

**THE HUMAN RIGHTS STANDARDS IN COMBATING  
TERRORISM AND MAINTAINING SECURITY: A  
COMPREHENSIVE ANALYSIS OF THE COUNTER-  
TERRORISM MEASURES TAKEN BY THE UNITED  
STATES AND EGYPT AND THEIR COMPLIANCE WITH  
THE INTERNATIONAL HUMAN RIGHTS STANDARDS**

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**ABSTRACT**

*On the first anniversary of the 11<sup>th</sup> September attack, at the World Day of Human Rights, seventeen investigators together with UN human rights experts, issued the following joint statement:*

*You have to assess the policy to find a fair balance between the enjoyment of all human rights and fundamental freedoms on the one hand, and legitimate concerns for national and international security on the other hand. The fight against terrorism must not lead us to violate human rights guaranteed under international law.<sup>1</sup>*

*This article will question the meaning and definition of terrorism, and will examine the counter-terrorism rules introduced by the international human rights institutions and the American and Egyptian counter-terrorism measures. The choice of The USA and Egypt is due to the fact that the American and the Egyptian counter-terrorism measures*

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<sup>1</sup> UNCHR, Abid Hussain, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. On the First Anniversary of the World Day of Human Rights, passed after the September Attacks'. U.N. Doc.E/CN4/2002/75 (U.N.2002) 4, 34.

*considered being amongst the most questionable measures by the international community in the war against terrorism.*

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## 1 INTRODUCTION

Terrorism has a significant impact on the enjoyment of the right to life and liberty by human beings. It destabilises governments, undermines civil society and jeopardises peace and security.<sup>2</sup> It also affects other rights, such as civil, economic and political rights.<sup>3</sup> An act of terrorism is an act that generally targets civilians in the pursuit of political or ideological aims.<sup>4</sup> In legal terms, it could be defined as ‘a criminal act intended or calculated to provoke a state of terror... for political purposes’.<sup>5</sup> Others define it as, ‘the illegitimate political activity of a criminal’.<sup>6</sup>

*However, what is it exactly?*

*Is it a new political form of war, or is it a new form of criminality?*<sup>7</sup>

### 1.1 DEFINING TERRORISM

There are some difficulties when it comes to deciding a clear definition of the term ‘terrorism’. It seems that the definition depends on who defines it, as one State’s terrorist may be another State’s freedom fighter or partisan fighter. In this respect, it appears that the problem revolves around the question whether a person or a group is to be considered terrorists or partisan fighters – ‘resistance fighters’. This is since the boundary between ‘partisan fighters’, and ‘terrorists’ is extremely ill-defined, as terrorists and partisans use the same methods. To the point that; some countries owe their birth or their independence in part to partisan fighters or the use of terrorism.<sup>8</sup> The result is that historical terrorists, who called themselves or were called by others as ‘partisan fighters or freedom fighters’, frequently

<sup>2</sup> UNCHR ‘Annual Report of the Office of the High Commissioner’, (15 September 2015) UN Doc A/HRC/30/64.

<sup>3</sup> *ibid.*

<sup>4</sup> UNGA Res ‘Measures to Eliminate International Terrorism’ (U.N. 1994) 49/60.

<sup>5</sup> *ibid.*

<sup>6</sup> Rik Coolsaet, *Le Mythe Al'qaida* (Mols 2010) 113.

<sup>7</sup> Christopher Daase, *Kleine Kriege - große Wirkung : wie unkonventionelle Kriegsführung die internationale Politik verändert* (Nomos Baden Baden 1999) 365–389; *See also* Teodoro Klitsche de la Grange, ‘*Osservazioni Sul Terrorismo Post-Moderno*’ (Behemoth 2001) 30.

<[http://www.behemoth.it/index.php?pag=news&id=1235499015\\_14](http://www.behemoth.it/index.php?pag=news&id=1235499015_14)> accessed 12 February 2017.

<sup>8</sup> E.g. *Israel and the Palestinian authority.*

ended up in positions of power, thereby transforming them into valuable spokespersons or respectable representatives of their country.<sup>9</sup> Such examples can be found in the history of World War II during which the members of the resistance movements of the countries occupied by the Germans were denounced as ‘terrorists’ by the Germans. After 1945, they effectively presented themselves as resistance fighters and obtained international recognition,<sup>10</sup> as the methods, they had used retrospectively deemed to be justified.<sup>11</sup>

Another example is that of the USA who during the Cold War supported certain terrorist groups in Nicaragua and Angola and the Taliban in Afghanistan. These groups were initially called ‘freedom fighters’ by the Americans but were later called ‘terrorists’ when they started to use the same methods against their former allies.<sup>12</sup> Even today, the same people who are seen as ‘resistance fighters’ by some are very often seen as ‘terrorists’ by others.<sup>13</sup>

More recently, we have witnessed the transformation of the definition of the IRA from that of a terrorist organisation to a politically recognised party, and Gerry Adams the Sinn Fein leader became a respectable political figure.<sup>14</sup> Another example is the transformation of the Colombian FARC organisation which was defined by the former Colombian authorities as a terrorist organisation, but after the successful 2016 peace talks between the Colombian administration and the FARC, the FARC came to be recognised as a political group.<sup>15</sup>

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<sup>9</sup> *E.g. Hassan Nasrallah, the leader of the Lebanese Hizbollah Organization, was considered by Israel and the west during the Israelis’ war on Lebanon as a terrorist, by the Arabs and Iranians as a freedom fighter, and by the Lebanese as a national hero. Later, during the Syrian War, he was listed by the Arabs as a terrorist. He still controls sixty percent of the Lebanese Parliament, and forty percent of the ministerial posts are given to his Organization. Such is the case of Menahem Begin and Itzhak Shamir, who distinguished themselves in the bomb attacks against the English soldiers and Arab civilians before the proclamation of the State of Israel. Another example is Yaser Arafat who was the head of Palestinian liberation Organization P.L.O and was considered by many countries as a terrorist. Later Arafat attained the highest position in his country.*

<sup>10</sup> Alain de Benoist, Carl Schmitt Today, Terrorism “Just War,” and State of Emergency (Arktos Media 2013) 6.

<sup>11</sup> *ibid.*

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

<sup>14</sup> Richard English, *Armed Struggled: the history of the IRA* (Oxford University Press 2003) 285.

<sup>15</sup> Amy La Porte, *Colombian President, accepts Nobel Peace Prize for deal with FARC* (CNN December 10, 2016)1A.

<http://edition.cnn.com/2016/12/10/americas/columbia-santos-nobel-prize/index.html>. accessed 11 December 2016.

Nevertheless, the equation by which terrorists are considered to be criminals, generally supported by violence, has been used in the past to disqualify the members of resistance movements or ‘freedom fighters’ in anti-colonial struggles, from being recognised as political prisoners.<sup>16</sup> This equation made it possible for governments to classify them as criminals,<sup>17</sup> In order to justify their arrests.<sup>18</sup> An example can be found in the case of the assassination of the William McKinley, an American President, in September 1901 by an anarchist. His successor Theodore Roosevelt called the anarchists as, ‘criminals against the human race’.<sup>19</sup> In such cases, a terrorist is generally designated with terms such as ‘criminal’.<sup>20</sup> Francesco Ragazzi explained that a terrorist might be defined as another type of creature, a real *hostis humani generis*. This definition gives governments the motivation to strip such persons of their political, legal rights, and this has been described by some as state terrorism.<sup>21</sup> In this regard, Art Jipson explained that ‘most of the current definitions of terrorism do not exclude this type of state terrorism; this type of terrorism has had more victims than illegal violence at the (sub-State) level’.<sup>22</sup>

## **1.2 THE RETURN TO CARL SCHMITT’S THEORY OF THE PARTISAN**

Soon after the 9/11 attacks, the legality and legitimacy of partisan fighters started to occupy the thoughts of many authors, as they tried to analyse the recent rise in terrorism. Some authors have returned to the works of Carl Schmitt such as the *Theory of the Partisan*, which focus on the figure of a partisan.<sup>23</sup> According to Schmitt, “the partisan fights an eminently political battle, but as they usually fight against the State, their politics are, at the same time, outside the sphere of the State.”<sup>24</sup>

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<sup>16</sup> Art Jipson, ‘The Post-September 11th Era: Interpretations of Security and Civil Liberties in the Political Margins of the Left and Right’ (2003) March, *J of.Int J.I.Stu* <<http://www.cmsu.edu/cjinst> ISSN 1-538-7909> accessed 31 October 2016.

<sup>17</sup> Gérard Chaliand, *Les Stratégies Du Terrorisme* (Desclée de Brouwer 1999) 23.

<sup>18</sup> *ibid*.

<sup>19</sup> de Benoist (n 10).

<sup>20</sup> Pierre Mannoni, *Les Logiques Du Terrorisme* (In Press 2004) 41.

<sup>21</sup> Francesco Ragazzi, ‘*The National Security Strategy of the USA (Ou La Rencontre Improbable De Grotius, Carl Schmitt Et Philip K. Dic)*’ (2016) *Cultures & Conflicts* (En ligne), 56 <<http://conflits.revues.org/1648>; DOI: 10.4000/conflits.1648> accessed 11 February 2017.

<sup>22</sup> Jipson (n 16).

<sup>23</sup> Carl Schmitt, *Theorie Des Partisanen* (GRIN Publishing 2011) 65.

<sup>24</sup> *ibid*; Rory Henry Rowan, *The Crisis of Political Form the Question of Space in the Work of Carl Schmitt* (PhD thesis, University of London 2010) 58.

Schmitt described a classic partisan as “one who might be found in the guerrilla wars at the beginning of the 19<sup>th</sup> century in Prussia and Spain, fighting against Napoleon’s occupation.”<sup>25</sup> The Schmittian partisan fighter has a character distinct from that of the revolutionary fighter. According to Schmitt, “the objectives of the partisan fighter are limited to their own territory, while the revolutionary fighter or the revolutionary activist is a classic partisan who has found themselves drawn into the force field of an irresistible battle.” In this respect, Schmitt considered both the partisan fighter and the revolutionary fighter to be acting illegally. This seems to have been because Schmitt had legitimised their activities according to his own political perspectives.<sup>26</sup>

In this regard, Alain de Benoist suggested that “terrorists consider themselves to be legitimate – a legitimacy which is strongly denied by their adversaries.”<sup>27</sup> He explained that “this problem is exemplified by the case of the classic partisan and is directly related to the terms ‘legality’ and ‘legitimacy’.”<sup>28</sup> He relied on Carl Schmitt’s suggestion that the partisan is “an illegal fighter, and that the partisan can only claim to have a superior legitimacy than the positive law exemplified by the authority he is fighting,” which means that legality and legitimacy cannot be confused.<sup>29</sup>

“Terrorists will try to argue that their actions fall under the sphere of legitimacy. In fact, all terrorists consider themselves to be effectively fighting a war, their actions to be legitimate and the violence of their acts only as the result of another’s ‘legal’ violence, which is justified by the injustice of a situation and is an acceptable reaction to a situation which is unacceptable.”<sup>30</sup>

### 1.3 THE CHARACTERISTICS OF THE TERM TERRORISM

During the drawing-up of the Rome Statute of the International Criminal Court (ICC), several delegations argued that terrorism should be included as a separate crime within the

<sup>25</sup> Ernesto Laclau, ‘On Real and Absolute Enemies’ (2005) Number 5, 12, *Spr.New.Con.Rev* <<https://muse.jhu.edu/article/183251>> accessed 3 November 2016.

<sup>26</sup> *ibid*; de Benoist (n 10) 10.

<sup>27</sup> Alain de Benoist, *Global Terrorism and the State of Permanent Exception* (Routledge 2007) 76.

<sup>28</sup> *ibid*.

<sup>29</sup> *ibid*; See also Carl Schmitt, *Legality and Legitimacy translated by Jeffrey S and John M P* (Duke University Press 2004) 43.

<sup>30</sup> Percy Kemp, *Terroristes ou Anges Avengeurs* Esprit Presse <<http://www.esprit.presse.fr/archive/review/article.php?code=7948>> accessed 28 April 2017. 21,22.

jurisdiction of the court.<sup>31</sup> The majority of States disagreed precisely on the issue of the definition.<sup>32</sup> Later, in 2009, in the Final Act of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court,<sup>33</sup> The representatives decided to review the Rome Statute, with respect to some of the recommendations that remained unresolved.<sup>34</sup> Amongst other things, they reviewed a recommendation to consider several crimes, including terrorism, with the hope of arriving at acceptable definitions to enable their inclusion in the list of crimes within the jurisdiction of the International Criminal Court. One may note that the Rome Statute does not include ‘terrorism’ as a separate crime, but this might have been so to leave the doors open to the judiciary to interpret offences such as terrorist conduct.<sup>35</sup> In this respect, the Rome Statute defines a terrorist act as,

‘one which might constitute a crime against humanity’,<sup>36</sup>

A definition which would include certain acts committed as part of a widespread or systematic attack directed against any civilian population.

It is important to note that when the international communities examined the issue of the legality and legitimacy of terrorism, they expressly clarified several situations by issuing resolutions that were mostly based on or supported by the relevant legal principle of ‘self-determination’. This is evident from resolution 3034 of the General Assembly and the 1994 Declaration on Measures to Eliminate International Terrorism,<sup>37</sup> Which confirmed that the use of terrorism for self-determination is not legitimate.<sup>38</sup> In its Global Counter-Terrorism Strategy, the General Assembly also stated that the

‘Member States of the U.N should resolve to consistently, unequivocally, and strongly, condemn terrorism in all its forms and manifestations, committed by

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<sup>31</sup> UNCHR Report ‘Human Rights, Terrorism and Counter-terrorism’, Fact Sheet No. 32, Geneva (2008). GE.08-41872.

<sup>32</sup> *ibid.*

<sup>33</sup> UNGA. Diplomatic Conference of Plenipotentiaries, ‘on the Establishment of the International Criminal Court’, U.N. 17<sup>th</sup> July (1998).

<sup>34</sup> Christopher Greenwood, ‘International Law and the War Against Terrorism’ (2002) 78 *Int. Aff.*, 301.

<sup>35</sup> *ibid.*

<sup>36</sup> *See*, EC Treaty (Treaty of Rome, as amended) art 7.

<sup>37</sup> UNGA Res 3034 (1972).

<sup>38</sup> *ibid.*

whomever, wherever, and for whatever purpose’, and that all acts of terrorism are unjustifiable, regardless of their motivation.<sup>39</sup>

According to the Security Council, terrorism has the following characteristics: Acts against civilians, with the intent to cause death or serious bodily injury, or the taking of hostages, the purpose of which is to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population, or compel a government or an international organization to do, or to abstain from doing, any act, and constituting offences within the scope of, and as defined in, the international conventions and protocols relating to terrorism.<sup>40</sup>

There are similarities between the Characteristics mentioned above and that in the proposal of the UN General Assembly’s ‘Anti-terrorism Convention’, which defined terrorism as follows:

‘Unlawfully and intentionally’ causing, attempting or threatening to cause;

- a).death or serious bodily injury to any person;
- b).serious damage to public or private properties, including a place of public use, a State or government facility, a public transportation system or an infrastructure facility;
- c).Damage to property, places, facilities, or systems, 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 abstain from doing any act.<sup>41</sup>

The General Assembly’s Anti-Terrorism Convention Draft Proposal was described as controversial, particularly the definition of terrorist offences, as it was not explained whether liberation movements were included in the definition of terrorist organisations.<sup>42</sup> Other criticisms relate to the fact that the definitions were not comprehensive, but this is also true of other international conventions that do not give a precise definition of terrorism either. Even the various UN resolutions relating to the subject have not set out a comprehensive and

<sup>39</sup> See, UNSC Res 1269 (1999), 1566 (2004).

<sup>40</sup> UNSC Adopted Res 1566 (2004).

<sup>41</sup>UN, Doc General Assembly's Anti-Terrorism Convention Proposal Draft Art 2 (UN 2006) <<http://www.un.org/law/terrorism/index.html>> accessed 5 November 2016; See also E/CN.4/2006/98 para 42.(UN 2006)

<sup>42</sup> *ibid*; See also UNCHR (n 31).

clear definition of the term ‘terrorism’ till now.<sup>43</sup> Instead, the terms are more ‘sectoral’, which could lead to their misuse.<sup>44</sup> For example, States may act upon the excuse of a threat that they themselves may define as an act of terrorism, and this may be used to suppress peaceful acts *inter alia* labour rights or to limit political opposition.<sup>45</sup>

#### **1.4 THE OBSTACLES TO COUNTERING TERRORISM**

One may ask why we have failed to defeat Terrorism once and forever.

##### **1.4.1 THE INTEGRATION OF TERRORISM**

The difficulties of countering terrorism are caused by the fact that terrorism is integrated into some groups' political ideologies. Therefore, to confront it, one must acknowledge the need for specific educational, political, social, economic and religious tools and not just legislation, arms and force – a difficult task that governments have not taken seriously. Another factor is that terrorism does not recognise territorial boundaries.<sup>46</sup> Terrorist groups come in the form of loose networks, which makes them difficult to locate and counter.<sup>47</sup> This is since the post-modern era is itself an era of networks,<sup>48</sup> which accentuates de-territorialisation, not only of where terrorists live but also spread all over the world.<sup>49</sup> For instance, the Al-Qaeda and ISIS are not classical types of localised organisations with set hierarchies but are loose collections of tangled networks.<sup>50</sup>

##### **1.4.2 THE SPECTACULARISM OF TERRORISM**

Another factor that could surface when countering terrorism is that terrorism seems to be a spectacular for terrorists, in the sense that its spectacular character cannot be disassociated from its objectives.<sup>51</sup> This has a real impact on the Victim's psychological domain,<sup>52</sup> As the goal of the terrorist is to use terror as a method to accomplish their main target, which could be to force a State or regime to act in a predesignated manner, such as to

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<sup>43</sup> *ibid.*

<sup>44</sup> UNGA, Doc. E/CN 4/2005/103 para 32 (UN 2005); See also UNGA, Doc E/CN 4/2006/98 para 26.(UN 2006)

<sup>45</sup> *Castillo Petruzzi et al. v Peru* (1999) IACtHR, Series C no 52, 182.para 121.

<sup>46</sup> De Benoist (n 10) 8.

<sup>47</sup> *ibid.*

<sup>48</sup> *ibid.*

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*

<sup>51</sup> De Benoist (n 10) 10.

<sup>52</sup> *ibid.*

modify policies in the way the terrorists wish them to be.<sup>53</sup> The spectacularism of terrorism requires highly qualified specialists to analyse the phenomenon and to draw efficient strategies to tackle it, but most governments find it difficult to acquire such experts.

#### 1.4.3 THE COMPLEXITIES OF THE GOALS OF TERRORISM

One could add that the complexities of identifying the goals of terrorists make them difficult to comprehend, as most terrorist groups are sponsored by some country's intelligence services, and this may create two parallel goals of a terror attack – one of the terrorists and the other of the proponent. It would need great analytical effort, in the form of counter-espionage and counter-terrorism intelligence, to clarify these goals. The executive also has a role in enlightening the public about the real aim of terrorists and States sponsoring it. Social science scholars should try to show the executive how to prevent terrorism, for instance, by making changes in the political, diplomatic, social, educational and economic domains. It is a battle that requires brains more than arms – not only to eliminate terror but also to stop the widespread practices known as 'terrorism mirror effect'.

### 1.5 TERRORISM MIRROR EFFECTS

The terrorism mirror effect has become one of the most debated subjects in politics today in the sense that if a State is to fight terrorism, then it could be argued that all means to do so can be justified.<sup>54</sup> This mirror effect is as old as terrorism itself.<sup>55</sup> For example, Napoleon's reaction to the terrorist activities against the French army in 1813 was along the lines of the statement, 'We must act as partisans in any place where there are partisans'.<sup>56</sup>

Under the justification of efficiency, there is a tremendous temptation, for the purpose of counter-terrorism, to condone the use of the same methods as those employed by the terrorists themselves.<sup>57</sup> This will have negative consequences on the human rights of not only those suspected of having committed an offence, but also the population as a whole, resulting in restrictions on the citizens' right to the enjoyment of freedom.<sup>58</sup>

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<sup>53</sup> *ibid* ; *See also* Seymour M Finger and Yonah Alexander, *Terrorism: Interdisciplinary Perspectives* ( John Jay Press 1977) 21.

<sup>54</sup> De Benoist (n 10) 15.

<sup>55</sup> *ibid*.

<sup>56</sup> *ibid*.

<sup>57</sup> *ibid*.

<sup>58</sup> *ibid*.

The mirror effect may also manifest in the form of asymmetrical actions owing to its very nature,<sup>59</sup> as terrorists do not use classical methods of confrontation.<sup>60</sup>

...This asymmetry existed during the era of the classical partisan, and the spread of terrorism and the evolution of counter-terrorism tactics have resulted in the asymmetry becoming generalised at all levels.<sup>61</sup> The asymmetry of the people involved constitutes, on the one hand, the heavy structures of States and, on the other hand, the fluid 'liquid' nature of trans-national groups. The asymmetry of objectives is that though the terrorists know where and how they will attack, their adversaries do not know 'or know imperfectly' where or how to respond.<sup>62</sup>

Asymmetrical action can also be seen when exceptional measures, including those of states of emergency or to counterterrorism, are implemented to confront a threat. Examples of this include the passing of the 2001 Patriot Act in the USA as a reaction to the 9/11 attacks, the introduction of the first Prevention of Terrorism (Temporary Provisions) Act in 1974 in the UK and the introduction of the 1997 Counter-terrorism Act in Egypt. These examples demonstrate how governments react to terrorism by asymmetrical legislative responses.<sup>63</sup>

### **1.6 TERRORISM, LIBERTIES V SECURITY**

Another problem that makes terrorism challenging to counter is the fact that it spreads widely.<sup>64</sup> It has been noted recently that this is not only confined to extremist religious groups but also has spread to political, economic and racist groups.<sup>65</sup> One must also conclude that the political extremism of religious terrorism is not limited to the scholars and followers of Muslim clerics, but also extends to the Christian clergy and Jewish groups and to the priests of many other religions and their followers who practice politics.<sup>66</sup>

Consequently, the fast and widespread of such terrorist ideologies has led not only to the justification of the use of measures which may be considered to be mirror effects but also

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<sup>59</sup> *ibid.*

<sup>60</sup> *ibid.*

<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

<sup>63</sup> The USA Patriot Act (2001); *See also* First British Prevention of Terrorism 'Temporary Provisions' Act (1974).

<sup>64</sup> *e.g. Lord's Resistance Army, National Liberation Front of Tripura, Anti-balaka, Catholic Reaction Force, Protestant Action Force, The Orange Volunteers, The Aryan Nations, The Christian Identity Movement, Zealotry and Sicarii.*

<sup>65</sup> *E.g. Baader Meinhof, the Zionists Groups, Brigade Rosse, and the IRA, See English (n 14); See also Mapping Brigade, <https://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/77>. accessed 15.09.2017.*

<sup>66</sup> *ibid.*

to the frequent use of such measures,<sup>67</sup> With the consequent diminution of civil and political rights.<sup>68</sup> The problems caused by the use of such measures have concerned many legal institutions, especially in the US as can be seen in the case of

*Hamdi v Rumsfeld*, where the US Supreme Court expressed the following opinion:

... War does not justify the suspension of fundamental rights, but it does allow for recalibration of the scope of such rights, to account for greater concerns regarding the polity's security and well-being, and this can be accomplished through the judicial deployment of ordinary balancing approaches and proportionality analysis.<sup>69</sup>

In this respect, Ronald Dworkin opined as follows:

By reserving the most draconian measures for aliens suspected of some connection to terrorism, we are not balancing fairly. We are not deciding upon how to weigh our liberties against our security, but instead, are balancing others' liberties for our security.<sup>70</sup>

In line with the above-mentioned opinions, one could suggest that permitting the use of exceptional measures, by promoting the rhetoric of 'fighting terrorism' as a justification for States to ignore binding responsibilities towards human rights, has created the fear that such exceptional measures may create the above-mentioned mirror effects, which may contribute to the emergence and increase of new terrorism.<sup>71</sup>

The restrictions on the exercise of human rights, including political and legal rights, of the citizens of some Middle Eastern countries, are clear examples of how the 'fighting against terrorism' rhetoric may be used as an excuse to pass exceptional legislation or to

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<sup>67</sup> *Hamdi v Rumsfeld* [2004] 03-6696 542 U.S. 507. 'The US Supreme Court applied plurality opinion using a balancing test to determine the validity of continued detention without charges of war on terror prisoner'; See also *Beit Sourik Village Council v the Government of Israel* (2004) HCJ, 4764/04. 'The Israel Supreme Court used proportionality analysis to determine the legality of the separation barrier designed to protect Israeli civilians from would-be Palestinian suicide bombers'.

<sup>68</sup> *ibid.*

<sup>69</sup> *ibid.*

<sup>70</sup> Ronald Dworkin, 'The Threat to Patriots' (2002) 41 NY Review of Books; See also Patriot Act (2001); See also David Cole, 'Hearing on HR 3162 before the Subcommittee on the Constitution, Federalism and Property Rights of the Senate Judiciary Committee' (statement, 107<sup>th</sup> Cong 2001) 320.

<sup>71</sup> Pierre Hassner, *La Violence Et La Paix* (Éditions du Seuil 2000) 200; See also de Benoist (n 10) 236.

implement a permanent state of emergency in political and legal systems to facilitate the rulers' long occupation of power. In this regard, Pierre Hassner wrote that 'one distinguishes tyrannical governments from others, from the manner they utilise the exceptional situation to make it permanent'.<sup>72</sup>

### 1.7 THE USA'S COUNTER-TERRORISM EMERGENCY POWERS

The USA has a long history of applying emergency powers to counter terrorism. One of the earliest examples was Lincoln's proclamation on 24<sup>th</sup> September 1862, during the Civil War, which authorised the military to apply military justice to civilians.<sup>73</sup> Lincoln had questioned whether a republic must 'of necessity be too strong for the liberties of its own people'.<sup>74</sup> Scholars, such as Kelly Klaus, explained that to justify his proclamation, Lincoln had borrowed the Roman maxim *Silent leges inter arma*, which means that 'the power of law is suspended during the war'.<sup>75</sup> The application of such emergency powers resulted in many consequences in the exercise of citizens' rights. Amongst the rights affected were the right to a fair trial and the writ of habeas corpus. An example is the historical case of *Milligan*, where Milligan, the defendant, was accused and convicted of traitorous conduct.<sup>76</sup>

Following Lincoln's assassination, Andrew Johnson ordered Milligan's execution, but he then relented and commuted the sentence to life imprisonment with hard labour.<sup>77</sup> After the end of the war, Milligan's petition for release under a writ of *habeas corpus* was allocated to a judge of Indiana's Circuit Court and, upon appeal, the Supreme Court unanimously upheld Milligan's release.<sup>78</sup> Yet, the bench was split on the reasons for the decision. The majority affirmed the broad principle that, in a time of peace, as long as the

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<sup>72</sup> *ibid.*

<sup>73</sup> James D Richardson and George Raywood Devitt, *A Compilation of the Messages and Papers of the Presidents* (Washington Government Printing Office 1897) 23; *See also* President Lincoln's Message to Congress (4 July 1861) Congress library D65/898.

<sup>74</sup> *ibid.*

<sup>75</sup> Jeff Bleich, Kelly Klaus and Deborah Pearlstein, 'When War Comes to the Court: The True Limits of Our Freedoms May Soon Be Revealed' (2001) 21. *Oregon State Bar Magazine* <<https://www.osbar.org/publications/bulletin/01nov/war.htm>> accessed 27 December 2016.

<sup>76</sup> Harold Melvin Hyman and William M Wiecek, *Equal Justice under Law: Constitutional Development, 1835–1875* New American Nation series. (Harper & Row 1982) 232–385; *See also* Stuart Streichler, *Justice Curtis in the Civil War Era: At the Crossroads of American Constitutionalism (Constitutionalism and Democracy)* (University of Virginia Press 2005) 151–171; *See also* John A Garraty, *Quarrels That Have Shaped the Constitution* (2nd edn, Harper Perennial 2009) 90–108.

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*

civil courts remained open, the military tribunals lacked jurisdiction over civilians.<sup>79</sup> It was, however, argued that the Congress could authorise military tribunals to have such jurisdiction during wartime by applying common law legal rationality.<sup>80</sup> A recent study by Dyzenhaus suggested that this opinion refuted executive unilateralism.<sup>81</sup>

The reasoning of the majority was, in part, a product of a peculiarity of the US Constitution, which, unlike modern constitutions, does not explicitly provide for emergency powers, except to make reference to the congressional power to call out the militia and to permit the suspension of the privilege of *habeas corpus* under certain conditions.<sup>82</sup> Thus, the American Constitution foresees that it may be necessary to suspend *habeas corpus* in times of great threat to the safety and security of the United States,<sup>83</sup> Such as the times of rebellion or invasion, and the power of suspension is assigned to the Congress.<sup>84</sup> However, there have been exceptions to these rules such as during the Civil War when Abraham Lincoln decided to suspend *habeas corpus* without conferring the Congress. It should be noted that during periods of emergency, the US Congress may pass legislation to give the President the power to use their constitutional authority, by assigning to him the power to suspend *habeas corpus*, with the aim of reinforcing the power of the executive and to make them able to confront exceptional threats.<sup>85</sup>

#### 1.7.1 THE USA INTERNAL SECURITY 1950 ACT

Another example of the early use of emergency powers in the US can be found in the Internal Security 1950 Act. The Act authorised the Internal Security Service to detain any person whom the government had a ‘reasonable ground’ to believe would ‘probably’ commit

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<sup>79</sup> *ibid.*

<sup>80</sup> Eric A Posner and Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (Oxford University Press 2007) 252.

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*

<sup>83</sup> C. Herman Pritchett, *The American Constitution* (McGraw-Hill 1959) 23; *See also* the American Constitution art I, 9, cl.2.

<sup>84</sup> *ibid.*

<sup>85</sup> *U.S Senate Report No. 93-1170*, ‘A Recommended National Emergencies Act’, 93rd Congress, 2nd Session (1974) 2-3.

or conspire to commit acts of espionage or sabotage.<sup>86</sup> Not until the 1970s did the Congress move to terminate the on-going national emergency.<sup>87</sup>

In 1975, a special Senate Committee called the Church Committee was formed to examine the emergency procedures. The committee found that the FBI had conducted a broad campaign of surveillance on some political groups that had no history of engagement in any illegal conduct.<sup>88</sup> This has resulted in the infringement of the privacy of citizens by the intelligence agencies.<sup>89</sup> The Committee issued its recommendations, which included a recommendation that the FBI should only be allowed to undertake electronic surveillance if authorised under a judicial warrant.<sup>90</sup> The committee concluded that ‘the Foreign Intelligence Surveillance Act was an exception to the general rule, and that wiretapping should be permitted when there was probable cause to believe that a crime had been committed and when authorised by a warrant signed by a judge’.<sup>91</sup>

The report concluded that

‘The FISA permitted wiretapping to be carried out without the showing of probable cause’.<sup>92</sup>

It was not difficult to comply with the requirement to obtain a judicial warrant for the FBI and CIA to monitor suspects, as can be seen from the large numbers of judicial warrants issued to the FBI and CIA during the application of the Internal Security Act, where an estimate of more than 13,000 wiretaps authorizations were issued.<sup>93</sup> These abuses were also noted by other congressional committees<sup>94</sup> and were committed under the guise of having

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<sup>86</sup> *United States v Salerno* [1987] 481 US 739, 748; *See also* US Internal Security Act of 1950, Pub L no 81–831, 103, 64 Stat 987, 1021 (1950) (repealed in 1971); *See also* Robert Justin Goldstein, *Political Repression in Modern America* (University of Illinois Press 2001) 322–324 .

<sup>87</sup> Americo R. Cinquegrana, ‘The Walls “And Wires” Have Ears: The Background and First Ten Years of the Foreign Intelligence Surveillance Act of 1978’ (1989) 136 U Pa L Rev. 793.

<sup>88</sup> US Congress Church Committee. (Congress 1976) 299, 302, 327–28.

<sup>89</sup> *ibid.*

<sup>90</sup> *ibid.*

<sup>91</sup> US Foreign Intelligence Surveillance Act 1978 50 USC 1801 et seq.

<sup>92</sup> *ibid.* arts 1804(a)(7)(B), 1823(a)(7)(B).

<sup>93</sup> Michael Ratner, *Moving Toward a Police State* (Counter Punch 2001).

<<http://www.counterpunch.org/2001/11/20/moving-toward-a-police-state/>> accessed 5 August 2017.

<sup>94</sup> The US. Senate Special Committee on National Emergencies and Delegated Emergency Powers, ‘A Brief History of Emergency Powers in the United States’ (93<sup>rd</sup> Cong 2<sup>nd</sup> sess., GPO 1974) 93-1170; *See also* U.S. Senate Special Committee on the Termination of the National Emergency, *Emergency Powers Statutes* (S Rept., 93<sup>rd</sup> Cong 1<sup>st</sup> sess., GPO 1973) 93-549.

emergency or war authority. In an effort to correct such abuses, the Congress enacted a number of reform statutes, including the War Powers Resolution in 1973,<sup>95</sup> which revoked most of the above-mentioned emergency legislation.<sup>96</sup>

### **1.8 THE USA COUNTER-TERRORISM MEASURES AFTER THE 11TH OF SEPTEMBER 2001**

There was much confusion after the 9/11 terror attacks, and, on the 14<sup>th</sup> of September, US President George W. Bush declared a state of emergency.<sup>97</sup> Emergency powers were reinstated, and the Congress gave the executive the power to conduct searches of a person's home or office without prior notification.<sup>98</sup> and the authority to spy on web surfing, even if the person being spied upon was not the target of the investigation.<sup>99</sup>

Justice O'Connor was proven prescient on the matter when she noted after viewing Ground Zero that 'restrictions on our personal freedom would be seen in future'.<sup>100</sup> Various government executives have pointed out that the objective of the security measures taken was not to eliminate the September 11<sup>th</sup> attackers.<sup>101</sup>

Since then, the American administration has expanded the war on terrorism, and those accused by them of sponsoring terrorism and seeking weapons of mass destruction have been called the 'axis of evil'.<sup>102</sup> The post-September 11 war against terrorism may be compared with the measures that were taken during the Cold War against communism.<sup>103</sup> The expansion of the executive's power unchecked by the judiciary or Congress, the increase in government secrecy and the institutional level of unfairness in the treatment of alleged offenders, which are normally seen only in wartime and justified only as wartime measures,

<sup>95</sup> US. War Powers Resolution, Pub L no 93-148, 87 Stat 555 (1973) codified at 50 USC § 1541-1548 (1994).

<sup>96</sup> US. National Emergencies Act 1976.

<sup>97</sup> US. Emergency Proclamation 7463, Federal Register 66, September 2001, 48197-48199.

<sup>98</sup> USA Patriot Act s 213 amending 18 USC 3103a, (2001).

<sup>99</sup> EFF, *Analysis of the Provisions of the USA Patriot Act that Relate to Online Activities* (Electronic Frontier Foundation 2001) <[http://www.eff.org/Privacy/Surveillance/Terrorism\\_ilities/20011031\\_eff\\_usa\\_patriot\\_analysis.html](http://www.eff.org/Privacy/Surveillance/Terrorism_ilities/20011031_eff_usa_patriot_analysis.html)> accessed 5 November 2016.

<sup>100</sup> Linda Greenhouse, 'We're Likely to Experience More Restrictions on Our Personal Freedom than Has Ever Been the Case in Our Country. New York Times ( New York 12 May 2001).B5

<sup>101</sup> Dudley Robert, 'Verbatim Special, Colin Powell, State Department Briefing 9 December 2001' Air Force Magazine ( Washington 3 April 2001)5

<sup>102</sup> Herb Keinon, 'Sharon Declares Day of Mourning'. Jerusalem Post ( Jerusalem 3 September 2001) 2

<sup>103</sup> Donald H Rumsfeld, 'Department of Defense Briefing'(25 Sep 2001) <[http://www.defenselink.mil/news/Sep2001/t09252001\\_t095sd.html](http://www.defenselink.mil/news/Sep2001/t09252001_t095sd.html)> accessed 1 April 2017.

have all led to departures from the traditional American notions of fairness. The perceived threats to the USA's power have generated a profound sense of permanent crisis and have led some to say that 'the price of democratic survival in a world of aggressive totalitarianism is to give up some of the democratic luxuries of the past'.<sup>104</sup>

#### 1.8.1 THE USA PATRIOT ACT

On 25<sup>th</sup> October 2001, the American Congress enacted a bill called the USA Patriot Act. The Senate passed the Act with only one dissenting vote, and the House of Representatives voted on 26<sup>th</sup> October to adopt it. The Act flows from a consultation draft circulated by the Department of Justice,<sup>105</sup> which was introduced to the Congress and to which modifications and additions were made.<sup>106</sup> In his letter to the Senate, the Assistant Attorney General Daniel J. Bryant of the DOJ's Office of Legislative Affairs argued that the President, as the Commander-in-Chief, must be able to use whatever means necessary to prevent attacks upon the United States and that this power, by implication, includes the authority to collect information.<sup>107</sup>

The USA Patriot Act introduced some revised rules such as the introduction of a new definition of terrorism. The former definition of terrorism defined it as, 'communist activity encompassing any crime that involves the use of a weapon or other dangerous device other than for personal use'.<sup>108</sup> Section 411 of the Patriot Act resurrected this provision but substituted 'terrorist' for 'communist'.<sup>109</sup> The Act further granted federal officials greater powers to trace and intercept communications and reinforces federal anti-money laundering regulations.<sup>110</sup>

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<sup>104</sup> J. William Fulbright, 'American Foreign Policy in the 20th Century Under an 18th-Century Constitution' (1961) Volume 47 Cornell L. Rev., 7 <<http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1744&context=clr>> accessed 5 November 2016; See also Arthur M. Schlesinger, The Imperial Presidency (Mariner Books; Reprint edition 2004) 163,164.

<sup>105</sup> Draft of the Anti-Terrorism Act 2001, 'Hearing before the House of Common' (107<sup>th</sup> Cong 1<sup>st</sup> Sess. 54, 2001).

<sup>106</sup>? *ibid.*

<sup>107</sup> *ibid* ; Dennis Loo and Peter Phillips, *Impeach the President: The Case Against Bush and Cheney* (Seven Stories Press 2006) 171.

<sup>108</sup> USA Patriot Act 2001 s411a amending 8 USC 1182 a3.

<sup>109</sup> *ibid.* s216b.

<sup>110</sup> *ibid.*

The Act also created a few new federal crimes and increased the penalties for many others. It introduced several changes in Criminal procedure, such as a longer limitation period for crimes of terrorism.<sup>111</sup> The Act modified the procedures as follows:

- i. It permitted pen registers and trap and trace orders for electronic communications (e.g. e-mail).<sup>112</sup>
- ii. It authorised the security services to access stored e-mail or communication records.<sup>113</sup>
- iii. It considered Voice mails as stored e-mail.<sup>114</sup>
- iv. It permitted authorities to intercept communications from a trespasser within a computer system.<sup>115</sup>
- v. It amended the statute to permit wiretaps, even if the primary purpose of the surveillance is a criminal investigation.<sup>116</sup>
- vi. It added terrorist and computer crimes to the predicate offence list.<sup>117</sup>
- vii. It encouraged the cooperation between American security services and foreign intelligence investigators.<sup>118</sup>
- viii. It allowed for increased sharing between criminal and intelligence operations.<sup>119</sup>

As mentioned above, the Patriot Act has created newly defined crimes, including the crime of domestic terrorism. Domestic terrorism is defined as

‘dangerous acts that violate the criminal law, and appear to be intended ... to influence government policy by intimidation or coercion’.<sup>120</sup>

Another new crime introduced by the Act includes the act of hiding information necessary to the national security, which means that if a person fails to notify the security services of his suspicion that someone might commit a terrorist attack,<sup>121</sup> this person is to be arrested and tried under the provisions of this Act.<sup>122</sup> The US President G.W. Bush defended the

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<sup>111</sup> *ibid.*

<sup>112</sup> *ibid.* s216 b1.

<sup>113</sup> *ibid.*

<sup>114</sup> *ibid.*

<sup>115</sup> *ibid.* DoJ, s107.

<sup>116</sup> *ibid.* amending 50 USC 1804/(a).7/(B), 1823/a.7/(B); *See also* USA Patriot Act. 2001 Section 218.

<sup>117</sup> *ibid.*

<sup>118</sup> USA Patriot Act. 2001 s 203, 218.

<sup>119</sup> *ibid.*

<sup>120</sup> *ibid.* S 802.

<sup>121</sup> *ibid.*

<sup>122</sup> *ibid.*

introduction of the Patriot Act by stating that ‘the Americans are under attack’.<sup>123</sup> Attorney General Ashcroft and referred to the Patriot Act and said that ‘during a war, giving a foreign enemy the same constitutional rights as American citizens is not proper’<sup>124</sup>, he further suggested the suspension of even the minimum of human rights (the right to freedom of expression) when he said that ‘those who criticise the government are aiding our enemies’. The Press Secretary Ari Fleischer also observed that ‘Americans, should watch what we say and what we do’.<sup>125</sup>

### **1.9 THE CONSEQUENCES OF THE APPLICATION OF THE USA PATRIOT ACTS ON HUMAN RIGHTS**

One could conclude that the Patriot Act resulted in a human rights disaster, as the FBI interviewed at least 5,000 non-American citizens under the pretext of ‘war on terror’.<sup>126</sup> And resorted to selective prosecution based on racial profiling.<sup>127</sup> Over 1,200 persons were detained mostly Muslim aliens. Most of the detainees were held for at least several months in jail.<sup>128</sup> Many of them had nothing to do with the September 11 attacks or international terrorism and were detained on the flimsiest of evidence.<sup>129</sup> The rest of the 1,200 detainees were either not charged with any violation or with minor immigration offences, for which they would not normally have been jailed. Many of the detainees were held in solitary confinement and were kept in their cells for 23 hours a day. Moreover, they were held *incommunicado*, allowing only one telephone call a week. Some were prohibited from

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<sup>123</sup> White House, ‘Remarks by the President of the United States of America in State of the Union’(2010) <<http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>> accessed 8 November 2016.

<sup>124</sup> ‘Attorney General Ashcroft stated that foreign terrorists who commit war crimes against the United States are not entitled to and do not deserve the protection of the American Constitution’ Nightline (ABC television broadcast, 14 November 2001).

<sup>125</sup> White House, Press Secretary Ari Fleischer, ‘Press Briefing at the James S Brady Briefing Room’(2001) <<http://www.whitehouse.gov/news/releases/2001/10/200111001-4.html>> accessed 7 November 2016.

<sup>126</sup> Jim McGee, ‘Ex-FBI Officials Criticize Tactics on Terrorism: Detention of Suspects Not Effective, They Say’. Washington Post ( Washington 14 May 2001)2

<sup>127</sup> Ali Al-Maqtari, ‘Testimony Before the Senate Judiciary Committee’ (2001) <<http://judiciary.senate.gov/te120401F-al-Maqtari.htm>> accessed 11 February 2017.

<sup>128</sup> Amnesty International, ‘United States of America Amnesty International’s Concerns Regarding Post–September 11 Detentions in the USA’ (March 2002), available <[www.aiusa.org/usacrisis/9.11.detentions2.pdf](http://www.aiusa.org/usacrisis/9.11.detentions2.pdf)>. Accessed 7 November 2016; See also Reuters, ‘Hundreds of Arabs Still Detained in US Jails’(13 March 2002) available at<[www.reuters.com/prnterfriendly.jhtml?type=search&StoryID=696703](http://www.reuters.com/prnterfriendly.jhtml?type=search&StoryID=696703)> last accessed 10 December 2016.

<sup>129</sup> Amy Goldstein, ‘I Want to Go Home: Detainee Tony Oulai Awaits End of Four-Month Legal Limbo’. Washington Post (Washington 11. Nov 2002) A1.

contacting their lawyers and families.<sup>130</sup> Since the Act gave the executive the power to hold an inmate *incommunicado*, in solitary confinement, for a year, and this period could be extended indefinitely.<sup>131</sup>

For instance, in the Guantánamo Bay camp in Cuba, there were hundreds of detainees from more than 40 different nationalities who had never been charged or notified the reasons for their arrests, and they were not allowed access to attorneys or the right to be treated as prisoners of war under the Geneva Convention.<sup>132</sup> These prisoners were detained as ‘Illegal Enemy Combatants’.<sup>133</sup> The result of this was that the accused could be stripped of all judicial rights, incarcerated without judgment and not considered to be a criminal at common law, but a political prisoner or a prisoner of war.<sup>134</sup> Ill-treatment and brutality inside the detention centres were common practices. Some of the detainees were transferred to allied countries where human rights were insignificant, and they were systematically tortured in the custody of those allied countries.<sup>135</sup> Also, some foreign prisoners were held by the American forces in Afghanistan and Iraq, and there were others who were sent by other countries to the USA to be transferred and detained in Guantanamo.

The US Government has refused the international demands that the Guantanamo detainees be tried by a competent international tribunal, asserting their right to hold them indefinitely.<sup>136</sup> A case in point is that of *Boumediene*, who later challenged his detention in the American courts. When the judgment in the case of *Boumediene v Bush* was delivered, the majority opinion was that

‘the constitutional *habeas corpus* protection extends to all detainees at Guantanamo Bay, including foreign prisoners’.<sup>137</sup>

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<sup>130</sup> *ibid.*

<sup>131</sup> U.S. National Security, ‘Prevention of Acts of Violence and Terrorism’ (2001) 66 Fed Reg 55065.

<sup>132</sup> *See, e.g.,* Geneva Conventions which stipulate that; ‘civil populations must never be used as targets, and prisoners must be well treated’.

<sup>133</sup> Lauri S Scherer, *The Patriot Act* (Green haven Press 2006) 78–89.

<sup>134</sup> *ibid.*

<sup>135</sup> *ibid.*

<sup>136</sup> OAS, ‘Letter from the Inter-American Commission on Human Rights’ adopting *precautionary measures to require the U.S. to submit detainee status to a decision by a competent international tribunal.* (2002) <<http://www.oas.org>> accessed 17 March 2017.

<sup>137</sup> *Boumediene v Bush* [2008] 553 U.S. 723; *See also Hamdi v Rumsfeld* (n 67).

In the *Boumediene* case, as in the old *Milligan* case, the opinions of the majority of legal scholars supported the proposition that martial rule is appropriate only in case of a foreign invasion or war.<sup>138</sup> In this sense, ‘martial rule is to be considered valid only if the normal courts are closed and it is impossible to administer criminal justice according to law’.<sup>139</sup>

The case of *Muhammad Salah* is similar to *Boumediene* case. In the indictment, Salah was charged with racketeering and providing material support for terrorism.<sup>140</sup> The prosecutor dropped the material support charge on the eve of the trial, and the jury acquitted him on the racketeering charge.<sup>141</sup>

Another example can be found in the Egyptian case of *Wael Abdel Rahman Kishk*, where Kishk was convicted in February 2002 of lying to the FBI about his plans to study aviation.<sup>142</sup> The government sought a long prison sentence for Kishk, whilst acknowledging that there was no evidence that he was in any way connected to terrorism.<sup>143</sup>

The above trials show how the applications of the Patriot Act lead to the violation of basic human rights. The trials also show how the war on terrorism has extended the process of legal securitization, a process whereby the law is expanded beyond traditional categories or even threatens to override the operation of legal process (as in the case of state-sanctioned torture) and how it may be the dominant mode of radicalisation affecting Arabs and Muslims in the USA.<sup>144</sup>

Steven Salaita has linked anti-Arab racism to what he terms as ‘imperial adventurism’, suggesting the world-historical dimension within which the expression of cultural ‘othering’ occurs. He explained as follows that ‘the *Boumediene* case is significant for its rejection of the extreme view that foreign nationals subjected to USA action abroad

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<sup>138</sup> *ibid.*

<sup>139</sup> *ibid.*

<sup>140</sup> *Salah v US Department of Treasury* [2012] Northern District Court of Illinois, 1:12-cv-07067 ND Ill.

<sup>141</sup> *ibid.*

<sup>142</sup> Glaberson W, ‘Judge Rejects Long Prison Term for Arab Caught in Terror Sweep’. *New York Times* ( New York 05 Mar 2008) A8.

<sup>143</sup> Finkelstein K E, ‘Sept 11 Shadow Lingers as Egyptian’s Trial Begins’. *New York Times* ( New York 11. Feb 2002) 9

<sup>144</sup> Michael E. Deutsch and Erica Thompson. ‘Secrets and Lies: The Persecution of Muhammad Salah’ (Part I) (2008) 37 *J. Palest. Stud.* 25–53, 38–58.

should be denied all constitutional rights, including *habeas corpus*, and for its adoption of a more pragmatic or ‘functional’ approach’.<sup>145</sup>

### **1.10 THE EGYPTIAN COUNTER-TERRORISM MEASURES**

The Egyptian legislators defined terrorism as follows:

All use of force or violence, threats or intimidation, to offend individually or collectively, in order to disturb public order or endanger the safety and security of society or to put it at risk, and which would harm the people or spread horror, including threatening their lives or freedom or security, or causing damage to the environment, communication, transportation, finance, occupying or seizing public or private properties, preventing or impeding public authorities, or places of worship or scientific institutes from doing their work, or disable the application of the Constitution or laws or regulations.<sup>146</sup>

#### **1.10.1 THE MODERN ERA OF THE EGYPTIAN TERRORISM**

Most Egyptian political and legal analysts refer to the modern era of Egyptian terrorism as those that began in 1992 in the confrontation between the Egyptian government and the Islamic armed group ‘Algamaa El Islamiyah’. This group had stepped up its attacks against officials, politicians, security officers, Copts, intellectuals and foreign tourists and had caused massive disturbances. To eliminate that threat, the Egyptian government passed a large number of amendments to several laws, including the anti-terrorism law.<sup>147</sup>

At the end of the 1990s, the human rights situation in Egypt had severely deteriorated, with exceptional trials occurring every day and imprisonment and the death penalty being widely applied.<sup>148</sup> Thousands were arrested on the charges of belonging to terrorist groups or being loyal to such groups, without being convicted of involvement in any acts of violence.<sup>149</sup> In many cases, security forces made mass arrests. In 2010, the report of the Human Rights Centre for the Assistance of Prisoners estimated the number of political

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<sup>145</sup> Steven Salaita, *Anti-Arab Racism in the USA: Where It Comes From and What It Means For Politics Today* (Pluto Press 2006) 6-15.109; *See also*, Gerald L Neuman, ‘The Extraterritorial Constitution After *Boumediene V Bush*’ (2009) *South Calif Law Rev* 82, 259.

<sup>146</sup> Egyptian Law 58/1937. art 86.

<sup>147</sup> Egyptian Act 97/1992. ‘Amending Some Provisions of the Egyptian Code of Criminal Procedure and the Establishment of the State Security Courts’.

<sup>148</sup> ‘Behind the Wall of Oblivion A Field Research on the Phenomenon of Long-Term Detention and its Impact on Detainees and their Families and the Egyptian Society’ (Human Rights Center for the Assistance of Prisoners, Cairo. 2010) 7.

<sup>149</sup> *ibid*.

detainees to be between twelve and sixteen thousand, a large number of whom had spent more than ten years in detention.<sup>150</sup> Some of them had been acquitted of the charges brought against them without being released, and some had never been prosecuted, but they remained in detention just the same.<sup>151</sup>

On 22<sup>nd</sup> March 2006, a decision was taken by the Egyptian Prime Minister to form a committee to prepare a draft law to combat terrorism, to propose amendments to the provisions relating to pre-trial detention and to allow the revision of the Egyptian Counter-Terrorism Act according to the modern judicial provisions contained in international agreements.<sup>152</sup> Shehab, the Minister responsible for legal affairs, together with nine members representing the ministries of the Interior, Defence and Justice, formed a committee to draft the new Act. In April 2006, a month after the formation of the committee, it was decided, after conferring with the Parliament, to continue meeting to discuss the new Act, but they also agreed that, until the new Act was passed, the state of emergency would be renewed.<sup>153</sup> It was also decided that only the Article III of the Emergency Law will be applied.

The Article 'III of the Emergency Law' stipulated the following emergency procedures:

- i. The arrest of persons suspected of involvement in crimes of terrorism and drug trafficking.<sup>154</sup>
- ii. Inspection of persons and places suspected of involvement in these crimes and the power to decommission any arms and explosive materials found, together with the right for the authorities to confiscate them.<sup>155</sup>

On January 6<sup>th</sup>, 2007, the Egyptian Parliament approved the renewal of the state of emergency and, as proposed by the President, the formation of a committee to draft a new counter-terrorism Act.<sup>156</sup> The President proposed that the new counter-terrorism Act should be based on the alteration of the text of Article 179 of the Egyptian Constitution.<sup>157</sup> In this

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<sup>150</sup> *ibid.*

<sup>151</sup> *ibid.*

<sup>152</sup> Prime Minister Decree No. 477' (Egyptian Official Gazette 2006)

<sup>153</sup> Egyptian parliamentary Decree 131 to extend the State of Emergency (People's Assembly 4 May 2006)

<sup>154</sup> *ibid.*

<sup>155</sup> *ibid.*

<sup>156</sup> Egyptian Parliament committee 'amendment of Article 34' (People's Assembly, 8<sup>th</sup> January 2007).

<sup>157</sup> *ibid.*

meeting, the Minister of Legal Affairs, Shehab made specific references to the American Patriot Act and the anti-terrorism laws of Britain, Canada, Australia, Russia, France and Spain.<sup>158</sup> Among the main suggested alterations to Article 179 was the proposal to give the President the authority to refer ‘any crime of terror to any judicial body’ and the power to refer civilians to military courts.<sup>159</sup> It may be noted that the integration of the amended Article 179 of the Constitution expanded the power of the President to refer civilians to military courts, not just during times of emergencies but even after the abolition of the state of emergency.

#### 1.10.2 COUNTER-TERRORISM ARTICLE 179

The authorities came up with the idea of accommodating the modified Article 179 into the Constitution to keep the State Security Courts functioning even during the times when a state of emergency had not been declared. However, the proposal included an intention to create a limited right of appeal in the military courts but did not state if the appeal from the military courts is to be made to a higher, possibly non-military, tribunal or not.<sup>160</sup> In my opinion, the suggestion of creating a limited right of appeal in the military courts, including State Security Courts, was an attempt to placate the international institutions who had criticised the Egyptian government for violating the civilian rights of appeal in military and emergency State Securities Courts.

A close analysis of Article 179 also reveals that it expanded the roles of the executive and the security forces in the civilian’s litigation rights. This results in the derogation of the rights granted by Article 41 of the Egyptian Constitution, which prevents the arrest, inspection, detention of a citizen or the placement of any restriction on the citizens’ freedom or of their right to move freely, except with the permission of the judiciary.<sup>161</sup> It is also contrary to the Article 44 of the Egyptian Constitution, which recognises the sanctity of the home and prevents it from being searched, except under a judicial warrant.<sup>162</sup> It is also contrary to the second paragraph of the Article 45 of the Constitution, which recognises the

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<sup>158</sup> *ibid.*

<sup>159</sup> Khaled Salah, ‘Amendments to the Code of Military Justice Allows the Appeal of its Provisions’ *Al Youm El Sabe* (Cairo 15 March 2007) 1

<sup>160</sup> *ibid.*

<sup>161</sup> Egyptian Constitution 1972 arts 41, 44.

<sup>162</sup> *ibid.*

sanctity of correspondence and communications and prevents the confiscation of the access to or control of such communications, without the permission of a judicial warrant.<sup>163</sup>

### 1.10.3 THE LEGAL AND POLITICAL DEBATES ON ARTICLE 179

On 12<sup>th</sup> February 2007, Professor Yahya Algamal, the Former Egyptian Minister of Justice, warned that the proposed Article 179 would turn Egypt into a police state.<sup>164</sup> On 15<sup>th</sup> February 2007, Dr Mustafa Afifi, the Head of the Constitutional Law department at the University of Tanta, stated that

‘the development of constitutional accommodation of the new Counter-Terrorism Act may violate the rights and freedoms of the citizens and undermine the judicial oversight’.<sup>165</sup>

Meanwhile, Dr Mohammed Jibril pointed out that ‘the current Penal Code is sufficient to combat terrorism’. He questioned who was to determine whether a terrorist crime was one covered by the Act and asked whether it would be the Secret Service officers.<sup>166</sup> Some might see this as a judicial oversight, but this control comes in at a later stage.<sup>167</sup> Meanwhile, the parliamentary bloc of the Muslim Brotherhood requested that the Government refrain from altering or adding any further constitutional provisions, claiming that Penal Code 92 of 1997 was already sufficient to combat terrorism.<sup>168</sup>

Dr Boutros Boutros-Ghali, the former Secretary-General of the United Nations and the former General Secretary of the Egyptian National Council for Human Rights, sent his objection to the speaker of the Parliament stating that

‘the text of the proposed Article 179 contradicts the rights, freedoms and guarantees provided for in Part III of the Constitution ... it also does not determine the meaning of the Act of Terrorism’.<sup>169</sup>

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<sup>163</sup> *ibid.* art 45.

<sup>164</sup> Mohamed Sabri, ‘Turning Egypt into a Police State and Violating the Public Freedoms’. *Al Wafd* (Cairo, 12 October 2007) 3

<sup>165</sup> Samy Mohamed, ‘Law Professors Refused the New Anti-Terrorism Law’ *Alyum Alsabe* (Cairo 12 June 2007).

<sup>166</sup> *ibid.*

<sup>167</sup> *ibid.*

<sup>168</sup> Egyptian Initiative for Personal Rights (2002) para 2.

<sup>169</sup> Mahmoud Abd Alal, ‘Article 179, the Rights and Freedoms of Citizens’ *Al Badel Newspapers* (Cairo, 4th October 2007) A 1

However, on 6<sup>th</sup> March 2007, the sub-committee announced the completion of the draft amendments and announced that they would be referred to Parliament at the end of March 2007 and that the amendments would then be put to a referendum in the middle of April 2007.<sup>170</sup>

One could infer that the manner in which the Article was drafted poses a real threat to individual freedom in particular and the rights of the public to freedoms in general. It also disrupts the constitutional guarantees contained in Articles 41, 44 and 45 of the Constitution, which provides guarantees of personal freedoms.<sup>171</sup> Moreover, the transfer of regulations from the special emergency legislation that had been included in the Emergency Law to the 179 proposed Article to be integrated into the constitution represents a transformation of the special power<sup>172</sup> From an exception to a normalised exception. This is contrary to the principles of all international human rights covenants.<sup>173</sup>

One could also conclude that the implementation of the altered Article 179 has weakened the capabilities and **efficacy** of the security forces in the long run, as the Article 179 if challenged in the Constitutional Court surely would be declared to be unconstitutional, and it would then be suspended, leaving the security forces unable to function properly under the norm of the code of criminal procedures.<sup>174</sup> This might be the main reason why the government did not want to abolish the state of emergency without Article 179 being implemented since the premature abolition of the state of emergency would create a legislative vacuum constituting a serious threat. This might explain the reasoning behind the decision of the Egyptian President, Hosni Mubarak to extend the state of emergency.<sup>175</sup> One could note that neither the declaration of the state of emergency nor the counter-terrorism measures prevented terrorist attacks, but, on the contrary, the threat of terror attacks increased when compared to the periods when the state of emergency did not apply. The excuse of terrorism was not seen as being sufficient grounds for the imposition of the emergency power or the introduction of counter-terrorism acts and raised suspicions that the

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<sup>170</sup> Egyptian Shura Council 'Legislative Committee Proposed draft of Articles 32' (Shura Council 6 March 2007).

<sup>171</sup> El Gamal Yahya, 'A Statement' Al Dostor News Papers ( Cairo 15 June 2010)5

<sup>172</sup> *ibid.*

<sup>173</sup> *ibid.*

<sup>174</sup> 'From Emergency to Anti-Terrorism Law: Continuation of the Police State and the Absence of Human Rights' Egyptian Organization for Human Rights statement (2006).

<sup>175</sup> *ibid.*

real aim of imposing such legislation was that the regime could not survive without an emergency.<sup>176</sup>

One could also conclude that the Egyptian government has relied on the declaration of the state of emergency as its first priority to counter terrorism without achieving any significant results.<sup>177</sup> However, this might be because the powers enshrined in the emergency law provisions have proved attractive to the Egyptian executive, as they could exercise the powers without being bound by the provisions of the Constitution or the Code of Criminal Procedure.<sup>178</sup> This has been noted by many international institutions that have criticised the way that the Egyptian government has abused power to declare states of emergency by violating human rights standards.

### **1.11 THE INTERNATIONAL INSTITUTIONS RESPONSE TO THE EGYPTIANS COUNTER-TERRORISM MEASURES**

The credibility of the allegations of torture in Egypt, made by non-governmental organisations and reported to the UN Human Rights Committee (UNHRC), has proved consistently that torture was routinely practised in the country. Based on their reports, the UNHRC stated in 1996 that

‘torture is practised systematically by the security forces in Egypt, in particular by the SSI, the Egyptian Security Service, despite government denials’.<sup>179</sup>

After the introduction of the 1997 Counter-Terrorism Act, which replicated almost every provision of the Egyptian Emergency Law 62/58, the Egyptian executive started to use the new Act as its favorite procedure to bring the accused to the task. In 2002, the UNHRC expressed further concerns when it examined the Egyptian government's commitment to the International Covenant on Civil and Political Rights (ICCPR).<sup>180</sup> In the Committee's report, it described the final definition of terrorism under the 1997 Egyptian Act as very broad and general, opining that it increased the number of crimes punishable by capital punishment in contravention of the Articles of the Covenant.<sup>181</sup>

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<sup>176</sup> The Egyptian Supreme State Security Court, of Damanhour, Memorandum No (5631/2005) Claus 2-13.

<sup>177</sup> Egyptian Emergency Law 62/1958 art 3: Decree 4 Authorized the Minister of Interior to take the Measures provided for in Article 3 of Law 162 of 1958 on States of Emergency (1982).

<sup>178</sup> *ibid.*

<sup>179</sup> UNCHR, Committee against Torture Activities report (U.N. Doc A/51/44 para 220/ Egypt, 3 May 1996).

<sup>180</sup> UNCHR, Human Rights Committee statement on Egypt (September 2002).

<sup>181</sup> *ibid.*

The African Union also criticised the Egyptian government for violating human rights standards under the guise of fighting terrorism and asked the Egyptian Government to honour its commitment to implement the African Charter on Human and Peoples' Rights within their legal system.<sup>182</sup> In its concluding observations, the Committee stated that the state of emergency imposed for decades cannot lead to the people's enjoyment of rights and freedoms and that the actions taken to combat terrorism are not always consistent with the human rights standards, and it referred to the problems of torture of detainees and the threats to the independence of the judiciary.<sup>183</sup> In a letter sent by the United Nations special reporters to the Egyptian Government on 21<sup>st</sup> September 2005, it was pointed out that the definition of terrorism contained in the new Anti-Terrorism Act was very general, and it allowed the use of force against political opponents lead to a more significant number of crimes becoming punishable by death.<sup>184</sup>

### **1.12 THE RULE OF INTERNATIONAL HUMAN RIGHTS LAW IN GUARANTEEING HUMAN RIGHTS STANDARDS DURING COUNTERING TERRORISM**

The Impact of terrorism and counter-terrorism measures on Human Rights were addressed by the highest authorities of the UN.<sup>185</sup> In all, thirteen treaties relating to the prevention and suppression of terrorism have been introduced by the UN – the so-called Sectoral Instruments. Most of these Instruments cover offences that vary from the financing of terrorism to offences based on the victim's status.<sup>186</sup>

On 28<sup>th</sup> September 2001, acting under the authority of Chapter VII of the Charter of the UN, the Security Council adopted Resolution 1373; the Resolution obligated member States to take the necessary measures to prevent terrorism.<sup>187</sup> And to criminalise terrorist acts, including acts in support of or in preparation for terrorist offences. It recommended the freeze of the funds of persons who commit or attempt to commit terrorist acts. The Resolution also highlighted the importance of strengthening international cooperation in

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<sup>182</sup> ACHPR, Concluding Observations on the Periodic Report as Submitted by the Arab Republic of Egypt Regular Session No 37. Banjul, Gambia from 27th April to 11th May (2005) para 21.

<sup>183</sup> *ibid.*

<sup>184</sup> Martin Scheinin, Report of the Special Rapporteur 'the Promotion and Protection of Human Rights and Fundamental Freedoms in the Fight against Terrorism Correspondence with governments' UNSC, Doc E/CN4/2006/98/Add1 para 1.(UN 2006)

<sup>185</sup> UNSC Res 1373; *See also* UNGA Res 48/122, 49/185, 50/186, 52/133, 56/160, 58/174; *See also* UNCHR, Commission on Human Rights Res 2001/37, 2004/44; *See also* UNCHR Human Rights Council Resolution 6/28.

<sup>186</sup> *ibid.*

<sup>187</sup> UNSC Res 1373.

tackling criminal matters.<sup>188</sup> Moreover, stressed that ‘the promotion and protection of human rights for all and the rule of law are essential,’ recognising that ‘effective counter-terrorism measures and the promotion of human rights should not be conflicting goals, but be complementary and mutually reinforcing.’<sup>189</sup>

Since the ICCPR came into force in 1976, fewer than ten States have introduced states of emergency with explicit reference to acts or the threat of acts of terrorism.<sup>190</sup> In some cases, the declaration of an emergency has been related to the State’s definition of terrorism.<sup>191</sup> It is true to say that the development of terrorism could justify the declaration of a state of emergency, but this could also raise fundamental questions about the role of international human rights law in guaranteeing human rights standards during such exigencies and also about the substance and procedures of the criminal law.<sup>192</sup>

Those opinions emerged in recent years to justify the use of emergency procedures to counter terrorism, claimed that the law’s response is aimed at anticipating and preventing terrorism.<sup>193</sup> In which could provide a strong argument for applying emergency procedures. The international community has acted in response to these opinions, and, in its Resolution 1456; the Security Council stated the follows:

States must ensure that any measure is taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular, international human rights, refugee, and humanitarian law.<sup>194</sup>

This response can also be seen in the context of the International Convention for the Suppression of the Financing of Terrorism (ICSFT), which expressly permits States to refuse extradition or legal assistance if there are substantial grounds for believing that the requesting

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<sup>188</sup> *ibid.*

<sup>189</sup> UNGA Res, Res 60/288; *See also* UNSC adopted Resolution 1373.

<sup>190</sup> *Azerbaijan, Chile, Colombia, Egypt, El Salvador, Israel, Nepal, Peru, the Russian Federation and the United Kingdom, and recently France*, at <<http://treaties.un.org>>.accessed 12 July 2017.

<sup>191</sup> *Algeria and Peru*, UNHRC, JR (2001).

<sup>192</sup> James Renwick and Gregory F Treverton, “*The Challenges of Trying Terrorists as Criminals; Proceedings of A RAND/SAIS Colloquium*” (2008) RAND Corporation <[http://file:///C:/Documents%20and%20Settings/Karena/My%20Documents/RAND\\_CF249.pdf](http://file:///C:/Documents%20and%20Settings/Karena/My%20Documents/RAND_CF249.pdf)>accessed 7 March 2017.

<sup>193</sup> *ibid.*

<sup>194</sup> UNSC Res 1456; *See also* The ministerial-level Security Council Meeting (2003) whereby the Council made a declaration in a statement attached to the Resolution No 1456.

State intends to prosecute or punish a person on prohibited grounds of discrimination.<sup>195</sup> The ICSFT also requires the ‘fair treatment’ of any person taken into custody,<sup>196</sup> moreover, it makes it clear that the ICSFT does not affect the other rights, obligations and responsibilities of States,<sup>197</sup> also, those obligations and responsibilities are applicable in the case of terrorism.<sup>198</sup>

The ICSFT also states that any criminal law proscription must comply with the principle of non-retroactivity.<sup>199</sup> It is to be noted concerning this point and as a part of the whole set of regulations which deal with combating terrorism while preserving human rights values that other conventions have also stressed the principles of non-retroactivity. For instance, ICCPR Article 15.<sup>200</sup>

In the UN Security Council’s preliminary draft of principles and guidelines concerning human rights and terrorism, the members of the committee issued a report stating the following:

It was important for the international community to remember that the objective of countering terrorism is often used as a pretext to broaden State powers in other areas and that offences which are not considered to be acts of terrorism, even the most severe offences, should not be dealt with under counter-terrorist provisions,<sup>201</sup> Even if committed by a person also suspected of terrorist crimes.<sup>202</sup>

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<sup>195</sup> UNGA International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, opened for signature 10 January 2000) 39 ILM 270. art 15.

<sup>196</sup> *ibid.* art 17; *See also* CTITF Working Group on Protecting Human Rights while Countering Terrorism, ‘Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism’ (United Nations Department of Political Affairs Counter-Terrorism Implementation Task Force, NY 10017 2014) <<http://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf>> accessed 2 November 2016.

<sup>197</sup> UNGA International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, opened for signature 10 January 2000) 39 ILM 270. art 21.

<sup>198</sup> *ibid.* art 23.

<sup>199</sup> *ibid.*

<sup>200</sup> ‘In the context of terrorism offences these requirements have been emphasized by the Special Rapporteur on the promotion and protection of Human Rights and Fundamental Freedoms while countering terrorism’ UN Doc No E/CN.4/2005/L10/Add17 (UN 2005) *See also* UNGA, Doc E/CN.4/2006/98 para 49.(UN 2006).

<sup>201</sup> UNSC Doc. E/CN.4/2006/98 para 47; *See also* • UN Human Rights Council, “A Preliminary Framework Draft of Principles and Guidelines Concerning Human Rights and Terrorism” E/CN.4/Sub2/2005/39Para 33 (UNCHR 2005).

<sup>202</sup> *ibid.*

In fact, the principle that the report addressed reflects the various international and regional standards on the promotion and protection of human rights while countering terrorism.<sup>203</sup>

### **1.13 TORTURES AND NON-HUMAN TREATMENT DURING COUNTER-TERRORISM**

Lately, we have witnessed a growing willingness to sacrifice civil liberties in order to eliminate the threat of terrorism. Politicians can manipulate public opinion, by taking advantage of the climate of fear of terrorism that prevails in the world.<sup>204</sup> Consequently, that has contributed to increment of the destructive impact on citizens human rights.

The engagement of some States in torture and other types of ill-treatment of suspects in their war against terror has occupied the concern of the UN. The UN noted that some States use the excuses of national security and the war on terror to cover up direct attacks on the media, investigative journalists, political opposition and human rights activists.<sup>205</sup> Some States have used the ‘necessity defence’ to justify the resorting to measures that would otherwise be clearly prohibited,<sup>206</sup> Such as torturing a suspected terrorist in a ‘ticking bomb’ situation.<sup>207</sup> However, the international community had made it clear that the prohibition against torture is an absolute, non-derogable norm in all human rights treaties and is a peremptory (*jus cogens*) norm of customary international law, prohibiting the torturing of those even accused of terrorism.<sup>208</sup>

To combat such practices, the UN has created mechanisms for the enforcement of the States’ obligations to observe the international human rights standards, amongst which are the treaty-monitoring bodies. These bodies are responsible for monitoring the States’

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<sup>203</sup> See. e.g. UNGA Siracusa Principles UN Doc. E/CN4/1985/4. para 17 (UN 1985); *See also* Council of Europe, Guideline III. para 2.

<sup>204</sup> UN Doc S/Res/1456 Annex Para 6. Meeting of the Security Council Which Was Held at the Ministerial Level in 2003 “Whereby the Council Made a Declaration in a Statement Attached to Resolution No 1456” (2003).UNSC.

<sup>205</sup> Ambeyi Ajabo, Report of the Special Rapporteur ‘Freedom of Opinion and Expression’ UNCHR Doc, E/CN4/2003/67. para 65.

<sup>206</sup> Alan M Dershowitz, ‘The Torture Warrant: A Response to Professor Strauss’ (2004) 48 N.Y.L. Sch. L. Rev.275.<<http://www.pem.cam.ac.uk/wp-content/uploads/2012/07/1B-Dershowitz-article.pdf>>accessed 31 October 2016.

<sup>207</sup> *ibid.*

<sup>208</sup> Bruce A Ackerman, *Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism* (Yale University Press; annotated ed 2006) 78; Bruce A Ackerman, *Social Justice in the Liberal State* (Yale University Press 1981) 89.

compliance with certain treaties and for guaranteeing that individuals can complain about violations of their rights.

Action has been taken by the UNHRC with respect to the States that have violated the Committee's recommendations. For example, in its observations on Israel's third periodic report, the Committee concluded that it had,

'...deep concern at the continued Israeli state of emergency on the excuse of countering terrorism, which has been in effect since its independence',

and recommended that

'...the State must limit its scope and territorial applicability and the derogated rights'.<sup>209</sup>

In another case, the Committee criticised the United Kingdom for the prolongation and excessive use of emergency measures and also expressed its concern to 'the excessive powers enjoyed by police under anti-terrorism laws' and 'the liberal rules regarding the use of firearms by the police'.<sup>210</sup>

In 2004, the Security Council adopted Resolution 1535 (2004) to re-activate the counter-terrorism strategy by the establishment of the Counter-Terrorism Committee Executive Directorate.<sup>211</sup> Later in 2006, the UNSC adopted the strategy of the UN Global Counter-Terrorism plan built on the basis of UNSC resolution no. 1635,<sup>212</sup> Which was a plan of action with a clear message delivered by the Committee, and stated that there should be

'no conflict between anti-terrorism measures and the protection of human rights'.<sup>213</sup>

In this action plan, the UN Secretary-General reasserted that human rights values were essential to the fulfilment of all aspects of a counter-terrorism strategy.<sup>214</sup> The international bodies' treaties have similar views that state that

'the lawfulness of counter-terrorism measures depends on their conformity with international human rights law'.<sup>215</sup>

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<sup>209</sup> UNGA Fifth-eighth session, Supp no 40 (A/58/40) vol I ch IV para18.( UN 1952).

<sup>210</sup> UNHRC Committee's observations. GAOR A/46/40, 45, para 183 (Spain)102 para 411 (United Kingdom). (UN 2001)

<sup>211</sup> *ibid* ; UNSC Res 1535 (2004).

<sup>212</sup> UNSC, Counter-Terrorism Committee "*UN Global Counter-Terrorism Plan*", (September 8<sup>th</sup>, 2006).

<sup>213</sup> *ibid*. Part IV.

<sup>214</sup> UNSG 'Uniting against terrorism: recommendations for a global counter-terrorism strategy' (A/60/825) (2006).

<sup>215</sup> IACHR. Inter-American Commission on Human Rights 'Annual Report' (1990–1991) ch V sec II.

It is essential to bear in mind that, in general, the international human rights guarantees exist to protect everyone, including terrorists, against some critical and essential issues concerning human rights violations, so that, for example, the arbitrary deprivation of life is non-derogable.<sup>216</sup> Also, the prohibition of torture and other cruel or inhuman treatment or punishment is prohibited, as it is a peremptory norm or a norm of *jus cogens* under international law.<sup>217</sup> The said prohibitions do not yield to the threat to the security of a State posed by terrorism.<sup>218</sup>

The use of torture and other cruel, inhuman or degrading treatment is absolutely prohibited, even in the case of terrorist suspects, as is the use of evidence in legal proceedings obtained by torture.<sup>219</sup> Using such evidence would be a violation of the principle of the non-admissibility of evidence extracted by torture contained in Article 15 of the Convention against Torture.<sup>220</sup> In accordance with the rights enshrined in the ICCPR, this applies to all persons subject to its jurisdiction. This means that the rights guaranteed by the Covenant must be respected and, amongst those rights, is the absolute prohibition against torturing anyone within a State party's power or effective control, even if such control is exercised in a territory not situated within the physical boundaries of the State's territory.<sup>221</sup>

The UNHRC has also given its view concerning unacceptable conditions of detention, including the use of secret and *incommunicado* detention, prolonged solitary confinement and the use of torture, cruel, inhuman or degrading treatment.<sup>222</sup> The view of the Committee is that 'such practices are contrary to the State's international human rights obligations'.<sup>223</sup>

According to international law, inhuman and degrading treatment includes both refolement, in any case where there is a risk of torture or other cruel, inhuman or degrading

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<sup>216</sup> ICCPR (art 6); *See also* the American Convention on Human Rights (art 4); *See also* The European Convention Article 2; *See also* UNHRC Human Rights Committee's views on communication N° 146/1983, *Baboeram v Suriname* (1985) (A/40/40) annex X para 14.3.

<sup>217</sup> *Prosecutor v Furundžija* (1998) International Criminal Tribunal for the former Yugoslavia, ICTR, IT-95-17/1. Para 144.

<sup>218</sup> U.N. Committee against Torture, views on communication on *Tapia Páez v Sweden* (1997)N° 39/1996; *See also* UN.Human Rights Committee: *The individual's rights under Article 7* (A/61/40) vol I para 76,15.

<sup>219</sup> UNHRC Report of the Special Rapporteur on "torture and other cruel, inhuman or degrading treatment or punishment" (A/61/259).(14/08/2006) paras 44-65.

<sup>220</sup> *ibid.*

<sup>221</sup> UNSC. Doc. E/CN4/Sub2/2005/39.para 33. Para 9.

<sup>222</sup> *ibid.*

<sup>223</sup> *ibid.*

treatment,<sup>224</sup> And the extradition of suspected terrorists to countries that practice such treatments<sup>225</sup> or where the suspect might face cruel treatment or where their life might be put at risk, such acts being considered to be in violation of the principle of non-refoulement.<sup>226</sup> One can note that this principle is also set out in the Article 33(1) of the 1951 Convention relating to the Status of Refugees and is also recognised in other international instruments, most notably in Article 3 of the Convention against Torture and in the Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance.

The ICCPR also obligates States to not subject individuals to the above-mentioned violations.<sup>227</sup> According to the Human Rights Committee, the Article 2 of the Covenant puts the following obligation on States:

Not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, either in the country to which removal is to be third-country or in any country to which the person may subsequently be removed.<sup>228</sup>

In 2006, the Human Rights Committee adopted the draft principles and guidelines on human rights and terrorism<sup>229</sup> And advised member States,

‘to focus as much as possible on international action to develop and implement strategies that are forward-looking, rather than dealing with individual acts of terrorism, or a series of acts of terrorism’.<sup>230</sup>

In the comments annexed to the draft principles, the Chairman of the Committee expressed concern that

...the taking of hasty or long-term measures by States to combat terrorism could violate the fundamental principles of law.<sup>231</sup>

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<sup>224</sup> *Chahal v. the United Kingdom* [1996] ECHR, 70/1995/576/662; *See also* Louise Arbour. ‘In Our Name and on Our Behalf’ (2006) 511 Int’l & Comp. L.Q.55.

<sup>225</sup> UNGA, Doc. E/CN.4/2005/103 para 52.(UN 2005).

<sup>226</sup> *ibid.*

<sup>227</sup> *Soering v. the United Kingdom* (1989) ECtHR,14038/88; *See also* UN Human Rights Committee general comment N° 20 (1992).

<sup>228</sup> U.N Human Rights Committee. General Comment No 31( 29 March 2004).

<sup>229</sup> UNHRC Commission on the Promotion and Protection of Human Rights of the United Nations. ‘New Priorities, in Particular Terrorism and Counter-Terrorism’ U.N. Doc no A/HRC/Sub 1/58/30 (2006) para 24.

<sup>230</sup> *ibid.*

<sup>231</sup> *ibid.*11.

The draft principles confirmed the unlawfulness of the arrest of a person based on evidence obtained under torture or cruel, inhuman or degrading treatment or based, exclusively, on the evidence obtained from a person under arrest or detention.<sup>232</sup> The Sub-Committee also re-emphasised the general international principles that govern the process of arrest and provided clarification on some of the conditions relating to the evidence that may be used to justify the arrest of a person. The draft principles stated as follows:

No one should be arrested on the basis of evidence obtained through searches which violate international standards. While a State may, in certain circumstances, carry out inspections across a whole region, or impose restrictions on freedom of movement in order to facilitate the collection of evidence, there must be reasonable and sufficient grounds to suspect the existence of terrorists or of evidence to justify these inspections, and the search must be conducted in a manner that does not deviate from international standards.<sup>233</sup>

The Committee also noted that

There must be respect for the right to privacy and that States may not infringe the right to privacy of mail or private communications - whether by electronic means or by any other means - without legal orders, and without adequate and rational reasons.<sup>234</sup>

After it had received a large number of cases alleging human rights violations by States claiming to counterterrorism,<sup>235</sup> The Special Representative of the Secretary-General of the UN on human rights defenders advised that some of the methods that had been used against suspected terrorists, including violations of the peaceful exercise of some fundamental human rights, were not acceptable, and he advised that

Governments are confronting the challenge of ... terrorist acts, tend to stigmatise the legitimate activities of the defenders as being opposed to the State, threatening its security and providing support for terrorist organisations.<sup>236</sup> All in all, defenders are

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<sup>232</sup> *ibid.* Paras 38(b), 38(c).

<sup>233</sup> *ibid.* para. 38(a).

<sup>234</sup> *ibid.* Paras 38(b), 38(c).

<sup>235</sup> Hina Jilani, Report of the Special Representative of the Secretary-General on Human Rights Defenders UN Doc E/CN4/2005/101 para 132.

<sup>236</sup> *ibid.*

subjected to harassment, intimidation, arrest and detention, torture and assassination.<sup>237</sup>

It should be noted that the former Sub-Commission on the Promotion and Protection of Human Rights also addressed some critical issues related to terrorism and its impact on due process rights, including the administration of justice through the use of military tribunals to try terrorist suspects, especially in African and American continents.<sup>238</sup> Concerning this, the Secretary-General stated that

Governments should be concerned about the growing sense of willingness to sacrifice civil liberties in order to eliminate the threat of violence, as the response of our actions against terrorism, and our efforts to prevent it should promote human rights that terrorists aim to undermine.<sup>239</sup>

The above concern of the international communities about the violations of human rights in the application of counter-terrorism measures can also be seen in the ICCPR provisions that stress on the right to protection from arbitrary detention, and it requires that any person who is arrested be informed of the reason for his arrest.<sup>240</sup> The provisions also provide that each detainee should have the right to challenge his detention before a court and the right to compensation for illegal detention or arrest.<sup>241</sup> In this respect, the UNHRC has determined that the intended meaning of the phrase ‘arbitrary detention’ as follows:

- 1) When one cannot explicitly invoke any legal basis justifying the deprivation of liberty.  
For instance, when someone continues to be held after the completion of his or her sentence, notwithstanding the applicability of an amnesty law to them.
- 2) When the deprivation of liberty stems from the breach of a number of rights or freedoms guaranteed by the Universal Declaration of Human Rights and the ICCPR.
- 3) In the case of a serious breach, in whole or in part, of the international norms relating to the right to a fair trial, as is expressly provided for in the Universal Declaration of Human Rights and in relevant international documents.<sup>242</sup>

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<sup>237</sup> *ibid.*

<sup>238</sup> *Media Rights Agenda v Nigeria* ACHPR 1998 (Communication N° 224/98) paras 59–62; *See also Castillo Petruzzi et al. v Peru* (n 45) paras 128–31, 172.

<sup>239</sup> UN Secretary-General Statement to Counter-Terrorism Committee (U.N. Doc No SG/SM/8624, 6 March 2003).

<sup>240</sup> ICCPR) art 9.

<sup>241</sup> *ibid.*

<sup>242</sup> U.N. Fact Sheet No 26 P IV (May 2000).

According to the above-mentioned conditions, the requirement to ensure fair and transparent procedures must include some essential rights, such as the right to be informed of the case against the accused, the right to be heard within a reasonable time, the right to have their case independently reviewed according to independent procedures, the right to counsel in respect of all proceedings and the right to an effective remedy for unlawful detention. In this respect, the UNHRC has stressed that human rights violations should not be justified by grounds such as security.<sup>243</sup>

#### **1.14 REGIONAL APPROACHES IN RESPONSE TO THE VIOLATIONS OF THE FUNDAMENTAL HUMAN RIGHTS STANDARDS DURING COUNTER-TERRORISM**

Regional approaches have also been developed in line with UN Security Council Resolution No. 1373,<sup>244</sup> and many countries have followed the U.N recommendations. In 2010, the European Commission issued communication stressing that

‘A European area of freedom, security and justice must be an area where all people, including third country nationals, benefit from the effective respect of the fundamental rights enshrined in the Charter of Fundamental Rights of the European Union’.<sup>245</sup>

It concluded as follows:

...Differences in the guarantees provided to victims of crime and terrorism across the 27 Member States should be analyzed and reduced with a view to increasing protection by all means available. European law should guarantee a high standard of rights for the accused, concerning the fairness of the procedures. Detention conditions, including in prisons, should also be addressed.<sup>246</sup>

The analysis conducted in this article found many similarities between the US and Egyptian counter-terrorism measures, including their effects on human rights. Therefore, one

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<sup>243</sup> UN Secretary-General Report ‘In Larger Freedom: Towards Development Security and Human Rights for All’, A/59/2005, 140; *See also* David Cole. ‘The Poverty of Posner's Pragmatism: Balancing Away Liberty After 9/11’ (2007) 59 *Stanford Law Review* 1735. <<http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1405&context=facpub>> accessed 13 November 2016.

<sup>244</sup> UNSC adopted Resolution 1373.

<sup>245</sup> EUC, Commission of European Parliament Communication to the European economic and social Committee ‘*Delivering An Area of Freedom, Security and Justice for Europe's Citizens*’ Action Plan Implementing the Stockholm Programme (Brussels, COM 171, 2010) 2.

<sup>246</sup> *ibid.* 3.

could conclude that the counter-terrorism measures have had adverse effects on the rights of the citizens in the US and Egypt, whose effects may be summarized as follows:

- i. The right to freedom of opinion and expression guaranteed by international human rights conventions, especially the ICCPR, was violated. Moreover, the counter-terrorism measures used in both the countries restricted the right to collect information – political, artistic or commercial – and restricted the freedom of the press by the monitoring of publications. For example, the US Patriot Act permitted the executive to monitor communications, to tap postal, telegraphic and telephone communications and to enter houses and arrest individuals, without having to follow the Code of Criminal Procedures or the principle of *habeas corpus*,<sup>247</sup> also, the Egyptian emergency measures had similar provisions.
- ii. The right to freedom of association was hampered, as peaceful public demonstrations were not freely allowed.<sup>248</sup>
- iii. The right to freedom of movement was affected, as the authorities in both the countries restricted the right of the citizens to leave the country or their movement to specified areas. This contradicts the principle of the right to freedom of movement provided by both the countries' constitutions and also by international instruments.<sup>249</sup>
- iv. The setting up of military and special courts, including the State Security Courts, in both the countries restricted the right to a fair trial and also undermined the principle of the separation of powers. In these courts, the trials were mostly held in secret and the decisions sometimes even including that of the death penalty were often implemented immediately. The operation of these courts conflicts with many constitutional and international human rights standards.<sup>250</sup>
- v. The functionality of the public law provisions and procedures were greatly affected in both the countries by the application of the measures to counter terrorism, as the executive was allowed to refer civilians to State Security Courts, where legal procedures were limited with no guarantee of a fair trial, and judicial authorities were given the freedom to not comply with the Code of Criminal Procedures. This undoubtedly led to

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<sup>247</sup> Freedom House, 'Report of the Civil Society Organizations' (2010) para 2.

<sup>248</sup> *ibid.*

<sup>249</sup> *ibid.*

<sup>250</sup> U.N. Doc GAOR A/56/40 (2001) (vol I) 206 para 16.(UN 2001).

the lack of fairness in the trials of citizens, lack of transparency, and the malfunction of the whole operation of law, as witnessed in Egypt where, during the last five years, thousands of peaceful demonstrators were taken to the Military or State Security Courts, and hundreds of them were sentenced to death.

- vi. Arbitrary detention and the arrest of suspects without having a judicial warrant were commonly exercised by the Egyptian and American authorities during the application of counter-terrorism measures. This led to the detention of innocent citizens who had committed no crimes, as seen in the earlier examination of the US Patriot Act with respect to the case of Salah,<sup>251</sup> and a breach of the guarantees provided in both the constitutions and international treaties.<sup>252</sup>
- vii. The right of every human to demand compensation for the damage suffered due to the violation of their fundamental human rights by the authorities is guaranteed by most of the constitutions of the world and also afforded by international instruments. However, as these guarantees were waived under the excuse of extraordinary/exceptional circumstances, no Guantanamo Bay prisoner has so far managed to obtain compensation from the US government for their illegal detention.

### 1.15 CONCLUSION

The war against terror and the use of exceptional and states of emergency legislation to counter such exceptional situations has a great impact on human rights in general and the security and the functionality of societies in particular. There is no doubt that countering terrorism is a principal objective that permits the limitation of certain rights; however, the imposition of such limitations must satisfy various criteria. Furthermore, any limiting measure should follow pre-set procedural requirements and must be necessary to achieve a particular counter-terrorism objective.<sup>253</sup>

One can conclude from the analysis conducted in this article that the international bodies are still debating the definition of terrorism, and consequently every country has been left free to define who is a terrorist and who is not to suit their own interests, rather than

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<sup>251</sup> See. *Salah v US Department of Treasury* [2012] Northern District Court of Illinois, 1:12-cv-07067 ND Ill.

<sup>252</sup> UNHR Committee's Comments in U. N Doc GAOR A/48/40 (2001) (vol I) 43 para 184 (Tanzania); See also 101 para 459 (Dominican Republic); See also U>N Doc GAOR A/53/40 (2001) (vol I) 39 para 241 (Uruguay); See also U.N Doc GAOR A/56/40 (2001) (vol I) 32 para 9(b) (Trinidad and Tobago).

<sup>253</sup> U.N. Doc E/CN 4/2002/18 annex para 4(d).(UN 2002)

according to one unified international definition. In the recent years, many countries have abandoned their commitments towards maintaining human rights standards under the justifications of countering terrorism, and this has resulted in many innocent citizens being left behind bars, tortured or killed.

As the UNHRC lacks the mechanism to enforce the implementation of international human rights standards in the application of counter-terrorism strategies, they have failed in stopping states from overriding the international human rights standards under the excuse of countering terrorism.