

**HUMAN RIGHTS VIOLATIONS RESULTING FROM ANTI-TERROR
LAWS - A SOUTH AFRICAN PERSPECTIVE**

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

In fulfillment of the requirements for the degree LLM

Faculty of Law

UNIVERSITY OF CAPE TOWN

Student: Shabnam Ebrahim Mayet

Student Number: (EBRSHA026)

Email: shabnam_99@hotmail.com

Date of submission: 9 March 2009

Supervisor: Salim Nakhjavani

School For Advanced Legal Studies

Department of Public International Law

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ACKNOWLEDGEMENTS

To God for his undeniable favours.

To my parents for always helping me live my dreams.

And to my supervisor who ensured my thesis evolved from an idea into a reality.

DEDICATION

For all the children caught in the crossfire of the state responses to so-called terror,
may you play freely and dream beautiful dreams once more.

TABLE OF CONTENTS

1. Introduction	
1.1 Introduction	6
1.2 Significance of the Study	6
1.3 Methodology	7
1.4 Contextualisation of the Study	7
1.5 Chapter Outline	8
1.6 A Brief History of Human Rights and Terrorism in South Africa	9
1.7 Literature Review	11
2. The Effect of Terrorism on Human Rights	
2.1 Causes of Terrorism	14
2.2 Defining Terrorism	15
2.3 State Terror	22
2.4 The Relationship Between Terrorism and Human Rights	25
3. Finding the Balance Between National Security and Individual Freedoms	
3.1 Human Rights Obligations of States	32
3.2 Balancing of National Security and Individual Freedoms	36
3.3 Derogable and Non-Derogable Rights	42
4. International and National Perspectives on Terrorism and Anti-Terror Laws	
4.1 International Anti-Terror Laws (The United Nations System)	44
4.2 Approaches Taken by Various Countries	52
5. Anti-Terrorism, A South African Perspective	60
6. Conclusion	71

CHAPTER 1

1.1 Introduction

Terrorism has become one of the most used (and arguably, abused) terms this decade. Not only has the world been shaken by this phenomenon in the form of various high profile, high publicity attacks; it has also been forced to take action. Unfortunately, these actions have often had and continue to have devastating and dangerous effects not only on the direction of world politics, but also on both the victims of state violence as well as the general health of civil society itself. The effects of terrorism, or rather the discourse around it, can be seen most vividly in the 'descending spiral'¹ of the protection of human rights.

This thesis evaluates the related human rights issues, as well as the relevant legislation, and both the national and international attitudes to terror and counter-terror. The following aspects will be considered:

- a. Terrorism as a concept
- b. The relationship between terror, anti-terror and human rights
- c. The balancing of individual human rights against national security
- d. The approaches of various countries to fighting terrorism

1.2 Significance of the Study

This thesis identifies the problems with anti-terror legislation with regard to human rights in South Africa and abroad. It considers what can be done in order to protect human rights in the 'war on terror'. This thesis hopes to contribute to alternative views on global anti-terror regimes and reviews the current position of anti-terror legislation.

1.3 Methodology

¹Wilson: 2005: 225-241, * the name of the article by Richard Falk

This thesis is intended to be an academic study of existing international law and human rights issues that relate to the contemporary global discourse concerning terrorism. Research was conducted through the Internet, journals, books and a few interviews for background purposes. Careful attention was accorded to the university rules concerning the writing of a minor dissertation.

1.4 Contextualisation of the study

It has become a cliché to say that after 9/11, the world is no longer the same and history has changed course. The events of 9/11 were by no means the worst or most violent attacks the world has seen. However, the terrorist attacks on the US on September 11th received ample coverage and what was indeed different about 9/11 was, as America's leading dissident intellectual Noam Chomsky put it, in the 500 years of the modern world (capitalist) system, "the guns were turned the other way". Up till then, almost uniformly, it was always Europe and its allies brutalizing the "darker nations." And undoubtedly, the world is still reeling from the after-effects. Armies have been deployed, countries destroyed and nations have been crippled as thousands of civilian deaths and injuries have been written off as collateral damage. Most important to note is that all of this has occurred without conclusive evidence – be they at the larger level when entire nations are accused of sponsoring terror (or amassing weapons of mass destruction to be used for terror) or when individuals have been detained unlawfully and/or without proper due process. Much pessimism and scepticism are now displayed toward the rule of law and the water that it holds, basic human rights have become secondary to the collective ego of the first world, and many countries, large and small, have joined the 'war on terror' either by sending military support or amending their legislation relating to terrorism.

1.5 Chapter outline

The aim of this thesis is to track the arguments and concepts related to terrorism and their impact on human rights. It also assesses how national security has been prioritized over the protection of human rights when fighting terrorism. It begins with the definition of terrorism. The vagueness and the inability of players across the board to give a more definite idea as to what terrorism is, ensures that right from the start,

states are given much leeway to deal with terrorism and terrorists for the most part exactly as they please, this undermines the upholding of human rights practices at the outset. This thesis engages with the international as well as national methods of anti-terrorism, as it attempts to highlight the inadequacies of the anti-terrorism policies through the eyes of various authors. Even though South Africa's anti-terrorism regime is said to be among the most lenient of these regimes, it ensures that the state has ultimate power to deal with terrorism as it chooses. This thesis hopes to cover all the aforementioned issues and offer some counter arguments to the current practices, where human rights have been given a back seat in favour of national security.

Chapter 1 includes the introduction, contextualisation of the study, literature review and a brief history of the protection of human rights in South Africa. Chapter 2 attempts to define terror and considers the relationship between terrorism and anti-terrorism and human rights. Chapter 3 delves into the human rights obligations of states and the balancing of individual rights and security as well as the derogation of rights. Chapter 4 seeks to summarise the various international legislation and considers how specific countries deal with terrorism. Chapter 5 focuses on the South African perspective on terrorism and anti-terror, legislation and the question of whether countries are seeking to appease the first world by following the trend of stricter anti-terror laws. Lastly, chapter 6 concludes the entire study and shares recommendations and opinions.

1.6 A Brief History of Human Rights and Terrorism in South Africa

South Africa's human rights history is a rags to riches story. The journey from slavery to freedom and democracy has been a remarkable one spanning from 1652 to 1994. It was a period of over three centuries characterised by colonisation, unjust wars, slavery and oppression. The arrival of the British and the abolition of slavery in the 1834 marked the beginning of the recognition of a human rights ethos. In South Africa, emancipation day is recorded as 1 December 1834. However, slaves were not freed but rather apprenticed to their owners for a period of four years and therefore, the actual emancipation day was 1 December 1838. This effectively maintained the

Cape as a slave colony for 176 years. The abolishment of slavery was a conscious statement affirming that humans cannot be bought, sold and used as a commodity.²

In 1910, Britain handed over power to the white South Africans and thus the Union of South Africa was created. Power was passed into the hands of the Afrikaners who over the next four decades increasingly curtailed the rights of “non-white” citizens in the country, culminating in the creation of a full scale Apartheid state. In 1948, the Nationalist Party was voted into power. Apartheid, a legally –enforced policy of racial segregation and discrimination, was entrenched and racial segregation became a way of life. This was followed by a wave of protests and defiance campaigns by the non-white social majorities of the country. By 1955, the people’s resistance struggle gained great momentum all over the country. The old maxim of ‘one man’s terrorist is another man’s freedom fighter’ rang true, as the apartheid government – in the name of ‘terrorism’³ – killed hundreds of anti-apartheid activists including Steve Biko, Phineas Sibiya and Ahmed Timol. On 26 June 1955, the Congress of the People drew up the Freedom Charter. The document was signed in Kliptown and was witnessed by thousands. It was the forerunner to the current constitution. It made a compelling call for the following demands to be met:

1. The people shall govern,
2. All national groups shall have equal rights,
3. The people shall share in the countries wealth,
4. The land shall be shared among those who work it,
5. All shall be equal before the law,
6. There shall be work and security,
7. The doors of learning and culture shall be opened,
8. There shall be houses, security and comfort and
9. There shall be peace and friendship.⁴

²www.iziko.org.za/sh/resources/slavery/index.html , accessed at 9:56 am, on January 18, 2009.

³The Terrorism Act no. 83 of 1967, was law until all but section 7 was repealed under the International Security and Intimidation Ammendment Act no. 138 of 1991

⁴The Posterbook Collective – South African History Archive, Images of Defiance, STE Publishers, Johannesburg (2004)

South Africa's first democratic free and fair elections took place on 27 April 1994. The South African Constitution⁵ is hailed as the most comprehensive and progressive document in the world today, and came into operation on 4 February 1997. The 17th to the 21st of March was named 'Constitution Week' and millions of copies of the constitution were distributed, in all 11 languages of the country. The Constitution is the highest law in the land and also the basis of all human rights and freedoms afforded to South Africans. The Fundamental human rights are entrenched in the Bill of Rights – which codifies civil, political, procedural and socio-economic rights- in chapter two of the constitution.

Indeed, the people have been victorious in their struggle for democracy. On 14 February 1995, former president of the Republic, Mr. Nelson Mandela, inaugurated the new Constitutional Court. It was created by chapter eight of the final constitution and some of the landmark cases were the following: *S v Makwanyane*⁶, which brought about the abolition of the death penalty; the *Treatment Action Campaign*⁷ case, which ensured free roll out of ante- retrovirals for HIV/AIDS victims; and the *Grootboom*⁸ matter, which reaffirmed the government's responsibility in the provision of socio-economic rights and more particularly the right to housing.⁹ The 'long walk to freedom'¹⁰ is not over as both a democracy and a constitution are ever-evolving living entities and are ongoing processes of growth, learning, and constructing and reconstructing – through the new democratic institutions of the state – rather than finished, pre-packaged end-products.

1.7 Literature Review

The definitional arguments:

⁵The Constitution of the Republic of South Africa , Act 108 of 1996

⁶*S v Makwanyane* 1995 (3) SA 391 (CC)

⁷*Minister of Health v Treatment Action Campaign* (2) 2002 (5) SA 721 CC

⁸*Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC)

⁹<http://www.constitutionalcourt.org.za/site/htm>

¹⁰The title of the very famous autobiography of former South African President Nelson Mandela, *Long Walk to Freedom*, Published by Macdonald Purnell in South Africa (1995)

Onwudiwe¹¹ delves into the various definitional problems regarding the defining of 'terrorism'; he considers the varieties of terrorism and the factors that lead to acts of terror being perpetrated, the history and the ideology of terrorism as well as third world revolutionism. Roach¹² discusses the need for definitional restraint in the sphere of terrorism; he claims that many States have opted for vague and wide definitions, which include under the umbrella everything from civil disobedience to violent crimes against a civilian population. Powell¹³ argues that a definition of terrorism is a must both nationally and internationally, she then analyses the attempts to define terrorism and also describes the anti-terror regime, lastly she considers adaptation of a definition to the local sphere as a manner in which to monitor a mechanism to fight terror, restrain the existing regime and bring counter terror under the 'rule of law.'

The national security versus individual freedom arguments:

Ramraj and colleagues, give an analysis on recent developments internationally regarding anti-terrorism laws, giving more consideration to the UK, Canada, New Zealand and Africa. Geary¹⁴ gives a more detailed lecture on the human casualties of anti-terror, and the problems facing national security in this 'war on terror'. Benvenisti¹⁵, looks at the practise of national courts to place the decisions related to security threats in times of war in the hands of the executive, and the consequences of such actions. Clapham¹⁶ considers the domestic measures adopted by counter-terror policies, and whether they confirm with measures taken internationally as well as the importance of mechanisms that check domestic adherence. Goldstone¹⁷ analyses how the development of human rights and how states balance fighting terror with protecting individual freedoms, by delving into the rules of both law and war and the effects of 9/11 in democracies. Teso'n¹⁸ gives a rather selective view of the war on terror, looking only at the needs of the state and supporting the states policies which

¹¹Onwudiwe: 2001: 28-50

¹²LaViolette: 2008: 97-127

¹³LaViolette: 2008: 128-164

¹⁴Geary: 2005: 99-139

¹⁵Bianchi: 2004: 307-328

¹⁶Ibid: 283-305

¹⁷Wilson: 2005: 157-168

¹⁸Ibid: 57-76

are not only one sided, but also in violation of human rights. His approach makes one feel like the situation of states fighting terror is one of a schoolmaster reprimanding children who have misbehaved.

The South African perspective:

Powell¹⁹, takes a closer look at terrorism, governance and related legislation in Africa, she considers both the international and national terror regimes, the background to anti-terror legislation in Eastern and South Africa as well as South African politics.

The human rights violation arguments:

Baxi's²⁰ analysis of 'human rights in times of terror' is one that takes into consideration the roots of terrorism, which include the legacy left by the many negative effects of colonialism as well as the relationship between terrorism and human rights and state terrorism. Falk²¹ gives a global perspective on terror and a critical approach of the American practises in this regard. Both their writings are realistic and attack the problem; it is one thing to fight the situation but not facing the cause of the circumstances, will ensure that the situation always exists. People do not wake up one morning and decide to be terrorists. Kessing²² measures how greater interests in anti-terror have caused great infringements on human rights and how human rights protection has been incorporated into anti-terror instruments both regionally and internationally and lastly he also looks at the 'political will' to protect human rights in the war on terror. By considering America's relationship with Al-Qaeda, Barnidge²³ explores the anti-terror framework, he then considers the application of human rights law internationally and how it protects the interests of the states in armed conflict.

¹⁹Ramraj: 2005: 625-633

²⁰Baxi: 2007: 157-196

²¹Wilson: 2005: 225-240

²²Laqoutte: 2007: 133-162

²³Barnidge: 2008: 162-206

CHAPTER 2

THE EFFECTS OF TERRORISM ON HUMAN RIGHTS

It is important to begin with the causes of terror, as the world did not wake up one morning with a sudden surge in terrorism, often the large-scale actions are a result of a long period of strife and both indirect and direct rebellion. The definition of the term 'terrorism' has been the root of much controversy both before and now in this new global 'war on terror'. Various states, policy makers and academics have attempted to 'tame' the concept, however all these efforts have remained inconclusive. It is also necessary to delve into the relationships between terrorism and its impacts on human rights as well as the effects of anti-terror on human rights. Lastly it is relevant to consider that states can also be and have been the perpetrators of terrorism and that it is essential that human rights be protected against abuse by the state.

2.1 Causes of Terrorism

It is important to recognise that revolutions, or indeed any dramatic form of socio-political protest (often accompanied by violence), do not occur in a vacuum. They occur amidst social structures and historical settings where any change, whether deemed positive or negative, is fiercely resisted by the social and political beneficiaries of a certain status quo, by those whose interests are wedded to a particular social order²⁴. From the Tamil Tigers to the Palestinian Liberation Organisation (PLO), since the time when historians and sociologists believe social stratification, hierarchy, and consequently, oppression, first emerged, those resisting various manifestations of injustice across space and time have made enormous sacrifices for social change or for their vision of transforming the world. For Baxi,²⁵ the present 'war on terror' has "scant regard for its own otherwise endlessly proclaimed Euroamerican 'gift' of human rights to the benighted 'failed states' and examples of what Gayatri Spivak now troublesomely names as 'failed decolonization'"²⁶. It is precisely such a misreading of the dialectic of terror and

²⁴Onwudiwe 2001: 37

²⁵Baxi: 2007: 159

²⁶Gayatri Chakravorty Spivak, *A critique of Post-Colonial Reason: Toward a History of the Vanishing*

resistance that facilitates the 'war on terror' paradigm to be so hegemonic in contemporary political-ideological discourse on the topic.

The third world, due to its collective history of imperialism, colonialism and indeed, according to some, neo-colonialism – a condition in which the former colonial powers continue to dominate the ex-colonies by having a preponderant influence over the latter's political, economic, and social affairs – could not have been subjugated and subjected to their status as 'underdeveloped' societies without a heavy reliance on brute force, among other things, by the 'developed' Western nations. In their efforts to resist the exploitative colonial state structures, the colonised people engaged in uprisings and revolutions, which were uniformly and predictably always considered to be the illegitimate violence of 'thugs' and 'criminals' by the colonising forces. The people involved in such struggles, however, saw their struggle as part of a national liberation movement for self-determination, as a means to end colonial rule and the exploitation, ethnic cleansing and often the genocidal levels of brutality that often accompanied it. The colonial powers, nevertheless, saw it as 'terrorism'.²⁷

The most glaring example of the freedom fighter/terrorist constructed dualism is the Palestine/Israel conflict. According to Geary,

“Palestinians turned to isolated acts of political violence, by both official and renegade rival factions, on occasion very bloody it is true, but as not much more than a kind of consolation prize that had to be accepted because it was all that was available. It is in this sense that it is right to say that Arafat was a reluctant terrorist and in this sense it is also absolutely right to describe terrorism as a weapon of the weak²⁸.”

2.2 Defining Terrorism

Present, Harvard University Press, Cambridge (1999)

²⁷Onwudiwe 2001: 49-50

²⁸Geary 2005: 114-115

There are almost as many definitions of terrorism as there are detainees at Guantanamo Bay²⁹, and this undoubtedly creates much leeway for the abuse of power by states bent upon benefiting from such ambiguity by conscious definitional selectivity in the service of certain political interests. It also creates grave problems for those who are being detained because of the potential of human rights violations that are indeed likely to occur in a context of no definite paradigm to work within³⁰. Phrases like 'today's terrorist is tomorrow's freedom fighter' demonstrate the difficulty of defining terror even at an elementary level³¹. Between 1936 and 1983, over one hundred definitions of terrorism had been cited in the relevant literature, and the two common factors in all of these definitions have been firstly, the element of fear, and secondly, the objective of the terrorist³². The first attempts to define terrorism were undertaken in 1937 during the League of Nations' Convention for the Prevention and Punishment of Terrorism.

According to Roland Barthes:

“The probability that insurgents may have the capabilities and internationalities to deploy the weaponry of mass destruction against the aggressive global incumbents constitutes the founding myth of the ‘war on terror’. Like all myths it provides a new powerful political language³³.”

Arguments like this shed light on the loaded and propagandistic nature of the word ‘terrorism’ in contemporary discourse on the subject. Onwudiwe provides two possible ways in which terror can be defined. Firstly, he refers to structural terrorism, which he defines as the threat or use of violence to affect the behaviour of a foreign government and to achieve political, ideological, economic, cultural and other strategic objectives in the target state, with the aim being to influence the policy of a state or satellite government, or to intimidate its population through coercion.

²⁹The infamous American military base and prison, used specifically post 9/11 for the 'War on Terror', located on Cuban soil, to circumnavigate jurisdictional issues. It has become the subject of much controversy

³⁰A philosophical analysis of the problems related to defining terrorism is available in TM Franck and SC Senecal, 'Porfiry's Proposition: Legitimacy and Terrorism' (1987) 20 *Vand J Transnat'l L* 195.

³¹Onwudiwe: 2001:28

³²Ibid 29

³³Roland Barthes, *Mythologies*, Fontana Books, London (1983)

Secondly, there is state terrorism, which is the employment of selective forms of violence directed against nations by other nations (or sometimes, by a nation-state against its own people).³⁴

Definitions of terrorism have been generally based on state-centred approaches to the subject. However, it has been pointed out that such an approach may be mistaken on at least two counts. Firstly, human rights laws as well as international criminal laws set clear limits on, and define the parameters of, the level/type of violence that a state may employ, thereby potentially delegitimising a state's use of force when such bounds are violated. Secondly, international law and practice both allow remedies to non-state actors.³⁵

Prior to 9/11, 'terrorism' was very often perceived as simply the collective political acts of violence by insurgents against oppressive regimes of political domination. However, post-9/11, the entire concept has largely been reconceived and bandied around as a justification for rather violent 'retaliations' by states. In this light, the Israeli Knesset – the Israel parliament – is also declaring the infliction of great harm, destruction and displacement on the Palestinians by Israel a 'war on terror'.

Quite often, the definitions of terrorism tend to be narrow and limited to the objectives and values of the scholars who create them, a problem that perhaps afflicts all intellectual discourse. Research on the subject tends to focus on a single dimension of terrorism and isolates discussion on it from larger systemic and structural factors leading to its rise, and/or the particularities of its social and political context. This study is divided into various sub-concerns and these must all be taken into consideration in order to create an all-encompassing and accurate definition. These concerns include: the association between morality, emotions and terrorism; the psychological and criminal dimensions of terrorism; the meaning of terrorism to terrorists; and the distinction between terrorism and terror.³⁶

³⁴Ibid

³⁵LaViolette: 2008: 143

³⁶Ibid 30 - 40

Different definitions³⁷ have been proposed in legislation of nation-states, regional and international organisations, and academic literature; of course, they all have varied implications, both politically and ethically. Most of the definitions share the following characteristics and combine four major factors, i.e., the goals, the means, the perpetrators and the victims of the terrorist acts. Nevertheless, a global consensus on a uniform definition of the word is still elusive³⁸.

The Sixth (Legal) Committee of the General Assembly has undertaken negotiations on this matter in the form of the 'draft comprehensive convention against terrorism'³⁹. However, in their deliberations, they have chosen to focus on possible exclusions from the scope of the convention instead of the definition itself.

The problem with defining terrorism lies in the fact that the word itself is a rather loaded and inciteful one, and is pregnant with profound ethical and political meaning of which the implications can be very serious. It has proven to be every spin-doctor's dream and the most convenient and useful justification for the use of force by states⁴⁰. According to Becker, while there is a growing consensus on what terrorism is, there is also a complex debate about what it is not⁴¹. The High-Level Panel on Threats, Challenges, and Change⁴² suggests that there are two issues created by attempts to define terrorism. Firstly, there is the claim that a definition should include 'state terrorism' by a government's own military since modern political history is replete with examples of acts of terror carried out by states that routinely have demonstrated a predilection to wanton acts of violence⁴³. Secondly, there is the question of whether acts undertaken in the context of national liberation struggles or as resistance to foreign occupation can or should be excluded from the scope of any such definition of terrorism.

³⁷A 1984 study lists 109 definitions between 1936 and 1981

³⁸Becker 2006: 83-118

³⁹23rd Meeting of the Sixth Committee of the UN General Assembly GA/L/3292 (29/11/2005)

⁴⁰The involvement of the USA and UK in both Afghanistan and Iraq as well as Pakistan

⁴¹Onwudiwe 2001: 49-50

⁴²Appointed by the Secretary General of the UN. Report on A More Secure World: Our Shared Responsibility, UN Doc A/59/565 (2004) 48

⁴³Ibid

The General Assembly 2000 Resolution proclaims that ‘acts of terrorism in all its forms and manifestations’ are ‘aimed at the destruction of human rights’ and at a creation of ‘an environment that destroys the right of people to live in freedom from fear’. It also reaffirms that ‘all measures to counter ‘terrorism’ can never be justified in any assistance, as a means to promote and protect human rights.’⁴⁴ The Resolution, which follows in 2002 of the Sub-Commission on Human Rights, addresses the negative impact in its entirety of terror on human rights, and interestingly, the ambit of this particular description of terrorism includes counter – measures and policies of states that amount to terror.

Baxi⁴⁵ has very interestingly divided the concept into a war ‘on’ terror’ and a war ‘of’ terror. According to him, the former ‘mobilizes an infinite potential for counter-‘terror’ response by the coalition of the willing states against nomadic insurgents and states that supposedly or allegedly ‘harbour’ them. The latter, meanwhile, ‘signifies’ both the collective intent and capability of non-state actors and networks to deliver, organize, and implement the threat or use of force directed pre-eminently against a civilian populace and sites across the world. The intent consists in declaring ‘war’ and waging international hostilities against sovereign incumbents in the world order; the capability consists in harnessing some extraordinary material resources (such as to access sophisticated weaponry) and non-material resources (professional competence and skills in the preparation for, and of, ‘efficient’ recourse to violence, cultivating motivation for its self-annihilating practices, and overall commitment to a ‘just’ cause.)⁴⁶

For Goldstone, the concept of ‘waging a war on terror’ is problematic; terrorism is by no means a new subject and is also radically different from conventional warfare. Such a ‘war’ is unlikely to come to a conclusion, and thus formulating policies, which posit terrorism within the ambit of war, stand only to serve state authorities by allowing them to categorize those opposing such policies as being ‘unpatriotic’. Interestingly enough, Goldstone also mentions that a government ‘failing to act within

⁴⁴ A/Res/54/161, 24 February 2000

⁴⁵ Baxi: 2007: 156-157

⁴⁶ Ibid

the law, undermines its democratic legitimacy, forfeits public confidence, and damages respect for the criminal justice system.⁴⁷

Falk⁴⁸ finds that the word 'terror' is regressive and unhelpful if it is used only to highlight anti-state political violence. The singular obsession by powerful political forces with the concept of terrorism is perceived as having made the other 'worldly' issues invisible as well as completely having ignored the factors contributing to the phenomenon.

According to *Gearson*,⁴⁹ the essence of terrorism is the breaking of the 'enemies will' through the propagation and exploitation of fear. In addition, it should be noted that terrorism seeks to achieve very diverse aims, which include: the publicising of a cause; the mobilisation of supporters; undermining the credibility of the state; attempting to assert or restore lost dignity, or simply rebelling – in whatever shape or form – as an act of solidarity; causing economic damage; punishing particular enemies; creating a shift in the moral complacency of the upper classes; and for self-determination. The moral-ethical transgression occurs, however, in the fact that innocent civilians are often the victims of terrorist attacks.

In the draft Comprehensive Convention on Terrorism, terrorism is defined as follows:

Article 2

1. Any person commits an offence within the meaning of this Convention if that person, by any means, unlawfully and intentionally, causes:
 - (a) Death or serious bodily injury to any person; or
 - (b) Serious damage to public or private property, including a place of public use, a state or government facility, a public transportation system, an infrastructure facility or the environment; or
 - (c) Damage to property, places, facilities, or systems referred to

⁴⁷Wilson: 2005: 164

⁴⁸Wilson: 2005: 225

⁴⁹Gearson: 2002: 8

in paragraph 1(b) of this chapter, resulting or likely to result in major economic loss,

When the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act.⁵⁰

According to Cassese⁵¹, the dispute lies not in the definition itself, but rather in the argument around which exceptions should be applied to the definition. The two areas of contention are the inclusion/exclusion of the 'freedom fighter' clause and the right to self-determination⁵². Previously, both of these issues were given consideration. However, no recent resolutions from either the General Assembly or the Security Council include such clauses. On the contrary, irrespective of where, by whom or the purpose, terrorism has been unequivocally condemned⁵³. This exclusion gives rise to much controversy as there are numerous groups who have been fighting for their independence and many who have gained independence through a heavy reliance on armed struggle – both of which would now be potentially deemed as having engaged in forms of terrorism.

In 1999 the International Convention for the Suppression and Financing of Terrorism gave a general definition of terrorism:

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to

⁵⁰The current draft Comprehensive Convention can be found in the *Report of the Ad Hoc Committee Established by the General Assembly Resolution 51/210 of 17 December 1996, Sixth Session (28 January-1 February 2002), Fifty-seventh Session. Supplement No. 37(A/57/37)*.

⁵¹Cassese: 2005

⁵²The following resolutions condemn terrorism and add that, 'the continuation of repressive and terrorist actor colonial, racist and alien regimes in denying people their legitimate rights to self-determination and independence and other human rights and fundamental freedoms: General Assembly Resolution 27/3034, (1972), General Assembly Resolution 32/147, (1977), General Assembly Resolution 34/145, (1979), General Assembly Resolution 36/109, (1981), General Assembly Resolution 38/130, (1983).

⁵³General Assembly Resolution 40/61, (1985), General Assembly Resolution 50/53, (1995), General Assembly Resolution 51/210, (1996), General Assembly Resolution 52/165, (1997), General Assembly Resolution 53/108 (1999), General Assembly Resolution 55/158, (2001), Security Council Resolution 1269, (1999) and Security Council Resolution 1373, (2001)

intimidate a population, or to compel a Government or an international organisation to do or to abstain from doing any act.⁵⁴

Lastly the UN High-Level Panel report from 2004⁵⁵ and the report of the UN General Secretary⁵⁶ also seem to have contributed to creating a stronger consensus on a generic definition of terrorism and – perhaps not least – on the possible exceptions to this definition. Both reports suggest that the definition should exclude state terrorism and not contain any ‘freedom fighter clause’. This raises some well-founded hope that in the near future it will be possible to reach agreement on a definition (however inadequate this definition may be) and, following this, on the Convention itself.

The domain of human rights will not truly be protected and engaged meaningfully until the language of terrorism, with all its dangerous rhetoric of ‘good’ and ‘evil’ and the overall ideological baggage, is removed entirely from political discourse and from national and international law. The idea would be to substitute such a reductionist and politically charged discourse with a more nuanced approach to international relations and a code of law that emphasises the primacy of the criminal model over that of emergency or national security driven approaches. And for either of these outcomes to be regarded even as possibilities, a workable solution that addressed the fundamental political nature of problems that exist in conflict zones such as Palestine and Israel is a *sine qua non*⁵⁷.

2.3 State Terror

According to Geary, no significant attention needs to be paid to the political violence - by Israeli forces, by US forces, or by other armies in the latest ‘Coalition of the Willing’ or indeed other repressive states that are on favourable terms with the West - which creates the conditions for subversive violence by non-state actors and helps to ensure its perpetuation. The current drive for a particular kind of definition of terrorism has been able to skilfully manipulate the topical language so that state

⁵⁴Article 2 of the draft Comprehensive Convention is more extensive as it includes ‘damage to public or private property’

⁵⁵Onwudiwe 2001: 49-50

⁵⁶In *larger Freedom: Towards Development, Security and Human rights for All*, 21 March 2005, A59/2005, par. 91

⁵⁷Geary: 2005:139

violence is completely absolved - all of the implicating and condemnatory language has been exclusively reserved for small, weak groups that mostly cause a fraction of the fatalities of their more powerful opponents. But their mistake is to kill people like 'us' – 'us' defined in relation to a typically non-Western, non-modern, darker 'other'⁵⁸. Chomsky and Herman, in their classic *The Political Economy of Human Rights*, aptly make the distinction between what they call the "retail terror" of private, non-state groups, and the 'wholesale terror' of states and allied paramilitary and/or death squad forces.

Definitions of terrorism up to now have proven to be inadequate because they fail to adequately engage the modern history of colonialism and imperialism and their lingering effects. The result is that the powerful will rarely be defined as terrorists or as those who employ terror. In short, global power differentials often tend to obscure the reality of institutional terror that emanates from the potency of military, political, and economic systems of domination connected to powerful nation-states. This is obvious today more so than ever as the death toll in Gaza hit 1300 in just over three weeks during the most recent Israeli assault there⁵⁹. And of course, the language of 'self-defence', 'retaliation', and so on has been the consistent justificatory discourse which Israel has repeatedly deployed in legitimizing its use of force – entailing levels of violence that human rights bodies and analysts have considered to be nothing less than amounting to state terror. Related to such a discussion of terrorism is the concept of asymmetrical warfare, according to Pfanner:

“The parties are unequal and the principle of equality of arms no longer holds true. The belligerents have disparate aims and employ dissimilar means and methods to pursue their tactics and strategies⁶⁰.”

The other area of concern in the past is the fact that 'state terror' not be overlooked in the efforts towards defining terrorism⁶¹. The current draft Comprehensive Convention appears to include state terror. In the preamble it states that, the suppression of acts of

⁵⁸Geary: 2005: 123

⁵⁹*Israel Mounts Third Day of Gaza Raids, 307 Killed*, Mail & Guardian online, accessed at 12:14 on December 29, 2008 (Reuters)

⁶⁰ Toni Pfanner, *Asymmetrical warfare from the perspective of Humanitarian Law and /humanitarian Action*, 87 (875) INT'L REV. RED CROSS 149, 161 (2005)

⁶¹Laquotte: 2007: 138

international terrorism, including those which are committed or supported by states, directly or indirectly, is an essential element in the maintenance of international peace and security and sovereignty and territorial integrity of States.⁶²

According to the Charter of the UN, the Rome Statute and the Geneva Conventions have regulated and confined their decisions regarding the use of force by states to times of war. The UN High-Level Panel on Threats Challenges and Change of 2004 found that the norms, which govern the use of force by non-state actors, have not kept with those pertaining to states.⁶³

Powell's idea of a proposed definition entails one that needs to be effective, calls for counter-terror policies that rely on international cooperation, and is contained within a feasible legal system. Furthermore, he argues that the question that should be asked is:

“Whether a legal regime can be constructed which acknowledges the political element of the crime of terrorism but does not turn on it thus allowing all states to cooperate within a uniform legal system, independent of their approval of the cause for which the non-actor is fighting⁶⁴?”

The other question to be answered is whether acts of terror create a state of war? Because times of war are dealt with by the implementation of humanitarian law, which aims to restrict the conduct of warfare in order to minimise the consequences of the armed conflict on its victims. The ICJ in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons states that:

“The Court observes that the protection of the ICCPR 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 emergency⁶⁵.”

⁶²Roland Barthes, *Mythologies*, Fontana Books, London (1983)

⁶³United Nations High-Level Panel on Threats, Challenges and Change (2004). *A More Secure World: Our Shared Responsibility*, 158-163

⁶⁴LaViolette 2008: 149-157

⁶⁵Legality of the Threat of Use of Nuclear Weapons, 1996 Advisory Opinion of ICJ, para 25, ('Nuclear Weapons Opinion')

Both the ICJ and Human Rights Committee have agreed that the 'application of human rights law in times of armed conflict must be informed by the standards of humanitarian law'⁶⁶ and the rules of human rights law do not cease to exist in times of armed conflict. They may, however, become subject to derogation, and it must be borne in mind that some human rights, like the right to life are non-derogable.⁶⁷

Due to the politically motivated nature of the vast majority of violence that comes under the rubric of "terrorism", it seems important and germane to turn to International Humanitarian Law for guidance on this question. International Humanitarian Law comprises of a codification of the rules, which explicitly deal with violence that is politically motivated, and hence it moves beyond the problems faced by the current terror fighting mechanisms, as well as the limiting discursive paradigm of the "war on terror", and focuses directly on liberation movements, governments and insurgents. Although it takes political violence as its subject, it focuses on the manner in which the conflict is fought rather than the reasons for the use of force. The ILA committee on International Terrorism first brought the relevance of the IHL to the fore in the mid 1980s.⁶⁸

A definition based in International Humanitarian Law,

"Would identify the point at which politically motivated violence, perpetrated during peace time, becomes terrorism, once this point is reached the international anti-terrorism system would be triggered – bringing with it full cooperation in investigation, extradition, and prosecution of offenders, without resort to the political offence exception. This system would not be state-centred, in that it would focus on the type of violence perpetrated, ignoring both the nature of the perpetrator and the nature of the political cause being espoused. Thus it would be possible for states as well as non-state actors to perpetrate acts of terrorism⁶⁹."

⁶⁶Laquotte: 2007: 100

⁶⁷Ibid

⁶⁸LaViolette 2008: 150

⁶⁹LaViolette 2008: 152-153

2.4 The Relationship Between Terrorism and Human Rights

Hicks sees potential human rights ramifications in the new framework of understanding terrorism to be apparent in the following areas: activists for human rights being branded as terrorists; due to the intensification of civil conflicts in some regions, military means to resolve political conflicts being given precedence; state- to -state peer pressure, or intra-state accountability, in upholding international norms weakening; the rapid growth of exceptional laws that violate basic human rights standards; and the mixed messages sent by the U.S government on Human Rights⁷⁰.

Immediately after September 11th, countries such as the US, the UK, India, and so on, began to promulgate a series of legislation which gave very sweeping powers to the state to define what constituted terrorism and/or a threat to national security. Such draconian legislation has been criticized precisely for being so broad and indiscriminate as to also potentially implicate human rights activists working in a variety of areas. In particular, it was anticipated that such states would use the new language of anti-terrorism to repress those activists who were directly challenging abuses and misconduct of state power.

What has also transpired over the past several years is indeed the increasing reliance on military means to resolve conflicts, which are fundamentally political in nature. From the Israeli-Palestinian conflict to conflicts in Chechnya, Southeastern China, to indeed the question of internal 'terrorism' within countries such as Afghanistan and Pakistan – there has been a marked escalation of military force to deal with any domestic/regional disgruntlement and revolt by the use of massive state force. This has prevented states themselves, in perhaps concert with international and/or UN efforts, from resolving conflicts and problems whose origins are in politics and, very often, in issues of socio-economic development or lack thereof.

Since many repressive states, be they third world dictatorships or 'Western plutocracies', have benefited from the new age of the 'war on terror' in terms of both domestic legislation stifling dissent as well as the ease with which they can ignore

⁷⁰Wilson 2005:209- 221

political negotiation and rely on militaristic approaches, there has been a marked erosion of states holding each other accountable to international moral-legal norms and conventions. Whereas a decade or so ago, the US may have been critical of Russia's atrocities in Chechnya, any such pressure on the Russian government quickly vanished after September 11th. Indeed, alliances have been consolidated between the world's most powerful states and smaller – but often geo-strategically very important – countries in Western, South, and Central Asia, in Africa, and in Latin America. These networks of regional and international alliances have often entailed consigning human rights conditions in each respective state as secondary to larger *raisons d'état*.

And of course, what has also been of significant import is how nonchalantly the US government itself, under the Bush administration, has treated the subject of human rights. The images of Abu Ghraib, the US-run torture prison in Iraq, and Guantanamo Bay, the draconian domestic legislation in the form of Patriot Act I and II, the suspension of basic rights such as habeas corpus and the serious infringement on a whole host of other civil liberties, the introduction military kangaroo courts, the bloody invasions of “shock and awe” and for primarily political and economic reasons – the combination of all of these aspects of the “new America” have set a dangerous precedent in the world. States are constantly looking for pretexts to become more repressive and authoritarian, and the fact that the “leader of the free world” can act in the way it has provides them the most cogent justification for such behavior. Indeed, governments continue to rely on the US's vengeful and repressive response to 9/11 as a playbook that they can conveniently follow, as evidenced by the Indian government's response to the Mumbai bombings in November of 2008.

Jilani⁷¹ agrees that there is no denying the ‘menace of terrorism’, however, there should be “no contradiction between counterterrorism measures and human rights; and when such measures undermine human rights, they become counterproductive.”⁷²

The problem is that counterterror measures in most cases seriously infringe on individual rights such as freedom of expression, freedom of movement, freedom of

⁷¹Prominent Pakistani Human Rights Lawyer, Hina Jilani

⁷²Opening remarks of Ms Hina Jilani, United Nations Special Representative of the Secretary General on Human Rights Defenders, at the Human Rights Defenders on the “Frontlines of Freedom” conference, November 11-12, 2003 (see Carter Centre Report 2004) in Wilson: 2005: 211

association, and so on. In addition, some of the worst of such measures tend to dehumanise, exile, detain or kill those who stand up for human rights.⁷³

Powerful states and international bodies have demonstrated a great deal of deference toward governments that violate human rights but claim to have acted in such a manner in the name of counterterrorism measures. As this thesis is being written, the world is witnessing perhaps the foremost case of precisely such justificatory language for state violence: the Israeli war on the Gaza Strip supposedly to eradicate terrorism. The Israeli government claims that its air and ground invasion of Gaza is necessary to destroy the terrorist infrastructure of Hamas – a formidable Palestinian resistance movement. However, Israel – under this cover of pursuing the terrorist group Hamas – is engaged in mass violence, indeed terror, itself by inflicting heavy civilian casualties and devastating the social infrastructure that was barely keeping alive the destitute population of Gaza. The present Israeli policy of heavy reliance on state violence to putatively ‘counter terror’ may be at the extreme end of harsh state measures, but indeed may be reflective of a larger pattern of an array of both powerful and smaller states keen on repressing political resistance by resorting to this same distorted logic of ‘fighting terror’.

Further, in response to the ‘terrorist threat’, states have implemented or fallen back on so-called ‘emergency’ legislation. Often, these laws do not correspond with good human rights practice and, due to their vague nature, allow an ‘anything goes’ approach for states.⁷⁴ Perhaps the most prominent early precedent for the new era of “state of emergency” legislation was in the 1970s when the Indira Gandhi’s Congress Party-led Indian government declared such an emergency in response to growing opposition from religious minorities as well as general political dissent and protest. It allowed the Congress Party to engage in the most repressive crackdown on civil liberties – as well as severe state abuses of human rights, up to and including the killing of its own citizens – in democratic India’s history. This is effectively the model that many states today are employing. Utilizing the language of ‘grave’ threats to national security, indeed to ‘civilisation’ itself, states are constructing a framework of perpetual emergency that is becoming increasingly intolerant of any form of civil and political

⁷³Ibid

⁷⁴Wilson: 2005: 216

freedoms, particularly when forms of public activism are of an overtly politicized nature. The Italian philosopher Giorgio Agamben believes this so-called 'state of exception' – the period of emergency rule – is rapidly becoming the norm in many countries due to problematic ideological-discursive constructions accompanying the 'war on terror'.

Again, there is the issue of the mixed messages being sent out by the international community in combatting terror, when the supposed 'icon of democracy' – the United States – acts in total violation of international human rights norms when it is claiming to fight terror, hence setting the benchmark for other states to follow its profoundly negative example. Of course, this does not mean that other states do not themselves have their own agency deciding to adhere (or not) to the various human rights instruments that they have ratified. However, over the years, the U.S has been the leading public voice in the call for the protection and promotion of human rights – its own track record of human rights abuses aside – and clearly the behavior of the world's most powerful and influential country will have an impact on how other states act as well. As one of Egypt's leading human rights activist states:

“Every dictator in the world is using what the United States has done under the Patriot Act and other derivative measures to justify their past violations of human rights, as well as declaring a licence to continue to abuse human rights at present and in the future⁷⁵.”

The negative turn the relationship between terrorism and human rights has taken becomes apparent in the wake of 9/11 in the treatment of muslim males worldwide, particularly in regard to the promulgation of highly restrictive, selective, and according to some, bigoted, and racist, immigration laws. However, the most garish example of this is visible in the scandal of the photographs taken by American soldiers in the Abu Ghraib prison in Iraq.

The failure to show respect for the most basic human rights of individuals was indeed rather concerning considering the total disregard for human rights by the highest seats

⁷⁵Opening remarks by Professor Saad Eddin Ibrahim at the 'Human Rights Defenders on the Frontlines of Freedom' conference, November 11-12, 2003 (Carter Centre Report 2004:29)

in government.. America's rush to extract vengeance and find allies for its 'war on terror' ensured that major abuses of human rights were totally ignored in the name of 'anti-terror'. Suddenly, America had referred to the old-school style of the norms and ethics of law taking a back seat to the geopolitical considerations.⁷⁶

The USA PATRIOT Act⁷⁷, the piece of legislation which perhaps best epitomizes the contours of the new, post-9/11 America, has given the U.S. government the authority to commit acts which were prohibited in the past under the guise of anti-terror, including acts which are a direct infringement of individual liberties of citizens and non-citizens. Laws like this and policies that further deprive individuals of their rights have allowed the creation of harsh "detention centers" like Guantanamo Bay and Bagram. The creation of the term 'enemy combatants' as opposed to the usual 'prisoners of war' has allowed these 'individuals' to fall outside the protection of the Geneva Conventions, and the manner in which they were treated engendered a worldwide outcry.⁷⁸ As Nuzzo notes,

"Terrorism (as well as its symbol 9/11) is... the true effect or the real consequence of the war against terrorism that the United States has been waging for decades in numerous parts of the world. In other words, war is the true cause of that which declares it is fighting-namely, terrorism⁷⁹."

The questions to be asked about the relationship between human rights and the 'war on terror' according to Baxi⁸⁰ are two fold: Firstly, is the deliberate infliction of indiscriminate violence by insurgent non-state actors against civilian populations and sites ever justified as a means of restoration of their own human rights and making these secure for the future? And secondly, how far may collateral damage be justified under the principle of double effect?

⁷⁶Wilson: 2005: 231-232

⁷⁷Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, was signed into law in 2001 on October 26

⁷⁸The great majority of the inmates at such detention centres were never proved to have been involved in the resistance fighting they had been detained for. Ibid 233

⁷⁹Angelica Nuzzo, *Reasons for Conflict: Political Implications of a Definition of Terrorism*, *metaphilosophy* 35, 330-44, at 336 (2004)

⁸⁰Baxi: 2007: 165

For many writers it is obvious that human rights are being given the backseat in the fight against terror. The majority of human rights organisations are distressed at the current situation and in a joint statement in June 2003, numerous UN special rapporteurs and experts showed

“alarm at the growing threats against human rights, threats that necessitate a renewed resolve to defend and promote these rights...and ... profound concern at the multiplication of policies, legislation and practices increasingly being adopted by many countries in the name of the fight against terrorism, which affect negatively the enjoyment of virtually all human rights- civil, cultural, economic, political and social⁸¹.”

The arena where the effects of anti-terror laws on human rights are most visible, is within national law and policies regarding the manner in which states choose to secure themselves and whether this is done at the cost of civil liberties.

⁸¹Joint statement of UN Special Rapporteurs/Representatives, Experts and Chairpersons of the working groups on the special procedures of the United Nations Commission on Human Rights, 30 June 2003, A/58/120, Annex 2.

CHAPTER 3

FINDING THE BALANCE BETWEEN NATIONAL SECURITY AND INDIVIDUAL RIGHTS

One of the most vexing issues related to anti-terrorism is that of the balancing of individual liberties and national security. The question, which arises according to Luban, is: how much of your individual freedom are you willing to forgo⁸²? The established human rights instruments have conferred human rights obligations on states, to ensure that human rights are protected. However, when the situation arises when derogation is necessary, what rules should then be followed?

3.1 Human Rights Obligations of States

Measures to safeguard the life and property of citizens of any country certainly necessitate implementation by states in order to counter terrorism or the threat of terrorism to national security. It has been argued that in a post-9/11 world, potent steps must be taken to ensure that people within the state are protected. However, these steps can have – indeed, have had – a drastic effect on human rights⁸³. States usually deal with threats to their security by means of relatively surreptitious operations, including conduct such as tapping phone lines, deciphering code, monitoring the internet, intercepting e-mails and mail as well as employing undercover agents. All of this typically falls under the banner of maintaining security as well as the state's authority, and in the classical Weberian sociological sense, the state's legitimate 'monopoly of violence.' States consider these various actions as imperative for security although all too often, such classified behaviour – lacking any transparency and accountability – can seriously threaten democracy.⁸⁴ Basic human rights and freedoms like those of privacy, mobility, equality, the presumption of innocence, the right to be protected from unreasonable detention and arrest, cruel and inhumane treatment, torture, as well as freedoms of association, expression, and

⁸²Luban: 2005: 242- 255

⁸³LaViolette: 2008: 204

⁸⁴LaViolette: 2008: 327

religion – all can be violated with impunity in the name of 'security'⁸⁵. It is important to note that the infringements of rights differ depending on the state in question, and that in fact many of these rights are included in the major international instruments that have been ratified by most of these very same states.⁸⁶

There are a number of problems associated with these newly formulated 'security measures'. These include the risk of legal activities being criminalised, the suppression of political debate and dissent, which are essential for a healthy democratic polity, and the very selective translation of the intercepted data to further the government's particular ends.⁸⁷ Wright sets out the objectives for a regime of democratic control, oversight and review as follows: the propriety of the state's security intelligence activities; effectiveness of the activities; maximum transparency of the activities; and lastly the government's accountability for the activities.⁸⁸ In addition, the components of a regime of democratic control would be: clear statutory and internal controls; adequate statutory controls of the new security intelligence actors; accountability of the executive; periodic reviews by an independent body and by a body of the legislative branch of government; judicial control; supplementary controls like financial audit schemes, whistleblower protection, and public inquiry statutes and lastly, free and independent civil society institutions, which include a free media and advocacy groups.⁸⁹

The argument that the mere failure of the United States to have formally derogated from its non-derogable obligations under international human rights law means that, *ipso facto*, an armed conflict, and a corresponding international humanitarian law framework, cannot be said to exist – as rapporteurs of the United Nations Human Rights Commission (UNHRC) seem to imply in February 2006,⁹⁰ -- is equally problematic and unsustainable, preferring as it does form over substance. While it is technically required that states issue official derogations under international human rights law, an armed conflict is considered to be a clear and self-evident situation,

⁸⁵ Ibid, 329

⁸⁶ Ibid

⁸⁷ Ibid, 331

⁸⁸ Ibid, 333-334

⁸⁹ Ibid, see 338-367 for an in-depth discussion on the various factors

⁹⁰ SITUATION OF DETAINEES AT GUANTANAMO BAY, U.N. ESCOR, at 36, U.N. Doc. Future E/CN.4/2006/120 (2006).

with or without a formal derogation, when the facts and circumstances suggest as much. Hence, an armed conflict necessarily triggers international humanitarian law. Bassiouni is correct to note, albeit in the context of torture, that semantics only go so far and that “a rose by any other name is still a rose”.⁹¹

First and foremost, human rights treaties place the responsibility on states to ‘respect and ensure’ human rights⁹². However subsequently with the signing of further treaties, the obligations of states have become more definite. These responsibilities in the arena of human rights are threefold. Firstly to protect human rights, which requires that states take preventative measures that would ensure protection against interference by non-state actors. Secondly, to respect human rights, which instruct that, a state should refrain from both direct and indirect interference in human rights issues (add part from general comment of human rights commission). Lastly, the state must fulfil its obligations towards human rights. This is a direct obligation and impels a state to promote human rights as well as provide necessary resources to ensure such promotion and that processes are put in place to ensure that human rights obligations are fulfilled.⁹³

Therefore, only states can be held responsible for violations of the treaties. In order to find the equilibrium between the positive and negative duties imposed on states by human rights law, there must be careful consideration of the surrounding issues. Do states have responsibilities regarding the behaviour of their forces, which are participating in conflicts abroad?⁹⁴ Lately, many cases regarding human rights violations committed in conflict situations outside the territory of the state are being put before courts internationally. These trials raise many questions, many of which do not have specific answers because of the often complex and convoluted (from the perspective of international law – both criminal and humanitarian) nature of the cases. For example, is the state obliged to protect the rights of the individuals affected – non-combatants and others – by the conflict? Many human rights

⁹¹Barnidge: 2008: 171-172, M. Cherif Bassiouni, Great Nations and Torture, in *The TORTURE DEBATE IN AMERICA* 20, 204 (Karen J Greenberg ed., 2006)

⁹²International Convention on Civil and Political Rights, Article 2

⁹³www.unfpa.org/derechos/preguntas_eng.htm.

⁹⁴Laquotte: 2007:97

instruments limit the state's responsibility to those within the state's territory or to those whom are subjected to its jurisdiction.⁹⁵

The emerging consensus according to Barnidge is that 'international human rights law continues to have legal effect, *mutatis mutandis*, during situations of armed conflict'.

⁹⁶It was held in the ICJ Wall case that:

"The protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogations of the kind to be found in Article 4 of the ICCPR⁹⁷."

In the same paragraph the court continued, that 'the reality of armed conflict requires that, with respect to the *lex specialis derogat legis generalis* maxim, international human rights law be considered the *legis generalis* and international humanitarian law be treated as the *lex specialis*.

The General Assembly adopted a resolution⁹⁸ in December 2002 declaring that:

"States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law⁹⁹."

UN Secretary General Kofi Annan stated that:

"Human rights and the rule of law must always be respected and that upholding human rights is not merely compatible with a successful counter terrorism strategy. It is an essential element¹⁰⁰."

⁹⁵International Convention on Civil and Political Rights , Article 2

⁹⁶Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 (860) INT'L REV. RED CROSS 737, 737-739 (2005)

⁹⁷Legal Consequences of the Construction of the Wall in the Occupied Palestine Territory (Advisory Opinion), 2004 I.C.J., at para 106, G.A. Res. ES-10/14, U.N. GAOR, at 3, U.N.Doc.A/RES/ES-10/14 (2003)

⁹⁸G.A. Res. 57/219, U.N. GAOR, at 2, U.N. Doc. A/Res/57/219 (2002)

⁹⁹Humanitarian Law and the concepts of *legis generalis* and *lex specialis*, form part of a much greater, more complex body of legal research and work.

¹⁰⁰The Secretary of the United Nations, A Global Strategy for Fighting Terrorism: Keynote address to

Amnesty International has often criticized the U.N. Security Council for its lack of emphasis on human rights and demanded that it take responsibility for the adverse impact of the fight against terror on the human rights situation worldwide. The Office of the United Nations High Commissioner for Human Rights (OHCHR), refers to some counter-terror mechanisms as part of a 'vicious circle of illegality'¹⁰¹. Kofi Annan, the former secretary general, has previously said that states, which compromise human rights, are in fact assisting terrorism.¹⁰² The OHCHR emphasised that a commitment to human rights when fighting terror dictates that terrorism can be effectively fought without violating fundamental freedoms. For Arbour,¹⁰³ respecting human rights is vital for effective anti-terror mechanisms. Schmid¹⁰⁴ claims that terrorism can be best fought when its fundamental basis is human rights. His pillars for effective anti-terror mechanisms are: good governance, democracy, the rule of law, and social justice¹⁰⁵. He offers several reasons for this compilation. If governance is poor and ineffective, then resistance movements gain support against the corruption and malfeasance of the ruling regime. If uninspiring and corrupt leaders cannot be democratically replaced, then those backing political violence find a wide audience and fill a vacuum. The law loses its credibility when used by the state as a political instrument to silence Opposition. Lastly, when injustice and repression continue for many years without any semblance or hope of change, then the masses in desperation often become willing to fight and die for their 'just cause'.¹⁰⁶

3.2 Balancing of National Security and Individual Freedoms

Democracies that are supposedly engaged in the fight against terrorism are grappling with the question of how to balance their new law enforcement strategies while also

the closing Plenary of the the International Summit on Democracy, Terrorism and Security Madrid, 10 March 2005

¹⁰¹ Address by Louise Arbour, UN High Commissioner for Human Rights at Chatham House and the British Institute of International and Comparative Law (16 February 2006), available at <http://www.unhchr.ch/hurricane.nsf/view01/E60AF3995B87D7EDC1257117005711E8?opendocument>.

¹⁰² Kofi Annan, A Global Strategy for Fighting Terrorism: Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security (10 March 2005) available at <http://www.un.org/apps/sg/printsgstats.asp?nid=1345>

¹⁰³ SITUATION OF DETAINEES AT GUANTANAMO BAY, U.N. ESCOR, at 36, U.N. Doc. Future E/CN.4/2006/120 (2006)

¹⁰⁴ Alexander P. Schmid, Senior Crime Prevention Officer at the United Nations Vienna Office on Drugs and Crime, *Terrorism and Human Rights: A Perspective from the United Nations*, 17(1-2) *Terrorism and Political Violence* 25,29 (2005)

¹⁰⁵ Barnidge: 2008: 188

¹⁰⁶ Ibid

respecting the individual freedoms of their citizens. The greatest dilemma lies in addressing the issue of the extent to which such freedoms can be limited?¹⁰⁷ The simple right to be presumed innocent in criminal prosecutions often becomes a highly problematic and thorny formulation for governments during times of emergency or war. Along with this are issues such as guilt by association, collective guilt, and the right to trial before an independent judiciary. It is essential that any limitations of these rights only occur to the extent that is absolutely imperative to achieve legitimate government interest.¹⁰⁸

Having discussed in the previous chapter the effects of the policies of the USA on the international community and its commitment to upholding international human rights law, it clearly is rather disturbing when Washington acts contrary to the rule of law. Some of the obvious examples of such behaviour (as mentioned in the previous chapter) are: indefinite detention at Guantanamo Bay prison camp; indefinite detention of illegal – and sometimes legal – immigrants; secret deportation hearings; denial of legal representation to detainees; special ‘military commissions’; broad-based, indiscriminate wiretapping; grave violations of the attorney/client privilege; serious physical and sexual abuse of prisoners in Iraq and Afghanistan and ‘ghost’ prisoners detained in American prisons abroad.¹⁰⁹

“The purpose of holding the prisoners at Guantanamo Bay was and is to put them beyond the rule of law, beyond the protection of courts, and at the mercy of the victors. The procedural rules do not prohibit the use of force to coerce prisoners to confess. On the contrary, the rules expressly provide that statements made by a prisoner under physical or mental distress are admissible ‘if the evidence would have value to a reasonable person’, i.e. military officers trying enemy soldiers (Presidential Military Order of November 13, 2001, s. 4 (3)). At present, we are not meant to know what is happening at Guantanamo Bay. But history will not be neutered. What takes place there today in the name of the United States will be

¹⁰⁷Wilson: 2005:157

¹⁰⁸Wilson:2005: 162

¹⁰⁹Wilson: 2005: 163

assuredly, in due course, be judged at the bar of informed international opinion¹¹⁰.”

When can the limitation of individual rights be justified, and by its very nature, is not this notion of limiting basic human rights fundamentally antithetical to the idea and ideals of democracy? As Teson asks: aren't governments who curtail freedom, destroying democracy under the guise of defending it? He further argues that:

“Restrictions on liberty are justified if they are only by the need to preserve liberty itself, and not by other values such as order or security, and that subject to the usual requirements of necessity and proportionality, may justify some temporary restrictions to our freedoms¹¹¹.”

Threats to freedom, and hence security can be divided into moral and physical ones. Threats, which require the implementation of security measures, should be deemed to be of monumental proportions. If the threat is not of great proportions, then the state can remedy them by using its normal mechanisms. In a democracy, security and freedom are not supposed to be at odds with each other but rather complementary¹¹².

“Security measures are justified if and only if the amount of freedom they restrict is necessary to preserve the total system of freedom threatened by internal or external enemies¹¹³.”

On the other hand, there are alternative critical perspectives offered by great intellectual luminaries like Alan Dershowitz, law professor at Harvard Law School. Dershowitz's main argument rests on the fact that the type of 'terror' now becoming hegemonic in the world, i.e. 'suicide terror', is a unique form of terrorism demanding a different, more aggressive approach.¹¹⁴ Dershowitz claims that in fact a 'war on terror' paradigm is absolutely paramount today because of the grave threat to 'Western civilization' by the peculiar forms of terrorism emerging from the Middle

¹¹⁰The Twenty-Seventh F.A Mann Lecture delivered at Lincoln's Inn Old Hall on 25 November 2003

¹¹¹Wilson: 2005: 57

¹¹²Ibid: 63

¹¹³Ibid: 64

¹¹⁴Alan Dershowitz, *Shouting Fire: Civil Liberties in a Turbulent Age*, New York: Little Brown (2002)

East and broader Muslim world. Dershowitz has made some of the most compelling arguments in favour of increasing measures that restrict civil liberties to ensure an effective strategy of counter-terror. Along with the famous John Hu – professor of law the University of California at Berkeley – Dershowitz has justified certain forms of torture, as well as indefinite detention, as legitimate practices in the fight against terrorism.¹¹⁵ Dershowitz has repeatedly offered the ‘ticking time bomb’ example as one of many situations in which extraordinary measures -- extraordinary for their blatant violation of standard due process civil liberties protections – may indeed be taken. Along with Dershowitz and John Yoo, Michael Ignatieff, former professor at Harvard Law School and currently a prominent Canadian politician, has argued that despite being fully committed to the principles of liberalism and human rights, the exceptional circumstances engendered by modern terrorism do in fact necessitate drastic means and mechanisms to combat it.

Dershowitz has called for the US and other countries in the world to endorse the age-old Israeli method of dealing with the Palestinians, or what Israel broadly and unclearly calls ‘terrorism’, by permitting a whole range of violations of typical human rights and civil liberties standards. The claim is that if such measures are not undertaken, then the threat of terrorism would come to fruition, and terrorist acts would multiply. Dershowitz claims that the overall framework of human rights can be protected precisely when the ‘outrage’ or ‘scourge’ of terrorism is confronted head on, and this may indeed entail measures, which in the short run curtail modern day notions of human rights and civil liberties. Dershowitz, Yoo, and others like them have supported the US policy of ‘extraordinary rendition,’ ‘secret evidence,’ and often indefinite detention in the overall architecture of anti-terror policy.¹¹⁶ While the credentials of Dershowitz and Ignatieff as legal experts on issues concerning human rights and civil liberties are sound, their justificatory positions concerning the ‘war on terror’ paradigm have put their human rights commitments in doubt.

Security measures are constrained by the principles of necessity and proportionality, and moral threats are defined as threats to the broadly understood moral values of a

¹¹⁵ John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*, Chicago: University of Chicago Press (2005)

¹¹⁶ Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, New Haven: Yale University Press (2002)

society. For Teson, a spin-off of war is that the public has to face a temporary limitation of its freedoms. However, he claims that such limitations are only justifiable if the war itself is just. The obvious question that arises here is who has the authority and power to categorize a war as just or unjust? Of course, there also the larger ethical-philosophical question, going as far back as to the writings of St. Augustine, of whether any war can really be just, i.e. whether the whole notion of a 'just war' is simply a contradiction in terms, an oxymoron.¹¹⁷ He goes on to say that it is not only the predicament of the victim he considers, but also the need to 'prevent moral wrong' for a situation to be worth defending. He argues that firstly, there must be a genuine security threat and secondly, it must be 'posed by principled evildoers'¹¹⁸. There are indeed problems that arise with such an approach, and the obvious questions that would consequently emerge would be who decides firstly who the 'evildoers' are, and secondly, whether or not they are 'principled'? In addition, even the question of what constitutes a 'genuine security threat' is not a straightforward matter. States have had a notorious record of using the pretext of 'national security' – and threats to it – for the implementation of social, political, and economic policies that benefit the agenda and needs of powerful sectors of society.

Indeed, it is certainly the case that the human rights obligations of a state continue even when it is participating in an armed conflict abroad. International jurisprudence specifies when 'extraterritorial application is triggered or clear parameters for determining' the extent of these obligations is still required.¹¹⁹

Luban finds 'eight fallacies about liberty and security'¹²⁰ which merit review here. To begin with, he claims that the balancing of security and rights is simple if it is 'your' rights versus 'my' security; in such a case, then, the proper question to pose would be 'how many of your own rights are you willing to sacrifice for added security?' and the answer would be very few.¹²¹ In addition, there is the notable fallacy of thinking that liberties and rights are different from, indeed stand in opposition to, security. What is overlooked is that rights are in themselves a type of security against government over-

¹¹⁷Wilson: 2005: 70

¹¹⁸Wilson: 2005: 74

¹¹⁹Laquotte: 2007: 131

¹²⁰Wilson: 2005: 242

¹²¹Wilson: 2005: 243 , along with fallacy four , 247

encroachment and abuse of power.¹²² The flawed and dangerous notion of perpetual emergency is also critiqued because an emergency denotes short-term approaches and effects, and should therefore supposedly not result in long term effects such as indefinite detentions, etc. Emergency period policies should only result in short term departures from established norms of law and order – that hopefully prioritize human rights – and should not place daily life under ‘long-term risk’.¹²³ Of the 5000 supposed Al-Qaeda operatives arrested, only five were charged with terrorism-related crimes and only one was convicted, yet they had been detained for many months, and the only justification was that this was the ‘night and fog’ policy was to keep the principal Al-Qaeda members in the dark about which of their operatives with sensitive information had been arrested.¹²⁴ Two others were acquitted, and one was convicted of non-terror related charges. In the first seven weeks after 9/11, 12 000 individuals were detained and nearly 4000 more have been detained subsequently.¹²⁵ Indeed, it is only because of international outcry from the human rights community that perhaps some of the worst excesses of such policies have been slightly moderated, and the new US President Barack Obama making a commitment to close down perhaps the most prominent symbol of ‘indefinite detention’ – Guantanamo Bay prison camp.

The next common fallacy in the entire discourse is the ‘confusing of substantive liberties with their safeguards’. While a power is considered to be a substantive liberty or the ability to act, a protection, on the other hand, is a guarantee against state abuse. Unfortunately, the difference between the two is not always obvious and this ambiguity in the distinction between the two could lead to a state furthering its own agenda by selling protections as powers.¹²⁶ ‘Presuming guilt’ is yet another fallacy. The presumption of innocence is a basic tenet of criminal trials and abrogating this fundamental right would be akin to asking the question of ‘why a guilty criminal, should have the right o a fair trial?’ Considering the uninspiring track record of the

¹²²Wilson: 2005: 245

¹²³Wilson: 2005: 249

¹²⁴D Cole, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*, New Press, New York (2003), 25 - 26

¹²⁵Legal Consequences of the Construction of the Wall in the Occupied Palestine Territory (Advisory Opinion), 2004 I.C.J., at para 106, G.A. Res. ES-10/14, U.N. GAOR, at 3, U.N.Doc. A/RES/ES-10/14 (2003)

¹²⁶Wilson: 2005: 250

'war on terror's' ability to catch the actual perpetrator(s) of terrorist crimes, it seems imperative that the right to be presumed innocent is protected at any costs.¹²⁷ The final fallacy enumerated by Luban is the 'militarization of civilian life'. The 'war on terror' is effectively creating a global battlefield, and this is why it becomes very important to ensure that military necessity does not override all other civilian and democratic rules, procedures, and protections. Civil liberties are often sacrificed at the altar of putative military emergencies and this makes it easy to shelve human rights in the process.¹²⁸

Luban, hence, makes a cogent case why the simplistic binary of freedom versus security is problematic and mistaken. He demonstrates this by critiquing the various arguments put in favour of privileging one over the other, and by assessing the reality of whether the curtailments of civil liberties being advocated do indeed serve the purpose of reducing terror. The fallacies Luban finds in the current dominant framework of fighting terror point toward fundamental weaknesses in contemporary counter-terror approaches, and suggest the need for more novel and creative – and of course more effective – ways to advance the anti-terror objectives.

3.3 Derogable and Non-Derogable Rights

Posner¹²⁹ finds two philosophical underpinnings of the laws of war. These are symmetry and reciprocity. He defines the former as the,

“condition that requires that the laws of war generate military advantages for neither belligerent, and the latter as the condition that requires that each belligerent violates the laws of war.”

Both of these sit uneasily in the current environment, and do not thoroughly address the myriad questions and problems that arise in contemporary debates on the ideology and practice of war.

¹²⁷Wilson: 2005: 252

¹²⁸Wilson: 2005: 255

¹²⁹Eric A. Posner, *Terrorism and the Laws of War*, 5(2) CHI. J. INT'L L. 423 (2005)

Basic human rights are quite a closed genus and within this grouping a further division can be created of derogable and non-derogable rights. In theory, the most basic human rights are non-derogable regardless of the surrounding circumstances. According to the major human rights instruments, derogations can only occur in times of war or emergency situations. Article 4 of the ICCPR relates to derogations during times of emergency.

“Such measures must be taken in transparency, they must be of short duration, and must respect fundamental non-derogable rights embodied in our human rights norms. They must take place within the framework of the law. Without that, the terrorists will ultimately win- as we would have allowed them to destroy the very foundation of our modern human civilisation¹³⁰.”

It is the manner of those voted in to take decisions that will score them points with constituencies that tend to fall into the trap of jingoism in the midst of a heightened sense of the threat of terror. Goldstone says this causes them to take inappropriate or excessive action, and the higher the level of fear that exists in the public, the more important it is to be seen as acting in the defence of the public. It is for this reason, according to Goldstone, that vigilance on the part of the public can be an effective method to protect against ‘disproportionate and unnecessary invasions of civil liberties’.¹³¹ An example of the above situation is the rules, which were published in the Presidential Military Order of November 13, 2001. These allowed for secret hearings to be held by military judges who could impose capital punishment by a simple majority vote. No provisions were in place regarding an independent defence counsel or any right of appeal. There was widespread criticism from the legal profession and human rights organisations, and in March 2002, the rules were amended and some of the worst features were excluded.¹³²

Necessity and proportionality are intrinsic features of international law. Therefore unless it is an emergency situation exists, the limitation of rights is only allowed if the purpose of the limitation is proportional to the aim it seeks to achieve and is the least

¹³⁰Sergio Viera de Mello, The late High Commissioner for Human Rights, in his address to the Counter Terrorism Committee. Wilson: 2005: 166

¹³¹Wilson: 2005: 166

¹³²Wilson: 2005:167

restrictive manner in which to achieve these aims.¹³³ Although fighting terror forms part of a state's obligation to promote, protect and fulfil human rights, the mechanisms employed to counter terror should conform to both international law norms and international human rights standards.¹³⁴

¹³³See the judgment of the European Court of Human Rights in *Ireland v United Kingdom* Series A, No. 25 dd. 18.01.1978.

¹³⁴Goredema: 2005: 14

CHAPTER 4

INTERNATIONAL AND NATIONAL PERSPECTIVES ON TERROR AND ANTI-TERROR

In this chapter some of the main international legislation with regards to anti-terrorism will be reviewed as well as the manner in which they have been applied in Indian, the United Kingdom, Pakistan, Turkey and a few other countries. The focus appears to have been placed on protecting the national security instead of ensuring that human rights are given sufficient attention.

4.1 International Anti-Terror Laws (The United Nations System)

The current anti-terror regime is based largely on the responses of the United Nations Security Council system and in the past decade, both legislative and executive measures have been taken in the course of over 40 resolutions¹³⁵ adopted by the United Nations that attend to the issue of terrorism. The legislative instruments attempt to define the various acts that fall under the rubric of terrorism, including attacks on diplomats, taking of hostages and hijacking. Of the twelve legal international instruments relating to terrorism, five relate to aviation security¹³⁶, two to acts of terror on the high seas¹³⁷, two to nuclear terrorism¹³⁸, and four to other

¹³⁵ These Conventions include Convention on Offences Committed on Board Aircraft, 163, Convention on the Suppression of Unlawful Seizure of Aircraft, 860 U.N.T.S. 105, entered into force Oct. 14, 1971; Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, 974 U.N.T.S. 178, entered into force January 26, 1973; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents 1973; Convention against the Taking of Hostages G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), entered into force June 3, 1983; Convention on the Physical Protection of Nuclear Material, 1980; Convention on the Suppression of Terrorist Bombing, G.A. Res. 164, U.N. GAOR, 52nd Sess., Supp. No. 49, at 389, U.N. Doc. A/52/49 (1998), entered into force May 23, 2001; Convention on the Suppression of the Financing of Terrorism, G.A. Res. 109, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/54/49 (Vol. I) (1999), S. Treaty Doc. No. 106-49 (2000), 39 I.L.M. 270 (2000), adopted 9 Dec. 1999, entered into force 10 Apr. 2002; International Convention for the Suppression of Acts of Nuclear Terrorism, 2005. The full text of these conventions is available at <http://www.un.org/terrorism/instruments.html>. (Accessed on 13th May 2007).

¹³⁶ The Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963 (Ratified by 177 States); The Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970 (Ratified by 177 States); The Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971 (Ratified by 179 States); The Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988 (Ratified by 142 States); The Montreal Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1999 (Ratified by 101 States)

¹³⁷ The Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (Ratified by 102 States); The Rome Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988 (Ratified by 95 States)

¹³⁸ The Vienna Convention on the Physical Protection of Nuclear Material, 1979 (Ratified by 96 States)

specified acts of terror¹³⁹. In 2005 the Convention for the Suppression of Acts of Nuclear Terrorism was adopted by the General Assembly¹⁴⁰. In addition, terrorism is criminalised in article 33 of the Fourth Geneva Convention, article 51 of the First Additional Protocol, and article 13 of the Second Additional Protocol. States are required by the conventions to punish these acts within their own jurisdictions. The list of acts, however, is by no means a closed one with any international settled upon consensus on what is/is not included. General Assembly Resolutions have also been passed that criminalise terrorism, and Resolution 2625¹⁴¹ asks states to refrain from supporting acts of terror. The Resolutions of both the Security Council and the General Assembly on the subject of terrorism could potentially be the basis for a uniform international definition. In a 2005 report entitled "In Larger Freedom"¹⁴², the Secretary General of the UN requested that governments adopt a comprehensive international convention on terrorism in order to achieve a uniform definition of terrorism.

The Charter of the United Nations imposes a few binding substantive obligations on states in chapter VI.1.¹⁴³ The obligations are as follows: to prevent terrorist acts through early warning systems and mutual assistance in investigation and prosecution; not to provide support in any manner to terrorist groups; to establish and prosecute a range of terrorist offences within domestic criminal justice systems; and to suppress recruitment to terrorist groups¹⁴⁴. Resolution 1624 entails the recommendations by the Security Council, which appeal to states to 'criminalise the

The convention is currently being revised and updated: See Deliberations on the UN-backed conference in July 2005: www.un.org/apps/news/story.asp?NewsID=14873&Cr1, A new convention

¹³⁹The New York Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, 1973 (Ratified by 144 States); The New York International Convention Against the Taking of Hostages, 1979 (Ratified by 136 States); The New York International Convention for the Suppression of Terrorism Bombings, 1997 (Ratified by 116 States); The New York International Convention of Suppression of the Financing of Terrorism, 1999 (Ratified by 109 States)

¹⁴⁰International Convention for the Suppression of Acts of Nuclear Terrorism, 4 April 2005, A/59/766

¹⁴¹United Nations General Assembly Resolution 2625/1970, Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, U.N. G OAR 25th Sess.. Supp No 18 at 339. U.N Doc A/8018 (1970).

¹⁴²Report of the Secretary General, In Larger Freedom: Towards Development, Security and Human Rights for All, UN Doc A/59/2005 (2005).

¹⁴³Charter of the United Nations, 26 June 1945, 59 /stat. 1031, T.S. 933, 3 Bevans 1153 (entered into force 24 October 1945) [UN Charter].

¹⁴⁴Security Council Resolution 1373: SC Res. 1373, UN SCOR, 2001, S/RES/1373, Articles 1(a), 2(a) & (b)

incitement to terrorism', and to sign international conventions against terrorism¹⁴⁵. The other step taken by the Security Council has been the creation of mechanisms, which, designate certain entities as terrorists and provides a framework for constant liaison with – and sometimes the making of tangible demands of – states and other actors with regard to sanctions against these terrorist entities.¹⁴⁶

The Security Council has created four committees at the domestic level to support and monitor the implementation of its anti-terrorism program: the 1267 Committee¹⁴⁷; the Counter-Terrorism Committee¹⁴⁸; the 1566 Working Group¹⁴⁹; and the 1540 Committee¹⁵⁰, which was set up to monitor compliance with the Security Council Resolution on weapons of mass destruction. The 1267 Committee was created to oversee compliance of states with the sanctions imposed upon Al-Qaeda and the Taliban; in later resolutions, the mandate has been amended¹⁵¹.

This is the most contentious of the anti-terror mechanisms as it houses the 'listing' system, which calls for the committee to enumerate entities linked to Al-Qaeda or Taliban, and when one or more states have submitted the name of any such entity, the name is circulated to other states – at least the committee receives no objections within 48 hours. The only remedy to this listing process is the delisting process, which requires negotiations to be undertaken to remove the name. The charter obliges states to take the following action against terrorist entities: the freezing of financial assets; the denial of entry or transit through their territories; the prevention of selling and purchasing of military equipment (whether such sales and purchases occur within their territories or by their nationals from outside the territory of the state¹⁵²).¹⁵³

¹⁴⁵Security Council Resolution 1624, SC Res. 1642, UN SCOR, 2005, S/RES/1624 [Resolution 1624], Security Resolution 1566, SC Res. 1566, UN SCOR, 2004, S/ Res/1566 [Resolution 1566], Security Resolution 1456, SC Res. 1456, UN SCOR 2003, S/RES/1456 [Resolution 1456]; and Resolution 1373 above

¹⁴⁶LaViolette: 2008: 130-131

¹⁴⁷Established by Security Resolution 1267, SC Res. 1267, UN SCOR , 1999, 1999, S/RES/1267 [Resolution 1267], www.un.org/Docs/sc/committees/1267Template.html

¹⁴⁸Note 139 above

¹⁴⁹Note 140 above

¹⁵⁰Security Council Resolution 1540, SC Res. 1540, UN SCOR, 2004, S/RES/1540 [Resolution 1540], <http://disarmament2.un.org/Committee1540>.

¹⁵¹Security Resolution 1363, SC Res. 1363, UN SCOR, 2001, S/RES/1363; Security Council Resolution 1390, UN SCOR, 2002, S/RES/1390[Resolution 1390]; and Security Council Resolution 1526, SC Res. 1526, UN SCOR, 2004. S/RES/1526.

¹⁵²Para 2(a)-(c) of Resolution 1390, Ibid, also confirmed by Security Council Resolution 1455, SC Res. 1455, UN SCOR 2003, S/RES/1455 and Resolution 1456 , note 6 above

In 2001, the Security Council Resolution 1373¹⁵⁴ brought into existence the Counter-Terrorism Committee of which the aim was to monitor the compliance of the range of state obligations set out by the resolutions¹⁵⁵. The tasks of the committee are the evaluation and publicizing of reports from member states on their compliance and the facilitation of the passing and drafting of legislation that is required by the resolutions. It also provides the code of best practices that include models for domestic anti-terror legislation. The newest committee is the 1566 Working Group, which is meant to deal with terrorist groups falling out of the ambit of the 1267 Committee. It aims to examine 'practical measures imposed on terrorist entities, other than those previously designated by the Al-Qaeda/Taliban Sanctions Committee' and the 'possibility of establishing an international fund to compensate victims of terror acts and their families'.¹⁵⁶

The UN also has a treaty regime – premised on two spheres – that deals with anti-terror that runs concurrently to the Committees. The first sphere includes various preventative measures, including surveillance of suspects, as well as the monitoring, freezing, and even permanent seizure of their assets¹⁵⁷. The second sphere relates to the prosecution and extradition of terrorists, and due to the gravity of the offence, the punishment is typically quite severe. States must prosecute or extradite persons accused of terror or organised crime, and may not refuse to extradite or assist on the grounds that the crime is economically or politically motivated, or similar reasons. The point of the various conventions is to create co-operative mechanisms between states to effectively counter the threat and act of terror. It attempts to establish an early warning system as well as co-operation and coordination to facilitate investigation, prosecution, extradition as well as confiscation and disposal of assets connected to the treaty crimes¹⁵⁸.

¹⁵³LaViolette: 2008:131-132

¹⁵⁴Note 139 above

¹⁵⁵Since September 2005, it also monitors compliance with Resolution 1624

¹⁵⁶LaViolette: 2008: 133, www.unodc.org/pdf/crime/terrorism/explanatory_english2.pdf.

¹⁵⁷Financing Convention, Article 8, 12(2) 18(3) (see note 20) States or individuals may not refuse to provide information on the basis of bank secrecy., Bombing Convention, Article 15(a) (see note 21)

¹⁵⁸LaViolette: 2008: 135-136

Although anti-terror treaties claim that they are subject to international and human rights law norms, anti-terror mechanisms do indeed potentially threaten an array of what have come to be understood as fundamental human rights. Such mechanisms potentially allow states to deprive individuals of many of their freedoms, including the right to be presumed innocent until proven guilty, the right to property, and so on.¹⁵⁹ Perhaps the greatest threat to human rights is to be found in the provisions which, facilitate the ‘investigations and prosecution of terrorism’. In toto, the provisions can violate the right to privacy, the right to fair trial, and a range of other freedoms, including the fundamental freedom and security of the person. According to Powell, “it is the human rights implications of anti-terrorism that lie at the heart of the refusal to recognise the legal validity of a separate, anti-terrorism regime.¹⁶⁰” Ignoring the anti-terrorism regime cannot be a viable response to the problem as it has become an essential part of international law in the past decade. It is indeed far more efficacious and plausible to interrogate the relationship of the regime with international human rights law. Anti terror treaties ostensibly ought to take the backseat to international human rights law, and are meant to be sufficiently broad and vague in their content so as to allow interpretations that comply with international human rights law. Academics in the human rights field should be able to give states good compliance method guidelines. We would otherwise confront a situation that,

“... pits the ideal and the practice directly against each other risking a scenario in which human rights lawyers ignore anti-terrorism requirements and the government ignores human rights lawyers¹⁶¹.”

Although the provisions of some Security Council resolutions may be challenged, the two main conventions, as well as regional conventions, have imposed binding legal obligations on their signatories. The issue of the definition, nevertheless, need not cloud criticisms of human rights violations. If there are to be limitations of human rights, critics argue, it is important that the limitations are firmly kept within a fixed structure with clearly delineated parameters.

¹⁵⁹See the website of the Center for Constitutional Rights, New York, for in depth analyses of the implications of the wave of anti-terror legislation spreading from the US to elsewhere.

¹⁶⁰LaViolette: 2008: 136

¹⁶¹LaViolette: 2008: 137

Hence, it is becoming increasingly clear that,

“The lack of a definition of terrorism and of a set of criteria to identify members of a terrorist group opens a path for an extra-legal exercise of power by the executive branch of government¹⁶².”

What becomes potentially most perilous is the idea that the executive is elevated above the other two branches of government, and in particular, the consequences of this for the proper and independent functioning of the judiciary. The vague definition confers expansive privilege to the executive, and the resulting doubt and uncertainty broadens the discretion of law enforcement agencies.

The executive privilege is further strengthened by factors in both domestic and international law, although at the international level these factors are surreptitious and subtle. The UN Charter has imposed practically no limits on the Security Council in the exercise of its powers. Thus, it is able to work beyond any judicial rules of ‘national justice’ without being hampered by being subject to domestic laws. The powers of the executive are strong due to it being the nexus between states, as well as international and domestic regimes of social and economy policy. It is also the organ responsible for managing the foreign affairs of each respective nation-state.

The procedure of inter-state cooperation requires the simultaneous involvement of both law enforcement and the executive with guidance from the relevant legal regime (domestic and international) on the type of crimes that terrorism encompasses. The Security Council’s listing procedure is an example of ‘triple executive domination’ because it lets every state put forward names for the list. Minimal mechanisms exist to protect the entity being ‘black booked’, and the central problem that emerges is that “anti- terrorism programs could move beyond law and become simply an exercise of unfettered executive discretion.¹⁶³”

If important policy formulating and implementing entities that wield significant power do not face any limitations on the exercise of their powers, then the rule of law is rendered effectively meaningless. In addition, if its terminology is too vague, then it

¹⁶²LaViolette: 2008: 138

¹⁶³LaViolette: 2008: 139

no longer has the ability to limit the powers and becomes a means of making something lawful that is otherwise rather suspect from a human rights framework.¹⁶⁴ The world, therefore, is faced with a working anti-terror regime, which gives much discretion to the executive. To ensure that society and the rule of law is protected, it thus seems essential to insist that not only should a definitive definition of terrorism be agreed upon, but that human rights are always given primacy in the fight against terrorism.¹⁶⁵

Only three treaties address terrorism directly, even though many claim to do so. These are: the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999¹⁶⁶; The International Convention for The Suppression of Terrorist Bombings of 15 December 1997¹⁶⁷; and the International Convention for the Suppression of Acts of Nuclear Terrorism of 13 April 2005¹⁶⁸.¹⁶⁹ There are also regional instruments that have been created to establish co-operation regionally, including: the Convention of the Organization of the Islamic Conference on Combating International Terrorism of 1 July 1999¹⁷⁰; the European Convention on the Suppression of Terrorism¹⁷¹; the OAS Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance¹⁷²; The OAU Convention on the Prevention and Combating of Terrorism of 14 July 1999¹⁷³.

The special rapporteur on the protection of human rights and fundamental freedoms in the fight against terrorism recommended¹⁷⁴ that the Commission of Human Rights must look into creating a “special procedure with a multidimensional mandate to monitor states’ counter terrorism measures and their compatibility with human

¹⁶⁴ See David Cole’s excellent book for further discussion on this subject, *Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism*. New York City, The New Press, (2003)

¹⁶⁵ LaViolette: 2008: 136-139

¹⁶⁶ 10 January 2000, 39 I.L.M. 270 2000 Can. T.S. 9 [Financing Convention]

¹⁶⁷ 12 January 1998, 37 I.L.M. 251 [Bombing Convention]

¹⁶⁸ 7 July 2007, UN Doc. A/59/766 [Nuclear Terrorism Convention]

¹⁶⁹ LaViolette 2008: 134

¹⁷⁰ 7 July 2007, UN Doc. A/59/766 [Nuclear Terrorism Convention]

¹⁷¹ 27 January 1977, 1137 U.N.T.S. 93, Eur. T.S. No. 90 [European Convention]

¹⁷² 2 February 1971, 1438 U.N.T.S. 195.

¹⁷³ Online: http://untreaty.un.org/English/Terrorism/oau_e.pdf, for other treaties on the subject,

LaViolette: 2008: 134

¹⁷⁴ Sixty-first session of the Commission of Human Rights, April 2005

rights¹⁷⁵”. This created the position of the rapporteur on human rights and fundamental freedoms. While countering terrorism for a period of three years, the rapporteur has a broad and comprehensive mandate that includes the following duties: gathering information from states, victims, organisations and others, as well as country visits upon allegations of violations of human rights while countering terrorism; identifying and promoting the best practices and measures to counter terrorism, ones that do so while upholding adequate human rights standards; and making recommendations on the promotion and protection of human rights and fundamental freedoms while countering terrorism, doing so at the request of states and including the provision of advisory services or technical assistance on particular measures.¹⁷⁶

The UN appointed a special rapporteur specifically on the issue of “Protecting Human Rights while Countering Terrorism¹⁷⁷.” The appointment came after extensive deliberations on the problematic trajectory – in terms of upholding human rights – of the current ‘war on terror’ paradigm. The special rapporteur was charged specifically with the task of investigating repeated human rights abuses taking place by those governments claiming that they were waging battles, external and internal ones, against terrorism. One of the principal problems confronting this appointed rapporteur – it has been Mr. Martin Scheinin since 2005 – is that many countries, both more powerful and weaker ones, have been reluctant to allow entry to the rapporteur for him to thoroughly investigate human rights practices in countering terrorism. The fundamental dilemma has been that while a coalition of countries and global civil society organizations have called for the appointment of such a rapporteur, deeming it absolutely necessary to prevent the pattern of human rights abuses seemingly taking place in the fight against terrorism, the powerful nation-states waging a so-called ‘war against terror’ are indifferent at best, contemptuous at worst, at this rapporteur. Hence, the rapporteur’s role has been largely ineffective in curbing the excesses of human rights abuses by states such as the US, India, Russia, China, and so on.¹⁷⁸

¹⁷⁵Human Rights and Fundamental Freedoms While Countering Terrorism, 7 February 2005, E/CN.4/2005/103, p 27

¹⁷⁶Laquotte: 2007: 134-135

¹⁷⁷Martin Scheinin, “Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,” 4 Feb. 2009.

¹⁷⁸Ibid

Overall, the UN's own counter-terror policy, including the appointment of the special rapporteur, has been handicapped by the sluggish and reluctant response by the UN Security Council members. The permanent five – the US, Britain, France, Russia, and China – are themselves some of the worse violators of human rights, particularly during the current 'war on terror' phase of modern politics, and hence sceptical of any new initiative to monitor or uphold human rights.¹⁷⁹ While there has been rhetorical commitment to allowing the UN to formulate symbolic gestures toward upholding human rights standards, like appointing the special rapporteur, these influential nation-states have made it exceedingly difficult for the UN or any outsider organization to conduct independent investigations. It is for these reasons that critics have levelled the claim that the UN has been ineffective in 'taming' states' human rights abuses in the 'war on terror', and has become utterly subservient to the geo-political objectives of the powerful states – principally revolving around quashing any type of dissent, violent or not – rather than maintaining a principled and independent position on these issues.

4.2 Approaches Taken by Different Countries

The current approach to tackling the unspecified nature of the counter-terror system is based on fortifying the global agreement against specific forms of terror that occur commonly. The mechanism that has been enforced post 9/11 has been a state-centred one. Firstly, extradition treaties have been altered in order to exclude the 'political offence' exception for crimes of terror¹⁸⁰, thereby ensuring that every violent act beyond a certain measure is categorised as an act of terror and becomes subject to the anti-terror regime. Secondly, state-terror is not being clearly brought into the definition, so as it stands, only non-state actors can commit terrorism. Lastly, states and academics will not engage with the idea of terror unless the consequences are internationally felt. This allows states to deal with their own citizens and residents who commit terror in any manner they want. According to Powell, "current thinking, therefore, tends to legitimize the recourse to violence by the state and deliegitimize

¹⁷⁹The United Nations Action to Counter Terrorism, Implementing the Global Counter-Terrorism Strategy, March 2009

¹⁸⁰Article 5 and 11 of the Bombing Convention

any recourse by non-state actors¹⁸¹.” Powell sees this as a short term solution which is dependent upon tacit, international agreement on many factors including: the identity of the terrorist and the illegitimacy of any use of violence by the terrorist group – and the automatic legitimacy of the use of force by any state who is ‘threatened by terror’. This solution requires a consensus on which political motivations for violence are acceptable, thereby moving the focus to the actor. In measuring the moral value of the conduct on the basis of who the actor is, the not so subtle implication is that the nature/identity of the actor can justify the conduct.¹⁸²

From steps taken over the past decade (and arguably, well before), governments have demonstrated that they care very little for the freedom of those who fight for freedom. There undoubtedly exists the perennial dilemma of the term ‘freedom’ being contingent on who is calling it as such. Nevertheless, present legislative moves the world over show little mercy to, or sympathy for, those ‘fighting for a cause’¹⁸³. In November 2001, the then former Indian Deputy Prime Minister L.K Advani was in favour of a new Prevention of Terrorism Act (POTA) which would limit many rights and freedoms that were protected under the old act and stated that if the decree was opposed, then the opposition would be ‘wittingly or unwittingly’ furthering terrorist aims¹⁸⁴. After the November 2008 terrorist attacks in Mumbai, the Congress-led Indian government is once again under pressure to renew POTA-like draconian anti-terror legislation. The fear, however, is that once again the target will not be legitimately accused individuals involved in acts of terror, but political dissidents, minorities (especially Muslims), etc. with whom the state’s relationship has always been a repressive one.¹⁸⁵

The Columbian government of Alvaro Uribe, who took control in May 2002, stated that its fight against guerrilla forces is ‘working to the same ends’ as the US ‘war on terror’. It has taken harsher steps against rebels and continuously accuses human

¹⁸¹LaViolette: 2008: 148

¹⁸²LaViolette:2008: 149

¹⁸³For a good discussion of the politics of naming ‘freedom fighters’ versus ‘terrorists’, see Phyllis Bennis’s *Challenging Empire: How People, Governments, and the UN Defy US Power* (New York: Olive Branch Press (2005) and Eqbal Ahmad’s *Terrorism: Theirs and Ours*, New York: Open Media Press (2001)

¹⁸⁴Wilson: 2005: 211

¹⁸⁵Biju Matthew, *As the Fires Die: The Terror of the Aftermath*, SAMAR Magazine, Winter 2008.

rights defenders of 'serving terrorism and hiding in a cowardly manner behind the human rights flag¹⁸⁶.' On the other hand, it must be noted that the Columbian government (its security forces, military, and para-military forces) is consistently ranked as one of the leading violators of human rights in the world.

Hicks points out that Columbia, Indonesia, Pakistan, the Philippines, and Uzbekistan have received increases in foreign assistance from the US since 9/11, some of the assistance being directly military, and some of it as part of formal cooperation in the field of counter terror. Pakistan was anointed as a major non-NATO ally of the US in May 2004, even though Pakistani 'military democracy' left something to be desired. On his 2002 visit to the White House, Pakistani President (and military dictator) Musharraf was called by President Bush, 'a leader with great courage, and his nation is a key partner in the global coalition against terror'. What perhaps was a disappointment was that no mention was made of Pakistan's human rights record.¹⁸⁷ It becomes very apparent that regardless of the US criticisms of countries in its Country Reports on Human Rights Practices – with the states in question balancing it against the material assistance they continued to receive – this makes verbal rebukes in official human rights statements rather weak and inconsequential. The serious questioning regarding the motives of the US has brought into being a fundamental paradox. America cannot be seen as the 'protector of the free world' if it totally disregards international human rights norms.

In the UK, a series of anti-terror legislation have affirmed the British government's continued attempts to confront the 'terrorist threat.' Some of the major pieces of legislation have been: Prevention of Terrorism Act (1974-89), the Terrorism Act (2000), the Anti-terrorism, Crime and Security Act (2001), The Prevention of Terrorism Act of 2005, The Terrorism Act (2006), and The Counter-Terrorism Bill (2008). The British anti-terror legislation has been implicated by human rights groups as being overly broad so as to make a variety of legitimate forms of protest and dissent potentially classified under the rubric of 'terrorism.' Perhaps because of the July 7, 2005 terrorist attacks in London, the UK has taken a far harsher approach to

¹⁸⁶Ibid

¹⁸⁷Ibid: 2005: 220

counter-terror than the European Union on the whole. Human rights groups and the EU have accused the British legislation of sanctioning arbitrary – and often indefinite, at least when it comes to foreigners – detention without trial, warrant less searches and seizures, and the use of so-called ‘secret evidence’ – often evidence elicited through torture – to implicate suspects and detainees. The British model of anti-terror legislation is accused of going by the playbook of the United States, though not exactly reaching the draconian level of such notorious American legislative pieces as Patriot Act I and II.¹⁸⁸

In Turkey, a country that is seeking to gain entry into the European Union, anti-terror legislation and practice has been consistently harsh and repressive over the past few decades. The Turkish military and state has used such sweeping legislation to criminalize, detain, and very often brutalize, torture, and kill, elements from an array of ‘subservient’ groups in society. Perhaps the community, which has experienced most frontally the wrath of such legislation and state practice, is the Kurdish minority in Turkey. The Kurds’ struggle for autonomy has been met with extreme state violence, and political resistance emanating from Kurds is uniformly treated as ‘acts of terrorists.’ In addition, the Turkish military and security forces have relied upon such a draconian anti-terror approach to also stifle dissent and legitimate protest coming both from Islamic political activism as well as leftwing and labour movements. The Turkish Anti-Terror Law of 1991 contained various provisions that went so far as considering “separatist propaganda” as akin to supporting terrorism. In addition, special State Security Courts – with notorious records of violating basic due process both during the pre-trial and trial periods – dealt with terrorism-related cases up until 2004, when slightly more transparent and equitable Heavy Penal Courts replaced them. The AKP Islamist government has also been calling for a more robust defence of basic due process and habeas corpus rights of the accused under anti-terror legislation. In this regard, the new government has made it imperative that detainees receive access to a lawyer as soon as they are detained. While Turkey has had one of the worst human rights records in the world over the past two decades, particularly in

¹⁸⁸For perhaps the logical outcome of the subservience of British anti-terror legislation/strategy to that of America’s, see Moazzam Beg’s *Enemy Combatant: A British Muslim’s Journey to Guantanamo and Back*, London: Free Press (2006)

its relationship to its Kurdish minority¹⁸⁹ – and this has been done under the cover of fighting terrorism – recent developments, particularly with the recent election victory of the AKP Justice and Development (Islamist) party, demonstrate some encouraging steps in the development of a more sensible and balanced approach to anti-terror.

As was mentioned before, the Indian example has been interesting with regard to both the specific question of anti-terror legislation, as well as for the broader issue of the ‘state of emergency’, in which unprecedented powers are given to the state, in particular the executive, to forcefully and often unlawfully investigate, target, and apprehend persons suspected of being involved in acts of terrorism or subversion in general. Indeed, the decision by the Indian government, purportedly the world’s largest democracy, in the 1970s to declare a ‘stage of emergency’ sent shockwaves throughout the world precisely because such a proclamation was seen to be grossly out of proportion to any real security necessity of India’s. It was a period of massive crackdown on dissent, in which persons from minority communities (especially Sikhs and Muslims) and political activists and whole groups were rounded up under charges of ‘terrorism,’ ‘subversion’, ‘anti-state activities’, ‘separatism’, etc.¹⁹⁰ Because of the widespread resentment by Indian civil society against this bleak period in India’s history, the Indian government attempted to promulgate a clearer and less sweeping approach to anti-terror in the form of the Terrorist and Disruptive Activities (Prevention) Act (1985/1995), or TADA. TADA, nevertheless, was also mainly aimed at suppressing political activity emanating from the Punjab.

Perhaps the most draconian and notorious of Indian legislation addressing the issue of terrorism is the Prevention of Terrorist Activities Act, or POTA, of 2002. This was promulgated in response to the terrorist attack on the Indian parliament in Dec. 2001. The act included sweeping powers given to law enforcement authorities in their methods of investigation, their ability to detain suspects for up to 180 days without filing any charges against them, their withholding of the identities of witnesses, and their ability to solicit and use in a court of law confessions to the police as an admission of guilt. These provisions and others raised the eyebrows of civil society

¹⁸⁹See Noam Chomsky’s *World Orders: Old and New*, New York: Columbia University Press (1996) and *The New Military Humanism*, Boston: South End Press (1999)

¹⁹⁰See Tariq Ali’s *An Indian Dynasty: The Story of the Nehru-Gandhi Family*, New York: Putnam, (1986) for an extensive discussion of this dark period in modern Indian history

and human rights groups, and the strength and momentum of the movement against POTA forced the Congress-led United Progressive Alliance government to repeal in 2004.¹⁹¹ The much softer Unlawful Activities Prevention Act replaced it. However, after the Mumbai bombings in Nov. 2008, there is a renewed call by powerful, nationalist forces within India to reinstate POTA-type repressive anti-terror legislation so that the Indian state can take a far more pro-active role in finding and fighting the so-called 'terrorists' that exist within – or come from the outside to enter – India's borders.

Finally, the case of Pakistan provides an example where the influential role of the military has played a significant role in bolstering and implementing the state's anti-terrorism policies. Since 1975, there have been various anti-terror legislation promulgated by the Pakistani government, but the two most prominent have been the Suppression of Terrorist Activities Ordinance (1975) and the Anti-Terrorism Act (ATA) of 1997. The latter entered the Pakistani scene amidst incredible levels of sectarian acts of terrorism, primarily between Sunni and Shia religious communities.¹⁹² In addition, there was a disturbing amount of ethnic violence in the country's largest city, Karachi. Pakistan's civilian government in concert with the national security establishment – at the centre of which is the military – decided that the harsh Anti-Terrorism Act was necessary, especially its provision of 'Special Anti-Terrorism (military) Courts' that supposedly brought 'swift justice.'¹⁹³ Although deemed necessary by the government, military, analysts, and some sections of civil society at the peak of the violence, the ordinance gradually became subject to thorough scrutiny and criticism for the way the state used it to apprehend huge swaths of political dissidents, to try them often with basic due process highly compromised in courts which at times effectively functioned like kangaroo courts, to issue harsh punishments like the death penalty, and to make any type of appeals process next to impossible. In addition, the Pakistan Armed Forces Ordinance of 1998 also aided ATA in combating so-called 'civil commotion', which, unsurprisingly, covered

¹⁹¹ See Khushwant Singh's *The End of India*, New York: Penguin (2004) and Arundhati Roy's *War Talk*, Boston: South End Press (2003), for a discussion on the civil society uprisings against POTA and the increasingly repressive Indian state apparatus.

¹⁹² Muhammad Qasim Zaman, *Sectarianism in Pakistan: The Radicalization of Shi'i and Sunni Identities*, *Modern Asian Studies*, 32 (1998) 689-716

¹⁹³ Tariq Ali, "The Colour Khaki," *New Left Review*, 19, Jan-Feb 2003.

offences, which may not on the surface, seem to fit the characterization of terrorism but nevertheless effectively are criminalized and punished in the same way.

One thing, which the trajectory of anti-terror legislation in all of the abovementioned countries demonstrates is that the intensity or harshness of the respective government's response, is often dictated by very immediate socio-political circumstances within (and often from outside of) the country. One country after the other now claims that they have experienced their 9/11 whenever any terrorist attack occurs, no matter what the scale of that attack. It is becoming increasingly clear to the human rights community that this 9/11 mantra is employed as a justification to adopt the American post-9/11 anti-terror response lock, stock, and barrel, and to implement similar draconian legislation that often has disastrous consequences in terms of human rights.

The international anti-terrorism regime threatens a range of human rights, including the right to property, the right to be presumed innocent until proven guilty, the right to a fair trial, as well as a variety of freedoms, such as the freedom and security of a person and freedom of association. Although often the products of lengthy negotiation processes, the treaties dealing with counter-terrorism remain sufficiently vague to permit multivalent interpretations yet somehow remaining broadly within the international human rights regime. In the face of threats to human rights by the international anti-terror mechanisms, domestic mechanisms can offer a response by dictating that a norm be applied to a lesser extent. Often the greater the alacrity with which legislation is passed by parliament and for which there has been minimal debate, the more restrictive and repressive it is. It must be noted that in principle, the various treaties cannot deprive the respective state's judiciary of the control over the counter-terror processes, although this also is contingent upon the extent to which the executive controls the mechanisms. Due to the fact that international law is a compilation of different sources of authority, it cannot be approached as some neatly mechanized and codified corpus. It must be carefully delved into and the conflicting rules must be considered, analyzed, and reconciled for the optimal solution. The direct translation of treaties into domestic law is more akin to the Security Council's approach and it is well known that the Council has demonstrated scarce consideration for international human rights in its anti-terror policies. It is well understood that

terrorism should primarily be looked at as something to be prevented, not simply prosecuted. The latter approach may lead to the judiciary or legislature being overlooked in order to respond swiftly to threats. However, if this is not contained within a solid legal framework then the lines between law and power will be blurred quickly.¹⁹⁴

Related to this discussion are the problems that arise with the narrow, one-sidedness found in the current demand for 'universal jurisdiction'. Critics are reasonably arguing that such an approach ought to be treaded carefully as it very likely would lead to the institutionalisation of the internationally agreed procedures to deal with war crimes, genocide, or other crimes against humanity. The pursuit of universal jurisdiction, therefore, has the potential to threaten the very purpose for which the concept has been developed. Ultimately, an excessive reliance on universal jurisdiction may undermine the political will and collective moral compass to sustain and strengthen the humane norms of international behavior so necessary to temper the violent times in which we live.¹⁹⁵

It is imperative that states do not ignore human rights in the fight against terror. Friedman's¹⁹⁶ concept of a 'balance sheet' regarding the states involvement in society, listing the advantages and disadvantages, our principles would dictate which considerations should be given what value. Vijayakumar explains this best in relation to India:

“An acceptable course between giving too little power to the government so that it is unable to deal with terrorism, and too much power so that an intolerable violation of human rights is risked¹⁹⁷.”

¹⁹⁴Wilson: 2005: 576-580

¹⁹⁵Kissinger: 2001

¹⁹⁶Nobel Laureate Milton Friedman, *Capitalism and Freedom* 32 (1967)

¹⁹⁷V Vijayakumar, *Legal and Institutional Responses to Terrorism in India*, in *Global Anti-Terrorism Law and Policy* 351, 356 (Victor V, Ramraj et al. eds. 2005)

CHAPTER 5

South Africa is said to have among the most lenient anti-terror laws, however upon closer inspection this is questionable, the vague construction of these laws ensure that human rights can be violated in favour of the protection of national security.

Anti-Terrorism, A South African Perspective

The bombing in Uganda in 1997 and the attacks on U.S embassies in both Dar-es-Salaam and Nairobi in 1998 and the bombing of a Kenyan hotel in 2002, have been some of the instances of terror in Africa. South Africa had 338 bombings between 1994 and 1998¹⁹⁸. Bombing continued until 2000,¹⁹⁹ however according to reports these were motivated by crime and not terrorism²⁰⁰. Although Africa as a continent has been affected by both colonial and natural disasters, terrorism has never been at the forefront of African safety concerns. Since 9/11 and the global trend regarding a response to terror, Africa too has been forced to take an anti-terror stance.²⁰¹

South Africa's move to passing anti-terror laws has been a long and problematic journey as South Africa's past is one that remembers all too well, that the language of war can be misused, with disastrous effects. Apartheid Legislation labelled all those fighting against it 'terrorists' and imprisoned and murdered many activists under the guise of treason. In 1998 South Africa officially undertook a new official stance on terror. In doing so it vowed to: protect the freedom and security of its citizens; respect its obligations to the global community; uphold the rule of law and agreed not to resort to any form of oppressive discrimination²⁰². The installation of anti-terror laws gained momentum post 9/11 with the adoption of United Nations Security Council Resolution 1373, which compelled all members to implement the operative provisions of the resolution²⁰³.

¹⁹⁸Powell and Goodman, *Reconciling the Fight*, South African Law Commission, Report no. 92 (2000), 43-45

¹⁹⁹H Boshoff and M Schonteich, *South Africa's Operational and Legislative Responses to Terrorism*, (2002) Africa and Terrorism Monograph no. 74, Institute for Security Studies Pretoria, 63;

²⁰⁰Mostly smuggling of weapons, drug trade, ivory, gold, valuable substances and cars

²⁰¹Ramraj: 2005: 559-560

²⁰²Hubschle: 2005: 1

²⁰³Ibid

This led to South Africa's enforcement of, The Protection of Constitutional Democracy Against Terrorist and Related Activities Act²⁰⁴ - previously known as the Anti-Terrorism Bill – that was enacted to undertake the treaty obligations imposed by both the UN and Security Council resolutions as well as the OAU Convention on the Prevention and Combating of Terrorism²⁰⁵, regarding terror. The perceptions that Africa's borders are both porous and lack proper security along with the general problems of extreme poverty, lack of government resources, and black-market trade, make Africa a 'terrorist's haven, according to UN and other reports. Thus South Africa and neighbouring states have been pressurised to create and enforce anti-terror legislation that is inline with the 'war on terror'²⁰⁶. The act also repeals its apartheid predecessor, which included 'indefinite detention' clauses²⁰⁷. The legislative chose to recreate, the old act instead of replace it with an entirely new act. The act has been met with much criticism from trade unions as well as civil society organisations.

The Bill's preamble is mainly a repetition of the international call of support to the global community to assist in the 'crusade against terrorism'²⁰⁸, which the UK and US have been preoccupied with since 2001. The Anti-War Coalition protested outside at its inception saying that:

“Today the state and all parliamentary parties are ushering in what can only be described as a permanent state of emergency, under the guise of the defence of constitutional democracy²⁰⁹.”

They went further in their open letter saying that:

“The true intention of this new law is not to fight 'terrorism', but to crack down on the working class resistance in the face of super-exploitation by imperialism and their local lackeys²¹⁰.”

²⁰⁴ Act 33 of 2004 enforced on 20 May 2005

²⁰⁵ Adopted at Algiers, on 14 July 1999, entered into force in accordance with Article 20

²⁰⁶ Hubschle: 2005: 3

²⁰⁷ Project 105 Review of Security Legislation, Terrorism: Section 54 of the Internal Security Act 1982 (Act no. 74 of 1982) August 2002 at 1

²⁰⁸ Kimani: 2003

²⁰⁹ Anti-Terror Legislation Adopted by Parliament, www.iol.co.za

²¹⁰ Ibid

Parliamentary portfolio committees and the South African Law Reform Commission (SALRC) initially drafted counter-terror legislation in 1999 by the police and thereafter. The draft was affirmed by the National Assembly but underwent amendment by the National Council of Provinces. It was then sent back to portfolio committees for further discussion, it was reintroduced to parliament, and finally passed on 12 November 2004. There are two main criticisms of South African anti-terror legislation; the first being an objection on the liberal constitutionalism, the doctrine of separation of powers and human rights²¹¹; and the second being the fear of specific groups of people being victimised. The latter has caused an outcry by both Muslim communities²¹² and trade unions (COSATU) alike. An outcry by the trade unions led to amendments to the legislation that ensured that workers participating in unprotected strikes are not classified as terrorists. The legislation itself attached to the pre-trial stage in that it attempts to prevent terror and trial stage, wherein the offences, rules of evidence and results of conviction are detailed.²¹³

South Africa's previous counter-terror regime has a rather dubious reputation. 'Terrorism' cases were not subject to normal criminal procedure and gave the executive the power to act with impunity. The new regime has ironed out the problem areas of the old regime and has also discarded the notorious 'detention without trial'. The prevention of terror has been incorporated into the prevention of organised crime, in that the Prevention of Organised Crime Act (POCA)²¹⁴ has been protracted to encompass terrorism. POCA allows for the freezing and forfeiture of assets linked to crimes and this also applies to assets seized in or associated with terrorist activities²¹⁵. This allows the National Director of Public Prosecutions to acquire a directive for the forfeiture of assets²¹⁶, that were 'acquired, collected, used, possessed, owned, provided for the benefit of, or on behalf of, or at the direction of, or under control of an entity which commits or attempts to commit or facilitates the commission' of the offences in the anti-terrorism Bill. Criminal prosecution of offenders is unnecessary.

²¹¹Ramraj: 2005: 562

²¹²SALRC, Compendium of Recent Publications, 31 March 2004 at 22, <http://www.law.wits.ac.za/salc/report/report.html>; A National South African Bayaan, http://www.jamiat.co.za/noticeboard/anti_terror_bill.html.

²¹³Ramraj: 2005: 562-563

²¹⁴Act 121 of 1998

²¹⁵Ibid, chapter 6

²¹⁶Section 38 of the Anti-Terrorism Bill is amended by the schedule, which allows for forfeiture of property.

Officers investigating suspected terrorism would have the same authority as those investigating organised crime due to the National Prosecuting Authority Act²¹⁷. Another added mechanism is that the Scorpions²¹⁸ may assign specific officers to a particular investigation and they may then have the increased authority to search and seize assets, section 29 dictates that they still require court orders however they need not detail what it is they expect to find. The Bill also in clause 23 allows for *ex parte* applications by the National Director of Public Prosecutions (NDPP) to freeze the assets of a terror suspects. This is relevant and noteworthy as it shows executive discretion without judicial oversight. All that must be proved is that NDPP is that the property concerned is controlled by an entity “listed” as terrorist²¹⁹, by the UN Security Council. Interestingly enough the vague and wide rules come into play here, as it need not be shown whether the assets will be used for the purposes of terrorism or whether the organisation is really a terrorist organisation. Unfortunately the Bill does not allow for recourse by victims against the UN’s, almost draconian ‘listing’ system. Clause 24 allows judges to order the halting and search of vehicles – with a 10-day validity period.²²⁰

The other part of South Africa’s anti-terror regime becomes apparent in the trial phase. The universal problem with terror legislation is that suspects are accused of the most vaguely defined crimes, South African law is no exception, both ‘terrorism’ and the ‘offence connected with terror activities’ are the main treaty crimes which are codified by the Bill and create great liability for accomplices²²¹. Even though the definition is wide, two exceptions have been placed; these ensure that those in the legitimate struggle for their right to self-determination and those taking part in protests, the fight for national liberation, industrial actions and political opposition are not termed terrorists²²².

Terrorism as an offence, is made up of three wide components, these are: an act, the intention behind it and the motivation for the action. Part (a) of the Bill, which defines the act masquerades as in depth, however on closer investigation is rather wide: ‘ the

²¹⁷National Prosecuting Authority, (NPA) ACT number 32 of 1998

²¹⁸Directorate of Special Operations (DSO)

²¹⁹Clause 23(1) b of the South African Bill, referring to clause 25

²²⁰LaViolette: 2008: 563-565

²²¹Clause 2 and 3 of the Bill

²²²Clause 1(3) and (4)

systematic, repeated or arbitrary use of violence' amount to 'terrorist activities'²²³. Section (a) of the definition, then lists the various acts that cause harm from the release of dangerous chemicals into the environment to creating a serious public emergency. The requirement of intent, related to the disruption or interfering with the provision of essential services is necessary. The list of these 'essential services' is not a closed genus and features public services from financial services to telecommunications. Section (b) catalogues the terrorist intentions: to intimidate or make the public insecure about their security; to intimidate the public, a person or the state to behave in a particular manner and to threaten the sovereignty of a government. These intentions are very wide and the standard of proof is lowered, the problem being, that it is very easy to accuse persons and have little by way of proving that it is not so. Section (c) enumerates the motivations, meaning that any act which satisfies a criteria in section (a) and (b) becomes an act of terror if it is conducted for any individual, ideological, political, philosophical or religious purpose.²²⁴

According to Powell, "redundancy is a common feature of anti-terrorism legislation, because definitions of terrorism often duplicate crimes already found in the municipal system²²⁵." She finds the extent to which the draft Bill duplicates itself to be quite exceptional. The 13 international conventions alluded to in the preamble are independently implemented through the extensive range of offences generated by clauses 4-10 of the Bill. Bombing, financing, hijacking, hostage taking, harming foreign representatives and other persons and objects, fixed platforms and ships. All of these crimes fit under the umbrella of terrorism and, terrorism itself includes the crimes of murder, arson malicious damage to property and culpable homicide, both are already crimes under South Africa's laws. The area in which reproduction reaches inane proportions is that of the liability of accomplices in acts of terror. According to Powell²²⁶ it is referred to over four times, -which is unnecessary as the many forms of terror cover both accomplice and principle liability- and create the situation where they become consequences and not circumstance crimes. The other point to note is that the planning, assistance, facilitation and contribution toward or of terrorism are

²²³LaViolette: 2008:565

²²⁴Ibid: 565-566

²²⁵Ibid: 566

²²⁶Ibid

already part of the crime of 'terror' itself²²⁷. Clause 3 already makes the 'enhancing of another to engage in terrorist activity, offering or providing a skill and the provision of weapons and other logistical support' a crime. It also creates liability for one assisting whether he knows or reasonably should have known or suspected the existence of the offence, thereby creating liability for situations where assistance is negligently given. Still on the subject a further criminal liability is created by clause 14 for those conspiring with and causing another form of accomplice liability to commit the crime and failure to report a suspected terrorist or act of terror is also an offence according to clause 12. Lastly the convention crimes of financing and harbouring create more forms of accomplice liability in clause 4 and 11, these are also common law crimes. The fearful thing is that accomplice liability is created whether the terrorist act occurs or not²²⁸.

The maximum sentences and fines for terror related crimes are exorbitant. Clause 2 allows for life imprisonment for terrorism and the crimes catalogued by the conventions. Terrorism carries the highest fines of all at R100 million²²⁹. POCA has raised the sentencing limits of district courts to R250 000 and five years and regional courts R100 million and 18 years. Usually the district courts have a fine limit of R60 000 and a sentence limit of three years and regional courts have a fine limit of R300 000 and a sentence limit of 15 years²³⁰. This hike in usual sentencing and fines is contentious and its aims uncertain. Clause 19 makes forfeiture of property compulsory upon conviction, however the standards of proof remain vague. Third parties have a three-year usual prescription period in which to claim restitution or compensation according to clause 20. However a reverse onus of proof exists in order to show that they acquired the property in a *bona fide* method²³¹. In addition the reverse onus requires the accused to prove that surrounding circumstances 'were not such as to arouse a 'reasonable' suspicion of terrorist use of property, or that the prevention of such use was impossible^{232 233}.

²²⁷Clause 1(1) (iv)

²²⁸Clause 2,3,4,11,12 (2), 14 and 17

²²⁹Clause 18 of the Bill

²³⁰Section 92 of the Magistrates Courts Act 32 of 1944 and Government Gazette 19435, GN R1410 of 30 October 1998

²³¹Clause 17(6)

²³²Clause 20(1)

²³³LaViolette: 2008: 566-568

Attempts to be more respectful of human rights by both the Bill and POCA are questionable and its constitutionality is doubtful. Courts may choose to be sympathetic to POCA, but it remains to be seen and if South African courts choose to follow international trend, and see terrorism as the greatest threat facing the international community then the Bill will be saved from constitutional review. Courts will most probably choose to interpret the Bill restrictively. The duty to report terrorist activity in clause 12 of the Bill may be protected by the reading in of 'use indemnity' whereby the information provided may not be used against the person who reported it. A court could also choose to read into clause 23 the right to challenge the Security Council's view that a specific organisation is a terrorist entity. The problem being if the Security Council's decision is valid under international law then South Africa's constitutional rights, would be forcing the country to act in violation of international law.

The broadness of the definition could be countered by a restrictive reading of the text. However without creative interpretation, the phrasing of these clauses could easily be wide enough to infringe the principle requiring that laws be certain²³⁴. The wide usage of negligence as the required form of fault causes complications and is yet to be tried before the courts. The South African Constitution goes against the deprivation of freedom arbitrarily and without a just cause. A sentence based on negligence could thus be in violation of section 12 of the Constitution because the reason for the states deprivation of liberties – negligence- is insubstantial. The Bill adopts the Security Councils list of terror organisations²³⁵ for the aim of asset forfeiture could be said to be an unconstitutional delegation of legislative power²³⁶. The Constitutional Court has previously struck down the delegation of plenary legislative powers by the legislature to the executive²³⁷. Therefore the transference of such authority to an international body, which has not been instructed by the citizens of South Africa, is even less justifiable.²³⁸

²³⁴ *ius certum* principle

²³⁵ Clause 23

²³⁶ The Constitution bestows legislative power in Section 44

²³⁷ *Executive Council of Western Cape Legislature v President of the Republic of South Africa* 1995 (10) BCLR 1289 (CC); 1995 (4) SA 887 (CC)

²³⁸ *LaViolette*: 2008: 568-570

Many opponents have debated, that the Bill does not really protect South Africans but rather is a mechanism to ensure that the position of the 'imperialist hegemony' is entrenched. The laws are being imposed on weak states and South Africa should not let itself get caught in the power game of the first world. Although it is essential that governments respond to the international calls to fight terror, they do not have to do it in line with the more forceful methods chosen by other states. According to Kimani, more resources can be allocated towards the investigation and prosecution of the crimes embodied in the Bill. Already over 22 pieces of legislation exist related to the crimes the Bill wishes to prosecute.²³⁹

The rights which are most often trampled in the race to fight terrorism are: the right to a fair trial²⁴⁰ -which includes many subsidiary rights like the right to be presumed innocent, the right to equal treatment, the right to freedom and security of the person²⁴¹ and the right to a fair trial before an unbiased tribunal-, the right to both freedom of expression²⁴² and freedom of assembly²⁴³ or association²⁴⁴ in terms of common beliefs or aims are long standing human rights, which arrived along with the rights to vote and practice religion freely and the right to privacy²⁴⁵. These create a forum in which tolerance and diversity are protected. These rights are often threatened when countries with weak democratic systems restrict them in the hope of retaining majority support. With terrorism there is an easy cover for forbidding any legitimate political opposition. The right to freedom of expression can be withheld by claiming that the expression is party to the 'promotion, incitement or sponsoring of terror' the wide formation of the definitions of terror and surrounding issues ensure a justification of such limitations.

Lastly and most controversial is the relationship between the right to life and extradition, considering South Africa's stance, that the death penalty is unconstitutional. Allowing suspected terrorists to be extradited to countries, which do

²³⁹Kimani: 2003

²⁴⁰Constitution of the Republic of South Africa Act 108 of 1996 , The Bill of Rights, Chapter 2, Section 34

²⁴¹Bill of Rights, Section 12

²⁴²Bill of Rights, Section 16

²⁴³Bill of Rights, Section 17

²⁴⁴Bill of Rights, Section 18

²⁴⁵Bill of Rights, Section 14

retain the death penalty, is in direct abuse of the right to life²⁴⁶.

This issue is highlighted in *Mohamed*²⁴⁷, where a Tanzanian national who was accused of being involved in the bombings of the US Embassy in Dar es Salaam, made his way to Cape Town and applied for refugee status under a false identity. Meanwhile his actions had been discovered and he had been indicted in his absence before a Federal District Court in New York. He was recognised in a photograph, he had filed with the Department of Home Affairs in Cape Town and was arrested when he came to check up on his application. Upon interrogation he admitted involvement and was subsequently taken to the US without any proper extradition procedure or guarantees that he would not be given the death penalty. He challenged the legality of his treatment i.e. the unlawful extradition/disguised deportation and the Constitutional Court agreed that South Africa had violated his constitutional right to life by allowing such deportation without any undertaking that he would be protected from the death penalty – which has been outlawed in South Africa²⁴⁸ -

In a comment on the case Katz stated that:

“One of the many lessons learnt from the Mohamed saga is that the important and justifiable desire of states to co-operate in the area of terrorism must not allow them to act unlawfully. If extradition procedures are undesirable, then consideration must be given to amending those procedures. It is unlawful to utilise deportation procedures to effect an extradition. Similarly, states must ensure that they do not violate the inalienable rights of persons even indirectly, in their desire to bring alleged terrorists to justice, as would appear to have happened in the Mohamed saga²⁴⁹.”

Situated in the greater web of the global responses to terror South Africa's current outlook on terror does not conform to the aggressive approach taken by The UK and

²⁴⁶Bill of Rights, Section 11

²⁴⁷*Mohamed v President of the Republic of South Africa* 2001 (7) Butterworths Constitutional Law Reports 685 (CC)

²⁴⁸*S v Makwanyane* 1995 (3) SA 391 (CC)

²⁴⁹A Katz, *Terrorism and its effect on refugee and extradition law*, in J Cilliers & K Sturman (editors) *Africa and Terrorism*, ISS Monograph Series, 74 (2002) p 59

US which threaten individual freedoms. The ratification of various conventions by South Africa requires that mutual assistance and international cooperation be given. Some of the Bill's implications of this co-operation are that any country in the OAU will not give any support to any person or organisation seeking to pursue the legitimate liberation of the people of their country or allow any political asylum or exiles of the same. The ratification of the Arab Anti-Terrorist Agreement requires the narrowing of preventative rules and exchange of information between Arab countries. The Council of Europe obliges member states to block refugee and exile status into Europe.

It is important to realise that the objections which have been raised do not by any means condone terrorism, although when examining the Bill it becomes obvious that more research and a narrowing down of terms and re-examination of legislation is necessary and until then the existing laws can be implemented more broadly to protect the state from threats of terror. Further the Bill has allowed the police much latitude in terms of search, seizure and arrests, such power is easy to abuse.

According to Kasrils²⁵⁰, great care must be taken to protect the rule of law and international conventions. He insists that if human rights are sacrificed we will lose everything including the 'moral high ground'. In South Africa the rule of law and principles of human rights are the bases to our freedoms, that many have fought so hard to ensure, and the manipulation or disregard of these laws and human rights principles will end in defeat. He is adamant that terrorism can only be fought with democratic values.

"We must realise that we will not end terrorism through police work, better intelligence and improved co-operation, important as they are. We will end terrorism by tackling its warped notion that its object is achievable by abhorrent means. We must address the social and political inequalities that make some people misguidedly believe that terrorism can address their frustrations²⁵¹."

²⁵⁰Kasrils: 2007

²⁵¹Ibid

Although South Africa has not followed the international trend entirely, the conventions it is a party to ensure that to an extent it is forced to comply with international trends in the form of mutual assistance and co-operation against terrorism. Human rights groups as well as South Africa's history guarantee, that attention is paid to the protection of individual freedoms and that anti-terrorism laws are not totally blind to human rights practices. However this is not enough when consideration is given to what can occur at the behest of the current anti-terrorism laws.

CHAPTER 6

CONCLUSION

Globally anti-terror laws have been met with apprehension, pessimism, and protests. Activists and the worldwide civil rights movement, as well as civil society in general, are fearful of the deleterious consequences of these laws, with the fresh memories of the photographs which leaked from Abu Ghraib, the many horror stories of detention without trial, and the violation of many people's rights to fair treatment and trial based on their nationality, ethnicity or religious affiliations – all of which are illegal grounds for discrimination. Indeed, the suffering of the innocent due to the poorly drafted and thought-out anti-terror laws has become a frightening reality.²⁵²

The political willingness regarding the implementation and enforcement of the human rights obligations of states has clearly diminished in a world engulfed by the 'war on terror' paradigm. In particular, there are three relevant areas that present particular problems and merit reassessment. To begin with, there has clearly emerged an influential perspective that posits it is important that a state's responsibility to prevent terror goes beyond, and should be given primacy over, its human rights obligations, and therefore human rights protections should be subordinated to state security. Then there is the notion that quite often, the application of a doctrinaire human rights framework can, paradoxically, create a certain level of uncertainty. For instance, one question that seems to repeatedly emerge is whether human rights laws apply in armed conflict outside a state's own territory. Lastly, there is a great degree of confusion over the interpretation of human rights laws, as well as the extent to which they should apply, so despite the fact that human rights obligations must be respected, protected and fulfilled can there be a more restrictive interpretation in the fight on terror? The obvious problem is that a narrowing and restricted interpretation of these obligations is often inimical to the protection of human rights.²⁵³

²⁵²Hobschle: 2005: 1

²⁵³Laquotte: 2007: 149

The question of individual freedoms versus security, however problematic such a binary construction is in the first place, is correctly formulated by Luban when he asks:

“How much of your own protection against bureaucratic errors or malice by the government - errors or malice that could land you in jail – are you willing to sacrifice in return for minute increments in security? This, it seems to me, is not an easy question to answer, but the most plausible answer is, as he states: ‘not much’; and ‘none’ seems like a reasonable place to start²⁵⁴.”

For Goldstone²⁵⁵, hence, there is a tremendous burden placed on those who care for human rights and the human dignity of all peoples. He recommends vigilance towards what new and problematic legal formulations for ‘national security’ are being proposed, precisely because of their effects on human rights. Civil society and the human rights community can indeed play a role in assisting those in power to more sensibly manage the balance between individual liberties and national security. Their task would be to ensure that the state does not use repressive methods in order to pacify and intimidate the public.

In addition, Goldstone also identifies some compelling reasons for optimism in these trying times. For him, these reasons emanate from the global reaction to the injustices of state abuses, including the reliance on heavy violence and terror, as well as the militaristic and aggressive direction the foreign policies of various powerful states has taken. He discerns the effects of such pressure from global civil society in the fact that the international community is taking a stand and requesting answers. Goldstone also finds hope in the ‘Wall judgement’, which ordered the Wall, or the so-called Israeli ‘security fence’; to be demolished due to its blatant illegality for being constructed on occupied Palestinian land, and consequently its dire effects on Palestinian lives and livelihoods. The collapse of South African Apartheid represented a watershed moment for the victory of human rights and human freedom in Goldstone’s view, and that legacy deserves to be honored by the continued vigilance of the human rights community.

²⁵⁴Wilson: 2005: 256

²⁵⁵Ibid, 167-168

But more contemporaneously and pronouncedly, the unabashed and widespread criticism of American foreign policy is a new development (at least in its intensity) of enormous import. He says that:

“The United States has traditionally been perceived as the leader of the ‘free and democratic world’. That perception has been tarnished in the days since 9/11. This country has sought to lead by dint of its power alone. My fervent hope and wish is that it will regain its position of pre-eminence in the democratic world by leading by its traditional values and not by power alone²⁵⁶.”

Obama’s recent unwillingness to speak out against state terror or the recent massacre in Gaza does not bode well for a promising change in anti-terror policies of which the USA is the forerunner. Skirting the central political and human rights issues – such as US occupations of Iraq and Afghanistan, support for the Israeli occupation of Palestinian lands and for dictatorial, police-state Arab regimes – by calling for ‘friendship’ with the Muslim community, and creating groups of specialists to be more attuned with the cultural sensitivities of Muslim nations, seems to completely miss the point and is designed for further failure, and to perpetuate mutual mistrust between the US and the Muslim world. Again, in reference to the Dec-Jan 2009 Israeli assault on Gaza, Roger Cohen writes:

“It seems that among liberal democracies, it is only in the US congress that a defence against terror that results in the slaying of hundreds of Palestinian children is not a cause for agonised soul-searching. In my view, such Israeli ‘defence’ has crossed the line²⁵⁷.”

International law asks a lot from States when countering terrorism. States have to fight terrorism and protect the human rights of the public and respect the human rights of suspected terrorists. . Globally the relevant players have tried to structure human rights in a package that attracts the interests of states, however the fact that a

²⁵⁶Ibid: 168

²⁵⁷Roger Cohen, *Dream Team? Not Quite*, The Times, Wednesday January 14, (2009), 19

community's rights to security and individual freedoms can often be in conflict cannot be denied.

Terrorism often results in the violation of human rights, and it will continue to do so until the global response is stronger. According to Goredema, in the short-term, the legal measures, with which the international community chooses to respond to terror, should protect human rights forcefully because all the other relevant conditions required for long-term stability will be unable to exist in an arena where good human rights practices are not nurtured.²⁵⁸

This thesis has attempted to demonstrate the relationship between terrorism, anti-terrorism and human rights. It has also tried to highlight the aggressive manner in which states have chosen to fight terrorism for the most part and how the vague and broad definition of terrorism and its related activities and issues have given much latitude for states to develop an indifferent attitude towards the protection of human rights.

International conventions are many and all encompassing, however much of their existence is to appease the collective conscious of the first world's crusade on terror and amounts to naught in practise. The balancing of individual freedoms versus national security, often forces human rights to walk the tightrope as the sovereignty of states always has the final say. South Africa has shown once again its ability to stand its own ground and make its own policies, which aim to be a memorial to past struggles, however international cooperation and the various international instruments make individuality a difficult reality when the more powerful states have already dictated their line.

The basic tenet in the fight against terrorism should always be justice, fighting injustice with further oppression and injustice would only perpetuate the cycle.

²⁵⁸Goredema 2005: 14

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SUMMARY

Terrorism has become one of the most used (and arguably, abused) terms this decade. Not only has the world been shaken by this phenomenon in the form of various high profile, high publicity attacks; it has also been forced to take action. Unfortunately, these actions have often had and continue to have devastating and dangerous effects not only on the direction of world politics, but also on both the victims of state violence as well as the general health of civil society itself. The effects of terrorism, or rather the discourse around it, can be seen most vividly in the 'descending spiral'¹ of the protection of human rights.

This thesis evaluates the related human rights issues, as well as the relevant legislation, and both the national and international attitudes to terror and counter-terror. The following aspects will be considered:

- a. Terrorism as a concept
- b. The relationship between terror, anti-terror and human rights
- c. The balancing of individual human rights against national security
- d. The approaches of various countries to fighting terrorism

The aim of this thesis is to track the arguments and concepts related to terrorism and their impact on human rights. It also assesses how national security has been prioritized over the protection of human rights when fighting terrorism. It begins with the definition of terrorism. The vagueness and the inability of players across the board to give a more definite idea as to what terrorism is, ensures that right from the start, states are given much leeway to deal with terrorism and terrorists for the most part exactly as they please, this undermines the upholding of human rights practices at the outset. This thesis engages with the international as well as national methods of anti-terrorism, as it attempts to highlight the inadequacies of the anti-terrorism policies through the eyes of various authors. Even though South Africa's anti-terrorism regime is said to be among the most lenient of these regimes, it ensures that the state has ultimate power to deal with terrorism as it chooses. This thesis hopes to cover all the aforementioned issues and offer some counter arguments to the current practices, where human rights have been given a back seat in favour of national security.

¹ Wilson: 2005: 225-241, * the name of the article by Richard Falk