

**AN ASSESSMENT OF THE IMPACT OF COUNTER TERRORISM ON NON
DEROGABLE RIGHTS UNDER INTERNATIONAL LAW**

BY

**Teslim Olalekan OYETUNJI
LL.M/LAW/01399/2009-2010**

**A DESSERTATION SUBMITTED TO THE POSTGRADUATE SCHOOL,
AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL FULFILLMENT FOR THE
AWARD OF MASTER OF LAWS DEGREE (LL.M)**

**DEPARTMENT OF PUBLIC LAW,
FACULTY OF LAW,
AHMADU BELLO UNIVERSITY,
ZARIA**

JULY, 2016.

DECLARATION

I, Teslim Olalekan Oyetunji declare that apart from references to the works of other people, which have been acknowledged, this work is the product of my research and it has neither in whole or, in part been presented for the award of another degree elsewhere.

Teslim Olalekan Oyetunji

Date

CERTIFICATION

This LL.M thesis entitled: *The Prevention and Control of Terrorism under International Law* by *Teslim Oyetunji*, meets the regulation governing the award of the Degree of Masters of Laws (LLM) Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

Dr. Y. Dankofa
Chairman, Supervisory Committee

Date

Dr.B. Babaji
Member, Supervisory Committee

Date

Dr. K.M. Danladi
Head, Department of Public Law

Date

Prof. K. Bala
Dean School of Postgraduate studies

Date

DEDICATON

This LLM thesis is dedicated to my friend Bello Tahir for his unwavering belief in me and for the moral and emotional support he gave me throughout the period of writing this work.

ACKNOWLEDGEMENTS

Praise be to God to whom I am most indebted for his mercies and kindness in seeing me through this work from its inception to its nadir.

My sincere appreciation and inestimable gratitude also goes to my parents for their unwavering filial support, financially, morally and emotionally.

In similar vein, I wish to express my earnest and heartfelt gratitude and appreciation to my savvy and indefatigable supervisor; Dr. Yusuf Dankofa for his scholarly attention, patience, insight and assistance in the planning, construction, organization and the preparation of this project.

I am also greatly indebted to my sibling, Abdul Akeem, whose constant support and concern was material in producing this work.

And last but not the least, comes my colleague and trusty friend; Aisha Muhammad, a woman of uncommon discipline, warmth and discernment for her constant encouragement and wise counsel to me throughout the period of this work and beyond.

TABLE OF CONTENTS

Title page	-	-	-	-	-	-	-	-	-	-	i
Declaration	-	-	-	-	-	-	-	-	-	-	ii
Certification	-	-	-	-	-	-	-	-	-	-	iii
Dedication	-	-	-	-	-	-	-	-	-	-	iv
Acknowledgements	-	-	-	-	-	-	-	-	-	-	v
Table of Contents	-	-	-	-	-	-	-	-	-	-	vi
List of Abbreviations	-	-	-	-	-	-	-	-	-	-	viii
Tables of Cases	-	-	-	-	-	-	-	-	-	-	ix
Table of Statutes	-	-	-	-	-	-	-	-	-	-	x
Abstract	-	-	-	-	-	-	-	-	-	-	xi

CHAPTER ONE: GENERAL INTRODUCTION

1.1	Background to the Study	-	-	-	-	-	-	-	-	1
1.2	Statement of the Problem	-	-	-	-	-	-	-	-	2
1.3	Aim and Objectives of Research	-	-	-	-	-	-	-	-	4
1.4	Scope of Research	-	-	-	-	-	-	-	-	4
1.5	Justification	-	-	-	-	-	-	-	-	5
1.6	Methodology	-	-	-	-	-	-	-	-	7
1.7	Literature Review	-	-	-	-	-	-	-	-	7

CHAPTER TWO

2.1	Introduction	-	-	-	-	-	-	-	-	15
2.2	Conceptual Clarification of Key Terms	-	-	-	-	-	-	-	-	15
2.2.1	Terrorism	-	-	-	-	-	-	-	-	15
2.2.2	Human Rights	-	-	-	-	-	-	-	-	20
2.2.3	Counter Terrorism and Counter Insurgency	-	-	-	-	-	-	-	-	24
2.2.4	Derogable and Non-Derogable Rights	-	-	-	-	-	-	-	-	28
2.2.5	Derogable and Restricted Rights	-	-	-	-	-	-	-	-	30
2.2.6	Non-Derogable and Absolute Rights	-	-	-	-	-	-	-	-	32

CHAPTER THREE: AN ANALYSIS AND ASSESSMENT OF THE RIGHTS TO LIFE UNDER INTERNATIONAL LAW AND ITS IMPACT ON COUNTER TERRORISM

3.1	Introduction	-	-	-	-	-	-	-	-	34
3.2	The Concept Right to Life under International Law	-	-	-	-	-	-	-	-	34
3.2.1	Restrictions to Rights to Life under International Law	-	-	-	-	-	-	-	-	36
3.2.2	In Defence of any Person from Unlawful Violence	-	-	-	-	-	-	-	-	37
3.2.3	In Order to Effect a Lawful Arrest or Prevent the Escape of a Person									
	Lawfully Detained	-	-	-	-	-	-	-	-	37
3.2.4	Action Lawfully Taken for the Purpose of Quelling Insurrection	-	-	-	-	-	-	-	-	38
3.2.5	The Right to Life and the Legality or otherwise of the use of Drones and									
	Targeted Killing of Terrorists	-	-	-	-	-	-	-	-	38
3.3	Meaning of Armed Conflict and Battlefield under International Law	-	-	-	-	-	-	-	-	42
3.4	Applicable Laws: International Human Rights Law or International									
	Humanitarian Law	-	-	-	-	-	-	-	-	44
3.5	Determining the Status of the Targets	-	-	-	-	-	-	-	-	47
3.5.1	The Targeted Killing of Osama Bin Laden	-	-	-	-	-	-	-	-	49
3.6	State Responsibility, the use of Force in Counter-Terrorism and its									
	Implication on the Rights to Life since September 11, 2001	-	-	-	-	-	-	-	-	52

CHAPTER FOUR: AN ANALYSIS AND ASSESSMENT OF COUNTER TERRORISM ON PROHIBITION OF TORTURE, CRUEL INHUMAN AND DEGRADING TREATMENT AND NON-REFOULEMENT AFTER SEPTEMBER 11, 2001

4.1	Introduction	-	-	-	-	-	-	-	-	58
4.2	The Definition of Torture, Cruel, Inhuman and Degrading Treatment	-	-	-	-	-	-	-	-	58
4.3	States Obligation to Protect, Investigate and Grant Redress for Torture	-	-	-	-	-	-	-	-	61
4.4	Deconstructing the Ticking Bomb Theory	-	-	-	-	-	-	-	-	63
4.5	The Prohibition on Torture and Right of Non-Refoulement	-	-	-	-	-	-	-	-	65
4.6	Meaning of Extraordinary Rendition	-	-	-	-	-	-	-	-	67

CHAPTER FIVE: SUMMARY AND CONCLUSION

5.1	Summary	-	-	-	-	-	-	-	-	73
5.2	Findings	-	-	-	-	-	-	-	-	74
5.3	Recommendations	-	-	-	-	-	-	-	-	76
5.4	Conclusion	-	-	-	-	-	-	-	-	77

Bibliography - - - - -	78
------------------------	----

LIST OF ABBREVIATIONS

AFCHPR	African Court on Human and Peoples Right.
CIA	Central Intelligence Agency
CTED	Security Council Counter-Terrorism Executive Directorate
CTITF	Counter-Terrorism Implementation Task Force
ECHR	European Convention on Human Rights
EU	European Union
ICCPR	International Convention on Civil and Political Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
IHRL	International Human Rights Law
SC	Security Council
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCCT	United Nations Counter Terrorism Centre
US	United States

TABLE OF CASES

Bensayah vs Bosnia & Herzegovania (4 April 2003) case no CH/02/94 999
Bensayah vs Bosnia & Herzegovania (4 April 2003) case no CH/02/94 999
Blanco Abad vs Spain, CAT Communications 56/1996-14 May 1998 & 8.2
Blanco Abada vs Spain (1998) Op.cit, S.8.88
Boundellea and others vs Bosnia & Herzegovania & The Federation of Bosnia and Herzegovania (11th October 2002, case nos. CH/02/5679ch/02/8689 CH/02/8690ANDch/02/8691 para 236 to 267
Chahal vs United Kingdom (224/4/93) (1996) EHCR 54
Chahal vs United Kingdom (224/4/93) (1996) EHCR 54 (15 November 1996)
Dimtrijevic vs Servia and Montenegro CAT Communication No.27/2002/24
Dimtrijevic vs Servia and Montenegro CAT Communication No.27/2002/24 November, S.4
Galec vs Turkey 1998 Case No. 54/1997/838/44 para 71
Hamdan vs Rumsfeld 548 US 557 2006
Ireland vs United Kingdom Euro H. HR. Series A- No.25 para 167
Kelly vs UK 1930, Application No. 17579/90 DADSL
Lawless vs Ireland 1961 1 EHRR 15, para 28, McBradi vs. U.K. 1993 1 EHRR 1 para 2
McCann vs Uk 2008 ECHR 385, para 213
Nachova and others vs Bulgaria 2005 Application Nos.43579/98 para
Nicaragua vs United States of America (1986) I.C.J. 14
Ogurz vs Turkey 1999 ECHR para 83
Paez vs Sweden, Committee against torture no.39/1996, 28/04/1997 para 145
Parrot vs. Spain; CAT Communications No. 6/1990 May 1995 & 10.4
Prosecutor vs Tadic (judgement) case No. IT-94-/-A38ILM 1518,
Prosecutor vs Auto Furunzije judgment, international criminal court for former Yugoslavia (ICTY) 15-95-17/1-A, 21 July 2000
Prosecutor vs Auto Furunzije judgment, international criminal court for former Yugoslavia (ICTY) 15-95-17/1-A, 21 July 2000
Ristic vs Yugoslavia, CAT Communication No. 13/1998 11 May 2001 & 9.5; Blanco Abad vs. Spain (1998) Op.cit, S.8.8

TABLE OF STATUTES

International Covenant on Civil and Political Rights (1966)
Universal Declaration on Human Rights (1948)
Fourth Geneva Convention (1949)
European Convention on Human Rights (1953)
Articles Responsibility of States for Internationally Wrongful Acts
Draft Articles Responsibility of States for Internationally Wrongful Acts
Draft Articles Responsibility of States for Internationally Wrongful Acts.
Tehran World Conference on Human Rights,(1968).
UN Security Council Resolution (1566).
United Nations Convention relating to the status of refugees (1951).
United Nations Security Council Resolution (1368)
United Nations Security Council Resolution (1373)
United Nations Security Council Resolution (1368)

ABSTRACT

International Human Rights Law provides adequate safeguard and protection against Human Rights violation even in times of Public Emergency which threatens the life of a nation such as when a state faces the threat of continuous terrorist attack. On the other hand, the problem of terrorism which has gained notoriety since after the 9/11 attacks in America has impacted heavily on international law, particularly international Human Rights Law. This research thus addresses a few of these legal problems such as those relating to non-derogable rights, the Ticking Bomb Theory and the principle of state responsibility. To contextualize and analyze these problems properly in the light of the topic of research, this research identified some research problems such as; whether State Parties are justified in acting outside the provisions of the International Covenant on Civil and Political Rights especially the Article 4 which provides for the adequate safe guards and protection against human rights violations in times of public emergency which threatens the life of a nation; Whether also, the fear of imminent terrorist attacks or a credible terrorist plot can serve as a justification for the re introduction of torture as a permissible interrogative technique on certain hardened terrorists. This research examined the arguments relied upon by some states , particularly the US in justifying measures taken by them to combat terrorism outside the provisions of the International Human Rights Legal Framework. It also examined critically the Ticking Bomb theory and certain international conventions prohibiting the practice of torture as an interrogative tool with a view to determining the legality or otherwise of it. The research employed a doctrinal method of research throughout the entire work which include online resource materials, books journals, Newspapers Articles, Reports, Conference papers, Case laws and statutes both of which constitute primary and secondary sources of law. On the whole, this research found amongst other things that there is a lack of adequate international regulatory safeguards that is supposed to ensure proper oversight and control of military operations especially with respect to measures taken by states parties in combating terrorism. It also found that there is a lack of transparency in implementing counter terrorism measures amongst state parties, especially by the conspicuous ways state parties deliberately neglect or ignore the responsibility to investigate facts and allegations relating to human rights abuses in the course of enforcing counter terrorism measures. It was also discovered that the ticking bomb theory provided no valid justification for the selective use of torture in fighting and preventing terrorism. In the light of its findings, this research also thus recommended inter alia for the provision of a more effective and better monitoring structure and also a better regulatory safe guards and protection to ensure proper oversight and control of military operations of state parties and their Secret Service Agencies. It also recommended the promotion of transparency in implementing counter terrorism measures and the empowerment of international courts and quasi-judicial committees like the Human Rights Committee to ensure the proper enforcement of the accountability of states parties with respect to cases of Human Rights abuses. Lastly, it recommended an absolute ban on the use and practice of torture in line with the current standard of international law and the subsisting international human right mechanism

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

Since the aftermath of the 9/11 attacks in New York and Washington in 2001, there has been an increase in both the frequency of terrorist attacks around the world and the counter measures employed by states to combat terrorism. But some of these counter measures employed have violated certain norms of international law especially those norms of International Human Rights Law relating to non derogable rights.

International Human Rights Law provides adequate safeguards and protection against Human Rights violations even in times of public emergency that threatens the life of a nation such as when a state faces the threat of continuous terrorist attacks.

Despite the flexibility built into the International Human Rights Law and the permissible measures which allow states to limit and derogate from certain rights in times of public emergency, some states, notably the United States, have continued to operate outside the framework of the International Human Rights Law with impunity and at times with allusion to different moral and legal arguments to justify their position.

These include the legal arguments for justifying the current practice of targeted killings and drone strikes resorted to by some states to fight terrorism, and the doctrine of the use of force in international law as it relates to cross border attacks directed toward terrorist elements operating within the territories of another state and their implication on Right to Life, the ticking bomb theory and the justification canvassed by its proponents and whether such reasons qualify as exceptions to the absolute prohibition of the use of torture under International Law and lastly the policy of transferring terror suspects to countries where they face the risk of torture and abuse.

In the light of its findings; this research thus, recommends inter alia for the provision of a more effective and better monitoring structure and also a better regulatory safe guards and protection to ensure proper oversight and control of military operations of state parties and their Secret Service Agencies. It also recommends the promotion of transparency in implementing counter terrorism measures and the empowerment of international courts and quasi-judicial committees like the Human Rights Committee to ensure the proper enforcement of the accountability of states parties with respect to cases of Human Rights abuses. Lastly, it recommends an absolute ban on the use and practice of torture in line with the current standard of international law and the subsisting international human right mechanism

1.2 Statement of the Problem

Since the end of the Second World War and the tensions of the Cold War in the late 1990s, the International Political System has not witnessed a problem more serious than Terrorism.

The problem of terrorism touches on several key aspects of the International Law notably; Human Rights, The Use of Force under International Law, The absolute prohibition against Torture etcetera. This research particularly focuses on some of these problems, such as those especially relating to non derogable rights, the ticking Bomb Hypothesis and the use of force against non state actors operating within the territory of another state. Thus to effectively address the research topic, the following research questions are raised.

1. Giving the enormity of the scale and savagery of the 9/11 attacks and other serious terrorist attacks which the world have been witnessing since 2001, whether states are justified in acting outside the provisions of The Covenant on Civil and political Rights, especially Article 4 which provides for adequate safe guards and protection

against Human Rights violations in times of public emergency which threatens the life of a nation.

2. The International Covenant on Civil and Political Rights has made the prohibition on torture and consequently the Right of Non Refoulement an absolute Right. These twin Rights are often regarded ‘erga omnes’ which means a owed to the whole world. They are now regarded as peremptory norms of international standards from which no derogations are allowed. However, the emergence of the Ticking Bomb argument which became popular after the 9/11 attacks now seeks to justify the selective use of terrorism in so called exceptional circumstances of terrorism. Thus one of the research question considered in this work is whether the fear of an imminent terrorist attack or a credible terrorist plot can serve as a justification for the re introduction of torture as a permissible interrogative technique on certain hardened terrorist suspects.
3. Article 2 (4) of the United Nations Charter Prohibits the Use of Force against the territorial integrity of other states except in cases set out in Article 39, 42,43 and 51 of the Charter However, since the 9/11 terrorist attacks, the activities of non state actors operating within the territorial bounds of sovereign states have increased both in frequency and lethality. Hence in the light of the increasing threat posed by non states terrorist groups operating within the territory of certain sovereign states most of whom can claim protection from extra territorial attacks under Chapter VII of the UN charter, whether states can rely on the justification of terrorism and the principle of state responsibility to launch punitive military attacks on the territory of states perceived as providing safe haven to terrorist groups or states who have shown lack of capacity to deal with such threat.

1.3 Aim and Objectives of Research

This research will access, and analyze the impact of some counter terrorism measures especially after 9/11 by examining how such measures have impacted on some non derogable rights guaranteed under international law i.e. Right to life, prohibition of torture and right of non refoulement.

To achieve this aim, the research will;

- i. Examine the arguments relied upon by some states, particularly the United States in justifying measures taken to combat terrorism outside the provisions of The International Covenant on Civil and Political Rights when those measure violates non derogable fundamental rights such as The Right to Life and Prohibition against Torture. A particular case of the use of drones against terrorist targets will be examined
- ii. Examine critically the Ticking Bomb Theory viz a viz the provisions of certain International conventions prohibiting the Use of Torture as an unacceptable interrogative technique with a view to addressing the legality or otherwise of its application in Terrorism cases.
- iii. Consider critically the justification for the use of force against terrorists operating within the territory of other states and its implication on the International Principle of State Responsibility and Violation of Human Rights particularly non derogable rights

1.4 Scope of Research

This research is limited to terrorist events occurring after the 9/11 terrorist attacks. It concentrates mainly on the measures employed particularly by the United States in conducting its War on Terror after the 9/11 terrorist attacks. This research work limits itself to certain provisions of international Conventions and treaties addressing the human rights violations. In discussing human rights violations viz a viz the counter terrorism

measures employed by states, it is delimited to analyzing the impact of such measures on non derogable rights.

1.5 Justification

Since the aftermath of the 9/11 attacks in New York America in 2001, there has been an increase in both the frequency of terrorist attacks and the counter measures employed by states to combat terrorism. However, some of these measures have violated certain norms of international law especially those norms of International Human Rights Law relating to non derogable rights.

From Pakistan to Afghanistan to Yemen and Somalia, America's drone program and policy of targeted killings of so called terrorists anywhere and everywhere in the World has sparked debates on whether it is justifiable for a state to hide under the vague and insubstantial coinage of War on Terror to violate the territorial sovereignty of other states for the purpose of taking out terrorists. A case in point was the killing of Osama Bin Laden in 2011. To underscore the seriousness of this problem, Between 2004 to 2015 in Pakistan alone, US drone program was estimated to have killed between 2,489 to 3,989 people mostly women and children and innocent people¹. In Yemen between the same periods, US drone strike killed a total of between 492-725 people including women and children. There have been similarly high figure of casualties reported and documented by the Bureau of Investigative Journalism in both Somalia and Afghanistan².

Terrorism is a global problem which transcends territorial borders. With modern advancement in technology it is now easy for terrorist to plan and carry out attacks and move freely from one country to another. The 9/11 attack thus marked a new phase in the global fight on terror. In the early days of America's military operations against the Taliban and Al-

¹*Drones War-The Bureau of Investigative Journalism* (2015) retrieved on April 6th, 2016 at 1:24pm from <http://www.thebureauinvestigates.com>.

² *ibid*

Qaida in Afghanistan in 2001, several fighters were captured on the battlefield of Afghanistan and transported to a prison facility called Guantanamo Bay (GTMO) where they were held under the status of unlawful combatants. Many of the terror suspects were reportedly tortured and subjected to cruel and inhuman treatments, I.e. Water boarding techniques, Sleep deprivation etc. some of the detainees however were later secretly transferred to countries where they face the risk of torture and even summary execution. Majid Khan³, a high value al Qaida detainee held in Guantanamo in 2003 and who later became a government cooperating witness said while in detention in GTMO interrogators poured ice water on him naked and repeatedly touched his “private parts”, he also said interrogators, some of whom smelled of alcohol, also threatened to beat him with a hammer, baseball bats, sticks and leather belt. President Bushes’ administration encouraged the use of these tactics often referred to as “enhanced interrogation techniques.

What is most worrying is that the perception of the public towards the practice of torture is fast changing towards one of acceptance. In a BBC survey of 27,000 people in 25 countries in October 2007, it was reported that more than one of three people in nine countries, including America, considered a degree of torture acceptable if it saves lives⁴. Another poll in 2005 by the Pew Research Centre found that nearly half of Americans thought the torture of suspected terrorists was sometimes justified⁵.

The ticking bomb hypothesis has often been cited as the ultimate justification for torture. Both the International convention on torture and the (CAT) International Covenant on

³ Rohdhe. D. (2015, June 2) Detainee alleges CIA sexual abuse, torture beyond Senate findings. *Reuters*. Retrieved April 6th 2016 at 3:45pm from <http://mobiles.reuters.com/articles>.

⁴ *BBC News special reports, one third support ‘some torture’* (2006). Retrieved April 6th 2016 at 3:54pm from <http://news.bbc.co.uk/2/hi/in.../6063386.stm>

⁵ *Americans have mixed views on use of torture in fighting terrorism/ Pew Research Center*. (2005). Retrieved April 6th 2016 at 4:03pm from <http://www.pewresearch.org/.../americans-view>

Civil and Political Rights (ICCPR) is absolute in prohibiting the use of torture under any circumstances.

1.6 Methodology

This research will employ a doctrinal methodology of research which include; online resource materials, books, Newspaper articles, Case Laws, Statutes and International Legal Instruments which constitutes both primary and secondary sources.

1.7 Literature Review

A review of the literatures and extant laws on the subject matter of this research is imperative in order to lay the necessary foundation for this study. In the course of this research, several books were reviewed.

This review opens with the seminal work of Heinz and Micheal; the international fight against terrorism and the protection of Human Rights.⁶ This work sets the tone for the present research and provides it with the necessary background and compass to achieve the task it sets out to achieve as it focused on the international efforts to combat terrorism in the post 9/11 era by highlighting some of the critical issues and challenges which the global war on terror projects on the international system of human rights as entrenched under international law.

The work is divided into two parts headed respectively as; the international fight against terrorism and security policy and Human rights. While the first chapter of the paper is instrumental in providing ideas for the general background of this work, such as taking a critical look at the problem of defining the concept of terrorism and the lack of comprehensive definition thereof, It is the second part that is most germane to this work. The second part of the paper looks at the connection between security policy and human

⁶ Wolfgang F. and Arand M. (2005) *The International Fight against Terrorism and Protection of Human Rights (A Study) with recommendation of German Parliament* (ed) German Institute of Human Rights.

rights and considers the traditional response of USA, NATO and the EU in the fight against terrorism which supports the position of this research. According to the work, US refer to the task of fighting terrorism mainly as a military affair which goes hand in hand with their explicit willingness to use force anywhere.

This research thus builds on this assertion by narrowing down the American's secret drone campaign and how its practice in regions where there are no active conflict violates the fundamental rights to life as guaranteed by the international covenant on civil and political rights, the United Nations Declaration on Human Rights and other international human right instruments.

Also seminal to the object of this research is the work of the Danish Institute for Human Rights titled; Practical Guidance paper on counter terrorism and human rights.⁷ Soholm and Kessing provides in this, a conceptual analysis of fundamental rights from the angle and perspective of what is now known as the International Bill of Rights i.e. the Universal Declaration of Human Rights (1948) (UNDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Political Rights including its optional protocol.

The paper is divided into two parts. Part A and Part B; the part B is divided into four chapters. On the whole, the paper provides a detailed analysis on key areas which this research dwells upon such as in chapter 7 which focused on the criminal prosecution of terrorist suspects especially arrest, detention and also investigation and interrogation method and evidence collection from which this research borrows in addressing and discussing the prohibition of torture vis a vis the ticking bomb theory.

⁷ Sohm I. & kissing p. (2012) *Practical Guidance Paper on Counter Terrorism and Human Rights Danish Institute for Human Rights* . Retrieved from <http://um.dk/.../> Danida / ../ counter terrorism and human rights (PDF) on 25th January 2016 ,

On the aspect of both the definition and history of terrorism, without which a research on terrorism will be incomplete, the work of Gerard and Blin titled the History of Terrorism⁸ was reviewed. The book is an extensive and intensive discourse on the concept of terrorism and its historical development through time from around antiquity to Al-Qaeda.

The work of Seth, Curtis and Waterman on terrorism, identity theory and perspective⁹ is another work reviewed. The research provides a conceptual analysis into the study of terrorism and highlights fundamental errors often made by the Western government which limits their ability to understand the roots and underpinnings of terrorism; one that precludes a full perspective understanding of its motives and goals. The work argues that to deal effectively with the problem of terrorism, it is essential to attempt to understand the terrorist acts from all perspective and only in that way can one design responses that address the roots of terrorism rather than responding to its expression in specific, often dramatic acts of violence. The work is relevant to this research in that it provides the necessary sociological understanding to the problems of terrorism and the kind of response it has so far triggered by the west.

David in his book Counter Terrorism and Human Rights¹⁰ presents a fundamental question which is often a recurring theme of any research on terrorism. It poses the fundamental question of: “what is the price of countering terrorism”? Although modern day terrorism seen as an artifice by malevolent individuals in groups demands urgent collective action to counter it, it however holds in it a real danger of eroding our freedom and elemental human rights.

⁸ Chaliand, G. & Blin, A (ed) (2007) *The History of Terrorism from Antiquity to Al Qaeda* (Pulver K. & Browner J) University of California press, Berkeley Los Angeles, London.

⁹ Schwartz, J. Dunkel, S. & Waterman, S. (2009) *An Identity Theory Perspective*. Retrieved from <http://sethschwartz.info/.../Identity and Terrorism PDF> on 17th January 2016 12: 10 pm

¹⁰ David, J. (2009) *Counter Terrorism and Human Rights*. Routledge press

The book attempted to clarify and disentangle some of the main counter terrorism problems, such as finding balance between operating strategies and programs and protecting human rights. It is thus very relevant and helpful to this research as it provides vantage perspective to analyze the concept of counter terrorism against the backdrop of International Human Rights. Chapter two of the book however, takes a hard look at the basic human rights agreed to in various international human rights instruments i.e. UNDHR, ICCPR etc.

Sudden justice; American's Secret Drone War¹¹ is another book reviewed for this research. The central theme of the book addresses a key topic which forms one of the two main pillars of this research. The book traces the growing use of armed drones from the most ad hoc mission after 9/11, to their gradual acceptance in the wars in Iraq and Afghanistan before spreading "beyond the conventional battle field" to places like Somalia and Pakistan. More appositely, Woods examines multiple legal and ethical issues that surround the drone war including the question of targeted killings, asymmetric warfare and civilian casualties. As a compliment to Wood's good effort, this research attempts to view the theme of Wood's book from a legal aspect, viz a viz the targeted killing of terrorist suspects in areas where there are no evidence of existing conflict. This research thus blends a certain aspect of Wood's work with a new research effort which focuses more on the imperatives of international law standard for carrying out justifiable drone war with minimal damage to the sacrosanct concept of human rights as guaranteed under international law.

William M. in his book; Drones, Data and Illusion of perfect Warfare¹² also considered the US Drone Warfare from September 9/11 to 2015. The author argued that at the time of the 9/11 attacks, the US military operated fewer than 200 unmanned drones today. However, that number had ballooned to roughly 12,000. In 2001, drone attacks totaled 22,000

¹¹ Chriswoods, (2005) *Sudden Justice; American's Secret Drone War*, oxford university

¹² Arkin M. (2015) *Unmanned; Drones, Data and the illusion of a perfect War*. Little Brown & Company

combat flight hours. A decade later, the same measure had escalated to 550,000. Indeed the US had massively expanded the drone program since 2001, from 2001 to 2013 available data shows that government funding for drones and other unmanned systems increased from 350 million to well more than \$5 billion a year.

Williams concluded that drones are the ultimate disruptive technology, their dynamic and multi-faceted functionality created an unequal degree of risk and opportunity. William's work is seminal to the objective of this research which is in part intends to show that Americans drone program and strategy for dealing with terrorists threat is a national policy used at will and with little regards for international standard of human rights.

Still on Drones and targeted killings, John and Sarah in their book titled; *Drone Warfare*¹³ discusses the legal, moral and political questions borne out of the rampant use of armed drones during the last decade. Much like David, Woods and Williams, it begins with a survey of the rapid rise of the use of armed drones, from the first covert, CIA attack in November 2011, until the present. Its central theoretical arguments are organized into three neat sections on the politics of drones. It attempts to look however, at some positive sides of the use of drone such as, minimizing the domestic cost of warfare both in economic terms and human cost of soldiers' lives, hence making drones a politically popular option. More importantly, John and Sarah traces the limits of what constitutes "immanent threat" which is invoked by the supporters of the use of military drones and targeted killing as a justification for use of military drones against terrorist suspects. On the whole, the book is very instructive on the divisive issue on drone warfare and much like other books already reviewed for the object of this research, offers a useful introduction into the intricate subject of drone warfare which the researcher of this work finds very helpful.

¹³ Kaag, J. & Krept, S. (2014) *Drone Warfare*. Polity press

Bowen is the author of the book titled: *The finish; the killing of Osama bin Laden*.¹⁴ The book gives a detailed account and analysis of what happened in Abbottabad in 2011. It chronicled how the operations that killed one of the world's most wanted persons at that time happened. The book provides the much needed facts and insight necessary for discussing the killing of Osama bin Laden which generated several fundamental legal question bothering on human right, precisely the non-derogable right of life. On the whole, the book is very helpful to this research although it hails the operation largely as a success story. The Abbottabad operations while representing a political and military success for the American's marks yet again a worrisome trend in American's global war on terror as this research will point out.

Fritz in his book; *Terrorism, Ticking Bomb and Torture*¹⁵, on the other hand considers some challenges which the global need to combat terrorism brought about by the 9/11 attacks in United States projected on the argument proscribing the use of torture.

While the international legal system places an absolute ban on the use of torture and condemns it in certain instances as a crime against humanity or war crime, Fritz on the other hand while demonstrating the weakness of the case against torture, seem to take the view that although torture is morally wrong, in exceptional cases, it represents the lesser of two evils. In the final section of his book, he justly devoted a section to the question of how to authorize torture and how to set limits on its use.

This research however argues in the opposite direction using logic and moral argument as well as the well-established principle of international law to debunk the assertion that torture can in certain instances be justified.

¹⁴ Bowen, M. (2012). *The finish: the killing of Osama Bin Laden*. Atlantic Monthly Press.

¹⁵ Alhoft, F. (2012) *Terrorism, Ticking Bomb and Torture*. University of Chicago Press

Torture and the Ticking Bomb¹⁶ is another book reviewed in this research. Brecher, the author, attacked the argument that torture can even be justified in extreme cases such as terrorism. He took on Alan Deshawitz (the Harvard law Professor famous for his support for the re-introduction of the systematic use of torture in criminal investigation) headlong and attempts to deconstruct the idea of a re-introduction of torture on any basis. For example, in chapter 3 of his book, he argued that whatever we think of the argument supporting torture, the consequences of legalizing interrogational torture and institutionalizing it will be disastrous as to outweigh any such benefits to be derived from doing so. This research thus aligns itself with Brecher's position and seeks to further reinforce it by proffering fresh arguments and insight to support the position.

1.8 Organizational Layout

This work is comprised of five (5) chapters. The first chapter comprises of a general introduction of the topic of research and laid the foundation for the research

Chapter two (2) mainly comprise of the conceptual clarification of key terms germane to the topic of research i.e. the meaning of Terrorism, Human Rights, Counter Terrorism, Non-derogable rights, Restricted and Unrestricted rights.

Chapter three (3) an analysis and assessment of the right to life under international law and its impact on Counter Terrorism; The chapter sets out to discuss the concept of the right to life under international law and the restrictions to the right, the available defences and exceptions to it under international law. It discussed the concept of right to life under international law and the current troubling practice of the increasing use of military drones to target so called terrorists. The defined the meaning of armed conflict and battle field under international law,

¹⁶ Brecher, B. (2007) *Torture and the Ticking Bomb*. Wiley Blackwell

the relevant applicable laws in cases of targeted killing by military drones and the status of targets. It also attempted a rich discourse of the controversies surrounding the killing of Osam BinLaden particularly its justification, legality or otherwise under the international law. Lastly, it considered the discussion on the use of force in counter terrorism and its implications on the right to life September 11, 2001.

Chapter four (4) is an analysis and assessment of the counter terrorism on the prohibition of torture, cruel inhuman and degrading treatment and non refoulement after the 9/11 attacks.

It defined torture , cruel, inhuman and degrading treatment,. It explored states obligations to protect, investigate and grant redress for torture. It also sets out a specific sub heading for analyzing and de constructing the Ticking Bomb Theory, the prohibition on torture an right of non refoulement and lastly the meaning of rendition.

Chapter five (5) comprises of the general summary of the research, findings, recommendations and conclusion..

CHAPTER TWO

2.1 Introduction

This chapter opens with the conceptual clarification of key terms such as, terrorism, counter terrorism and human rights inter alia. An understanding of these terms is central to this research. It will further examines concepts of derogable and non-derogable rights under international law, the extent of derogation permissible under international law and the principles governing the limitation of these derogable right i.e. prescription by law, in pursuance of a Legitimate purpose, the principle of necessity and proportionality.

2.2 Conceptual Clarification of Key Terms

2.2.1 Terrorism

Terrorism is a difficult word to define because it means different things to different people. There are several available definition of terrorism perhaps too numerous to track. Just to illustrate a few; the United Kingdom's Terrorism Act of 2000 which is the first of a number of terrorism Act passed by the United Kingdom define terrorism to include an act "designed seriously to interfere with or seriously to disrupt an electronic system".¹

Under its Federal Criminal Code the United States defined Terrorism and lists the crime associated with terrorism in section 2331 of Chapter 113(B) as "activities that involve violent...or life threatening acts...that are a violation of the Criminal Laws of United States or any state and appear to be intended (i) to intimidate or coerce civilian population (ii) to influence the policy of a government by intimidation or coercion or (iii) to affect the conduct of a

¹ Terrorism Act(2000), Legislative gov.uk, [http://: www.legislation.gov.uk/pge/2000/11](http://www.legislation.gov.uk/pge/2000/11)

government by mass destruction, assassination or kidnapping; and... (c) Occur primarily within the territorial jurisdiction of the United States.² The US Patriot Act of 2001 defines terrorists' activities to include "threatening, conspiring or attempting to hijack airplanes, boats, buses or other vehicles, threatening, conspiring or attempting to commit acts of violence on any protected persons such as government officials".³

The European Union defines terrorism for legal/official purposes in Art 1 of the Framework Decision on combating terrorism (2002) to include certain criminal offences set-out in a list comprised largely of serious offences against persons and property which given their nature or context, may seriously change a country or an international organization where committed with the aim of: seriously intimidating a population or unduly compelling a government or an international organization to perform or abstain from performing an act; or seriously destabilizing or destroying the fundamental political, constitutional, economic or socio structures of a country or an international organization.⁴

There have also been efforts at the regional level to define terrorism. The Arab Convention for Suppression of Terrorism was adopted by the Council of Arab Ministers of the interior and the Council of Arab Minister of Justice in Cairo, Egypt in 1998. Terrorism was defined in that convention as; any act or threat of violence whatever its motives or purposes that occurs in the advancement of any individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in

² Various definition of terrorism, www.azdema.gov/.../pdf/, see also 18 US Code 2331-Definitions-legal information institute www.law.cornell.edu/uscode/text/.../2331 retrieved November 11, 2015 at 10am

³ The Patriot Act Constitutional Rights Foundation, www.crf-usa.org/...terrorism/the-patriot-act... retrieved November 11, 2015 at 8am

⁴ Various definition of terrorism, www.azdema.gov/.../pdf retrieved November 12, 2015 at 7pm

danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize natural resources.⁵

There have also been efforts at the level of the United Nations to define terrorism both at the UN General Assembly and at the Security Council Level. The UN General Assembly Resolution 49/60 (adopted on December 9, 1994) titled “Measures to Eliminate International Terrorism” contains a provision describing terrorism as;

Criminal acts intended or calculated to provoke a state of terror in the general public; a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of the political, philosophical, ideological, racial, ethnic, and religious or any other nature that may be invoked to justify them.⁶

Similarly, the UN Security Council Resolution 1566 (2004) defines terrorism as; “criminal act, including against civilians committed with the intent to cause death, or seriously bodily injury or taking of hostage with the purpose to provoke a state of terror in the general public or in a group persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act⁷.”

A sense of how difficult it is to define terrorism can be seen in dead-locked effort of the international community to come up with a generally acceptable definition of the term currently, there are efforts to come up with a comprehensive convention on international terrorism. One of the sticking points of this attempt has been the lack of agreement amongst members state of the united nations on what should be regarded as terrorism proposal treaty which aims to

⁵ Ibid

⁶ A/RES/49/60 Measures to eliminate international terrorism, www.un.org/documents/gal.../949r060.htm retrieved November 16 2015 at 6:45pm

⁷ UN Security Council Resolution (1566), www.cfr.org/.../un-security-council-1566, November 16, 2015 at 6:35pm

criminalize all forms of international terrorism, access to funds by terrorist, access to arms and weapons of mass destructions, denying of safe to haven to terminates terrorist, etc. even though negotiation of treaty is currently underway at the United Nations General Assembly's Ad Hoc committee established by resolution 51/210 of 17 December 1996 on terrorism⁸ and the United Nations General Assembly sixth committee (legal) the negotiation are currently deadlocked and this is because there are fundamental differences over the definition of terrorism i.e. what distinguishes a terrorist organization from a liberation movement? Should the definition of terrorism include or exclude state sponsored or state terrorism?

The proposed definition of terrorism which has been on the table of the comprehensive convention since 2002 reads as follows:

“Any person commits an offence within the meaning of this convention if that person by any means, unlawfully and intentionally, causes

- a. Death or serious bodily injury to any person; or
- b. Serious damage to public or private property, including a place of public use, a state or government facility, a public transportation system, an infrastructure facility or the environment; or
- c. Damage to property, places, facilities or systems referred to in paragraph 1(b) of this article, resulting to likely to result in major economic loss.

⁸ A/RES/51/210 – The United Nations, Retrieved on November 15, 2015 from www.un.org/documents/ga/.../astr210.ht.

When the purpose of this conduct by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act”.⁹

Because of the inter-play of states conflicting interests, it may be very difficult, if it is at all possible for state to resolve on a generally acceptable definition. In the words of Carlos Diaz-Paniagua, the coordinator of negotiations on the proposed convention on terrorism, the proposed definition must have the necessary “legal precision, certainty, and fair-labeling of the criminal conduct all of which emanate from the basic human right obligation to observe due process”.¹⁰

However, despite the row over a comprehensive generally acceptable definition of terrorism which states have been plunged, there appears to be a general understanding and acceptable consensus on what should constitute terrorism.

Take for example the approach taken by two Dutch researchers from the University of Leiden, Alex Schmid and Albert Jongman¹¹ they gathered 109 academic and official definitions of terrorism and analyzed them in search for main components. They found that the element of violence was included in 83.5 percent of the definitions and political goals in 65 percent, while 51 percent emphasized the element of inflicting fear and terror. Only 21 percent of the definitions mentioned arbitrariness and indiscriminate targeting, and only 17.5 percent included the victimization of civilians, non-combatants, neutrals or outsiders. A closer appraisal of all the assortments of definitions of terrorism available reveals that certain elements are key to almost all the definitions namely; acts of violence done to cause, death, serious injury to persons,

⁹ United Nations General Assembly, Report of Ad Hoc Committee established by the General Assembly resolution 51/2010 of 17 December 1996, sixth session (28 January, 1- February 2002) Annex II, art 2.1

¹⁰ Barnidge, B.(2007) *Non State Actors and Terrorism: Applying the Law of State Responsibility and due diligence principle*. T.M.C. Asser press. P.17

¹¹ Alex, P. & Al Jongman. (1988) *Political Terrorism; New guide to actors, authors, concept, data base, theories and Literature*. New Brunswick (USA) West Hemisphere. Pp. 5-6

sometimes combatants, sometimes civilians and sometimes public property often to inspire fear or terror which is not necessarily an end itself but a tool to compel the government to do or abstain from doing something.

2.2.2 Human Rights

Human rights are commonly understood as those rights inherent to all human beings regardless of race, tribe, nationality, gender¹² or status. Human Rights are protected by International law. They are expressed in treaties, customary international law and international judicial decisions.

An important ingredient of human right is that they are not rights created by law. Human rights are inalienable rights of all humans. The inalienability and universality of this right is captured in Thomas Jefferson's words thus; "we hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights, that amongst these are life, liberty, and the pursuit of happiness".¹³

Some of the characteristics of Human Right are as follows:

- a. Human rights are founded on respect for the dignity and worth of each person
- b. Human rights are universal; they apply equally and without discrimination to all people;
- c. Human rights are inalienable, in that no one can have his or her rights taken except in certain special and justifiable situations. This is often for public good or other legitimate purpose or reasons i.e. where a person is found guilty of a wrong under the law;

¹² Human Rights: A Basic Handbook for UN Staff, office of the High Commissioner for Human Rights (1997) Retrieved November 28, 2015 from www.ohchr.org/HRhandbooken.pdf

¹³ Brainyquotes.com/quotes/quotes/thomasreff157212.html 28 November, 2015 3:25pm

d. Human rights are indivisible, interrelated and interdependent¹⁴

The obligations to protect promote and ensure the enjoyment of human rights is the prime responsibility of the state. This includes providing effective remedies to persons whose rights have been found to be violated.¹⁵ These remedies include: judicial restraint to prevent further violations, and in some cases offer of apology and compensations.

The full collection of international human rights instruments consist of more than one hundred treaties, declarations, guidelines and recommendations which together set-out international human rights standards. Some of these treaties and declarations focus on specific rights. A collection of these body of laws; treatise, declarations, guidelines, principles and recommendation join together to form what is known as; Human Rights Standards.

The adoption of the Universal Declaration of Human Rights in 1948 was the first step towards the progressive codification of international human rights.¹⁶ Some of the most notable international instruments include;

- a. The International Bill of Human Right of 1946 which collectively comprise of the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (1966) and Universal Declaration of Human Rights 1948.
- b. International Covenant for Elimination of all form of Racial Discrimination (1965).
- c. International Covenant on the Elimination of Discrimination against Women (1979)

¹⁴ Human Rights: A Basic Handbook for UN Staff, office of the High Commissioner for Human Rights, retrieved from www.ohchr.org/HRhandbooken.pdf. November 28, 2015, 3:34pm

¹⁵ Ibid, p.16

¹⁶ Ibid, p.21

- d. Covenant against Torture and other Cruel, inhuman or degrading treating or punishment (1986)
- e. Covenant on Right of Child 1989
- f. Declaration on the right to development 1986

The Universal Declaration of Human Rights is the umbrella instrument which laid the foundation for all other subsequent treatise and declarations on human right. It recognizes the inherent dignity of all the members of human family as the foundation of freedom, justice and peace in the word.

S.1 of the UNDHR states: “All human beings are born free and equal in dignity and rights. They are endowed with reasons and conscience and should act towards one another in a spirit of brotherhood”¹⁷.

There are also some human rights bodies set up at the regional level to assist in upholding human rights standards. These regional bodies are also offshoots and the UNDHR. Some of the regional bodies set up include: the Africa Commission on Human and People’s Rights, Inter American Commission on Human Rights, Arab Human Rights Committee etc.

Although for the purpose of this research topic, the world human right will mostly refer to political right and will be specifically concentrated on the right to life and freedom from torture, cruel and inhuman treatment, it must be understood that human right is indivisible

¹⁷ S.1 Universal Declaration on Human Rights, retrieved from [http://: www.onniglof.com/udhr/index.html](http://www.onniglof.com/udhr/index.html).
November 2015 28, at 4:46pm

whether they are social rights, cultural rights or political rights. Hence all human rights interdependent interconnected.¹⁸

Human Right applies both in peace time and in war times. At least in times of armed conflict, basic human rights must be guaranteed along with all the applicable humanitarian rights.¹⁹ On the whole, the concept of human rights is integral to the modern concept of global peace and security and the United Nations system. With terrorism now occupying the front burner of both national and international issues, the very idea of how human rights can be preserved and respected is dominating international discourse. Terrorism poses a direct threat to human rights. The activities of terrorists directly affects some of the most basic and most essential human rights especially the right to life. It also indirectly affects other forms of rights such as right to development, right to dignity of persons²⁰, due process, and freedom from slavery and servitude²¹. Similarly, some counter-measures taken by some government authorities against terrorists also sometimes violate some human rights i.e. right to privacy, freedom of government, freedom of speech and press, freedom of association and even freedom from discrimination which sometimes result from unfair profiling of terror suspects.

The former UN Secretary General Kofi Anan once rightly warned against making human rights yet another victim of terrorism. During the first open debate of the Security Council on counter terrorism in January of 2002, he told the Security Council to “make sure that the counter

¹⁸ Human Rights Basic Handbook, Op.cit, p.21

¹⁹ Tehran World Conference on Human Rights,(1968) retrieved from [https://en.m.wikipedia.org/.../world conference on Human Rights](https://en.m.wikipedia.org/.../world_conference_on_human_rights) on November 28, 2015 at 4:34pm

²⁰ Dearden, L. (2015) ISIS Jihadi Bride claims forced sex with Yazidi girls is never rape because Koran condones it. *The Independent* retrieved on November 28, 2015 4:50pm from <http://www.independent.co.uk/.../isis-jihadi-bride>.

²¹ Shubert, A. & Naik, B. (2015, October, 6) ISIS ‘forced pregnant yazidi woman to have abortions’. *The CNN freedom Project*. Retrieved November 29, 5:43 pm from <http://www.cnn.com/pregnant-yazidi-women-forced-to-have-abortion>.

terrorism measures others pretext to do so” further speaking at an open debate of the counter terrorism council (a body set up to see to the implementation of the resolution 1373) in October of 2002, he further re-iterated that to pursue security at the expense of human rights is short sighted, self-contradictory and in the long run self-defeating”. Similarly, in the very first paragraph of his 2002 report on the work of the CTC, he stated thus again “I believe firmly that the terrorist menace must be suppressed, but states must ensure that counter-terrorist measures do not violate human rights.²²

2.2.3 Counter Terrorism and CounterInsurgency

Counter terrorism literally means political or military activities designed to prevent or thwart terrorism. Functionally, counter-terrorism is a difficult concept to define. According to Paul Wilkinson “there is no universally applicable counter-terrorism policy for democracies”.²³ This may be because every conflict involving terrorism has its own unique characteristics²⁴.

Counter-Terrorism is defined in the US Army field manual as “operations that include the offensive measures taken to prevent, deter, pre-empt and respond to terrorism.²⁵ Generally, counter-terrorism is also referred to as anti-terrorism. It can be defined broadly as a policy or strategy which incorporates the practice used by governments to combat and prevent terrorism. These may include; overt military campaign, intelligence efforts, programs and other broad base measure to deal with the long term and short term effect of terrorism.

²² Human Rights Watch. Hear no evil see no evil.(2013) Retrieved December 1st , 2015 8:45pm from <https://www.hrw.org/legacy/backgrounder/un/2004/un0804//2.htm>.

²³ Wilkinson, P. (2001). *Terrorism versus Democracy; the Liberal State Response*. New York, Routledge. P. 203

²⁴ Rhineheart, J. (2010). Counter Terrorism and Counter Terrorism. *Perspective on terrorism*. Retrieved 2nd December, 2015 12:51 pm www.terrorismanalyst.com/pt/index.php/pot/article/view/22/html

²⁵ Schmid, A. (2004). Framework for conceptualizing Terror. *Terror and Political Violence* .16(2) pp. 197-221 retrieved December 3, 2015, 1:45 from <http://www.tanfoline.com>

Counter terrorism may also broadly speaking include counter-insurgency efforts²⁶ while counter-insurgency is often sometimes taken to also mean counter-terrorism, on closer inspection, they are two different words and they are not necessarily mutually reinforcing.²⁷

Counter-terrorism and counter insurgency are two different doctrines and it is important to understand the fine difference between the two. There are a number of noticeable differences between the two strategies. It is the essential to identify the major differences between the two concepts. A table is provided hereunder to identify the major differences between the two concepts.

COUNTER TERRORISM AND COUNTER INSURGENCY²⁸

S/NO	COUNTER INSURGENCY	COUNTER TERRORISM
1	Relies on the military/army	Uses mainly civil law enforcement agents, i.e. the police, secret-intelligence, immigration, coastguards, swat team, special forces, civil defence etc
2	Relies on kinetic force, Heavy military deployment, hardware equipment	Use mainly soft power, relies on less use of weapons
3	Operations are physical, open and campaign	Operations are shadowy, behind the

²⁶ Rhineheart, J. Op.cit

²⁷ Schmid P. & Singh R. (2009) Measuring Success and Failure in Terrorism and Counter Terrorism US Government Metrics and the Global War on Terror Regional and Multilateral Perspective on Counter Terrorism, Rusi books.

²⁸ Rhineheart, J. (2010). Counter terrorism and Counter Insurgency. *Perspective on Terrorism, a journal of Terrorism research initiative and Center for Terrorism and Security Studies*. Vol 4, No.5. Retrived April 6th, 2016 at 6:50pm from [http://www.terrorismanalysis.com/.../...](http://www.terrorismanalysis.com/.../)

	like engaging and destroying targets	scene and more stealth,analyzing, investigating, arresting, and in some cases interrogating, more of prevention
4	Easy to set timeframe, determinable	Long and sustaining, intangible and difficult to quantify results
5	Results determined by physical superiority of weapons, soundness of battle strategies, military training etc	Result determined/guaranteed by institutional efficiency, policing efficiency, inter-agency corporations, and vigilance, monitoring and tracking ability.
6	Success measured by numbers or size of territories captured, enemy troops killed or taken as prisoners, number or size of weapons and equipment's recovered	Success measured by numbers of attacks on soft targets prevented
7	It is hard approach and relies heavily on the use of force	Soft approach, flexible and can alternate between hard and soft involves measures to address root cause of the problem such as; economic development assistance, counter-radicalization, addressing poverty, prolonged unresolved conflicts, de-radicalization, targeted

		killing drone strikes etc
8	Centralized in approach, determinable limits of operation. Enemy is visible and may result to guerrilla tactics. Enemy engages in sustained battle enemy bears arms openly	Approach is diffused, insubstantial mainly due to the invisibility of the enemy who operate in the shadows and under the cloak of civilian population. Enemy doesn't bear arms openly
9	Less cost effective because it involves military presence and sometimes military build-up such as personal equipment's and heavy weaponry all of which are very expensive, may also involve responsibility for community service and welfare for population	More cost effective because it relies more on the use of technology such as, computer, trackers, global satellite systems, drones etc all of which are force multipliers.

It must be noted that in this research, the word “counter-terrorism” will be used interchangeably to mean insurgency. This is because the main thrust of this research is to assess state responses terrorism since 9/11 and the effects they have had non-derogable rights specifically right to life and freedom from torture.

By this token, we can categorize American's drone program as a counter-terrorism efforts and their invasion of Afghanistan in 2001 as a counter-insurgency both of which formed their response to the September 11 2001 terror attacks. American's Global War on Terror had several fallouts, for example it brought about Guantanamo Bay (GITMO), the maximum prison facility

sited near the tip of Cuba, a place facing Haiti and Jamaica, and nestling on a place once called Oriente Province.²⁹

Similarly, the efforts of the Nigerian government directed at extinguishing Boko Haram can be largely seen as counter-insurgency. A very important point to note also is that when it comes to holding states responsible for human rights violations, the international community i.e. the UN and other watchdog Human Rights Organizations like Amnesty International do not differentiate between Counter-Terrorism and Counter-Insurgency. The differentiation in this research is to enable reader to appreciate the nuances between the two approaches.

2.2.4 Derogable and Non-Derogable Rights

Under the international human rights law, there are two categories of civil and political rights namely; those from which derogation can be allowed in times of public emergency which threatens the life of a Nation³⁰ and those from which no derogation is allowed even in times of public emergency.³¹

To understand these rights, there is a need to take a close look at the International Covenant on Civil and Political Rights (ICCPR). The first two parts of the ICCPR comprising articles 1 to 5 are an important set of what can be described as provisions of an overarching or structural nature. Article 1, which forms part 1 guarantees the right of self-determination different from other rights in the covenant because the right is ascribe collectively to a people rather than an individual. It is also the only right that is common to both the International

²⁹ Guantanamo Bay. (2015). Naval base New York Times (CUBA) Retrieved December 4, 2015 from http://www.nytimes.com/.../guantanamo_bay

³⁰ S.4 International Covenant on Civil and Political Rights (1966) retrieved December 4,2015 at 8:32am from <http://ohchr.org/en/professionalinterest/pages/ccpr.aspx> 4th December

³¹ Article 4(2) Ibid

Covenant in Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.³²

Part II Comprises of Articles 2 to 5. Article 2 is one of the fundamental cornerstones of the ICCPR and it provides that state must respect and ensure the rights of ICCPR to all persons within its jurisdiction, of course with some exceptions such as right to vote which may only be guaranteed to citizen.³³

Part III is the crux of the covenant which we are mainly concerned about in this work. This section lists substantives rights and fundamental freedoms guaranteed by the treaty. These are the articles that are commonly invoked by individuals alleging that their rights have been violated³⁴. They include the following rights; article 6, right to life, article 7 freedom from torture, article 8 freedom from slavery, article 9 right to liberty and security, article 10 the right of detained person to be treated humanely, article 12 freedom of movement, article 14 right to fair trail, article 15 right from retrospective penalties, article 17 the right to privacy and family life and protection of reputation, article 18 right to freedom of thought, conscience, religion and belief, article 19 freedom of opinion and expression, article 20 the prohibition on incitement to discrimination, hatred or violence, article 21 and 22 freedom of assembly and association, article 26 equal protection of the law etc.³⁵

³² United Nations Office on Drugs and Crime (2009) *frequently asked questions on International Law Aspect of Terrorism*. Retrieved December 4th 2015 at 9:07am [https://www.undoc.org/.../terrorismandcouterterrorism\(pdf\)](https://www.undoc.org/.../terrorismandcouterterrorism(pdf))

³³ Ibid, p.95

³⁴ Ibid, p.95

³⁵ Ibid, p.95

2.2.5 Derogable and Restricted Rights

The Oxford Online dictionary defines the term “derogation” as; an exemption from or a relaxation of a rule or law.³⁶ The international human rights law allow for derogation in certain limited circumstances such as situations which threatens the life of a nation. States are thus allowed to take certain measures which derogate from certain human rights provisions especially where there a supervening reasons such as “in times of public emergency which threatens the life of a nation”.

Public emergency which threatens the life of the nation represent the only condition under which derogation from certain rights under the ICCPR IS permitted.³⁷

In interpreting the meaning and extent of derogation permissible under Article 4(1) of the International Covenant for Civil and Political Rights which is in pari-material with the European Convention on Human Rights and Fundamental Freedom, the European Court of Human Rights laid-down four criteria in considering whether a time of public emergency which threatens the life of the nation can justify der.ogation from derogable rights. The court stated that for a situation to qualify as a period of public emergency weighty enough to threaten the life of a nation, such must be;

- a. A crises or emergency that is actually imminent
- b. It must be exceptional, so that “formal” measures are inadequate
- c. The emergency must threaten the continuance of organized life the community

³⁶ Derogation. (2015) In: *Oxford Dictionary.com*. Retrieved on December 4, 8:15am from <http://www.oxforddictionary.com/definition>.

³⁷ Article 4 ICCPR op.cit p.20

- d. It must affect the population of the state taking measures. The court however appears to have subsequently accepted that an emergency threatening the life of nation might only affect one part of the nation at the time of the emergency.³⁸

Incidences that may amount to public emergency sufficient enough to threaten the life of a nation include Incidences or circumstances which threatens National Security, endangers public safety, threaten public health and Terrorism.

It must be noted that only rights that are restrictable can be derogated from human rights are inalienable. Ordinarily, they should never be denied or taken away. However, certain rights are restrictable in specific circumstances provided that the restrictions does not undermine the spirit of the right itself and that due process is followed in restricting those rights. The Right to Freedom of Association and Assembly, Right to Private life and Right to Personal Liberty are all examples of rights that can be restricted under the ICCPR.

Some of the provisions providing for derogation of some of the rights listed above contain grounds for qualifying the enjoyment of a particular right in order to protect the rights of others and for the protection of national security. For example Article 19 of the ICCPR provides;

“Everyone shall have the right to hold opinion without interference. Everyone shall have the right to freedom of expression; this right shall include from to seek and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.

Article 19(3) however watered down this right by providing thus:

³⁸*Lawless V. Ireland* 1961 1 EHRR 15, para 28, *McBradi v. U.K.* 1993 1 EHRR 1 para 2

“The exercise of the rights provided for in paragraph 2 of this article carried with it special duties and responsibilities. It may there for be subject to certain restrictions, but these shall only be such as are provided by law and are necessary”.³⁹

For a derogation of any restricted right to be lawful, it must comply with at least three conditions namely; (a) such restriction must be prescribed by law i.e. it must be written and accessible to the people which it is meant to affect, (b) it must be done in pursuance of a legitimate purpose, and (c) it must be proportional and necessary. This means that such restriction must advance an objective that bears a direct connection to the right been restricted. A rational link must exist between the limiting measure and the pursuit of the particular objective sought to be achieved.⁴⁰

2.2.6 Non-Derogable and Absolute Rights

In international law, absolute and non-derogable rights are two separate categories of rights, although both rights are often confused, the distinction is very important as it has a significant impact upon how rights are interpreted and applied in international law.

For example the right to life is not an absolute right, although it is non-derogable. What this means is that it is possible for the right to life to be limited in certain circumstances. For example, reasonable limitation in the right to life implies that a police officer to shoot a person when it is necessary to save lives or avoid catastrophic situations such as a terrorist attack. But right to life cannot be suspended even in times of public emergency which threatens the life of a nation.

³⁹ Article 19(1) and (3) International Covenant on Civil and Political Rights Op.cit, p.20

⁴⁰ Office of the United Nations High Commissioner for Human Right (2003) *Human Rights, Terrorism and Counter Terrorism* [Fact Sheet.32] retrieved on November 6, 2015 at 18:42pm from www.ohchr.org/.../factsheet32EN.pdf,

On the other hand, the right which prohibits torture, inhuman and degrading treatment is an absolute right just as it is also non-derogable. No circumstance or justification may justify the modification of the right. Further examples of both absolute and non-derogable rights include, right which prohibits genocide.

The right to be free from slavery and servitude, prohibition from prolonged and arbitrary detention, prohibition on the retrospective operation of criminal laws, right to be recognized as a person everywhere before the law and right which prohibits racial discrimination.⁴¹

Most non-derogable rights are also ergo omnes. That is; they are duties on rights owed by states to humanity. In international law, the concept of ergo omnes obligation refers to obligations that states have towards the international community as a whole. In general legal theory the concept or “ergo omnes” (meaning; in relation to everyone) has its origins dating as far back as Roman law and is used to described obligations or rights towards all.⁴² It is now understood that certain human rights are so important that they must be classed specially and States under those rights owe their duty not to the holder of those rights alone but to humanity as a whole. Such rights described as ergo omnes now include; the prohibition of torture, inhuman and degrading treatment, the prohibition of act of aggression by one state on another, the prohibition of slavery and genocide.

⁴¹ Ibid

⁴² Ragazzi, M. (1998). [A review of the article *The concept of international Obligations Erga Omnes* by Antonio, J. and Salcedo, C.] *The American Journal of International Law*. vol 92. No.4 pp. 791-793. Retrieved April 7th 2016 at 7:25am from <http://www.jstor.org/stable/2998150>

CHAPTER THREE

AN ANALYSIS AND ASSESSMENT OF THE RIGHTS TO LIFE UNDER INTERNATIONAL LAW AND ITS IMPACT ON COUNTER TERRORISM

3.1 Introduction

This chapter will set out first to define and explore the Concept of Right to Life under International Law and its exceptions, and then it will proceed to analyze and assess the relationship between the Right to Life and justification for current practice of drone strikes against terrorists, the legal meaning and the limitation of battle field in armed conflict. It will also look at the status of terrorists subjected to drone strikes and assassinations and analyze the relevant International Laws which should apply to them. It will specifically examine the legality or otherwise of the killing of Osama Bin Laden by the Americans viz a viz State Responsibility and the use of force against Terrorists under International Law.

3.2 The Concept Right to Life under International Law

The right to life is one of the non-derogable rights guaranteed under international law. It is not an absolute right and in certain circumstances, persons can be justifiably deprived of their lives. It is arguably the most important right. This is because the enjoyment of all other rights is dependent on it. Physical survival is a prerequisite for benefiting from various right and liberties enshrined in international law. For this reason, the drafters of the Universal Declaration of rights gave primary emphasis to the protection of human rights and made direct reference to everyone's right to life.¹

¹ Article 6 international Covenant on civil and Political Rights Retrieved on December 14, 10:34am from www.ochr.org/en/professionalinterest/pages/ccpr.aspx 14th December 2015

In order to grasp the full implication of the law on right to life under international law, it is important to replicate the provisions of S.6 of the Covenant on Civil and Political Rights in full.

Article 6, sub article 1, 2, 3, 4, 5 and 6 read thus;

Article 1: Every human being has the inherent right to life. This right shall be preserved by law. No one shall be arbitrarily deprived of his life.

Article 2: In countries which have not abolished the death penalty, sentence of death may be imposed only for most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the prevention and punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

Article 3: When deprivation of life constitute the crime of genocide, it is understood that nothing in this article shall authorize any state party to the present covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

Article 4: Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

Article 5: Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant woman.

Article 6: Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any state party to the present covenant.²

² *ibid.*

The word “Arbitrary” in sub-article 1 and the phrase “pursuant to a final judgment rendered by a court of competent jurisdiction” both indicate that in some circumstances or situations, it may be lawful to take lives.

Although international law is stringent in terms of the provision on right and the responsibility of states to ensure the enforcement of these rights, there are acceptable exceptions to right to life.

There exceptions are often construed narrowly.³ There are legally recognized circumstances both treaty based and under international customary law where it is lawful to use lethal force. Such situations include; self defence, arrest and prevention of escape of a suspect or quelling and suppressing an insurrection or a mutiny.

However, the amount of force used in all situations must be no more than that necessary and justifiable to achieve the required end. The phrase “absolutely necessary” provides for a stricter test than that applied when determining whether a state interference is necessary in a democratic society. The use of force must be strictly proportionate in response.

3.2.1 Restrictions to Rights to Life under International Law

Although the right to life is a non derogable right, it is however not absolute. In specific situations recognized under the law, it may be justifiable to take lives. However, such situations must not only be absolutely necessary, it must also be justifiable in the light of the objective for taking the life.

The right to life may be lawfully restricted in the following circumstances;

³ Article 2(2) European Convention on Human Rights (1953).

3.2.2 In Defence of any Person from Unlawful Violence

Self-defence or the defence of any person from unlawful violence can provide a legitimate ground upon which the life of persons can be lawfully taken. This exception is however often construed narrowly. Where the act of taking lives is being perpetrated by members of the state security forces, they will be required to supply cogent and credible evidence that they were confronted with lethal force by the assailants. It must also be demonstrated that the force employed was a matter of last resort. Thus, where it is shown that there were earlier opportunity for escape, then his act of taking a lives will not be justifiable under the law.⁴

3.2.3 In Order to Effect a Lawful Arrest or Prevent the Escape of a Person Lawfully Detained

A security officer acting within the scope of his duty may be justified in using lethal force to prevent the escape of a person who has been lawfully taken into custody. Similarly he will also be justified in using lethal force to execute the arrest of a suspect where in the course of the process he is violently and lethally attacked by the suspect.

However, the European Court has emphasized the need for proper warning to be given before potentially lethal force is used.⁵ The suspect must be given all opportunity to surrender and the use of force must be the option of last resort. On the part of the state authority, there must be a clear policy concerning when lethal force can be used.

Here are some few instances where the court has decided on the legality or otherwise of the use of force;

⁴ *McCann V. Uk* 2008 ECHR 385, para 213

⁵ *Ogurz v. Turkey* 1999 ECHR para 83

- i. The legal shooting by soldiers of suspected terrorists who drove through a check point without stopping was found absolutely necessary in the circumstances in order to give effect to lawful arrest⁶.
- ii. It was not absolutely necessary to use firearms to arrest a non-violent offender who posed no threat to anyone. Under these circumstances, the use of lethal force should be unlawful even if it means the loss of opportunity to arrest.⁷
- iii. The use of firearms where the applicant was shot several times, although not killed by officers after going through a red light has been held as a violation of right to life.⁸

3.2.4 Action Lawfully Taken for the Purpose of Quelling Insurrection

There is no established definition in international human right law of a riot or insurrection. But where hundreds of thousands of people are throwing projectiles at the security forces, this can be a justification for reliance on the use of force. However, for use of such force to be absolutely necessary, these projectiles must be likely to cause death or serious harm to the law enforcement officers. Throwing stones at fully armed and protected officers is unlikely to justify the resort to lethal force⁹.

3.2.5 The Right to Life and the Legality or otherwise of the use of Drones and Targeted Killing of Terrorists

On the 11th of September 2001, 19 militant associated with the Islamic extremist group al-Qaeda hijacked four airliners and carried out suicide attacks against the United States. Two

⁶ *Kelly V. UK* 1930, Application No. 17579/90 DADSL

⁷ *Nachova and others v. Bulgaria* 2005 Application Nos.43579/98 para

⁸ *Galec v. Turkey* 1998 Case No. 54/1997/838/044 para 71

⁹ Article 2(c)(1) European Convention on Human Rights (1953)

planes crashed into the world trade center, a third hit pentagon and the fourth crashed into a field in Pennsylvania. In total, more than 3000 people were killed.¹⁰

Following the attack, on the 20th of September 2001, President George W Bush declared war on terror also known as Global War on Terror or GWOT¹¹. By so doing, President George W. Bush became the first person to use that term.¹² However, since his declaration, the use of the term has had far reaching consequences on the understanding of the traditional concept of armed conflict as understood under international law. This has sought to blur the lines between the applicability of the international human rights law and the international humanitarian law especially as they apply to and affect actions taken by states in furtherance of the fight against terror viz-a-viz the violation of human rights as guaranteed under international law.

In 2013, President Barack Obama announced that the United States will no longer be pursuing a war on terror, as the military focus should be on specific enemies rather than tactic.¹³ Despite this declaration, the Obama Administration has continued to pursue loose ended policy of targeted killing which is only reminiscent of GW Bush's War on Terror.

After the 9/11 attacks, the United States, pursuant to its declaration of the War on Terror launched a drone program whose aim was to find and kill black-listed terrorists who have been singly adjudged as potentially dangerous to the security of United States anywhere they may be found. It was effectively a "killing program" whose sole aim is assassination. Although the United States is not the only country to have resorted to the targeted killing of high ranking terror

¹⁰9/11 Attacks Facts and Summary History.com Retrieved on the December 18, 2015, 7:33pm from [www. History com/topics/9-11-attacks](http://www.history.com/topics/9-11-attacks)

¹¹ What the "War on Terror" really is and how to fight it- truth out -. Retrieved December 18, 2015,8:05am from [http//www. Truth-out.org/.../34151-what-is the war on terror](http://www.Truth-out.org/.../34151-what-is-the-war-on-terror)

¹² Ibid

¹³ Shinkman D. (2013). *U.S. News & World Report*. Retrieved December 15, 3:58 from www.usnews.com/news/..obamaglobalwar-terror-over

suspects, the Russians have also resorted to a similar tactic in neutralizing terrorism threat from Chechen Mujahideens.¹⁴ But what distinguished American's targeted killing campaign is more principally because it has been carried out with little or no respect for territorial integrity or human right considerations.

Since September 11, the United States have developed two parallel drone program; one operated in secrecy by the CIA and the other by the US Military. Drone strikes targeting terrorist suspects pose serious threat to human rights; especially the right to life.¹⁵ Drone strikes targeting terror suspects have hit schools, weddings¹⁶ and tribal assemblies resulting in considerable civilian death.

However, the fact that civilian deaths resulted from a drone strike targeting a terrorist suspect does not *ipso facto* make such strike illegal if it's done within the ambit of the law. Such strike may be justifiable if it is carried out in an active armed conflict area to achieve a strategic military objective provided that the principle of distinction and proportionality¹⁷ as required under the humanitarian law are observed.

The US has consistently maintained that its within its right to strike any suspected terrorist on its hit list anywhere in the world, regardless of wherever they maybe as long as they pose a direct threat to the security of United States. According to President George W. Bush,

¹⁴ List of second Chechen War assassinations. (2009). Retrieved December 16, 2015 from <https://www.ligisearch.com/list...chechen> war

¹⁵ Diaz, A (2015) *Drones and targeted killings: the need to uphold human rights and international law*. In: Parliamentary Assembly, Committee on Legal Affairs and Human Rights. Retrieved December 16, 2015 from <http://www.website-pace-net/.../targetedkilling...pdf> p.1

¹⁶ Ibid

¹⁷ Office of the United Nations High Commissioner for Human Rights (2003) *Human Rights Terrorism and Counter Terrorism* [fact sheet] retrieved November 16, 2015 from www.ohchr.org/.../factsheet32EN.pdf

United State is waging a global war on terror.¹⁸ US maintains its practice of targeted killings, including lethal operations conducted with the use of drones comply with all applicable law, including the laws of war.¹⁹

United States Supreme Court have also maintained in the celebrated case of *Hamdan v. Rumsfeld*²⁰, that the United State is at war against al-Qaeda and Taliban, and the applicable laws were the laws of war, military forces, including, the use of drones could be used if consistent with laws of war.

But United States have not only carried out such targeted killings in Afghanistan alone, it has done so and continued to do so in other areas where it is not legally at war such as Somalia, Yemen and Pakistan. It has also maintained that it has the right to carry out similar strikes anywhere else because it is fighting a global war on terrorism. This open ended and subjective definition of war, battlefield and legitimate targets has continued to be a source of concern for international human rights organization. A one size fit all definition is likely to leave a lot of room for several human rights violations especially such as right as considered as very important like the right to life.

To determine whether targeted killings are justifiable in the light of the inviolability of the right to life guaranteed under international law and in the context of the United States current tactic of targeted assassination through the use of combat drones, it's important to discuss certain concepts to wit; the definition of battlefield and the meaning of war under international law,

¹⁸ Op.cit, Schmit E & Shanker T. p.37

¹⁹ Lewis, W. & Vitkowsky, J. (2011). *The use of drones and targeted killing in Counter Terrorism*. Retrieved on December 27, 2015 from [http:// www. LewisVitekowskyEngage.12.pdf](http://www.LewisVitekowskyEngage.12.pdf) p.73

²⁰ Hamdan v. Rumsfeld: 548 US 557 2006 retrieved from <https://supreme.justia.com/cases/.../557>

applicable international laws and their implication on the right to life, and the status of persons being targeted as legitimate targets.²¹

3.3 Meaning of Armed Conflict and Battlefield under International Law

The United States has consistently maintained that it is at war with Al-Qaeda and Taliban and that the battle theatre covers the entire gamut of human space i.e. wherever such terrorists might be found. If this is true, then its practice of targeted killings through drone strikes will be justifiable under International Humanitarian Law.

For an armed conflict to exist under international law, the following elements must be satisfied: hostilities must rise to a certain level and/or be protracted beyond mere internal disturbances or sporadic violence, the parties and territories must be identified and defined and the beginning and end of the conflict must be identifiable and definable.

The war on terror has been criticized for not being a proper war such as to have necessitated the application of International Humanitarian Law. The idea of a war on terror has proven highly contentious. It has also been contended that participating governments are exploiting it to pursue long-standing policy/military objectives²² reduce civil liberties²³ and infringe on human rights. It is further argued that the term “war” is not appropriate in this

²¹ Sterio, M. (2012) The United States use of drones in the War on Terror: the (il)legality of targeted Killing under International Law. *Case Western Reserve Journal of International Law vol.12*. Citation :45. Case W. Res. J.int’lL. 197 2012-2013 . p.7 Retrieved on December 20, 2015

²² Gabor, R. (2004). *When is a War not a War? - The proper role of the law of armed conflict in the “global war on terror”* . Workshop on the protection of Human Rights While Countering Terrorism Copenhagen. Retrieved December 21, 2015 from www.icr.org/web/eng/siteengco.net/html/5xCMNJ

²³ George, M. (2003, March 11) “A willful blindness”. *The Guardian*. Retrieved on December 23, 2015 at 4:09pm. From <http://en.m.wikipedia.org/wiki/criticismofthewaronterror>

context, since there is no identifiable enemy and international terrorism cannot be brought to an end by military means.²⁴

On the 7th of October 2001, America declared war on Taliban and by extension Afghanistan²⁵, United States blamed Al-Qaeda for the 9/11 attacks.²⁶ The attack on the World Trade Centre on the 11th of September 2001 was regarded by the United States as an act of war weighty enough to necessitate and justify the use of force under Article 51 of the UN Charter²⁷. The International Community also thought so and thus approved of the right of the United States to defend itself against such attacks.²⁸

The war against Afghanistan officially ended in 2014 with the US declaring an end to combat operations. However, between 2001 to 2014 during the subsistence of the war, which had extended to parts of Pakistan's treacherous terrain known Waziristan, the US resorted to the use of drones to target those it labeled as key terror suspects, some of these attacks had resulted in considerable civilians deaths, and on occasion, wrong targets were hit, such as weddings or tribal meetings.

However, the fact that these attacks were carried out within of a clearly defined battlefield inside an existing armed conflict situation may have made most of the al-Qaida leaders killed through targeted drone strikes legitimate targets since soldiers in active battle

²⁴ Singu, Ryan (March 13, 2008), wired.com. Retrieved February, 13 2012 www.en.m.wiki/criticismofwaronterror

²⁵ War in Afghanistan (2014) *Wikipedia, the free encyclopedia*. Retrieved December 23, 2015 at 4:39 pm from http://en.m.wikipedia.org/wiki/war_inafghanistan

²⁶ Schmit, M. (2002). *Counter-Terrorism and the use of force in international law*. Retrieved December 24 ,2015. <http://www.usnwc.edu/.../counter-terrorism/22-December,2015,12:53.pdf> p.4

²⁷ Ibid, p.6

²⁸ United Nations Security Council Resolution 1368

under the International Law of War have license to kill²⁹, but on the other hand, a war on terror with an undefined battlefield is not a war capable of being so called under the International Law of War as to justify indiscriminate drone strikes. The United States cannot justify the drone strikes it carries out in other parts of the world where it is not actively at war by resorting to the laws of war under International Humanitarian Law. Such killings will amount to a violation of the right to life.

3.4 Applicable Laws: International Human Rights Law or International Humanitarian Law?

While International Human Rights law applies in both peace Times and during armed conflict³⁰, international humanitarian law applies only during times of armed conflict.

The Right to Life is regarded as one of the most important rights in all International Human Rights Conventions and Domestic Human Rights Legislations. It is a non-derogable right and cannot be suspended even in times of public emergency that threatens the life of a Nation.³¹ However, in times of War, combatants are conferred with the license to kill their fellow enemy combatants and are not bound by the inviolability of Life under international Law.

Hence, the question often asked is; “what then is the position of the non-derogability of Art 6 of the ICCPR in times of armed conflict when combatants are regarded as possessing the license to kill enemy combatants who bear arms against them? Where such targeted killings

²⁹ Tomuschat, C. (2010) Human Rights and International Humanitarian Law. *European Journal of International Law*. Vol 21(1) p.15 Retrieved December 27, 2015 from <http://ejil.org/pdfs/21/1/1987.pdf>

³⁰ Tehrian Conference on human rights (1968)

³¹ Tomuschat, C. (2010) Human Rights and International Humanitarian Law. *European Journal of International Law*. Vol 21(1) p.15 Retrieved December 27, 2015 from <http://ejil.org/pdfs/21/1/1987.pdf>. See also Article 4(2) International Covenant on Civil and Political Rights (1968)

occur within an active conflict zone, will the victims of these killings possess any remedy in international law under the International Human Rights Law? Will the outcome of the killings be different if same is perpetrated by drone strikes on the pretext of killing Blacklisted Terrorist?

These questions can only be answered by examining the turbulent debate of the relationship between international human rights law and international humanitarian law and the extent of their mutual applicability during times of armed conflict as it relates to the topic of research.

In recent times, the International Court of Justice (ICJ) has made three pronouncements on the relationship between the two bodies of rules stated above³²: first, that Human Rights Law remains applicable even during armed conflict. Second; that it is applicable in situations of conflict, subject only to derogation and third; that when both International Humanitarian Law and Human Rights Law are applicable, International Humanitarian Law is the “lex specialis”.

Both the United States³³ and Israel³⁴ have objection to the first two propositions. The United States maintains that when International Humanitarian Rights Law is applicable, Human Rights law is automatically not applicable. The United States ratified the ICCPR. However, it is clear that the Human Rights Commission regarded the covenant as applicable in conflict and the United States did not enter a reservation to such applicability.³⁵

³² ICJ, legality or threat of the use of Nuclear Weapons, Advisory Opinion 8, July 1996, Para 25; the legal consequences of the construction of a wall in the occupied Palestinian Territories, Advisory opinion, July 2004, para 106, ICJ, case concerning armed activity on the territory of the Congo (Democratic Republic of the Congo v. Uganda), judgment of 19 December 2005, para, 216-220

³³ Dennis, J. (2012) ‘Application of Human Rights Practices Extra-territorially in times of Armed Conflict and military operations; ICPC/C/USA/3 para 3

³⁴ Human Rights Committee, CCPR/CO/78/ISR; CCPR/CO/79/Add.93; CCPR/CO/78/ISR. Para 11.

³⁵ Ibid

Although the generally acceptable position still remains the one espoused by the Human Rights Commission; that both the International Human Rights law and the International Humanitarian Law remains applicable during armed conflict,³⁶. However, in respect to the extent of applicability of Article 6 of the ICCPR in times of arms conflict, the doctrine of *lex specialis* will take precedence to suspend or override the full applicability of Article 6. Thus, where a counter terrorism operation is being carried out in the context of an armed conflict situation, those labeled as terrorists may become legitimate targets if they form part of active combatants on the enemy side where such attacks or strikes form part of acts which offer definite military advantage and are directed towards achieving strategic military advantage with a view to bringing about a swift end to the conflict.

However, indiscriminate attacks that are not directed towards specific military targets or attacks that are carried out with wanton disregard for human lives and public safety will be prohibited. Such indiscriminate act will include punitive attacks or attacks carried out with the purpose of spreading terror.³⁷

In between 2004-2005 America carried out a total of 370 drone strikes in Pakistan mostly around the tribal regions of Pakistan known as Waziristan (an area considered to be an extension of Afghanistan's battlefield). In total about 2,489 to 3,989 lives were lost including 423-965 civilians. In Afghanistan within the same period, there were a total of 181 confirmed air strikes and about 44-103 civilian deaths. Also, on 3rd October 2015, a US airstrike hit a Hospital run by Doctors' without Borders in Kunduz killing several people.³⁸ Whether these attacks and several

³⁶ Hampson (2007) J. 'other areas of customary law .' in E. W. Imshurt and J. Breau (eds), *Perspectives on the ICPRC Study on Customary International Humanitarian Law*. Cambridge University Press, Cambridge, p.68-72

³⁷ Article 13(2) Fourth Geneva Convention (1949)

³⁸ Hennigan, W. (2015, November 25th). U.S report on Afghan hospital attack 'Shocking' medical group says. *Los Angeles Times*. Retrieved December 29 2015 at 11:07pm from [http:// www.latimes.com/.../la-fg-kunduzairstrikes](http://www.latimes.com/.../la-fg-kunduzairstrikes)

others carried out within this region (many of which resulted in huge civilian lives) were a violation of Right to Life under International Human Rights Law will depend on whether such acts were deliberate attacks on civilians or acceptable collateral damage incidental to warfare. Meanwhile the US still carries out drone strikes in areas where it's not currently at war, such as in Somalia and Yemen. Such strikes are strikes carried out in Peacetimes outside the battlefield and they have been held to violate International Human Rights Law i.e. the Right to life³⁹

3.5 Determining the Status of the Targets

Under International Humanitarian Law, which applies in situations of armed conflict, only “combatants” are legitimate targets. In addition, the use of lethal force must be militarily necessary and proportionate and reasonable precautions must be taken to prevent mistakes and minimize harm to civilians. On the other hand, under the International Human Rights Law an intentional killing by state agents is only legal if it's required to protect human life and there is no other means of preventing the threat to human life.

Determining the status of a subject of targeted killing may be one of the indicators of knowing whether a particular killing is lawful or not. The right of a government to use deadly force against a citizen is constrained by both domestic criminal law and International Human Rights norms.⁴⁰ In law enforcement, individuals are punished for their individual guilt which must be proven in a court of law. Individuals facing trial enjoy the guarantee of due process.⁴¹ Killing an individual without trial is allowed only in very limited circumstances such as self-defense (where the person poses an immediate threat) or where there is an immediate necessity

³⁹ O'connell, M. (2015, April 24th) Drone strikes are illegal beyond the Battlefield. *New York Times*. Retrieved December 29th 2015 at 5:25 pm www.com/.../NYtimes.com/.../dronestrike/drone

⁴⁰ Gabriella Blum and Philip Heymann; Law and policy of targeted killing, *Harvard National Security Journal*, Vol 1.- June 27, 2010 havardnsf.org/.../vol.1Bum-Heymann 23rd December 2015 10:46am p.1

⁴¹ Ibid

of saving lives. In almost any other case, it would be clearly unlawful, and tantamount to extra judicial execution or murder.⁴²

The fact that an individual is labeled as “terrorists” does not give him a special status under international law. Whether terrorists or not, civilians in peace times are subject of human rights law and must be dealt with within the paradigm of law enforcement. This means that killing an individual without trial is only allowed in very limited circumstances, such as self-defense i.e. where the person poses an immediate threat or where there is an immediate necessity to save lives.⁴³ Hence the recent justification given by the United States for extending their drone program to cover other territories where there are no active combat operations only threatened to blur the line between armed conflict and law enforcement to the detriment of protection of human rights.⁴⁴

Although the United States have argued back that those terrorists which it targets in foreign land actually pose imminent threat and danger to the security of United States and that its right to self-defense justifies the killing of those terrorists, its drone program is still largely shrouded in secrecy and same is carried out with little or no consideration for international Human Rights best practice.⁴⁵

⁴² Ibid

⁴³ Ibid

⁴⁴ Committee on Legal Affairs and Human Rights, Drones and Targeted Killings: The need to uphold human rights and international law report. Rapporteur: MrArcadio Diaz Tejera Spain socialist group pdf p.2

⁴⁵ Ibid

3.5.1 The Targeted Killing of Osama Bin Laden

Osama bin Laden, the founder and the head of the Islamist militant group al-Qaeda, was killed in Pakistan on May 2, 2011, some minutes after 1:00am Pakistan time⁴⁶ by the United States Navy SEALs of the U.S Naval Special Warfare Development Group (also known as SEAL Team Six). The Operation Code Named Neptune Spear, was carried out in a central intelligence Agency led Operation, the raid on bin Laden's compound in Abbottabad, Pakistan was launched from Afghanistan⁴⁷. The raid was supported by 90% of the American Public.⁴⁸ It was welcomed by the United Nations, NATO, the European Union and a large number of governments.⁴⁹ However, the attack was condemned by others, including two-third of the Pakistan Public.⁵⁰ Also the fact that Bin Laden was killed despite been unarmed has being criticized by Amnesty International.⁵¹ One of the fundamental legal and ethical questions raised by Osama's death is whether the stealth operation that killed him conformed to requisite international law standards?

Shortly after the September 11 terrorist attacks, the Bush Administration quickly blamed Al-Qaeda and Osama Bin Laden, the leader of the group for the 9/11 attacks.⁵² On the 20th of September 2001, the United States declared "War on Terror" and started a man-hunt for Osama bin Laden as well as other key al-Qaeda members on its target list.

⁴⁶ Cooper Helene (May 1, 2011) "Obama Announces killing of Osama bin Laden". *The New York Times*. Retrieved May 1, 2011

⁴⁷ Fair, C. (May 4, 2011) "The bin Laden aftermath: The US Shouldn't holds Pakistan's Military against Pakistan's Civilian Foreign Policy. *The South Asia Channel*. Retrieved December 29th 2015 at 8:09pm from [http:// foreign policy .com/.../the bin Laden aftermath](http://foreignpolicy.com/.../the bin Laden aftermath)

⁴⁸ Frank, N. (2011) Americas Back Bin Laden; Credit Military, CIA Most. *Gallup*. Retrieved December 29th 2015 at 10:00 pm [http://: www. Gallup .com/.../American-back-bin Laden mission](http://www.Gallup.com/.../American-back-bin Laden mission)

⁴⁹ UN Chef Ban Hails Bin Laden's death as Watershed. (2011, May 2nd) *Reuters*. December 30th , 2015 at 8:23am from [http:// www. Reuters .com/.../ us-binladen](http://www.Reuters.com/.../ us-binladen)

⁵⁰ Ray, j. & Sirinvasan, R. (2011, May 18) Pakistan Criticize US Action that killed Osama Bin Laden . *Gallup* . December, 30th 2015 at 9:00am from [http://www.gallup /.../Pakistanis criticize](http://www.gallup.com/.../Pakistanis criticize)

⁵¹ Questions around operations against Osama Bin Laden. (2011) / *Amnesty international* Retrieved December 30th 2015 at 10:00 am from <http://amnesty.org/.../questions around-against-osama-bin-laden>

⁵² Bin Laden Claims Responsibility for 9/11 attacks Retrieved December 30th at 10:01am from [http://www. Foxnews.com/bin-laden-claims-responsibility for 9/11](http://www.Foxnews.com/bin-laden-claims-responsibility for 9/11)

The U.S. would argue that killing Osama Bin Laden was part of his Global War on Terror. That it had already openly declared war against al-Qaeda, and that the killing of Osama is likely to offer a specific military advantage in its war against al-Qaeda. They would also argue the collateral damage resulting from the Abbottabad strike was minimal and reasonably congruent with that incidental to military operations in warfare.

It is not in doubt that in warfare, governments may use deadly force against enemy combatants which may include assassination. The controversial assassination of Japanese Admiral Isoroku Yamamamoto traveling in a military airplane during the Second World War can be cited⁵³ as well as the killing of the German SS General Reinhard Heydrick in the 1942⁵⁴. However, the idea of “The War on Terror” as touted by President Bush is a legal aberration and cannot be used to justify killing or attacks carried out outside active combat zone. The US have for some time now made targeted killing an essential part of its counter terrorism Strategy because it argued that it is the most effective means of frustrating the activities of terrorists who are directly involved in plotting and instigating attacks outside United States.

The United States was never officially at war with Pakistan; rather, Pakistan had always proved a supportive ally in the war against The Taliban⁵⁵. So the fact that the U.S continuously carries out drone strike against specific alleged terrorists in Pakistan constitutes a violation of the principle of international law prohibiting the use of force against the territorial sovereignty of other states.

⁵³ Admira Yamamoto and the justification of targeted killing-ilya somin on May 13, 2011; targeted killing, warfare and armed conflict, war on terror, volokh.com/.../admiral-yanamamoto-and-the-justification for targeted killings, 24th December 2015, 15:22pm

⁵⁴ Assassination -Operation Anthropoid (2015) Retrieved on December 30th2015 at 7:19pm from <http://www.army.cz/id.../id.../assasination-en.pdf>

⁵⁵ Operation Enduring (2001) Fast fact-CNN.com Retrieved 24th December, 2001, at 6:02pm from <http://www.com/.../operation-enduring> freedom

At the time of the attack on Abbottabad compound, Osama bin Laden was unarmed and despite the fact that he had given himself up for capture, he was still shot and killed.⁵⁶ Even if Osama bin Laden's assassination was a legitimate combat operation carried out in a time of genuine armed conflict, it still violates one of the most important provisions of the Geneva Convention which prohibits the killing of persons Horsde Combat. Common Article 3 of the Geneva Convention prohibits killing (amongst other things) of persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed horsde combat for reasons of sickness, wounds, detention or any other cause.⁵⁷ Suffice it to say that this article 15 is common to all the Geneva Conventions i.e. Additional Protocol 1, Article 41(1)⁵⁸ of the 1977 Additional Protocol, Additional Protocol 11, Article 7(1)⁵⁹ of the Draft Additional Protocol II. It is also contained in the Military Manuals of most countries including the United States. Under the US War Crime Act (1996) violation of Article 23(c) of the 1907 Hague Regulations are war crimes.⁶⁰ It prohibits the killing of sick, wounded or unarmed soldier.

Under International law, the killing of Osama cannot be justified whether as a civil law enforcement action or a combat operation. This is because in both instances, it violated fundamental principles of both International Human Rights law and International Humanitarian Law.

⁵⁶ Ross, B & Feeran, L. (2011, May 3) Changing story? Bin Laden unarmed, White house says. *abc News*. Retrieved 30th December 2015 at 10pm from <http://www.abcnews.go.com/.../Osamabinladen>.

⁵⁷ Practice relating to rule 47 Attacks against persons Horsde combat (2016). Retrieved 31st December 2015 at 8:10am from http://www.icrc.org/.../ihl/.../v2_rul_rule_24_December_2015,

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Military Medical ethics, volume 1-2(2004) Department of the Army Retrieved 31 December at 7:28pm from <https://books.google.com>

3.6 State Responsibility, the use of Force in Counter-Terrorism and its Implication on the Rights to Life since September 11, 2001

Imagine that the U.S. intelligence services obtain reliable information that a known individual is plotting a terrorist attack against the United States. The individual is outside the US in a country where law and order are weak and unreliable. U.S. officials can request that country to arrest the individual, but they fear that by the time the individual is located, arrested and extradited, the terror plot would be too advanced, or would already have taken place.

Let's add that the host government is either unable or willing to perform the arrest. Moreover, even if it did arrest the suspected terrorist, it might decide to release him shortly after, exposing the U.S. to renewed risk⁶¹. Of course the Natural question that follows this hypothesis is; should the U.S. be allowed to kill the terrorist in the foreign land without a prior authorization or co-operation of the host state?

This hypothetical question is very reminiscent of the one used to justify the practice of torture which is particularly known as the ticking bomb theory. But if we substitute the word "US" with "Nigeria" in the above hypothesis, our answer might be instinctively different. Perhaps, Nigeria may have to go and table its grievance at the United Nations General Assembly. Does this therefore mean that different international law applies to different countries?

The above hypothesis highlights 3 important aspects of public international law, namely; the principle of state responsibility, the concept of use of force in international law, and territorial integrity.

⁶¹ Blum, G. & Heyman, P. (2010). Law and policy of Targeted killing. *Harvard National Security Journal* , Vol 1 retrieved December 30th, 2015 from [http://www.havervnsj.org/.../vol.1.Blum-Heymann...\(pdf\)](http://www.havervnsj.org/.../vol.1.Blum-Heymann...(pdf))

It is true and correct that every state has the responsibility not to use its territory in a way and manner likely to pose a threat or endanger the sovereignty and wellbeing of another state. This is a very much in line with the declaration made by the ICJ in the “Corfu channel case” that; every state has an obligation to not knowingly allow its territory to be used in a manner contrary to the rights of other states⁶². The brief fact of the case is that; two British destroyers struck mines in Albanian waters, while transiting the Corfu straits in 1946. Though the evidence was insufficient to demonstrate that the Albanians laid the mines, the Court nevertheless held that they had the obligation to notify shipping of the danger posed by the mines. Albania’s failure to do so represented an international wrongful act entailing international responsibility of Albania.⁶³

However, since the September 11 2001 terrorist attacks on the US, it has arrogated to itself the power to launch drone strikes in any country where it feels fit to do so with little regard to the principle of territorial integrity as it applies to other Nations. On the 20th of September 2001, in a pointed address to the members of parliament, President George W. Bush launched what has now come to be known as America’s War on Terror.⁶⁴ The war suggests that America will use its force and might to attack any country where it perceived that terrorists have been given an operational base as well as conduct targeted killing of any terrorists which it found culpable on its terror list.

Although the international law is clear about the liability of states that allow their country to be used by non-state armed band to attack another country, it is also clear on the general

⁶² Corfu Channel Case (merits) 1949 ICJ Rep. 4,22

⁶³ See discussions in James Crawford, the international law commission’s articles on state responsibility: introduction text

⁶⁴ The War on Terror (2001) –Global Issues Retrieved December 30th 2015 at 9:51 am from www.globalissues.org/.../war on terror See also: *Selected Speeches of the President George W. Bush.* (2001-2008) Retrieved December 30th 2015 at 10:05 am from <http://www.georgewbush.com/>

prohibition on the use of force against the political independence of other states.⁶⁵The 1970 Declaration on friendly relations urges each state to refrain from... acquiescing in, or organizing activities within its territory directed towards the commission of terrorists acts in another state⁶⁶. A similar prescription was echoed in the 1994 Declaration on Measures to Eliminate Terrorism⁶⁷.It is in the bid to address this kind of situation that the principle of state responsibility was developed in international law.

The laws of state responsibility are the principles governing when and how a state is held responsible for breach of an international obligation.⁶⁸ Until recently, the theory of the law of state responsibility was not well developed. However, the position is now different with the adoption of the Draft Article on the Responsibility of States for internationally wrongful acts by the International Law Commission in the August of 2001.⁶⁹

The existence of a state responsibility for international wrong does not justify the use of force to correct or remedy the wrong. The traditional remedy often available for liability of a state under the laws of state responsibility Includes: restitution, compensation and satisfaction.⁷⁰It is also allowed to undertake counter-measures in response to an internationally wrongful act.⁷¹ Counter-measures are “measures which would otherwise be contrary to the international obligations of the injured state vis-à-vis responsible state if they were not taken by

⁶⁵ United Nations Charter (1945) Retrieved December 30th 10:30 am from www.un.org/en/un-charter/.../index.html 30th December 2015, 8:10am

⁶⁶ General Assembly Resolution 25th Session – the United Nations 2625 (xxi) 24 October 1970 Declaration on Principle of International Law concerning friendly relations and cooperation among states www.un.org/documents/.../res/ares25... 30 December 2015, 8:23am

⁶⁷ Declaration on Measures to Eliminate International Terrorism G.A. Res 49/60 UN

⁶⁸ Violation of international law and State Responsibility outline under international law (2015). Retrieved December 30th 2015 qt 11:00 am from <http://www.uio/.../undervisningmateriale> 30th December 2015, 9:00am

⁶⁹ Draft Articles Responsibility of States for Internationally Wrongful Acts, Report for the ILC on the Work of its fifty-third session, UN GAOR, 56th sess, supp No.10, p.43 UN Doc A/56/10 (2009)

⁷⁰ Ibid. Art 34-37, Art 35, 36 and 37. See also Op.cit, 66

⁷¹ Ibid Art 49(1)

the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation.⁷²

In order to justify the legitimate use of counter-measure to address a perceived wrong flowing from the territory of the host state, the victim state must show that its counter-measures, actions are proportional to the injuries suffered and that it had earlier notified and called on the host state to address the ongoing wrong and comply with its international obligations. However Article 50 of the Draft Article on State Responsibility earlier referred to clearly prohibited the use of Armed Forces which is in tandem with Art. 2(4) of the UN Charter.

In the light of America's recently declared on terror, the question that follows is; whether the U.S. is justified in its insistence to use armed force against the territorial integrity of states which it perceived or claimed to either be harbouring terrorists or sponsoring them, while at the same time also going after perceived terrorists in foreign land without the necessary authorization from the states involve?

The former President G.W. Bush in a televised public address to the nation on the 7th of October 2001, while announcing the commencement of hostilities against Taliban in Afghanistan stated that;

Today we focus on Afghanistan, but the battle is broader. Every nation has a choice to make in this conflict, there is no neutral ground.

If any government sponsors the outlaws and killers of innocents they have become outlaws and murderers themselves. And they will take that lonely path at their own part.⁷³

⁷² Op.cit, p.66

⁷³ Bush's address to the nation, Saturday, 7 October, 2001 18:29 GMT, news.bbc.co.uk/z/hi/Americas/1585153.htm 1st January, 2016 3:37am

This extract of President G.W. Bush's speech contains a veiled threat of armed attack to countries that it perceives to be providing assistance to those perceived as terrorist. This is known as the "Bush Doctrine".⁷⁴

Recall that the UN Charter is clear on the general prohibition of the use of force against the political independence and the territorial integrity of states. That the charter only made two exceptions under Art 39, 42, 43 and 51 of the Charter.⁷⁵ However, in the case of *Nicaragua v. United States*, the ICJ has held that the acts of a non-state group or armed band may be attributable to a state under Article 51, and that such act may amount to an armed attack if it is of a scale and effect that where it to have been carried out by the regular force of a state same would have amounted to an armed attack. The court however, went further to add that for the act of such an armed band or non-state group to be attributable to a state, it must be shown that such a state has "effective control" and command of the armed band or non-state group and that mere sponsorship and provision of weapons will not suffice to amount to attribution.⁷⁶ The more flexible approach was favored by the court in the case of *Prosecutor v. Dusko Tadic*⁷⁷. The Court replaced the word "effective control" with "overall Control".

It should be noted most importantly that the principle of attribution which the court resorted to, and which was already a part of International Customary Law only allowed the court to expand the application of Article 51 of the UN Charter in so far as it addressed attacks from non-state groups (including terrorist groups) on a state. It did not purport to create another head of exception to Art. 2(4) of the Charter.

⁷⁴ Bush Doctrine; constitutional right foundation(2001) 1st January 2016 at 3:42 am from www.crf-usa.org/wr.../bush-doctrine

⁷⁵ The United Nation charter (1945)1st January 2016 at 3:42am from www.un.org/en/.../uncharter/.../index.ht...

⁷⁶ *Nicaragua v. United States of America* (1986) I.C.J. 14 <https://www.ilsa.org/.../icjnicaragua.pdf>

⁷⁷ *Prosecutor v. Tadic* (judgement) case No. IT-94-/A38ILM 1518, <https://litigation-essentials.lexisnexis.com/...>

As far as principle of state responsibility is concerned, remedies for wrong are only limited to non-military and non-armed measures. The traditional exception to the general prohibition of the use of force still remains intact. It is therefore safe to conclude that states who want to resort to armed measures, including targeted killing of so called terrorist on foreign soil must seek their justification under one of the two exceptions provided by the charter for the use of force suffice.

In the case of Article 51, it means that it would have to be shown that an armed attack has occurred, that such attack was occasioned by a certain non-state group, armed band or terrorist organization who is acting under the instruction of a state, who is in “effective control” of its forces. Contrasting this position with what has been happening in the war on terror since 11 2001 i.e. the drone strikes and targeted killing of terrorists in Pakistan, Somalia and Yemen, a different conclusion is likely to be reached as regards its justification for the use of such force under international law.

Such attacks and strikes would be legal if anytime they are about to take place within the territorial borders of another State, the permission and authority of that State is sought. But that was not the case with Osama bin Laden’s killing in May of 2011. That the United States cannot embark on a global war is already a self-evident legal fact. Hence the justification of a global military campaign in which its military will have freedom to pick, identify and eliminate target anywhere in the world cannot also be correct. Targeted killings happening within any other context other than those sanctioned by the known exceptions to the UN Charter on the prohibition to the use of force must be within the law enforcement framework i.e. such target must be shown to pose imminent threat, there must be no other means or measure of capturing or arresting him.

CHAPTER FOUR

AN ANALYSES AND ASSESSMENT OF COUNTER TERRORISM ON PROHIBITION OF TORTURE, CRUEL INHUMAN AND DEGRADING TREATMENT AND NON-REFOULEMENT AFTER SEPTEMBER 11, 2001

4.1 Introduction

This chapter seeks to examine the definition of torture, cruel, degrading and in human treatment. It will show that although the points of differences between these concepts are tenuous and blur, they are underpinned by the same principle of international law. I.e. Its non derogability. In further analyzing the concept of torture, it will consider state's obligation to protect persons against it

It will consider the validity or other wise of the Ticking Bomb theory in details, and examine some arguments canvassed in favour of the assertion that it can serve as a valid defence to torture. Lastly, it will look at the concept of Non Refoulement and consider how recent practices such as the concept of rendition in counter terrorism cases is undermining the efficacy of its application

4.2 The Definition of Torture, Cruel, Inhuman and Degrading Treatment

The word torture has evolved over the years and has come to cover acts which may not have been envisaged by the drafters of the earliest declarations and laws where it was first mentioned. This concern was noted by the International Committee of the Red Cross (ICRC) in its commentary on the Geneva Conventions. It stated that a strict definition listing every prohibited act would simply test the apparently endless ingenuity of torturers rather than providing effective protection to their victims and the appropriate redress in the perpetration of occurrence of such occurrence

The Universal Declaration of Human Rights, Article 5 states that; no one shall be subjected to torture, cruel, inhuman or degrading treatment or punishment.¹ Torture, inhuman, cruel and degrading treatment or punishments are explicitly prohibited under a number of international treaties that are binding on those states which have ratified them.²

The most comprehensive definition of torture to date is the one given by the United Nations Convention on torture passed in 1984.

According to S.1 of the Convention, defines torture as;

Any act by which several pain or suffering whether physical or mental is intentionally inflicted on a person for such purpose as obtaining from him or a third person information or a confession punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind when such pain or suffering is inflicted by the instigation of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from inherent or incidental to lawful sanctions.

The committee against torture has itself recognize that in practice, the definition/threshold between cruel, inhuman or degrading treatment or punishment and torture is not often clear³.

Article 1 of UNCAT's definition provides a stringent *mens rea* for establishing the crime of torture i.e. "intention to cause severe pain or suffering" which is not limited to positive acts but also may constitute omissions.⁴

¹ Universal Declaration of Human Rights G.A. Res 2174(111) U.N Doc A/810 at 71 (1948)

² Article 7 ICCPR, G.A. res 2200A (xxi), 21 U.N. GAOR Supp (No.16) at 52, U.N. Doc A/3/6 (1966) convention against torture and other cruel inhuman or Degrading treatment or punishment (UNCAT), G.A. res 39/46. Annex (1984) Article 37, Convention on the Rights of Child, G.A. res.44/25 annex. 44 UN GAOR Supp. (No.49) at 167 UN Doc.A/44/49 (1989) , Article 10 of International Convention on the Protection of rights of all migrant workers members of their family, G.A res. 45/158 annex 45 U.N GAOR etc

³ Reporting special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. E/CNJ 4, 2006/6, 23 December 2005 SS.39

Also such an infliction must be for a specific purpose stated in the definition i.e. “for the purpose of obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected to have committed or intimidating or coercing him or a third person...”

However, it would appear that severe pain or suffering by a public official for purely sadistic reason would be excluded from the definition of torture. But it is still likely that such behavior would come within the scope of the UNCAT if there is additional element of punishment or intimidation, and acquiescence by the state.⁵

Article 7(2) of the 1998 Rome Statutes of the International Criminal Court (ICC) defines torture as; “intentional infliction of severe pain or suffering, whether physical or mental upon a person in custody or under the control of the accused; except that torture shall not include pain or suffering arising only from inherent or incidental to lawful sanction.”⁶

The Rome Status contains no indication to severity of the pain or other form of ill treatment. The finalized draft text of the element of crimes adopted by the preparatory commission for ICC, in its footnote explicitly affirms in respect of the crime against humanity of torture that “it is understood that no specific purpose need be proved for the crime”.⁷

⁴ Dzemajl & others v. Yugoslavia, CAT Communication No.161/2000, 21 November 2002, 9.1

⁵ Danelius, H. (2008) the United Nations Convention against torture and Cruel Inhuman or Degrading Treatment or Punishment. *United Nations Audiovisual Library of International Law*, p.119 Retrieved on 2nd January 2015 at 8:23am from http://legal.un.org/avl/...catcidtp_e.pdf.

⁶ Rome Status for International Criminal Court adopted by the UN Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, 17 July 1998, UN Doc A/Conf183/a; reproduced in 37 international legal materials (1998).

⁷ UN Doc PC NICC/2000/1/Add2. Art. 7(1) note 14

4.3 States Obligation to Protect, Investigate and Grant Redress for Torture

In international law, the prohibition against torture is similar to the prohibition imposed on slavery, genocide or the use of force against the political independence or territorial sovereignty of other states. It is both a non-derogable right and an absolute right. Torture is impermissible under any circumstance, including war, public emergency or terrorist threat. Thus, even states which have not ratified any international treaty on torture are banned from using it against any one.

At the international level, the UN Human Rights Committee and Committee against Torture interpret state obligations under the International Covenant on Civil and Political rights and Convention against Torture respectively. These Committees are not courts but rather quasi-judicial bodies. Hence their decisions while important to the interpretation of treaties are not directly legally enforceable.

One of the problems with enforcing the prohibition against torture is that a few states openly admit to its practice. In most cases, the governments of the states practicing it try to obliterate any evidence suggesting its involvement in such practice.⁸

Every state has a duty to investigate allegations of torture brought to its notice. Article 12 of the UNCAT States;

“Each state party ‘shall ensure that its competent authority proceed to a prompt and impartial investigation wherever there is a reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction”.

⁸*Torture in international law; A guide to jurisprudence* (2008) Association for the prevention of torture (APT) and the Center for Justice and International Law (CEJIL) Retrieved 2nd January 2015 at 8:23am from www.apatch/.../jurisprudenceguide.pdf p.16

This obligation to investigate is complimented by Article 13 which provides that individuals shall have the right to complain to the competent authorities and that the state shall take steps to protect the complainant and witness against reprisal. Article 12 and 13 also applies to acts of cruel, inhuman or derogating treatment.⁹

The state's obligation to ensure a prompt and impartial investigation does not depend on the submission of a formal complaint rather, it is sufficient for torture to have been alleged by the victim.¹⁰

Furthermore, investigation must be effective and carried out by the appropriately qualified person¹¹ which must seek both to determine the nature and circumstances of the alleged act to establish the identity of any person who might have involved therein¹² and at least where it is necessary to ensure the right of redress, the alleged victim must be informed of the outcome of the investigation.¹³

Article 2(1) ICCPR requires that state ensure covenant right to all individuals within its territory and subject to its jurisdiction. Article 2(3) provides that persons whose rights are violated shall have an effective remedy with their right thereto determined by a court of competent jurisdiction.

Taken together with Article 7 "complaints about ill-treatment must be investigate promptly and impartially by competent authority"¹⁴

⁹ Blanco Abad v. Spain, CAT Communications 56/1996-14 May 1998 & 8.2

¹⁰ Parrot v. Spain; CAT Communications No. 6/1990 May 1995 & 10.4

¹¹ Ristic v. Yugoslavia, CAT Communication No. 13/1998 11 May 2001 & 9.5; Blanco Abad v. Spain (1998) Op.cit, S.8.8

¹² Blanco Abada v. Spain (1998) Op.cit, S.8.88

¹³ Dimtrijevic v. Servia and Montenegro CAT Communication No.27/2002/24 November, S.4

¹⁴ Comment 20 HRC General Comment No.20 S.14

4.4 Deconstructing the Ticking Bomb Theory

Since the 9/11 terrorist attacks, the idea that torture could be used as an acceptable tool in war has become popular. The most common objection has been that torture is something warranted a means of combating terrorism and the most commonly alluded example of this is the ticking bomb theory example.¹⁵

The ticking bomb theory is a hypothetical though experiment that is used to question the absolute prohibition of torture its often formulated in the following kind of hypothesis:

“Suppose that a perpetrator of an imminent terrorist attacks, that will kill many people is in the hands of the authorities and that he will disclose the information needed to prevent the attack only if he is tortured, should he be tortured?”¹⁶

The ticking bomb theory seeks to argue the moral permissiveness of torture by asserting that it may sometimes be necessary to choose between the lesser of two evils. This was the argument of the French army during the Algerian war of independence. It is also the argument relied on by the Israeli Security Forces in the occupied territories and its main justification for the use of torture by the US government in the war on terror.¹⁷

It has been argued by some scholars that the ticking bomb theory deceives us about the choices we face in the real world. That the argument deceives us in two ways; by suggesting that torture could be limited to ticking bomb situations, and by suggesting that the ticking bomb itself

¹⁵ Mayfield, J (2008). In defense of prohibition of torture. *Public Affairs Quarterly*, Volume 22. Retrieved January 2nd, 2016 9:23am from <http://faculty.washington.edu/.../4May-field>

¹⁶ *Defusing the Ticking Bomb Scenario, why we must say no to torture always.*(2007). The Association for the prevention of Torture. Geneva, Switzerland. Retrieved January 2nd,2016 www.apr.ch/.../tickingbombscenario.pdf

p.5

¹⁷ Ibid

is a realistic possibility.¹⁸ It has also been forcefully argued that even if a ticking bomb situation were to occur, torture would still be wrong.¹⁹

Some authors have further argued also that the ticking bomb scenario, as we are invited to imagine it almost certainly has never happen, they argued that in the long history of counter-terrorism campaigns, there has not been one verifiable report of a genuine ticking bomb scenario.²⁰

Morally, the ticking bomb scenario does not justify the use of torture since information extracted by torture often have approximately large margin of inaccuracy as most people who are subjected to the severe punishment of torture will often confess to anything. In the real world, torture yields poor information, sweeps up many innocent, degrade organizational capabilities and destroys interrogators.²¹

Legally, the ticking bomb theory has no application under the international law. There is no room for its accommodation or acceptance under the international law. This is because the law that prohibits torture is final and absolute and no derogation from it is also under any circumstance.²² Most non-derogable rights including the prohibition of torture are “erga omnes”²³. They belong to a special category of rights; hence nothing justifies the resort to torture under

¹⁸ Jean and Yaria. (2004). Utilitarian Argument against torture interrogation of terrorists. *Science and engineering ethics*, vol.10 (2004) pp.534-572; Breacher, B. (2007) *Torture and ticking bomb* Oxford Blackwell ; Henry, S. (2006). *Torture in Dreamland: Disposing of the ticking bomb*. *Case western Reserve Journal of International Law*, Vol.37 (2006) pp.231-240

¹⁹ Juratowitch, B. (2008). Torture is always wrong. *Public Affairs Quarterly* Vol.22, No.2 pp.81-90

²⁰ Mayfield, J. (2008). In defense of absolute prohibition of torture. *public affairs quarterly*, volume 22, No. 2

²¹ Rejali, D. (2007) *Torture and Democracy*. Princeton M.J. Princeton University Press, p.478

²² S.4 International Covenant on civil and Political (1966).

²³ The concept of erga omnes, obligations in international law www.newbalkenpolitics.orgmk/.../the... 12th December 2015 7:32am

international law. Not even a National Emergency which threatens the life of a nation or terrorism.

4.5 The Prohibition on Torture and Right of Non-Refoulement

The prohibition on torture and cruel and inhuman or degrading treatment or punishment is set-out in all the major international instruments dealing with civil and political rights i.e. Article 5 of the Universal Declaration of Human Rights 1948; Article 7 of the International Covenant on Civil and Political Rights 1966; the 1984 UN Torture Convention, Article 3, Article 35 of the American Convention of Human Rights; Article 5 of the African Charter on Human and People's Rights and the Inter-American Convention to prevent and punish torture. It is also prohibited by the Four Geneva Conventions of 12 August 1949 and their two Additional Protocols and in National Constitutions and Domestic Legislations throughout the world.²⁴

Torture, cruel and inhuman or degrading treatment or punishment is now recognized around the world as one of the most serious crimes and its prohibition is regarded as a fundamental standard to be adhered to by every states party.²⁵The European Court of Human Rights in analyzing torture held that torture is a deliberate inhuman treatment causing various serious and cruel sufferings²⁶. The court also held further that procedures like “disorientation” or sensory deprivation techniques” such as wall standing, hooding, subjection to continuous

²⁴Office of the United Nations High Commissioner for Human Rights. (2008). *Terrorism, counter terrorism and torture, international law in the fight against terrorism*. [factsheet No.32 Retrieved January 3rd 2016 at 12:00pm available at www.redress.org/.../terrorismreport.pdf p.21.

²⁵ Prosecutor vs. Auto Furunzije judgment, international criminal court for former Yugoslavia (ICTY) 15-95-17/1-A, 21 July 2000

²⁶ Ireland v. United Kingdom Euro H. HR. Series A- No.25 para 167

noise, sleep deprivation and deprivation of food and drink combined are prohibited by international law as “cruel, inhuman or degrading treatment”²⁷.

On the other hand, non refoulement is a principle of international law which forbids the rendering of a victim of persecution to his or persecutor.²⁸ The word refoulement originates from the French word “refouler”, which means sending a person back to a country where they face a threat to their life or freedom²⁹ some of the dangers to their persons or life.³⁰ The prohibition against expulsion or return of a person to a place in which he is expected to suffer persecution forms the cornerstone of the protection of refugees. The principle is formalized in Article 33 of the international refugees law and same has long been considered a binding principle in the international customary law.

The concept of non-refoulement in modern international law has its origin in the aftermath of World War II. At that time, many nations were anxious to ensure that incidents like those of the Jewish refugees who were sent back into the hands of the Nazis should not happen again. This led to the establishment of the convention relating to the status of refugees in 1957 by the United Nations.

Recently, shortly after the September 11 attacks on the United States of America by Al-Qaeda militants, America launched a global war on terror. This declaration in the months and years that followed impacted negatively on the protection of fundamental rights as guaranteed by various instruments under international law.

²⁷ Ibid

²⁸ Non-refoulement. (2015). *Wikipedia, free encyclopedia*. Retrieved January 3rd, 2016 at 2:10pm available at http://en.m.wikipedia.org/wiki/Non_Refoulement.

²⁹ Explaining the concept of refoulement available at world/DW.com of 07 2014 www.chr.com/theconceptofnonrefoulement, 18th January 2016 4:55pm

³⁰ Policy Paper: The Principle of Non Refoulement.(2008). *Refugee Rights Forum*. Retrieved 3rd 2016 at 3:00 pm available at www.acri.org/.../nonrefoulementeng.pdf p.1.

The scale of the atrocities committed on September 11 2001 on the two states of New York and Washington DC is believed to have changed the way international law and politics are perceived especially as it relates to combating terrorism. The position maintained by the United States after the 9/11 attacks is that to combat the new wave of terrorism which was unleashed on the United States in the wake of the September 11 attack, it would be necessary to bend some rules of international law i.e. the law which prohibits the practice of torture in any form or shape or for whatever reason.

Article 4 of the International Covenant on Civil and Political Rights (ICCPR) provides that states may abridge human rights in limited circumstances. In times of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states parties to the present covenant may also take measures derogating from their obligation under the present covenant to the extent strictly required by the exigencies of the situation.³¹ However, some other states i.e. the United States have continued to devise new means of circumventing it.

4.6 Meaning of Extraordinary Rendition

Much like the much criticized CIA secret drone program, the practice of “extra ordinary rendition” of terrorism suspects has attracted similar condemnation. Shortly after the 9/11 terrorist attacks, there started to emerge a new trend of practice attributed to the CIA in America in which terror suspects were being sent to countries where they run the risk of being put through

³¹ Committee, General Comment No.29, States of Emergency (Article 4) U.N Doc CCPR/C/21/Rev.1/Add 11 (2001)

torture; cruel, and inhuman treatment. The then United States president in his speech on the 6th of September 2006 acknowledged this practice.³²

Extraordinary rendition is not a legal term but a practice implemented by the Central Intelligence Agency (CIA).³³ Since 2001, several hundred terrorism suspects have been detained in more than a dozen countries i.e. Afghanistan, Iraq, Italy, Macedonia and Sweden. These suspects are often transferred by CIA agents, forcibly without legal procedure to countries known for brutal and systematic torture like Egypt, Syria and Jordan and put in secret prisons where they are held incommunicado for months, possibly years. They are often subjected to torture and interrogation. Some of the suspects are periodically released while others remain in custody for an indefinite period of time.³⁴

The term “rendition” was first used by previous US government administrations to describe the extra-legal transfer of individual suspects from another country to the US where they were put on trial or later transferred to other countries. The original purpose of rendition flights was however to put suspects on trial though clearly with no consideration of extradition procedure or other international guarantees or safeguards. The model however shifted under Bush administration from rendering to justice using illegal means to intelligence gathering without trial or due process.³⁵

Unfortunately, the wide spread abuses occasioned by this practice only serves as a reminder of similar abuses in history; such as the US led operation Condor, a continental Secret

³² President Bush’s speech on terrorism New York Times. (2001). Retrieved January 3rd 2015, at 4:00 pm at available at www.nytimes.com/2006/bush_18th_January_2016.

European for Constitutional and Human Right (2009)³³ *CIA-Extra ordinary Rendition flight, torture and accountability, A European Approach*.8 Retrieved January 3rd 2016 at 4:30 pm available at www.echr.rendition.secondedition.online.pdf

³⁴ Ibid

³⁵ Ibid

Services operations in the framework of the dirty war in Latin America in the 1970s.³⁶Technically, the purpose of the rendition practice is simply to out-source torture to countries notorious for their torture practices and the complete deprivation of fundamental rights of the abducted persons. On the whole, rendition flights violates international law especially the rights of absolute prohibition on torture and non-refoulement as well as international refugee laws.

International law recognizes as absolute the prohibition against the forcible sending and transferring or returning of a person to countries where he or she may be subjected to torture, cruel, inhuman or degrading treatment or punishment and its requires the implementation of effective remedies to guarantee the protection of this right.³⁷

The principle of non-refoulement underscores the “*jos cogens*” nature of the prohibition against torture (a peremptory norm of international law from which no derogation is permitted).³⁸In considering the absolute and inviolable nature of both the prohibition on torture and right of non-refoulement, the United Nations Committee held that Article 7 of the International Covenant on Civil and Political Rights (ICCPR encompasses the prohibition against forcibly sending persons to countries where they may be subject to ill treatment. In its General Comment 20, the UN Human Rights Committee States that;

In view of the committee, states parties must not expose individuals to the danger of torture or cruel, human or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or non-refoulement states parties

³⁶ Patrice, J. (2007) Counter terror wars and human rights from operations condor to the present. Retrieved January 4th 2016 at 7:45am available at <https://nada-org/.../counter-terrorismwars-and-humanrightsoptions.com>.

³⁷ United Nations Convention relating to the status of refugees (1951). January 4th 2016, 10:10am available at <http://www.unchr/cgibin/tehis/vtx/home+LWWWBmejstis>,

³⁸ Op.cit furundz.ja's case

should indicate in their reports what measures they have adopted to that end.³⁹

It explained that the UN Committee against torture recognizes the need for close cooperation between states in the fight against crime and for effective measures to be agreed upon for that purpose. It believes however, that such measures must fully respect their rights and fundamental freedom of individuals concerned.⁴⁰

The committee issued a statement on 22nd November 2001, where it reminded states parties to the UN Convention against torture of the non-derogable nature of most of the obligations undertaken by them in ratifying the convention.

In the case of *Paez v. Sweden*, the committee ruled out the possibility of a balancing act between the prohibition against torture and right of non-refoulement on the one hand and national security and terrorism on the other hand by stating that the fact that the applicant is a member of an alleged terrorist organization is not a material consideration in cases of Article 3 of the Convention.⁴¹

Similarly, in *Chahal v. UK*, the European Court considered the argument that there was an implied limitation to Article 3 of the European Convention to expel an individual on grounds of national security, even where there is a risk of ill-treatment in rejecting this argument. The court upheld the absolute nature of the prohibition against torture and principle of non-refoulement it stated thus;

The court is well aware of the immense difficulties faced by states in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective

³⁹ General Comment N20 10/3/92 para available at [http://www.unchrch/tbs/docnsf/\(symbol\)612-491970754969C12563ed056craes?open/](http://www.unchrch/tbs/docnsf/(symbol)612-491970754969C12563ed056craes?open/).

⁴⁰ Arana Strance, Committee agent torture no.63/1997, 05/06/2000, para 11.5

⁴¹ Paez v. Sweden, Committee against torture no.39/1996, 28/04/1997 para 145

of the victims conduct...the prohibition provided in Article 3 against ill treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face risk of being subjected to treatment contrary to article 3, if removed to another states, the responsibility of the contracting state of safeguarding him or her against such treatment is engaged in the event of expulsion...in these circumstance, the activities of the individual in question however, undesirable or dangerous, cannot be a material consideration. The protection afforded by art 3 (art 3) is thus wider than that provided by Article 32 and 33 of the United Nations 1951 Convention on status of refugees.⁴²

Stressing the principle further and applying it to the post September 11 US ongoing ‘war on terror’ the Human rights chamber for Bosnia & Herzegovania, which applies the European Convention on Human Rights in *Boundellia and others*⁴³ and subsequently in *Bensayah*⁴⁴ held that;The chamber fully acknowledges the seriousness and utter importance of the respondent’s parties obligation as set forth in the UN Security Council resolution 1373 to participate in the fight against terrorism. The chamber notes, however that it is absolutely necessary to respect human rights and the rule of law while fighting against terrorism. Terrorism cannot exempt the respondent parties from the responsibility under the agreement, should the chamber find that the handover of the applicant to US forces was in violation of Article 1 of Protocol No.6 to the convention or Article 3 of the Convention.

⁴² *Chahal v. United Kingdom* (224/4/93) (1996) ECHR 54 (15 November 1996) available at <http://www.hrchr.org/safrica/.../chahal.html>

⁴³ *Boundellea and others v. Bosnia & Herzegovania & The Federation of Bosnia and Herzegovania* (11th October 2002, case nos. CH/02/5679ch/02/8689 CH/02/86qoANDch/02/8691 para 236 to 267

⁴⁴ *Bensayah v. Bosnia & Herzegovania* (4 April 2003) case no CH/02/94 999

It is therefore clear that both the prohibition against torture and the principle of non-refoulement are absolute and admits of no room for a balancing act between the interest of National Security and the interest of a person to be protected against torture, cruel, inhuman or degrading treatment or punishment.⁴⁵

⁴⁵ Braun, R and Wonters, K. (2003). Terrorism and the non-derogability of non-refoulement international. *Journal of Refugee Law*. Oxford University Press, 2003, Vol.15, No.1, pg.5 at 21

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

This research is divided into 5 chapters. The first chapter provided a general introduction which includes the background of study, the statement of problems, aims and objectives, scope of research, justification and a literature reviewed.

Chapter two dealt with conceptual classification of key terms such as; the definition of terrorism, the difference between counter terrorism and counter insurgency, derogable and non-derogable right and restriction and absolute rights.

Chapter three focused on the challenges of targeted killings of the suspected terrorist especially by drone-strikes. The chapter highlighted the danger of targeted killing of terrorist suspects especially where it violates territorial integrity sovereign state. It considered specially the killing of Osama bin-Laden by the U.S Navy seals special squad in May 2011 and its effects on the non-derogability of the right to life under International Human Rights law. It explored related topics such as the definition of armed conflict and battle field under the international law with specific emphasis on determining the validity or otherwise of certain excuses peddled by some states to justify the enforcement of measures which are not captured within ambits of article 4 of the ICCPR

The chapter further analyzed the difference between Human Right Law and the Humanitarian Law in order to debunk the assertions of states like the United States that terrorism can accommodate the ground for the activation and application of the principle of *lex specialis*”

as to Justify some extreme and drastic measures resorted to, to combat terrorism after 9/11. Lastly, the chapter considered State responsibility in countering terrorism under International Law.

Chapter four focused on the impact assessment of certain counter-terrorism measures adopted by some states especially the United States after 9/11 on prohibition on torture and the right of non-refoulement such as; The Ticking Bomb argument and the extra-ordinary rendition of terrorist suspects to countries where they are likely to face persecution.

5.2 Findings

1. There is a lack of adequate internal regulatory safe guards that is supposed to ensure proper oversight and control of military operations and the Secret Intelligence activities of states parties especially with respect to measures taken by states parties in respect of their fight against terrorism.
2. There is a lack of transparency in implementing counter-terrorism measures especially in empowering and strengthening the powers and reach of international courts and quasi-judicial committees such as the human rights committee and international committee on torture etc towards ensuring accountability of states parties especially with regards to their international human rights obligations such as the right to life and prohibition on torture and right non-refoulement
3. There is a noticeable failure or refusal of state parties to investigate facts and allegations relating to rendition of terrorist suspects to country countries where they face the risk of persecution.

4. The non-universal application of the jurisdiction of the International Criminal Court has made it easy for countries like the United States to claim that they do not recognize the jurisdiction of the International Criminal Court on the pretext that they were not signatories to it. This has made it easy for them to escape accountability and sanctions for their counter terrorism activities many of which have led to several human rights violations i.e. the drone strikes.
5. The United States refusal to investigate the responsibility of top persons in positions of command with respect to certain allegations of human rights violation, i.e. cases wrongful targeted killing of terrorist suspects has made it easy to promote the general belief that some countries are more equal and privileged than others.
6. There is lack of adequate independent and non-partisan human rights organizations to investigate and expose the effect of scandalous programs such the CIA secret drones programs and the practice of extra-ordinary rendition of terrorism suspects
7. Most of the targeted killings of the terrorist suspect carried out by the United States under their secret drone programs since in 9/11 in Pakistan, Yemen, and Somalia, including the killing of Osama Bin Laden are unlawful and tantamount to murder and a violation of right to life under international human rights law because they are carried out in regions where active conflict does not exist.
8. The ticking bomb theory provides no valid justification for the selective use of torture in the fight terrorism or in respect in other emergency which threatens the life of a nation since the prohibition of torture is both an absolute right and non-derogable right

5.3 Recommendations

The following are the recommendation made from the finding of the research,

1. The provision of a more effective and better international monitoring structure and a better regulatory safe guard to ensure proper oversight and control of the military operations of state parties as well as the secret service operation in their fight against terrorism
2. Promoting transparency in implementations of counter terrorism measures and empowerment international court and quasi-judicial committee such as the Human Rights Committee and the international committee on torture etc towards ensuring accountability of states parties with respect to the violation of basic (non-derogable rights) particularly the right to life and prohibition on torture.
3. International pressure vide the United Nations and other relevant international bodies should be exerted and brought to bear on all state-parties regardless of their status, economic strength or military might to investigate alleged facts bothering on human rights abuses such as rendition of terrorism suspects to places where they are likely to face persecution.
4. The jurisdiction of International Criminal Courts should be made binding on all states both the signatories and the non signatories to the Rome Status as this will help to further ensure accountability for cases of human rights violations perpetrated by so called superpower countries i.e. this should include accountability for unlawful drone program targeting civilians indiscriminately outside conflict areas.
5. Countries like United States who shield top military commanders and high-ranking states officials from facing trial for alleged human rights violations should be punished for

doing such to serve as deterrence for smaller countries who may be tempted to rely on such behavior to commit similar violations.

6. The promotion of more independent and non-partisan human rights organizations and the provision of funds to encourage the investigation and exposure of the effects of scandalous programs such as the CIA secret drone programs and America's extra ordinary rendition of terror suspects to places where there are likely to face prosecution is recommended.
7. Drone programs outside conflict areas should be discouraged and condemned internationally and also prohibited through the adoption of relevant international instruments.
8. The use of ticking bomb theory as an exception to the prohibition against torture should be collectively denounced and states that stubbornly rely on such argument should be sanctioned even if they do so using the fight against terrorism as a justification.

IN CONCLUSION

This research has attempted to bring to the foreground certain recurrent arguments about violation of non derogable rights. Prior to 9/11, the drone program was a relatively unknown phenomenon. Internationally Terrorism was largely fought at the political level by diplomatically and economically sanctioning states suspected of sponsoring terrorism; also cross border attacks against rebel groups were rare and utterly unjustifiable. The same can also be said as regard the absolute prohibition of torture. The 9/11 however attacks militarized the international global response to terrorism and provided a general pretext under which countries like the US has hidden to pursue an ever expanding agenda of impunity and global dominance. This research has thus shown that the realities of the 9/11 attacks as commonly believed did not create a new set of international law as regards the responsibility of states to observe and respect fundamental human rights.

BIBLIOGRAPHY

- Alex, P. & Al Jongman. (1988) *Political Terrorism; New guide to actors, authors, concept, data base, theories and Literature*. New Brunswick (USA) West Hemisphere.
- Alhoft, F. (2012) *Terrorism, Ticking Bomb and Torture*. University of Chicago Press
- Arkin M. (2015) *Unmanned; Drones, Data and the illusion of a perfect War*. Little Brown & Company.
- Barnidge, B.(2007) *Non State Actors and Terrorism: Applying the Law of State Responsibility and due diligence principle*. T.M.C. Asser Press.
- Blum, G. & Heyman, P. (2010). Law and policy of Targeted killing. *Harvard National Security Journal* , Vol 1 retrieved December 30th ,2015 from [http://www.havervnsj.org/.../vol.1.Blum-Heymann...\(pdf\)](http://www.havervnsj.org/.../vol.1.Blum-Heymann...(pdf))
- Bowen, M. (2012). *The finish: the killing of Osama Bin Laden*. Atlantic Monthly Press.
- Brainyquotes.com/quotes/quotes/thomasreff157212.html 28 November, 2015.
- Braun, R. and Wonters, K.(2003).Terrorism and the Non-Derogability of Non-Refoulement international. *Journal of Refugee Law*. Oxford University Press 2003, Vol.15, No.1.
- Breecher, B. (2007) *Torture and the Ticking Bomb*. Wiley Blackwell
- Chaliand, G. & Blin, A (ed) (2007) *The History of Terrorism from Antiquity to Al Qaeda* (Pulver K. & Browner J) University of California press, Berkeley Los Angeles, London.
- Chriswoods, (2005) *Sudden Justice; American's Secret Drone War*, Oxford University
- Danelius, H. (2008) the United Nations Convention against torture and Cruel Inhuman or Degrading Treatment or Punishment. *United Nations Audiovisual Library of International Law*, Retrieved on 2nd January 2015 at 8:23am from http://legal.un.org/avl/...catcidtp_e.pdf.
- David, J. (2009) *Counter Terrorism and Human Rights*. Routledge Press.
- Dearden, L. (2015) ISIS Jihadi Bride claims forced sex with Yazidi girls is never rape because Koran condones it. *The Independent* retrieved on November 28, 2015 4:50pm from <http://www.independent.co.uk/.../isisjihadi bride>.
- Dennis, J. (2012) 'Application of Human Rights Practices Extra-territorially in times of Armed Conflict and military operations; ICPC/C/USA/3 para 3

- Derogation. (2015) In: *Oxford Dictionary.com*. Retrieved on December 4, 8:15am from <http://www.oxforddictionary.com/definition>.
- Diaz, A (2015) *Drones and targeted killings: the need to uphold human rights and international law*. In: Parliamentary Assembly, Committee on Legal Affairs and Human Rights. Retrieved December 16, 2015 from [http://www. website-pace-net/.../targetedkilling...pdf](http://www.website-pace-net/.../targetedkilling...pdf)
- Fair, C. (May 4, 2011) “The bin Laden aftermath: The US Shouldn’t holds Pakistan’s Military against Pakistan’s Civilian Foreign Policy. *The South Asia Channel*. Retrieved from [http:// foreign policy .com/.../the bin Laden aftermath](http://foreignpolicy.com/.../the bin Laden aftermath)
- Frank, N. (2011) Americas Back Bin Laden; Credit Military, CIA Most. *Gallup*. Retrieved December 29th 2015 at 10:00 pm [http://: www. Gallup .com/.../American-back-bin Laden mission](http://www.Gallup.com/.../American-back-bin Laden mission)
- Gabor, R. (2004). *When is a War not a War? - The proper role of the law of armed conflict in the “global war on terror”* . Workshop on the protection of Human Rights While Countering Terrorism Copenhagen. Retrieved December 21, 2015 from www.icr.org/web/eng/siteengco.net/html/5xCMNJ
- George, M. (2003, March 11) “A willful blindness”. *The Guardian*. Retrieved from <http://en.m.wikipedia.org/wiki/criticismofthewaronterror>
- Hampson J. (2007) ‘Other areas of customary law ’. In E. W. Imshurt and J. Breau (eds), *Perspectives on the ICPRC Study on Customary International Humanitarian Law*. Cambridge University Press, Cambridge.
- Hennigan, W. (2015, November 25th). U.S report on Afghan hospital attack ‘Shocking’ medical group says. *Los AngelesTimes*. Retrieved from [http:// www.latimes.com/.../la-fg-kunduzairstrikes](http://www.latimes.com/.../la-fg-kunduzairstrikes)
- Human Rights Watch. Hear no evil see no evil.(2013) Retrieved December 1st , 2015 8:45pm from <https://www.hrw.org/legacy/backgrounder/un/2004/un0804/2.htm>.
- Human Rights: A Basic Handbook for UN Staff, office of the High Commissioner for Human Rights (1997) Retrieved November 28, 2015 from www.ohchr.org/HRhandbooken.pdf
- Human Rights: A Basic Handbook for UN Staff, office of the High Commissioner for Human Rights, retrieved from www.ohchr.org/HRhandbooken.pdf. November 28, 2015.
- Kaag, J. and Krept, S. (2014) *Drone Warfare*. Polity press

- Lewis, W. and Vitkowsky, J. (2011). *The use of drones and targeted killing in Counter Terrorism*. Retrieved on December 27, 2015 from [http:// www. LewisVilkowskyEngage.12.pdf](http://www.LewisVilkowskyEngage.12.pdf)
- Mayfield, J (2008). In defense of prohibition of torture. *Public Affairs Quarterly*, Volume 22. Retrieved January 2nd, 2016 9:23am from <http://faculty.washington.edu/.../4May-field>
- O'connell, M. (2015, April 24th) Drone strikes are illegal beyond the Battlefield. *New York Times*. Retrieved December 29th, 2015, www.com/.../NYtimes.com/.../dronestrike/drone
- Patrice,J.(2007) Counter terror wars and human rights from operations condor to the present. Available at <https://nada-org/.../counter-terrorismwars-and-humanrightsoperations.com>.
- Ray, J. and Sirinvasan, R. (2011, May 18) Pakistan Criticize US Action that killed Osama Bin Laden . *Gallup* . December, 30th 2015 at 9:00am from <http://www.gallup/.../Pakistanis criticize>
- Rejali,D. (2007) *Torture and Democracy*. Princeton M.J. Princeton University Press.
- Rhineheart, J. (2010). Counter Terrorism and Counter Terrorism. *Perspective on terrorism*. Retrieved 2nd December, 2015 www.terrorismanalyst.com/pt/index/php/pot/article/view/22/html
- Ross,B &Feeran,L. (2011, May 3)Changing story? Bin Laden unarmed, White house says. *abc News*. Retrieved 30th December 2015 at 10pm from <http://www.abcnews.go.com/.../Osamabinladen>.
- Schmid P. & Singh R. (2009) *Measuring Success and Failure in Terrorism and Counter Terrorism US Government Metrics and the Global War on Terror Regional and Multilateral Perspective on Counter Terrorism*, Rusi books.
- Schmid, A. (2004). Framework for conceptualizing Terror. *Terror and Political Violence* .16(2) retrieved December 3, 2015, 1:45 from <http://www.tanfoonline.com>
- Schwartz, J. Dunkel, S. & Waterman, S. (2009) *An Identity Theory Perspective*. Retrieved from [http:// sethschwartz info/.../Identity and Terrorism PDF](http://sethschwartz.info/.../Identity and Terrorism PDF) on 17th January 2016.
- Shinkman D. (2013). *U.S. News & World Report*. Retrieved from www.usnews.com/news/..obamaglobalwar-terror-over
- Shubert, A. & Naik, B. (2015, October, 6) ISIS ‘forced pregnant yazidi woman to have abortions’. *The CNN freedom Project*. Retrieved November 29, 5:43 pm from [http://: www.cnn.com/pregnant yazidi women forced to have abortion](http://www.cnn.com/pregnant yazidi women forced to have abortion).

- Sohlm I. & kissing p. (2012) *Practical Guidance Paper on Counter Terrorism and Human Rights Danish Institute for Human Rights* . Retrieved from [http://um.dk/.../Danida / .../ counter terrorism and human rights \(PDF\)](http://um.dk/.../Danida/.../counterterrorismandhumanrights(PDF)) on 25th January 2016.
- Sterio, M. (2012) The United States use of drones in the War on Terror: the (il)legality of targeted Killing under International Law. *Case Western Reserve Journal of International Law vol.12*. Citation :45. Case W. Res. J.int'Ll. 197 2012-2013.
- Tehran World Conference on Human Rights,(1968) retrieved from <https://en.m.wikipedia.org/.../world> conference on Human Rights on November 28, 2015.
- Terrorism Act(2000), Legislative gov.uk, [http://: www.legislation.gov.uk/pge/2000/11](http://www.legislation.gov.uk/pge/2000/11)
- The Patriot Act Constitutional Rights Foundation, www.crf-usa.org/...terrorism/the-patriot-act... retrieved November 11, 2015.
- Tomuschat, C. (2010) Human Rights and International Humanitarian Law. *European Journal of International Law*. Vol 21(1) p.15 Retrieved from <http://ejil.org/pdfs/21/1/1987.pdf>
- UN Security Council Resolution (1566), www.cfr.org/.../un-security-council-1566, November 16, 2015.
- United Nations General Assembly, Report of Ad Hoc Committee established by the General Assembly resolution 51/2010 of 17 December 1996, sixth session (28 January, 1-February 2002) Annex II, art 2.1
- United Nations Office on Drugs and Crime (2009) *frequently asked questions on International Law Aspect of Terrorism*. Retrieved December 4th 2015 at 9:07am [https://www.undoc.org/.../terrorismandcouterterrorism\(pdf\)](https://www.undoc.org/.../terrorismandcouterterrorism(pdf))
- Wilkinson, P. (2001). *Terrorism versus Democracy; the Liberal State Response*. New York, Routledge.
- Wolfgang F. and Arand M. (2005) *The International Fight against Terrorism and Protection of Human Rights (A Study) with recommendation of German Parliament* (ed) German Institute of Human Rights.