

## PROTECTION OF THE RIGHTS OF VICTIMS IN THE WAR AGAINST TERRORISM: A LEGAL ANALYSIS\*

### Abstract

*International Human Rights Law provides adequate safeguard and protection against Human Rights violation even in times of Public Emergency which threatens the life of a nation such as when a state faces the threat of continuous terrorist attack. On the other hand, the problem of terrorism which has gained notoriety since after the 9/11 attacks in America has impacted heavily on international law, particularly international Human Rights Law. This research thus addresses a few of these legal problems such as those relating to non-derogable rights, the Ticking Bomb Theory and the principle of state responsibility. Terrorism has been a threat to both the people and government of Nigeria. The loss of human and material resources is so monumental and a huge set back to the country. The primary aim of this paper is to appraise human rights protection during anti-terrorism operations in Nigeria. The objective of this paper is to evaluate the measures put in place for the protection of human rights in the fight against terrorism. The doctrinal research methodology was adopted in this research as both the primary and secondary sources of laws were relied upon. The major findings of this research includes terrorism prevention Act 2011 and Terrorism Prevention (Amendment) Act 2013, s 27 of the Act states that a suspect may be detained for 90 days subject to renewal, while s 28 deals with access to detain person pending the conclusion of investigation while s 29 relates to the privacy of the citizens. These provisions run counter to the spirit of the constitution of federal republic of Nigeria 1999 (as amended). It is in the light of the forgoing that this recommendation is made amendment of the above mentioned provisions to conform with constitution as it relates to Fundamental Human Rights.*

**Keywords:** Terrorism, Insurgency, Internally displaced persons, armed conflicts

### 1. INTRODUCTION

International Human Rights Law provides adequate safeguards and protection against Human Rights violations even in times of public emergency that threatens the life of a nation such as when a state faces the threat of continuous terrorist attacks.<sup>1</sup> Despite the flexibility built into the International Human Rights Law and the permissible measures which allow states to limit and derogate from certain rights in times of public emergency, some states, notably the united states, have continued to operate outside the framework of the International Human Rights Law with impunity and at times with allusion to different moral and legal arguments to justify their position. These include the legal arguments for justifying the current practice of targeted killings and drone Strike resorted to by some states to fight terrorism, and the doctrine of the use of force in international law as it relates to cross border attacks directed toward terrorist elements operating within the territories of another state and their implication on Right to Life, the ticking bomb theory and the justification canvassed by its proponents and whether such reasons qualifies as exceptions to the absolute prohibition of the use of torture under International Law and lastly the policy of transferring terror suspects to countries where they face the risk of torture and abuse. Since the end of the Second World War and the tensions of the Cold War in the late 1990s, the International Political System has not witnessed a problem more serious than Terrorism. The problem of terrorism touches on several key aspects of the International Law notably; Human Rights, The Use of Force under International Law, The absolute prohibition against Torture etcetera. This research particularly focuses on some of these problems, such as those especially relating to non derogable rights, the ticking Bomb Hypothesis and the use of force against non-state actors operating within the territory of another state. The reason for the above is that states can use security as a reason to infringe on the rights of the citizens. The Security Council Resolution affirms that security concern and counter terrorism measures cannot override obligations under international human rights and humanitarian law. The State has dual obligation to combat terrorism and respect human rights of its citizens. Terrorism *per se* is an anathema to human rights. Modern human rights standards are rooted in the following four simple values:<sup>2</sup> freedom from want; freedom from fear; freedom of belief; and freedom of expression. These freedoms form the core principles of the Universal Declaration of Human Rights (UDHR), which sets out the fundamental elements of international human rights accepted by United Nations member states and elaborated in many subsequent human rights treaties. The UDHR is accepted as ‘a common

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\* By H. O. ONYI-OGELLE, PhD, Professor of Law, Faculty of Law, Nnamdi Azikiwe University, Awka; and

\* Ogoma Uzochi IZIMAH, LLB (Hons) (NAU), LL.M (Port Harcourt), BL, MCIArb, PhD candidate, Faculty of Law, Nnamdi Azikiwe University, Awka.

<sup>1</sup> PI Azubuike, ‘An Appraisal of Immigrant Rights Through the Lens of Public International Law’ (2022) *Essays in Honour of Honourable Justice Ejembi Eko, JSC*; 152.

<sup>2</sup> These were most famously articulated by the US President Franklin D. Roosevelt as “The Four Freedoms” in his aim for the post-war world, PI Azubuike, (n 11)

standard of achievement for all peoples and all nations.’<sup>3</sup> Therefore, even in the pursuit of such a society, using acts of terrorism, which are themselves in direct contradiction with those values, is never justified. Internationally recognized human rights standards require governments to take into account and implement certain key universal principles. This imposes a level of discipline and rigor upon government agencies. If they ignore or misapply those human rights standards, they are to be held accountable before an independent and impartial court. As a general principle, the more severe the potential human rights violation, the greater the scrutiny that should be carried out by both decision makers and courts. Human rights standards ought to be uppermost in the minds of those implementing a counter-terrorism policy. Counter-terrorism mechanisms and enforceable human rights standards are intimately linked. Counter-terrorism laws and practice that damage or destroy human rights are self-defeating and unacceptable in a society governed by human rights, the rule of law and democratic values.

Terrorism is a concept of both National and International contestation. The human cost of terrorism has been felt in virtually every corner of the globe. Terrorism clearly has a very real and direct impact on human rights with devastating consequences for the enjoyment of rights to life, liberty, dignity of human persons and personal integrity of the victims. In addition to these individual costs, terrorism can destabilize governments, undermine civil society, jeopardize peace and security and there after social and economic development. All these have real impact on the enjoyment of human rights. Since the aftermath of the September 11, 2001 (hereinafter 9/11) attacks in New York and Washington in 2001, there has been an increase in both the frequency of terrorist attacks around the world and the counter measures employed by states to combat terrorism. But some of these counter measures employed have violated certain norms of international law especially those norms of International Human Rights Law relating to non-derogable rights.<sup>4</sup> Elsewhere within the United Nations structure, there have been additional developments from a human rights perspective. For example, since 1998, the Sub-Commission on the Promotion and Protection of Human Rights has appointed an expert on human rights and counter-terrorism.<sup>5</sup> In 2005, a United Nations Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism was appointed. Since 11<sup>th</sup> September 2001, resolutions have been adopted by the General Assembly and Commission on Human Rights explicitly calling on the relevant UN human rights mechanism ‘to consider, within their mandates, the protection of human rights and fundamental freedoms in the context of measures to combat terrorism and to coordinate their efforts, as appropriate, in order to promote a consistent approach on this subject.’<sup>6</sup> Since the Human Rights Council came into being in June 2006, it has endorsed the approach of the now defunct Commission for Human Rights in these respects.<sup>7</sup>

### 3. The Impact of Terrorism on its Victims

A victim is defined as any individual who has suffered harm as a result of a crime, and as such has varying levels of risk and protection needs.<sup>8</sup> It is also defined as any physical person who has suffered damages caused by a criminal offence, including the immediate family or the people in charge of the direct victim. The relatives of victims who died violently are considered ‘victims in a vulnerable situation’ if they face limitations in avoiding or mitigating the damages derived from criminal offences (primary victimization) or in their contact with the justice system (secondary victimization).<sup>9</sup> The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power is the most relevant international document setting standards for the treatment of victims of crime and abuse of power. In paragraph 1 of the Declaration ‘victims’ is defined as:

<sup>3</sup> Preamble to the Universal Declaration of Human Rights adopted by the United Nations General Assembly, Resolution 217(III) of 10 December 1948.

<sup>4</sup> C Okeanonife, ‘Inter-Agency Intelligence Gathering and Sharing for Effective Crime Control’ (2012) 4 *POLAC Intl Journal of Humanities and Security Studies*, 20.

<sup>5</sup> R Young, ‘Definition of Terrorism: The Evolution of Terrorism as a Legal Concept’ (2016) (9)(4) *Harvard Law Review*; 63

<sup>6</sup> The work of the UN OHCHR in this area includes, among other things: the Report of the High Commissioner for Human Rights to the 58th session of the Commission on Human Rights, “Human Rights: A Uniting Framework”, doc. E/CN.4/2002/18, 27 February 2002; the *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism*, doc. HR/PUB/03/1 (New York and Geneva, 2003).

<sup>7</sup> K Annan, ‘A Global Strategy for Fighting Terrorism’ Keynote Address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, 8 - 11 March 2005, Madrid, available at <<http://summit.clubmadrid.org/keynotes>> accessed 19 February 2022

<sup>8</sup> E A Angela, ‘Trafficking in Women and Children in South Sudan Analysis of the Legal Framework (Unpublished LL.M. Thesis, University of Sudan, Khartoum, 2017) 11. <<http://www.aiamp.net/sistema/UserFiles/File/GUIAS%20Ingles.6%20de%20octubre.%20pdf.pdf>> accessed 29 December 2021.

<sup>9</sup> The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly, 29 November 1985 (A/RES/40/34).

‘persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.’<sup>10</sup> The instrument further provides recommendations to ensure that victims of crime, including terrorism, receive access to justice and fair treatment, restitution, compensation and social assistance.<sup>11</sup>

The normative framework of the International Criminal Court includes a broad definition of ‘victims,’ describing them as ‘natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.’ Victims ‘may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes and to their historic monuments, hospitals and other places and objects for humanitarian purposes.’<sup>12</sup> The torments of the victims of terrorism have not only confined to loss of life and limb but also include the physiological trauma to the innocent victims. The physical wounds may heal, but the trauma remains in the mind and heart of the victims and their loved ones; however, one should not deny that these terrorist activities affect to a major extent to their livelihood. To protect their human rights and restore the shattered lives of the victims of terrorism all the Nations beyond their differences have to show solidarity and frame a comprehensive restorative policy with an effective implementing mechanism. Support for victims of terrorism is complex and requires a flexible approach to adapt to each unique terrorist attack. Terrorism affects individuals, communities and societies. In the aftermath of an attack, identifying who is a victim is complex and requires an understanding of the different ways people can be affected.

#### **Categorization of Victims of Terrorism**

Victims of terrorism crime are categorized based on their level of impact to the acts. The following are the categorization of victims; The inner circle of impact includes the individuals present at the scene and directly affected by the terrorist attack, referred to as ‘direct victims’. The trauma caused to the individual present at the scene can include psychological, physical, and financial distress. Within this first group of victims are included the deceased, the injured and the physically uninjured. The second circle of impact includes the direct victim’s close social environment, such as family, friends, or peers. The next of kin of deceased victims are generally recognized as particularly affected. The third circle embraces the wider society of which the individual victim is a member. Within this larger population, the impact of terrorism may be of a psychological, social or economic nature. In the aftermath of terrorist attacks, a rise in psychological difficulties has been observed in the general population (e.g. people living in the area)<sup>13</sup>.

#### **Consideration for the Protection of Victims of Terrorism**

The protection of victims of acts of terrorism and their families against intimidation and threats is a practical matter faced by law enforcement agencies. The right to receive a suitable level of protection is also essential to avoid further victimization, and to ensure the results of the criminal procedure, in particular as regards their safety and protection of their privacy. Considering that many acts of terrorism are aimed at innocent civilians, the continued threat to victims, the survivors of terrorist acts, may be related to their ability to identify and give testimony against the perpetrators, as well as to contribute in any other manner to the collection of evidence for the purpose of conviction. Similar challenges are faced in trials involving organized criminal groups. Therefore, victims that actively contribute in criminal proceedings ought to be protected and treated with special care, for their contribution to unveiling the truth.

#### **4. Rights of Victims of Terrorism**

The rights of victims of crime have been recognized in a number of soft law instruments and norms at the international level, most notably the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which, while non-binding, recommends the adoption of measures to address matters relating to access to justice and fair treatment, restitution, compensation and assistance for victims of crime, including terrorism. States can aid the swift physical and psychological recovery of victims of terrorism by ensuring there

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<sup>10</sup>United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly, 29 November 1985 (A/RES/40/34).

<sup>11</sup> General Assembly resolution 40/34, annex.

<sup>12</sup> Rule 85, Rules of Procedure and Evidence of the International Criminal Court.

<sup>13</sup> W E Schlenger and Others, ‘Psychological Reactions to Terrorist Attacks – Findings from the National Study of Americans’ Reactions to September 11’ available at <<http://jamanetwork.com/journals/jama/fullarticle/195165>> accessed 10 April 2022.

are robust mechanisms in place to support such recovery. The following are the list of rights of victims of terrorism:<sup>14</sup>

### **Emergency Treatment and Care**

The Global Counterterrorism Forum held in Madrid, the Spanish capital, came up with a Memorandum on Good Practices for Assistance to Victims of Terrorism immediately after the Attack and in Criminal Proceedings recognizes the importance of immediate and adequate care for victims of terrorism in the direct aftermath of an attack: 'Prompt and efficient assistance and support to terrorism victims from the moment of the attack through normalization and beyond can have a positive effect on victims' mental health and ability to cope'.<sup>15</sup>

### **Prompt Medical Attention**

This is an important measure for the benefit of potential future victims. For victims of terrorism, receiving prompt medical attention – payment of the costs of which should be guaranteed by the State – is a vital matter. Delayed medical treatment, particularly because of complicated administrative processes involved in hospital admissions or advance guarantees of payment for treatment, can have fatal consequences.

### **Legal status**

Timely declaration of an act of terrorism and recognition of the victims – ideally through a system of registration – is relevant for immediate access to emergency medical treatment. A register helps to facilitate measures favouring victims' rights to longer-term medical and psychosocial support, and to any potential entitlement to restitution or financial compensation. Early recognition of the legal status of victims can help to reinforce their role as possible key witnesses and stakeholders in terrorism-related cases in the criminal justice and counter-terrorism frameworks.

### **Restitution and compensation Reparations**

Through the criminal justice process in terrorism-related cases are notoriously difficult to obtain. In contexts where compensation is provided only at the close of lengthy criminal proceedings victims often have to wait for years, without guarantee, especially in cases where the perpetrators were killed in their own attacks, are difficult to identify or have become fugitives. Where possible, it is recommended that States should allow compensation to victims independently from the results of any criminal or civil proceedings.<sup>16</sup> Reparations in the form of restitution and compensation resulting from criminal justice proceedings in terrorism-related cases are often extremely difficult to obtain and take a very long time. States can consider special ad hoc measures leading to more structural legislative changes, where necessary, to ensure that the rights and needs of victims are met in a timely manner. Financial compensation or other special allowances, such as State-sponsored pensions and disability livelihood insurance, can help to support victims in the long term. Other possible approaches, including one identified by the Special Rapporteur, involve legislative prohibitions on insurance companies whose policies exclude coverage for damage, death, injury or other losses resulting from terrorist acts.<sup>17</sup> Another possible approach, already implemented in France, for example, is the imposition of levies on insurance policies, although this might be less effective in markets with low insurance penetration. States must also protect the security of individuals under its jurisdiction. This includes the rights of victims of terrorism. States can help victims by appropriately condemning the suffering that has resulted by acts of terrorism. Importantly, they must also support the victims and their families, expressing profound unity and cohesion with them, and providing them with practical assistance in the form of appropriate emergency aid.

## **5. Attitude of Nigerian Government to Acts of Terrorism**

There are no binding rules under international law that deal with the issue of how States should handle cases in which more than one State might assert jurisdiction to prosecute a crime involving the same suspect. The overall approach to address terrorism in Nigeria leaves serious cases of human rights violation either from terrorist or law enforcement agencies. The approach of Nigeria has generally been questioned. For example, in quite a lot of instances, the government has been actively involved in negotiating the release of Boko Haram (Nigeria terrorist group) victims especially when schoolgirls were concerned. The Chibok girls release 3 years after their kidnap and the Dapchi girls return 5 weeks after they were abducted from school involved negotiations and exchange of arrested Boko Haram members in place of the girls. Negotiation with a group of terrorists who have threatened the security of the nation is a statement of the government's inability to tackle and defeat the terrorists.

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<sup>14</sup> UNODC, The Criminal Justice Response to Support Victims; L Staiger and H Pemberton, 'Assisting Victims of Terrorism' (2014) (10)(2) *International Committee of the Red Cross Journal*; 326

<sup>15</sup> Global Counter-Terrorism Forum, Madrid Memorandum on Good Practices for Assistance to Victims, p. 1

<sup>16</sup> UNODC, Good Practices in Supporting Victims of Terrorism, para. 194.

<sup>17</sup> 5 A/HRC/20/14

Neumann said that ‘Negotiations give legitimacy to terrorists and their methods...’<sup>18</sup> A democratic government should not be involved in negotiations with a terror group because it undermines its authority and ability to effectively secure the lives and properties of the citizens who voted it in. Another approach the Nigerian government has adopted is granting Amnesty and rehabilitation for the alleged repentant terrorist members. The situation right now is that about 2000 repentant terrorists have been rehabilitated back into the society.<sup>19</sup>

## 6. American Trial System and Punishment of Terrorist Suspect

One Democratic country that has vowed never to negotiate with terrorists no matter how severe the situation, is the United States of America.<sup>20</sup> On November 13, 2001, President Bush signed a Military Order pertaining to the detention, treatment, and trial of certain non-citizens as part of the war against terrorism. The order makes clear that the President views the crisis that began on the morning of September 11 as an attack ‘on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces’<sup>21</sup>. The order finds that the effective conduct of military operations and prevention of military attacks made it necessary to detain certain non-citizens and if necessary, to try them ‘for violations of the laws of war and other applicable laws by military tribunals’.<sup>22</sup> The unprecedented nature of the September attacks and the magnitude of damage and loss of life they caused have led a number of officials and commentators to assert that the acts are not just criminal acts, they are ‘acts of war.’<sup>23</sup> However, it may be argued that an application of the law of war to terrorism does not imply lawfulness of the conflict, nor does it imply that perpetrators are not criminals<sup>24</sup>. Terrorists are not members of armed forces for the purpose of the law of war<sup>25</sup> and do not, by definition, conduct themselves as lawful combatants.<sup>26</sup> A public trial, some argue, could be used to the terrorists' advantage by allowing them to force the government to release sensitive information. A trial of suspected terrorists could also become an ‘international media circus,’ raising possible concerns for the safety of judge and jurors.<sup>27</sup> Such a trial could be lengthy and subject to multiple appeals, during which a conviction could be overturned on a technicality. President Bush's order authorizing the use of military commissions for the trial of terrorists cites the President's authority under the Constitution as well as the laws of the United States, including the congressional authorization to use military force in response to the September 11 attacks,<sup>28</sup> as well as 10 U.S.C. §§ 821 and 836. There is no express language in the Constitution and very little mention in the legislative authorities cited that clearly authorizes military tribunals; however, there is historical precedent that may form a basis for an interpretation of the authorities to support the order.

Generally, the power of the President to convene military commissions flows from his authority as Commander in Chief of the Armed Forces and his responsibility to execute the laws of the nation.<sup>29</sup> Under the Articles of

<sup>18</sup> P R Neumann, 'Negotiating with Terrorists' available at <www.foreignaffairs.com/articles/2007-0101/negotiating-terrorists?amp> accessed 27 December 2021

<sup>19</sup> F Soyombo, 'Before we Grant Amnesty to Boko Haram' *The Cable Newspaper*, 24 December 2021 <www.thecable.ng/before-we-grant-amnesty-to-boko-haram/amp> accessed 27 December 2021

<sup>20</sup> H Toros, 'We Don't Negotiate with Terrorists!: Legitimacy and Complexity in Terrorist Conflicts and Security Dialogue' (2008) (39)(4) *Security Dialogue*; 407

<sup>21</sup> Military Order, November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, §1(e), 66 Fed. Reg. 57,833 (Nov. 16, 2001)

<sup>22</sup> *Ibid*

<sup>23</sup> P A Lacovara, 'Criminal or Military Justice for Captured Terrorists?' (2001) 10 *New Jersey Law Review*; 7.

<sup>24</sup> Lt. Col. Richard J. Erickson, Legitimate use of Military Force Against State-Sponsored International Terrorism 63-65 (1989).

<sup>25</sup> *ibid*; M P Scharf, 'Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?' (2001) 7 *ILSA J. Int'l & Comp. L.*; 391 (arguing that treating terrorists according to the law of war would enable them to target government facilities, invoke the defense of obedience to orders, and claim prisoner-of-war status.)

<sup>26</sup> The Handbook of Humanitarian Law in Armed Conflicts 70 (Dieter Fleck, ed. 1995)(hereinafter "Handbook")(noting that for groups to qualify as "armed forces," they must have a responsible command and an internal disciplinary system to ensure members' compliance with the law of war).

<sup>27</sup> S J. Crona and N A Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism* (1996) 21 *Okl. City U.L. Rev.*; 349.

<sup>28</sup> L Jacobson and G Fenoglio, 'How Would They Be Tried?' (2001) 33 *Nat'l J.*; 3350

<sup>29</sup> C Okeanonife 'Inter-Agency Intelligence Gathering and Sharing for Effective Crime Control' (2012) 20, available at <www.everycrsreport.com> accessed 5 January 2022

<sup>29</sup> U.S. Const. Art. II.

War and subsequent statute,<sup>30</sup> the President has at least implicit authority to convene military commissions to try offenses against the law of war.<sup>31</sup> Articles 18 and 21 of the Uniform Code Military Justice recognize the concurrent jurisdiction of military commissions to deal with ‘offenders or offenses designated by statute or the law of war.’<sup>32</sup> Statutory offenses for which a military commission may be convened include only aiding the enemy, 10 United States Codes § 904, and spying, 10 U.S.C. § 906. Case law suggests that military commissions could try as enemy belligerents those accused of committing war crimes even if they hold U.S. citizenship.<sup>33</sup> Recognized hostilities with foreign enemies may qualify to invoke the law of war even where no declared state of war exists.<sup>34</sup> Congress has thus recognized the authority to convene military commissions,<sup>35</sup> and has delegated to the President the authority to set their rules of procedure, both trial and post-trial.<sup>36</sup> Congress has not, however, provided a definition of the offenses under the law of war over which a military commission might exercise its jurisdiction, nor has it explicitly identified many statutory offenses for which the accused might be tried by military commission. Jurisdiction; while the 1942 proclamation defined the acts subject to prosecution by military tribunal, the new order defines a class of non-citizens whose members are subject to military trial upon the President’s determination. The President must first determine that the person is or ever has been associated with terrorist acts or organizations, and that it is in the interest of national security to subject that person to the order. The President has complete discretion once those determinations are made. Alien terrorists and violators of the law of war might not be subject to the order; citizen terrorists and war criminals are never subject to the order.<sup>37</sup>

### 7. Challenges of Human Rights in the Fight against Terrorism

International human rights law puts obligations on States to respect, protect and fulfil human rights in good faith in the governance of their borders. Human rights must be at the centre of all border governance policies and practices at international borders, including screening for counter-terrorism purposes. Human rights obligations apply wherever a State is exercising jurisdiction or effective control. That includes extra-territorial border security and management by government agencies or border security measures undertaken by private-sector agents employed by the State. States need to ensure that measures such as screening that are aimed at combating irregular migration, organized crime or terrorism at international borders do not adversely affect the enjoyment of the human rights and dignity of people at the border, whatever their status. The objectives of combating terrorism or violent extremism do not override a State’s international human rights obligations, nor do international obligations regarding countering terrorism at borders automatically apply to other categories of state action or security concerns. There is no gainsaying the fact that terrorism ostensibly presents a serious, and real impact on human rights, with damaging and catastrophic consequences which affects negatively the enjoyment of the right to life, liberty and other important human rights. As stated by the United Nations High Commissioner for Human Rights that respect for human rights and the rule of law must be the bedrock of the global fight against terrorism.<sup>38</sup> States therefore have an obligation to respect, protect and fulfil the provisions and enforcement of human rights. The United Nations General Assembly has reaffirmed that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights laws. It further reaffirmed the obligation of States to respect certain rights as non-derogable in any circumstances and recalled that any measures derogating from the provisions of the International Covenant on Civil and Political Rights must be in accordance with the prescribed limitative

<sup>30</sup> The Articles of War were codified at 10 U.S.C. § 80 as part of the Uniform Code of Military Justice (UCMJ). Although the cases cited in this report interpreted the Articles of War, the relevant sections of the UCMJ would likely be interpreted to be essentially identical; R O Everett and S L Silliman, ‘*Forums for Punishing Offenses Against the Law of Nations*’ (1994) 29 *Wake Forest L. Rev.*; 509.

<sup>31</sup> *Ex Parte Quirin*, 317 U.S. 1 (1942).

<sup>32</sup> 10 U.S.C. § 821

<sup>33</sup> *Johnson v. Eisentrager* (1950) 339 U.S. 763, 786; cf *Madsen v. Kinsella* (1952) 343 U.S. 341 (upholding jurisdiction of military commission to try civilians in occupied foreign territory).

<sup>34</sup> *Johnson v. Eisentrager* (n 71) citing *Duncan v. Kahanamoku* (1945) 327 U.S. 304; D M Filler, ‘*Values We can Afford -- Protecting Constitutional Rights in an Age of Terrorism: An Answer to Crona and Richardson*’ (1999) 21 *Okla. City U.L. Rev.*; 360.

<sup>35</sup> 10 U.S.C. § 821.

<sup>36</sup> 10 U.S.C. § 836.

<sup>37</sup> The M.O. appears to leave open the possibility that violators of the law of war who do not fall into the category of persons defined in section 2 may be nevertheless be prosecuted by military commission. M.O. at section 7(3).

<sup>38</sup> Office of the United Nations High Commissioner for Human Rights ‘Human Rights, Terrorism and Counter-terrorism’, Fact Sheet No.32, (United Nations Global Counter-Terrorism Strategy/ General Assembly Resolution 60/288, annex P.2

conditions, and underlined the exceptional and temporary nature of any such derogations.<sup>39</sup> States have a duty to respect, protect and fulfil internationally recognized rights and freedoms. Respect for human rights primarily involves not interfering with their enjoyment. Protection is focused on taking positive steps to ensure that others do not interfere with the enjoyment of rights. The fulfillment of human rights requires States to adopt and implement appropriate measures, including legislative, judicial, administrative or educative measures, in order to fulfil their legal obligations. A State party has the obligation to respect and to ensure the rights recognized in the Covenant for all individuals within its territory and subject to its jurisdiction<sup>40</sup>. The enjoyment of the rights enshrined in the Covenant is not limited to the citizens of a State party but for anybody who may find themselves in the territory or subject to the jurisdiction of the State party. Considering the number of Laws,<sup>41</sup> seeking to protect the rights of every human, it is safe to say that human rights is of utmost importance to government authorities all over the world to note that derogation from all these rights are frowned at. The actions of states in seeking to combat both actual and perceived terrorist threats since 9/11 have presented the international human rights system with its strongest challenge since the 1930s. These include challenges to:

*The right to life*

Through the practice of 'shoot to kill' legislation, extra judicial killings and arbitrary executions have multiplied. This is especially pertinent when considering that human rights legislation already permits states to use deadly force when applying it strictly to protect human life.

*The absolute prohibition against torture, cruel and inhuman treatment*

The use of discriminatory and stigmatizing measures affects the rights of entire communities, and may lead to further marginalisation and possibly radicalisation within those communities. Many of the conditions conducive to the spread of terrorism result from discrimination and disenfranchisement and the appropriate use of counter-terrorist measures should never result in such conditions. Transparency and judicial oversight of state counter-terrorist measures must be promoted to ensure state compliance with international human rights.

*The transfer of persons suspected of terrorist activity between or within states, also infamously known as extraordinary rendition, or irregular rendition*

*The liberty and security of the person*

Any deprivation of liberty should be based on the grounds and procedures established by law, with detainees being promptly informed of the reasons for their detention and notified of the charges against them. Since 9/11 several states have extradited, expelled, deported or otherwise transferred foreign nationals, some of them refugees and asylum seekers, suspected of terrorism to their country of origin or to other countries, where they allegedly face torture or ill treatment in violation of the core principals of the ICCPR. This is despite it being well-established in international law that such practices are prohibited to protect the victim specifically from being subject to torture, arbitrary treatment and cases of deprivation of life. Some states, including the UK, have made use of diplomatic assurances and other forms of agreements to justify such rendition to countries where the accused faces the real threat of torture or some other serious human rights abuse. However, the UN High Commissioner for Human Rights has emphasized that such measures do not work and do not provide adequate protection. In any case, states are already bound by the provisions in international and regional treaties so these additional bilateral steps should not be necessary.

*Ratification and implementation of existing agreements*

Despite the absence of a universally accepted definition of terrorism, domestic and international law provisions provide an extensive legal basis for the prosecution of crimes of a terrorist nature. The UN framework for protecting human rights and the direct application of regional mechanisms supported by enhanced international cooperation between states in criminal matters can be extremely effective in countering terrorist threats. Indeed regional cooperation can play an essential role in punishing and/or preventing terrorist acts.

*Profiling and the principle of non-discrimination*

*Due process and the right to a fair trial*

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<sup>39</sup> Resolution 62/159 of 18 December 2007 available at <<https://www.un.org/unispal/document/auto-insert-181583/>> accessed 12 January 2022

<sup>40</sup> Article 2 of the International Covenant on Civil and Political Rights

<sup>41</sup> The Universal Declaration of Human Rights (Articles 18, 19, 20 and 23.4), International Covenant on Economic, Social and Cultural Rights (Article 8), International Covenant on Civil and Political Rights (Articles 18, 19, 21 and 22), African Charter on Human and Peoples' Rights (Articles 8, 9, 10 and 11)

*The principle of legality and the definition of 'terrorism'*

The process of defining a terrorist act is in of itself a challenge. For example, the Australian Government definition refers to 'an organization that is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)'.

**8. Conclusion and Recommendations**

This paper has attempted to bring to the foreground certain recurrent arguments about violation of non derogable rights. Prior to 9/11, the drone program was a relatively unknown phenomenon. Internationally, terrorism was largely fought at the political level by diplomatically and economically sanctioning states suspected of sponsoring terrorism; also cross border attacks against rebel groups were rare and utterly unjustifiable. The same can also be said as regard the absolute prohibition of torture. The 9/11 attacks militarized the international global response to terrorism and provided a general pretext under which countries like the United States has hidden to pursue an ever expanding agenda of impunity and global dominance. This paper has thus shown that the realities of the 9/11 attacks as commonly believed did not create a new set of international law as regards the responsibility of states to observe and respect fundamental human rights. Governments may resort to a wide range of constructions to justify unilateral exceptions to human rights under international law in the name of countering terrorism. None of the constructions discussed affects a State's obligations under peremptory norms of international law (*jus cogens*). Outside the realm of peremptory norms, some of the constructions discussed have an impact upon both treaty law and customary law, hence affecting the substantive human rights obligations of a State. This would be the case for the following three constructions: (1) the *lex specialis* effect of international humanitarian law during armed conflict and properly construed as an interpretive effect upon the scope or content of a particular human right (2) permissible limitations on human rights, again properly construed, i.e. through a rigorous limitations test, rather than an all-encompassing act of 'balancing' (cf. supra section 3.11) and (3) the proper division of responsibility between individual states and an international organization, with acknowledgement that there also exist situations where the State remains responsible for internationally wrongful acts despite the parallel responsibility of an international organization. Globally, the security crisis set off by September 11 does not appear to have an end in sight. The fight against terrorism is clearly in for 'the long haul'. As long as terrorists continue to have access to funds and weapons, the world shall continue to experience a protracted period in which the enjoyment of civil liberties will continue to shrink. The challenge for most states is whether they have built 'safeguards of liberty that can endure the fears and frenzy of sudden danger - bulwarks to help guarantee that a nation fighting for its survival does not sacrifice those national values that make the fight worthwhile. In the light of the forgoing this paper makes the following recommendations:

1. Terrorism is better prevented than punished. For this reason the best counter-terrorism response is prevention. To do this, states need to focus on ways to eliminate the causes of terrorism. Poverty, hunger, discrimination, unequal distribution of material resources and lack of economic opportunities generate resentment and provide fodder for persons seeking to recruit young people into the terrorist networks. Equality in socio-economic development is a common denominator in addressing root causes of terrorism. Together with equality, states should develop good governance mechanisms. Corruption makes it possible for terrorism to thrive. It fuels and drives channels of accessibility to funds and weapons and the preparation of false documentation without which terrorism cannot survive. A transparent and accountable administration is a critical necessity in fighting corruption. At the international level states need to engage in a socially just management of the effects of economic globalisation. On the social plane, it has been shown that religious discontent breeds fanaticism, which is responsible for a great many incidents of terrorism. Religious tolerance and a respect for minorities therefore will eradicate the resentment associated with terrorism founded on religion
2. Counter terrorism efforts are packaged as 'top secret' programs in which the government plays its entire hand close to its chest. In so doing it excludes a crucial constituency: the public. It should be realized that counter terrorism activities are not the exclusive responsibility of the executive. The public has an interest. For this reason governments should cultivate public trust so as to tap into the information resource that is frequently in the public domain. It would then be easier to prevent terrorism than having to deal with the resultant effects.
3. Prohibition against torture should be collectively denounced by states. State law should explicitly prohibit the use of any confessions of an accused which have been obtained under duress, any evidence obtained by torture or other ill-treatment, or such material gained as a result of other serious human rights violations. This prohibition should apply regardless of whether the prohibited treatment took place at home or abroad, and with or without the involvement of domestic agents. Where allegations of torture or other prohibited treatment are made, the competent authorities should take all necessary steps to ascertain the veracity of such allegations and to bring to justice those responsible.