Cambridge: Cambridge University Press, 2010) at 339. [Cryer et al].

consensual definition of "terrorism."[16] The committee's disagreements revolved around distinctions between the acts of freedom fighters in national anti-colonization groups versus other forms of terrorist violence and conduct.[17]

As a consensus definition of terrorism eluded international bodies, treaties began to reflect a "thematic" approach in which a series of eleven treaties considered contemporaneous terrorist activity or behavior.[18] These agreements are modeled on the foundations of state cooperation, incorporating the principle "aut dedere aut judicare,"[19] and imposing obligations on state parties to assist in criminal and extradition proceedings. The three most recent conventions[20] have treated terrorism as an offence that is totally divorced from politics in order to impose limitations on the political offense exception and to facilitate extradition. In this regard, these agreements or conventions have as their specific purpose the effective prosecution and prevention of terrorism acts at the state level.[21] They include the following:[22]

- *Convention for the Suppression of Unlawful Seizure of Aircraft,*1970,
- *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,* 1971,

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[16] *Ibid.*
[17] *Ibid*. See also Chaliand & Blin, *supra* note 1 at 2.
[18] See Duffy, *supra* note 5 at 23.
[19] See Zdzislaw Galicki, "The Obligation to Extradite or Prosecute ("*aut dedere aut judicare*") in International Law," online: International Law Commission <http: untreaty.un.org/ilc/reports/2004/english/annex.pdf>.
[20] See *International Convention for the Suppression of Terrorist Bombings,* 15 December 1997, 2149 UNTS 256, art 11, (entered into force 23 May 2001) [*Terrorist Bombing Convention*]; *International Convention for the Suppression of the Financing of Terrorism,* 9 December 1999, 2178 UNTS 197, art 14, (entered into force 10 April 2002); *International Convention for the Suppression of Acts of Nuclear Terrorism,* 13April 2005, 2445 UNTS 89, art 15, (entered into force 7 July 2007) [*The Nuclear Terrorism Convention*].
[21] Cryer et al, *supra* note 15 at 340.
[22] For all the conventions listed, see online: United Nations Treaty Collection < http://treaties.un.org>.

- *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents*, 1973,
- *International Convention against the Taking of Hostages,* 1979,
- *Convention on the Physical Protection of Nuclear Material,* 1980,
- *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 1988,
- *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf,* 1988,
- *Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, 1988,
- *International Convention for the Suppression of Terrorist Bombings,* 1997,
- *International Convention for the Suppression of the Financing of Terrorism,* 1999 and
- *International Convention for the Suppression of Acts of Nuclear Terrorism,* 2005.

By the time the *Terrorist Bombing Convention*[23] was concluded, most terrorist acts or conduct had been covered in one or other of these agreements. It would seem that the "thematic" approach to ensuring cooperation on terrorism was to a large extent successful in securing consensus, since it was able to identify a series of acts that can be labeled "terrorist acts or conduct" rather than attempt the more difficult

[23] See *supra* note 20.

option of adopting an all-encompassing definition for "terrorism." However, as noted from the beginning, the term "terrorism" and its subsequent variations in the English language are particularly controversial. It is therefore unsurprising that disagreements on what constituted "terrorist" activity plagued the *International Convention for the Suppression of the Financing of Terrorism*.[24] This act, which came into force in 2002, generated disagreements among the contracting parties on article 2(1) (b), a clause that describes terrorist acts. Reservations were entered by Egypt, Syria, and Jordan to the effect that an act of national armed struggle and the fighting of foreign occupation in the exercise of a people's right to self-determination cannot be considered to be a type of terrorist activity within the framework of article 2(1) (b).[25] The reservation made by these three states resulted in numerous rejections from twenty-three states on the grounds that this reservation defeated the object and purpose of the treaty.

Not too long after the conclusion of these eleven agreements, discussions of an all-encompassing consensual legal definition of terrorism resurfaced.[26] In response, the United Nations General Assembly in 1994 adopted a definition in the *Declaration on Measures to Eliminate International Terrorism*.[27] This resolution is important primarily for two reasons: first and foremost, it nurtured the hope that the

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[24] *Ibid.*
[25] *International Convention for the Suppression of the Financing of Terrorism*, *Ibid*. See also Henry J Steiner, Philip Alston & Ryan Goodman, *International Human Rights Law in Context: Law, Politics and Morals* 3d ed (New York: Oxford University Press, 2008) at 377 [Steiner, Alston & Goodman].
[26] These discussions were tabled by India in 1996 who led forth the proposal of generally acceptable definition. See India, "Letter to the Secretary-General, Annex, Draft International Convention on the Suppression of Terrorism" UN Doc A/C./6/51/6 (1996).
[27] *Declaration on Measures to Eliminate International Terrorism*, UNGAOR, 49th Sess, 84th Plen Mtg, UN Doc A/RES/49/6O, (1994).

international community could find a generally acceptable definition of terrorism, and, secondly, it represents the concerted efforts of UN member states as a whole to reach agreement on a definition. This resolution also makes no references to national liberation movements or possible justification on political or religious grounds. Although this resolution offers a more direct working definition of terrorism, the lack of those features has resulted in it being deadlocked.

This treaty history of terrorism confirms the popular saying that "one man's terrorist is another man's freedom fighter." However, it is clear that over time, some progress has been achieved in defining terrorism. It is thus more accurate to say that, "[w]hile there is a growing consensus on what terrorism is, there is also a complex debate about what it is not."[28] Thus, it is not entirely true that terrorism cannot be defined. It is rather that there is still no consensus as to exceptions.[29] In the light of the unending disagreements as to what should constitute a valid definition, the United Nations has practiced an alternative solution, encouraging states to negotiate specific multi-lateral treaties that define peculiar criminal acts as subject to extradition or prosecution within the nation of the national in question.[30]

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[28] Tal Becker, *Terrorism and the State* (Oxford: Hart Publishing, 2006) at 86 [Becker].
[29] The exceptions in this regard largely contend with an inclusion of "state terrorism" by a government's own military forces as well as an inclusion or exclusion of acts undertaken in the context of national liberation struggles or resistance to occupation in any definition of terrorism. See Antonio Cassese, "Terrorism as an International Crime" in Andrea Bianchi, ed, *Enforcing International Law Norms Against Terrorism* (Oxford: Hart Publishing, 2004) at 214. See also *Report of the High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, UNGAOR 59th Sess, UN Doc A/59/565, (2004).
[30] Gillian D Triggs, *International Law: Contemporary Principles and Practices* (Australia: Lexis Nexis, Butterworths, 2006) at 631.

Pending the adoption of a comprehensive treaty that would eventually provide a consensual definition of terrorism, the definition used in Security Council Resolution 1566 offers a partial solution to the definition problem and has the advantage of being widely used by legal commentators:

> [C]riminal acts, including against civilians committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, and all other acts which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature… .[31]

This thesis adopts this definition because it does address the international realm. It also encompasses state-terrorism, which has a long history of being used as a tool in governance to either dissuade or punish.[32] From the Assyrians[33] of the ancient world, who conquered large populations and ruled their vast territory through systematic terror, to the deadly Judean sect known as the Sicarii,[34] to the Ismaili sect known as

[31] SC Res 1566, UNSCOR, UN Doc. S/RES/1566 (2004).
[32] Chaliand & Blin, *supra* note 1 at vii.
[33] Famous among the Assyrian kings is Emperor Assurnasirpal II who is reputed to have skinned alive, impaled, burned, mutilated, decapitated and performed other torturous acts on the leaders and citizens of the rebel city of Susa. See Randall D Law, *Terrorism: A History* (United Kingdom, Cambridge: Polity Press, 2009) at 11-12 [Law].
[34] The Sicarii fanned a flame of terror using distinctive daggers on their victims, mainly prominent Jews who collaborated with the Romans, while attempting to liberate Judea from Roman tyranny by a philosophy that was nearly apocalyptic. See *Ibid* at 26 – 29; Chaliand & Blin, *supra* note 1, at 2-3.

the Assassins[35] in the middle ages and King John of England,[36] terrorist violence has been used to control people and polities.

Indeed the Jacobin "reign of terror" under the French Revolution[37] and the use of state violence in Nazi Germany make it clear that it has always been available as a tool of governance.[38] In the twenty-first century, terrorism is now associated with both transnational terrorism,[39] and with fundamentalist religious terrorism brandished by shadowy terrorist groups such as Al Qaeda, who are reputed to be responsible for the bombings of the World Trade Center as well as the Pentagon in the United States on September 11, 2001.

In historical context, then, terrorism can be classified as including:

- state-sponsored terrorism,
- non-state terrorism or transnational terrorism, and
- fundamentalist religious terrorism.

It is interesting to note that, while developed states have focused on non-state terrorism, developing and socialist states are more concerned with state-sponsored terrorism by imperial powers, regarding anti-colonial violence either as an exception

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[35] The Assassins targeted rival Muslim military, political, and religious leaders in gruesome assassinations by the blade which was its trademark. It is worth noting that this particular form of terrorism was a fore-runner to the jihadist terrorist movement. See *Ibid.*

[36] King John is believed to have terrorized his subjects into deterrence by a clever orchestration of the disappearance of his enemies by so vicious and dreadful a means that punishment by public execution paled in comparison. See Law, *supra* note 33 at 38.

[37] Vincent Robert Johnson, "The Declaration of the Rights of Man and of Citizens of 1789, the Reign of Terror, and the Revolutionary Tribunal of Paris" (1990) 13 BC Int'l & Comp L Rev 1, at 19-22.

[38] Law, *supra* note 33 at 37.

[39] Monika Heupel, "Adapting to Transnational Terrorism: The U.N. Security Council's Evolving Approach to Terrorism" (2007) 38:4 Security Dialogue 477 at 478.

to terrorism or justified by colonialism.[40] The reason for this divide is, however, beyond the scope of this thesis.[41]

Terrorism is thus old and new; old in that it is as ancient as human civilization and new in that it is as current as the morning headlines of a popular newspaper. There is, however, a "newness" associated with the terrorism of today that does not transcend the history of terrorism in ages past. This newness registers itself in the employment of devious counter-terrorism responses that are not merely positively security-conscious, but potentially violations of fundamental human rights.

1.3 Terrorism: Rationale for Combat

The attainment of the goals of international security and the norms of fundamental human rights are important to all within the civilized world, particularly in the light of the events of 9/11. Suffice it to say, however, that, the aftermath of the September 11th attacks have not merely made the words "security" and "human rights" popular, connoting an "almost insuperable opposition"[42], but have brought about serious tensions between the two political norms as states and the international community at large, grapple with the arduous task of maintaining security while preserving human rights. This is a challenging dichotomy. The execution of how best to safeguard

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[40] See Becker, *supra* note 28 at 90-91.
[41] See Paul Wilkinson, *Terrorism versus Democracy: The Liberal State Response* 2d ed (London, New York: Routledge, 2006) at 2-21.
[42] Liora Lazarus & Benjamin Goold, "Security and Human Rights: The Search for a Language of Reconciliation" in Liora Lazarus & Benjamin Goold, eds, *Security and Human Rights* (Oxford: Hart Publishing, 2007) at 1 [Lazarus & Goold].

freedom and provide security while promoting human rights is not new, but it has become more urgent in the aftermath of 9/11.[43] To this end, anti-terrorism legislation enacted in the United Kingdom (UK) and the United States of America (USA) is outlined to bring contemporary issues into sharper focus. The discussion of the UK *Anti-Terrorism Crime and Security Act 2001, (ATCSA*)[44] and the *USA Patriot Act*[45]concludes with observations on how concern for national security is affecting the rule of law, democracy and the protection of fundamental human rights.

1.4 The UK *Anti-Terrorism Crime and Security Act 2001*

The United Kingdom has had a long history in dealing with terrorism and particular terrorist offences at home within its domestic legal framework,[46] and abroad in former colonies as well.[47] Prior to the events of 9/11, the UK parliament had already passed legislation containing wide range measures to counter terrorist activity.[48] The *Terrorism Act 2000*[49] in particular was a response to the continuing threat in Northern Ireland. However, it preserved and maintained peace and order generally.[50]

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[43] *Ibid.*
[44] *Anti-Terrorism Crime and Security Act 2001*(UK), c 24 [*ATCSA*].
[45] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism* (*USA PATRIOT ACT*) Act of 2001, Pub L No 107–56, 115 Stat 272 (2001) [*USA Patriot Act*].
[46] See generally Paul Wilkinson, ed, *Terrorism: British Perspectives* (Aldershot: Dartmouth, 1993).
[47] See generally Clive Walker, *Blackstone's Guide to the Anti-terrorism Legislation* (Oxford: Oxford University Press, 2002).
[48] The legislative centerpiece that dealt with the subject was the *Terrorism Act of 2000* which came into force on the 19th of February 2000.
[49] *Terrorism Act 2000* (UK), c 11.
[50] *Terrorism Act 2000*, online: introduction <http://www.legislation.gov.uk/ukpga/2000/11/introduction>.

Shortly after the events of 9/11, however, the UK and the US assumed a leadership role[51] in the "war on terror" while its government went ahead in announcing proposals to adopt new legislative measures in order "to counter the threat of international terrorism."[52] The UK parliament thus passed the *Anti-Terrorism Crime and Security Act 2001* in response to the threat of international terrorism.

This legislation represents a shift in UK anti-terrorist strategy, toward a proactive approach which has as its primary aim the prevention of terrorist attacks, rather than a reactionary response designed to culminate in finding solutions to crimes after they have occurred.[53] Positive as this proactive approach may seem, it is treacherous in its use of preventive detention which leads to the imprisonment of persons based on an unfounded fear of what they are yet to or might do, rather than on the basis of what they have actually done.[54]

This provision of internment without trial for an unspecified length of time is by far the most controversial feature of *ATCSA.* On grounds of "national security" and suspicions, non-UK citizens who cannot be deported are likely to become victims of human rights violations, having such rights as their right to fair trial and the presumption of innocence until proven guilty arbitrarily curtailed without reasonable

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[51] See Dominic McGoldrick, "Terrorism and Human Rights Paradigms: The United Kingdom after 11 September 2001" in Andrea Bianchi & Alexis Keller, eds, *Counterterrorism: Democracy's Challenge* (Oxford; Hart Publishing, 2008) at 112 [McGoldrick, "Terrorism and Human Rights Paradigms: The UK after September 11"].
[52] Spoken by the Secretary of State for the Home Department. See HC, *Parliamentary Debates*, 6th ser, vol 372, col 923 (15 October 2001).
[53] Noel Whitty, Therese Murphy& Stephen Livingstone, *Civil Liberties Law: The Human Rights Act Era* (London: Butterworths, 2001) at 143.
[54] See *ATCSA*, *supra* note 45 at s 21.

limits. These wide powers of detention without charge or trial granted in the *ATCSA* have made it necessary for the UK to derogate from article 5(1) of the *European Convention on Human Rights (ECHR),*[55] the only country to have done so. The *ATCSA* also places new restrictions on refugees seeking asylum, empowering the government to deport them if certified as "conducive to the public good" by the Secretary of State.[56] The legislation also limits grounds for appeal of deportation to a commission called the Special Immigration Appeals Commission (SAIC), [57]no further considerations of such asylum claims may be made, and no further consideration of the balance between the individual's fear of persecution and the government's perceived threat to national security can be carried out.[58]

In the words of one commentator:

> [P]arliament's role in relation to the *Anti-terrorism, Crime and Security Act* . . .-the main legislative response of the UK Government to September 11-reveals not only an absence of any effective democratic opposition to the draconian powers it granted, in particular those in Part 4 giving powers to detain non-British nationals without trial, but also a lack of willingness to subject it to the kind of sustained, careful scrutiny that might be expected of a country with (purportedly) a strong allegiance to the rule of law and basic human rights values.[59]

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[55] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5, art 5(1) (entered into force 3 September 1953) [*ECHR*].
[56] See *ATCSA*, *supra* note 45, at s 33(1) and (2).
[57] The SIAC was specially set up to deal with cases involving security under the *Special Immigration Appeal Commission Act, 1997*(UK), c 68.
[58] *Ibid* at s 34.
[59] Helen Fenwick & Gavin Phillipson "Legislative Over-Breath, Democratic Failure and the Judicial Response: Fundamental Rights and the UK's Anti-terrorist Legal Policy" in Victor V Ramraj et al, *Global Anti-Terrorism Law and Policy* (New York, Cambridge: Cambridge University Press, 2005) at 457.

1.5 The *USA Patriot Act of 2001*

The United States was of course the direct target of the terrorist attacks of 9/11. Beyond suffering the loss of many lives in addition to the destruction of two of its most symbolic buildings, these attacks also shocked US society and the international community generally. The collective sense of fear and dread created by September 11 was matched with an equally forceful and resolute determination within US society to "do something" about terrorism and to pursue remedial action in response to these attacks.

The then president, George Bush, in addressing the nation in the wake of the 9/11 attacks, declared a rather radical "war on terror" in which the avowed United States would make "no distinction between the terrorists who committed the attacks and those who harbored them."[60] A host of other legal[61] and policy[62] responses were triggered within the United States in the aftermath of September 11th. A congressional joint resolution authorizing the President to "use all necessary and appropriate force" against persons responsible for the attacks and those persons who

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[60] George W Bush, "Presidential Address to the Nation on the Terrorist Attacks" 37 Weekly Comp Pres Doc 1301 (11 September, 2001).

[61] See e.g. *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,* 66 Fed Reg 57, 833 (2001) which establishes military commissions to detain and try suspected Al Qaeda and Taliban operatives captured in the war on terrorism as part of the legal scheme crafted by the United States in response to the September 11 attacks. This legal order authorizes the detention of any non-citizen whom the president has "reason to believe" is a member of Al Qaeda, is involved in international terrorism or has knowingly harbored such members or terrorists, for an unlimited period of time.

[62] See e.g. "The Creation of a White House Office of Homeland Security" under the *Homeland Security Act of 2002*, Pub L No 107–296, 116 Stat 2135 (2002) [*Homeland Security Act of 2002*], "to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorists' threats or attacks" as an immediate policy response by the United States government to the September 11 attacks.

"harbored such organizations and persons" "in order to prevent any future acts of international terrorism against the United States…"[63] was one such response.

Many other responses followed. The National Security Strategy adopted the doctrine of "pre-emption"[64] for the first time in the history of the United States.[65] This was justified on the basis of the "immediacy of today's threats…."[66] At the same time, the US enacted new anti-terrorism legislation, the *USA Patriot Act.*[67] Credited with galvanizing support for the Bush Administration's anti-terrorism policies,[68] this three hundred and fifty-two page act amended numerous other acts,[69] created the new crimes of "domestic terrorism"[70] and "harboring or concealing terrorists,"[71] and expanded the definitions of "international terrorism" and the "federal crime of terrorism" under the *United States Code*.[72] The act also granted the police and the FBI wider surveillance and investigative powers, including keeping suspected terrorists under surveillance, monitoring their conversations, sharing intelligence with other agencies, and conducting covert searches.[73]

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[63] *Authorization for the Use of Military Force,* Pub L No 107–140, 115 Stat 224 (2001) [*AUMF*].
[64] The doctrine of "pre-emption" as employed by the United States in the "war on terror" implies attack as the best form of defense and hence, striking terrorists before they strike. See generally, Sanjay Gupta, "The Doctrine of Pre-emptive Strike: Application and Implications during the Administration of President George W Bush" (2008) 29:2 International Political Science Review 181.
[65] *Homeland Security Act of 2002*, *supra* note 62.
[66] *Ibid*.
[67] See *supra* note 45.
[68] William C Banks "United States Responses to September 11" in Victor V Ramraj et al, *Global Anti-Terrorism Law and Policy* (New York, Cambridge: Cambridge University Press, 2005) at 492.
[69] See for e.g. *Immigration and Nationality Act of 1965,* Pub L No 89–236, 79 Stat 912 (1965) [*INA*].
[70] *USA Patriot Act*, *supra* note 45 at § 802 (a) (4).
[71] *Ibid* at § 803.
[72] *Ibid* at § 802 (a) (1) and (2), amending USC § 2331, and *USA Patriot* Act, § 808 (2), amending USC § 2332 (b) (g) (5) (B).
[73] *Ibid*, at § 201-225.

The most significant changes introduced by *USA Patriot Act*[74] are those with regard to the *INA*.[75] Immigration laws under the *INA*[76] have been tightened in a way that restricts the due process rights of immigrants. The class of non-citizens subject to removal from the United States on grounds of terrorism has been expanded by calling for expulsion of aliens involved in activity "that endangers the national security of the United States."[77]

Like the UK, the US responded to 9/11 by giving priority over fundamental human rights despite its long history of leadership of developing the rule of law and civil liberties.[78] This has been justified by some in these terms: "the violent destruction of life and property incident to war and the continual effort and alarm attendant on a state of continual danger [can compel] nations the most attached to liberty to resort for repose and security to institutions which have a tendency to destroy their civil and political rights."[79] Nonetheless, I maintain that this justification cannot excuse egregious state violations of human rights. To justify violation on the basis that "founding states"[80] like the United States and the United Kingdom disrespect human rights, turns the concept on its head. States that have invested so

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[74] *Supra* note 45.
[75] *INA*, *supra* note 69.
[76] *Ibid*.
[77] *Ibid*, at § 412 (3) (b).
[78] It would be noted that the United States doctrine on the rule of law as well as its Constitution have been an influential model for the drafting of constitutions of other states around the world. See also Paul Wilkinson, "Liberal State Response to Terrorism and their Limits" in Andrea Bianchi & Alexis Keller, eds, *Counterterrorism: Democracy's Challenge* (Oxford: Hart Publishing, 2008) at 88. [Wilkinson, "Liberal State Response to Terrorism and their Limits"].
[79] See Clinton Rossiter, ed, *The Federalist No. 8* (New York: Alexander Hamilton, 1961) at 50.
[80] The phrase is being used here to refer to the US and the UK as leaders in the doctrines of democracy and the rule of law and pioneers of the civil rights movement.

heavily in the creation and protection of human rights have an even heavier obligation to protect them in times of crisis.[81]

1.6 Conclusions on the Rationale for Combat

UK and US counter-terrorist legislation aimed at enhancing national security is undeniably a product of the "continuing state of urgency" ushered in by the 9/11 attacks. This theory of a "continuing state of urgency" has gained acceptance within a wide political gamut, thus validating the claim that there must necessarily be some adjustment toward the execution of fundamental rights as an inevitable compromise.[82] To this end, scholars and politicians alike have endorsed an erosion of fundamental rights and civil liberties, heralding this choice as a "lesser evil"[83] or an "unavoidable necessity."[84] As demonstrated in UK and US legislation, the end result is a preference for national security at the expense of the fundamental rights of persons who are non-citizens. Certainly, there is an evident culture of discrimination inherent in both pieces of legislation discussed above whose topic is however, beyond the scope of this work. [85]

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[81] For instance, the following speech epitomizes how strongly the United States in particular upholds the cause of civil liberties. It was made by former president Benjamin Franklin who was one of the drafters of the famous United States Declaration of Independence. He remarked that "[t]hey that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." See Letter from Benjamin Franklin to Josiah Quincy (11 September 1773), in John Bartlett, *Familiar Quotations*, 10th ed, (Boston: Little Brown, 1919).

[82]Jeremy Waldron, "Security and Liberty: The Image of Balance" (2003) 11:2 The Journal of Political Philosophy 191at 191 [Waldron].

[83] See Michael Ignatieff, "The Lesser Evil: Politics in an Age of Terror" (Princeton: Princeton University Press, 2004).

[84] See Elizabeth Manningham-Buller, "The International Terrorist Threat and the Dilemmas in Countering It," The Hague, (1 September 2005), online: <http://www.mi5.gov.uk/output/page387.html>.

[85] This legislation is also highly discriminatory, an issue that is outside the scope of this thesis. See *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, art 4(1) (entered into

National security is indeed a vital concern within the liberal democratic enterprise. In fact, human rights obligations require states to protect and defend their territory from the interests of terrorists and ensure the safety of their citizens.[86] But as has been submitted by the National Commission on Terrorist Attacks upon the United States, "the choice between security and liberty is a false choice."[87] The Commission found that though insecurity is a threat to liberty, "to have our liberties curtailed while defending the interest of security, implies a loss of the values that we are struggling to defend."[88] However, the threat of international terrorism in the light of 9/11, especially as amplified by the concept of a "continuing state of urgency," pushes the political choice to the direction of security. Human rights and fundamental freedoms have become vulnerable to easier justification in the face of "urgent" claims. In the words of one commentator, the big change "has been in the way in which terrorism laws have become generalized and in the flimsiness of the national security claims that have underpinned their expansion."[89]

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force 23 March 1976) [*ICCPR*]. Article 4(1) of the *ICCPR* stresses that states should not discriminate solely on grounds of colour or race when derogating their obligations under the Covenant in times of a public emergency which threatens the life of a nation.

[86] See "States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life." Guidelines on Human Rights and the Fight against Terrorism," Principle I, Committee of Ministers of the Council of Europe, (11 July 2002) online: <http://wwww.coe.int/t/E?Human_Rights/Guidelines%20compendium%20ENG.pdf>; See also International Commission of Jurists, "Assessing Damage, Urging Action," Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights Geneva (Geneva: ICJ, 2009) online: International Commission of Jurists <http://ejp.icj.org/IMG/EJP-Report.pdf> at 16.

[87] National Commission on Terrorist Attacks upon the United States "The 9/11 Commission Report" (2004), online: National Commission on Terrorist Attacks upon the United States, <http://govinfo.library.unt.edu/911/report/911Report.pdf > at 395 ["The 9/11 Commission Report"].

[88] *Ibid.*

[89] See Conor Gearty, "Re-thinking Civil Liberties in a Counter-Terrorism World" (2007) Eur HRL Review 111 at 115.

To assert that no preferential distinctions or choices be made between national security and human rights is to risk being labeled a “moral perfectionist” or an “illusionist” about the looming threat of international terrorism. Nonetheless, this option remains in my view, the most ethical and feasible. The remainder of this work will thus focus on the promotion of an unqualified protection of the right to life in the face of competing interests such as national security, despite the urgency evoked by the recent threats of international terrorism.

CHAPTER TWO: THE RIGHT TO LIFE: PRINCIPLE AND PROTECTION UNDER INTERNATIONAL HUMAN RIGHTS LAW

2.0 Introduction

Human rights are commonly described as "fundamental,"[90] although some scholars would disagree with this wholesale classification.[91] On any view however, the right to life is self-evidently the most fundamental of human rights norms.[92] As a biological process, life is the pre-condition without which the enjoyment of all other rights including liberty, fair trial and privacy would be impossible. Protection of the right to life represents the protection of a principle regarded as sacred by many people from different walks of life, and with differing ideological and religious views. The protection of the right to life, especially under international law, is a unifying symbol of the inherent value in human life.

It is thus an oddity that the most basic and most upheld of rights is the least discussed within the legal academic discipline and especially with regard to the subject of international terrorism, which is more popularly grounded in discussions of such rights as torture and fair trial. The right to life is thus a prime choice for

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[90] See e.g. *Universal Declaration of Human Rights*, GA Res. 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc. A/810 (1948), preamble. [*UDHR*]. The preamble affirms a faith in "fundamental human rights." See also: *Vienna Declaration and Programme of Action 1993,* online: <http:www.ohcr.org/en/issues/pages/WhatareHumanRights.aspx>.

[91] Admittedly, human rights are hard to categorize. However scholars have designed a system of classification of rights into first generation, second generation and third generation rights. Freedom from torture, equal protection, due process and the right to form political associations are examples of rights that fall within the first category. See Steiner, Alston & Goodman, *supra* note 35 at 134. In modern human rights thinking however, human rights are considered to be indivisible, form a single unit and cannot be ranked on a hierarchical scale. See *ibid* at 157.

[92] A great deal of law in humanitarian conventions and international human rights instruments support the existence of very fundamental human rights which by their protection, constitute a class of rights on which the law permits no derogation even in times of emergency. The right to life is one of such rights protected by common article 3 of the *Four Geneva Conventions*, as well as under article 4(2) of the *ICCPR.*

discussion with particular reference to the topic of international terrorism, being the least of rights explored in relation to the subject, and being yet the most fundamental and important of all human rights.

This chapter begins with a brief examination of the origins of the right to life in diverse traditions including religion, philosophy and law. Most of today's major world religions including Christianity, Islam and Buddhism, all have specific notions about the treatment of human life per a value that is attached to it. It is notable, however, that no theological school of thought fosters a system of "rights" per se, but rather, a duty to protect life.[93] Thus the protection of a "right" to life represents a secularized concept of the duty to protect life under most religions particularly Christianity. This notwithstanding, there exists an inseparable dichotomy between rights and duties as both are coterminous. It is thus no surprise that the expression given to the right to life in particular, as it exists today in declarations,[94] treaties and other legal documents, mirrors closely Judeo-Christian concepts of a duty to protect life.

Philosophy, unlike religion, embraces the value of human life in more metaphysical terms. Thoughts on the value of life have been expressed by ancient and modern philosophers alike. Socrates and many other Stoics like Seneca expressed a belief in an "afterlife" through death, which is purportedly advantageous to the

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[93] Rhona KM Smith, *Textbook on International Human Rights* (Oxford: Oxford University Press, 2003) at 5[Smith].
[94] For instance, it is strongly argued that the right to life as presented in the *UDHR* has Christian roots. See Hilary Charlesworth "The Challenges of Human Rights Law for Religious Traditions" in Mark W Janis & Carolyn Evans: *Religion and International Law* (The Hague: Martinus Nijhoff Publishers, 1999) at 405.

philosopher because death results in a separation of the soul from the body, and this separation enables philosophers to examine matters in a pure state devoid of fleshly limitations.[95] In fact, these Stoic philosophers tolerated views of suicide to an arguably large extent, welcoming it as a means to liberation rather than a misdeed for which societal condemnation and punishment was necessary. Thus, it would seem that the ancient philosophical protection of human life was not necessarily absolute. Modern philosophers however viewed the protection of human life as absolute even from the very hands of its inhabitants. Immanuel Kant for instance, argues that man as a being fills an objective end and purpose in his own self, and thus, cannot be substituted to simply serve another means.[96] Other modern philosophers like Dworkin also discuss the sanctity of life against the backdrop of more controversial issues like euthanasia and abortion, while seventeenth century philosopher John Locke, fastened his concept of a natural right to life on "self-preservation" which he claimed as the "first and strongest desire God planted in Men."[97]

Religion and philosophy offer varied reasons for the protection of human life which are grounded in a fundamental belief in the sanctity of human life. But whereas religion and philosophy intersect and end in a fundamental belief in the sanctity of human life, law offers a conception of the right that is essentially naturalistic and

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[95] See generally Seneca, *The Laws*, book 9, s 843 in Francis Caldwell Holland, *Seneca* (London: Longmans, 1920).
[96] Lawrence Pasternack, ed, *Immanuel Kant: Groundwork of the Metaphysics of Morals In Focus* (London: Routledge, 2002) at 428.
[97] Peter Laslett, ed, *Locke's Two Treatises of Government* (Cambridge: Cambridge University Press, 1998) at 1st Treatise, s 88. Locke adds that the second strongest desire God planted in men is a "strong desire also of propagating their kind, and continuing themselves in their posterity."

embedded in the rules of positive law. From this position, the law provides effectiveness and expression to the right as a subject of interpretation and classification. This section would thus focus on the legal origins and development of the right to life, paying particular attention to the development of the right under international law as a more relevant method of assessing the value of the said right.

The second part of this chapter examines more closely the protection and enforcement of a legal right to life under international human rights law. Generally, the international community views the right to life as absolute from which no derogations are permissible even in the event of an emergency that threatens the life of a nation.[98] For this reason, the protection of the right to life under international law has come under scrutiny in light of controversial issues like the death penalty, meted out to persons convicted of serious crimes including genocide under a host of domestic or national laws. Most western states, however, support the abolition of capital punishment, culminating in the expanding abolition of the death penalty. The issue of the legality of the death penalty is however beyond the scope of this section. This section focuses on the nature and scope of the international protection of the right to life.

The third section of this chapter questions whether the "continuing state of urgency" evoked by the recent threats of international terrorism constitutes a special type of emergency that permits derogations from the right to life. This discussion asks

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[98] *ICCPR*, *supra* note 85, at arts 6; 4(2). See also Human Rights Committee, *General Comment 6*, 16th Sess, 378th Mtg, Un Doc. HRI/GEN/1/Rev. 9 (1982), at para 1 and 3 [*Gen Cmt 6*].

whether the implementation of counter-terrorism measures that facilitate arbitrary killings of persons suspected of terrorism by states, in their bid to defend national security, constitutes a violation of the right to life under international law.

2.1 Origins of the Right to Life under International Human Rights Law

The development of fundamental human rights including a legal right to life and its protection under international human rights law has no doubt been greatly influenced by religious and philosophical traditions of thought. The existence of a body of basic rights can be traced as far back to the early thirteenth century in Europe.[99] Concepts such as liberty and "rights" are linked to the constitutional concept of the rule of law theories of "natural rights." These in turn helped create a legal concept of human rights.[100] "Natural rights" concepts eventually found legal expression at the close of the century by which time the phrase "human rights" had gained popularity, having been coined by radical English writer Tom Paine.[101] The famous declarations proclaimed by the United States[102] and France[103] at independence following freedom from colonial rule and a revolution respectively, both embody

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[99] The most significant amongst these was the "Magna Carta" (Great Charter) of England issued by King John in 1215. The "Magna Carta" contained a number of important rights for instance: the rule that there should be no punishment without a lawful judgment which has been rendered today as the rule of law. See David Hoffman & John Rowe, *Human Rights in the UK: An Introduction to the Human Rights Act 1998 (*England: Pearson, 2003) at 17 [Hoffman & Rowe]. See also Smith, *supra* note 93 at 5.

[100] Elizabeth Wicks, *The Right to Life and Conflicting Interests* (Oxford New York: Oxford University Press, 2010) at 35 [Wicks].

[101] See generally Thomas Paine, *The Rights of Man* (London, 1791).

[102] See "The Declaration of Independence: The Want Will and Hopes of the People" (4 July 1776), online: <http://www.ushistory.org/declaration/document/>.

[103] See "Declaration of the Rights of Man and of the Citizen" (27 August 1789), online: Human Rights Constitutional Documents < http://www.hrcr.org/docs/frenchdec.html>.

statements on rights such as liberty and equality after the natural law philosophy of the eighteenth century.[104] This system of rights or civil liberties then influenced the civil codes and constitutions of many countries, with a liberty-based theory being more prevalent in common law jurisdictions, while the rights-based theory remained dominant in many civil legal systems. The rights-based theory demanded an acknowledgement of the inherent rights of peoples which states and state organs were bound to respect, while the liberty theories argued an independence of the individual from arbitrary state interference.[105]

The international protection of human rights, including the right to life, however, postdates the Second World War. Prior to this period, there had been very little by way of international human rights protection primarily because international law was generally concerned with the law between states, not between states and individuals. It was thus viewed as having no authentic role in the protection of individuals.[106] Based on treaties, international law dealt with matters such as the settlement of border disputes and peace terms for ending a war. Internal affairs, such as how it governed its nationals and how it treated its citizens, were seen as matters of domestic jurisdiction.

International law at the time was not entirely unconcerned with the welfare of human beings. It did selectively recognize and protect individual human interests through the apparatus of the state. Naturally, states were legitimately concerned about

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[104] Wicks, *supra* note 100 at 18. See also Smith, *supra* note 93 at 6.
[105] Smith, *supra* note 93 at 4.
[106] See Steiner, Alston & Goodman, *supra* note 25 at 130; See also Hoffman & Rowe, *supra* note 99 at 20.

their diplomats and diplomatic missions as well as their property within the territory of another state; this led to the creation of a system of norms to ensure that nationals and property of a state within another state were treated fairly. In this vein, the law early identified an international standard of justice by which a state must abide in its treatment of foreign nationals.[107]

The scope of international protection for individual human interests gradually widened in the latter part of the eighteenth century and mid-nineteenth century with the abolition of the slave trade in Europe and America.[108] There were also moves to ensure a basic level of protection from ill-treatment during wars, which eventually led to the adoption of the *Geneva Convention of 1864*[109] as well as *The Hague Conventions on the Treatment of Prisoners of War*.[110] States thus began to attend to human values through humanitarian interventions. In addition, the League of Nations following the First World War further extended the international protection of human rights through a number of treaties which it deployed in favor of minorities, in addition to such other rights as the right to life, liberty, equality before the law and

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[107] This concept was later developed under what is now known under international law as diplomatic immunity. See Steiner, Alston & Goodman, *supra* note 25 at 130.

[108] The abolition of slavery was primarily the result of the actions of individual states in particular the Royal Navy of England, which played a tremendous role by confiscating slave ships while the increasing recognition of the immorality of slavery led to adoption of the *Slavery Convention of 1926*. See *Slavery Convention*, 25 September 1926, 60 LNTS 254, (entered into force 9 March 1927).

[109] *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, 22 August 1864, TS 377, (entered into force June 22 1865). This Convention later became the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 [*First Geneva Convention*].

[110] See *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land*, 29 July 1899, 32 Stat 1803, 187 Consol TS 429, (entered into force 4 September 1990); *Hague Convention IV- Laws and Customs of War on Land*, 18 October 1907, 36 Stat.2277, 205 Consol TS 277 (entered into force 26 January 1910).

non-discrimination. The League of Nations further devised a system of bringing complaints before it although this system was practically limited and achieved little efficiency.[111]

In sum, the period prior to the Second World War did lay a foundation of some sort for the international protection of human rights including the fundamental right to life, although this recognition and protection of rights were limited to a certain class of persons and were pursued out of states' political and economic interests. Humanitarian interventions did enlarge the number of persons whose rights were protected under international law, but that was also insufficient in terms of an international threshold for the protection of human rights.

The establishment of the International Military Tribunal at Nuremberg in the ashes of the Second World War strategically emphasized the need for the international protection of human rights in a way that could no longer be ignored by the world.[112] The gross violations of rights, in particular the right to life, disdained by Nazi Germany in its onslaught of hundreds of thousands of Jewish lives, led to a resolution by the Allied Powers to prosecute war crimes and particularly, crimes against humanity at Nuremberg with the defeat of Germany.[113] In addition, the establishment of an internationally recognized organ for the promotion and protection of human rights among other purposes – The United Nations organization (UN) – was

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[111] Hoffman & Rowe, *supra* note 99 at 21.
[112] Smith, *supra* note 93 at 27.
[113] Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 2000) at 40.

birthed.[114] The UN Charter affirmed in its preamble a "faith in fundamental human rights," "the dignity and worth of the human person . . . [and] the equal rights of men and women."[115] The Charter also established a Human Rights Committee (HRC) chaired by former US First Lady, Eleanor Roosevelt until 1951. The Committee set out to draw up an international bill of rights, but could not agree on enforcement mechanisms. As a compromise, the Committee agreed to a preliminary non-binding declaration of principles on human rights, to be followed by a legally enforceable covenant. This was the first international expression of human rights.[116]

Many things influenced the *UDHR*. Article 1 of the Declaration in itself provides some clues when it states: "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."[117] This fundamental statement echoes the popular natural law philosophy of the memorable eighteenth century documents such as the US "Declaration of Independence." Morsink however credits the Holocaust as the most influential event to have shaped the *UDHR,* contending that the pronunciations of the Declaration are not mere statements of natural law or "Enlightenment

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[114] The United Nations Organization replaced the League of Nations and assumed some of the functions of its predecessor organ in addition to the promotion and protection of fundamental human rights which had been grossly violated within three decades of the two world wars. The *Charter of the United Nations* was adopted in San Francisco on the 26th of June 1945 and came into force on the 24th of October, 1945 with 48 states voting in favor and eight abstaining. See generally *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7, (entered into force 24 October 1945) [*UN Charter*].
[115] *Ibid*, preamble.
[116] See *UDHR*, *supra* note 90. As mentioned above, the *Universal Declaration on Human Rights* was to set the stage for what would be legally enforceable human rights covenants – the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights.* These two together with the Declaration make up the International Bill of Rights.
[117] *UDHR*, *supra* note 90 art 1.

reflexes," but "deep truths rediscovered in the midst of the Holocaust . . . ."[118] The right to life conferred under article 3 of the *UDHR* was thus the "first clear statement of an international right to life."[119] The declaration right was inspired by details of the War Crimes Commission Report of November 1947,[120] which found that aged, insane and incurable people, who were killed, were referred to as "useless eaters."[121]Although, the text of article 3 incorporates the essence of a right to life based on the war experience, it also encompassed positive rights such as the right to food, clothing, housing and medical care all, of which were aimed at improving the standard of life entitled to each human being.[122] By stating the right to a standard of living, the drafters of the *UDHR* made it clear that the right to life is the most important and fundamental of all human rights, and its value is lost or cannot be fully appreciated if allowed to exist in a vacuum. Thus the provision of other rights such as the right to a standard of living presents as it were an enabling environment which establishes auxiliary support for the right to life, and gives the right its full essence and value.

The *UDHR* was however fundamentally limited despite its noble and grand recognition of the fundamental right to life. It lacked the legal status of a declaration

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[118] Morsink, *supra* note 113 at 37.
[119] Wicks, *supra* note 100 at 39.
[120] United Nations War Crimes Commission Report, *Information Concerning Human Rights Arising from Trials of War Criminals,* UNESCOR 1948, UN Doc E/CN.4/W.20 [War Crimes Commission Report of November 1947].
[121] Morsink, *supra* note 113.
[122] *UDHR*, supra note 90, art 25(1): "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

of the General Assembly of the United Nations rather than a treaty ratified by states that are accordingly bound per their ratification. The *UDHR* is thus purely hortatory and aspirational, merely declaratory of internationally recognized human rights norms.[123] However, it has assumed a role of importance and "honor in the human rights movement"[124] as the international human rights constitution.[125]

The statement of an international legal right to life eventually came twenty-eight years after the *UDHR*. As earlier noted, the *UDHR* was meant as a forerunner to precede an international binding legal covenant on human rights.[126] However this proposed "binding legal covenant" did not emerge for another three decades. As McGoldrick notes, the drafting of the Human Rights Covenants coincided largely with "the depths of cold war confrontation, the explosive development of notions of self-determination and independence, the accompanying political tensions of large scale decolonization, and the consequential effects of a rapidly altering balance of diplomatic power within the United Nations.[127]" Buffeted by conflicting ideologies in the then polarized world, the provisions of the *UDHR* were addressed in two covenants: one on civil and political rights, the other on economic, social and cultural rights. The *International Covenant on Civil and Political Rights* (*ICCPR*)[128] and the

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[123] Steiner, Alston & Goodman, *supra* note 25 at 152.
[124] Henry Steiner, "Securing Human Rights: The First Half-Century of the Universal Declaration, and Beyond*",* *Harvard Magazine*, September-October 1998.
[125] Steiner, Alston & Goodman, *supra* note 25 at 136.
[126] See note 116 above.
[127] Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Clarendon Press, 1994) at 14 [McGoldrick, *The HRC: It's Role in the Development of the ICCPR]*.
[128] *ICCPR, supra note 85.*

International Covenant on Economic, Social and Cultural Rights (*ICESCR*),[129] were approved in 1966. Receiving the sufficient number of ratifications from states, both covenants entered into force in 1976, with the *ICCPR* affirming the right to life under article 6.[130]

It is worthwhile to note that right to life in the *ICCPR* is the only of its kind in the entire document expressly qualified as an "inherent right." The HRC described it as "the supreme right" under its first *General Comment* on article 6.[131] Furthermore, article 6 of the *ICCPR* in its opening words clearly states the right as one which shall be protected by law. These statements concerning the right to life though opposed on account of being declaratory in context rather than on principle[132] demonstrate the importance which the HRC has attached to the right and emphasizes that the right to life is not "a right conferred on the individual by society. Society, in fact, owed a duty

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[129] *International Covenant on the Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, 6 ILM 368 (entered into force 3 January 1976) [*ICESCR*].
[130] *ICCPR*, *supra* note 85, art 6. It states as follows:
(1). Every human being has the inherent right to life. This right shall be protected by law. Now one shall be arbitrarily deprived of his live.
(2). In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
(3). When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention on the Punishment of the Crime of Genocide.
(4). Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
(5). Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
(6). Nothing in this article shall be invoked to delay or prevent the abolition of capital punishment by any State Party to the present Covenant.
[131] *Gen Cmt 6*, *supra* note 98 in UN Doc. A/37/40 at 93- 94.
[132] The first sentence of article 6(1) was adopted by sixty-five votes to three with four abstentions.

to the individual - that of protecting his right to life."[133] Moreover, the inclusion of the right to life in the *ICCPR* discards notions and doubts about the fact that the right to life can merely exist only outside of positive law, as held for instance by the natural law theories of the eighteenth century.

Although the emergence of article 6 took three decades, it now exists as an affirmation that the inherent right to life is to be safeguarded by law - an international statement of law, an international legally recognized right to life.

2.2 Nature and Protection of the Right to Life under International Human Rights Law

Recognition of an internationally binding right to life has had a host of repercussions under international law. International legal protection of the right to life intersects with regional protection systems[134] as well as other international human rights instruments.[135] While other human rights may offer more practical approaches to protecting human life, this section focuses primarily on the right to life as guaranteed under the *ICCPR* and the enforcement of the Human Rights Committee.

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[133] Marc J Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Martinus Nijhoff, 1987) at 119.

[134] The right to life is protected under the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221, Eur T S 5 (entered into force 3 September 1953) [*ECHR*]; *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123, 9 ILM 99 (entered into force 18 July 1978) [*ACHR*]; and the *African Charter on Human and Peoples' Rights,* 27 June 1981, 1520 UNTS 217, 21 ILM 58 (entered into force 21 October 1986) [*ACHPR*].

[135] The *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277, (entered into force 12 January 1951), [*Genocide Convention*], is a specialized international human rights instrument that has its core, the protection of human life and subsequently the right to life through the prohibition of killing as an element of genocide, which constitutes a crime punishable under international law.

2.2.1 Nature and scope of the right to life under the *ICCPR*

Article 6 of the *ICCPR*, entitled "Right to life" is composed of six clauses that plainly state the existence of an inherent right to life which should be protected by law while prohibiting arbitrary killing. It further discusses the death penalty. Given the twin focus of this article's definition, the right can be broadly classified under the following two parts: life and death. It deals with life when it makes a statement of the right and its protection at law, and it deals with death when it discusses the imposition of the death penalty. There is however a paradox about the statement of the right to life in the *ICCPR* in that it discusses death to a greater degree than the mere statement of the right to life.

> ARTICLE 6 – RIGHT TO LIFE[136]
>
> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried our pursuant to a final judgment rendered by a competent court.
> 3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

[136] *ICCPR, supra* note 85 art 6.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State party to the present Covenant.

The Right to Life

The first clause under article 6 guarantees the right to life of every human being. Questions steeped in controversy, like "who is a human being?" or "when does human life begin?" are evoked by the mere statement "every human being has the inherent right to life."[137] The HRC has however deliberately remained elusive in its wording on the parameters of the said right under article 6(1) of the *ICCPR* unlike the *American Convention on Human Rights* (*ACHR*),[138] the language which explicitly and clearly guarantees the right to have one's life respected at law and protected from the moment of conception.[139] Though the HRC has remained distant on the issues that surround the definition or conceptualization of life for instance, its members have

[137] *ICCPR, supra* note 85 art 6 (1); See also *ECHR, supra* note 54 art 2(1) which provides that "everyone's right to life shall be protected by law." Both documents the *ICCPR* and the *ECHR* are unclear on whether "every human being" or "everyone" includes a fetus, thus leaving the question open for determination by treaty bodies; *ACHR, supra* note 134 art 4; *ACHPR, supra* note 134, art 4.
[138] *ACHR, supra* note 134, art 4 (1) states: "Every person has the right to have his life respected. This right shall be protected at law, and in general, from the moment of conception. No one shall be arbitrarily deprived of his life."
[139] See Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary 123* (N.P Engel, 1993) [Nowak]. Nowak in his commentary on the *ICCPR* relates that the drafters of the *ICCPR* specifically rejected language that referred to the canonization or crystallization of life at conception, choosing to leave the language of article 6(1) rather "open'" so as to be able to give it a broad interpretation.

participated in abortion and euthanasia debates intermittently.[140] However, article 6(1) of the *ICCPR* remains distinguished amongst other rights in the Covenant as the only "inherent" right, thus enforcing the image of an unquestionable duty owed by states and society at large to protect this right.

Article 6(1) further enlists the protection of the right to life by law and ensures that no one is to have his or her life arbitrarily curtailed. In this regard, the HRC has focused on the protection of the right to life under law by prohibiting arbitrary killings. The term "arbitrarily" was debated largely on account of vagueness during the drafting of the clause. The term "intentional,"[141] as derivatively used in the *ECHR*, was proposed as a suitable substitute, although it was ultimately rejected. McGoldrick accounts for the rejection of the use of the term "intentional" by noting that it is obviously more difficult to justify an "intentional killing" in terms of the tests of necessity and proportionality as compared to an "arbitrary killing," which would probably include negligent or reckless killing in certain circumstances.[142] The HRC, however, maintained that the term "arbitrarily" was autonomous. Furthermore, it cast this principle as a statement (of law) to prevent the deprivation of human life through any national bodies.

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[140] Particularly on the issue of abortion, the HRC has tended to focus on the potential risks associated with anti-abortion legislation noting in particular that the criminalization of abortions in general has implications on article 6(1) to the extent that the lives of pregnant women who resort to clandestine abortions are at risk of termination. See *Camarago v Colombia* Communication No. 45/1979 (31 March 1982), CCPR/C/15/D/4/51979 at para 13.3 [*Guerrero*].

[141] The term "intentionally" appears in article 2(1) of the *ECHR* which states: "Everyone's right to life shall be protected by law. No one shall be deprived of his life *intentionally* save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." See *ECHR*, *supra* note 55 art 2(1).

[142] McGoldrick, *The HRC: Its Role in the Development of the ICCPR*, *supra* note 127 at 341. See generally *McCann and others v the UK*, 21 EHRR 97.

Thus in *Guerrero v Colombia*,[143] the HRC determined that the actions of the police in intentionally shooting seven "suspected kidnappers," including Mrs. Maria Fanny Suarez De Guerrero,[144] was disproportionate to the requirements of the law. Mrs. De Guerrero had been shot several times after she had already died of a heart attack. Though the actions of the police were deemed lawful under Colombian law, the HRC held that it amounted to an arbitrary deprivation of the right to life contrary to article 6(1) of the *ICCPR* and that the right to life was not adequately protected under Colombian law as required by article 6(1).

The decision of the HRC in the *Guerrero Case*[145] reflects the status of article 6 as the "supreme right" in that it gives the right to life greater priority over arbitrary acts of state force. These sentiments are clearly expressed in General Comment No. 6 in which the Committee States:

> State parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.[146]

Moreover, in interpreting the concept of the deprivation of life under article 6, the HRC has pursued a broad approach noting that the "'inherent right to life' cannot

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[143] *Guerrero, supra* note 140 in UN Doc CCPR/C/OP/1, at 112.
[144] Camarago, who was the husband of Mrs. Maria Fanny Suarez de Guerrero is the author of this complaint.
[145] *Guerrero, supra* note 140.
[146] *Gen Cmt 6, supra* note 98 at para 3.

properly be understood in a restrictive manner"[147] and calls on states to adopt "positive measures"[148] to protect the inherent right to life.[149] In considering state reports, the HRC has also paid particular attention to measures undertaken by states to protect the right to life, in particular "positive measures. " One commentator noted during the consideration of the report of Lebanon that "it was not only for the legislator, but for all [s]tate authorities, the executive, the police, [and] the military - actively to protect life."[150] Similarly, I would argue that the HRC would extend "positive measures" to require participation of all state organs to ensure the non-arbitrary deprivation of life. The HRC has determined that omissions by state organs may violate article 6(1). In *Dermit Barbato v Uruguay*,[151] the HRC held that state authorities were in violation of article 6(1) for failing to take adequate measures either by act or *omission* to protect life. Furthermore, the HRC takes a very serious view toward the death of persons in custody, holding that a state is duty bound to ensure that the lives of the persons it brings under custody are adequately

[147] *Ibid*, at para 5.
[148] *Ibid*
[149] *Ibid*. In addition, the Committee remarked that "it would be 'desirable' for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics." Armed conflicts and thermonuclear wars are the fairly recent threats which the HRC has added to the list of items that States parties should adopt measures to eliminate. It is argued however that this broad approach and consequent call for positive measures including those indicated by the HRC as desirable does raise legal difficulties especially on the question of the justiciability of these matters.
[150] See McGoldrick, *The HRC: Its Role in the Development of the ICCPR*, *supra* note 127 at 329, para 8.4.
[151] *Dermit Barbato v Uruguay*, Communication No. 84/1981 (27 February 1981), CCPR/C/17/D/84/1981, at para 9.2.

protected.[152] The HRC thus requires full and thorough investigations into allegations of disappearance as well as of suicides by persons in custody.[153]

The death penalty

Article 6(2) concedes the use of the death penalty in countries[154] which have not abolished its use but restricts usage for "the most serious crimes."[155] The HRC has yet to clearly enumerate those offences which it categorizes under "the most serious crimes," but does view it restrictively.[156] The *Second Optional Protocol to the ICCPR* condemns the death penalty altogether, however, and requires signatories to abolish it entirely, subject only to reservations for use during war.[157] Article 6(2) prescribes the use of the death penalty pursuant to a "final judgment rendered by a competent court," while adding that the judgment should be meted out in accordance with the

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[152] *Ibid*; See also *Herrera v Colombia*, Communication No. 161/1983 (2 November 1987), CCPR/C/31/D/161/1983, at para 10.3.

[153] The HRC has noted that "[s]tates should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life." See *Gen Cmt 6*, *supra* note 98 at para 4.

[154] Countries that retain the death penalty include Yemen, Egypt, Iraq, Libya, Guatemala, Vietnam and the United States of America. See "Abolitionist and Retention Countries" online: Amnesty International <http:www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries#retentionist>. The United States in particular remains one of the countries with the highest use of the per capita punishment system, which has victimized many of its youths. See "The Death Penalty in the US (1976-2008)," online: The Clark County Prosecuting Attorney <http:www.clarkprosecutor.org/html/death/dpusa.htm.>. The United States is a signatory to the *ICCPR*.

[155] See also Protocol No. 6 of the *ECHR*. Both the *ICCPR* and the *ECHR* expressly permit the death penalty while the optional protocols of both treaties have prohibited its use. Article 2(2) of *ECHR* permits lawful derogations from the right to life under certain express conditions, the fulfillment of which would not amount to a deprivation of the right to life or the contravention of the said right under the convention. The conditions include instances where the deprivation of life is the result of the use of force which is no more than absolutely necessary:
(a). in defense of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

[156] *Gen Cmt 6*, *supra* note 98 at para 7. The restrictive construction of the term parallels the explicitly expressed language of the *ACHR* under article 4(2), which prohibits the death penalty from either being reintroduced or extended.

[157] *Second Optional Protocol to the International Covenant on Civil and Political Rights*, 15 December 1989, 1642 UNTS 414, (entered into force 11 July 1991) art 2(1), GA Res 44/128, UN Doc. CCPR/PO2/DP 1989 [*Second Optional Protocol to the ICCPR*].

law in force at the time, thus preventing retroactivity. Article 6(2) therefore introduces quite a rigid standard for the imposition of the death penalty. The elements of this standard include the following:

- imposition for a crime of a serious nature;
- penalty of death must be prescribed by the law in force at the time of the commission of the crime;
- execution of death penalty as the instruction of a final judgment; and
- penalty of death must be rendered by a competent court.

Satisfaction of the above threshold by a state that has not abolished the death penalty or entered a reservation to use the sentence during a time of war does not contravene the provisions of the Covenant nor the *Genocide Convention*.[158] Although the *ICCPR* clearly permits the use of capital punishment per article 6(2) of the Covenant, it has focused on the abolition of the death penalty, and where this has not been possible, aimed at restricting its use. These ideals have been counted as *"*progress*"* toward protecting human rights within the meaning of the reporting requirements under article 40.[159]

Article 6(3) restrains state parties from invoking anything under the entire article 6 of the *ICCPR* as sufficient grounds for derogation from their obligations under the *Genocide Convention* when the deprivation of life constitutes the crime of genocide.

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[158] See *Genocide Convention supra* note 135.
[159] *Gen Cmt 6, supra* note 98 at para 6.

In this regard, the HRC has sought to hold state parties accountable for acts of mass violence that result in the arbitrary loss of life. Subsequently, the HRC has derived from Article 6(3) a *supreme duty* to prevent large-scale violent attacks that result in the arbitrary loss of life, further stressing the continual need for "[e]very effort . . . to avert the danger of war, especially thermonuclear war"[160] – both of which are typical examples of acts of mass violence resulting in the arbitrary loss of life. On the issue of thermonuclear war in particular, the HRC has expounded on its vast potential threat to the right to life in terms of the manufacturing, possession and deployment of nuclear weapons.[161] It has however noted that individuals who claim a potential threat to their right to life as a result of the use or testing of such nuclear weapons must establish a real and immediate threat to their lives so as to justify their case.[162]

Clause 4 of article 6 of the *ICCPR* subtly articulates the HRC's stance on the execution of the death penalty as a second-rate option under criminal law, guaranteeing rather the right of an individual sentenced to death to seek commutation or pardon. It further states that pardon or amnesty sought from the death penalty may be granted in all cases without exception. Nowak notes that, although not expressly stated, article 6(4) implies that the execution of the death sentence must be postponed in order to allow an appeal for amnesty or pardon to take its full course, the proper conclusion of this procedure upon which further action may be taken. Moreover, the

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[160] *Ibid*, at para 2.
[161] Human Rights Committee, *General Comment No. 14, Right to Life* 23rd Sess, CCPR/C/21/ Rev. 1, (1984), at para 4; 5 [*Gen Cmt 14*].
[162] See *EW et al. v The Netherlands*, Communication No. 429/1990, (8 April1993), CCPR/C/47/D/49/1990 at para 6.4.

HRC has emphasized the importance of fair trial guarantees in cases leading to death sentences and has affirmed that the imposition of a sentence of death upon conclusion of a trial in which provisions of article 14 of the Covenant have not been respected, constitutes a violation of the right to life.[163]

Clause 5 of article 6 disallows the imposition of the death sentence for crimes committed by persons below eighteen years while expressly stating that the sentence shall not be carried out on pregnant women. In this regard, the HRC has succeeded in creating a special category of persons who are exempt from the imposition of the death penalty in countries where the practice has not been abolished. In addition, state parties cannot circumvent the restriction on the imposition of the sentence on persons below eighteen years by waiting until these persons attain that age to impose or pronounce the sentence.[164] In contrast to other Covenant provisions involving juveniles,[165]article 6(5) sets an absolute age limit and does not rely on domestic law definitions of "juvenile." Nonetheless, the prohibition of the imposition of the death sentence on pregnant women is not entirely absolute in that the prohibition does not forestall the sentence itself but merely its execution.

The sixth and final clause of article 6 is a statement to the effect that nothing shall be used in the entire sum of the article to delay or prevent the abolition of capital punishment by state parties present to the Covenant.

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[163] See Human Rights Committee, *General Comment No. 32, Right to Equality before Courts and Tribunals and to a Fair Trial*, 90th Sess, UN Doc CCPR/C/GC/32 (2007) [*Gen Cmt 32*].
[164] Nowak, *supra* note 139 at 120.
[165] See *ICCPR*, *supra* note 85, arts: 3; 14(1); 24(1) and 102(b).

On the nature and scope of the right to life under article 6 of the *ICCPR*, the foregoing discussion paints a picture of a firmly established inherent right safeguarded by the law against arbitrary killing even at the hands of state authorities. It also elicits, though not explicitly, the non-absolute nature of the right which is only violated through an act or acts that would amount to "arbitrary killing" without further setting out details of potential exceptions to the violation of the said right. Read together with article 4(2) of the *ICCPR* which establishes a list of rights under the Covenant from which state parties cannot derogate their obligations, the right to life emerges as an even more powerful right from which the derogation of a state's obligation from under the said article is not permitted even in the face of an officially proclaimed emergency that would threaten the very life of a nation. Then, there are the five express limitations on the imposition and implementation of the death sentence which the HRC has heretofore approached consistently as opposed to its intermittent treatment of abortion and euthanasia under a clearly perceived abolitionist philosophy. It is thus my view that though the *ICCPR* clearly evinces that the right to life is not absolute, the broad approach which the HRC has demanded be given to the interpretation of the article, coupled with the express limitations on the imposition and implementation of the death sentence, reveal an unqualified abolitionist philosophy and imply a very near absolute interpretation of the right to life subject to non-derogation even in life-threatening emergencies.

2.2.2 *ICCPR* Enforcement of the Right to Life

The *ICCPR* implements and enforces substantive human rights provisions, including the right to life, by holding states accountable for recognizing and promoting these rights through domestic law. Domestic laws serve as the direct vehicle through which criminal sanctions are imposed on the deprivation of life, thus protecting the right to life. Indeed, the widespread protection of the right to life under domestic law, which represents by far the most effective means of ensuring protection for the said right, enforces the universality of the concept of the sanctity of human life. A robust criminal legal system with legal prohibitions on acts that result in the deprivation of life and consequently, the punishment of individuals convicted of such offences, in addition to an effective police force and court system, constitute the most fundamental measures undertaken by most states towards the protection of the right to life. International law currently recognizes the need for and further imposes obligations on states party to human rights treaties for the protection of rights.[166]

As with other treaties, the *ICCPR* can only act indirectly to ensure that states do comply with the treaty. As one of the major seven treaty bodies within the UN, the HRC promotes compliance with the *ICCPR* and its corresponding protocols through procedural mechanisms. Three procedural mechanisms are available to the HRC in relation to the *ICCPR*: a state reporting system, an individual complaints system and

[166] The HRC for instance has required state parties to the *ICCPR* to take measures "to prevent and punish the deprivation of life by criminal acts." *Gen Cmt 6*, *supra* note 98.

an inter-state complaints system. Each of these three procedural mechanisms will be discussed briefly in turn.

State Reporting System

Article 40 of the *ICCPR* requires states to file reports with the HRC. Reporting operates to promote compliance in two ways: provide record of the measures a state has taken to implement the Covenant at the outset. Subsequent periodic reports update those initial reports.[167] One commentator has described these periodic reports as the "most sweeping tool in the Committee's arsenal to pursue *ICCPR* compliance."[168] The HRC examines states parties' reports in collaboration with the state's representatives and makes conclusions or observations - "Concluding Observations" - that spell out practical measures that should be taken by the respective state to safeguard the rights enshrined in the Covenant. In this way, the reporting system requires states to examine the current human rights situation within their countries, thereby reflecting upon the effectiveness of their human rights protections and guarantees, while bearing in mind that the international community is actively watching and monitoring domestic affairs. David Harris defines this monitoring and observing role of the HRC as "a symbol of . . . commitment to human

[167] *ICCPR*, *supra* note 85, art 40(1) (a); (b). It is worth noting that the HRC previously required periodic reports every five years in 1981. See Human Rights Committee, *Decisions on Periodicity*, Annex V, UN Doc. A/136/40, (1981). It has however amended this decision requiring since 2001, the submission of periodic reports on a case by case basis, communicating the timeline for such additional periodic reports in the last paragraph of its Concluding Observations. See Human Rights Committee, *Decisions on Perodicity* Annex III, 113 UN Doc. A/55/40, (2001) at para B.1.
[168] Scott N Carlson & Gregory Gisvold, *Practical Guide to the International Covenant on Civil and Political Rights* (Ardsley, New York: Transnational Publishers, 2003) at 5.

rights and a medium for reminding and educating governments of the standards to which they are subject."[169]

The persistent problem, however, with the state reporting procedure has been the failure on the part of most states in submitting reports on time or altogether. A host of factors account for the failure of compliance of states parties' in this regard. They include "unforeseen preparatory difficulties, pending constitutional or governmental reforms, co-ordination between various domestic ministries, consultations required under federal systems, status as a developing country, and concurrent obligations to other international forums."[170] Moreover, some states are reluctant to formally acknowledge short comings in the area of human rights protection. Likewise, other states fail to attend sessions dedicated to the examination of their state's report subsequent to submitting their report, even though ample notice of such meetings is always given. The above excuses should not warrant the neglect of states' responsibility to submit reports, a process which has been described as more of a "presentational requirement than a substantive one."[171] Indeed, they are bound under international law to keep their obligations under treaties in good faith,[172] and more so under article 40 of the *ICCPR* as a compulsory treaty requirement. The HRC has thus unilaterally appraised the human rights situation of non-reporting states in private

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[169] S Joseph, "The Right to Life" in D Harris & S Joseph, eds, *The International Covenant on Civil and Political Rights and United Kingdom Law* (Oxford: Clarendon Press, 1995) at 29.
[170] McGoldrick, *The HRC: Its Role in the Development of the ICCPR, supra* note 127, at 71 and 72.
[171] Wicks, *supra* note 100 at 55.
[172] *Vienna Convention on the Law of Treaties*, 1969, 1155 UNTS 331, (entered into force 27 January 1980), art 26 requires states to keep their obligations in good faith. The principle is called the "pacta sunt servanda" principle and also exists under customary international law.

settings when states do not send a representative. In such situations, the HRC then bases its report on any information that is available to it. When a state representative attends, the HRC considers the human rights situation in the respective state party publicly.[173] This new proactive approach taken by the HRC is of immense benefit in filling in the gaps on human rights situations around the world and particularly within states parties to the Covenant. It provides an effective remedy for monitoring truant states, but it lacks the element of voluntary commitment under article 40 of the *ICCPR*, which guarantees the intrinsic value of the reporting system. In addition, Concluding Observations are not binding; hence, a state may fulfill its obligations by submitting reports and attending examination sessions, but may neglect to perform the suggestions of the HRC through its Concluding Observations. Nonetheless, though a state is not bound by the Concluding Observations of the Committee, the remarks serve a useful purpose of setting forth general standards and specific guidance aimed at strengthening state compliance with *ICCPR* obligations. It also creates an important opening through which civil society groups can gain access to the HRC and provide additional information that will then be considered in periodic reviews. A state party that is therefore serious about observing international human rights standards, especially in keeping with the traditional tenets of democracy and constitutional rule, will not only actively pursue compliance with the provisions of

[173] Both methods were used for the first time during the 75th and 76th sessions of the HRC held in Geneva respectively from the 8th to the 26th of July 2002(where The Gambia's implementation of the Covenant was considered) and the 14th of October to the 1st of November 2002 (where the Committee examined Suriname's implementation of the Covenant).

the *ICCPR*, but will further pay close attention to the Concluding Observations of the HRC under the state reporting procedure.

Individual Complaint System

The individual complaint system enables individual members of states parties to bring specific violations to the attention of the HRC. If an individual belonging to a state party to the Covenant may bring allegations of human rights violation in the form of a "communication," the respective state party has ratified the *First Optional Protocol of the ICCPR*.[174] Under this system, the individual petitions the HRC as a non-judicial body. The HRC then hears the communications from these individuals and issues its views on the merits of the complaint. Again, the views of the Committee after having considered communications based on their merits are not binding. However, its decisions are considered to be "strong indicators of legal obligations."[175] This mechanism simply seeks to encourage compliance with the provisions of the *ICCPR* by considering specific individual complaints of violation under the *First Optional Protocol*. The argument advanced for the individual complaint system is that individuals, being the direct beneficiaries of human rights that states undertake to protect, should be able to take action against their state in the

[174] Over a hundred countries have ratified the *First Optional Protocol of the ICCPR*, thereby recognizing the authority of the committee to decide such individual cases. See *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [*First Optional Protocol of the ICCPR*].
[175] S Joseph, J Schultz & M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* 2d, ed, (Oxford: Oxford University Press, 2004) at 24.

event that they become victims of rights violations, particularly the right to life. The mechanism therefore privileges the individual who suffers from alleged violations on account of the importance or the value of each human life, as well as the potential threat to all life from a single arbitrary deprivation of life by the state. Consequently, the procedure has been noted:

> [t]he most reliable means of policing a state's observance of its treaty obligations because, unlike the reporting system, it does not rely on the state authorities' own views of the human rights situation and, unlike the inter-state complaint system, it does not rely on another state overcoming its apathy and endangering its own international relations . . . [It] relies upon the people who matter most under human rights treaties: the potential victims.[176]

Some of the individual communications considered by the HRC have raised issues pertaining to the death penalty, police shootings and deaths in custody. In considering communications regarding the death penalty, the HRC has noted that the availability of interim measures can effectively enforce the right to life.[177] Where an individual brings a communication alleging wrongful imposition of the death penalty, for example, the HRC can ask the state to refrain from executing the sentence until it has properly and adequately considered the matter. An execution can proceed at a later date when a complaint is unfounded. However, a life taken cannot be returned. For this reason, the HRC has issued strong condemnations against states that have

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[176] See Wicks, *supra* note 100 at 57.
[177] The HRC considers the need for interim action where the performance of certain actions by a state would cause irreparable damage to the author of the communication. See Human Rights Committee, *Rules of Procedure of the Human Rights Committee*, UN Doc. CCPR/C/3/Rev.6, 24 April 2001, at rule 86.

carried out the execution of the death sentence after convicted individuals had brought communications that were pending before the Committee.[178] By not respecting the HRC's request for an interim relief in right to life cases, states are seen as displaying a flagrant contempt for the HRC and undermining the very heart of the right to life.

Inter-State Complaint System

The inter-state complaint system is an optional system that allows a state to bring a complaint before the HRC concerning another state it believes is not giving full effect to the terms of the Covenant.[179] This mechanism is designed to enable states hold each other accountable with respect to their obligations to protect and safeguard the rights enshrined in the *ICCPR*. This mechanism has not been used despite the fact that the HRC has confronted some states that are in flagrant violation of the Covenant. There are several reasons why states are reluctant to use this procedure.

States with the worst human rights records have not yet accepted this article 41, and there is concern that using it will cause political and possible economic tensions between states as a result of one challenging the other on account of domestic human rights issues which are matters of sovereign jurisdiction under international law.[180]

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[178] See HRC's condemnation of states actions in *Paindiong et al v Philippines*. Communication No. 869/1999, (19 October 2000), CCPR/C/70/D/869/1999 and *Ashley* v *Trinidad &Tobago*, Communication 580/1994, CCPR/C/49/D/580/1994.

[179] *ICCPR*, *supra* note 85, art 41, states that, states may bring complaints against each other before the HRC on condition that both states have issued optional declarations to the effect.

[180] See generally Scott Leckie, "The Inter-State Complaint Procedure in International Human Rights law: Hopeful Prospects or Wishful Thinking? (1988) 10:2 Hum Rts Q 249.

The concern for human rights in recent times, which has led to the justification of armed intervention within sovereign territories of abusive states, as well as the support for international accountability systems, such as the International Criminal Court, represent a paradigm shift toward an international culture that is not only proactive but also intrusive into what used to be considered matters of sovereignty. It is thus an anomalous that the inter-state complaint system continues to be unused. The inter-state complaint procedure, like the state reporting system, is designed to use the levers of publicity and political condemnation of the violations of rights, particularly large-scale violations that also violate the right to life. Governments that are serious about protecting all human rights should be more willing to use this mechanism to increase the protection of human rights.

2.3 International Terrorism, Continuing States of Urgency and the Right to Life

The right to life cannot be absolutely enforced under international human rights law, particularly because the international community cannot enforce compliance with this right.

Nevertheless, the inherent value of human life embodied in the statement of the right to life under the *ICCPR* and the emphatic statement disallowing derogation from obligations towards the said right in particular are clear.[181] The question addressed in this section is whether the "continuing state of urgency" evoked by recent threats of

[181] *ICCPR supra* note 85 arts: 6(1); 4(2).

terrorism constitutes a unique exception under which a state may derogate their obligations toward the right to life under the *ICCPR.*

International human rights law permits the derogation of states' obligations to uphold some human rights in times of war or public emergency which threaten the life of a nation.[182] To trigger this derogation, the state must officially proclaim such states of emergency and deposit written notice of the derogation(s) with the office of the UN Secretary-General.[183] Measures implemented pursuant to such derogations must be proportionate in that they must be limited "to the extent strictly required by the exigencies of the situation," and they must maintain consistency with the state's other international law obligations.[184] The measures adopted pursuant to derogations must also not discriminate on a host of prohibited grounds.[185] Not all rights can be derogated however. The *ICCPR* sets out rights that cannot be derogated from, whether in time of war or in time of peace.[186] The right to life, the prohibitions on torture, the right to recognition everywhere as a person before the law, and the right to freedom of thought, conscience and religion are all examples of non-derogable rights listed under the *ICCPR.*[187] The right to life thus applies at all times and cannot be derogated from at any time. It remains alongside a state's obligations to prevent

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[182] *ICCPR supra* note 85 art 4 (1). It is worthy to note that the HRC predicated article 4(1) of the *ICCPR* on short term emergencies.
[183] *Ibid*, art 4(3). Note that a notice of withdrawal of the derogation at the end of the emergency must be deposited in the same way and manner.
[184] *ICCPR, supra* note 85 art 4 (1); see also *EHCR, supra* note 55 art 15.
[185] *ICCPR, supra* note 85 art 4(1); see also *ACHR supra* note 134 art 27.
[186] *ICCPR, supra* note 85 art 4(2).
[187] *Ibid.*

and repress terrorism.[188] The non-derogable status of both the obligation to protect the righto life and to prevent terrorism are placed in tension with each other by the concept that some terrorist acts create a "continuing state of urgency."[189] In political usage, the "continuing state of urgency" created by terrorism is an informal state of emergency acknowledged publicly by politicians and other political figures as a justification for the pursuit of radical counter-terrorism responses to the recent threats of international terrorism.[190] With the exception of the UK,[191] no state in Europe has yet declared a public emergency to the effect of derogating their obligations to certain rights so as to combat terrorism. This usage suggests that derogations are not seen as essential to effective counter-terrorism policies. "Continuing state of urgency" therefore does not qualify as a special type of an emergency or an exception for which certain rights or civil liberties should be derogated from. Hypothetically speaking, even if it did qualify as an exception entitling a state to derogate from other rights, the right to life will still remain non-derogable; it must be observed at all times and under all circumstances and conditions.

International law has recognized that some limitations on rights do not constitute derogations in time of a public emergency.[192] Limitations on rights may even apply during normal times in pursuit of an agenda such as national security, public safety or

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[188] See Statement of the Committee Against Torture, CAT/C/XXVII/Misc.7, 22 November 2001 [*Torture Committee Statement, 2001*].
[189] See *infra*, Chapter One at 3.
[190] See Saul, *supra* note 4 at 5; See generally Charlesworth, *supra* note 4, Waldron, *supra* note 82.
[191] Derogations are rarely used in Europe such that the UK's derogation to article 5(1) (f) of the *ECHR* from 2001 – 2004 was a very significant example. See *Thesis*, Chapter one at 23.
[192] See *ICCPR*, *supra* note 85 arts 18; 20 and 21. See also *ECHR* supra note 55 arts 8(2); 9(2); 10(2); 11(2); *ACHPR*, *supra* note 134 art 11; *ACHR*, *supra* note 134 arts 13; 15; 16; 22.

public order.[193] However, like derogations in time of a public emergency, instances of limitation on rights may only be invoked in proportion to the exigency of the situation.[194] Furthermore, limitations on rights are valid only if prescribed by law. "Continuing state of urgency" without identifiable legislative recognition, would also not qualify as an instance for which limitations should be placed on rights unless expressed in formal initiatives enacted laws.

The informal "continuing state of urgency" acknowledged in political discourse neither qualifies as a state of emergency officially proclaimed and approved by the international community, nor an instance that necessitates limitations on rights prescribed by law. Hence, it cannot be used to justify the implementation of radically negative counter-terrorism responses that are discriminatory and potentially result in the violation of fundamental and non-derogable human rights. Some states argue that the obligation to prevent and repress terrorism by all means justifies long-term or perpetually unending states of emergency, irrespective of whether or not the state in question formally derogates. However, the HRC has concluded that the clause in article 4 of the *ICCPR* on short term emergencies[195] cannot be invoked to justify ongoing human rights violations during long standing states of emergency similar to those in Egypt[196]and Sri Lanka.[197] The apparent difficulty in discussing the protection

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[193] *Ibid.*
[194] See Human Rights Committee, *General Comment No. 29, States of Emergency*, CCPR/C/ 21/Rev. 1 / Add.11, (2001).
[195] *UDHR*, *supra* note 90 art 25(1.)
[196] See Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism on his visit to Egypt,* 13th Sess, UN Doc. A/HRC/13/37/Add.2, 14 October 2009.

of the right to life in times of emergency such as war is evident. It is also challenging to conceptualize how the right to life is to be protected during the "continuing state of urgency" evoked by threats of international terrorism. The right to life, which also embraces a standard of living, is vulnerable to compromise in such circumstances, particularly when security-oriented counter measures to combat terrorism continue to proliferate without legal prescription. The next chapter of this work will thus be devoted to investigating how security-oriented counter-terrorism measures applied particularly in the Guantanamo Bay Detention Facility have in fact violated accused terrorists' rights to life.

[197] Human Rights Council , Manfred Nowak, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Mission to Sri Lanka*, 7th Sess, UN Doc. A/HRC/7/3/Add.6, 26 February 2008.

CHAPTER THREE: VIOLATIONS OF THE RIGHT TO LIFE BY POST 9/11 COUNTER-TERRORISM MEASURES: THE CASE OF GUANTANAMO BAY

3.0 Introduction

This chapter attempts to violations of the right to life by examining reports of detainees - either terrorist suspects or "enemy combatants"- who have been unlawfully incarcerated at the Guantanamo Bay Naval Base.

That the events of 9/11 spawned both terror and fear not just in the United States but across the entire world is a well understood. The host of responses in terms of law and policy, pursued by the US in response to those particular acts of terror has also been noted in the first chapter of this work. Remarkable amongst these laws is the *Authorization for Use of Force Against Terrorists of 2001 (AUMF).*[198] Two resolutions enshrined in one law, the *AUMF* authorizes the Armed Forces to locate the perpetrators of the September 11th attacks, and authorizes the President to use all "necessary and appropriate force" to bring to book persons whom he determines "planned, authorized, committed or aided" the September 11th attacks as well as persons who harbored them. [199] Justified by the above law, the then President George Bush pursued two actions, the latter of which is consequent to this chapter.

First and foremost, the president sent United States troops into Afghanistan to wage war against Al Qaeda and Taliban. Secondly, and more important to this discussion, the President established the use of Guantanamo Bay Naval Base, Cuba,

[198] *AUMF*, *supra* note 45.
[199] *Ibid.*

as a detention center, and then established protocols to try detainees who were referred to the camp. Thus, by early 2002, the United States military had taken captive several hundreds of persons from Afghanistan to the United States Naval Base at Guantanamo Bay.

The themes of torture and habeas corpus entitlements are undisputedly central to the discussion of Guantanamo Bay and its detainees. However, there is also the untold story of the violation of the right to life in the treatment of detainees at Guantanamo Bay. This chapter identifies potential violations of the right to life documented in reports of deaths that have occurred at the Guantanamo Bay detention facility, and particularly, the report of the deaths of three detainees who allegedly suicided on June 9, 2006.[200]

This chapter begins with a brief historical discussion on the Guantanamo Bay Naval Base in order to contextualize and ground the setting of this chapter and a review of its significance in international human rights jurisprudence.

The chapter then focuses on the lack of weight given to the facts that have emerged concerning the treatment of detainees there, and how protecting the right to life in such circumstances still remains a challenge.

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[200] See "Admiral: Gitmo suicides, a 'planned event'", *CNN News* (11 June 2006) online: CNN News <http://www.cnn.com/2006/WORLD/americas//06/10/guantanamo.suicides/index.html?iref=newssearch> ["Admiral: Gitmo suicides, a 'planned event'"].

3.1 Guantanamo Bay: How it Came to be the Home of Terrorists

Guantanamo Bay Naval Base, also commonly known by the acronym GTMO/ GITMO, is located in the former Oriente Province of southeastern Cuba. The forty-five square miles of land and water (approximately 120 square kilometers), rests on the "lizard's heel" at the northern tip of the Cuban border facing Haiti and Jamaica. It is reported that US Marines landed on the Bay on the 10th of June 1898 during the Spanish-American War[201] and has been under US control since the end of the war in 1898.[202]

Formally, however, the base was leased to the United States in 1903 following the *Cuban-American Treaty of 1903,* and was renewed in 1934 for a sum of $4,085 per year. The base which was initially used as a fueling station is the "oldest U.S. base outside the continental United States and the only one in a country that does not enjoy an open political relationship with the United States."[203] In the latter part of the twentieth century, the base served as a refugee camp to Haitian and Cuban nationals intercepted on the High Seas, while it was used in the early 1990s as a shelter for Haitian refugees who fled Haiti after the military coup d'état of the then democratically elected President Jean-Bertrand Aristide.

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[201] The Spanish-American War arose out of a conflict between the United States and Spain and was fought in 1898. See generally, Joseph Smith, "The Spanish-American War: Conflict in the Caribbean and the Pacific, 1895-1902", (London, New York: Longman, 1995).

[202] See generally Richard Feinberg, "The Cuba Wars: Fidel Castro, The United States and The Next Revolution" (2008) 87:6 Foreign Affairs 170.

[203] See ME Murphy, *The History of Guantanamo Bay 1494-1964,* (1953). See also; *The Agreement Between the United States of America and the Republic of Cuba (Lease Agreement)* finalized on February 16-23 1903. The U.S treasury has sent out a cheque each year for $4,085; Cuba has however not cashed the cheques since 1958.

In September of 2001, pursuant to the 9/11 attacks on the United States and pursuant to the joint resolution passed by Congress establishing the *AUMF*[204]as well, the purpose of the base was announced as a detention camp for individuals suspected by the United States of committing the 9/11 attacks on the World Trade Centre and Twin Towers of the United States. Thus, "since January 11, 2002, Guantanamo has served as a joint military prison and interrogation camp under the leadership of [the] Joint Task Force Guantanamo (JTF-GTMO) of the United States Navy . . . for suspected terrorists."[205] The inmates of the prison, most of whom have not been charged, are mainly suspects of Al Qaeda and Taliban operations captured in Afghanistan. In addition, there are a significant number of inmates who were abducted from other countries and these include minors.[206]

Detainees were determined eligible to stand trial only before military juries, on the notion that standard jury trials were not appropriate in light of the "war on terror" that has altered the role of the executive in protecting traditional civil liberties in the United States. The United States justified military tribunals on the basis that the detainees were not captives or prisoners of war under the *Third Geneva Convention*[207], but were "enemy combatants" suspected of Taliban or Al Qaeda

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[204] *AUMF supra* note 45.
[205] Rita Maran "Detention and Torture in Guantanamo" (2006) 33 Social Justice 4 at 2.
[206] *Ibid*. Maran reports that in July 2003, a total of about 680 people from 42 different countries were incarcerated at the detention camp.
[207] See *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135, (entered into force 21 October 1950), art 3 [*Third Geneva Convention*].

operations, who were unfit to appear before a "competent tribunal."[208] This action constituted one of many egregious violations of the rights of the detainees at the camp under international law as well as the constitutional laws of the United States, culminating in the refusal to grant habeas corpus rights to several of the detainees who had sought to petition the courts in the United States. Accordingly, the government's stance was that detainees at the base could not sue in any federal court pursuant to the rule that habeas corpus relief may be entertained only within the respective jurisdiction of a federal district court, although petitions brought before the lower courts yielded inconsistent results.[209] The Supreme Court was thus impelled to review the said matter. This, however, drew the battle lines between the US Supreme Court, Congress and the Executive in an ideological and legal debate which ensued over five and half years. The United States' Supreme Court has issued four decisions in favor of habeas corpus entitlements of alleged terrorist detainees incarcerated at Guantanamo Bay.[210] Thus far, decisions of the Supreme Court asserting habeas

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[208] "White House Fact Sheet: Status of Detainees at Guantanamo" online: The White House <http://www.whitehouse.gov/news/releases/2002/02.>. See also Fiona de Londras, "Guantanamo Bay: Towards Legality?" (2008) 71 MLR 36 at 39 [Londras, "Guantanamo Bay: Towards Legality?"]. She argues that the United States has steadfastly resisted suggestions to the effect that suspected terrorists and in particular non-citizen suspected terrorists be granted access to conventional courts to challenge their detention on grounds of national security.

[209] See *Al Odah v United States*, 321 F. 3d 1134 (DC Cir 2003). In the aforementioned case it was held that non-resident aliens cannot appeal to the protection of the Constitution or laws of the United States. See also *Gherebi v Bush,* 352 F 3d 2278 (9th Cir 2003). In this case it was held that habeas corpus may be available to detainees at the detention facility because Guantanamo Bay is effectively subject to US jurisdiction and control.

[210] See the following cases: *Hamdi v Rumsfeld,* 124 US 2633 (2004) [*Hamdi*]: this case concerned an American-born citizen captured in Afghanistan and detained at Guantanamo Bay. His father filed a suit on his behalf claiming that his son should be allowed to challenge his detention. It was held that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker".

Rasul v Bush, 124 US 2686 (2004) [*Rasul*]: This was a habeas corpus suit brought on behalf of some detainees at Guantanamo Bay including some EU citizens who were captured on the battlefield in Afghanistan. The Supreme Court ruled that federal courts had jurisdiction "to determine the legality of the Executive's potentially indefinite detention of

corpus rights of the detainees at Guantanamo have been followed by counter legislation on the part of Congress.[211] Londras notes that the very nature of legislative habeas corpus rights makes it amenable to legislative regulations and proposes that the Justices declare the detainees to be "constitutional rights-bearers" in order to end what she describes as the "ping-pong situation" between these US state organs.[212] This resolution in my view, however, does not seem practical, especially since both state organs are not ad idem on the construction of habeas corpus rights.[213] Further, the US Congress and Executive are of the view that granting terrorists' rights in the area of habeas corpus petitions could very well threaten the foundations of national security.[214]

There have been attempts by the United States government to use the death penalty in executing non-citizen detainees at Guantanamo being tried before its

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individuals who claim to be wholly innocent of wrongdoing" and that Guantanamo is within the jurisdiction of the United States as the latter exercised effective and permanent control over the territory.
Hamdan v Rumsfeld, 126 US2749 (2006) [*Hamdan*]: The Supreme Court considered inter alia the permissibility of military tribunals as set up by the president in his capacity as the Chief Executive and, subsequently, the limited rights established for the trial of detainees. While the Supreme Court recognized the authorization of the Executive in establishing military tribunals under special conditions by Congress as legal, it however required that the standard rules of courts-martial replace the limited rights used during the trial of Guantanamo's detainees. *Boumediene v Bush*, 128 US 2229 (2008) [*Boumediene*]: In this case the Supreme Court established the United States' jurisdiction over Guantanamo Bay Naval Base per the latter's exercise of effective control over the territory and concluded that the right of the detainees to petition US courts on habeas corpus entitlements stems from that jurisdiction. It further ruled that provisions for the trial of detainees established under the *Military Commissions Act* were inadequate and an unsuitable replacement for habeas corpus entitlements.

[211] See Detainee *Treatment Act of 2005* Pub L 109 –148 119, Stat 2680, *Military Commissions Act of 2006* Pub L 109 – 366, 120 Stat 2600. See also Fiona de Londras "In the shadow of Hamdan v Rumsfeld: Habeas Corpus Rights of Guantanamo Detainees" 17 Irish Criminal Law Journal, 2 at 8.

[212] See Londras, "Guantanamo Bay: Towards Legality?" *supra* note 208 at 37.

[213] *Ibid*.

[214] The creation of the Combatant Status Review Tribunals by the Executive branch in response to the Supreme Court's decision in *Rasul v Bush* as well as *Hamdan v Rumsfeld* is evident of the stance of the political branches of the United States.

military commissions.[215] The US Military is authorized to apply the death penalty.[216] It is worth noting that the Pentagon is still seeking to pursue the death sentence against five Guantanamo detainees accused of leading involvement in the attacks of September 11, 2001.[217] It has been noted in the previous chapter the HRC's stance on fair trial guarantees in cases leading to death sentences.[218] It has also been established in this chapter how detainees at Guantanamo are denied access to regular courts, and are arraigned instead before military tribunals that do not guarantee their rights to fair trial under international law.[219] In light of the HRC's resolve that the execution of a sentence of death upon conclusion of a trial in which the provisions of article 14 of the Covenant have not been respected constitutes a violation of the right to life, the right to life of non-citizen detainees at the Guantanamo Bay stands condemned to violation.[220]

It is apparent that the United States in detaining alleged terrorist suspects outside of the United States, *i.e.*, Guantanamo, Cuba, sought to put them beyond the reach of federal law, and it succeeded in doing so legally under the pretext that the ultimate

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[215] See "U.S to seek death penalty for 6 Gitmo Detainees", *CNN News* (11 February 2008) online: CNN News <http://articles.cnn.com/2008-02-11/us/911.charges_1_ali -abd-gitmo-detainees-detainees-face?_s=PM:US>.
[216] "The Death Penalty in the US (1976-2008)", online: The Clark County Prosecuting Attorney <http:www.clarkprosecutor.org/html/death/death/dpusa.htm>.
[217]See "Aiming for Execution, Denying Fair Trial: Government wants Death Penalty Option at Upcoming Military Commission Trials in Guantanamo", AMR/51/049/211 (London, United Kingdom: Amnesty International Publications 2011), online: Amnesty International <http//www.amnistiainternacional.pt/files/Relatoriosvarios/Pena_de_Morte_em_Guantanamo_31Jun2011.pdf>.
[218] See *Gen Cmt 32*, *supra* note 163.
[219] See *ICCPR*, *supra* note 85 art 14.
[220] See *Gen Cmt 32*, *supra* note 163.

sovereignty over Guantanamo rests with Cuba.[221] Consequently, the argument was adopted that US courts do not have jurisdiction to hear matters relating to prisoners in Guantanamo, Cuba, and that the single judicial forum available to detainees in Guantanamo comprised internal military tribunals whose rules differed significantly from that of domestic US courts.[222]

It is this concept that has grounded the reference to Guantanamo Bay as the "legal black hole"[223] in that it is a creation of a territory in which a complex jurisdictional gap permits the suspension of certain fundamental legal rights which are embodied in a larger legal system.[224] For instance, the jurisdictional gap created by the establishment of Guantanamo Bay, which is under the effective permanent control of the United States and yet within Cuban territory, presents a barrier in bringing petitions of habeas corpus entitlements before US courts.

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[221] It is worth noting that Guantanamo is not the only place where the United States has kept suspected terrorists beyond the reach of federal law. In September 2006 President GW Bush confirmed reports that the Central Intelligence Agency had operated "secret prisons" operation outside of the United States and, while suspending the program, expressly reserved the option of recommencing such activities in the future. See Sheryl Gay Stolberg, "President Moves 14 Held in Secret to Guantanamo" *New York Times*, (6 September 2006), 1.

[222] It must be noted that the position of the United States with regard to jurisdiction over detainees at Guantanamo is incorrect. In accordance with article 2 of the *ICCPR* where states are obliged to protect and ensure persons within their territory, the HRC has clarified that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power and effective control of that State party, even if not situated within the territory of the State party." See Human Rights Committee, *General Comment No. 31,The Nature of the General legal Obligation Imposed on State Parties*, CCPR/C/21/Rev.1/Add.13, (2004)at para. 10. [*Gen Cmt 31*]. Similarly, the ICJ with respect to the jurisdiction of the *ICCPR* extends to "acts done by a State in the exercise of its jurisdiction outside its own territory." See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, ICJ Rep 2004. Hence, the United States being a signatory to this Covenant is not privy or cannot succeed under the argument of jurisdiction, sovereign or territorial as it exercises effective control over Guantanamo Bay, Cuba, as determined by its courts and the international lease agreement between the United States and Cuba.

[223] The expression "legal black hole" was used by Lord Phillips to describe Guantanamo Bay in *Abassi v Secretary of State for Foreign and Commonwealth Affairs*, [2002] EWCA Civ 1598 at 22. See also Johan Steyn, "Guantanamo Bay: The Legal Black Hole" (2004) 53 1 ICLQ 1 [Steyn].

[224] See also Gerald L Neuman, "Anomalous Zones" (1996) 48:5 Stan Law Rev 1197 at 1233 – 1234.

The barrier against habeas corpus rights on a fundamental question of jurisdiction cannot be overstated. The right of habeas corpus as being a right of paramount importance is recognized both locally[225] and internationally.[226] The "Great Writ" was recognized by the US Supreme Court as the "fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action,"[227] and is to be "administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected"[228]. Undoubtedly, habeas corpus entitlements constitute a gateway right that protects the right to physical liberty, in addition to a host of other rights relevant to an individual in state custody. Its fundamentality to the rule of law in common law countries cannot be overemphasized, as it fosters the democratic principle that a state must have adequate and reasonable grounds without which the life, liberty and property of an individual may not be taken.[229]

In addition to other human rights standards, such as the right to life and freedom from torture, the United States has failed to measure up in terms of the protection of this all-important right, and has resorted to treating detainees at Guantanamo Bay

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[225] See US Const art I, § 9, cl 2. This clause is also known as the "Suspension Clause" and provides that "The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it." See also William F. Duker, *A Constitutional History of Habeas Corpus* (Westport: Greenwood Publishing, 1980)

[226] See *UDHR*, *supra* note 90, art 9; *ICCPR*, *supra* note 85, art 9; *ECHR*, *supra* note 55, art 5. Furthermore, the repetitive emphasis on the right to challenge the lawfulness of one's detention by habeas corpus within the international arena has led to the universal acceptance of the right as non-derogable. See *Marlem Carranza Alegre v Peru*, Communication No. 1126/2002 (17 October 2005) CCPR/C/85/D/1126/2002 .

[227] *Brown v Vasquez*, 952 F 2d 1164, 1166 (9th Cir 1991).

[228] *Harris v Nelson*, 394 US 286 (1969) at 291.

[229] David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press 2005).

under the worst of the worst conditions. Guantanamo has come to be seen as a symbol of American terrorist policy in the wake of the global "war on terror," and in the execution of its policies, it has "exceeded what any other democratic government has done in dealing with those persons it has accused of terrorism."[230]

Guantanamo is the most ridiculous and contradictory parody in the "Land of the Free," and has ultimately compromised the United States' leadership position in the area of fundamental human rights and freedoms.[231]

3.2 Deaths at Guantanamo Bay: Violations of the Right to Life

Since beginning operations in 2002, the Guantanamo Bay Detention Facility has been home to a number of over 750 inmates.[232] According to a report from Amnesty International, approximately 385 men of about 30 different nationalities remained detainees as of April 1, 2007, having been held indefinitely for a period exceeding five years, without trial.[233] The inmates, comprising adult males and minors[234] at the

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[230] Neier Aryeh, "How Not to Promote Democracy and Human Rights" (2006) Research Papers, Paper 3 online: <http://digitalcommons.uconn.edu/hri_papers /3>.

[231] William F Schulz notes: that [w]hat has been especially damaging to human rights over the past seven years is that policies inimical to human rights have been carried out *in the name* of human rights. This . . . encompasses the larger war on terror that has been pursued in the name of defending freedom and the rule of law. . . . All of this has contributed markedly to the decline of the US's global reputation. . . . Only when no gap remains between domestic practices and international standards can the US begin to reclaim the mantle of human rights leadership . . ." William F Schulz "The Future of Human Rights : Restoring America's Leadership " online: <http://www.betterworldcampaign.org/assets/pdf/humanrights-schulz-final.pdf >.

[232] See "Facts Behind Guantanamo" online: National Guantanamo Coalition <http: //www.guantanamo.org.uk/factsbehindguantanamo.> ["Facts Behind Guantanamo"].

[233] See "United States of America, Cruel and inhuman: Conditions of isolation for detainees Guantanamo Bay" (April 2007) AMR 51/051/2007 (London, United Kingdom: Amnesty International Publications 2007), online: Amnesty International <http:www.amnesty.ca/amnestynews/upload/AMR510512007.pdf>.

[234] Omar Khadr was one of the minors and apparently the youngest who was detained at Guantanamo. He was taken there when he was only fifteen. See *Prime Minister of Canada, Minister of Foreign Affairs, Director of the Canadian Security Intelligence Service and Commissioner of the Royal Canadian Mounted Police v Omar Ahmed Khadr,* 29

time of capture, have been housed together contrary to the rules of international law.[235] The suspects, who have been classified as either "unlawful enemy combatants" or terrorists, are held in small open-sided wire mesh cells whose measurement is given as 1.8m by 2.4m.[236] They are usually chained hand and foot in the fetal position on the floor of their cells and are allowed half an hour of exercise handcuffed and in leg irons in a small yard.[237] Further, each prisoner is provided a US army standard two centimeter-thick mattress, two orange boiler suits, a pair of flip flops, two bath towels (one for washing while the other serves the purpose of a prayer mat), some shampoo, toothpaste and soap, and a copy of the Qur'an.[238] The detainees are fed rations of three meals a day which are culturally appropriate to their Muslim dietary regulations. Detainees are also blindfolded, handcuffed and masked, although camp officials have explained that these restraints are used when transiting the detainees from one point to another.[239] Reports have also revealed that detainees have been kept in extreme solitary confinement for periods lasting as long as a year and are further deprived of sleep for several days, even weeks. In addition, prisoners are

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January 2010. See also, Michelle Shephard, *Guantanamo's Child: The Untold Story of Omar Khadr* (Mississauga, Ontario: Wiley, 2008).

[235] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, 28 ILM 1456 (entered into force 2 September 1990), art 37(c) stipulates that children deprived of liberty should be treated in accordance with the inherent dignity of a human and with the needs of persons his age. It stresses "[i]n particular [that] every child deprived of liberty shall be separated from adults . . . ."

[236] See "Life in a Guantanamo Cell, *BBC News* (7 February 2002) online: BBC News <http://news.bbc.co.uk/2/hi/americas/1766037.stm> ["Life in a Guantanamo Cell"].

[237] See David Rose, "Guantanamo Bay on Trial" (2004) 521 Vanity Fair, 88.

[238] See "Life in a Guantanamo Cell" *supra* note 236; See also "Facts Behind Guantanamo, *supra* note 232.

[239] The UN Special Rapporteur to the Situation of Detainees in Guantanamo has expressed concern for the application of excessive violence or force in transporting detainees at the Guantanamo Bay Detention facility indicating that such treatment amounts to torture as it inflicts severe pain or suffering on the victims for the purpose of intimidation or punishment. See Human Rights Commission, "Situation of Detainees at Guantanamo Bay" 62nd Sess, online: <http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/16_02_06_un_guantanamo.pdf> at 26, para 54 ["Situation of the Detainees at Guantanamo Bay"].

exposed to extreme temperatures while being subjected to severe sensory deprivation. The aforementioned constitute some of the interrogation techniques that have been approved for use at the detention facility in addition to twenty-eight hour interrogations, the adoption of forced stress positions, nudity and sexual assault, as well as the use of growling dogs to intimidate the detainees.[240] On the treatment of terrorist suspects detained at Guantanamo, one mother had this to say: "they treat their dogs better than they treat our sons."[241] In a *New York Times* article on Guantanamo dated June 21, 2005, Anthony Lewis quoted an FBI agent who said the following:

> On a couple of occasions, I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food or water. Most times they had urinated or defecated on themselves and had been left there for 18, 24 hours or more. [242]

On the contrary, the above is not an exhaustive description or account of the conditions at Guantanamo. It is rather a summary of accounts of the inhumane conditions at the naval base which are a potential threat to life, particularly in light of death reports at Guantanamo which will be discussed in ensuing paragraphs.

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[240] See "Facts Behind Guantanamo", *supra* note 232 at 6 – 7.
[241] *Ibid* at 5. This statement was made by the mother of Fahd Al Fawzan aged 22 who was imprisoned in Guantanamo for over four years.
[242] Anthony Lewis, "Guantanamo's Long Shadow" *New York Times* (June 21 2005) online: New York Times <http://www.nytimes.com/2005/06/21/opinion/21lewis.html>.

3.2.1 Guantanamo Bay Detention Facility Death Reports

The deaths of three detainees in the maximum security section of the Guantanamo Bay Detention Facility were recorded on June 9, 2006. The actions of these detainees whose bodies were found hanging in their cells, was dismissed by the United States as "suicide" and further described as conspiratory and "part of an asymmetrical warfare" to discredit the United States.[243] The Deputy Assistant Secretary of State, Colleen Graffy, claimed that they were nothing more than a "good PR move to draw attention" and a "tactic to further the jihadi cause."[244] Both comments were made before investigations into the deaths were completed.

When these deaths were discovered, reporters and media personnel were ordered off the territory by the military almost immediately, while lawyers were prevented from visiting their clients. The deaths of these three detainees, Yassar Talal Al Zahrani (Al Zahrani, ISN 093), [245] Mani Shaman Turki Al Habadi Al Tabi (Al Tabi, ISN 588)[246] and Ali Abdullah Ahmed (Ahmed, ISN 693)[247] while in custody at Camp 1 of the Guantanamo Bay Detention Facility, sparked as much controversy as it did questions, about how and why the detainees should die.[248]

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[243] See "Admiral: Gitmo suicides, a 'planned event'", *supra* note 200.
[244] See "Guantanamo decides a 'PR move'", *BBC News* (June 11, 2006) online: BBC News <http://news.bbc.co.uk/2/hi/americas/5069230.stm>.
[245] See Naval Criminal Investigation Service, "Report of Investigation 2" online: <http://www.dod.mil/pubs/for/detainees/death_investigation/NCIS_DeathInvestigativeFiles.pdf> at b. [NCIS Report].
[246] *Ibid.*
[247] *Ibid.*
[248] See *"*Father of Gitmo Suicide Victim Blames U.S," *MSNBC*, (14 June 2006) online: MSNBC <http://www.msnbc.msn.com/id/13300107>; Andy Worthington, "Guantanamo Suicide Report: Truth or Travesty?", The Huffington Post (25 August 2008) online: The Huffington Post <http://www.huffingtonpost.com/andy-worthington/guantanamosuicide-report_b_121358.html>; "Anger at US response to suicides," *BBC NEWS*, (12 June 2006) online: BBC News <http://news.bbc.co.uk/2/hi/uk_news/5070574.stm>.

The Naval Criminal Investigation Service (NCIS), [249] which has primary investigation jurisdiction within the naval base, began investigations shortly after the last detainee was declared dead. The NCIS proceeded by questioning and interviewing military personnel who had had "any dealings and response with the three (dead) detainees."[250] Persons interviewed included the Alpha Block guards, escort control guards from other cell blocks, officers on duty and medical personnel at the Detention "DET" Clinic.[251] NCIS officials interviewed sixteen of the detainees in the Alpha Block, although the report dismisses the details of these interviews on the account that the detainees failed to provide any substantive or consequential information.[252] The Investigative file reports that on the night of the deaths, there were five guards monitoring the twenty-eight detainees housed in the Alpha Block. The detainees in question were housed in cells located on the same side of the Alpha Block, with at least three empty cells in between them. Alpha Block was designed so that all the guards including the tower guards could see into the cells. The guards were also required to conduct searches that required that they see the detainee's skin while moving, and to carry out a headcount every ten minutes.[253]The preliminary findings of the report concluded that all three detainees had last been seen and

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[249] See NCIS, online: < http: //www.ncis.navy.mil/mission/crime.asp.>
[250] NCIS Report, *supra* note 245.
[251] *Ibid* at b.
[252] *Ibid*.
[253] See Camp Delta *Standard Operating Procedures* (2004) online: <http:www.scribd.com/doc/52461251/Guanatano-Bay-Standard-Operating-Procedures-2004-gitmo-sop-2004>. [SOP]. SOP 1-1 (a) 2004. Guards sign an undertaking to ensure a firm and impartial fulfillment of rules and regulations in order to facilitate control of the detainees. Failure to carry out instructions as assigned under the SOPs result in the institution of punitive measures and disciplinary action under the Uniform Code of Military Justice (UCMJ) or appropriate military/civilian personnel regulations including ejection from Camp Delta and or denial of entry. See SOP 6-1(c) 2004; SOP 6-1(a) 2004; SOP 1-1(d) 2004.

recorded alive at 22:00 that evening.[254] Moreover, Alpha Guard 1 (AG1) walked the cell at 00:00 and continued without noticing any suspicious activity.[255] The detainees were, however, discovered dead between 00:20 and 00:45 after midnight on June 10. Al Zahrani is reported the first to have been discovered and was apparently transported to the DET clinic approximately a 100 yards away by all five Alpha guards, thus leaving the cell completely unguarded with the other two detainees hanging dead in their cells. There was, however, no medical staff to attend him upon his arrival at the clinic which was apparently closed.[256] He was thus taken to the Naval Hospital where he was declared dead at approximately 1:50 am after all attempts at resuscitation had failed.[257] The other two detainees were later discovered and brought in separately by some other guards to the DET clinic where they were pronounced dead at 1:15 am and 1:16 am respectively.[258]

The Investigative File contained autopsy reports from the Armed Forces Institute of Pathology, the institution that performed the autopsies on the three dead detainees. The autopsies concluded that the deaths of the three detainees had occurred by hanging, and further found out that they had been dead for over two hours, based on the presence of the physical condition described as "rigor mortis."[259] The NCIS report

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[254] See NCIS Statement, online : < http://www.dod.mil/pubs/foi/detaineesNCISStatement_Suicide_Investigation.pdf> at 1. [NCIS Statement].
[255] NCIS Report, *supra* note 245 at 958.
[256] *Ibid* , at 1071.
[257] *Ibid*, at 1016-17; 1113.
[258] *Ibid* at 1069-79.
[259] Rigor mortis is described as a condition in the state of death beyond which no amount of resuscitation offered after it sets in will be effective. See Richard WO Beebe & Deborah L. Fink, *Fundamentals of Emergency Care*, 10th ed, (New York, Albany: Delmar, 2001) at 37. The reports further record that in one instance when medical personnel had

failed, however, to address these findings, although it did accept the conclusion on the manner of death of the detainees. The findings of the government reports conclude that the deaths of the detainees were simultaneously orchestrated after the pattern described below. Each detainee is alleged to have done the following:

- created nooses from strips of sheets or clothing, presumably tee shirts, and fastened them to the top of their cells' eight feet high steel mesh wall.[260]
- arranged clothes to look like mannequins of themselves asleep in their cells;[261]
- hung sheets in their cells so as to obstruct the view into their respective cells;[262]
- shoved rags deep into their throats[263]
- bound both their hands and feet[264]
- climbed onto the washbasin in their cells and slipped their heads through the noose;[265] and then

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attempted to pry open the detainees' jaws to remove the rags lodged deep within their throats, the medics broke at least one of the detainee's teeth in the process as a result of the condition of rigor mortis. See NCIS Report, *supra* note 243, at 1071; 1085; 1091.

[260] *Ibid*, at 958; 966; 1024; 1031. Blankets and sheets are considered comfortable or luxury items. It does not add up why two of the detainees, (693 and 588), would have these items on account of *good behavior* after being transferred as punishment for engaging in a hunger strike to the Alpha Block of Camp 1, which is reputed to be a high security maximum detention camp used to house the most notorious of the detainees. See also SOP 2-2(c) 2004 and NCIS Report *supra* note 244 at 1062.

[261] *Ibid*.

[262] *Ibid*, at 946; 949; 958; 965. Note that this practice violates SOP 6-21(d) 2004 which provides that blankets or sheets may be temporarily hang up no higher than halfway up the cell walls for the purpose of providing privacy when using the toilet after which they are to be taken down immediately. The question thus remains as to why the detainees should be able to violate this particular SOP without the guards noticing. This also infers breach of the guards' duties with respect to ensuring that SOPs are not violated. The question also remains as to why guards were not punished when this particular instance establishes a clear violation of SOP's by the guards on duty.

[263] *Ibid* at 938; 950; 959; 966; 975; 1073; 1079;1091;1093;1097. The investigative reports as well as the autopsies do not account for why the dead detainees each had cloths in their mouths and deep inside their throats.

[264] *Ibid*, at 950; 958; 975; 1091; 1094.

- fastened the noose and allowed themselves to hang to death.[266]

The NCIS apparently closed investigations two years after the event on May 12, 2008.[267] The conclusions or findings of the investigative file were not made public until August 22, 2008, when the NCIS issued a press release.[268] Even then, the release of some parts of the heavily redacted report of over 1700 pages[269] was the result of pressure from groups citing the provisions of the Freedom of Information Act.[270] An examination of the NCIS Investigative File and other government investigative files on the deaths of the detainees[271] reveals that there are many unanswered questions in connection with the manner of the deaths of the three detainees.[272] This examination found the following:

- the report omitted all autopsy findings that three dead detainees were in rigor mortise; that they each had rags lodged deep within their throat, that they had been dead for at least two hours before being discovered;

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[265] *Ibid*, at 1004.
[266] *Ibid*.
[267] *Ibid* at c.
[268] NCIS Statement, *supra* note 254.
[269] The Investigative File also contains the government's official report in addition to the Staff Judge Advocate (SJA) Report, an "informal investigation" initiated by Rear Admiral Harris into assertions of violations of SOPs on the eve of the deaths. The report concluded that six SOPs were violated altogether. However, this information did not appear in the NCIS Investigative File. Further, the Admiral ruled that though the SOP violations "potentially contributed to the ability of the detainees to commit suicide . . . it is possible . . . the detainees could have successfully committed suicide regardless." He further concluded that disciplinary action was unwarranted, hence no guards were punished. See Staff Judge Advocate, "Investigation Initiated by Admiral Harris", 149 online: <http://www.dod.mil/pubs/foi/detainees/death_investigation/DicksteinGITMO_SJA_DeathInvestigation.pdf> at 1; 2. [SJA Investigation].
[270] *The Freedom of Information Act*, Pub L 104–231, 110 Stat 3048 (1996).
[271] See Mark Denbeaux, et al, Death In Camp Delta online : <http://law.shu.edu/programscenters/publicintgovserv/policyresearch/upload/gtmo_death_camp_delta.pdf>.[Death In Camp Delta].
[272] *Ibid*. See also Scott Horton, "The Guantanamo 'Suicides': A Camp Delta Sergeant Blows the Whistle", *Harpers Magazine* 320:1918 (February) 2010 27 [Horton, "The Guantanamo 'Suicides': A Camp Delta Sergeant Blows the Whistle"].

- there was no explanation as to how the bodies of the dead detainees hung in their cells for at least two hours unnoticed when the cell was under constant surveillance by video cameras and guards who patrolled the camp every ten minutes;
- there was no explanation how the three dead detainees came into possession of so much restricted material in a maximum security facility and could use it to orchestrate their deaths in ways that violated standard operating procedures; these violations of SOPs were had to have been noticed or reported by any guards;
- there was no explanation how three detainees who had been in unadjoining cells on the same cell block for less than seventy-two hours with occupied and unoccupied cells between them could have coordinated the supposed acts of "asymmetrical warfare":
- there was no information on why Alpha guards were advised on account of suspicions of failure to obey direct orders under established standard operating procedures and making false statements when no disciplinary action or punitive measures were actually taken against them;
- there was no explanation as to why guards were directed not to provide sworn statements about the events of the night;
- the lack of an explanation as to why guards on duty, medics and tower guards, all of whom had been in the cell block prior to the hangings, were

not systematically interviewed regarding their observations on the night of the event;

- the lack of an explanation with regard to the investigators' failure to take into account relevant and available information, including that provided by material witnesses who were privy to the events of the night, or to review audio and video recordings of the activities within the camp on the eve of the event, to examine "pass on" books, records from the Serious Incident Reports and the Detainee Information Management System, all of which chronicle relevant information consequential to an investigation of alleged suicides. [273]

The above facts not only demonstrate the failings of the entire investigation in conforming to standard best practices as well as minimum standards for investigations of such a serious nature, but also leave room for doubt as to the veracity and authenticity of the reports, particularly, with the manner of the deaths.[274] The issue of the deaths in themselves establishes a case of a potential violation of the fundamental right to life in light of the HRC's interpretation of article 6(1) of the *ICCPR*. [275] It will be recalled that the HRC, in interpreting the right to life, admits a very stern view of the death of persons in state custody, requiring that persons brought into the custody of a state are adequately protected by the state's resources

[273] Death In Camp Delta, *supra* note 271 at 1 and 12.
[274] See Death In Camp Delta, *supra* note 271 at 58. The report concludes aptly with the more than obvious assertion of the reconstruction of the events of the night by the United States government.
[275] See *infra*, Chapter Two at 45 – 65.

and further, thorough investigations into allegations of suicides of persons in custody, as an enquiry into a possible violation of the right to life.[276] The fundamental gaps inherent in the US government's investigation reports with respect to the detainees suicides have done very little to satisfy the standard thresholds of investigations required by the HRC. The reports have created and left many more questions unanswered than they have solved concerning the manner of the deaths. In light of the fact that interrogation techniques approved for use at the detention camp amount torture, and the inhumane treatment and conditions to which detainees have been subjected, the investigations do not rule out a more sinister and ominous orchestration of the deaths of the detainees than the allegations of an "asymmetrical warfare" of suicides.

Aside from the deaths of Al Zahrani, Al Tabi and Ahmed, five other detainees have died while in custody at the Guantanamo Bay Naval Detention Facility bringing the total number of *reported* deaths to eight between 2002 and 2011. [277] The most recent death, also allegedly suicide, is of Hajji Nassim who is alleged to have suffered severe mental conditions while at the camp.[278] Although investigative reports into the details of the death of this detainee are not public, the United Nations has condemned the operations of the detention camp at Guantanamo Bay, calling subsequently for its

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[276] See *Gen Cmt*, 6 *supra* note 98, at para 4.
[277] See "Al Qaeda Terrorist Commits Suicide" *The Daily Mail* (19 May 2011) online: The Daily Mail <http://www.dailymail.co.uk./news/article=1388575/Al-Qaeda-terrorist-Inayatullah-commits-suicide-Guantanamo-Bay.html>.
[278] *Ibid.*

immediate closure based on its own findings of violations of fundamental rights.[279] Its report describes harsh conditions which pose challenges to both the physical and mental health and well-being of detainees.[280] Consequently, issues related to the physical and mental well-being of detainees are matters of concern for the quality of life of the detainees and ultimately, their fundamental right to life. The foregoing thus establishes that state conduct at Guantanamo not only amounts to brutal, unparalleled torture, or the denial of liberty, and indefinite arbitrary detention, but also appears to violate the right to life. This calls for independent and impartial investigation, particularly of these suicides.[281]

3.3 The Right to Life and Counter-Terrorism Measures: A Lack of Weight

The "war on terror" is arguably the most resonant phrase in the twenty-first century 9/11 terrorism epoch. Though used metaphorically, the term has come to engulf this "war" with physical wars such as "World War I" and with the insidious secrecies associated with the "Cold War." Counter-terrorism responses and policies have become rife within individual states, as well as at the regional and international

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[279] See "UN Calls for Guantanamo Closure" *BBC News* (16 February, 2006) online: BBC News. <http://news.bbc.co.uk/2/hi/americas/4718724.stm.> See also Situation of Detainees at Guantanamo Bay" supra note 238 at 38 and 39, para 92 and 96.

[280] *Ibid*, at 38 para 92. See also Neil A Lewis, "Red Cross Finds Detainee Abuse in Guantanamo" *The New York Times* (30 November 2004) online: The New York Times <http://www.nytimes.com/2004/11/30/politics/30gitmo.html>. He reported that the ICRC stated that keeping detainees indefinitely without knowing their fate would lead to mental health problems.

[281] See "Guantanamo Bay Detention Camp Suicide Attempts" online: Wikipedia <http://en.wikipedia.org.wiki/Guanatanamo_Bay_detention_camp_suicides_attempts>. This report notes that the Department of Defense (DoD) has acknowledged 41 suicide attempts among 29 detainees.

levels.[282] As demonstrated in the first two chapters, the pursuit of some of these counter-terrorism measures in response to the "war on terror" has tended to conflict with the institutions of democracy, the rule of law and established fundamental rights and freedoms as emphasis is placed on a seemingly constant "state of urgency".

As a result governments have had to balance fundamental rights and freedoms against national security initiatives. This requirement is however not unique to the current era; governments have many times in the past had to rise to the challenge of striking a delicate balance between the protection of fundamental human rights and freedoms such as the right to life on the one hand, and the protection of national security on the other. *Korematsu v United States*[283] illustrates perhaps the most apposite case of a balancing act between fundamental rights and national security. In that case, the Supreme Court considered the internment of US citizens of Japanese ancestry during World War II. In that situation, Justice Hugo Black concluded it was necessary to protect national security to require that "all citizens of Japanese ancestry be segregated from the West Coast temporarily."[284] Similarly, *Ex parte Quirin*[285] upheld the execution of six out of eight German citizens with attempted sabotage and espionage. The suspects were tried before a military tribunal established by a Proclamation that asserted that "the safety of the United States demanded that all

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[282] See SC Res 1373 UNSCOR, 56th Sess, 4385th Mtg, UN Doc S/RES/1373 (2001). The UN Security Council calls on states to adopt a wide range of legislative, procedural, economic and other measures to prevent prohibit and criminalize terrorist acts. The UN Security Council also establishes the Counter-Terrorism Committee (CTC).
[283] *Korematsu v United States* 323 US 214 (1944) [*Korematsu*]. See also *Co-operative Committee on Japanese Canadians v The Attorney-General of Canada*, [1947] AC 47.
[284] *Korematsu, supra* note 283.
[285] *Exparte Quirin et al*, 17 US 1 (1942).

enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage, or other hostile or warlike acts, should be promptly tried in accordance with the law of war."[286] Attempts at petitioning a federal district court in the District Court of Columbia for habeas corpus entitlements on behalf of the accuseds to challenge the constitutionality of Proclamation 2561 failed. The court held that the accused persons were subjects of a nation at war with the United States under the terms of the Proclamation, and therefore were not entitled to seek redress from the US courts. The Supreme Court upheld the president's authority to order military trials, even though the permanent courts were open and functioning normally. All eight suspects were sentenced to death under Proclamation 2561, although only six were executed; two had their sentences commuted to life imprisonment per their roles in the trial and investigation process.

Although both cases occurred during the World War II era, they are relevant to the twenty first century "war on terror" factually and legally. Non-citizen terrorism suspects have been interred at Guantanamo and other detention facilities under conditions have threatened to their right to life in addition to violating numerous other individual rights. These detainees have become the illegitimate subjects of trials conducted by military commissions whose rules do not guarantee their rights to a fair trial and provide for the death penalty. The US's history of deploying of counter-

[286] See Proclamation 2561, *Denying Certain Enemies Access to the Courts of the United States*, online: <http://www.presidency.ucsb.edu/ws/index.php?pid=16281>.

terrorist measures that erode fundamental rights and civil liberties appears to be repeating itself.

Admittedly the threats inherent in the 9/11 attacks present novel aspects to the modern struggle against terrorism and have thus warranted development of counter-terrorism responses tailored to address the new threat as effectively as possible. Nonetheless, effective counter-terrorism responses should not be treated as outweighing fundamental human rights, without careful examination of all options. A careful and delicate balance between the two is the most likely effective response to the challenges of modern terrorism. As history has repeated itself however, there is little indication that human rights are taken seriously during perceived crises. The final chapter of this thesis suggests how protection of human rights can be more effectively balanced with the goal of enhancing national security.

CHAPTER FOUR: BALANCING THE RIGHT TO LIFE WITH SECURITY

4.0 Introduction

The necessity of balancing security and human rights has often been attributed to the "continuing state of urgency" ushered in by 9/11. Statements by authors, judges, politicians and other public officials in the aftermath of the September 11th attacks reflect concern with guaranteeing public safety and security while protecting fundamental human rights.[287] The idea of maintaining an equal balance between these political norms can be traced to the countless resolutions that were adopted in response to 9/11. Resolution 1373,[288] which is considered the first legislative piece of the UN Security Council, is a leading example. This resolution calls on states to adopt all measures, including legislative, economic and procedural measures, to combat terrorist acts. The preamble of this resolution, however, clearly and expressly states that this need to combat terrorism by "all means" should be in accordance with the *UN Charter*, which espouses the promotion and protection of fundamental human rights.[289] Furthermore, subsequent resolutions[290] by both the UN General Assembly

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[287] See McGoldrick, "Terrorism and Human Rights Paradigms: The UK after September 11" *supra* note 51at 113; see also "The 9/11 Commission Report," *supra* note 87 at 395.

[288] SC Res 1373 UNSCOR, 56th Sess, 4385th Mtg, UN Doc S/RES/1373 (2001).The Resolution represents the first time that the Council has used its Chapter VII powers to impose universally binding obligations without temporal or geographic limitations. It also marks the beginning of what has been described as the revolution of "International legislation" on the International platform where the UN Security Council plays the leading role of legislating for the entire United Nations' membership. See Stefan Talmon, "The Security Council as World Legislature" (2005) 99 Am J Int'l L 175 at 175; Szasz Paul C, "The Security Council Starts Legislating" (2002) 96:4 Am J Intl L 901at 901. This act of the Security Council has however met with disapproval and criticism on account of a perceived usurpation of the General Assembly's "legislative" powers and inconsistency with the original Charter Framework in addition to America's preponderant influence over the law-making process. See Alvarez Jose E, "Hegemonic International Law Revisited," (2003) 97:4 Am J Intl L 873, at 874-78; Matthew Happold, "Security Council Resolution 1373 and the Constitution of the United Nations" 16 Leiden J Int'l L (2003) 593 at 596.

[289] See *UN Charter, supra* note 114, preamble.

and the Security Council, addressing the need to combat terrorism, have stated emphatically that counter-terrorism measures must comply with international legal obligations, particularly, international human rights provisions, international refugee law, and where applicable, international humanitarian legal standards[291] even in the face of terrorist acts that are deemed threats to international peace and security. The "gospel" of preserving human rights and other traditional democratic ideals while countering terrorism cannot be overemphasized. In spite of numerous resolutions, UN officials continue to stress the need for the preservation of fundamental human rights in the war against terror.[292] There is also an emerging consensus in the decisions of UN treaty bodies, as well as other regional human rights courts, to the effect that counter-terrorism and human rights are complementary ideals rather than conflicting

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[290] See GA Res 60/158, UNGAOR, UN Doc A/60/509/Add.2 (Part II), (2005); GA Res 59/191, UNGAOR, UN Doc A/59/509/Add.2, (2004); GA Res 58/187, UNGAOR , UN Doc A/58/508/Add.2, (2003); GA Res 57/219, UNGAOR, UN Doc A/57/556/Add.2, (2002); See also *The United Nations Global Counter-Terrorism Strategy*, GA Res 60/288, UNGAOR 60th Sess, UN Doc A/60/L.62 (2006), para 3. See SC Res 1904 UNSCOR, UN Doc S/RES/1904 (2009); SC Res 1822, UNSCOR, UN Doc S/RES/1822 (2008); SC Res 1735, UNSCOR, UN Doc S/RES/1735 (2006); SC Res 1624, UNSCOR, UN Doc S/RES/1624 (2005); SC Res 1617, UNSCOR, UN Doc S/RES/1617 (2005); SC Res 1566, UNSCOR, UN Doc S/RES/1566 (2004); SC Res 1526, UNSCOR, UN Doc S/RES/ 1526(2004); SC Res 1456, UNSCOR, UN Doc S/RES/1456 (2003); See also Office of the United Nations High Commissioner for Human Rights (OHCHR), *Human Rights, Terrorism and Counter-Terrorism*, Factsheet no 32, at 4. [OHCHR, *Human Rights, Terrorism and Counter-Terrorism*, Factsheet no 32].

[291] It is important to note that while international human rights law remains applicable regardless of the existence of a terrorist threat, international humanitarian law only applies in situations of an armed conflict or belligerent occupation. See generally Francois Bugnion, "Terrorism and International Humanitarian Law" 61 Whitehall Papers (2008) 47; See also Craig Forcese, "De-Militarizing Counter Terrorism" in Nicole Laviolette & Craig Forcese, eds, *The Human Rights of Anti-Terrorism* (Toronto, Ontario: Irwin Law, 2008) at 165, [Forcese]; Elizabeth Stubbins Bates, *Terrorism and International Law* (Oxford, New York: Oxford University Press,2011) at 22.[Bates]

[292] See Statement delivered by the Secretary General at the Special Meeting of the Counter–Terrorism Committee with Regional Organizations, New York, 6 March 2003, online: Secretary-General: Office of the Spokesperson <http://www.un.org/apps/sg/sgstats.asp?nid=275>; See also Statement delivered by the United Nations' High Commissioner for Human Rights at the Biennial Conference of the International Commission of Jurists, Berlin, 27 August 2004, online: <http://www.unhchr.ch/hurricane/hurricane.nsf/NewsRoom?OpenFrameSet>.

goals.[293] Thus, the idea of maintaining a balance between security and the right to life is a fit conclusion, not a far-fetched figment of an imagination, or an impossibility. The need for balance has been established firmly by these documents, decisions and statements, which resolve that counter-terrorism measures should not be implemented at the expense of human rights standards and other established democratic ideals such as the rule of law.

This concluding chapter aims at capturing the essence of the need for a balance by proposing that state security measures should grant terrorists the same right to life they are punished for violating. In other words, the acts that this thesis identifies as potential violations of the right to life in the context of the "war on terror", particularly with the situation regarding the Guantanamo Bay Detention Centre discussed in the previous chapter, should not be permitted. The potential violations identified include the following:

- the exposure to severe torture and other cruel, inhuman and degrading treatment particularly through the use of harsh interrogation techniques, such that health whether physical or mental has been compromised leading ultimately to a violation of the right to life;
- the failure to conduct standard investigations to establish the facts of deaths, particularly, in the case of alleged detainee suicides, beyond any shadow of doubt as to a potential violation of the right to life;

[293] See *Gen Cmt 31*, *supra* note 222; Human Rights Committee, *Delia Saldias de Lopez v. Uruguay*, CCPR/C/13/D/52/1979, 29 July 1981; *Bankovic and others v Belgium and others* [GC], No 52207/99, [2001] XII ECHR; *Al-Sekini and Others v Secretary of State for Defense* [2007] UKHL 26.

- the application of the death penalty upon conviction of the "most serious crimes" including terrorism, by tribunals that do not guarantee fair trial provisions and thereby violate the right to life of the accused.

This recommendation is that these state acts violate unnecessarily the obligation to respect international human rights law, particularly the right to life, in the name of countering terrorism. Having established the principles of law relevant to the divide, the curtain will be drawn on this thesis by proposing that these violations be eliminated by balancing counter-terrorism goals and the concern for national security in this era of prominent terrorist attacks with the fundamental right to life.

4.1 The Right to Life and Counter-Terrorism

Chapter two was largely an inquisition into the principle and protection of the right to life under international human rights law. The right was found to be a non-derogable right to which human beings were entitled, and of which they may not be arbitrarily deprived. It is, however, necessary to undertake an exploration of the relationship between the right to life and counter-terrorism responses. The ensuing is an account of such.

In this era of international terrorism, states are more conscious of their obligations to the international community to undertake by all means necessary the prevention and punishment of terrorism. Nevertheless, a state's obligation to act with "due diligence" in preventing terrorist attacks does not and should not override its

obligation to protect and fulfill all human rights,[294] particularly the rights that cannot be derogated or suspended even in the time of war or public emergency.[295] Although the right to life under the *ICCPR* is not absolute, its non-derogability in times of war or public emergency is beyond question.[296] Hence, the pursuit of counter-terrorism measures in response to the obligation to combat terrorism effectively must run concurrently with a state's obligation to protect the right to life of every human being.[297] No public emergency or the apparent "continuing state of urgency" [298] discussed in the latter parts of chapter two can warrant the suspension of the obligation to protect the right to life under international human rights law.

On the contrary, however, the principle of fulfilling human rights obligations while countering terrorism has been ignored, or rather, flagrantly flouted. State practice in counter-terrorism has resulted in numerous composite human rights violations including torture, arbitrary detention, enforced disappearances, extrajudicial executions and last but not least, arbitrary killings. While some states[299]

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[294] See OHCHR, *Human Rights, Terrorism and Counter-Terrorism*, Factsheet no 32, *supra* note 290 at 4; see also University of Ottawa Faculty of Law, *Ottawa Principles of Anti-Terrorism and Human Rights*, 8 February 2007 online: < http://www.unhcr.org/refworld/docid/470e0e642.html>, *Ottawa Principles of Anti-Terrorism and Human Rights*, Part 1.1.2 states that "all measures taken by states to fight terrorism must respect human rights and the rule of law, while excluding any form of arbitrariness as well as any discriminatory or racist treatment, and must be subject to appropriate supervision." Part 2.2.1 also states that," any measures, criminal, quasi-criminal or otherwise, taken by or on behalf of a state to prevent terrorism, must comply with international human rights standards." Part 9.1.1 (f) also elicits the principle that states must ensure that Security Intelligence activities, including law enforcement activities related to national security are subject to a multi-faceted regime of safeguards and scrutiny which should include human rights among others.
[295] See *ICCPR*, *supra* note 85, art 4(2).
[296] *Ibid*; art 6(2).
[297] Statement of the Committee Against Torture, CAT/C/XXVII/Misc.7, 22 November 2001.
[298] See *infra*, Chapter Two at 34 –37.
[299] See *Saadi* v *Italy*[GC], (European Court of Human Rights, February 28 2008), App No 37201/06, online: <http://www.echr.coe.int>; *Ramzy v. Netherlands*, (still pending before a Chamber of the European Court of Human

have called for new national security-based exemptions to the prohibition of refoulement,[300] still other states have argued that international human rights law does not apply during armed conflicts fought with a counter-terrorist aim. These states have pursued policies to the contrary,[301] all of which acts have undermined the binding force of international human rights law and the ultimate legitimacy to counter-terrorism initiatives in themselves.[302]

It is primarily for this reason that recommendations or proposals that aspire to a balance between counter-terrorism and the right to life must be seen as urgent.

4.2 Counter-Terrorism: In Pursuit of National Security

Under international human rights law, states have the option to impose limitations on certain rights, even during a time of normalcy, so as to facilitate the pursuit of

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Rights), App No 25424/05, online: <http://www.unhcr.org.refworld/docid/49f876b92.html>*; Chahal v United Kingdom*, 23 EHRR 413.

[300] Refoulement refers to the transfer of an individual from one state to another state where it is believed on substantial grounds that he/she would be subjected to torture. It is a practice that international law generally seeks to avoid. See generally the principle of non-refoulement in Aoife Duffy, "Expulsion to Face Torture? Non-refoulement in International Law" 20:3 Int'l J Refugee L (2008) 373; Jean Allain, "The jus cogens Nature of non-refoulement" 13:4 Int'l J Refugee L (2001).

[301] See Committee Against Torture, *Concluding Observations on the Second Report of the United States of America*, CAT/C/USA/CO/2, 25 July 2006, para 14; see also Human Rights Committee, *Concluding Observations on the Initial Report of Israel*, CCPR/C/79/Add.93, 18 August 1998, para 10; Human Rights Committee, *Concluding Observations on the Second Periodic Report of Israel*, CCPR/CO/78/ISR, 21 August 2003 para 11.

[302] See *Legality of the Threats or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 at para 42, where the ICJ rejected arguments to the effect that the Covenant was solely "directed to the protection of human rights in peacetime, and that all questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict." It held instead that "the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency." The above decision of the ICJ was amplified in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ General List No 131 (9 July 2004), (2004) 43 ILM 1009 at para 139, [*Israeli Wall Case*]; the ICJ reiterated that "the protection offered by human rights conventions does not cease in armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the *ICCPR*. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.

agendas such as national security or public security and public order.[303] These limitations differ in substance from derogations that may only be imposed upon declaration of a public emergency or a time of war. Limitations must be the subject of a formal prescription of law and satisfy other thresholds.[304] It is worth noting that the rights on which limitations may be imposed do not include the list of rights from which no derogation is permitted under article 4(2) of the *ICCPR*; hence, limitations may not be imposed on the right to life in pursuit of a national security agenda. States may thus validly pursue limitations to certain rights where the agenda of national security is prime, and indeed, some states have.[305] The very first chapter of this thesis established a national security agenda as a primary underlying motive for the pursuit of counter-terrorism laws and policies.[306] The right to life being outside the list of rights on which states may impose a lawful limitation in pursuit of a national security agenda, it stands to reason that the right to life should be upheld concurrently with a

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[303] See *ICCPR, supra* note 85, arts 18; 20; 21. Note that these set of rights do not include the non-derogable rights listed under article 4(2) of the *ICCPR.*

[304] *Ibid.* See also, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights,* Annex, UN Doc E/CN.4/1984/4(1984) (*Siracusa Principles*). They constitute non-binding standards or soft law principles that call for the exceptional application of limitations on human rights in pursuit of national security or derogations in public emergency. Although the principles are soft law and not binding on states as a matter of treaty law, they are highly authoritative and useful to judges and lawyers in their interpretation of the substantive provisions in the *ICCPR*. Further they are instructive and totally relevant given the subsequent violations of human rights in the name of counter-terrorism. Some of the principles elicited in the document are as follows:

- "National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force." para 29.
- National security should not be invoked as a reason to limit rights when the threat to law and order is "merely local or relatively isolated." para 30.
- "National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be used when there exists adequate safeguards and effective remedies against abuse" para 31.
- "The systematic violation of human rights undermines true national security and may jeopardize international peace and security" para 32.

[305] See UK and USA post 9/11 counter-terrorism law and policy discussed in Thesis, *Chapter One* at 19-26

[306] See *infra*, Chapter One at 18 – 26.

state's obligation to prevent terrorism. The need for balance between both aspirations is thus inevitable.

4.3 Recommendation: The Way Forward

In light of the potential violations of the right to life pertaining particularly to the situation of the detainees incarcerated at Guantanamo Bay discussed in chapter three and highlighted above,[307] the following recommendation is proposed.

a. The Use of a Non-Military Approach in Countering Terrorism

The "war on terror" has deployed a military approach in countering the attacks of September 11th.[308] The deployment of military force is not new to combatting terrorism.[309] The United States missile strikes on Benghazi and Tripoli, Libya, in response to the 1968 Berlin discotheque bombing as well as the 1998 Entebbe raid by Israeli forces are examples in the past where states have responded to terrorism using the apparatus of the military. Nevertheless, the degree of militarization used to respond to the violent tactics employed by Islamic jihadists on September 11, 2001 is unparalleled. The invasion and occupation of territories have had pride of place

[307] See *infra*, Chapter Four at 92.
[308] See *AUMF*, *supra* note 45.
[309] It is worth noting that the use of force is prescribed under International law in response to armed attack on a state, pursuant to the authorization or sanctioning of the UN Security Council under Chapter VII of the *UN Charter* and in self-defense under article 51 of the *UN Charter*. However, article 2(4) of the *UN Charter* discourages the use of force where it undermines the territorial integrity or political independence of a state in a manner that is determined inconsistent with the purposes and objectives of the United Nations. This statement under article 2(4) of the *UN Charter* also exists as customary international law and is regarded as "jus cogens" norm.

among the tactics deployed in response to the threats of terrorism.[310] The use of secret detention centers for the incarceration of terrorist suspects as well as the application of harsh interrogation techniques that amount to torture are equally worthy of mention.[311] Such military responses justified occasionally by the "Bush Doctrine" or the "pre-emptive"[312] use of military force against feared, as opposed to actual adversaries, have not only challenged existing or established legal doctrines[313] on the use of force by states, but have cheapened the value of life represented at law as the "inherent right to life."[314]

An approach to terrorism that does not deploy military force is in my estimation, a better way of resolving the threats of terrorism. The proposed approach would embrace the use of civilian criminal structures in the war against terror. Under this approach, terrorist suspects would be detained in state or federal prisons rather than secret detention centers and will appear before state or federal courts so as to ensure the guarantee of their rights to fair trial. There are many benefits with this system. In the first place, states are less likely to pursue harmful interrogation techniques and other conditions that amount to torture and other human rights violations when

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[310] The invasion and occupation of Afghanistan and Iraq by the United States and its allies in response to the September 11th attacks constitute a very typical example.
[311] PACE, "Secret Detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report" Doc 11302 rev, 11 June 2007.
[312] See, Gupta, *supra* note 64 at 181; Antony Anghie, "The War on Terror and Iraq in Historical Perspective" (2005) 43 Osgoode Hall LJ 45 at 46.
[313] See Forcese, *supra* note 291 at 165. He argues that the application of intense military force in the "war on terror" dictates a "regime change" from the application of international human rights law which places an absolute bar on taking human life to the application of the law of armed conflict, particularly jus in bello, where the taking of human life is tempered by international humanitarian law.
[314] See Adam Roberts, "Countering Terrorism: A Historical Perspective" in Andrea Bianchi & Alexis Keller, eds, *Counterterrorism: Democracy's Challenge* (Portland, Oregon: Hart Publishing, 2008) at 31 – 34.

detainees are within state territory thus information on the use of such tactics is more easily accessible to the media and general public. Secondly, in death penalty states, the right to life of the detainee or suspect is not in risk of violation because most state criminal systems, particularly the judicial system, provide the necessary guarantees that ensure an individual's right to a fair trial. Further, state accountability toward detainees is enhanced per the presence of these detainees on the state's territory vis-a-vis the state's obligation under the *ICCPR* to ensure that it has adequate resources to maintain persons it brings under its custody. In the foregoing instance, the assumption is that states would be even more compelled to satisfy the threshold of investigations required into the deaths of detainees on alleged accounts of suicide and enforced disappearances. In this vein, the right to life runs a lower risk of violation for the following reasons:

- Terrorism suspects would not be subjected to harsh interrogation techniques that result in torture and further impact the physical and mental health of suspects, thus compromising their right to life.
- When terrorist suspects die while in custody, state investigations would satisfy standard thresholds to establish the facts of their deaths beyond any shadow of doubt as to an arbitrary killing such as amounts to a potential violation of their right to life.
- Where the application of the death sentence is in force, suspects will not run the risk of their lives being arbitrarily curtailed by being arraigned before

military tribunals that do not guarantee the provisions of the right to a fair trial.

4.4 Concluding Remarks

International terrorism has come to be almost synonymous with destruction, death and large-scale violence toward human life. International terrorism threatens the very foundations of nationhood because it wields the potential for causing destruction to state symbols and disruption of the normal functioning of a state. In addition, considering the connections that increasingly exists among states politically, socially and economically, there is the fundamental threat to not just national security but international security as well.[315] The above problems posed by international terrorism thus introduce considerations that present themselves as conflicting with states' obligation to protect the right to life and, in particular, the right to life of persons suspected of terrorist acts.

A nation on whose frontiers are advanced the deathly blows of terrorism is obviously confronted with the challenge of maintaining or heightening its security in order to protect persons and property from future attacks while at the same time, punishing persons by whose hands these acts of terrorism are committed. Both measures are complementary and ideal: the first is proactive, while the latter is both reactive and proactive. As a reactionary measure, the latter entails punishment meted

[315] See e.g. SC Res 1526, UNSCOR, UN Doc S/RES/1526, (2004). The Council condemned strongly "all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security."

out to persons successfully convicted of terrorist acts, which serves as a deterrent to potential future terrorists. It is also proactive in the sense that by deterring future terrorists from carrying out any such acts, the threat of international terrorism is potentially nipped in the bud.

The objective of pursuing counter-terrorism measures that are security-oriented should therefore not in any way cause a fundamental shift from the civilized guiding principles of the rule of law and democracy in which lie the promotion and the protection of fundamental human rights, including the right to life. Having established that the right to life is not absolute under international law, yet is an objective that states should pursue at all times whether in peace or in war, it would stand to reason that the right to life of persons suspected of terrorism, which also includes the quality of life of these suspects, should be respected at all times. The right to life of these suspects should be respected irrespective of whether there exists "a continuing state of urgency" evoked by terrorism or an absence of the threat of terrorism. Wicks reasons that "[a] life is of no less value in times of war than in times of peace, nor is the life of an enemy of less value than the life of a friend although it may seem that way"[316] – particularly as a result of special situations and in this particular context, the "continuing state of urgency." When circumstances or situations are branded as exceptional, [317] it tends to legitimize what under normal circumstances would be considered untenable. The culture of the rule of law calls

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[316] Wicks, *supra* note 100 at 101.
[317] See generally US "exceptionalism" in Michael Ignatieff, ed, *American Exceptionalism and Human Rights* (New Jersey: Princeton University Press, 2005).

upon states to pay attention to human rights and fundamental freedoms particularly the right to life. This call is even stronger in times of urgency when human life is most vulnerable and the obligation to protect the right to life is non-derogable even in times of emergency under international law.

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