

# Unilateral Exceptions to International Law: Systematic legal Analysis and Critique of Doctrines that seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight against Terrorism

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## Abstract

It is well known that many governments have resorted to a wide range of constructions to justify, under international law, their unilateral exceptions to human rights in the name of countering terrorism. This paper seeks to take stock of a range of arguments, doctrines or constructions that states may resort to when seeking to justify their unilateral exceptions to human rights norms in the fight against terrorism. Many constructions have a valid legal basis and a proper scope of application. However, they also have limitations and often relate to a specific treaty, or the availability of a procedure, but do not alter the substantive obligations of the state in question under international law. In many cases, this results from the overlap of treaty law and customary norms of international law. Some of the constructions are open to abuse, i.e. bad faith efforts to distort international law to the detriment of human rights. Because the combined effect of the various excuses and exceptions are complex, there is a need for a holistic approach which seeks to address the combined effect of various constructions of unilateral exceptions.

Keywords: *jus cogens*, *lex specialis*, self-determination, terrorism, unilateral exceptions

## 1. Introduction

This article begins by briefly explaining some issues concerning the definition of terrorism, for the purpose of formulating the actual research question (Section 2) and providing a context for the analysis. As demonstrated by this section, the assessment is conducted primarily on the international (global) level, rather than regional level. International instruments against terrorism and international human rights treaties, such as the International Covenant on Civil and Political Rights therefore enjoy a prominent place in the discussion.

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In Section 3, the main part of the paper turns to identifying and confronting doctrines and legal constructions that seek to deny or reduce the applicability of human rights norms in the fight against terrorism. Such doctrines often seek to escape not only human rights treaty law but also other norms of international law. The discussion is therefore not limited merely to human rights treaty law. This main section of the article discusses a wide range of arguments and doctrines used in practice by governments to carve out more leeway for action in the name of countering terrorism than what international law *prima facie* would allow. The link to actual usage of such doctrines of exception in the context of counter-terrorism also explains how the relevance of such doctrines is highly dependent on whether States resort to a properly crafted and internationally legitimate definition of terrorism, or whether they seek to apply broad and vague definitions of terrorism, possibly for political reasons.

Section 4 presents the conclusions.

## 2. Terrorism and Related Notions

Although the United Nations has adopted a whole series of international treaties related to specific forms of terrorism such as hostage-taking, nuclear terrorism, and terrorist bombings,<sup>1</sup> work towards a comprehensive convention against terrorism is still underway.<sup>2</sup> Governments have been unable to agree on the definition of terrorism.<sup>3</sup> Differing views persist, *inter alia*, regarding whether States<sup>4</sup> - and not only non-state actors<sup>5</sup> - can commit acts of terrorism, and whether the quest for *self-determination*<sup>6</sup> could preclude an act otherwise falling under the definition of terrorism from being a form of terrorism<sup>7</sup>. These disagreements are more political

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<sup>1</sup> For a list of these treaties, see <http://www.un.org/terrorism/instruments.shtml>.

<sup>2</sup> The matter of a comprehensive convention against terrorism is pending before the Sixth Committee of the United Nations General Assembly, see UN Doc. A/64/453 (12 November 2009) and A/RES/64/118 (16 December 2009).

<sup>3</sup> Williamson, M., *Terrorism, War and International Law: The Legality of the Use of Force against Afghanistan in 2001*. (Ashgate, 2009), pp. 49-71.

<sup>4</sup> Howard Zinn, *Terrorism and War* (Seven Stories Press, 2002); G. Wardlaw, *Political Terrorism: Theory, Tactics and Counter-Measures*, (Cambridge: Cambridge University Press, 1982), p. 19.

<sup>5</sup> Report of the Secretary-General's High Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', see UN Doc. A/59/565 (2 December 2004), paras. 51-52 (arguing that terrorist acts are restricted to acts carried out exclusively by non-state actors). See also B. Hoffman, *Inside Terrorism*, (Columbia: Columbia University Press, 1998), pp. 43-44 (noting that one key element of a definition of terrorism is that it is 'perpetrated by a sub-national group or non-state entity').

<sup>6</sup> Ben Saul, Defending 'Terrorism': Justifications and Excuses for Terrorism in International Criminal Law, (2006) *Australian Yearbook of International Law* 25, pp. 177-226 available as Sydney Law School Research Paper No 08/122, p. 13: 'If international law takes self-determination seriously, it must impede human rights law to allow States to criminalize—as terrorists—those who forcibly resist its denial, and to deny them recognition as combatants. International agreement on defining terrorism must be conditioned on the exclusion of legitimate liberation movements from the scope of terrorism, by the full application of Protocol I.'

<sup>7</sup> The Arab Convention on the Suppression of Terrorism (22 April 1998), the Convention of the Organisation of the Islamic Conference on Combating International Terrorism (1 July 1999) and the Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism (adopted on 14 July 2009) have exemptions for liberation struggles against foreign occupation. Saul notes that some of the signatories of these conventions take a double standard on this issue. According to Saul, for instance 'some Asian countries are willing to suppress liberation movements fighting against themselves (as in Sri Lanka, India, the Philippines, Indonesia and Malaysia), but nonetheless argue for the exemption of liberation movements directed against foreign States.' B. Saul, 'Branding

than legal<sup>8</sup>, as it should be fairly easy to agree that it is the choice of morally inexcusable tactics, namely, the sacrificing of innocent bystanders,<sup>9</sup> that qualifies an act as ‘terrorism’ not the identity of the perpetrator or the cause or ideology invoked.<sup>10</sup>

In the aftermath of the terrorist attacks of 11 September 2001<sup>11</sup>, governments have increasingly resorted to vague and broad definitions of terrorism. While this may have been triggered partly by a desire to respond to an unspecific threat posed by unknown and ‘alien’ groups, all too often governments intend to target individuals or groups that do not deserve to be labelled as terrorist. Such groups include political opposition groups, radical trade unions, vocal but nonviolent separatist movements, indigenous peoples, religious minorities, and human rights defenders. For a while, the global consensus about the imperative of combating terrorism was so compelling that authoritarian governments could get away with their repressive practices simply by renaming political opponents as ‘terrorists’. Within European Union circles, for instance, this has resulted in critical reflections on the EU’s inability to properly address the situation in Uzbekistan.<sup>12</sup>

Following 9/11, the United Nations Security Council<sup>13</sup> repeatedly called for action to combat terrorism, which is of particular concern to the international protection of human rights. This could be understood as leaving individual States to define the term ‘terrorism’,<sup>14</sup> and interpret the far-reaching measures authorised and required by the Security Council. The misuse of the term ‘terrorism’ has aggravated the potential risk for unintended human rights abuses.

Enemies: Regional Legal Responses to Terrorism in Asia’, (2008) *Asia-Pacific Yearbook of International Humanitarian Law* 2, p. 110.

<sup>8</sup> See John Dugard, ‘The Problem of the Definition of Terrorism in International Law’, in P. Eden and T. O’Donnel, *September 11, 2001 – A Turning Point in International and Domestic Law?* (New York: Transnational Publishers, 2005), p. 188. Louis R. Beres, ‘The Meaning of Terrorism-Jurisprudential and Definitional Clarifications’, (1995) *Vanderbilt Journal of Transnational Law* 28, p. 248.

<sup>9</sup> See also Marcello Di Filippo, ‘Terrorist Crimes and International Co-operation: Critical Remarks on the Definition and Inclusion of Terrorism in the Category of International Crimes’, (2008) *European Journal of International Law* 19, p. 544, stating that ‘Examination of the values at stake reveals the potential content of a notion of terrorism common to the entire international community. When essential rights of civilians are impaired, a notion of terrorism can be elaborated which entails conduct putting at special risk this basic value: special treatment in criminal law terms can be based upon the intention to spread a climate of panic among the population, leaving the actual motivations of the perpetrators to the field of juridical indifference.’

<sup>10</sup> In his first report considered by the Human Rights Council, Martin Scheinin, the UN Special Rapporteur on human rights and counter terrorism, who is also the main author of this paper, discussed various definitions and elements of definitions of terrorism. See UN Doc.E/CN.4/2006/98 (28 December 2005).

<sup>11</sup> Hereafter referred to as 9/11

<sup>12</sup> See in general: Ian Manners, ‘European Union ‘Normative Power’ and the Security Challenge’, (2006) *European Security* 15, p. 405, G. Crawford, EU human rights and democracy promotion in Central Asia: From Lofty principles to Lowly self-interests, 9 *Perspectives on European Politics and Society* (2008), p. 172.

<sup>13</sup> The Security Council has, under its powers provided by Chapter VII of the UN Charter, adopted a number of legally binding resolutions on countering terrorism, including Resolution S/RES/1373 (28 September 2001) which in the immediate aftermath of 9/11 identified the 9/11 terrorist attacks as well as ‘any act of international terrorism’ (without defining the term) as a threat to international peace and security and proceeded to list a number of mandatory measures for states to take.

<sup>14</sup> Ben Saul, *Defining Terrorism* (Oxford: Oxford University Press, 2006), p. 317 (‘In the absence of any ‘law on terrorism’ in public international law, it is not sufficient to leave the definition of terrorism to individual governments, as the Security Council has done.’)

There is a clear risk that the international community's use of the term 'terrorism', without defining it, can result in the unintentional international legitimisation of conduct undertaken by oppressive regimes<sup>15</sup> through delivering the message that the international community wants strong action against 'terrorism,' however defined. Besides situations where some States resort to the deliberate misuse of the term, there is reason for concern about the more frequent adoption in domestic anti-terrorism legislation of terminology that is not properly confined to countering terrorism.<sup>16</sup>

The European Union partly addressed these concerns by adopting a Council Framework Decision on Combating Terrorism in 2002, which defines three types of terrorist offences.<sup>17</sup> The main aim of the Decision was to harmonise the definition of terrorist offences in all EU Member States, as in 2001 only six Member States had separate provisions on terrorist acts in their criminal law. The lack of a uniform definition potentially undermined possibilities for extradition or other forms of judicial cooperation which traditionally required double criminality, i.e. that only acts that are criminal in both the requesting and the requested States are extraditable offences. However, the EU Network of Independent Experts on Fundamental Rights stated that the definition in the Framework Decision was not adequate in meeting the requirement of lawfulness,<sup>18</sup> which is especially relevant, as this decision formed the basis for EU initiatives such as the establishment of terrorist lists. It has been assessed that the Framework Decision contains adequate protections for human rights if its preamble and the statements attached to it<sup>19</sup> are fully applied.<sup>20</sup>

As a context for their analysis of unilateral exceptions to international law in the name of countering terrorism, the authors assert that States often resort to such exceptions in the defence of their broad or vague understanding of terrorism. The scope of unilateral exceptions could be better controlled if legal definitions of terrorism systematically refer to the methods used, not the

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<sup>15</sup> Mark R. Thompson, Pacific Asia after 'Asian Values': Authoritarianism, Democracy, and 'Good Governance', (2004) *Third World Quarterly* 25, p. 1086 (claiming that 'in Pacific Asia, the U.S.-initiated 'war against terrorism' has been a windfall for authoritarians in the region.' See in general, Rohan Gunaratna (ed), *Terrorism in the Asia-Pacific: Threat and Response*, (Singapore: Eastern Universities Press, 2003); John P. Entelis, The Democratic Imperative v. the Authoritarian Impulse: The Maghrib State between Transition and Terrorism, (2005) *Middle East Journal* 59, pp. 544-545 (on Algeria, Morocco and Tunisia).

<sup>16</sup> See the above-mentioned report of the Special Rapporteur on human rights and counter-terrorism which assesses the practice by the Counter-Terrorism Committee of the Security Council in considering reports by States on their implementation of Security Council Resolution 1373 and concludes that in many instances the Committee was insensitive in relation to the risk that its recommendations will be used in support of policies or practices that breach human rights. See also, reports on country visits by the Special Rapporteur, including A/HRC/4/26/Add.2 (16 November 2006), paras. 11-18; A/HRC/4/26/Add.3 (14 December 2006), paras. 12-17; A/HRC/6/17/Add.2 (7 November 2007), paras. 23-24; and A/HRC/10/3/Add.2 (16 December 2008), paras. 6-14. See fn. 10.

<sup>17</sup> Official Journal Legislation 164, 22.06.2002, p. 3. See also, Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330, 9.12.2008, p. 21.

<sup>18</sup> EU Network of Independent Experts in Fundamental Rights (CFR-CDF). The balance between freedom and security in the response by the European Union and its Member States to the terrorist threats, May 2003, p. 11. Available at [http://ec.europa.eu/justice\\_home/cfr\\_cdf/doc/obs\\_thematique\\_en.pdf](http://ec.europa.eu/justice_home/cfr_cdf/doc/obs_thematique_en.pdf). Last accessed 18 August 2011.

<sup>19</sup> Council document 14845/01 of 6 December 2001 (which can be used as interpretative tool, but has no legal status or effect) states that the Decision should not be 'construed so as to incriminate on terrorist grounds persons who exercise their legitimate right to manifest their opinions, even if in the course of the exercise of such right they commit offences'. Council document 14845/01 of 6 December 2001, p. 15.

<sup>20</sup> See Steve Peers, 'EU Responses to Terrorism', (2003) *International and Comparative Law Quarterly* 52, p. 243.

underlying aim.<sup>21</sup> What transforms political or ideological aspirations into terrorism is the decision by one or more morally responsible individuals to employ the morally inexcusable tactics of deadly or otherwise serious violence against ‘civilians’, i.e. innocent bystanders or members of the general population or a segment of it.<sup>22</sup> With the qualification that hostage-taking entails a threat of serious violence and should therefore be included in the definition, terrorism and terrorist crimes should always be defined so that such violence is an element of the definition.<sup>23</sup>

Amongst UN Security Council resolutions calling for action against terrorism, Resolution 1566 (2004) is closest to defining terrorism adequately<sup>24</sup> by including three cumulative conditions:

1. Acts, including against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages; and
2. Irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious, or other similar nature, also committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a government or an international organisation to do or to abstain from doing any act; and
3. Such acts constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.<sup>25</sup>

The third condition, that only acts constituting offences within existing terrorism-related conventions may fall under the terrorism definition, includes an important rule-of-law based delimitation of the notion of terrorism. However, two caveats are in order here. Firstly, not all of the international conventions that are today listed as conventions against terrorism were originally intended to cover instances of terrorism alone. For instance, the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation seeks generally to protect the security of civilian aircraft and therefore addresses also petty offences

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<sup>21</sup> In *R .v. Khawaja*, Canadian Justice Rutherford concluded that the requirement for proof of political religious, or ideological motive in Canada’s 2001 anti-Terrorism act would ‘chill freedom protected speech, religion, thought, belief, expression and association, and therefore, democratic life; and will promote fear and suspicion of targeted political or religious groups, and will result in racial or ethnic profiling by governmental authorities at many levels.’ [2006] Official Journal No 4245 (Supreme Court of Justice) at para. 73.

<sup>22</sup> For an alternative approach see Cassese, who advances the view that the possible victims of terrorist acts can be also State officials. A. Cassese, ‘The Multifaceted Criminal Notion of Terrorism in International Law’, (2006) *Journal of International Criminal Justice* 4, pp. 938-939. Kolb points out that ‘non-discrimination may well be a distinctive sign of some terrorist actions, but it by no means exhausts the phenomenon. Consider, for example, the killing of carefully selected persons of symbolic value.’ R. Kolb, ‘The Exercise of Criminal Jurisdiction over International Terrorists’, in A. Bianchi, (ed). *Enforcing International Law Norms against Terrorism*, (Oxford: Hart Publishing, 2004), p. 235.

<sup>23</sup> Report of the Special Rapporteur on counter-terrorism and human rights, E/CN.4/2006/98. See fn. 10. . See also Kent Roach, ‘Defining Terrorism: The Need for A Restrained Definition’, in Nicole La Violette and Craig Forcese (eds), *The Human Rights of Anti-terrorism*, (Toronto: Irwin Law Inc., 2008), p. 98 (saying that ‘a precise definition of terrorism that concentrates on the murder and maiming of civilians could become a unifying point that focuses on the worst forms of terrorism, while also providing maximal protection for dissent and protest.’)

<sup>24</sup> Roach agrees, but states however that ‘resolution 1566 came too late, as many States had already responded to SC RES 1373 by enacting overbroad definitions of terrorism’. See fn. 22.

<sup>25</sup> UN Doc. S/RES/1566 (8 October 2004), para. 3.

that do not deserve to be referred to as terrorism.<sup>26</sup> Therefore, even Security Council Resolution 1566 may in certain respects be over-inclusive in defining terrorism.

Secondly, the delimitation contained in the Security Council resolution is appropriate on the international level, as the Security Council has no authority to call States to action against forms of terrorism that have not been qualified as such by the international community. But there may be situations where a particular State feels compelled to implement additional counter-terrorist measures according to specific regional or domestic threats. Where there is evidence that a State must respond to domestic or regional terrorist threats, it may therefore have genuine reasons to proscribe acts that fall outside the scope of offences under the existing universal terrorism-related conventions. What then comes into play is the requirement that any national definitions of crimes must meet the requirement of legality, enshrined in the non-derogable provision of Article 15 of the International Covenant on Civil and Political Rights (ICCPR).

In the absence of an internationally agreed definition of terrorism, this last-mentioned provision of human rights law has come to serve, together with the prohibition against discrimination, as the basis for a ‘checklist’ for the conformity of definitions of terrorism or terrorist crimes with human rights. Besides the obvious element of a prohibition against the retroactive application of the criminal law, Article 15 ICCPR also includes the requirements of *nullum crimen sine lege* (all elements of a crime must be defined by the law), *nulla poena sine lege* (all punishments must be defined by the law), accessibility (the law must be publicly available), precision (the line between permitted and prohibited conduct must be clear), and foreseeability (the law must enable an individual to anticipate the consequences of his or her conduct). The safest way to secure compliance with these requirements is to base any definitions of terrorist crimes on an exhaustive list of already defined serious violent crimes. Criminalisation of terrorist intent as such, or circular definitions that refer back to the word ‘terror’, or definitions that generally cover crimes against the state, regularly fail the test under Article 15 ICCPR. Among existing legal definitions of terrorism, the one contained in the EU Framework Decision is in principle a healthy one, as it is based on the exhaustive enumeration of pre-existing crimes that under certain additional requirements qualify as terrorist crimes.<sup>27</sup> However, the list of ordinary crimes in the Framework Convention is rather lengthy and therefore does not distinguish terrorist crimes as a particularly serious category of crime, to a sufficient degree.

The above discussion of definitions of terrorism makes it is obvious that when the remaining part of this paper discusses doctrines or arguments through which States seek to depart from their human rights obligations or other obligations under international law in the context of countering terrorism, there is no uniform definition of terrorism that could serve as a proper basis for defining the scope of the study. Rather, the starting point will be in the invocation of the term ‘terrorism’, however defined, by the state in question as justification for its departure from one or another norm of international law. This approach may be over-inclusive in the sense that it covers, besides action against terrorism as properly defined, also unintended or intentional broader use of the notion of terrorism. However, in order to avoid situations of under-inclusiveness, it must also be taken into account that sometimes counter-terrorism or analogous

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<sup>26</sup> See Article 1 of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation signed at Montreal on 23 September 1971.

<sup>27</sup> See fn. 16.

powers are triggered also with reference to terms such as ‘state of emergency’, ‘national security’, or ‘extremism’. Such instances are also covered by the scope of this study, although most of the discussion focuses on situations where the term ‘terrorism’ is explicitly used by States.

### 3. Unilateral Exceptions to International Law and to Human Rights Norms

#### 3.1. Sources of International Law

As human rights law forms a part of the broader normative framework of public international law, the sources of human rights law are to be sought by applying the general doctrine of public international law. Article 38(1) of the Statute of the International Court of Justice<sup>28</sup> provides an authoritative account of the sources of law to be applied by the Court. This list, widely understood as reflecting the catalogue of sources of international law generally, includes four items:

- a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognised by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

According to its formulation, the fourth category (d) is clearly subsidiary in respect of the three preceding sources. Otherwise, there is no hierarchy between the sources of international law.<sup>29</sup> In particular, treaty norms and customary law norms are equally authoritative and may result in deviations from each other. This should not be confused with the hierarchically superior position of peremptory norms of international law (*jus cogens*)<sup>30</sup> which, as reflected in Article 53 of the Vienna Convention of the Law of Treaties (VCLT),<sup>31</sup> enjoy primacy in respect of treaty norms and result in the invalidity of a conflicting treaty norm.<sup>32</sup> Although *jus cogens* norms - as being

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<sup>28</sup> The Statute of the International Court of Justice is an Annex to the United Nations Charter (1945).

<sup>29</sup> See also Pierre Dupuy, *Droit International Public*, (Paris: Précis Dalloz, 1995), pp. 14-16 (arguing that there is no hierarchy in international law norms and that logically there can be none). For the relationship between treaty and custom see Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, (Leiden: Martinus Nijhoff Publishers, 2009), pp. 1-27.

<sup>30</sup> See in general, Ian Seideman, *Hierarchy in international law: the human rights dimension*, (Antwerp: Intersentia, 2001).

<sup>31</sup> According to Shelton, ‘the concept was controversial from the start’; ‘Article 53 demands that there first be established a norm of general international law and, second, that the international community of states as a whole agree that it is a norm from which no derogation is permitted. While this definition precludes an individual state from vetoing the emergence of a peremptory norm, it sets a high threshold for identifying such a norm and bases the identification squarely in state consent.’ D. Shelton, ‘Normative Hierarchy in International Law’, (2006) *American Journal of International Law* 100, pp. 300-301.

<sup>32</sup> See separate opinion of John Dugard, Armed Activities on the Territory of the Congo (New Application: 2002) (*Democratic Republic of Congo v. Rwanda*), Jurisdiction and Admissibility (International Court of Justice, 3 February 2006), para. 6. Shelton however comments: ‘Yet it is hard to accept the practical import of the VCLT: if one assumes that two states enter into an agreement, for example to commit genocide, slave trading, or aggression,

peremptory for all states - by definition fall within the category of customary international law, they can also be included in treaties. For instance, the prohibition against torture is a *jus cogens* norm based not only on customary law, but also on a number of widely ratified treaties pertaining to human rights law and international humanitarian law.<sup>33</sup> Therefore, hierarchically superior status of *jus cogens* norms does not imply any primacy of customary law in respect of treaty norms in general.

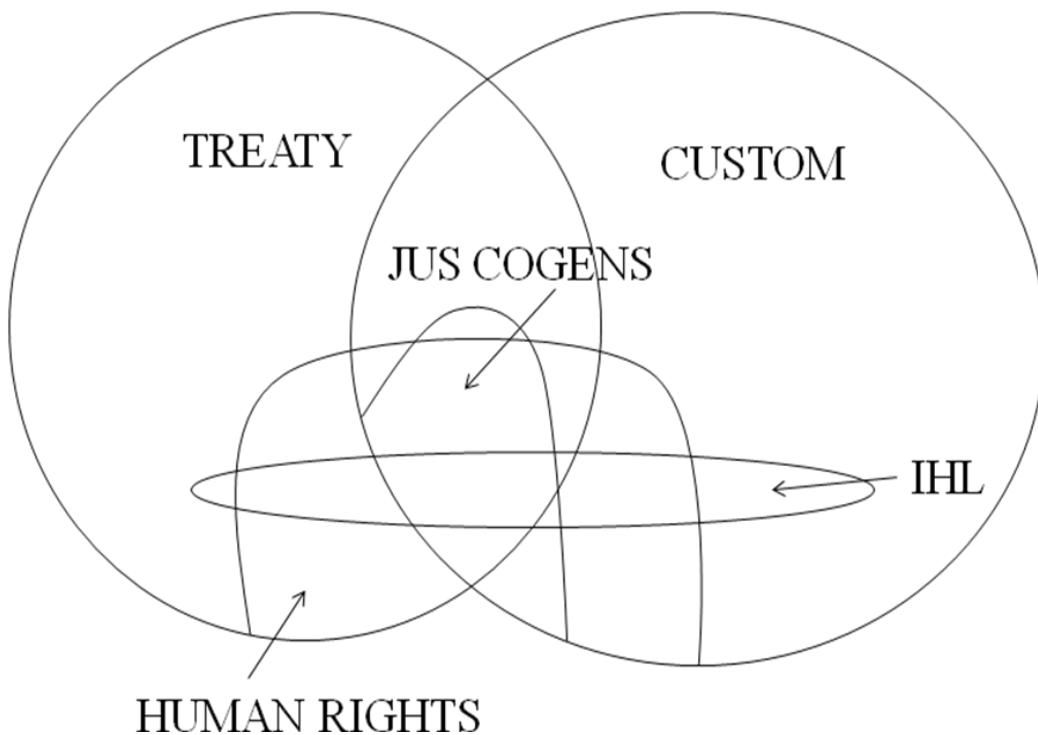


Figure 1

Treaty and custom are the two main sources of international law. Human rights norms may belong to one of them, or to the area where treaty and customary law norms overlap. Likewise, norms of international humanitarian law (IHL) may have their legal basis in treaty, custom or both. To a large extent, norms of international humanitarian law overlap with norms of human rights law. Peremptory norms of international law (*jus cogens*) always qualify as customary law, even when they are expressed in a treaty. Many norms of *jus cogens* also fall within the realm of human rights law or humanitarian law, or both. The partially overlapping nature of these concepts, related to sources and normative categories of international law, are illustrated in Figure 1. Towards the end of this article, we will return to Figure 1 in order to demonstrate how

Article 71 would dictate that the parties should then eliminate the consequences of any illegal act performed in reliance on the treaty and bring their relations into conformity with the peremptory norm. Since the treaties and acts mentioned would also be likely to constitute breaches of UN Charter Article 103, it would seem unnecessary to resort to *jus cogens*.<sup>33</sup> Shelton, p. 304. See fn. 30.

<sup>33</sup> See also Erika de Wet, ‘The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and International Customary Law’, (2004) *European Journal of International Law* 15, p. 97.

the various forms of unilateral exception each require separate assessment in relation to their place in the overall framework of international law.

The third source of international law (general principles of law recognised by civilized nations) can be bypassed here, as its role has gradually diminished<sup>34</sup> owing to the evolution of both treaty and custom as true sources of international law,<sup>35</sup> the effect being that general principles of international nature would largely overlap with what is already covered by customary law. General principles of law may still be seen as a reference to legal principles of national legal systems, primarily in the field of private law, such as those pertaining to contractual relationships between two parties.<sup>36</sup>

### *3.2. Typology of Exceptions to be Discussed*

There is nothing new in governments engaging in legal argumentation to justify a measure that at first sight, or according to another government or an individual, amounts to an internationally wrongful act<sup>37</sup> or, more specifically, to a human rights violation. However, post 9/11, international terrorism and global measures of counter-terrorism have been transformed from legal arguments in a specific case of issue into a complex matrix of arguments, doctrines, concepts and interpretations. The overall effect of the various arguments and constructions is difficult to assess without the elaboration of a systematic approach. Therefore, these constructions will be addressed one after the other in order to assess their appropriateness and effect, and also their interrelationships..

The notion ‘unilateral exceptions’ seeks to demonstrate that the constructions in question are invoked by a single State in an effort to justify a measure that seemingly constitutes an internationally wrongful act, or otherwise departs from the substantive primary norms that express the normative contents of international law. It should be added, that many States resort to such constructions jointly, with other States, or seeking support from the international community (such as United Nations bodies), or in some cases, referring to action by others (such as the United Nations Security Council) as a part justification for their own measures. The reference to the constructions as ‘unilateral’ does not carry the connotation that a State invoking one or more would have chosen unilateralism, in contrast to multilateralism, as a framework for its international policy. However, there may be a correlation between the policy of unilateralism and an effort by an individual state to invoke a whole range of the constructions discussed below. The authors acknowledge that their category of unilateral exceptions is broad and comprises both arguments that entail a choice between potentially available legal frameworks and justifications for measures that *prima facie* would constitute a breach of international law.

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<sup>34</sup> See Aust who states that ‘General principles of law, judgments and the opinions of writers are of less importance as sources.’ Anthony Aust, *Handbook of international law*, (Cambridge: Cambridge University Press, 2005), p. 6.

<sup>35</sup> See generally Fabian O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, (Leiden: Martinus Nijhoff Publishers, 2008), pp. 42-44.

<sup>36</sup> Aust, p. 9. See fn. 33.

<sup>37</sup> According to Article 2 of the Articles on State Responsibility by the International Law Commission, an internationally wrongful act on the part of a State occurs when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State. See UN Doc. A/RES/56/83, United Nations General Assembly Resolution, 12 December 2001.

The discussion below will address the following range of unilateral exceptions:

- a. Denial of the applicability of human rights law during armed conflict (3.3)
- b. Denial of status as protected persons under international humanitarian law (3.4)
- c. The United Nations Charter as *lex superior* (3.5)
- d. Denial of attribution to an individual state of action by intergovernmental organisations (3.6)
- e. Denial of extraterritorial effect of human rights (treaties) (3.7)
- f. Reservations to treaties (3.8)
- g. Persistent objection to custom (3.9)
- h. Derogation during times of emergency (3.10)
- i. Overly broad use of permissible limitations or restrictions (3.11)
- j. Withdrawal from treaties (3.12)

Thereafter, subsection 3.13 will apply a holistic approach to address the combined effect of the various constructions.

### *3.3. Denial of the Applicability of Human Rights Law during Armed Conflict*

Some governments have sought to justify their unilateral exceptions to international human rights norms by referring to a ‘war’ against terrorism<sup>38</sup> which triggers the application of international humanitarian law. Such a position is usually<sup>39</sup> factually incorrect, since acts of terrorism on their own do not constitute an international armed conflict between two or more States, or a non-international armed conflict<sup>40</sup> between a State and a non-state actor capable of conducting organised armed hostilities.<sup>41</sup> Instead, terrorism should primarily be seen as a serious form of crime and fought within a law-enforcement paradigm.<sup>42</sup> Therefore, the unaffected

<sup>38</sup> Reply of the Government of the United States of America to the Report of the Five UNHCR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba 4 (2006). Available at <http://www.asil.org/pdfs/ilib0603212.pdf>. Last accessed 19 September 2011. ‘The United States is engaged in a continuing armed conflict against Al Qaeda, the Taliban and other terrorist organizations supporting them, with troops on the ground in several places engaged in combat operations.’

<sup>39</sup> Silvia Borelli, ‘Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the ‘War on Terror’’, (2005) *International Review of the Red Cross* 87, p .46. (arguing that outside of an armed conflict *stricto sensu*, i.e. during the conflicts in Afghanistan and Iraq and the subsequent military occupation, the ‘war on terror’ should not be considered an armed conflict but as law enforcement on an international scale).

<sup>40</sup> International Committee of the Red Cross, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts (2003), p. 19. Available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/\\$File/IHLcontemp\\_armedconflicts\\_FINAL\\_ANG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5XRDCC/$File/IHLcontemp_armedconflicts_FINAL_ANG.pdf). Last accessed 18 August 2011. See also D. Jinks, September 11 and the Laws of War, (2003) *Yale Journal of International Law* 28, p. 1.

<sup>41</sup> See e.g., Helen Duffy, *The ‘War on Terror’ and the Framework of International Law*, (Cambridge: Cambridge University Press, 2005), pp. 250-55 (arguing that the conflict with Al-Qaida cannot be characterised as an international or non-international armed conflict).

<sup>42</sup> Mark A. Drumbl, ‘Judging the 11 September Terrorist Attack’, (2002) *Human Rights Quarterly* 24(323) (arguing that the September 11th attack should be treated as a criminal attack and be addressed by international criminal law and process). Compare with the position of the UK Government as described by one commentator: ‘The ‘war’ does not constitute an overarching armed conflict, but each individual counterterrorist military operation in the context thereof should be designated separately as either international or non-international in nature, depending on the international law definition and the facts on the ground-this is the position currently maintained by the British

applicability of human rights law on its own as the proper legal framework for the rights of terrorist suspects or other persons affected by counter-terrorism measures should be the point of departure.

It is possible, however, that for a limited period of time and in respect of a specific geographic area, non-state actors referred to (by the State) as 'terrorists' may be engaged as a party in an armed conflict. A prime example is Afghanistan in late 2001, when members of Al-Qaida were engaged in an armed conflict against the US, siding with the local Taliban that constituted the *de facto* government of Afghanistan.<sup>43</sup> When the Taliban ceased to be the *de facto* government of Afghanistan, the international armed conflict was over but continued in the form of a non-international armed conflict as long as identifiable parties were conducting organised armed hostilities against each other. Consequently, in exceptional cases what is referred to as 'terrorism' may qualify as pockets of armed conflict within a general law enforcement environment. But even in such rare circumstances human rights law remains *applicable*, although it may need to be *interpreted* in the light of more specific rules contained in international humanitarian law.<sup>44</sup>

It has become customary to use the Latin notion of *lex specialis* when discussing the interrelationship between human rights law and humanitarian law. *Lex specialis* is one of the recognised tools for resolving conflicts between legal norms, including within international law or between different international treaties.<sup>45</sup> However, as there are at least three different understandings of what *lex specialis* actually entails, sometimes reference to it is more a part of the problem than the answer.

- a. A broad meaning of *lex specialis* would imply that the applicability of a regime of more specific norms, which precludes the application of more general ones. Hence, when international humanitarian law addresses an issue in more specific terms than human rights law, the latter would be set aside as a regime.
- b. A more modest version of *lex specialis* would not result in the exclusion of a general normative framework, but only in the primacy of the more specific norm in a concrete case. The International Court of Justice (ICJ) has used the notion of *lex specialis* to express this position, or perhaps a half-way approach between the first (exclusionary) position and the second (priority-based) position, when dealing with the interrelationship between humanitarian law and human rights law in situations of armed conflict.

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government.' David Turns, 'The Treatment of Detainees and the 'Global War on Terror': Selected Legal Issues', (2008) *International Legal Studies Series US Naval War College* 84, p. 215.

<sup>43</sup> See Report of the Special Rapporteur on human rights and counter-terrorism, A/HRC/6/17/Add.3 (22 November 2007), in particular para. 9.

<sup>44</sup> Idem, para. 7. See also Roy S. Schondorf, 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?', (2004) *New York University Journal of International Law and Politics* 37(1), pp. 62-75 (arguing that IHL as *lex specialis* paradigm would apply even in the context of an armed conflict between a State and non-State armed group that takes place outside of the State's territory).

<sup>45</sup> Notably, *lex specialis* does not appear in Article 30 of the Vienna Convention on the Law of Treaties which is the primary conflict-resolution provision in the Convention. However, it can be read into Article 31 on the interpretation of treaties, and in particular into Article 31(3)(c) and its reference to 'any relevant rules of international law applicable in the relations between the parties'. See Villiger, p. 409. See fn. 28. See also Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Yearbook of the International Law Commission, 2006, vol. II, Part Two.

In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ affirmed the applicability of human rights law, notably the International Covenant on Civil and Political Rights, during armed conflict, stating that ‘the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what constitutes an arbitrary deprivation of life, however, then must be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict.’<sup>46</sup> Similarly, but not identically, in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* the ICJ pronounced:

[...] the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the [ICCPR]. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.<sup>47</sup>

(c) A third approach is represented by the treaty body that monitors compliance with the ICCPR, the Human Rights Committee, which applies the maxim of *lex specialis* in conformity with the VCLT as an interpretive tool, to the effect that the more specific norm informs the interpretation of the more generic one, and this takes place in both directions and not only in the sense of humanitarian law informing human rights law. In order to reduce confusion in the matter, the Human Rights Committee omitted to use the Latin expression of *lex specialis* when formulating its position:

As implied in General Comment 29, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.<sup>48</sup>

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<sup>46</sup> International Court of Justice Reports 1996, pp. 226, 240 (8 July 1996), para. 25: ‘In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict, which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.’

<sup>47</sup> International Court of Justice Reports 2004 (9 July 2004), para. 106: ‘More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the ICCPR. As regards the relationship between international humanitarian law and human rights law there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.’

<sup>48</sup> U.N. Doc. CCPR/C/21/Rev.1/Add.13, Human Rights Committee, *General Comment 31 Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, at para. 11. See also, William A. Schabas, ‘Lex

Human rights law continues to apply in times of armed conflict. More specific norms of international humanitarian law may inform the interpretation of human rights law but this does not mean that the latter could be pushed aside.

### 3.4. Denial of Status as Protected Persons under International Humanitarian Law

Human rights law is based on the principle of universality. Human rights belong to every human person because of his or her membership in the human race, irrespective of colour, nationality, sex, age, or other characteristics. In contrast, international humanitarian law evolved from the need to provide protection to specific groups because they are not legitimate targets of lethal force during an armed conflict. Therefore, a person's membership in categories such as combatants, civilians, prisoners of war, or wounded and sick is important for the proper application of humanitarian law and will also depend on the nature of the armed conflict in question, i.e., whether it is an international or a non-international armed conflict.

During the Bush administration, the United States not only sought to exempt itself from obligations under human rights law through denying its extraterritorial reach<sup>49</sup> and through a reference to humanitarian law as the *lex specialis* regime governing the situation during the ‘war on terror’.<sup>50</sup> It also sought to deny the application of concrete rules of humanitarian law by explaining that suspected terrorists fell outside all categories of protected persons under humanitarian law, thus falling into what is referred to as a ‘legal black hole.’ In short, the doctrine of the Bush administration was that suspected terrorists were neither lawful combatants, a term applicable only in international armed conflict between two or more States, nor civilians. The individuals the United States captured and detained in the context of the ‘war on terror’ were ‘unlawful alien enemy combatants’ who could be detained indefinitely without trial and without prisoner of war status.<sup>51</sup>

Such a position is a misrepresentation of international humanitarian law. In situations of armed conflict, combatants (soldiers) can be lawfully targeted for the use of lethal force. The same applies to civilians who actively participate in hostilities.<sup>52</sup> As soon as a person is not a lawful target, he or she is entitled to protection under international humanitarian law either as a combatant taken as prisoner of war, or as a civilian. In case of a non-international armed conflict, the notions of ‘prisoner of war’ or ‘combatant’ are technically not applicable, but the outcome is

Specialis? Belt and Suspenders? The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum’, (2007) *Israel Law Review* 40, p. 592.

<sup>49</sup> Periodic report by the United States of America under the ICCPR, CCPR/C/USA/3, p. 119. See fn. 37.

<sup>50</sup> Françoise Hampson, ‘The Relationship between International Humanitarian Law and Human Rights Law from the Perspective of a Treaty Body’, (2008) *International Review of the Red Cross* 90, p. 550.

<sup>51</sup> See John Bellinger, ‘Legal Issues in the War on Terrorism - A Reply to Silja N. U. Vöneky’, (2008) *German Law Journal* 8, p. 876. R. Knowles, ‘Detainee Policy and the Rule of Law: A Response’, (2007) *Harvard International Law Journal Online* 48, p. 69; George H. Aldrich, ‘The Taliban, Al Qaeda, and the Determination of Illegal Combatants’, (2002) *American Journal of International Law* 96, p. 894. Knut Dörmann, ‘The Legal Situation of ‘Unlawful/Unprivileged Combatants’, (2003) *International Review of the Red Cross* 85, p. 45.

<sup>52</sup> See International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 2009. Here, the notion of ‘members of organised armed groups of a party to the conflict’ is used analogously to ‘combatant’ when referring to non-international armed conflict.

nevertheless the same. A person who is fighting on the side of the non-state actor, party to the conflict, may be detained either as a person suspected of a crime, as a security detainee held for the duration of hostilities analogously to prisoners of war, or as an interned civilian. In all these cases, they remain protected under humanitarian law as a person who is not currently participating in hostilities. There is *no legal black hole* in humanitarian law between the various categories of protected persons, where suspected terrorists could be pushed into in order to deny to them the protection of the law. The notion of ‘unlawful combatant’ is merely an expression of convenience that does not carry legal consequences.<sup>53</sup>

### 3.5. *The United Nations Charter as Lex Superior*

On occasion, governments have argued that their measures against terrorism, including those entailing negative consequences for human rights, are not at their discretion, but amount to legal obligations under the United Nations Charter, its Chapter VII on the Security Council’s power to impose upon Member States mandatory measures in the name of international peace and security. Under Article 103, the UN Charter trumps competing treaty obligations, including those emanating from human rights treaties.<sup>54</sup> This argument was, for instance, presented by the delegation of the United Kingdom when appearing before the Human Rights Committee in October 2001, (soon after 9/11.<sup>55</sup>)

There is no contradiction between human rights and the UN Charter. On the contrary, the promotion of and respect for human rights has a central place in the purposes of the UN (Article 1), and the functions and powers of the Security Council are to be exercised in accordance with those purposes (Article 24, paragraph 2). Furthermore, the United Nations (Article 55) and its Member States (Article 56) are committed to promoting universal respect for, and observance of human rights and fundamental freedoms for all. Counter-terrorism measures, even when adopted in the form of mandatory resolutions under Chapter VII, must be implemented in full compliance with human rights. Security Council Resolution 1373 (2001) is a prime example in this context. While it is legally binding for Member States as a Chapter VII resolution, there is nothing in it *that makes it mandatory* to deviate from the same States’ human rights obligations when implementing the resolution. Some of the Security Council’s subsequent counter-terrorism

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<sup>53</sup> See Allan Rosas, *The Legal Status of Prisoners of War* (1976, reprinted 2005), p. 305 et seq; Special Rapporteur on human rights and counter-terrorism, Report on the Mission to the United States of America (2007), A/HRC/6/17/Add.3, para. 11; D. Turns, ‘The Treatment of Detainees and the ‘Global War on Terror’: Selected Legal Issues’, (2008) *International Legal Studies Series. US Naval War College*. 84, p. 209.

<sup>54</sup> See in general Hans Kelsen, ‘Conflicts between Obligations under the Charter of the United Nations and Obligations under Other International Agreements - An Analysis of Article 103 of the Charter’, (1948) *University of Pittsburgh Law Review* 10(284); Rain Liivoja, ‘The Scope of the Supremacy Clause of the United Nations Charter’, (2008) *International and Comparative Law Quarterly* 57, p. 583. The wording of Article 103 refers to the Charter having primacy in respect of other ‘agreements’, i.e. treaty law. However, some authors take the view that the primacy of the UN Charter extends to customary law as well, except that peremptory norms (*jus cogens*) would retain their primacy even in respect of the Charter.

<sup>55</sup> UN Doc. CCPR/C/SR.1963, Human Rights Committee, Summary Records 23 October 2001, at para. 25. ‘With regard to the relationship between Security Council Resolution 1373 (2001) and the Covenant, he was unable to say whether the action against terrorism called for in the resolution would involve a derogation from Covenant rights, but if it did the provision of Article 103 of the Charter of the United Nations to the effect that obligations under the Charter prevailed over those under any other international agreement would apply.’ (Mr Steel).

resolutions such as Resolutions 1456 (2003), 1624 (2005) and 1822 (2008) include an explicit clause on Member States' obligation to comply with human rights when implementing the measures.

Tensions between human rights and Security Council resolutions have arisen in relation to the question of sanctions against individuals suspected of terrorism or of financing terrorism. Here, the Security Council exceptionally decides on measures against named individuals, leaving very little room for discretion at the level of implementation by Member States. The appropriateness of the Security Council deciding as first and final instance on the fate of named individuals can be questioned under the United Nations Charter.<sup>56</sup>

As long as the Security Council continues to impose sanctions against named individuals, Member States shall implement such resolutions, while at the same time complying with their human rights obligations to the best of their ability. The United Nations is not involved in any general listing of terrorists. Instead, the listing system in place is based on Security Council Resolution 1267 of 1999, as amended, and is limited to individuals or entities belonging to or associated with Al-Qaida or the Taliban.<sup>57</sup> The consolidated list of Al-Qaida and Taliban terrorists maintained by a separate Security Council committee, the 1267 Sanctions Committee, includes hundreds of individuals and entities.<sup>58</sup> Increasingly, governments, domestic and regional courts,<sup>59</sup> human rights treaty bodies,<sup>60</sup> as well as many scholars,<sup>61</sup> argue that as long as there is no

<sup>56</sup> See Jochen Frowein and Nico Krisch, 'Introduction to Chapter VII' in B. Simma, (ed), *The Charter of the United Nations: a Commentary*, (Oxford: Oxford University Press, 2002), pp. 708-711; Martin Scheinin, 'Is the ECJ Ruling in Kadi Incompatible with International Law?', (2009) *European Yearbook of International Law* 28, pp. 650-652.

<sup>57</sup> See in general Michael Bothe, 'Security Council's Targeted Sanctions against Presumed Terrorists', (2008) *Journal of International Criminal Justice* 6, p. 541; Andrea Bianchi, 'Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion', (2006) *European Journal of International Law* 17, p. 881; Daniel Halberstam and Eric Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights on a Plural World Order', (2009) *Common Market Law Review* 46, p. 13.

<sup>58</sup> For the consolidated list, see <http://www.un.org/sc/committees/1267/pdf/consolidatedlist.pdf>. Last accessed 18 August 2011.

<sup>59</sup> Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union*, European Court of Justice (Grand Chamber), 3 September 2008.

<sup>60</sup> *Nabil Sayadi and Patricia Vinck v Belgium* (Communication no 1472/2006), Final Views by the Human Rights Committee, 22 October 2008.

<sup>61</sup> See Clemens A. Feinäugle, 'The UN Security Council Al-Qaida and Taliban Sanctions Committee: Emerging Principles of International Institutional Law for the Protection of Individuals?' (2008) *German Law Journal* 9, p. 1539 (saying that 'national or regional courts may examine listings by applying human rights as a standard of review as long as international mechanisms of judicial review are lacking'); Iain Cameron, 'UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights', (2003) *Nordic Journal of International Law* 72, p. 180 (saying that 'in most conceivable cases - and all conceivable cases of targeted financial and travel sanctions I can think of - there is thus no need, or room, for applying Article 103 to avoid human rights obligations.') Gert Vermeulen and Wendy de Bondt, 'Finding the Right Balance between Effective Measures and Fundamental Human Rights Guarantees', (2008) *Revue Internationale de Droit Pénal* 79, p. 379 (noting that the 'lack of due process is in clear violation of fundamental human rights'). See as well Imelda Tappeiner, 'The Fight against Terrorism. The Lists and the Gaps', (2005) *Utrecht Law Review* 1, p. 97; Johannes Reich, 'Due Process and Sanctions Targeted Against Individuals Pursuant to Resolution 1267' (1999) with an added note on European Court of Justice, Judgment in Joined Cases C-402/05 P and C-415/05 P, (2008) *Yale Journal of International Law* 33, p. 505; Piet Eeckhout, 'Community Terrorism Listings, Fundamental Rights, and UN Security Council Resolutions. In Search of the Right Fit', (2007) *European Constitutional Law Review* 3, p. 183; Andrew Hudson, 'Not a Great Asset: The UN Security Council's Counter-terrorism Regime: Violating Human Rights', (2007) *Berkeley Journal of International Law* 25, p.

effective independent review of listing and delisting decisions at the UN level, Member States must secure such review in respect of their own measures implementing the UN-imposed sanctions.<sup>62</sup>

### 3.6. *Denial of Attribution to an Individual State of Action by Intergovernmental Organisations*

A related and sometimes overlapping argument invoked to escape the human rights obligations of an individual State is related to situations where the State is involved in the international administration of a territory, for instance, by sending a national contingent to participate in international forces. Kosovo under Security Council resolution 1244 (1999) would be a prime example of a situation where some of the traditional sovereign powers of the territorial State were exercised by the United Nations. Some States may seek to avoid State responsibility under international law by referring to the primacy of their UN Charter obligations<sup>63</sup> and to the extraterritorial nature of their actions,<sup>64</sup> and also by arguing that the action in question is to be attributed to the international organisation rather than to individual States.

The aforementioned argument was accepted in the *Behrami* case by the European Court of Human Rights (ECtHR).<sup>65</sup> According to the Court, the responsibility of individual States could not be held to account for the impugned acts and omissions of KFOR and UNMIK, which were directly attributable to the United Nations, an organisation of universal jurisdiction fulfilling its imperative collective security objective.<sup>66</sup> As the United Nations had a legal personality separate from that of its Member States and was not a Contracting Party to the European Convention on Human Rights (ECHR), the ECtHR concluded that the applicants' complaints in those cases had to be declared incompatible with the provisions of the ECHR *ratione personae*.<sup>67</sup>

The same Court has referred to *Behrami* as a precedent to declare inadmissible several other complaints which related to the conduct of States who were acting on behalf of the UN, such as States acting as part of KFOR in Kosovo.<sup>68</sup> It has also applied the reasoning to the measures imposed on Bosnian citizens by the High Representative for Bosnia, whose function was created by the Dayton agreement.<sup>69</sup>

<sup>62</sup> Rosemary Foot, 'The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas', (2007) *Human Rights Quarterly* 29, p. 489.

<sup>63</sup> See Report of the Special Rapporteur on human rights and counter-terrorism, A/61/267 (16 August 2006), in particular para. 39. There have been piecemeal improvements in the 1267 sanctions regime, so far culminating in Resolution 1904 (2009) that establishes the mandate of an Ombudsperson to assist the 1267 Sanctions Committee when considering delisting requests, see para. 20 of the resolution.

<sup>64</sup> See subsection 3.5.

<sup>65</sup> See subsection 3.7.

<sup>66</sup> European Court of Human Rights, Inadmissibility decision (Grand Chamber) in *Behrami and Behrami v. France (Application no 71412/01) and Saramati v. France, Germany and Norway*, application no 78166/01.

<sup>67</sup> Idem, paras. 144 and 151 (summarising).

<sup>68</sup> *Idem*, paras. 151-152.

<sup>69</sup> *Ilaz Kasumaj v. Greece*, Decision of 5 July 2007, application no 6974/05; *Slavisa Gajic v. Germany*, Decision of 28 August 2007, application no 31446/02.

<sup>69</sup> *Berić and Others against Bosnia and Herzegovina*, application nos. 36357/04, 36360/04 et al, declared inadmissible on 16 October 2007.

However, these decisions have been heavily criticised, *inter alia*, for failing to recognise that it is fully possible for two entities (the United Nations and an individual State) to both bear responsibility.<sup>70</sup> Indeed, the Articles on State Responsibility, elaborated by the International Law Commission and softly endorsed by the General Assembly,<sup>71</sup> lay out a full range of situations where there can be overlapping responsibility by more than one State.<sup>72</sup> The responsibility of an individual State needs to be assessed independently of whether other States or intergovernmental organisations can also bear responsibility for the allegedly internationally wrongful act at issue.<sup>73</sup> The fact that a measure has a negative effect upon the enjoyment of human rights may be attributable to an international organisation, irrespective of how underdeveloped the mechanisms used to make that organisation accountable are. This does not preclude its attribution also to one or more individual States. In its General Comment 31 and its practice when considering State party reports, the Human Rights Committee has consistently held that a State retains responsibility over the conduct of a national contingent participating in international forces abroad.<sup>74</sup>

Among critics of the position taken by the ECtHR, Sari claims that the Court's venture into the issue of attribution was a mistake, since the question of State jurisdiction is a preliminary matter which logically must be dealt with before attribution.<sup>75</sup> Milanovic, in turn, demonstrates that the ECtHR analysis is entirely at odds with the established rules of responsibility in international law, and is equally dubious as a matter of policy. In his view, the Court's decision can be only be explained by its reluctance to decide on the questions of State jurisdiction and norm conflict, the latter issue becoming the clearest when *Behrami* is compared to the *Al Jedda* judgment of the House of Lords.<sup>76</sup>

The issue of attribution arose directly before the House of Lords in the *Al Jedda* case, where the UK Secretary of State for Defence relied on *Behrami* to argue that the detention of Al-Jedda in Basra, Iraq, should be ‘attributable to the UN and thus [it should be held] outside the scope of the ECHR’.<sup>77</sup> In rejecting that position, the House of Lords primarily relied on the substantial differences between the MNF in Iraq and KFOR in Kosovo in order to reach the verdict that the UN was not responsible for Al Jedda’s detention. Nevertheless, its judgment contains elements

<sup>70</sup> See e.g., Aurel Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases’, (2008) *Human Rights Law Review* 8, p. 151.

<sup>71</sup> UN Doc. A/RES/56/83, United Nations General Assembly Resolution, 12 December 2001.

<sup>72</sup> Idem. See Chapter IV of the Articles, in particular Article 16 (Aid or assistance in the commission of an internationally wrongful act) and Article 17 (Direction and control exercised over the commission of an internationally wrongful act).

<sup>73</sup> Idem, Article 19.

<sup>74</sup> Human Rights Committee, General Comment 31, HRI/GEN/1/Rev.9 (Vol 1) 243 (27 May 2008), para. 10: ‘This principle (of extraterritorial application of the ICCPR) also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.’

<sup>75</sup> Aurel Sari, ‘Jurisdiction and International Responsibility in Peace Support Operations: The *Behrami* and *Saramati* Cases’, (2008) *Human Rights Law Review* 8, p. 151.

<sup>76</sup> Marko Milanovic, ‘Norm Conflict in International Law: Whither Human Rights?’ in (2009) *Duke Journal of Comparative & International Law* 20 p. 69.

<sup>77</sup> *R. (Al-Jedda) v. Secretary of State for Defence*, [2007] United Kingdom House of Lords 58, p. 24.

that call into question the ECtHR's approach of attributing conduct only to a State or only to the UN, and not to both of them when the circumstances so require. As has been stated by Orakhelashvili, the House of Lords would have been more convincing<sup>78</sup> by 'delving further into the reasoning of the European Court of Human Rights' in order to acknowledge 'the deeper problems inherent in the reasoning of the European Court.'<sup>79</sup>

### 3.7. Denial of Extraterritorial Effect of Human Rights (Treaties)

A separate challenge to the applicability of human rights in the counter-terrorism context is the argument that human rights obligations are territorial in scope, limited to a State's own territory where it exercises full jurisdiction.<sup>80</sup> For example, governments may establish detention centres abroad and argue that constitutional guarantees do not apply there. As human rights treaties are said to be territorial in scope, they would also not apply. Therefore, detention without court review would be 'lawful'.

While this argument has some support in the wording of Article 2(1) ICCPR,<sup>81</sup> consistent practice by the HRC demonstrates that a State must comply with the Covenant wherever it factually exercises powers that affect the enjoyment of the rights enshrined in the ICCPR.<sup>82</sup> Thus, even if that provision were to be taken as excluding the obligation to 'legislate' for other countries or for their population,<sup>83</sup> this cannot form a justification to engage extraterritorially in outright human rights violations such as arbitrary detention, torture, or other cruel, inhuman, or degrading treatment.<sup>84</sup>

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<sup>78</sup> Francesco Messineo, 'The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights', in (2009) *Netherlands International Law Review* 56, p. 35.

<sup>79</sup> Alexander Orakhelashvili, A., *R (on the Application of Al-Jedda) (FC) v. Secretary of State for Defence*. [2007] United Kingdom House of Lords 58, (2008) *American Journal of International Law* 102, pp. 340-341.

<sup>80</sup> Besides the US (cf. *supra*) Israel often invokes this argument, see for instance *Concluding Observations of the Human Rights Committee: Israel*, CCPR/CO/78/ISR (Aug. 21, 2003), at para. 11. See generally Michael J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', in (2005) *American Journal of International Law* 99, p. 119; Ralph Wilde, 'Legal 'Black Hole'? Extraterritorial State Action and International Treaty Law on Civil and Political Rights', in (2005) *Michigan Journal of International Law* 26, p. 739.

<sup>81</sup> ICCPR, Article 2(1) provides: 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant...'

<sup>82</sup> See, for example, *Lopez Burgos v Uruguay*, CCPR/C/13/D/52/1979 (29 July 1981); *Gueye et al v. France*, CCPR/C/35/D/196/1985 (6 April 1989); Human Rights Committee, Concluding observations: Israel, CCPR/C/79/Add.93 (18 August 1998); Human Rights Committee, Concluding observations: Israel, CCPR/CO/78/ISR (21 August 2003); Human Rights Committee, General Comment 31, HRI/GEN/1/Rev.9 (Vol 1) 243 (27 May 2008), para. 10.

<sup>83</sup> This was the expression used in 1950 by the US representative, Mrs Eleanor Roosevelt, in the drafting of the ICCPR. See Third Periodic Report of the United States to the Human Rights Committee, CCPR/C/USA/3 (28 November 2005), annex I.

<sup>84</sup> Report of the Special Rapporteur on human rights and counter-terrorism on a mission to the United States, A/HRC/6/17/Add.3 (22 November 2007), at para. 8. See also Cerrone, who identifies a trend toward recognizing varying levels of extra-territorial human rights obligations. 'In particular, it may be that negative obligations apply whenever a State acts extraterritorially (at least with respect to intentional human rights violations, as opposed to indirect consequences), but that the degree of positive obligations will be dependent upon the type and degree of control (or power or authority) exercised by the state.' John Cerrone, 'Jurisdiction and Power: The Intersection of

Some human rights treaties include a reference to ‘jurisdiction’ when addressing the relationship between an individual as the beneficiary of a human right, and a State as the corresponding duty-bearer.<sup>85</sup> This concept relates to the degree of control or responsibility the State has over the circumstances that affect the enjoyment of human rights by the individual in question.<sup>86</sup> There may be differences of opinion, even disputes or confusion, as to what level of control is required in order to bring a person within the ‘jurisdiction’ of a State in the meaning of those human rights treaties that use the term jurisdiction, and whether the same approach should be extended to human rights treaties that do not mention that term. Some authors may emphasise that jurisdiction is primarily territorial in nature and that a State must be in effective control of a territory in order to be held accountable for human rights violations within it. Others may apply a less demanding test for ‘jurisdiction’, focusing on the actual control a State has over the contextual circumstances that affect the position of the individual and result in a violation of his or her rights.<sup>87</sup>

In its General Comment 31, the Human Rights Committee encapsulated its consistent practice of holding States accountable for human rights violations committed abroad in the phrase: ‘States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction.’<sup>88</sup> This position, which represents a dynamic interpretation of the treaty provision, raises the question of the interpretive authority of independent expert bodies established by human rights treaties. The issue is whether the practice by a human rights court, or other monitoring body established by the treaty for the purpose of interpreting its provisions constitutes ‘subsequent practice’ in the meaning of the VCLT.<sup>89</sup> When no States have explicitly objected to an interpretation arrived at by a human rights court or treaty body, this practice, which usually reflects the active practice of at least some States, is through acquiescence by other States transformed into ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’ (VCLT Article 31(3)(b)).<sup>90</sup>

Human Rights Law & The Law of Non-international Armed Conflict in an Extraterritorial Context’, (2007) *Israel Law Review* 40, p. 75.

<sup>85</sup> See for example, European Covenant on Human Rights, Article 1, CCPR Article 2(1), Convention against Torture Article 2(1). The issue has become particularly relevant (and difficult) under the European Covenant on Civil and Political Rights where some of the most important cases are *Banković and Others v. Belgium and 16 other Contracting States* (Application no 52207/99) denying extraterritorial applicability and *Ilascu and Others v. Moldova and Russia* (Application no 48787/99) allowing it. The currently pending case *Al-Saadoon and Mufdhi v. the United Kingdom* (Application no 61498/08), declared admissible on 30 June 2009, may come to provide more clarity as to the extraterritorial scope of the European Convention on Human Rights.

<sup>86</sup> See Martin Scheinin, ‘Extraterritorial Effect of the International Covenant on Civil and Political Rights’, in: Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties*, (Antwerp-Oxford: Intersentia, 2004), pp. 73-81.

<sup>87</sup> See the contributions in Fons Coomans and Menno T. Kamminga (eds). See fn. 85.

<sup>88</sup> Human Rights Committee, General Comment 31, HRI/GEN/1/Rev.9 (Vol 1) 243 (27 May 2008) at para. 10. Compare with the wording of ICCPR, Article 2(1). See fn. 80.

<sup>89</sup> See Villiger, pp. 429-432. See fn. 28., R.K. Gardiner, *Treaty Interpretation*, (Oxford: Oxford University Press 2008), at 225-249; Ulf Linderfalk, *On The Interpretation of Treaties - The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, (Dordrecht: Springer Netherlands, 2007), 165-181.

<sup>90</sup> See for instance, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*, International Law Association, Committee on Human Rights Law and Practice, Berlin Conference (2004), at para. 20.

Independently of the issue of treaty interpretation, the argument that human rights obligations are territorial in nature has no bearing on human rights treaties that lack a clause referring to territory or jurisdiction, and even more importantly, on customary international law norms. There is no basis for a contention that customary norms of human rights law would not be binding upon a State when it operates through its agents outside its own territory. While the scope of a State's positive human rights obligations outside its own territory 'to legislate', or 'to fulfil' may require a nuanced discussion, there is no doubt that, under international law, a State is responsible for human rights violations committed outside its territory by its agents.

### *3.8. Reservations to Treaties*

Reservations only apply to treaty law, and only as a technique to limit a State's obligations before being already bound by a treaty. The Vienna Convention on the Law of Treaties (VCLT) defines a reservation as a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.<sup>91</sup> Article 19 of the VCLT stipulates the main rule of the permissibility of reservations, under a set of conditions:

- A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
- the reservation is prohibited by the treaty;
  - the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
  - in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Under the VCLT rules, reservations cannot be entered after a State has become a party to the treaty.<sup>92</sup> In international law, however, there is an ongoing discussion of so-called late reservations, i.e. the question whether a State that already is a party to the treaty is allowed to modify its commitment afterwards.<sup>93</sup> Technically, late reservations do not fall under the definition of reservations in Article 2 of VCLT, and do not meet the conditions of Article 19. Authors who, for pragmatic reasons, have defended the permissibility of an institution of late reservations, emphasise that they could only be allowed with the consent of all other parties to the treaty. Hence, a late reservation could not be unilateral in nature and could be blocked by a

<sup>91</sup> VCLT Article 2(1)(d).

<sup>92</sup> Exceptionally, a State may try to circumvent this rule by first denouncing a treaty and then re-acciding with a reservation. The permissibility of such a measure will depend on whether the treaty in question allows for denunciation and on whether the new reservation will be interpreted to run counter to the object and purpose of the treaty. While some human rights treaties explicitly allow for withdrawal that takes effect after a specified period of transition, the two Covenants of 1966 (International Covenant on Economic, Social and Cultural Rights (ICESCR) and ICCPR) do not include such clauses and have been interpreted as not being subject to denunciation. See U.N. Doc . CCPR/C/21/Rev.1/Add.8/Rev.1 (1997), Human Rights Committee General Comment 26.

<sup>93</sup> For a full discussion, see Edward Bates, 'Avoiding Legal Obligations Created by Human Rights Treaties', (2008) *International and Comparative Law Quarterly* 57, pp. 769-779.

single objection. Due to the controversial nature of reservations, coupled with the fact that and they are not genuinely unilateral, late reservations are not discussed further in this paper. Nevertheless, no State has sought to enter a late reservation to any human rights treaty with reference to terrorism.

The VCLT rules that allow for timely unilateral reservations to multilateral treaties under the conditions of Article 19 aim at facilitating widespread participation in treaties. In the case of human rights treaties this, however, may be achieved at the expense of the integrity of treaties. For example when the United States ratified the ICCPR in 1992, it filed five reservations<sup>94</sup> (including on Articles 6 and 7), five understandings and three declarations.<sup>95</sup>

As reflected in VCLT Article 19, international law prohibits reservations that are contrary to the object and purpose of a treaty.<sup>96</sup> Some human rights treaties prohibit all reservations,<sup>97</sup> whilst others further limit the scope of permissible reservations.<sup>98</sup> Human Rights Committee General Comment 24 includes two fundamental elements of a human rights approach to reservations that appear to be in tension with the VCLT rules: (a) The HRC considers that the Committee itself, and not only the State parties to the ICCPR, has the *competence* to address the permissibility of reservations made under the treaty in question.<sup>99</sup> (b) The usual (but not automatic) consequence of an impermissible reservation will be its *severability*, i.e., the possibility of considering a State as a party to the ICCPR without the benefit of its impermissible reservation.<sup>100</sup> This latter element is absent from the text of the Vienna Convention on the Law of Treaties.<sup>101</sup> As to the former element, the VCLT regime is based on objections by other States in respect of reservations, but is silent as to the consequences of impermissible reservations.

Surprisingly, no reservations have been entered to human rights treaties with reference to terrorism.<sup>102</sup> This applies not only to the ICCPR and the Convention against Torture (CAT), but

<sup>94</sup> See generally: David P. Stewart, ‘U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations. Understandings and Declarations’, (1993) *Human Rights Law Journal* 14, p. 77.

<sup>95</sup> For a general discussion about reservations see: Catherine J. Redgwell, ‘Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties’, (1993) *British Yearbook of International Law* 64(245); Lilly Sucharipa-Behrmann, ‘The Legal Effect of Reservations to Multilateral Treaties’, (1996) *Austrian Review of International & European Law* 1(1); Jan Klabbers, ‘Accepting the Unacceptable? A New Nordic Approach to Multilateral Treaties’, (2000) *Nordic Journal of International Law* 69(179).

<sup>96</sup> See e.g., Optional Protocol to the Convention on the Elimination of Racial Discrimination against Women, Article 17.

<sup>97</sup> See European Convention on Human Rights Article 57 and the cases of *Belilos* and *Loizidou* by the European Court of Human Rights. See further: J Piers Gardner and Christine M. Chinkin (eds), *Human Rights as General Norms and a State's Right to Opt out: Reservations and Objections to Human Rights Treaties*, (London: British Institute of International and Comparative Law, 1997); Ryan Goodman, ‘Human Rights Treaties, Invalid Reservations, and State Consent’, *American Journal of International Law* (2002) 96(531); Roberto Baratta, ‘Should Invalid Reservations to Human Rights Treaties Be Disregarded?’ (2000) *European Journal of International Law* 11(413); Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?*, (Leiden: Martinus Nijhoff Publishers, 1995).

<sup>98</sup> See UN Doc. CCPR/C/21/Rev.1/Add.6, Human Rights Committee, General Comment 24, para. 18.

<sup>99</sup> See fn. 98.

<sup>100</sup> See Martin Scheinin, *Reservations by states under the ICCPR and its Optional Protocols, and the practice of the Human Rights Committee*, in Ineta Ziemele, *Reservations to Human Rights Treaties and the Vienna Convention Regime*, (Leiden: Martinus Nijhoff Publishers, 2004), pp. 41-58.

<sup>101</sup> This conclusion is based on the RATIF database at the Netherlands Institute of Human Rights (SIM). Available at <http://sim.law.uu.nl/sim/library/RATIF.nsf>. Last accessed 27 August 2011. The same result is confirmed by

also to other UN human rights treaties, and regional human rights treaties; namely the European Convention on Human Rights (ECHR), the Inter-American Convention on Human Rights (IACtHR) and the African Charter on Human and Peoples' Rights (AfrCHPR).

Against the background of the *Chahal* ruling by the European Court of Human Rights, confirming that the obligation of *non-refoulement* also applies in respect of suspected terrorists, British Prime Minister Tony Blair<sup>102</sup> suggested in 2003 that the United Kingdom might denounce the Convention and then re-accede to it with a new reservation (presumably to Article 3).<sup>103</sup> Such a denunciation strategy could be deemed as incompatible with the object and purpose of the ECHR and the new reservation therefore held impermissible under VCLT Article 19.<sup>104</sup>

Some of the existing reservations under human rights treaties may be applicable and relevant in respect of counter-terrorism measures, albeit not originally formulated with reference to terrorism. An assessment of the potential scope of reservations to human rights treaties in the counter-terrorism context could be made on the basis of analytical charts compiled in 2002 by Françoise Hampson in a study for the United Nations.<sup>105</sup> On the basis of updated UN and other electronic databases referred to earlier, the number of States that had reservations under the ICCPR in May 2011 was:

- 4 states under Article 9 (liberty)
- 7 states under Article 12 (movement)
- 27 states under Article 14 (fair trial)
- 1 state under Article 17 (privacy)
- 10 states under Article 19 (freedom of expression)
- 6 states under Article 21 (freedom of assembly)
- 9 states under Article 22 (freedom of association)

Of these reservations, only a handful appear to be of relevant to counter-terrorism measures. Not a single reservation refers explicitly to terrorism. On the basis of the authors' assessment, it appears that only in respect of the right to a fair trial (ICCPR Article 14) may reservations in practice have a real function as a legitimate form of unilateral exceptions to human rights when countering terrorism. The clearest cases are reservations by Bangladesh and Venezuela that seek

databases maintained by the respective intergovernmental organisations, see <http://treaties.un.org>, <http://www.oas.org/juridico/english/Sigs/b-32.html> and <http://conventions.coe.int/>. Last accessed 11 August 2011.

<sup>102</sup> On the UK Government's opposition to *Chahal* more generally see A. Lester and K. Beattie, 'Risking Torture', (2005) *European Human Rights Law Review* 6(565).

<sup>103</sup> See sources quoted in Bates, See fn. 92 and 105. The Guardian, 'Blair warning on rights treaty', 27 January 2003 and The Times, 'Asylum fears force human rights rethink', 27 January 2003. There were contemporaneous newspaper reports that the government had taken legal advice on withdrawing from the Convention Relating to the Status of Refugees (1951) 189 United Nations Treaty Series 137; see also 'You Can't Quit Treaties, Blair Warned,' *The Guardian*, 6 February 2003.

<sup>104</sup> See Human Rights Committee admissibility decision in *Rawle Kennedy v Trinidad and Tobago*, (Communication No 845/1999), UN Doc CCPR/C/67/D/845/1999 (2 November 1999). The Human Rights Committee declared impermissible and severable a reservation entered by the state after it had first denounced the Optional Protocol to the ICCPR that allows for individual complaints, and then re-acceded to the same instrument with a reservation excluding persons sentenced to death from the scope of the right of individual complaint. See also Bates, p. 766. See fn. 92.

<sup>105</sup> Reservations to human rights treaties, Working paper preparatory to the submission of the expanded working paper by Françoise Hampson submitted in accordance with the Sub-Commission decision 2002/17, UN Doc. E/CN.4/Sub.2/2002/34 (8 August 2002).

to allow for trials *in absentia*, a reservation by Malta that leaves room for a reversal of the burden of proof in some criminal cases, and a reservation by Denmark stating that the obligation to provide for a right of appeal under ICCPR Article 14(5) is not binding upon the country. Other States, such as France, Monaco, the Netherlands and Trinidad & Tobago, have more narrowly crafted reservations under the afore-mentioned provision. Notably, no reservations to the right to liberty (Article 9), freedom of movement (Article 12), the right to privacy (Article 17) or freedom of expression (Article 19) have been formulated in a way that would clearly have a bearing upon counter-terrorism powers. Mention can also be made of reservations or declarations by France and United Kingdom, according to which UN Charter obligations would prevail over ICCPR obligations in the case of a conflict.<sup>106</sup>

Under regional human rights treaties, reservations that come closest to addressing counter-terrorism measures are Venezuela's reservation under the IACtHR and Malta's reservation under the ECHR, both corresponding to their reservations under the ICCPR. An assessment under regional human rights treaties confirms that if reservations are at all used to justify counter-terrorism measures, that would be quite exceptional and relate to certain dimensions of fair trial.

### 3.9. Persistent Objection to Custom

Persistent objection is a technique through which a State dissociates itself from an emerging norm of customary international law.<sup>107</sup> By systematically opposing the adoption of declarations, resolutions or other texts that signal a normative commitment and would support the emergence or existence of a binding legal norm with certain substantive content, a State can seek to avoid being bound by a customary norm that would otherwise be inferred from the combination of wide-spread State practice and *opinio juris*, the expressed intention of States to take on board a normative obligation. A persistent objector cannot, however, evade being bound by norms of *jus cogens* nature.<sup>108</sup> In issues directly or indirectly related to the fight against terrorism, it would primarily be Israel and the United States that potentially could argue that their unilateral exceptions to human rights treaties are accompanied by persistent objection to the emergence of corresponding norms of customary international law.<sup>109</sup> Such claims are, however, weakened by the burden of argumentation that must be required from the objector,<sup>110</sup> and the overlap of objections by Israel and the USA with norms of *jus cogens* status that in any case are not subject

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<sup>106</sup> See also, the discussion in section 3.5 of this article.

<sup>107</sup> See in general, Ted L. Stein, 'Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', (1985) *Harvard International Law Journal* 26(457); Olufemi Elias, 'Some Remarks on the Persistent Objector Rule in Customary International Law' (1991) *Denning Law Journal* 6(37); Lynn Loschin, The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework, (1996) *U. C. Davis Journal of International Law & Policy* 2(147); Ian Brownlie, *Principles of Public International Law*, (Oxford: Oxford University Press 2003), p. 11.

<sup>108</sup> Holning Lau, 'Rethinking the Persistent Objector Doctrine in International Human Rights Law', (2005) *Chinese Journal of International Law* 6, p. 498 (arguing in general that the doctrine's applicability should be restricted in a human rights context).

<sup>109</sup> Françoise Hampson, Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?, (2009) *International Legal Studies Series US Naval War College* 85, p. 491 (arguing that the fact that neither the US nor Israel entered a reservation or interpretative declaration calls into question the persistence of such objections).

<sup>110</sup> Loschin, p. 172. See fn. 105.

to legitimate objection. Hence, the notion of persistent objector to customary norms of international law appears to have lost its relevance.

### *3.10. Derogation during Times of Emergency and Necessity*

#### *3.10.1. Derogation in the Proper Sense under Certain Human Rights Treaties*

Derogation is perhaps the most far-reaching of the permissible techniques for unilateral modification of a State's human rights obligations.<sup>111</sup> It is available under certain human rights treaties and only when specific circumstances make it impossible for a State to comply with all of its treaty obligations.<sup>112</sup> In short, there has to exist an emergency which threatens the life of the nation,<sup>113</sup> and a state of emergency must be officially proclaimed.<sup>114</sup> Consequently, a State may officially proclaim a state of emergency and introduce measures that derogate from certain human rights.<sup>115</sup> Even then, the principles of necessity and proportionality impose on the State an obligation to keep the derogation from its human rights obligations to a minimum, and the obligation of notification requires that the state specifies in what respects it seeks to derogate from the treaty in question. Any derogations must remain within the exigencies of the situation.

There are derogation clauses in the ICCPR (Article 4), the ECHR (Article 15) and the IACMR (Article 27). The AfrCHPR does not contain a derogation clause, and neither does the Convention Against Torture. Non-discrimination treaties, treaties on the human rights of a specific category of persons, or treaties on economic and social rights normally do not include a derogation clause.<sup>116</sup> The Convention on the Rights of Persons with Disabilities includes a special clause on the obligation to comply with the convention also during emergencies.<sup>117</sup> Under those human rights treaties that do not contain a derogations clause, such as the African Convention for Human and People's Rights<sup>118</sup>, States must even in times of emergency keep themselves within the framework of limitations permissible under the treaty.

<sup>111</sup> See for instance Joan Hartman, 'Derogation from Human Rights Treaties in Public Emergencies', (1981) *Harvard International Law Journal* 22(1). p. 2 (calling it an 'uneasy compromise between the protection of the individual rights and the protection of national needs in crisis').

<sup>112</sup> Rosalyn Higgins, 'Derogations under Human Rights Treaties', (1976) *British Yearbook of International law* 48(281); Hartman. See fn. 109.

<sup>113</sup> Article 27(1) ACHR on the other hand talks about a time of 'war, public danger, or other emergency that threatens the independence or security of a State Party'.

<sup>114</sup> See in general Victor Ramraj, (ed.) *Emergencies and the Limits of Legality*, (Cambridge: Cambridge University Press, 2008).

<sup>115</sup> See chapter 5. For instance: International Commission of Jurists, *States of Emergency: Their Impact on Human Rights*, 1983. Gerald L. Neuman, 'Comment, Counter-terrorist Operations and the Rule of Law', (2004) *European Journal of International Law* 15, pp. 1026-1029.

<sup>116</sup> See however, Article 30 of the European Social Charter and Article F of the Revised European Social Charter.

<sup>117</sup> Article 11: 'States Parties shall take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters.'

<sup>118</sup> Rachael Murray, *The African Commission on Human and Peoples' Rights and International Law*, (Oxford: Oxford University Press, 2000), p. 123 (arguing that the absence of a derogation clause has provided States with unchecked discretion by 'failing to set any standards at all, allowing States to act as they please.')

The existence of an emergency which threatens the life of the nation has been labelled the ‘primary criterion for validation of derogations’.<sup>119</sup> At present, there does not exist a clear-cut definition which encapsulates all possible situations which might fall under this banner.<sup>120</sup> Major terrorist attacks, or situations in which a terrorist organisation manages to destabilise public order in a country, may for a limited time constitute a threat to ‘the life of the nation’ in the meaning of the derogation clauses contained in many human rights treaties.<sup>121</sup> Other examples include declaring a curfew for a city, introducing checkpoints on major roads, restrictions on mass demonstrations, closer inspection of postal packages, and even restrictions to the right to liberty,<sup>122</sup> all of which may, within the exigencies of the situation, constitute lawful derogations in respect of the normal scope of freedom of movement, the right to peaceful assembly, and the right to privacy as guaranteed by the International Covenant on Civil and Political Rights (ICCPR). Any of these measures, however, must be demonstrated to be necessary and proportionate in the given circumstances and within the exigencies of the situation.

As early as in 1981, Hartman observed that treaty organs ‘have failed to formulate a precise and consistent standard of review of derogation claims’.<sup>123</sup> Most recently, the European Court of Human Rights has stated that while its assessment of the necessity and proportionality of a derogation measure was primarily based on ‘those facts which were known at the time of the derogation’, it was not precluded from having regard to information which subsequently came to light to assess the derogation.<sup>124</sup> While this pronouncement might be understandable in respect of the factual elements of the *A and Others* case,<sup>125</sup> this statement could give certain States an excuse to justify a prolonged state of emergency – which would give an appearance of normalcy to an extraordinary measure. This cannot be the purpose of an emergency measure, which must be temporary by definition, the aim being exactly the restoration of normalcy, including the full protection of human rights. In respect of the risk that in a post-9/11 world terrorism becomes the justification for a permanent state of emergency, Mokhtar notes: ‘One of the most common

<sup>119</sup> Aly Mokhtar, ‘Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights’, (2004) *The International Journal of Human Rights* 8, p. 67.

<sup>120</sup> See also Oren Gross, ‘Once More Unto the Breach’: The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies’, (1998) *Yale Journal of International Law* 23, p. 437 (arguing that it is impossible to enumerate an exhaustive list of eventualities that might threaten the continued existence of nations).

<sup>121</sup> See for instance *A and others v. the United Kingdom* (Application no 3455/05), European Court of Human Rights Judgment, 18 February 2009, par. 177 saying: ‘Although when the derogation was made no al’Qaeda attack had taken place within the territory of the United Kingdom, the Court does not consider that the national authorities can be criticised, in the light of the evidence available to them at the time, for fearing that such an attack was ‘imminent’, in that an atrocity might be committed without warning at any time. The requirement of imminence cannot be interpreted so narrowly as to require a State to wait for disaster to strike before taking measures to deal with it.’ See in general, Richard Burchill, ‘When Does an Emergency Threaten the Life of the Nation - Derogations from Human Rights Obligations and the War on International Terrorism’, (2005) 8 *Yearbook. New Zealand Jurisprudence* 8(99).

<sup>122</sup> Douglass Cassel, ‘Pretrial and Preventive Detention of Suspected Terrorists: Options and Constraints Under International Law’, (2008) *Journal of Criminal Law & Criminology* 98, p. 811 (arguing that if preventive detention of terrorist is to be allowed at all in the U.S., such detention can only be permitted by formal derogation in time of national emergency); Hickman, T., Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism, (2005) *Modern Law Review* 68, p. 655.

<sup>123</sup> Hartman, p. 2. See fn. 109.

<sup>124</sup> *A and Others*, para. 177. See fn. 119.

<sup>125</sup> While the United Kingdom derogated from the European Convention on Human Rights in 2001, the London bombings only took place in 2005.

reasons for a prolonged state of emergency is terrorism. Terrorism, however, has become a characteristic of modern society, and countries such as the United Kingdom and Turkey should cope with this through normal legislation.<sup>126</sup> Or, in other words, ‘If the emergency develops in stages of varying intensity, the measures during each phase should likewise vary.’<sup>127</sup>

The Human Rights Committee’s view on derogations, codified in General Comment 29, is clear and robust, emphasising that measures derogating from the provisions of the ICCPR must be of ‘an exceptional and temporary nature’. In contrast, the European Court of Human Rights has never explicitly incorporated the requirement that the emergency be temporary, ‘although the question of the proportionality of the response may be linked to the duration of the emergency’.<sup>128</sup> In General Comment 29, the Human Rights Committee also explained that the power of a State to derogate from some provisions of the ICCPR does not entail a power to suspend completely the application of these provisions. Derogations should, therefore, be seen as a particular form of restriction on human rights rather than as their temporary circumvention.

In actual State practice, derogations from human rights treaties with the explicit or implicit justification of terrorism amounting to a threat to the life of the nation have appeared. While the number of States that have derogated from the ICCPR (or from the ECHR or the IACR) with a reference to terrorism are low, some declarations of emergency have remained in effect for lengthy periods of time. In most cases, declarations of a state of emergency with a reference to terrorism were either declared for a short period of time, or were officially withdrawn.

Since the entry into force of the ICCPR in 1976, fewer than ten States have introduced a state of emergency with explicit reference to acts of, or the threat of terrorism.<sup>129</sup> In other cases the declaration of an emergency relates to what a State perceives terrorism to be, although the term is not used in the official notification to the United Nations.<sup>130</sup> Officially, two States are currently derogating from the ICCPR for reasons that relate to terrorism. Israel has maintained a state of emergency since May 1948, and in October 1991, it filed a notification that it derogates from Article 9 ICCPR.<sup>131</sup> After Nepal was subject to ‘terrorist attacks perpetrated by the Maoists in various districts, killing several security and civilian personnel and attacking the government installations’, it declared a state of emergency on 26 November 2001 and has not filed a notification of withdrawing its derogations.

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<sup>126</sup> Mokhtar, p. 79. See fn. 117.

<sup>127</sup> Hartman, p. 17. See fn. 109.

<sup>128</sup> *A and Others v. UK*, para. 178. See fn. 119.. The paragraph continues ‘Indeed, the cases cited above, relating to the security situation in Northern Ireland, demonstrate that it is possible for a ‘public emergency’ within the meaning of Article 15 to continue for many years. The Court does not consider that derogating measures put in place in the immediate aftermath of the al’Qaeda attacks in the United States of America, and reviewed on an annual basis by Parliament, can be said to be invalid on the ground that they were not ‘temporary’.’ For an earlier critique of the deferential judicial attitude towards states’ resort to the derogation power see Oren Gross and Fionnuala Ni Aolain, ‘From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights’, (2001) *Human Rights Quarterly* 23, p. 625.

<sup>129</sup> Azerbaijan, Chile, Colombia, El Salvador, Israel, Nepal, Peru, the Russian Federation and the United Kingdom (<http://treaties.un.org>).

<sup>130</sup> Algeria and Peru.

<sup>131</sup> See John Quigley, ‘Israel’s Forty-Five Year Emergency: Are there Limits to Derogations from Human Rights Obligations?’ (1994) *Michigan Journal of International Law* 15, p. 491.

From 1976-1984, the United Kingdom derogated from ICCPR Articles 9, 10(2), 10(3), 12(1), 14, 17, 19(2), 21 and 22 with reference to

campaigns of organised terrorism related to Northern Irish affairs which have manifested themselves in activities which have included murder, attempted murder, maiming, intimidation and violent civil disturbances and in bombing and fire-raising which have resulted in death, injury and widespread destruction of property.

In 1988-2001, the United Kingdom again derogated from Article 9 with reference to ‘terrorism connected with the affairs of Northern Ireland’. After 9/11, from 18 December 2001 until 14 March 2005 the United Kingdom again derogated from ICCPR Article 9, this time with reference to international terrorism. During the same period, the United Kingdom was the only European State to derogate from Article 5 ECHR. Notably, it is the only State that has resorted to formal derogation from human rights treaties to make room for its unilateral exceptions to human rights treaties, because of the threat of international terrorism. In contrast, the United States has resorted to a number of other arguments or constructions but not the formal mechanism of derogation.

The concept of a state of emergency is extremely vague and reliance on it can potentially result in dangers for the protection of human rights, partly owing to the wide margin of appreciation the European Court of Human Rights is *de facto* granting to States in determining whether a situation amounts to an emergency.<sup>132</sup> These dangers have been countered by treaty organs through the scrutinisation of necessity and proportionality requirements to which a derogation is subject. Such a proportionality analysis is in any case ‘a more disciplined and demanding process than open-ended balancing of rights and security’, because it addresses whether deviations from human rights will actually increase security and whether less drastic measures can be used to prevent terrorism.<sup>133</sup>

Both the ECHR and the ICCPR require derogation measures to be consistent with the State’s other obligations under international law, such as the norms of international humanitarian law, applicable during armed conflict. In general this consistency requirement enhances the protection of the individual’s rights during states of emergency,<sup>134</sup> and makes clear that the power of States to derogate does not extend to customary human rights law, still less norms of *jus cogens*. The principle of consistency is an important tool in identifying and protecting the non-derogable aspects of derogable human rights.<sup>135</sup>

<sup>132</sup> It is not without reasons that Carl Schmitt famously begins his work *Political Theology* with the sentence: ‘Sovereign is he who decides on the exception.’ C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, (Massachusetts: MIT Press, 1985), p. 5.

<sup>133</sup> Kent Roach, ‘Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain’, (2006) *Cardozo Law Review* 27, p. 2153.

<sup>134</sup> Aly Mokhtar, p. 79. See fn. 117.

<sup>135</sup> UN Doc CCPR/C/21/Rev.1/Add.11, Human Rights Committee, General Comment 29. See also Evelyn Schmid, ‘The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Article 14 of the International Covenant on Civil and Political Rights’, (2009) *Gottingen Journal of International Law* 1, p. 29; Clémentine Olivier, ‘Revisiting General Comment 29 of the United Nations Human Rights Committee: About Fair Trial Rights and Derogations in Times of Public Emergency’, (2004) *Leiden Journal of International Law* 17, p. 405.

Non-derogable rights are sometimes referred to as absolute human rights, although the same notion also can be used for human rights that do not permit limitations. The scope of the two meanings of the term ‘absolute rights’ is not identical, since, for instance, the prohibition against torture is non-derogable and allows for no limitations,<sup>136</sup> while the freedom of thought, conscience and religion leaves room for limitations in the field of manifestations of the right; this right is nevertheless non-derogable in times of an emergency,<sup>137</sup> whereas the requirement of free and full consent for marriage by both intending spouses does not permit limitations, but has not been listed as a non-derogable right.<sup>138</sup> Rights that are subject to the possibility of derogation may contain dimensions that are non-derogable, for instance, because of their overlap with *jus cogens* norms or treaty norms that do not permit derogation.<sup>139</sup>

### *3.10.2. Extension of Derogation Ex Analogia to Certain Persons (Terrorists)*

Although derogation from certain provisions of some human rights treaties is a permissible method under international law for the introduction of unilateral exceptions to human rights, such exceptions are not without limits and controls. It is therefore important to dismiss any suggestion that the institution of derogation would support the existence of some sort of a necessity regime in international law, so that an extreme situation could be used as justification for clearly unlawful methods. The first dimension of such unacceptable abuse of the institution of derogation as a rhetorical tool to legitimise unlawful measures by way of analogy is the declaration of terrorists as enemies of humankind (*hostis humani generis*), against whom even unlawful methods could be used. International law provides for a framework for lawful measures against real or suspected terrorists; bypassing that framework amounts to a breach of international law.

A paradigmatic example of the relevance of international law in controlling the use of the argument of *hostis humani generis*, whether or not presented under the excuse of a state of emergency or not, is so-called targeted killings. Some States - notably Israel and the United States - believe that they can justify the use of lethal force against terrorists, wherever in the world they are and whatever they might be doing at the moment when they are attacked. Any reference to the notion of derogation is clearly out of place in this context, because the right to life is a non-derogable human right. As to the situation during armed conflict, it has been convincingly demonstrated in a study by the International Committee of the Red Cross how international humanitarian law provides many layers of restrictions for the use of lethal force in situations during an armed conflict, outside the framework of a battle between two or more organised armed forces.<sup>140</sup> When there is no ongoing armed conflict, human rights law characterises as arbitrary deprivation of life any killing by agents of the State that does not

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<sup>136</sup> See ICCPR, Articles 7 and 4(2). See also Michael K. Addo and Nicholas Grief, ‘Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?’, (1998) *European Journal of International Law* 9, p. 510.

<sup>137</sup> See ICCPR, Articles 18 and 4(2).

<sup>138</sup> See ICCPR Article 23(3).

<sup>139</sup> See UN Doc CCPR/C/21/Rev.1/Add.11, Human Rights Committee, General Comment 29.

<sup>140</sup> International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 2009.

strictly comply with the framework of rules that govern the use of firearms in law enforcement, including the requirement that it can only be a measure of last resort.<sup>141</sup>

### *3.10.3. Necessity Defence Transformed into a Policy*

A second error in the use of the *hostis humani generis* argument is to justify anything in the name of necessity through the broad use of the so-called necessity defence in criminal law. In many countries, it may constitute a legitimate defence for a person accused of a crime, that the act corresponding to the definition of a particular crime was committed out of necessity, since no lawful option was available to the individual. The necessity defence can result in a person going unpunished or receiving mitigated punishment, although the act as such remains unlawful. The necessity defence does not transform an unlawful act into a lawful one. Neither can its application be extended from an individual accused to the defence of a State. On the contrary, if the laws of the State permit an individual perpetrator to go unpunished, this may result in the State having a positive obligation to remedy the harm suffered by the original victim of the unlawful act.

In the international discussion of terrorism, the necessity defence has sometimes been referred to in an effort to justify resorting to measures that would otherwise be prohibited, such as torturing a terrorism suspect in a 'ticking bomb' situation.<sup>142</sup> The prohibition against torture, however, is an absolute and non-derogable norm in human rights treaties and a peremptory (*jus cogens*) norm of customary international law. Hence, no situation of emergency or 'necessity' can provide a legal justification for a State allowing or condone a single act of torture. The Human Rights Committee stressed in its concluding observations on the third periodic report by Israel under the ICCPR, that there was no defence under Article 7 of the Covenant to conduct amounting to torture or cruel, inhuman or degrading treatment; it is equally prohibited in non-derogable terms by Article 7.<sup>143</sup> This statement was issued in response to a 1999 decision by the Supreme Court of Israel where the Court accepted that the necessity defence could arise in instances of a 'ticking bomb', and that the imminence criteria of the defence could be satisfied even if the 'bomb' was set to explode in a few days, or even in a few weeks, provided the act was certain to materialise and that there were no alternative means of preventing it.<sup>144</sup>

In a report on a 2007 mission to Israel, the Special Rapporteur on human rights and counter-terrorism supported the assessment by the Human Rights Committee, and expressed concern that the use of so-called 'moderate physical pressure' as part of interrogation methods applied by the Israeli Security Agency in a situation characterised by itself as a 'ticking bomb' situation had

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<sup>141</sup> See *McCann and Others v. the United Kingdom*, European Court of Human Rights (Grand Chamber) Judgment of 27 September 1995 (Application no 18984/91).

<sup>142</sup> See Alan M. Dershowitz, 'The Torture Warrant: A Response to Professor Strauss', (2004) *New York Law School Law Review* 48, p. 275.

<sup>143</sup> *Official Records of the General Assembly, Fifth-eighth session, Supplement No 40* (A/58/40), vol. I, chap. IV, para. 18.

<sup>144</sup> *Public Committee against Torture in Israel v. The State of Israel* (HCJ 5100/94), para. 34.

been elevated to an institutional policy under which persons were not prosecuted, so that their individual necessity defence could be heard and addressed by a Court.<sup>145</sup>

### *3.11. Overly Broad Use of Limitations or Restrictions*

Since 9/11, it has been argued that the scale and nature of international terrorism justifies a revaluation of civil liberties and security, and that the corresponding process is best understood in terms of ‘striking a new balance between liberty and security’.<sup>146</sup> This argument explicitly or implicitly agrees with the statement that ‘respecting civil liberties has often real costs in the form of reduced security’.<sup>147</sup> Others, including former United Nations Secretary General Kofi Annan, and the European Parliament, disagree and emphasise the positive relationship between human rights and security.<sup>148</sup> In a resolution, the European Parliament stressed that the EU is ‘rooted in the principle of freedom’, pointing out that ‘in support of that freedom, security must be pursued in accordance with the rule of law and subject to fundamental rights obligations’. It concluded that ‘the balance between security and freedom must be seen from this perspective.’<sup>149</sup> Notably, President Barack Obama distanced himself from the ‘new balance’ school of thought in his January 2010 State of the Union address: ‘Let’s reject the false choice between protecting our people and upholding our values.’<sup>150</sup>

One of the first victims of a balancing approach, as advocated for instance by Etzioni,<sup>151</sup> is the right to privacy. Gross has demonstrated that several States have engaged in ‘hasty and far-reaching legislative changes’ on the ground that ‘their checks and balances formulae had been mistaken and had given excessive weight to the individual’s privacy’.<sup>152</sup> In his 2010 report to the Human Rights Council, the Special Rapporteur on human rights and counter-terrorism addressed

<sup>145</sup> Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report on a mission to Israel including visits to the Occupied Palestinian Territory (2007), A/HRC/6/17/Add.4, paras. 17-21.

<sup>146</sup> Richard A. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency*, (Oxford: Oxford University Press, 2006). See also W. Kip Viscusi and Richard J. Zeckhauser, ‘Recollection Bias and the Combat of Terrorism’, (2005) *Journal of Legal Studies* 34, p. 27.

<sup>147</sup> Eric Posner and Adrian Vermeulen, *Terror in the balance: Security, Liberty and the Courts*, (Oxford: Oxford University Press, 2007), p. 32.

<sup>148</sup> U.N. Doc A/59/2005, Report of the Secretary General. In larger Freedom: Towards development, security and human rights for all, 21 March 2005 at 140 (saying that ‘it would be a mistake to treat human rights as though there were a trade-off to be made between human rights and goals such as security and development’). See also David D. Cole, ‘The Poverty of Posner’s Pragmatism: Balancing Away Liberty After 9/11’, (2007) *Stanford Law Review* 59, p. 1735.

<sup>149</sup> European Parliament resolution of 25 November 2009 on the Communication from the Commission to the European Parliament and the Council – An area of freedom, security and justice serving the citizen – Stockholm programme, P7\_TA-PROV(2009)0090, 25 November 2009, p. 7.

<sup>150</sup> Remarks by the President in State of the Union Address, 27 January 2010. Available at <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>. Last accessed 1 June 2011.

<sup>151</sup> Amitai Etzioni, ‘Implications of Select New Technologies for Individual Rights and Public Safety’, (2002) *Harvard Journal of Law & Technology* 11(1).

<sup>152</sup> Emanuel Gross, ‘Struggle of a Democracy against Terrorism - Protection of Human Rights: The Right to Privacy versus the National Interest - the Proper Balance’, (2004) *Cornell International Law Journal* 37, p. 63. See also Paul J.A. de Hert, ‘Balancing Security and Liberty within the European Human Rights Framework: A Critical Reading of the Court’s Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies after 9/11’, (2005) *Utrecht Law Review* 1(68).

the challenge of ‘balancing’ and the resulting risk of the erosion of the right to privacy.<sup>153</sup> Privacy has not been elevated to the status of a non-derogable right and can legitimately be subject to permissible limitations. The question, therefore, is whether the right to privacy in particular or human rights in general is just one factor in the process of weighing and balancing, or whether human rights law should provide the framework for balancing, by way of applying the test of permissible limitations and the requirement of proportionality in that process.

### *3.11.1. Efforts to Extend Balancing to Absolute or Non-derogable Rights*

A specific mistake in the use of the balancing metaphor, as a justification for States departing from their human rights obligations in the name of security, relates to the extension of ‘balancing’ such rights that do not allow for restrictions, or that are non-derogable even in times of emergency. Some human rights, such as the prohibition against torture or other inhuman treatment and many other non-derogable rights, have been formulated as prohibitions and do not include a limitation clause. They do not leave room for any ‘balancing’ within their scope of application, but require the interpreter to concentrate on defining that scope. Furthermore, even human rights that as such are subject to permissible limitations should be understood to include one or more essential elements that crystallise a broader principle into a rule or an essential core that allows no limitations or ‘balancing’. The identification of such essential elements and the exact definition of their scope of application is always a matter of interpretation. However, the need for interpretation should not blur the conclusion that the essence of any human right bears the characteristics of a rule and therefore is not subject to any further balancing. The essential content of any human right must always be respected within its scope of application.<sup>154</sup>

### *3.11.2. Proper Limitations Test as the Answer*

Limitations to human rights form a part of the everyday life of any human society. Most human rights are not absolute, in the sense that they permit restrictions or limitations that serve a legitimate aim, are prescribed by the law in a precise and foreseeable manner, and are both necessary and proportionate in nature. Permissible limitations may apply in respect of both treaty and customary norms of human rights law. The Universal Declaration of Human Rights includes a clause expressing the permissibility of, and even the need for, some limitations upon human rights.<sup>155</sup> Many human rights treaties contain detailed clauses that, for instance, provide for exhaustive lists of what aims are regarded as legitimate for the purpose of restricting a particular right.<sup>156</sup> Some human rights treaties are vaguer in their formulations of the conditions for

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<sup>153</sup> Report of the Special Rapporteur on human rights and counter-terrorism, A/HRC/13/37.

<sup>154</sup> For elaboration of this line of argument, see Martin Scheinin, ‘Terrorism and the Pull of ‘Balancing’ in the Name of Security’, in Martin Scheinin et al., *Law and Security - Facing the Dilemmas*, European University Institute Working Papers Law 2009/11, pp. 55-63.

<sup>155</sup> Universal Declaration of Human Rights Article 29(2): ‘...everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.’

<sup>156</sup> See European Convention on Human Rights Articles 8-11, as a prime example.

permissible limitations.<sup>157</sup> The permissibility of limitations to human rights is one of the most important, and one of the most disputed, issues of interpretation within human rights law. In order to comply in good faith with its human rights obligations, a State must ensure that any limitation upon a human rights must remain the exception and must respect the main rule that is enshrined in the treaty or customary law norm that protects the right in question.<sup>158</sup>

In the aforementioned report to the Human Rights Council by the Special Rapporteur on human rights and counter-terrorism, an effort is made to demonstrate that even the right to privacy can, and should, be subject to an analytically rigorous limitations test. Restrictions are permissible within human rights law itself, and they must give due attention to the legitimate interest of public security in the fight against terrorism. Nevertheless, any measure restricting the right to privacy should be assessed for its permissibility, through a step-by-step process consisting of, *inter alia*, the following conditions:

- a. The essence of a human right is not subject to restrictions.
- b. Any restrictions must be provided by the law.
- c. Restrictions must be necessary in a democratic society.
- d. Any discretion exercised when implementing the restrictions must not be unfettered. The deeper the intrusion, the stronger is the need for judicial review.
- e. For a restriction to be permissible, it is not enough that it serves one of the enumerated legitimate aims; it must be necessary for reaching the legitimate aim.
- f. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.
- g. Any restrictions must be consistent with other human rights.<sup>159</sup>

### *3.12. Withdrawal from Human Rights Treaties*

At least in the political discourse, one more option is often referred to when a State feels constrained by its human rights obligations in their fight against terrorism and wish to take unilateral measures to become exempt from them: withdrawal from human rights treaties.<sup>160</sup> At the outset, it needs to be emphasised that even this drastic measure produces limited results in terms of substantive legal obligations due to the high degree of overlap between human rights treaties and norms of customary international law. Furthermore, many of the human rights norms that a State may experience as uncomfortable constraints, may be of *jus cogens* nature and hence peremptory for all states, irrespective of whether they are parties to human rights treaties or seek

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<sup>157</sup> The African Charter on Human and Peoples' Rights contains so-called 'clawback clauses' that instead of defining the conditions for permissible limitations appear to subject the scope of a human right to what is allowed under domestic law. See for instance Article 10(1): 'Every individual shall have the right to free association provided that he abides by the law.'

<sup>158</sup> Or, as the Human Rights Committee formulated in its General Comment 27: 'States should always be guided by the principle that the restrictions must not impair the essence of the right...; the relation between right and restriction, between norm and exception, must not be reversed.' UN Doc. CCPR/C/21/Rev.1/Add.9, para. 13.

<sup>159</sup> A/HRC/13/37, para. 17. See fn. 151.

<sup>160</sup> For a number of situations where such discussion has emerged in individual countries, Bates, pp. 757-761. See fn. 92.

to object to norms of customary law. This would be the case, for instance, for the prohibition against torture, including its dimension of *non-refoulement*, i.e. the prohibition against sending a person to another country under a foreseeable real risk of torture there.

That said, many human rights treaties *are* subject to unilateral withdrawal as a matter of treaty law. Regional human rights treaties, such as the ECHR and the IACtHR<sup>161</sup> contain explicit withdrawal clauses allowing for denunciation and regulating the consequences of such withdrawal. The same is true for some (but not all) of the specialised United Nations human rights treaties.<sup>162</sup> The effect of a State's unilateral withdrawal from a human rights treaty that allows for it, would be (a) the termination of those substantive human rights obligations that do not have a corresponding counterpart as a norm of customary international law or as a norm of a treaty not subject to withdrawal, and (b) the termination of the operation of any monitoring mechanisms under the treaty in question, often after a certain transition phase.

There is no general rule in public international law that would make treaties subject to unilateral withdrawal. According to VCLT Article 56, a treaty which contains no provision regarding its termination and which does not provide for withdrawal is *not* subject to denunciation or withdrawal unless:

- a. it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- b. a right of denunciation or withdrawal may be implied by the nature of the treaty.
- c. In addition, VCLT Article 54 provides for the possibility of withdrawal if all other States party to the treaty consent to it. This rule may not be applicable for human rights treaties that have third-party beneficiaries instead of merely regulating the rights and duties of States toward one another. Irrespective of this issue, withdrawal from a human rights treaty with the consent of all other parties can be bypassed here, as it would not genuinely qualify as a State's unilateral exception from its human rights obligations.

Some human rights treaties, and notably the two Covenants of 1966, are not subject to unilateral withdrawal by a State. This was confirmed in 1997 when North Korea sought to denounce the ICCPR. Applying the principles reflected in VCLT Article 56, the Human Rights Committee issued its General Comment 26 in which it emphasised that the Covenants of 1966 did not include a withdrawal clause and that for their nature they were meant to codify in treaty form the Universal Declaration of Human Rights and hence were not of a temporary nature.<sup>163</sup> The conclusion that the ICCPR is not subject to unilateral withdrawal was supported by the international community,<sup>164</sup> and even North Korea accepted that it remained a party.<sup>165</sup>

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<sup>161</sup> See European Convention on Human Rights, Article 58 and Inter-American Court of Human Rights, Article 78. The African Charter on Human and Peoples' Rights does not contain a withdrawal clause but this may be related to it being also otherwise incomplete, lacking all typical final clauses of an international treaty.

<sup>162</sup> See Convention against Torture, Article 31, Convention for the Elimination of Racial Discrimination, Article 21, and Convention on the Rights of the Child, Article 52.

<sup>163</sup> U.N. Doc CCPR/C/21/Rev.1/Add.8/Rev.1, Human Rights Committee, General Comment 26 (1997).

<sup>164</sup> Bates, pp. 757-758. See fn. 92.

<sup>165</sup> In 2000, North Korea submitted a long overdue periodic report (CCPR/C/PRK/2000/2) under the ICCPR and soon thereafter appeared before the Human Rights Committee to present that report.

The fact that the Covenants of 1966 are not subject to unilateral withdrawal means that the procedural obligation of submitting periodic reports on the implementation of these treaties is not subject to withdrawal either. Therefore, a State that is a party to these treaties or other human rights treaties that do not allow for withdrawal will remain subject to the monitoring by the expert bodies entrusted with that function. However, it is notable—and from the perspective of effective international monitoring unfortunate—that all existing mechanisms of individual complaint under existing human rights treaties are subject to unilateral termination by States. This is either because the treaty is subject to denunciation (as the ECHR) or because its complaints procedure is optional in nature (as under the ICCPR)<sup>166</sup> and therefore subject to separate termination, even if the substantive treaty obligations are not subject to unilateral withdrawal. There are safeguards against the drastic consequences of such a termination of the right of complaint—such as a transition phase during which new complaints can still be submitted—but much of the effective international monitoring of treaty compliance is, however, lost with the possibility of unilateral termination of complaint procedures.

### *3.13. The Need for a Holistic Approach*

This paper has taken stock of a range of arguments, doctrines or constructions that States may resort to when seeking to justify their unilateral exceptions to human rights norms in the fight against terrorism. Many such constructions have a valid legal basis and a proper scope of application. However, they also have their limitations, to the effect that often they affect only a specific treaty, or the availability of a procedure, but do not affect the substantive obligations of the State in question under international law. In many cases this results from the overlap of treaty law and customary norms of international law. Some of the constructions are open to abuse, i.e. bad faith efforts to distort international law to the detriment of human rights.

Because of the complexity of the combined effect of the various excuses and exceptions, there is a need for a holistic approach that seeks to address the combined effect of the various constructions of unilateral exception. Their effect needs to be addressed together in such combinations that are invoked by a particular State, and separately in respect of substantive human rights norms that do, or do not, overlap with categories such as international humanitarian law, customary norms of international law and *jus cogens*. For purposes of illustration, some of the resulting situations are demonstrated below in Figure 2.

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<sup>166</sup> Under the ICCPR the right of individual complaint is based on a separate Optional Protocol which according to its Article 12 is subject to withdrawal. Jamaica and Trinidad and Tobago have utilised this possibility to terminate the competence of the Human Rights Committee to entertain individual complaints against themselves.

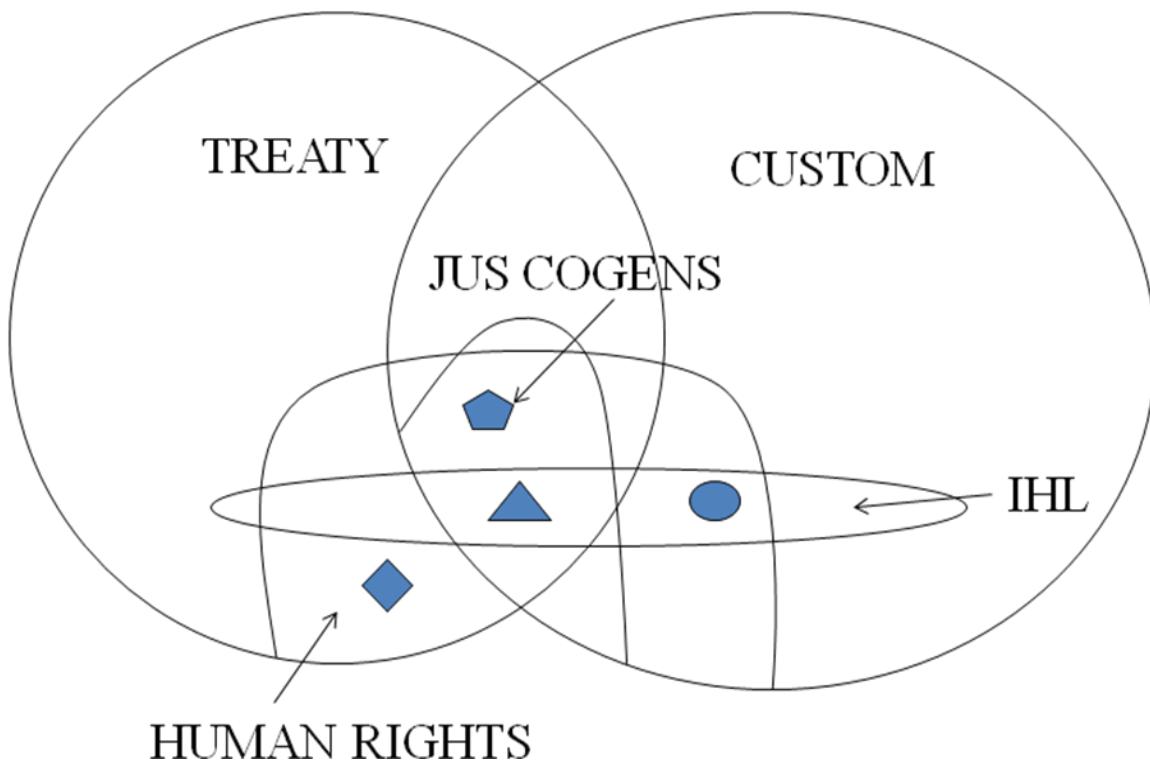


Figure 2

Unilateral exceptions to international law in the name of fighting against terrorism need to be addressed differently depending on what qualities the norm in question possesses in Figure 1. By way of example, it may be permissible to enter a reservation in respect of, or to derogate from, a human rights treaty norm that does not at the same time qualify as a norm of customary international law (diamond). However, no exceptions are permissible in respect of *Jus Cogens* norms, irrespective of whether they are expressed in a human rights treaty (pentagon), or also fall under humanitarian law treaties (triangle). Again, separate assessment must be made in respect of unilateral exceptions to such norms of customary law that for the State in question have no treaty basis (oval).

#### 4. Conclusion

Governments may resort to a wide range of constructions to justify unilateral exceptions to human rights under international law in the name of countering terrorism. None of the constructions discussed affects a State's obligations under peremptory norms of international law (*jus cogens*).

Outside the realm of peremptory norms, some of the constructions discussed have an impact upon both treaty law and customary law, hence affecting the substantive human rights obligations of a State. This would be the case for the following three constructions: (1) the *lex specialis* effect of international humanitarian law during armed conflict and properly construed as an interpretive effect upon the scope or content of a particular human right (cf. supra section

3.3), (2) permissible limitations on human rights, again properly construed, i.e. through a rigorous limitations test, rather than an all-encompassing act of ‘balancing’ (cf. supra section 3.11) and (3) the proper division of responsibility between individual states and an international organisation, with acknowledgement that there also exist situations where the State remains responsible for internationally wrongful acts despite the parallel responsibility of an international organisation (cf. supra section 3.6)

The construction whereby States claim the status of a persistent objector, to escape the binding force of customary norms of human rights law in issues where they are not a party to a treaty that includes the corresponding norm (cf. supra section 3.9) merely affects customary law and only outside the realm of peremptory norms. It is dubious whether there is a single issue where this excuse is legitimately applicable in the context of countering terrorism.

All other constructions discussed in this paper pertain merely to human rights treaties and do not affect the State's obligations under customary international law. As there is a high degree of substantive overlap between human rights treaties and customary norms of international law, resorting to these excuses usually only has procedural consequences. It does not affect the substantive obligations of the State under international law, but precludes the competence of an international (or regional) human rights court or treaty body to address the breach of international law through its regular monitoring mechanisms. However, there may also be situations where the scope of a customary norm of human rights law is more limited than the scope of the corresponding treaty norm, and an exception from the treaty norm will therefore result in narrowing down the substantive scope of the right to its customary law ‘core’. In the order of their practical relevance in the context of counter-terrorism, the following five constructions of unilateral exceptions to human rights treaty obligations are of importance.

Firstly, the practice of declaring a state of emergency owing to acts of the threat of terrorism; although only few States have resorted to formal derogation from those human rights treaties that include a derogation clause (cf. supra section 3.10), allowing for temporary exceptions to some but not all of the treaty provisions. When applied under the fairly strict requirements for derogation enshrined in the treaties in question and when subject to international monitoring through the procedures available under the treaties in question, the authors assert that derogation is a permissible and even recommended mechanism for reacting to situations of a genuine threat to the life of the nation.

Secondly, there is some justification for the contention that a State is not subject to exactly the same obligations when it is, through its agents, acting outside its own territory, i.e. extraterritorially - at least in respect to the European Convention on Human Rights (cf. supra section 3.7). However, caution is required when resorting to this excuse, as other human rights treaties and customary norms of human rights law may remain applicable, and as even the position of the European Court of Human Rights appears to be shifting (or inconsistent).

At least in the issue of sanctions against persons associated with Al-Qaida or Taliban, where the 1267 Sanctions Committee of the United Nations Security Council maintains a terrorist list, States may escape their human rights treaty obligations, such as the right to a fair trial, with reference to the primacy of the United Nations Charter over other treaty obligations (cf. supra

section 3.5). However, the authors assert that States retain an obligation primarily to reconcile their Charter obligations and human rights treaty obligations; this may require providing due process rights on the domestic level for persons listed by the Security Council, as long as the listing and delisting procedures of the United Nations do not meet the requirements of due process.

Fourthly, human rights treaties allow for reservations as a form of unilateral exceptions by a State (cf. *supra* section 3.8), provided that reservations are allowed under the treaty in question and the reservation is not contrary to the object and purpose of the treaty. As reservations must be formulated upon signature or ratification, States have not anticipated the specific threat of international terrorism when becoming parties to human rights treaties. There are no reservations that explicitly refer to terrorism. Some of the existing reservations, including in respect of the right to a fair trial, may have a bearing upon the treatment of terrorism suspects. Generally, however, the relevance of reservations as a legitimate form of unilateral exceptions from human rights treaties for the purpose of combating terrorism has in practice remained low.

Some, primarily regional human rights treaties, would allow for a fifth construction, namely States' unilateral withdrawal from the treaty (cf. *supra* section 3.12). The same applies for the individual complaints procedure under the ICCPR (but not for the ICCPR itself) and for some of the more specialised United Nations human rights treaties. In practice, States have not resorted to withdrawal from human rights treaties as a response to terrorism.

Finally, there is no justification whatsoever, neither under treaty law nor customary law, for those efforts to exclude suspected terrorists, after they have been captured and disarmed, from all categories of protected persons (such as civilians, wounded and sick, or prisoners of war) under international humanitarian law.